



2002 MEE
Questions and Analyses



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Preface

This publication includes the questions and analyses from the February 2002 and July 2002 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 2002 MEE tested Federal Civil Procedure I.A, subject matter jurisdiction, and I.E, venue. 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 and Limited Liability Companies, 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 2002

Question 1

Teacher lived in State A, where he taught in the public schools for eight years. Toward the end of his eighth year, Teacher was offered a lucrative teaching position in State B. Teacher decided to accept the offer and to move to State B. Teacher notified his school principal that he was leaving and put his State A home up for sale.

The day he sold his house, Teacher packed his belongings, rented a truck from Rentco, a State C corporation with its principal place of business in State A, and began the long drive to State B. While speeding on a State A highway toward State B, Teacher came upon a slow-moving car and applied the brakes in an effort to avoid an accident. The brakes failed, and Teacher rear-ended the slow-moving car. Passenger, a citizen of State A who was riding in the slower car, suffered severe back and neck injuries in the collision. After the State A police prepared a report of the accident, Teacher continued on to State B. Shortly after he arrived there, he purchased a home and began his new job.

Nine months after the accident, Passenger filed suit against Teacher in the United States District Court for the District of State A, alleging that Teacher's negligence caused Passenger serious personal injury. Passenger's complaint sought damages in excess of \$100,000.

Teacher timely moved to dismiss the complaint on the grounds that the court lacked subject matter jurisdiction and that venue was improper. While the motion to dismiss was pending, Teacher filed a third-party complaint against Rentco, seeking indemnification and claiming that the accident occurred because the brakes on the rental truck were defective. Before Teacher's motion could be heard, Passenger amended her complaint to state a claim directly against Rentco for negligence.

1. How should the federal district court rule on Teacher's motion to dismiss for lack of subject matter jurisdiction? Explain.
2. How should the federal district court rule on Teacher's motion to dismiss for improper venue? Explain.
3. If the district court were to deny Teacher's motion to dismiss on both grounds, would it have subject matter jurisdiction over Passenger's direct claim against Rentco? Explain.

Question 2

On January 2, Bank loaned Debtor \$5,000 and took a security interest in Debtor's "equipment now owned or hereafter acquired." On that date, Debtor signed a valid security agreement and financing statement that properly described the collateral. The security agreement contained a proper future advance clause. On January 3, Bank filed the financing statement in the correct locations.

On February 1, Seller sold a \$10,000 computer to Debtor on credit for use in Debtor's business. To secure payment of the purchase price, Seller took a security interest in the computer. Also on February 1, Debtor signed a valid security agreement and financing statement for Seller that properly described the collateral. Seller, however, did not file the financing statement. Debtor received possession of the computer on February 12 and began using it in her business on that same day.

On February 14, the sheriff lawfully seized the computer pursuant to a writ of execution obtained by Larry, a judgment creditor of Debtor, and sent notice of the levy to Bank. Bank received the notice on February 16. On February 17, Bank advanced Debtor \$12,000.

On February 20, Seller learned of Larry's levy. That same day, Seller filed in the correct locations the financing statement it had received from Debtor on February 1.

On March 1, Debtor defaulted on her obligation to Bank and on her obligation to Seller.

1. As between Bank and Seller, which has the superior security interest in the computer? Explain.
2. As between Seller and Larry, which has a superior interest in the computer? Explain.
3. Is Bank's security interest in the computer as collateral for the \$12,000 advance superior to Larry's claim? Explain.

Question 3

Several years ago, Bill, Carl, Donna, and several other participants formed a limited partnership named Transitions L.P., which operated a career counseling business. The limited partnership was properly formed, a written limited partnership agreement was properly executed, and all required filings were made in the proper state offices. The Certificate of Limited Partnership and the Limited Partnership Agreement do not modify any default provisions of the Revised Uniform Limited Partnership Act.

Bill is the sole general partner in Transitions. Carl, Donna, and the remaining partners are limited partners. Although the career counseling industry has experienced a rapid boom in the past few years, Transitions' business has not been financially successful and no distributions of profits have been made to the limited partners. As a result, several of the limited partners, including Carl and Donna, are unhappy with Bill's management of Transitions.

Carl decided that the limited partners should reach a consensus on how Transitions' day-to-day business should be conducted and then force Bill to follow their instructions. Carl went to Bill asking questions about the business operations of the limited partnership and asking to see Transitions' limited partnership records, including a list of the names and addresses of the other partners. Bill refused to answer any of Carl's questions, to allow Carl to examine any limited partnership records, and to provide him with information about the other partners. Bill claims that even if the limited partners all agree to change the way Transitions' business is run, Bill has no obligation to listen to them.

Donna does not believe that Transitions will be able to succeed in business if Bill remains in control. When Carl tells Donna that Bill does not intend to give up management of Transitions, Donna sells her interest in the limited partnership to Edward. Donna informs Bill that she has sold her interest to Edward and that Edward is now a limited partner in Transitions. Bill tells Donna that he doesn't approve of the sale and that Edward has no rights in the limited partnership and is not a partner.

1. Can Carl and the other limited partners decide how the day-to-day business of Transitions is to be conducted? Explain.
2. What rights, if any, does Carl have to obtain information from Bill about the business operations and records of Transitions? Explain.
3. What rights, if any, did Edward acquire as a purchaser of Donna's interest in Transitions? Explain.

Question 4

Testator duly executed a will dated March 1, 1998. Among other things, the will stated:

1. I direct that all of my just debts and expenses be paid by my executor.
2. I give my family home to my daughter, Daughter.
3. I give my 24-carat gold watch to my son, Son.
4. I give the rest of my estate, including any property over which I may have a power of appointment, to Trustee to hold in trust for the primary benefit of Son and Daughter, with the remainder to their children.

Testator was the income beneficiary of two separate testamentary trusts, one created by Testator's mother, Mary, the other by Testator's father, Frank.

Testator had a special testamentary power of appointment exercisable in favor of Testator's issue over the testamentary trust created by Mary. Mary's will provided that Testator could exercise the power only by a specific reference to the power of appointment created by Mary's will.

Testator had a general testamentary power of appointment over the testamentary trust created by Frank.

Both Mary and Frank died in 1990. They were survived by Testator, Son, and Daughter.

At Testator's death in October 2001, Testator owned (a) the family home on which Testator was personally liable for a \$50,000 mortgage, (b) an insurance policy that specifically insured Testator's 24-carat gold watch, which had been stolen from Testator five days before Testator died, and (c) a portfolio of stocks and bonds. Testator owned no other assets.

Bank was appointed executor of the estate. Trustee was named trustee of the trust created in paragraph 4 of Testator's will. Bank collected the value of the stolen watch from the insurance company.

1. Did Testator effectively exercise the two powers of appointment he had at the time of his death? Explain.
2. Should the \$50,000 mortgage on Testator's home be paid out of the assets of Testator's residuary estate? Explain.
3. Should the insurance proceeds for the stolen watch be distributed to Son, as legatee of the watch, or to Trustee? Explain.

Question 5

Seven months ago, Husband and his wife, Wife, were driving on a highway. Their daughter, Daughter, age 10, was in the backseat. While driving, Husband negligently turned the wheel of the car to the right and hit Frank's car. Frank had parked his car on the shoulder, turned on the emergency flashing lights, and was changing a flat tire. The accident caused Frank's car to hit and kill Frank. Frank's fiancée, Emily, was with Frank, but was not physically injured. However, she witnessed the accident and held Frank in her arms as he died.

Wife was seriously injured in the accident. She was hospitalized for a month with broken bones and internal injuries and is still undergoing physical therapy six months later. Wife and Husband have remained married.

After the accident, Husband took Daughter to the doctor to be examined. Although Daughter was not injured in the accident, the doctor found that she was suffering from an incipient bone disease brought on by calcium deficiency from an imbalanced diet.

Frank and Emily had lived together during their two-year engagement, and Frank died one week before their planned wedding date. Since Frank's death, Emily has suffered from depression because she misses his companionship and intimacy. Consequently, she has been under psychiatric care.

Wife has brought a lawsuit against Husband for his negligence. Emily has also sued Husband for his negligence. Daughter has sued both Husband and Wife for their failure to provide her with a diet richer in calcium.

There is no guest statute in this jurisdiction.

1. Assuming Wife can prove a prima facie case of negligence, is Husband liable to Wife? Explain.
2. Are Husband and Wife liable to Daughter for their failure to provide Daughter with a diet richer in calcium? Explain.
3. On what theory or theories arising from her relationship with Frank might Emily reasonably base claims for damages against Husband, and what would be the likely outcome of each claim? Explain.

Question 6

On March 1, Lender lent \$10,000 to Borrower in exchange for a promissory note from Borrower. The promissory note was a form note Borrower had obtained from a stationery store. Borrower signed the note as maker and filled in the “date due” line to provide that payment was due September 1 of the same year.

Borrower and Lender had agreed that the amount due on the note would be \$10,500, representing both principal and interest on the loan. However, Borrower neglected to fill in the blank space on the form note for the amount due and also neglected to fill in the name of the payee in the blank space following the “pay to the order of” language. Despite these two omissions, the language of the form note did contain an unconditional promise to pay and did not contain any other promise or undertaking by Borrower.

A week after Lender accepted the note in exchange for the loan proceeds, Lender realized that both the amount and the payee lines had been left blank. Lender filled in his own name as payee and wrote “\$10,500” as the amount due.

On August 25 of that same year, Lender’s home was burglarized by Robber, who stole the note. Lender did not realize at that time that the note was missing. Robber then forged Lender’s indorsement on the note and sold the note on August 26 to Innocent, a good-faith purchaser for value, who paid \$10,350 for the note.

On September 1, Lender realized for the first time that the note was missing.

On September 2, Innocent presented the note for payment to Borrower, who paid \$10,500 in good faith to Innocent without knowledge of the forged signature or the theft of the note from Lender’s home.

1. After Lender filled in the blank amount and payee lines on the note, was the note enforceable against Borrower as completed? Explain.
2. Assume the note was enforceable and that Lender, unable to produce the note, demanded payment from Borrower on September 1 *before* Borrower had paid Innocent. What would be the rights and obligations of Lender and Borrower on the note? Explain.
3. Assuming the note was enforceable, did Borrower’s payment to Innocent discharge Borrower’s obligation to Lender on the note? Explain.
4. After Borrower paid Innocent, did Borrower have any rights of recovery against Innocent? Explain.

Question 7

The articles of incorporation of Ergo, Inc. authorize the issuance of 400,000 Class A Common Shares and 1,000,000 Class B Common Shares, all of which are issued and outstanding. Dart owns all of the Class A shares and none of the Class B shares. Ergo's Articles provide that Ergo has seven directors elected by straight voting, with Class A shares to elect four directors and Class B shares to elect three directors.

Several months ago, Ergo's board of directors properly approved an expansion plan for the business that would require \$5 million of additional capital. At their regular February 1 meeting, the directors discussed possible sources to fund the expansion plan. One Class B director suggested that Ergo borrow the funds from a bank.

Dart, who had elected herself as one of the Class A directors, suggested that Ergo issue a new class of shares that Dart would purchase for \$5 million. The new class of shares (Class C Preferred) would be entitled to a cumulative preferred dividend. In support of this alternative, Dart presented an opinion from an independent investment bank that stated:

- (1) \$5 million would be a fair value for the Class C Preferred, and
- (2) in the long run, payment of the proposed preferred dividend would be less costly to Ergo than interest payments on a loan.

After one hour of spirited discussion of these alternatives, all seven directors voted to recommend to the shareholders that Ergo's Articles be amended to authorize the issuance of the Class C Preferred as proposed by Dart. A special meeting of the shareholders was properly called for the purpose of voting on the proposed amendment to the Articles.

Prior to that meeting, a proxy statement was issued to all shareholders disclosing all relevant information about the plan to issue the Class C Preferred to Dart. However, the proxy statement did not disclose the alternative funding method the Class B director initially proposed. At the shareholders meeting, a quorum was present, and the amendment to the Articles was adopted by the following vote:

	<u>In Favor</u>	<u>Opposed</u>
Class A Shares	400,000	0
Class B Shares	720,000	100,000

Following shareholder approval, the Ergo board of directors met to consider the issuance of the newly authorized Class C Preferred. All seven directors voted to issue the Class C Preferred to Dart for \$5 million in cash.

A Class B shareholder filed a derivative action against the directors to enjoin the issuance of the

February 2002, Question 7

Class C Preferred to Dart. The Class B shareholder alleged (a) that the directors erred in deciding to issue the Class C Preferred rather than borrow the money from the bank; (b) that the directors had breached their duty of care to Ergo; and (c) that Dart had breached her duty of loyalty to Ergo.

Considering the Class B shareholder's allegations and all possible defenses, who is likely to prevail? Explain.

July 2002

Question 1

Debtor bought a motor home from Uptown RV Sales on credit. Debtor signed a security agreement granting Uptown a security interest in the motor home. Two years later, Debtor lost her job and then defaulted on her loan by failing to make several monthly payments. Without sending any notice of default to Debtor, Uptown dispatched Ernest, one of its employees, to take possession of the motor home.

Ernest located the motor home parked on a public street. When he opened the door with a duplicate key, he found Debtor inside and told her that he was there to repossess the motor home. Debtor began yelling at him, "Get out of my home or I'll throw you out! This is the only place I have to live, and, anyway, you don't have any right to take my clothes and other stuff." Ernest departed without the motor home.

Two weeks later, the owner of Uptown sent Ernest back, this time to post a coupon on the windshield of the motor home fictitiously advertising a free steak dinner at the grand opening of a local restaurant on Friday evening. Debtor fell for the ploy. She went to the restaurant on Friday evening, parked the motor home in the lot at the rear of the restaurant, and went inside to see about her free dinner. She had left the door to the motor home unlocked.

Ernest, who had followed Debtor, waited for Debtor to get inside the restaurant, entered the motor home through the unlocked door, "hot-wired" the engine, and drove the motor home back to Uptown's garage. Debtor came out of the restaurant to find her motor home was gone.

Uptown's owner had arranged with a uniformed deputy sheriff to stand by in case it became necessary to keep the peace. The deputy sheriff observed the events from her patrol car parked some distance away but did not otherwise assist in the repossession.

1. Did Uptown have the right to repossess the motor home without sending notice of default to Debtor and without judicial process? Explain.
2. What arguments might Debtor reasonably make, based on the facts, that Uptown failed to carry out the repossession in a lawful manner? Explain.

Question 2

On February 10, 2000, Testator signed her last will, which was witnessed by two witnesses—Testator’s nephew, Nephew, and Testator’s next-door neighbor. Testator died on May 10, 2000, after a brief hospitalization.

During the six months before she died, Testator experienced frequent episodes of forgetfulness. For example, Testator often missed appointments with her physicians and her bank trust officer. Testator had also become increasingly forgetful about matters of personal hygiene. On the other hand, throughout that six-month period, Testator maintained all of her financial records and visited in person and by telephone with each of her 20 living relatives, all of whom she easily recognized and identified. On April 3, she contacted her broker to advise him to sell her shares in Able Corporation because she had lost complete faith in the corporation’s management following the release of its poor quarterly earnings report.

Testator’s will bequeathed \$100,000 to Nephew and the residue of her estate to Charity, a charitable organization with which Testator had been associated for more than 35 years. Nephew had no knowledge of the \$100,000 bequest until after Testator died. She left no bequest to her three nieces, who are Nephew’s three sisters. None of Testator’s other living relatives was as closely related to her as Nephew and her three nieces.

Contemporaneous with the execution of her last will, Testator signed a durable health care power of attorney designating Nephew as her agent to make all health care decisions for her in the event she could no longer make them for herself. Nephew and Testator’s next-door neighbor also witnessed this document.

One week before she died, Testator was admitted into a local hospital following a massive stroke causing severe brain damage. The following day, she lapsed into a coma and was connected to a life-support system. Four days later, Testator’s physician advised Nephew that there was nothing medical science could do for Testator. After considering this advice, Nephew directed the physician to remove Testator from all life-support systems. The following day, Testator was removed from the life-support system and she died. She left an estate in excess of \$1 million.

Testator’s three nieces argue that Testator’s durable health care power was not valid and that as a result Nephew should be liable in wrongful death for causing Testator’s death because Nephew directed Testator’s physician to withdraw Testator’s life-support systems. Furthermore, they claim that either Testator’s will is invalid or that, at minimum, the bequest to Nephew should be forfeited.

1. Is Nephew liable in wrongful death for causing Testator’s death? Explain.
2. Is Testator’s will invalid because of incapacity? Explain.
3. Assuming Testator’s will is valid, is the bequest to Nephew valid? Explain.

Question 3

Seller manufactures vending machines at a facility located in State A, where Seller is incorporated and has its principal place of business. Buyer, a German company with its principal place of business in Munich, Germany, contracted to purchase 1,000 vending machines from Seller for a total price of \$500,000.

The contract was carefully negotiated during lengthy discussions held in Germany. Early in the negotiations, each side insisted that the contract should be governed by its own law and that disputes should be resolved in its own courts. In the end, however, the parties agreed on contract clauses that provided: (1) “the substantive rights and remedies of the parties to this contract shall be governed by the Commercial Code of State N”; (2) “any and all litigation brought concerning this contract shall be brought in the state or federal courts of State N”; and (3) “Seller and Buyer hereby consent to venue, jurisdiction, and service of process by courts in State N.” Apart from these clauses, there is no connection between State N and the parties or the transaction. State N is located on the eastern seaboard of the United States. The parties chose State N because it has convenient air links to Germany and a widely respected judiciary that is regarded as expert in commercial law matters.

Seller shipped the vending machines to Germany, but Buyer refused the shipment after discovering that the goods had been seriously damaged during the ocean voyage and arrived in Germany in a worthless condition. Seller then sued Buyer in federal district court in State A, properly invoking the court’s subject matter jurisdiction and seeking recovery of the \$500,000 contract price on the ground that the risk of damage to the goods during transport was on Buyer throughout the ocean voyage.

In responding to Seller’s complaint, Buyer moved to transfer the case to the federal district court in State N, pursuant to 28 U.S.C. § 1404(a) and the forum-selection clause in the contract. Seller resisted Buyer’s transfer request on the grounds that (a) State A was a more convenient forum for Seller, and (b) the forum-selection clause was unenforceable under State A law, which declares such clauses to be “void as a matter of public policy.”

While the transfer motion was pending, Seller delivered a notice of deposition to Buyer, demanding that Buyer’s chief executive officer appear for a deposition. Buyer responded by asking the court for a protective order on the ground that its “officers, directors, and managing agents” are all in Germany and are therefore beyond the subpoena power or other authority of the court.

Assume that there are no applicable international law principles or treaties.

1. Should the federal district court in State A transfer the action to State N? Explain.
2. Irrespective of how the court rules on the transfer motion, should Buyer’s request for a protective order be granted? Explain.

Question 4

On May 10, Driver contracted to buy a sports car from Motors for \$25,000. The car was a popular model in high demand, and there was a four-month waiting period. Motors promised to deliver the car in September, and Driver promised to pay for the car at delivery using a cashier's check.

To make sure he had the money to pay for the car in September, Driver immediately bought the necessary \$25,000 cashier's check, payable to Motors, from First Bank. The cashier's check was dated May 11. Driver paid for the cashier's check by negotiating to First Bank a \$25,000 check that Driver had obtained from a lender called Auto-Loans.

On September 15, Motors delivered the sports car to Driver and took in exchange the \$25,000 cashier's check. Motors immediately presented the cashier's check to First Bank for payment.

First Bank refused to pay the cashier's check because the Auto-Loans check that Driver had negotiated to First Bank was dishonored. First Bank's refusal to pay the cashier's check surprised both Motors and Driver because neither of them knew of any problem with the Auto-Loans check. Driver has retained the sports car and has refused to make good on the cashier's check, claiming that his transfer of the cashier's check to Motors discharged his obligation under the contract.

What rights, if any, does Motors have against First Bank and Driver under Article 3 of the Uniform Commercial Code? Explain.

Question 5

Ann and Bert, a married couple, were unable to have biological children because Bert was infertile. They decided to try artificial insemination by an anonymous donor. Their doctor performed the procedure after obtaining written consent from both Ann and Bert. As a result of the artificial insemination, Ann became pregnant.

During the last months of Ann's pregnancy, she and Bert argued constantly, and Ann moved out of the family home into her own apartment. The baby, Daughter, was born while Ann and Bert were living apart. Bert visited Ann and Daughter in the hospital and paid their medical expenses. He tried to convince Ann to reconcile with him, but Ann refused, leaving the hospital with Daughter and returning to her apartment. Bert continued to visit them and contributed to Daughter's support.

Shortly after Daughter's birth, Ann began an affair with Walt. Walt also spent some time with Daughter and grew fond of her. When Daughter was one year old, Ann discovered she was pregnant by Walt. When Walt learned Ann was pregnant, he became very upset and began to abuse Ann verbally and physically. Ann immediately broke off the relationship with Walt. Shortly thereafter, she reconciled with Bert.

Ann, Bert, and Daughter were living together when Ann's baby, Sonny, was born. Walt, Sonny's biological father, contacted Ann, apologized for his past abusive behavior, and requested to see Sonny. He also offered to pay the expenses of Sonny's birth and to contribute to Sonny's support. Ann rejected both his request and his offer.

When Sonny was six months old and Daughter was two years old, Ann was killed in an automobile accident. She left a valid will stating that if she died while her children were minors, she wanted Bert to be named custodian and guardian of both of them.

Walt has sued Bert, seeking to establish himself as Sonny's legal father and requesting custody of both children. Bert claims that he is the legal father of both Daughter and Sonny and wants to maintain physical custody of both children. Under the law of the jurisdiction, both parties have standing to raise these issues.

How should the court rule on Walt's and Bert's claims? Explain.

Question 6

Sunrise Lodge is a corporation that develops and operates luxury resort hotels. Sunrise recently began constructing a hotel in East Beach, a beach town on the Atlantic coast of the United States. Sunrise hoped to give the East Beach hotel a local flavor by using local sources for materials.

Sunrise hired Adam to be its interior design agent on the East Beach project. The contract between them, which was for a one-year term, included the following language:

Adam has the discretion to make selections for interior floor and wall coverings, works of art, furniture, plumbing fixtures, and lighting fixtures for East Beach hotel, provided that (a) the cost of such purchases does not exceed the budgeted amounts listed in Exhibit A, (b) all purchases will be made from local vendors, and (c) the items selected are within the quantity and style guidelines described in Exhibit B. Adam shall inform vendors that purchases are for Sunrise East Beach and should arrange for Sunrise to be billed on a 30-day net basis.

The style guidelines in Exhibit B include a comprehensive list of themes and styles typical of an Atlantic fishing village like East Beach, including lighthouses, whitewashed wood, lobster traps, wicker furniture, and sailboats.

After hiring Adam, Sunrise sent a letter to prospective local suppliers on Sunrise stationery signed by the Sunrise president, announcing Adam's appointment as follows:

Sunrise Lodge is delighted to announce the appointment of Adam, a well-known local interior designer, to act on its behalf in the selection of interior floor and wall coverings, works of art, furniture, and plumbing and lighting fixtures for the Sunrise East Beach hotel. We are confident that—working only with local suppliers—Adam will exercise a wonderful creative flair in coming up with just the right look for this exciting project. Know that you deal with Sunrise when you deal with Adam on this project.

During the first months of Adam's one-year term, Adam entered into the following transactions with suppliers who had received Sunrise's letter.

First, Adam contracted with Tahini for the main lobby area of the hotel to be decorated entirely in a Tahitian theme. The items for the Tahitian décor are within the budget and are from a local supplier. However, they are not within the Exhibit B style guidelines.

Second, Adam contracted with Moby for the guest rooms to be decorated using authentic themes from the Atlantic seaboard region as required by Exhibit B. The décor selections are within budget and are from local suppliers, but the Sunrise officials do not like the design.

Sunrise has refused to pay either vendor and has terminated Adam's contract.

1. On what agency principles, if any, is Sunrise liable to Tahini and Moby on their respective contracts? Explain.
2. Is Adam liable to Sunrise as a result of the contracts with Tahini and Moby? Explain.
3. May Sunrise terminate Adam's agency before the end of their one-year contract term without incurring liability to Adam? Explain.

Question 7

On February 5, 1999, Testator created a revocable inter vivos trust. This trust was validly executed. Bank was designated trustee of the revocable trust.

Under the terms of the trust, Testator retained all income for life. The trust then provided in Article II that “upon my death the principal shall be held in further trust with the income payable to my wife, Wanda, for life, remainder to my children.”

Contemporaneous with the creation of the revocable trust, Testator validly executed a will devising Testator’s entire probate estate to the trustee of the revocable trust to be disposed of as part of that trust. The will further provided that, if the trust was revoked prior to Testator’s death, Testator’s entire estate should pass to Wanda.

On March 1, 2000, Testator sent a validly executed trust amendment to Bank revoking Article II of the revocable trust and substituting for it a new Article II. This new article stated that “upon my death the principal shall be held in further trust with the income payable to my wife, Wanda, for the immediate two years after my death, and, at the end of the two-year period, the trust principal shall be distributed to my surviving children.”

In March 2001, Testator and Wanda were divorced.

In March 2002, Testator died, leaving a probate estate of \$100,000. The revocable trust had not been funded prior to Testator’s death. Testator was survived by Wanda and by their three children, Adam, Ben, and Carrie.

Two months later, both Wanda and Adam died in an automobile accident. Under Wanda’s probated will, her entire estate passed to a charitable institution, Hope, and under Adam’s probated will, his entire estate passed to University. Ben and Carrie are alive. They each have one child who also survived Testator. Adam never had any children.

1. Which instruments control the disposition of the property included in Testator’s probate estate? Explain.
2. Upon Testator’s death, what interest, if any, did Wanda have under the revocable trust? Explain.
3. Assuming that Wanda had an interest under the trust, what rights, if any, do Hope and University have under the revocable trust upon the deaths of Wanda and Adam? Explain.

February 2002

FEDERAL CIVIL PROCEDURE I.A, I.E

Question 1 Analysis

- Legal Problems:
- (1) Were the requirements of the diversity jurisdiction statute met here, even though at the time of the accident Passenger, the plaintiff, and Teacher, the defendant, were citizens of the same state?
 - (2) Were the requirements of the venue statute met here, given that Passenger filed in her home state, which was where the accident occurred?
 - (3) Is supplemental jurisdiction available over Passenger's claim against Rentco, the third-party defendant, given that they are citizens of the same state?

DISCUSSION

Point One: (35-45%) Because Passenger and Teacher were citizens of different states when the complaint was filed and the amount in controversy exceeds \$75,000, Passenger properly invoked federal diversity jurisdiction. It is irrelevant that the plaintiff and the defendant were citizens of the same state at the time of the accident.

The court should deny Teacher's motion to dismiss for lack of subject matter jurisdiction. The requirements for federal diversity jurisdiction have been established in this case.

Passenger's complaint states only a state-law negligence claim, so federal question jurisdiction under 28 U.S.C. § 1331 is unavailable. Diversity jurisdiction is available under 28 U.S.C. § 1332(a)(1) only if Passenger and Teacher are citizens of different states and the amount in controversy exceeds \$75,000, exclusive of costs and interest. An individual is a citizen of the state in which he or she is domiciled. In order to change one's domicile, one must be physically present in the new place with the intent to make that place one's permanent home. *See, e.g., Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989).

The problem states that Passenger is a citizen of State A. At the time of the accident, Teacher had sold his home in State A, quit his job in State A, and accepted a new job in State B. Teacher was, however, still a domiciliary of, and hence a citizen of, State A because he had not yet reached State B after having formed the requisite intent to change his domicile. Had the suit been filed the day of the accident, diversity jurisdiction would have been unavailable because both the physical

and mental elements must be present for a change of domicile. Jack H. Friedenthal et al., *CIVIL PROCEDURE* 30 (3d ed. 1999).

It is well settled, however, that the availability of diversity jurisdiction is determined *as of the date the suit is commenced*. 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *FEDERAL PRACTICE AND PROCEDURE* § 3608 (2d ed. 1984 & Supp. 2001). Having purchased a home in State B and begun his new job shortly after his arrival there, Teacher had established a new domicile in State B. Hence, at the time suit was filed in this case, nine months after the accident, Teacher had become a domiciliary and citizen of State B. Thus, diversity of citizenship existed between Passenger and Teacher.

In addition to diversity of citizenship, the amount in controversy must exceed \$75,000, exclusive of costs and interest. 28 U.S.C. § 1332(a). Because Passenger's complaint seeks damages in excess of \$100,000, the amount in controversy requirement is met.

The motion to dismiss for lack of jurisdiction should be denied: there is diversity of citizenship, and the amount in controversy requirement is satisfied.

Point Two: (15-25%) Because venue is proper in a diversity case in the judicial district in which a "substantial part of the events or omissions giving rise to the claim occurred," and because the accident occurred in State A, venue is proper in the federal district court of State A.

The court should deny Teacher's motion to dismiss for improper venue. The requirements of the venue statute, 28 U.S.C. § 1391, are met.

Venue is a geographical concept that localizes lawsuits in places that are connected either to the parties or to the events giving rise to the action. Stephen C. Yeazell, *CIVIL PROCEDURE* 191-92 (4th ed. 1996). Under 28 U.S.C. § 1391(a), which applies to civil actions in which jurisdiction is founded solely on diversity of citizenship (as is the case here), venue is proper in "(1) a judicial district where any defendant resides . . . , [or] (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred . . ." 28 U.S.C. § 1391(a). Here, Teacher resides in State B. However, the accident itself occurred in State A. Thus, a substantial part of the events giving rise to the claim occurred in State A, and venue in State A is proper under § 1391(a)(2).

NOTE: Some examinees might suggest that venue is proper in the federal district court of State A because the plaintiff, Passenger, resides there. Although under the pre-1990 version of the venue statute, venue in diversity cases was proper in the district "where all plaintiffs . . . reside," that language was eliminated by enactment of the Judicial Improvements Act of 1990. Thus, under current law, the plaintiff's residence in State A is irrelevant to venue.

Point Three: (35-45%) Although Passenger's claim against Teacher and her claim against third-party defendant Rentco derive from a common nucleus of operative fact and hence are part of the same case for purposes of Article III of the Constitution, supplemental jurisdiction is statutorily unavailable over claims by plaintiffs against persons

made parties under Rule 14.

The district court cannot exercise subject matter jurisdiction over Passenger's direct claim against Rentco. There is no independent basis for jurisdiction (neither diversity nor federal question), and supplemental jurisdiction is not available for this type of claim.

Rule 14(a) of the Federal Rules of Civil Procedure permits a defendant to bring a third party into an action if the defendant believes the third party "may be liable" to defendant for all or part of any judgment against defendant in the action. Pursuant to this rule, defendant Teacher brought Rentco into the action as a third-party defendant. Passenger sought thereafter to amend the original complaint to state a claim directly against Rentco. The issue is whether the court has jurisdiction over Passenger's direct claim against Rentco. For reasons explained below, the court cannot take jurisdiction over Passenger's claim.

In the first place, there is no independent basis for federal jurisdiction over this claim. Plaintiff Passenger and third-party defendant Rentco are both citizens of State A, so diversity jurisdiction is not available for Passenger's claim against Rentco. Under § 1332(c)(1), a corporation is deemed a citizen of both its state of incorporation and the state in which it maintains its principal place of business. 28 U.S.C. § 1332(c)(1). Hence, Rentco is a citizen of both State A and State C. Because Passenger is a citizen of State A as well, there is no independent basis for diversity jurisdiction over Passenger's direct claim against third-party defendant Rentco. Further, because Passenger's claim against Rentco is a state-law negligence claim, there is no federal question jurisdiction.

Supplemental jurisdiction is also not available. Section 1367(a) provides that in a civil action of which the district court has original jurisdiction, the court has supplemental jurisdiction over "all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). In *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966), the U.S. Supreme Court held that two claims will have that requisite connection if they "derive from a common nucleus of operative fact." Here, Passenger's claim against Teacher and Passenger's claim against third-party defendant Rentco derive from a common nucleus of operative fact: the failure of the brakes, the accident, and Passenger's resultant injuries. Without regard to their federal or state character, we would expect plaintiff to bring these claims together in a single action. *Id.*

However, Congress created statutory exceptions to supplemental jurisdiction. One of those exceptions, 28 U.S.C. §1367(b), applies here to prevent the court from taking jurisdiction. Section 1367(b) provides that supplemental jurisdiction in diversity cases shall not extend to "claims by plaintiffs against persons made parties under Rule 14. . . ." 28 U.S.C. § 1367(b). Because Passenger's claim against Rentco is a claim by a plaintiff against a person made a party under Rule 14 (Rentco was brought into the suit when Teacher filed a third-party complaint against it under Rule 14), supplemental jurisdiction is unavailable. Passenger could proceed directly against Rentco only if there were an independent basis for jurisdiction (e.g., diversity), and there is none.

Because there is no independent basis for jurisdiction over this claim and because supplemental jurisdiction is unavailable, the district court should dismiss Passenger's claim against Rentco.

SECURED TRANSACTIONS IV.A, IV.F

Question 2 Analysis

- Legal Problems:
- (1) Does a purchase money security interest perfected later than a general security interest prevail over the earlier perfected general security interest?
 - (2) Does an initially unperfected purchase money secured creditor prevail over a later lien creditor?
 - (3) Does a lien creditor prevail over a secured creditor with respect to a post-lien future advance?

DISCUSSION

Point One: Because Seller perfected a purchase money security interest (PMSI) within 20 days after Debtor received possession of the computer, Seller prevails over Bank by virtue of the PMSI exception in UCC § 9-324(b) (2000).

As between two secured creditors, the general priority rule is found in UCC § 9-322 (2000)—first to file or perfect has priority. Bank filed on January 3 and it perfected on that date as well, since its security interest had previously attached (i.e., on January 2, Debtor had rights in its existing equipment, Bank gave value through its loan, and Debtor signed a security agreement). *See* UCC § 9-203 (2000); § 9-308 (2000). Seller, however, did not file and perfect until February 20. Thus, under the general “first to file or perfect” rule, Bank would have priority over Seller.

There is, however, an exception to the general rule. Under UCC § 9-324(b) (2000), a PMSI in collateral other than inventory has priority over a conflicting security interest in the same collateral if the PMSI is perfected at the time the debtor receives possession of the collateral or within 20 days thereafter. Seller did take a PMSI because Seller took a security interest to secure all or part of the price of the computer that it sold. *See* UCC § 9-103(b) (2000). In addition, it is a PMSI in “collateral other than inventory” because the problem states that the computer is “for use in Debtor’s business.” Thus, the computer is properly characterized as “equipment” of Debtor. *See* UCC § 9-102(33) (2000). Finally, as mentioned, the PMSI was perfected on February 20—within 20 days after Debtor received possession of the computer, because Debtor received possession on February 12. Thus, pursuant to the PMSI exception, UCC § 9-324(b) (2000), Seller has priority over Bank. (Note that Bank does hold a conflicting security interest because its after-acquired property clause attached to the computer as soon as Debtor had rights in it, which was no later than February 12, when Debtor took possession. *See* UCC § 9-203 (2000); § 9-204 (2000).)

Point Two: Because Seller filed within 20 days after Debtor received possession of the computer, Seller prevails over Larry by virtue of the PMSI exception in UCC § 9-317(e) (2000).
(30-40%)

Larry qualifies as a lien creditor because he acquired his lien on Debtor's computer by way of the sheriff's levy on February 14. UCC § 9-102 (2000). As between a secured creditor and a lien creditor, the general priority rule is found in UCC §§ 9-317(a)(2), 9-323 (2000)—a perfected security interest prevails over a lien creditor whose lien arises after the time of perfection. Under the majority rule, Larry became a lien creditor on February 14—the date of the sheriff's levy. *See* Lynn M. Lopucki & Elizabeth Warren, *SECURED CREDIT: A SYSTEMS APPROACH* 572 (2d ed. 1998). Another way of viewing it is to say that “The unperfected security interest is subordinate to the rights of a lien creditor.” UCC § 9-317(a)(2) (2000). Seller did not perfect until February 20 (see above discussion). Thus, under the general rule, Larry would prevail over Seller.

There is, however, an exception to this general rule as well. UCC § 9-317 (2000) notes that a secured party who files with respect to a PMSI within 20 days after the debtor receives possession of the collateral takes priority over the rights of a lien creditor that arise between the time the security interest attaches and the time of filing. As previously explained, Seller's interest is a PMSI, and Seller filed within the 20-day period after Debtor received possession (filing on February 20; Debtor's possession on February 12). Moreover, Larry's lien arose on February 14, which is between the time of Seller's attachment (February 12) and the time of filing (February 20). Thus, under the UCC § 9-317(e) (2000) exception, Seller prevails over Larry.

Point Three: Because Bank's future advance was made within 45 days of Larry's becoming a lien creditor, Bank has priority in the future advance.
(20-30%)

The general rule for contests over future advances between lien creditors and secured creditors is found in UCC § 9-323(b)(2000). That section provides that lien creditors are subordinate to perfected security interests only to the extent that the interest secures advances made (1) before the lien arose; (2) within 45 days of the lien; (3) without knowledge of the lien; or (4) pursuant to a commitment entered into without knowledge of the lien.

The problem is somewhat complicated because the facts indicate that Bank had knowledge of the lien on February 16—one day *before* the future advance was made. Some applicants may believe, therefore, that Bank's knowledge of the lien precludes it from gaining priority in the future advance. Pursuant to UCC § 9-323(b)(2000), however, future advances made within 45 days of the lien, *even if the secured creditor is aware of the lien's existence*, take precedence over the lien. As previously explained, the lien arose on February 14. The advance was made on February 17—well within the 45-day window of UCC § 9-323(b)(2000). Thus, Bank's security interest prevails over Larry's lien as to the future advance.

AGENCY & PARTNERSHIP X.C

Question 3 Analysis

- Legal Problems:
- (1) Can the limited partners decide how the day-to-day business of a limited partnership is to be conducted?
 - (2) What rights does a limited partner have to obtain information from the general partner about the limited partnership's affairs?
 - (3) What rights does a purchaser of a limited partnership interest have in the limited partnership if such purchase is not approved by the partnership?

DISCUSSION

Point One: (35-45%) Carl and the other limited partners have no right to determine how the day-to-day business of Transitions is to be conducted. Management of the business is vested exclusively in Bill, the general partner.

A limited partnership is a partnership which has one or more general partners and one or more limited partners. Revised Unif. Ltd. Partnership Act (RULPA) § 101(7). A general partner of a limited partnership generally has the powers and the liabilities of a partner in a general partnership. RULPA § 403. Management of a limited partnership is entrusted to the general partners, who are personally liable for the obligations of the business. *Life Care Centers of America, Inc. v. Charles Town Assoc. Ltd. Partnership*, 79 F.3d 496, 503 (6th Cir. 1996) (dictum); *United States v. Heffner*, 916 F. Supp. 1010, 1012 n.2 (S.D. Cal. 1996) (“general partner controls the business of the limited partnership to the exclusion of the limited partners”); *Duke & Benedict, Inc. v. Wolstein*, 826 F. Supp. 1413, 1415 (M.D. Fla. 1993) (“The defendant is the general partner of this partnership and has complete control over the management and affairs of this business.”).

By comparison, limited partners generally have no control over how the day-to-day business of the limited partnership is conducted. *Duke & Benedict, Inc.*, 826 F. Supp. at 1415 (“The plaintiff is the limited partner, who has no say or control as to how the partnership is run.”); *In re the Cincinnati, Ltd.*, 143 B.R. 108, 110 (S.D. Ohio 1992) (holding that limited partner was not entitled to have provision included in limited partnership agreement giving it voice in selection of manager; limited partners “do not have statutory right to exercise control of the partnership’s decisions”). The role of limited partners in a limited partnership is generally passive, with only limited rights to vote on extraordinary events of the partnership, such as dissolution or sale of substantially all of the partnership’s assets.

Therefore, Bill, as the sole general partner, has exclusive control over the daily management of Transitions, and Carl and the other limited partners cannot decide how the day-to-day business of Transitions is to be conducted.

Point Two: Carl, as a limited partner, has the right to inspect various records of Transitions (10-20%) and to obtain information about the affairs of Transitions from Bill, the general partner.

A limited partnership is required to keep specified records at its office, including the names and addresses of each partner, any income tax returns or reports for the three most recent years, and any financial statements for the three most recent years. RULPA § 105. Upon reasonable request, any limited partner may inspect and copy during ordinary business hours any of the records required to be kept by the limited partnership. RULPA §§ 105(b), 305. In addition, any limited partner has the right to obtain from the general partners upon reasonable demand “true and full information regarding the state of the business and financial condition of the limited partnership” and “other information regarding the affairs of the limited partnership as is just and reasonable.” RULPA § 305.

Therefore, Carl has the right to inspect the records that Transitions is required to keep and the right to obtain from Bill, the general partner, true and full information regarding the business and financial condition of Transitions.

Point Three: Edward’s purchase of Donna’s limited partnership interest in Transitions did not (30-40%) result in Edward’s becoming a limited partner, although Edward did obtain Donna’s financial rights in Transitions.

A limited partnership interest is personal property and, except as provided in the partnership agreement, is freely assignable in whole or in part. RULPA §§ 701, 702. However, assignment of a limited partnership interest does not entitle the assignee to become a limited partner or to exercise any of the rights of a limited partner. RULPA §§ 301, 702. Instead, assignment only entitles the assignee to receive (to the extent assigned) any distributions to which the assignor would be entitled. *Id.* In other words, a limited partner may only assign his or her economic rights in the limited partnership. *See generally* IV Alan R. Bromberg & Larry E. Ribstein, BROMBERG AND RIBSTEIN ON PARTNERSHIP §§ 13.04(e), 13.06(e)(2)-(f) (1988).

An assignee of a limited partnership interest may be admitted as a limited partner to the partnership only if all partners have consented to such admission, unless the partnership agreement expressly gives the transferring partner the right to admit a new partner without approval of the other partners. RULPA § 704. The facts indicate that Bill disapproves of the sale and there is no indication that the other partners approved the admission of Edward as a limited partner. Edward therefore did not become a limited partner in Transitions upon Donna’s sale of her limited partnership interest to Edward. As a result, Edward cannot exercise any of the rights of a limited partner, such as the right to inspect records (RULPA §§ 105, 305), the right to obtain information regarding the limited partnership (RULPA § 305), the right to seek a judicial dissolution (RULPA § 802), or the right to bring a derivative action (RULPA § 1001).

On the other hand, the assignment of Donna’s limited partnership interest to Edward did transfer Donna’s economic rights in Transitions to Edward. Consequently, Edward is entitled to any distributions from Transitions to which Donna would have been entitled.

DECEDENTS' ESTATES II.I TRUSTS II.D

Question 4 Analysis

- Legal Problems:
- (1)(a) Did Testator's will, which included a general residuary clause purporting to exercise all of the donee's powers of appointment (a so-called "blanket exercise" clause), effectively exercise the special testamentary power of appointment that was created in Mary's will?
 - (1)(b) Did Testator's will, which included a blanket exercise clause, effectively exercise the general testamentary power of appointment created in Frank's will?
 - (2) Does Daughter, the devisee of specifically devised encumbered property, take that property subject to the mortgage where the will contains a clause directing that the decedent's debts be paid by the executor?
 - (3) Is Son, the specific legatee of the watch, entitled to the insurance proceeds on the watch that were payable as a result of the theft of the watch shortly before Testator's death?

DISCUSSION

Point One(a): The "blanket exercise" clause in Testator's will did not effectively exercise the (15-25%) power of appointment given to Testator by Mary's will because Mary's will required Testator to refer specifically to the power when exercising it.

In most states, a general residuary clause in a will (e.g., "I give all of my estate. . .") does not exercise powers of appointment. The situation is different if the general residuary clause is coupled with what is called a "blanket exercise" clause (e.g., "including all property over which I have a power of appointment"), as is the case here. Under these circumstances, any power of appointment held by the donee is exercised, unless the donor of the power of appointment specifically required the donee to refer to the instrument creating the power when exercising the power. *See generally* Unif. Probate Code § 2-608. *See also* Restatement (Second) of Property §§ 17.1-.2 (1984); *accord Holzbach v. United Virginia Bank*, 216 Va. 482, 219 S.E.2d 868 (1975).

Here, Mary, the donor of Testator's special power, expressly required that Testator specifically refer to her will in which the power was created if Testator, as donee of the power, sought to exercise the power. Testator's will contained only a blanket exercise clause, which failed to satisfy a condition on the exercise of the power imposed by the donor. Thus, the power was not effectively exercised.

Point One(b): Testator's general testamentary power created by Frank's will was effectively (10-15%) exercised by a blanket exercise clause.

No facts indicate that Frank imposed a specific reference requirement with respect to the general testamentary power that Frank, as donor, granted Testator, as donee. Therefore, under the rule that a blanket exercise clause is effective to exercise powers absent a specific reference requirement (see Point One(a)), Testator's will effectively exercised the general testamentary power of appointment.

Point Two: At common law, Daughter takes the family home free of the mortgage. Under the (20-30%) law of most states today, Daughter takes the home subject to the mortgage on which Testator was liable at the time of his death. The mortgage is not payable from the assets of Testator's estate.

Under the common-law doctrine of exoneration, the specific devisee of encumbered real property was entitled to have the mortgage on the property paid from the estate as a debt of the decedent unless there was evidence of a contrary intent on the part of the testator. *See, e.g., Martin v. Johnson*, 512 A.2d 1017 (D.C. 1986).

On the other hand, many states have adopted statutes contrary to this common-law rule of exoneration. For example, the Uniform Probate Code provides that "a specific devise passes subject to any mortgage interest existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts." Unif. Probate Code § 2-607. In states with statutes of this type, the specific devisee of encumbered property takes subject to the mortgage notwithstanding the fact that the will contained a clause directing the executor to pay the decedent's debts.

Courts have also held that a general directive to pay debts is insufficient to evidence an intent to exonerate the devisee of specifically devised property. *See, e.g., Griffin v. Gould*, 72 Ill. App. 3d 747, 391 N.E.2d 124 (1979). Depending on the underlying state law, Daughter takes either subject to the mortgage or free of the mortgage.

Point Three: The insurance proceeds payable as a result of the theft of the watch shortly before (25-35%) Testator's death should pass to Son as the specific devisee of the watch. There is, however, contrary authority.

Under the doctrine of ademption, if the subject matter of a specific devise is not in the probate estate at the time of the testator's death, the bequest to the devisee adeems (or fails). *See generally* William H. McGovern, Jr. & Sheldon F. Kurtz, *WILLS, TRUSTS AND ESTATES* 295 (2d ed. 2001). However, if the property was destroyed by fire or lost by theft and proceeds of insurance are paid to the executor of the estate in settlement of claims against the insurance company, some courts hold that the insurance proceeds are payable to the specific devisee as a substitute for the specifically devised property. *See White v. White*, 105 N.J. Super. 184, 251 A.2d 470 (1969); *accord In re Estate of Wolfe*, 208 N.W.2d 923 (Iowa 1973); Unif. Probate Code § 2-606.

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However, some state courts have held to the contrary, finding that the insurance proceeds pass as part of the testator's residuary estate. *In re Estate of Wright*, 7 N.Y.2d 365, 197 N.Y.S.2d 711, 165 N.E.2d 561 (1960). They find that the insurance policy is a separate and distinct asset from the property subject to the specific devise and that the proceeds, as specifically undisposed property, pass to the residuary legatees under the will.

It seems that the majority rule stated in *Wolfe*, 208 N.W.2d 923, as well as in the Uniform Probate Code and some other state codes is the better rule because it is more likely to accord with the reasonable expectations of a testator.

FAMILY LAW V, VI.C, VI.E

Question 5 Analysis

- Legal Problems:
- (1) If a wife sues her husband for injuries resulting from her husband's negligence, is such action barred by spousal immunity?
 - (2) If a child sues her parents for negligence in an area of parental discretion, is the action barred?
 - (3) May a bystander who is an unmarried cohabitant and who witnesses her fiancé's death recover for negligent infliction of emotional distress or for loss of consortium, or is such recovery limited only to close family members?

DISCUSSION

Point One: (25-35%) In the great majority of jurisdictions, negligence suits between husbands and wives are no longer barred by spousal immunity.

For many years, husbands and wives could not sue each other for negligence. The usual reasons for such immunity were that such suits would be destructive of marital harmony and would encourage fraud and collusion against insurance companies. Homer Harrison Clark, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 11.1 (2d ed. 1987).

In the vast majority of jurisdictions, however, interspousal immunity has been abolished as courts have dismissed fears of disrupting familial harmony and of collusion. John DeWitt Gregory et al., *UNDERSTANDING FAMILY LAW* § 6.02 (2d ed. 1993). In these jurisdictions, if Wife can prove that Husband's negligence caused her injuries (as it appears from the facts that it did), then she may receive compensation for her injuries.

Point Two: (30-40%) The majority of courts have abolished absolute immunity for most parent-child lawsuits. However, in areas dealing with the exercise of ordinary parental discretion, no suit would be allowed.

Historically, just as husbands and wives could not sue each other, and for comparable concerns about family harmony, minor children could not sue their parents for personal injury torts. Many jurisdictions, probably a majority, have abolished this absolute immunity. Clark, *supra*, § 11.2.

Even though parents are not absolutely immune from suits by their children, they have substantial discretion in making decisions concerning their children's upbringing. Because of this discretion, children cannot recover for acts that might otherwise result in liability. Courts are

reluctant to substitute their judgment for that of parents (to act *in loco parentis*) and to interfere in the arena of family privacy. Matters falling within the exercise of parental discretion include providing food. (This is clearly not a case of true child neglect, where Daughter's parents have failed to provide sufficient food at all.) Clark, *supra*. Therefore, it is unlikely that Daughter could successfully maintain a lawsuit against her parents for not giving her more calcium in her diet.

Point Three: Both a claim for negligent infliction of emotional distress and a claim for loss of consortium are likely to fail because Emily was not married to Frank at the time of the accident.
(30-40%)

In many jurisdictions, when a bystander witnesses an accident which kills or seriously injures a close family member, and the bystander suffers from severe emotional distress, there may be a cause of action against the tortfeasor for negligent infliction of emotional distress. See W. Page Keeton & William L. Prosser, PROSSER & KEETON ON TORTS § 54 (5th ed. 1984); *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968). In this situation, Emily witnessed the accident, which was due to Husband's negligence. After Frank's death (which occurred while she was holding him), she suffered the severe distress required to pursue a tort action.

The problem for Emily's recovery, however, is that she was not Frank's wife. At the time of his death, they were engaged and were cohabiting.

A majority of jurisdictions would be unlikely to expand liability, even to a cohabiting fiancée. This reluctance is based on the difficulties of determining which cohabitants should be allowed to recover and problems of proving the importance of the relationship. See *Elden v. Sheldon*, 758 P.2d 582 (Cal. 1988). Some courts might also take the position that recognition of cohabitants' rights in this cause of action would undermine the strong public policy in support of marriage. Harry D. Krause, FAMILY LAW IN A NUTSHELL § 6.5 (3d ed. 1995).

On the other hand, some jurisdictions have allowed engaged cohabitants to recover in a tort suit of this type. See, e.g., *Dunphy v. Gregor*, 642 A.2d 372 (N.J. 1994); Krause, *supra*, § 6.3. Emily would argue that her claim should be recognized. Her relationship with Frank was like that of a husband and wife. They lived together and were to be married in a week. Witnessing his death was emotionally devastating to her. She had strong emotional ties to Frank, and she should receive compensation for her severe loss.

Emily might also try to bring a loss of consortium claim. This tort, which is recognized in almost all U.S. jurisdictions, is intended to compensate a spouse for loss of such things as the other spouse's companionship, sexual relations, and affection. See *Millington v. Southeastern Elevator Co.*, 239 N.E.2d 897, 899 (N.Y. 1968); Laura M. Raisty, Note, *Bystander Distress and Loss of Consortium: An Examination of the Relationship Requirements in Light of Romer v. Evans*, 65 Fordham L. Rev. 2647, 2650-51 (1997). While originally only the husband could recover for loss of consortium, the right was extended to wives during the mid-twentieth century. See, e.g., *Hitaffer v. Argonne Co.*, 183 F.2d 811 (D.C. Cir. 1950). Compensation for loss of consortium typically is available only to the legally recognized spouse of the injured party, not to a fiancée or cohabitant. Raisty, *supra*, at 2652. Thus, Emily would not have a claim for loss of consortium because she and Frank were not yet married.

Note: Emily might also try to bring a suit for wrongful death, a statutory tort unrecognized at common law. It is intended to compensate family members for the death of a relative, typically a spouse, child, parent, etc. Again, however, since Emily and Frank were not married, Emily would not have a claim worth pursuing.

COMMERCIAL PAPER II.D; IV.A, G; V.H; VII.A

Question 6 Analysis

- Legal Problems:
- (1) Is an instrument that is not negotiable because of omissions still enforceable if the payee fills in the blanks consistent with the payee's underlying agreement with the maker?
 - (2) Can a person without physical possession of an instrument still enforce the instrument in a case where the instrument has been stolen?
 - (3) Is the obligor on an instrument discharged by paying the instrument in good faith where there has been a forgery of the payee's signature?
 - (4) Does the obligor on an instrument who pays the instrument that has a forged payee's signature have any rights of recovery against the party that presented the instrument for payment?

DISCUSSION

Point One: Because Lender filled in the two blanks according to his actual agreement with (15-25%) Borrower, the note is enforceable as completed.

Before Lender filled in the blank lines on the note form, the note that Borrower gave Lender was not negotiable. That is because one of the requirements of negotiability under Article 3 of the Uniform Commercial Code is an unconditional promise to pay a fixed amount of money. UCC § 3-104(a) (1991). In this case, the amount due line was left blank by Borrower, the issuer of the note. Therefore, the note was an "incomplete instrument" under § 3-115(a). It is an instrument because Borrower signed the note and issued it to Lender; it is incomplete because the two lines for payee and amount due were left blank.

Section 3-115(b) indicates that an instrument that is not negotiable because of omissions is still enforceable "according to its terms as augmented by the completion." However, if the words or numbers were added to the incomplete instrument without the authority of the signer, the instrument is treated as an altered instrument and special rules apply.

In this case, although there was no mention of specific authority given by Borrower to Lender to fill in the blanks, the burden would be on Borrower to show lack of authority. UCC § 3-115(d). Because Lender did fill in the blanks consistent with the actual agreement of the parties, it seems likely that authority would be presumed. *See* Official Comment 2 to § 3-115 (1991). ("If the

payee completes the note by filling in the due date *agreed to by the parties*, the note is payable on the due date stated.”) (Emphasis added.)

(By leaving the payee space blank, Borrower made the note a bearer instrument, which the bearer could convert to an order instrument by filling in his name. 2 James J. White & Robert S. Summers, UNIFORM COMMERCIAL CODE § 17-3 (4th ed. 1995). Failure to include a payee does not diminish the negotiability or enforceability of the instrument.)

Point Two: Because Lender was entitled to enforce the instrument at the time it was stolen, (25-35%) Lender would still be able to enforce it if Lender can prove the terms of the note and provide adequate assurance to Borrower against the risk of possible loss for future claims.

Even though Lender no longer has physical possession of the note, Lender would still be able to qualify as a “person entitled to enforce” the instrument under UCC § 3-301 (1991). Section 3-301(iii) specifically refers to a person who is not in possession of an instrument as nevertheless being entitled to enforce the instrument under § 3-309. Section 3-309(a) contains three requirements that enable a person not in possession of an instrument to enforce it. In this case, Lender satisfies all three requirements: (1) Lender was the person entitled to enforce the instrument when loss of possession occurred; (2) Lender’s loss of possession was not the result of his own transfer or of a lawful seizure; and (3) the whereabouts of the note are unknown to both parties, at least before Borrower paid Innocent.

Section 3-309(b) requires that Lender prove both the terms of the instrument and his right to enforce it. Neither should be problematic in this case. Lender would have to give Borrower assurances against double payment because Borrower, by the terms of § 3-309(b), would be entitled to demand adequate protection against possible loss from future claims on the missing note.

Point Three: Given the forgery of the payee’s signature, Innocent did not qualify as a person (25-35%) entitled to enforce the instrument, and thus Borrower was not discharged by paying Innocent.

Under UCC § 3-602(a) (1991), the obligor on an instrument is ordinarily discharged by paying a person entitled to enforce the instrument. Borrower will not get the benefit of a discharge in making the payment to Innocent because Innocent does not qualify as a “person entitled to enforce” the instrument. In order for Innocent to be a person entitled to enforce the instrument under § 3-301, Innocent must be either a holder or a person who has the rights of a holder.

Innocent cannot be a holder because the chain of good title was broken by Robber’s forged indorsement of the payee’s (Lender’s) signature. UCC § 3-201(b) (1991) provides that, “If an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument *and its indorsement* by the holder” (emphasis added). *See also* UCC § 1-201(20) (1989) (A “holder” of a negotiable instrument means “the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession.”) Nor will Innocent qualify as a nonholder entitled to enforce

the instrument because Innocent inherits only the rights of Robber, which are non-existent because of the theft and forgery. Accordingly, Innocent was not a person entitled to enforce the note, and Borrower's payment to Innocent does not discharge Borrower.

Point Four: Because Innocent was not entitled to enforce the instrument, Borrower may recover from Innocent for breach of presentment warranty.
(15-25%)

Even though Innocent knew nothing about either the theft or the forgery, Innocent nevertheless breached a presentment warranty to Borrower under UCC § 3-417(d)(1) (1991). At the time Innocent presented the note to Borrower for payment, Innocent was warranting to Borrower that Innocent was "a person entitled to enforce the instrument or authorized to obtain payment on behalf of a person entitled to enforce the instrument." *Id.* As noted above, Innocent cannot be a person entitled to enforce the instrument because of Robber's forgery of a necessary signature in the chain of title. Therefore, under § 3-417(d)(2), Innocent will be liable to Borrower for the amount that Borrower paid Innocent plus interest and expenses resulting from the breach of the presentment warranty.

CORPORATIONS IV.B, VI.A, VI.B

Question 7 Analysis

- Legal Problems:
- (1) What is the applicable legal standard when a shareholder brings a derivative action based on breach of a director's fiduciary duties?
 - (2)(a) Do directors violate their duty of care to the corporation when they vote to recommend action after only one hour of discussion?
 - (2)(b) Does a director violate her duty of loyalty to the corporation when she votes to issue herself shares of the corporation?
 - (3) If the court finds sufficient evidence of a breach of a fiduciary duty to overcome the Business Judgment Rule (BJR), can the director prevail with a defense of (i) disinterested director approval, (ii) shareholder approval, or (iii) fairness?

DISCUSSION

Summary: The Class B Shareholder is unlikely to prevail in this derivative action. Ordinarily, the Business Judgment Rule (BJR) would preclude the court from second-guessing the board of directors on an issue of this sort (i.e., how best to finance a business expansion). In this case, however, even though the directors did not breach their duty of care to the corporation, Dart clearly did breach the duty of loyalty by voting to cause the corporation to enter into a transaction that provided her with a financial benefit. Because of the breach of the duty of loyalty, the BJR does not immunize the transaction from scrutiny. Nevertheless, the court would not enjoin the transaction because it was carried out in a manner that removes the taint of the breach of loyalty.

Point One: (5-10%) In a shareholder derivative action, decisions of the board on business issues are presumptively correct under the Business Judgment Rule (BJR).

In order to prevail in this derivative action to enjoin the issuance of Class C Preferred, the Class B shareholder must overcome the BJR. The BJR is a legal presumption. Absent a showing that the directors have violated a fiduciary duty to the corporation or committed fraudulent or illegal acts, the court will not second-guess their judgments. *See Davis v. Louisville Gas & Electric Co.*, 142 A. 654, 659 (Del. Ch. 1928) (court refused to enjoin the directors from amending the certificate of incorporation, stating "it is not [the court's] function to resolve . . . questions of policy and business management. The directors are chosen to pass upon such questions and their judgment unless shown to be tainted with fraud is accepted as final.")

If the Class B shareholder puts forth sufficient evidence to demonstrate that the directors breached a fiduciary duty to Ergo, the BJR will no longer apply.

Point Two (a): Although the directors discussed the matter for only one hour, they did not violate their duty of care to Ergo when they voted to recommend to shareholders the amendment to the Articles.
(25-35%)

Directors owe a duty of care to Ergo; they must act on an informed basis, in good faith in the honest belief that the action taken is in the best interest of the corporation. *See Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). Under the Revised Model Business Corporation Act (RMBCA), directors are required to discharge their duty “in good faith and in a manner the director reasonably believes to be in the best interests of the corporation.” RMBCA § 8.30(a). When becoming informed to make a decision, directors must discharge their duty “with the care that a person in a like position would reasonably believe appropriate under similar circumstances.” RMBCA § 8.30(b). The duty of care is procedural (process oriented), not substantive.

The facts do not support an argument for lack of good faith or failure to act “with the care that a person in a like position would reasonably believe appropriate under similar circumstances.” RMBCA § 8.30(b). Even if the other funding alternatives might have been better for Ergo, directors are not liable for bad decisions so long as they follow the appropriate procedures, which they did here. *See Kamin v. American Express Co.*, 383 N.Y.S.2d 807 (N.Y. Sup. Ct. 1976), *aff’d*, 387 N.Y.S.2d 993 (N.Y. App. Div. 1976).

The directors spent only one hour considering and deciding the issue. In *Smith v. Van Gorkom*, two hours was held insufficient for a major corporate decision. *See Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985) (Duty of care violated when directors approved a merger after a 20-minute oral presentation without reviewing the documents or assessing the valuation at a meeting that was called without much notice.) However, courts are generally concerned with major corporate decisions, like the sale of control in *Van Gorkom*. *See Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 370 (Del. 1993). In Ergo’s case, the issue was only the source of funding, as the directors had already properly approved the expansion plan.

Point Two (b): Dart violated her duty of loyalty to Ergo when she voted to issue the Class C Preferred to herself.
(10-20%)

The duty of loyalty requires a director to put the interests of the corporation before the director’s own interests. If a director enters into a transaction with the corporation that provides the director with financial benefit, it is a violation of the duty of loyalty. The purchase of the Class C Preferred by Dart is a transaction with Ergo that provides Dart with a financial benefit. Therefore, Dart violated her duty of loyalty to Ergo when she voted to issue the Class C Preferred to herself. This was also a conflicting interest transaction under the RMBCA because Dart knew she could benefit. RMBCA § 8.60.

Dart has a conflicting interest transaction because, at the time she voted to issue the Class C Preferred to herself, she knew she had a significant financial interest.

Point Three: Although the directors did not violate their duty of care to Ergo, Dart violated her duty of loyalty. Regardless, the court would not enjoin the issuance of the Class C Preferred because Dart could show the transaction was (1) approved by a majority of disinterested directors after full disclosure, (2) approved by a majority of shareholders after full disclosure, or (3) fair to Ergo.

Even though the directors did not violate their duty of care, Dart violated her duty of loyalty to Ergo, and that fact prevents the application of the BJR. Nonetheless, the court would NOT enjoin the issuance of the Class C Preferred if Dart could demonstrate that the sale of Class C Preferred to her was (1) approved by a majority of disinterested directors after full disclosure, (2) approved by a majority of shareholders after full disclosure, or (3) fair to Ergo. See Robert C. Clark, CORPORATE LAW § 5.2 (1986); Revised Model Bus. Corp. Act (RMBCA) §§ 8.61-.63. In this case, Dart can demonstrate all three.

Disinterested Director Approval: All seven directors voted to offer the Class C Preferred to Dart after full disclosure of all material facts relating to the transaction. Disclosure of all material facts constitutes full disclosure. Approval must also be by a majority of disinterested directors. Dart is interested because she is a party to the transaction. The three remaining Class A directors are arguably interested because their positions as Ergo directors are dependent upon election by Dart, the sole Class A shareholder. If they failed to support Dart, Dart could remove them from their positions as directors. The three Class B directors, however, are disinterested directors. They all voted in favor of issuing the shares to Dart. Therefore, a majority (indeed all three) of the disinterested directors approved the offering of the Class C Preferred to Dart. Under the RMBCA (and most state statutes), the three disinterested directors who voted are sufficient to constitute a quorum when voting on a conflicting interest transaction.

Shareholder Approval: According to the facts, the proxy solicitation provided full disclosure of all relevant information regarding the plan to issue the Class C Preferred to Dart for \$5 million. The fact that the directors did not disclose that they had considered and discarded other financing options is unimportant because information on other options was properly considered and discarded. All Class A shares voted in favor of the transaction, as did a majority of Class B shares (720,000 of 820,000 shares). Therefore, a majority of shareholders approved the transaction after full disclosure. Note that there is no requirement that the shareholders be disinterested.

Fair: Alternatively, Dart can show that the transaction was fair to Ergo at the time the Class C Preferred shares were issued. In assessing fairness, directors may rely on expert opinions. See RMBCA §8.30(e). To demonstrate that the price was fair to Ergo, Dart would offer the opinion of the independent investment bank stating that (1) \$5 million would be fair value for the Class C Preferred, and (2) in the long run, payment of the Class C Preferred dividend would be less costly to Ergo than interest payments on a loan.

July 2002

SECURED TRANSACTIONS V.A

Question 1 Analysis

- Legal Problems:
- (1) Does a secured party have the right to a self-help repossession without prior notice of default to the debtor and without judicial process?
 - (2) Under the circumstances of this case can it be reasonably argued that the repossession was carried out in breach of the peace?

DISCUSSION

Summary: After a debtor's default, a secured party may take possession of the collateral without notice and without judicial process. However, this right to self-help repossession exists only if the repossession can be accomplished without a "breach of the peace," a standard that the UCC leaves to the courts to define. Because the "breach of the peace" standard is open-ended and subject to judicial interpretation, the outcome of this case cannot be definitively stated. But the facts provide a basis for Debtor to make a reasonable argument that Uptown should have abandoned its attempt at self-help repossession and relied on judicial process to enforce its claim. First, Debtor had made it clear to Uptown that she would resist non-judicial repossession, and Uptown relied on trickery to avoid that resistance. A number of courts disfavor such "fraudulent" conduct by creditors. Second, the repossession was arguably done by an unauthorized entry into Debtor's "home," required "hot-wiring" of the motor home (ordinarily the act of a thief), and involved the incidental (but intentional) seizure of possessions of Debtor to which Uptown had no lawful claim. Such "trespassory" conduct may also be disfavored. In addition, the creditor's use of a police officer (without securing judicial approval) is also treated by courts as improper, though the police officer did not actually effect this repossession.

Point One: (20-30%) Following default, a secured party has the right to take possession of the collateral without prior notice of default and without judicial process.

The secured party's right to repossess the collateral arises on the debtor's default. UCC § 9-609. There is nothing in the Code that requires the secured party to give either notice of default or notice of intent to repossess. Repossession can be through self-help and without the need to

commence judicial proceedings. *Id.* The only limitation is that the repossession must be accomplished without a breach of the peace. *Id.*

Under the facts, Debtor, having missed “several monthly payments,” was clearly in default. Accordingly, Uptown was free to proceed with the self-help remedy of repossession.

Point Two: Debtor could argue that Uptown’s repossession was in breach of the peace because (70-80%) it involved an unconsented entry into Debtor’s place of residence, it was accomplished by “hot-wiring” the vehicle, it enlisted the aid of a law enforcement officer, and it was carried out over the verbal protests of Debtor.

UCC § 9-609 authorizes the secured party to engage in self-help “without judicial process if this can be done without breach of the peace. . . .” See Point One. The term “breach of the peace” is not defined in the Code. Rather, the drafters relied on pre-Code case law to prescribe the parameters of permissible conduct. Particularly important facts include (1) whether the creditor has entered upon the premises of the debtor and (2) whether the debtor has consented to the entry and repossession. *White & Summers*, UNIFORM COMMERCIAL CODE § 34-7 (4th ed. 1995). Moreover, it is the potential for violence and not necessarily the occurrence or imminence of violence that defines a breach of the peace. Ordinarily, repossession of a vehicle from a driveway or public street or parking lot would not be found, without more, to be in breach of the peace. The matter is complicated in this case, however, because the motor home could be viewed as Debtor’s residence.

Most courts would find that an unauthorized entry into the residence of a debtor would, in and of itself, constitute a breach of the peace. *Id.* In this situation, if the motor home is viewed as Debtor’s home, it is likely that unauthorized entry would be held to be trespassory and a breach of the peace. The fact that Debtor lived in the motor home and it contained Debtor’s “clothes and other stuff” supports Debtor’s claim that the motor home was her residence, so that the unauthorized entry would be a breach of the peace. Any effort to take the motor home in that manner probably would be considered a breach of the peace.

Debtor might also argue that her initial objection was enough to preclude any further attempts at self-help repossession without her consent. Under this view, the fact that the repossession occurred a couple of weeks later and under circumstances where there was little potential for violence probably would not change the outcome. It was clear that Debtor opposed the repossession and would have resisted had she known that the motor home was about to be taken. On the other hand, it can be argued that the passage of time served to cool down the threat of violence. See *Wade v. Ford Motor Credit Corp.*, 668 P.2d 183, 189 (Kan. Ct. App. 1983). If so, Debtor’s initial objection to repossession is irrelevant to an evaluation of the later action.

Even though Uptown’s entry into the motor home was accomplished without force, the fact that Ernest, the employee, “hot-wired” the engine might arguably be found to be a breach of the peace. See, e.g., *General Electric Credit Corp. v. Timbrook*, 291 S.E.2d 383 (W.Va. 1982)(breaking lock to debtor’s mobile home in order to gain entry constituted breach of peace); *Martin v. Dorn Equipment Co.*, 821 P.2d 1025 (Mont. 1991)(cutting locked chain on ranch gate constituted breach of peace).

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The fact that the repossession was accompanied by trickery (i.e., the fictitious coupon) may matter. The courts go both ways. *See, e.g., F.A. North & Co. v. Williams*, 13 A. 723 (Pa. 1888) (trickery is not a breach of the peace); *Ford Motor Credit Co. v. Byrd*, 351 So. 2d 557 (Ala. 1977) (trickery is a breach of the peace). The fact that the deputy sheriff was standing by does not contribute to a finding of breach of the peace because the deputy did not participate or serve to intimidate Debtor. *White & Summers, supra*. There is no evidence that Debtor saw the deputy or was at all affected by the deputy's presence.

The argument could go either way. On balance, however, a court would probably find a breach of the peace under the circumstances and that the repossession was unlawfully carried out.

DECEDENTS' ESTATES II.A, II.J, IV.C, IV.D

Question 2 Analysis

- Legal Problems:
- (1) Is Nephew liable in wrongful death for causing Testator's death?
 - (a) Was Testator's durable health care power of attorney validly executed?
 - (b) Was Nephew, a beneficiary under Testator's will and a witness to Testator's health care power of attorney, prohibited from acting as an agent?
 - (2) Can the nieces successfully challenge the will because Testator lacked the mental capacity to execute her will?
 - (3) Does Nephew forfeit the bequest under the interested witness statute?

DISCUSSION

Summary: Nephew would not be liable in wrongful death if, as it appears, he acted under a valid durable health care power of attorney and in good faith. His decision to direct the withdrawal of life support was entirely consistent with the doctor's medical advice.

Testator's will appears to have been validly executed. Arguments that Testator lacked mental capacity should fail because the facts show that she knew both the objects of her bounty and the nature and extent of her property.

Lastly, Nephew would not forfeit his share under typical state interested witness statutes because the will bequeathed him a share less than what would have been his intestate share. Likewise, under the UPC, he would take his share as that statute has no interested witness forfeiture statute.

Point One: (35-40%) Under the typical durable health care power of attorney statute, if Nephew acted under a valid durable health care power and in good faith, he would be shielded from civil liability that might otherwise arise as a result of his directing the withdrawal of the life-support systems.

The typical durable health care power of attorney statute immunizes the agent of the principal from civil liability for health care decisions made in good faith. *See, e.g.*, Unif. Health Care

Decisions Act § 9(b)(1993). Health care decisions include the decision to withhold or withdraw life-sustaining treatment, including food and hydration. *See* Unif. Health Care Decisions Act § 1(6).

Agents act within the scope of the statute when they act pursuant to a properly executed durable health care power of attorney. State laws vary, however, on whether the person designated as the agent can be a witness to the durable health care power of attorney. For example, under the Uniform Health Care Decisions Act, the designated agent is not prohibited from being a witness. In fact, under the Uniform Act, no witnessing of the power is required. On the other hand, in many states, the person designated as the agent cannot be a witness to the power.

Even if Nephew was not legally constituted as Testator's agent, he may nonetheless have acted appropriately under so-called "family consent" laws. These laws permit close family members (typically in the order listed in the statute) to act as a surrogate decision maker for a patient where there is no properly authorized agent acting under a durable power. For example, under § 5 of the Uniform Health Care Decisions Act, Nephew could act as a surrogate decision maker since there are no more closely related relatives and Nephew is an adult "who exhibited special care and concern for the patient."

Whether Nephew was acting as a properly constituted agent or as a surrogate under the family consent law, ultimately the issue of civil liability most likely depends on whether Nephew acted in "good faith." Here the facts suggest that he did. Testator had suffered a massive stroke and had lapsed into a coma, and Nephew's direction to withdraw Testator's life support appears to be consistent with sound medical advice to the effect that more care would be futile. While the fact that Nephew is named in Testator's will as a beneficiary may create the appearance of impropriety, this fact alone is not sufficient evidence of bad faith; empirically most agents and surrogates are persons who are both close to the principal and named as beneficiaries under the principal's will.

Point Two: Testator's will is valid notwithstanding that Testator was sometimes forgetful, as
(35-40%) the facts support the conclusion that Testator had the mental capacity to execute
 a will.

In order to validly execute a will, Testator must have "mental capacity." A testator has mental capacity if the testator knows (1) the nature and extent of the testator's property, (2) those persons who are the natural objects of the testator's bounty, (3) the nature of the instrument that the testator is signing, and (4) the disposition that is being made in the will. *See generally* William H. McGovern & Sheldon F. Kurtz, *WILLS, TRUSTS AND ESTATES* 272 (2d ed. 2001).

Here Testator was forgetful, which at first blush suggests the absence of mental capacity. But simply relying on that fact is insufficient to determine whether Testator had mental capacity since the criteria that determine mental capacity for purposes of validating a will look specifically to Testator's understanding of her property interests, her beneficiaries, and her disposition. On these issues, the facts suggest that Testator did have mental capacity.

Testator appears to have been actively involved in the management and administration of her

property affairs, suggesting that she knew the nature and extent of her property. She knew those persons who might be the objects of her bounty as evidenced by the fact that she frequently visited with her 20 relatives, including those not mentioned in her will. Furthermore, the bulk of her estate is bequeathed to Charity, an organization with which she had had a long association. Thus, the will does not reflect a disposition that would likely be inconsistent with Testator's testamentary intent. Given that the burden of proof to establish the lack of testamentary capacity rests on the contestants, it is most unlikely that they could sustain that burden on these facts.

Point Three: Nephew would not forfeit any of his bequest under the will.
(20-30%)

Under the Uniform Probate Code, Nephew would not forfeit his bequest even though Nephew was a witness to the will because the Code does not have an interested witness statute barring interested witnesses from taking under a will.

At common law, if a will was not witnessed by two disinterested witnesses the will was invalid. See McGovern & Kurtz, *supra*, at 177. In the United States, this harsh rule has been replaced by statutes in most states barring the interested witness from taking the bequest but not invalidating the will. *Id.*

The typical interested witness statute, however, contains one or two important exceptions. The first is that if the will is witnessed by three or more persons such that the will would have been valid without the witnessing by the interested witness, the interested witness does not forfeit the bequest. *Id.* That exception would not apply here as Testator's will was witnessed only by two persons.

The second exception is that if the interested witness also would have been an heir of the testator, the witness forfeits only so much of the bequest as exceeds what would have been that witness's intestate share. Under that exception, Nephew forfeits nothing, as the bequest to Nephew of \$100,000 is less than what his intestate share would have been. Nephew's intestate share would have been in excess of \$250,000, as the estate is valued at more than \$1 million and there are four heirs.

In light of the discussion under Point One, there is no reasonable basis on which to argue that Nephew's bequest is invalid under the slayer statutes.

Likewise, the facts state that Nephew was wholly unaware of the will provision in his favor. Thus, there is no basis to invalidate the will on undue influence grounds.

NOTE: If the will is valid, the nieces would probably have no standing to raise the interested witness issue. If the interested witness statute applied and the bequest, or some portion of it, were forfeited, the forfeited portion would pass to Charity as the residuary legatee under Testator's will.

FEDERAL CIVIL PROCEDURE I.E, II.A, IV.D CONFLICT OF LAWS II.B, II.D

Question 3 Analysis

- Legal Problems:
- (1)(a) What effect should the federal district court give to the forum-selection clause?
 - (1)(b) Is the court likely to transfer the case to State N in these circumstances?
 - (2) Can a foreign-based party to U.S. litigation refuse to make its officers available for depositions on the ground that they are “beyond the subpoena power” of the court?

DISCUSSION

Summary: A motion for transfer of a case from one federal venue to another should be granted if a transfer would serve the convenience of the parties and the witnesses, if it would be in the interests of justice, and if the transferee court would have been a proper venue in the first instance. All of these requirements are satisfied here. The existence of a freely and fairly negotiated forum selection clause favoring State N is strong evidence that State N is a convenient forum, and the facts support the conclusion that State N is generally convenient for both parties, although State A is more convenient for plaintiff. Justice also favors upholding the expectations of the parties when they have freely selected State N as an appropriate forum. The action could also have been brought in State N initially.

When a corporate party is properly before a court (and no objection to personal jurisdiction was made here), the opposing party may depose an appropriate officer or director to speak for the corporation. The deposing party does not need to rely upon the court’s subpoena power for the exercise of authority over the officer or director. A protective order is proper only if there is some other basis to oppose the deposition (e.g., the party that noticed the deposition did not proceed in accordance with the federal rules governing the timing of discovery).

Point One(a): Because Buyer is seeking to transfer the case from one federal court to another (25-35%) federal court, the motion to transfer is governed by 28 U.S.C. § 1404(a). State A’s policy against forum-selection clauses is irrelevant, and the forum-selection clause is an important factor the court should consider in deciding whether to grant the motion to transfer.

Motions to transfer cases from one federal court to another are governed by 28 U.S.C. § 1404(a), which provides:

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Under this statute, motions to transfer are determined by weighing a number of factors, including the “convenience of witnesses and parties,” and “public-interest factors of systemic integrity and fairness.” *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29-31 (1988).

When a venue-transfer motion is predicated on the existence of a forum-selection clause in a contract, the forum-selection clause “will be a significant factor that figures centrally in the district court’s calculus.” *Id.* at 29. This is because “the presence of a forum-selection clause,” bears upon the “convenience of [the proposed] forum,” given the parties’ expressed preference for that venue. Thus, the court must evaluate the fairness of the proposed transfer in light of the forum-selection clause. *Id.* Further, the existence of a state law rule invalidating the forum-selection clause does not excuse the court from considering the clause as one factor bearing on the propriety of a venue transfer.

Although the forum-selection clause must be treated as a “significant factor” when the district court evaluates Buyer’s transfer motion, the U.S. Supreme Court has said that the existence of a forum-selection clause is not “dispositive.” *Id.* For instance, an inequality of bargaining power between the parties may warrant giving less effect to the forum-selection clause. Similarly, litigating in the proposed forum may impose significant and unusual hardships on one of the parties. Absent such special factors, however, many courts hold that transfer motions under § 1404(a) should always be granted when doing so will give effect to a freely negotiated and fair forum-selection clause. *See, e.g., REO Sales, Inc. v. Prudential Ins. Co.*, 925 F. Supp. 1491 (D. Colo. 1996); *Riviera Finance v. Trucking Serv., Inc.*, 904 F. Supp. 837 (N.D. Ill. 1995).

Point One(b): The federal district court in State A should grant the motion to transfer because the (45-55%) transfer would uphold the parties’ expectations and provide them with the neutral and experienced forum for which they bargained.

Applying the factors set out in Point One(a) should lead to transfer of this action. The forum-selection clause in this case was a bargained clause in a contract between parties of apparently equal bargaining power. State N appears to be a neutral forum, and State N courts are well known for their expertise in commercial matters. Although State N does not appear to be an especially convenient forum, the parties’ decision to select that forum in their contract indicates that each party believed State N to be a reasonably convenient alternative to less desirable options, including the option of litigating in either party’s home jurisdiction. Absent some evidence to suggest that a transfer to State N would result in special hardship or a denial of justice to either party, the court is likely to take the view that the parties’ decision to select the State N forum was ample evidence of the general superiority of that forum to State A.

This conclusion is bolstered by the fact that this is an international case. In *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the Supreme Court adopted the view that a forum-selection clause in an international contract “should control absent a strong showing that it should be set aside.” According to the Court, the need for a neutral forum, the desirability of avoiding uncertainty about where litigation might occur, and the need for a forum with expertise in the subject matter all justify giving deference to the parties’ choice of forum when that choice is made in “a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power.” *Bremen*, 407 U.S. at 12.

NOTE: Although *M/S Bremen* was an admiralty case, the Supreme Court has described the decision as “instructive” for other cases, including motions under § 1404(a) to transfer diversity actions. *See generally* C. Wright, A. Miller & R. Marcus, *FEDERAL PRACTICE AND PROCEDURE* § 3803.1 (1995).

A transfer under § 1404(a) must be to a “district or division” where the case “might have been brought” initially. Here, it might be argued that the case could not have been brought in State N because there are no connections with State N sufficient to give State N courts jurisdiction over the defendant. However, personal jurisdiction can be based on consent, and both parties clearly consented to State N jurisdiction in their contract. Pre-lawsuit contractual consent serves as a basis for State N service of process on the defendant corporation, and would therefore have been an adequate basis for personal jurisdiction and venue had the action been brought in State N originally. *See American Airlines, Inc. v. Rogerson ATS*, 952 F. Supp. 377 (N.D. Texas 1996). In addition, because the defendant corporation is an alien corporation, venue in a suit brought against it would be proper in any district in the U.S., including in a federal district court in State N. *See* 28 U.S.C. § 1391(d); *Naegler v. Nissan Motor Co., Ltd.*, 835 F. Supp. 1152 (W.D. Mo. 1993).

Point Two: Under Federal Rule of Civil Procedure 30, Seller has the right to compel the deposition of an officer of Buyer without resorting to the court’s subpoena power.

A party to an action may secure the deposition of another party simply by providing notice to the other party. No subpoena of a party deponent is necessary, and a party is subject to sanctions for failing to provide a deponent, even if the party would be beyond the reach of the court’s subpoena power if the party were a non-party witness. *See* Fed. R. Civ. P. 30(b)(1), 37(b)(2), 37(d)(1). *See generally* Wright, Miller & Marcus, *supra*, §§ 2103, 2112 (1995).

As a corporate party, Buyer cannot speak for itself but requires a natural person to speak for it. Seller could have noticed Buyer’s deposition and required Buyer to nominate a representative to be deposed. *See* Fed. R. Civ. P. 30(b)(6). Alternatively, Seller can do what it did here—it can identify an officer or director of Buyer to be deposed as Buyer’s representative. *See, e.g., Triple Crown America, Inc. v. Biosynth AG*, 1998 WL 227886 (E.D. Pa. 1998). If the person fails to appear, sanctions are authorized by Rule 37(d)(1). *See generally* Wright, Miller & Marcus, *supra*. Hence, Buyer’s argument that its officers are “beyond the court’s subpoena power” does not present a valid reason to prevent the deposition of an officer. Buyer, as a party to the litigation, is obliged to produce its officers for deposition. Accordingly, Buyer’s request for a protective order

should be denied, unless Buyer can offer sound reasons for resisting the deposition other than the simple claim that its CEO is beyond the reach of the court's subpoena power.

NOTE: If the court had no personal jurisdiction over defendant corporation, the claim that the officers and directors are beyond the court's subpoena power might be a colorable basis to resist the notice of deposition. The facts, however, suggest that personal jurisdiction is not a real issue. First, any problem with the State A federal court's personal jurisdiction over defendant Buyer was waived when Buyer responded to Seller's complaint without raising the personal jurisdiction issue. (*See* Fed. R.Civ. P. 12(h)(1).) Second, if the case is transferred, the federal court in State N would have personal jurisdiction over defendant Buyer because of its contractual consent to the jurisdiction of that court.

Question 4 Analysis

- Legal Problems:
- (1) Is Motors' claim against First Bank subject to the defense of failure of consideration?
 - (2)(a) Did Motors' taking of the cashier's check discharge Driver's obligation to pay for the sports car under the sales contract?
 - (2)(b) May Motors recover from Driver for breach of transfer warranty?

DISCUSSION

Summary: First Bank is liable as issuer of the cashier's check to pay a person who is entitled to enforce the check. Motors is the holder of the cashier's check and is entitled to enforce it. However, Motors is not a holder in due course because the check was overdue on its face when Motors took it from Driver. Thus, First Bank can assert defenses to payment against Motors, including the defense of failure of consideration as a result of the dishonor of the check it received in payment for its cashier's check.

Driver's obligation to pay for the car was discharged when Motors accepted a cashier's check as payment. Moreover, Driver apparently was not a party to that check and did not indorse it, so Driver has no direct liability on the check, even if Bank dishonors it. However, Driver did transfer the check to Motors and therefore warranted that the check was not subject to any defenses. That warranty was breached, and Motors can recover from Driver for the breach of warranty.

Point One: (40-50%) Motors' claim against First Bank is subject to the defense of failure of consideration. Motors had notice that the cashier's check was overdue and therefore Motors is not a holder in due course.

Motors is the holder of the cashier's check because the cashier's check is payable to Motors and Motors is in possession of it. *See* UCC § 1-201(20) (definition of holder). As a holder, Motors has a right to enforce the cashier's check against First Bank. *See* § 3-301(i) (holder's right to enforce); § 3-412 (obligation of issuer of a cashier's check).

First Bank, however, may assert a defense of failure of consideration because the Auto-Loans check that First Bank took in exchange for the cashier's check was dishonored. *See* § 3-303(b) (defense of failure of consideration); § 3-305(a)(2) (right of a holder to enforce is subject to

ordinary defenses, such as failure of consideration). *See, e.g., Laurel Bank & Trust v. City National Bank*, 365 A.2d 1222 (Conn. Super. App. 1976) (bank refused to pay cashier's check because checks tendered to purchase the cashier's check were dishonored).

A holder in due course would not be subject to the defense of failure of consideration. *See* § 3-305(b) (defenses applicable to a holder in due course). Motors has met many of the requirements for becoming a holder in due course because Motors took the cashier's check in good faith, for value, and without notice of First Bank's defense. *See* UCC § 3-302(a) (requirements for holder in due course status). Motors, however, is not a holder in due course because Motors had notice that the cashier's check was overdue. *See* UCC § 3-302(a)(2)(iii) (holder in due course must not have notice that the instrument is overdue). Checks become overdue after 90 days. *See* UCC § 3-304(a)(2) (overdue instruments). A cashier's check is a "check" under UCC § 3-104(f). Motors should have known that the cashier's check was more than 90 days old on September 15 because the cashier's check was dated May 11 and thus was 126 days old.

Point Two: (a) Motors' taking of the cashier's check from Driver discharged Driver's (40-50%) obligation & (b) to pay the purchase price of the car under the sales contract. However, Driver is liable to Motors for breach of a transfer warranty because the cashier's check is subject to a defense or a claim in recoupment.

If a cashier's check is taken for an obligation, the obligation is completely discharged. *See* § 3-310(a) (effect of instrument on obligation). Accordingly, Driver's obligation to pay the purchase price of the car under the sales contract was discharged when Motors took the cashier's check in payment. (Note: At common law, this rule was referred to as the "doctrine of merger" because the underlying debt was said to be "merged" into the negotiable instrument.)

Driver is not liable on the cashier's check as a party because he did not sign or indorse it. Nothing in the problem's facts suggests that Driver indorsed the cashier's check. Accordingly, Motors could not enforce the check against Driver based on an indorsement. *See* § 3-415(a) (liability of indorser upon dishonor of an instrument) However, he did transfer the instrument. *See* § 3-203(a). When Driver transferred the cashier's check to Motors in exchange for the sports car, Driver warranted that the instrument was not subject to a defense or claim in recoupment. *See* § 3-416(a)(4) (transfer warranty). (See § 3-305(a), comment 3, for an explanation of claim in recoupment.) Driver breached this warranty because First Bank could have asserted a claim against Driver for the purchase price of the cashier's check after the Auto-Loans check was dishonored. *See* § 3-310(b)(1) (rights when an ordinary check taken for an obligation is dishonored, i.e., Driver's obligation to pay for the cashier's check is suspended until Auto-Loans' check was dishonored). Motors could recover the amount of the check in damages from Driver. *See* § 3-416(b).

Question 5 Analysis

- Legal Problems:
- (1) Is the husband of a married woman who conceives a child by artificial insemination regarded as the legal father of the child if the artificial insemination was performed by a medical doctor with the husband's written consent?
 - (2) If a married woman conceives a child by a man other than her husband, who is the child's legal father?
 - (3) Under what circumstances can the presumption favoring custody in the legal parent be overcome?

DISCUSSION

Summary: A child's legal parent is *presumptively* entitled to custody both because parental rights are protected by common-law and constitutional principles and because parental custody is typically consistent with a child's best interest. Under the presumption, Bert is Daughter's legal father because he consented to his wife's artificial insemination and the procedure was performed by a doctor. Bert, as Ann's husband, is also presumptively Sonny's father but this presumption is rebutted by the fact that Walt is Sonny's biological parent. Presumptively the legal parent is entitled to custody. On the facts, however, Bert may be able to rebut the presumption that Walt should have custody of Sonny. The third point considers whether, on the facts given, the presumption favoring custody in a legal parent could be rebutted.

Point One: Bert is the legal father of Daughter because he consented in writing to Ann's artificial insemination, and the procedure was performed by a doctor.
(10-20%)

Even though Bert is not the biological father of Daughter, he is regarded as her legal father in virtually all American jurisdictions because he consented to his wife's artificial insemination. The leading case is *People v. Sorensen*, 68 Cal. 2d 280, 66 Cal. Rptr. 7, 437 P.2d 495 (1968). The 1973 Uniform Parentage Act provides that a child conceived by artificial insemination by donor is the legal child of the mother's husband if he consented in writing and if the insemination was performed by a medical doctor. Uniform Parentage Act of 1973 § 5. Statutes in many states contain similar provisions. Both these conditions are satisfied here, and Bert is, therefore, the legal father of Daughter.

Point Two: Bert, as Ann's husband, is presumed to be Sonny's father. In most jurisdictions, (30-40%) the presumption is rebuttable. Here, Walt, the biological father of Sonny, can rebut the presumption.

At common law and under the statutes or case law of most states, a child born to a married woman is presumed to be her husband's child. Homer H. Clark, Jr., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 4.4 at 191 (2d ed. 1988); Uniform Parentage Act of 1973 § 4; Uniform Parentage Act of 2000 § 204(a)(1). The presumption could generally be rebutted by proof of the husband's infertility or his lack of access to his wife. *See Clark, supra.*

In those states that would allow the presumption of paternity in the mother's husband to be rebutted, Walt could rebut the presumption because Bert is infertile, and because he and Ann were living apart at the time of Sonny's conception.

Because Walt can show that he is Sonny's biological father, Walt will have all the legal rights of a married father in many states. *E.g.*, Uniform Parentage Act of 1973 § 2; *In the Interest of B.G.C.*, 496 N.W.2d 239 (Iowa 1992); *In re Petition of Kirchner*, 649 N.E.2d 324 (Ill. 1995). However, in some states, Walt may still be denied the status of legal father if Walt has not attempted to assume his parental responsibilities. *Cf. In re Raquel Marie X*, 570 N.Y.S.2d 604 (App. Div. 1991) (finding father's consent to the adoption of his child was unnecessary because father's conduct did not demonstrate intent to pursue a meaningful relationship with child). Walt has offered to pay the expenses of Sonny's birth and to support Sonny, even though his offers were rejected. He also informally acknowledged paternity upon Sonny's birth, although he did not file suit or assert his paternity in a registry before Ann's death. On balance, Walt has attempted to exercise his parental responsibilities, and it would arguably violate Walt's due process rights to accord him fewer legal rights than other biological fathers. *Cf. John S. v. Kelsey S.*, 4 Cal. Rptr. 2d 615 (Cal. 1992) (invalidating California statute that allowed mother to unilaterally thwart father's efforts to become "presumed father," thereby allowing father's rights to be terminated on best interest grounds).

In some jurisdictions, however, courts have authority to exclude evidence that would rebut the presumption favoring paternity in the wife's husband if rebutting the presumption would be contrary to the child's best interest. *E.g.*, *Ban v. Quigley*, 812 P.2d 1014 (Ariz. Ct. App. 1990); *Turner v. Whisted*, 607 A.2d 935 (Md. 1992); *B.H. v. K.D.*, 506 N.W.2d 368 (N.D. 1993). Bert might argue that rebutting the presumption that he is Sonny's father is inconsistent with Sonny's best interest for essentially the same reasons discussed in Point Three below.

Point Three: Bert will argue that, as the legal father of Daughter, he is presumptively entitled (45-55%) to custody of her. The man who is determined to be the legal father of Sonny will argue that he is presumptively entitled to Sonny's custody. The presumption of custody in the legal father can be rebutted, although what is required to rebut the presumption varies from state to state. Bert would be likely to rebut the presumption, but Walt would not be likely to rebut the presumption.

A child's fit legal parent is presumptively entitled to custody as against a nonparent. *See Homer*

H. Clark, Jr., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 811 (2d ed. 1988). In most jurisdictions, to rebut the presumption favoring custody in the legal parent, a third party must show that awarding custody to the legal parent will be detrimental to the child. *E.g.*, *Painter v. Bannister*, 140 N.W.2d 152, 156 (Iowa 1966); *Guardianship of Phillip B.*, 188 Cal. Rptr. 781,788 (Cal. App. 1983). This standard is clearly intended to be more favorable to the legal parent than is the best interest of the child test, which is used in custody disputes between parents and does not imply a preference in favor of either claimant. Some states, however, apply a best interest test to custody disputes between third parties and parents, although this test typically applies when the nonparent is living with the child and functioning as a parent. An application of the best interest standard in other situations arguably raises constitutional concerns. *Cf. Troxel v. Granville*, 530 U.S. 57, 69-70 (2000) (invalidating application of visitation statute where lower court gave no weight to the presumption that fit parents act in their children's best interest).

The presumption of parental fitness applies to the man deemed to be the legal father. Bert, Daughter's legal father, benefits from this presumption, and he will undoubtedly be awarded custody of Daughter. There is no evidence that he is not the fit and proper person to have custody of her. The fact that Walt has spent "some time" with Daughter and is fond of her is not enough to rebut the presumption. Walt's best argument is that if he is awarded custody of Sonny, he should also be awarded custody of Daughter because separating Daughter from Sonny would be detrimental to Daughter. Yet, on balance, this argument would not succeed as Bert can make the same argument (and more persuasively) in the context of Sonny's custody.

It is less clear who will be awarded custody of Sonny. The presumption of parental fitness applies to the man deemed to be the legal father. See Points One and Two above. Bert has a realistic chance of rebutting the presumption if Walt is Sonny's legal father. Walt has virtually no chance of rebutting the presumption if Bert is Sonny's legal father.

Assuming Walt is Sonny's legal father, Bert will argue that it would be detrimental to award Sonny to Walt. Bert is a fit and proper parent, Ann named him as guardian in her will, Sonny is currently living with him and Daughter, and separating siblings is generally disfavored. Moreover, Bert will argue that Walt's history of physical and mental abuse present a question of his fitness for custody.

Assuming Bert is Sonny's legal father, Walt will have difficulty arguing that an award of custody to Bert would be detrimental to Sonny. There are no facts given that would support this argument.

Therefore, Walt's best hope of obtaining custody of Sonny is if he is Sonny's legal father and the court rejects Bert's arguments that an award of custody to Walt would be detrimental to Sonny.

AGENCY AND PARTNERSHIP II.A, II.B, V.

Question 6 Analysis

- Legal Problems:
- (1)(a) Did Adam act with either actual or apparent authority in contracting for the Tahitian lobby decorations?
 - (1)(b) Did Adam act with either actual or apparent authority in contracting with Moby for the guest room furnishings?
 - (2) Does Sunrise have a claim for indemnification from Adam for either of the contracts for which Sunrise is liable?
 - (3) Can Sunrise terminate Adam's agency prior to the expiration of the one-year term, and if so, is Sunrise liable to Adam for damages based on the early termination?

DISCUSSION

Summary: Adam acted with apparent but not actual authority with respect to the contract with Tahini. Adam acted with apparent authority because Sunrise advised Tahini of the agency agreement but not of the limitations on Adam's authority. On the other hand, Adam acted with actual authority with respect to the Moby contract which was consistent with all of the terms of the agency contract between Sunrise and Adam. Thus, Sunrise is liable to both Tahini and Moby, albeit on different theories. Sunrise can seek indemnification from Adam for its liability under the Tahini contract but not under the Moby contract. Because Adam materially breached the agency contract, Sunrise can terminate that contract prior to the end of the fixed term in the contract without any liability to Adam.

Point One(a): Sunrise is liable on the contract for the purchase of the Tahitian decorations (20-30%) because Adam acted with apparent authority.

Adam had no actual authority to purchase the Tahitian lobby items on Sunrise's behalf. Under the Restatement (Second) of Agency, actual "authority to do an act can be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account." Restatement (Second) of Agency § 26. Sunrise made it clear to Adam that the items had to be within the style guidelines described in Exhibit B. The Tahitian items were inconsistent with the guidelines, and thus Adam had no actual authority to purchase them.

On the other hand, Adam did have apparent authority to purchase the Tahitian lobby items on Sunrise's behalf. Under the Restatement, "apparent authority to do an act is created as to a third person 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. Sunrise had sent a letter to Tahini appointing Adam "to act on its behalf in the selection of interior floor and wall coverings, works of art, furniture, and plumbing and lighting fixtures for the Sunrise East Beach hotel." The Sunrise letter emphasized Adam's authority by stating: "Know that you deal with Sunrise when you deal with Adam on this project." Sunrise did not indicate to Tahini that there were any restrictions on Adam's scope of discretion or authority, and the facts do not suggest that Tahini had knowledge of any limitations through other means. As a result, it was reasonable for Tahini to conclude that Adam acted with authority when he ordered the decorations. Since Adam acted with apparent authority, Sunrise is liable to Tahini. Restatement (Second) of Agency § 140(b).

Point One(b): Adam acted with actual authority in contracting with Moby for the guest room (10-20%) furnishings and therefore Sunrise is liable on the contract.

When Adam contracted with Moby for the guest room furnishings, he was within the budget and style limitations required by Sunrise and Moby was a local supplier. Therefore, he acted within the scope of the actual authority granted by Sunrise. Restatement (Second) of Agency § 26. Because Adam acted within the scope of the grant of actual authority, Sunrise is liable on the contract to Moby for the guest room furnishings. In addition, Adam also acted with apparent authority because Moby received the letter from Sunrise. See Point One(a) above.

Point Two: Sunrise has a claim against Adam for the amount of Sunrise's liability to Tahini (10-20%) but does not have a claim against Adam for its liability to Moby for the guest room furnishings.

Sunrise has a claim against Adam for the amount of its liability to Tahini because Adam did not act within the scope of his actual authority and, therefore, breached his duty to follow directions. Restatement (Second) of Agency §§ 399, 401.

Sunrise has no claim against Adam for reimbursement of its liability to Moby for guest room furnishings because Adam acted within the scope of his grant of authority. Restatement (Second) of Agency § 399. He followed directions and fulfilled his fiduciary obligations.

Point Three: Sunrise can terminate Adam's agency at any time and end Adam's authority to (20-30%) bind Sunrise. Early termination of Adam's agency may expose Sunrise to liability for damages to Adam, but in this case Sunrise has a defense to such a claim.

Although the general rule is that authority conferred for a specific time terminates at the expiration of the period, Restatement (Second) of Agency §§ 105 and 118 provide that: "[a]uthority terminates if the principal . . . manifests to the [agent] dissent to its continuance." Therefore, Sunrise

may terminate Adam as its agent at any time, including before the end of the one-year term. The principal has the power to terminate the agency even in violation of the agency contract: “The principal has power to revoke . . . although doing so is in violation of a contract between the parties . . .” Restatement (Second) of Agency § 118 cmt. b. However, the principal “has a duty not to repudiate or terminate the employment in violation of the contract of employment.” Restatement (Second) of Agency § 450. In such a situation, the principal may be liable to the agent for damages. Restatement (Second) of Agency § 455.

Given Adam’s deviation from the terms of his contract with Sunrise, Adam is not likely to recover from Sunrise for early termination. First, if a termination is based upon the agent’s breach of contract, then the principal has an offset against the agent’s damages. Restatement (Second) of Agency § 456. Second, “[a] principal is privileged to discharge before the time fixed by the contract of employment an agent who has committed such a violation of duty that his conduct constitutes a material breach of contract.” Restatement (Second) of Agency § 409(1). That appears to be the case in this situation.

TRUSTS & FUTURE INTERESTS I.B, I.D, II.A, II.C, III.A, III.B

Question 7 Analysis

- Legal Problems:
- (1)(a) Can Testator's probate estate be disposed of according to the terms of a revocable inter vivos trust that was not executed in accordance with the Statute of Wills?
 - (1)(b) Assuming the probate estate assets can be disposed of as a part of the revocable trust, do the terms of the trust in existence at the time the will was executed, or rather those as reflected in the subsequent amendment, apply?
 - (2) Are the terms of the trust in favor of Wanda, Testator's former wife, revoked by operation of law because of their divorce?
 - (3) Assuming the terms of the trust amendment apply, what is Hope's interest under the revocable trust?

DISCUSSION

Summary: The disposition of Testator's estate is governed by the will and the terms of the revocable trust as amended. Absent a governing statute or case law to the contrary, divorce does not revoke the provisions of a revocable trust in favor of a former spouse. Furthermore, if that interest is alienable and devisable (as is here the term interest in income), upon Wanda's death it would pass to Hope, the legatee under Wanda's will. As for Adam's interest in the remainder, which is limited to "surviving children," if governing law requires him to be alive when Wanda's two-year term ends, his interest fails since he died before the term ended. The remainder, thus, passes wholly to Testator's surviving children, Ben and Carrie.

Point One(a): Under the Uniform Testamentary Additions to Trust Act, a will may pour over (15-20%) the probate estate assets to the trustee of an unfunded inter vivos trust even if the trust instrument was not executed in accordance with the Statute of Wills.

At common law, the terms of the revocable trust could control the disposition of the testator's probate estate under the doctrine of incorporation by reference. Under this doctrine, if the will referred to an unattested document that was in existence at the time the will was signed, the terms of that document could be given effect in the same manner as if it had been properly executed. *See generally State Street Bank & Trust Co. v. Reiser*, 389 N.E.2d 768 (Mass. 1979).

This doctrine is no longer necessary to validate the so-called “pour over” will because of the almost universal enactment of the Uniform Testamentary Additions to Trust Act (1983) (UTATA). Unif. Prob. Code § 2-511. Under UTATA, a trust, even an unfunded trust, as here, can be the beneficiary of the testator’s probate estate so long as the trust is identified in the testator’s will and its terms are set forth in a written instrument. The validity of the pour over arrangement is unaffected by the fact that the trust was amended after the execution of the will.

Point One(b): Under the Uniform Testamentary Additions to Trust Act, the disposition of the probate estate assets are governed by the terms of the revocable trust, including all amendments to the trust.
(15-20%)

Under the incorporation by reference doctrine, the terms of the amended revocable trust would not apply to the disposition of the probate estate assets as that amendment was not in existence when the will was executed. Under the Uniform Testamentary Additions to Trust Act, however, the amendment applies. Unif. Prob. Code § 2-511(b). Thus, as of Testator’s death, the probate estate assets are to be held by Bank in trust to pay the income to Wanda for two years, and then to distribute the trust principal to Testator’s surviving children.

Thus, the will and amended trust govern the disposition of Testator’s estate.

Point Two: Under the laws of most states today, Wanda’s two-year term interest is not revoked by the divorce. Therefore, the trustee should hold the trust property and pay her the income for the next two years in accordance with the amended trust terms.
(20-30%)

Many probate codes provide that if, subsequent to the execution of a will, the testator and the spouse are divorced, provisions in a will in favor of the former spouse are automatically revoked by operation of law. In such case, the property that would have passed to the spouse is disposed of as if the spouse had predeceased the decedent. If Testator had created a testamentary trust, then under such a statute, Wanda’s two-year income interest would have been revoked by operation of law.

Here, however, Wanda’s interest is created under the terms of the revocable trust. Typically, state statutes affecting a divorced spouse’s interest under a will are inapplicable to interests created under a revocable trust and, therefore, Wanda’s interest is not revoked.

However, the law in this regard is slowly changing. For example, § 2-804 of the Uniform Probate Code would cause Wanda’s two-year interest in the revocable trust to be revoked upon her divorce from Testator. Some states have judicially reached that result by viewing the will and revocable trust as integrated estate planning documents and treating the probate statute’s revocation of the spouse interest upon divorce as reaching the trust as well. *See Clymer v. Mayo*, 473 N.E.2d 1084, 1093 (Mass. 1985). *See also* Unif. Trust Code § 112. Of course, if her interest is revoked, then nothing passes to Wanda under the trust after Testator’s death.

Point Three: Assuming Wanda had an interest in the trust, it would pass under her will to Hope (35-40%) since an interest for a two-year term does not terminate at death. Whether University has an interest in the trust depends on whether the phrase “surviving children” means surviving Testator or surviving the two-year period set aside to pay the income to Wanda.

Trust interests are alienable, devisable, and descendible unless the terms of a trust expressly or impliedly provide otherwise.

Here, Wanda has a two-year term, which is devisable in the event she were to die within that period. Since Wanda has died prior to the expiration of the two-year term, her interest passes to Hope, the sole beneficiary of her estate. See Point Two.

University has an interest only if Adam had an interest. Whether Adam had an interest depends on whether the word “surviving” in the gift to Testator’s “surviving children” means “surviving Testator” or “surviving the two-year period.”

The preferred rule is to construe the word to mean surviving to the time of distribution. Under this rule, only those children of Testator alive two years after his death are entitled to the trust principal. *See generally* Simes & Smith, *THE LAW OF FUTURE INTERESTS* § 577 (3d ed. 1956). This would, of course, exclude Adam; if Adam has no interest to devise, then University, the beneficiary under Adam’s will, would have no interest in the trust either.

On the other hand, in some states, surviving refers to surviving Testator. Under this interpretation, each of Testator’s three children—Adam, Ben, and Carrie—had vested interests in the trust principal as of Testator’s death. Vested interests are not forfeited even if the beneficiary dies within two years of Testator. Given that trust interests are devisable, the vested interest of Adam would pass under his will solely to University, at least under the common law. Construing “surviving” to mean surviving Testator results in the trust remainder vesting at the earliest time.

Under the Uniform Probate Code, the analysis would be somewhat different. Section 2-707(b)(3) provides that the word “surviving” does not evidence any intent that § 2-707 not apply, as that word often does under anti-lapse statutes on which § 2-707 is modeled. Under § 2-707(b), if a class gift is limited in favor of a class of children, only those children alive at the time of distribution are entitled to possession of the property (Ben and Carrie). However, if a deceased child left surviving issue, such issue would take the deceased child’s share. Here, because Adam had no such descendants, the general rule applies and only those children of Testator alive at the time of distribution (Ben and Carrie) are entitled to possession. Under the Code, therefore, University would have no interest.

