

**THE
MEE**

MULTISTATE ESSAY EXAMINATION

2004 MEE

Questions and Analyses



2004 MEE Questions and Analyses

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Preface

This publication includes the questions and analyses from the February 2004 and July 2004 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 4 on the February 2004 MEE tested Federal Civil Procedure I.A, subject matter jurisdiction, and IV.C, joinder of parties and claims (including class actions). 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 2004
Questions

Question 1

In 1995, Testator, age 85, executed a will in the presence of two witnesses. Immediately before signing the document, Testator's attorney asked Testator if she declared the instrument to be her will. Testator responded: "You bet it is. I want Charity to have everything. My family has enough." Then the attorney had Testator sign the document on the line provided for her signature. The two witnesses signed immediately below Testator's signature without any further direction or comment from Testator.

When Testator executed this will, she was suffering from cancer and her medications made it very difficult for her to remember facts. For example, when she executed her will she knew, correctly, that her estate was worth \$500,000 and that she had previously made large gifts to her child and some of her grandchildren. However, she could neither remember the name of her stockbroker nor recount the names of her stocks under her stockbroker's management. Also, she had no difficulty correctly naming her child and all of her grandchildren, but she could not recall that she had a great-grandchild. She also knew she owned both a home and a condominium but could not recall the precise street address for either residence.

Testator died in 2002 survived by her only child, Mary, and by three grandchildren and one great-grandchild, all of whom are descendants of Mary. Testator's will, which devised her entire estate to Charity, was timely offered for probate by Bank, the executor named in the will. Mary and one of her children, Grandchild, have initiated a timely contest of the will.

Governing state law provides that a will is properly executed if the testator signs the will in the presence of two witnesses after having (a) declared the instrument to be her will, and (b) requested the witnesses to act in such capacity.

1. Do Mary and Grandchild each have standing to contest Testator's will? Explain.
2. On what theory or theories, other than undue influence, might a person with standing contest Testator's will, what defenses might Bank, as executor, assert, and what is the likely outcome? Explain.

Question 2

Bill purchased a used car from Sally and paid her \$15,000 with a check drawn on his account at Local Bank. The check was payable to the order of Sally and was certified by Local Bank. Sally accepted the certified check and gave Bill the car and its paper title.

Before Sally had a chance to deposit the check, it was stolen by Thief. Thief forged Sally's indorsement on the check, then indorsed the check with his own signature underneath Sally's forged signature and deposited the check into his own bank account at Depository Bank.

Depository Bank provisionally credited Thief's account for \$15,000 and forwarded the check for payment to Local Bank, which made final payment. Thief then withdrew \$15,000 from his checking account at Depository Bank and disappeared.

In the meantime, Sally contacted Bill and asked him to stop payment on the certified check. Before Bill could contact Local Bank, however, it had already made final payment on the check.

Sally now demands payment from Bill, who refuses on the ground that he has already paid her. Sally is also demanding \$15,000 from both banks.

1. What rights of recovery, if any, does Sally have against Bill? Explain.
2. What rights of recovery, if any, does Sally have against Depository Bank and/or Local Bank as a result of the payment made to Thief for the amount of the certified check? Explain.
3. If Local Bank paid Sally the amount of the certified check, what rights would Local Bank have against Depository Bank? Explain.

Question 3

NOTE: Applicants answering this question in a community property state should use community property principles. For this purpose, the phrase “marital property” means community property.

Harold is the CEO and sole owner of a real estate business that he began about 25 years ago, shortly after he married Wendy. Wendy quit her job when they married and has ever since been a full-time homemaker. Last year, Harold became romantically involved with Carol, an employee of his real estate business. Wendy recently discovered this affair and also learned that Harold had bought expensive gifts for Carol, including a house purchased in Carol's name. Wendy sued Harold for divorce, based on his adultery with Carol.

Wendy would agree that she has never been a good housekeeper. The house was often dirty until the weekly visit by a cleaning company. Meals were often brought in from local restaurants. Wendy spent much of her time tending to the couple's two children, who are now adults, although a live-in nanny helped her until both children entered school. At Harold's request, Wendy occasionally entertained Harold's clients.

Harold has sole title to the real estate business and a private vested pension to which he has contributed since beginning his real estate business. Harold and Wendy have joint title to their family home and a bank account. These assets were acquired with funds Harold earned during the marriage. Wendy has sole title to 1,000 shares of stock she inherited shortly after she married Harold.

1. Are the real estate business, Harold's pension, the jointly titled family home, the joint bank account, and the stock subject to division at divorce? Explain.
2. What effect, if any, would Harold's affair with Carol and his gifts to her have on any property division? Explain.
3. What arguments regarding property division are available to Harold and Wendy based on Wendy's role as a mother and homemaker? Explain.

Question 4

Motorist was driving his automobile in the northbound lane on a highway in State X. Exceeding the posted maximum speed limit by 10 miles per hour, Motorist was gaining on a slow-moving U.S. Army truck convoy traveling in the same lane. At the same time, a motorcycle, driven by Husband with Wife as a passenger, was approaching the convoy from the opposite direction. Husband was operating the motorcycle at the posted speed limit and was traveling in the proper (southbound) lane.

The soldier driving the last truck in the convoy was feeling drowsy because he had not slept the night before. Suddenly, realizing that he had driven his truck far too close to the Army truck just ahead of him, he slammed on his brakes. Motorist, who had nearly overtaken the convoy, reacted to the sight of the truck's brake lights by frantically swerving his automobile into the southbound lane, where he sideswiped Husband's motorcycle. Husband was thrown to the pavement and seriously injured. Wife, however, miraculously avoided physical injury.

At the time of the accident, Husband and Wife were citizens of State Y, but a few months later they moved permanently to State X. Motorist was at all times a citizen of State X.

Shortly after moving to State X, Husband and Wife filed an action in the United States District Court for the District of State X seeking to recover for the injuries they suffered as a result of the accident. In the action, Husband claimed \$50,000 in damages for his injuries, and Wife claimed \$5,000 for her loss of Husband's consortium. They named as defendants both the United States of America and Motorist. Their claims against the United States are based on the Federal Tort Claims Act, which provides that federal district courts have exclusive jurisdiction over tort claims against the United States government. Their claims against Motorist are based on the tort law of State X, where the accident occurred.

1. Can Husband and Wife, as plaintiffs, join their respective personal injury and loss-of-consortium claims in a single action in the U.S. district court? Explain.
2. Can Husband and Wife join their respective claims against the United States and Motorist, as defendants, in a single action in the U.S. district court? Explain.
3. Does the U.S. district court have subject matter jurisdiction over the state law claims of Husband and Wife against Motorist? Explain.

Question 5

PC is a professional law corporation formed by Ted and Teresa. In 2002, PC obtained a \$100,000 line of credit from First Bank, and PC authenticated a security agreement that granted First Bank a security interest in “all of PC’s equipment, now owned or hereafter acquired.”

Although PC did not specifically authorize it, First Bank promptly filed a financing statement in the appropriate state offices. The financing statement, which PC had not signed, recited erroneously that First Bank had a security interest in “all of PC’s equipment, inventory, and accounts receivable.” PC knew that First Bank had filed a financing statement but was unaware that the financing statement covered collateral not mentioned in the security agreement.

In 2003, PC entered into contracts to provide legal services to a number of municipalities, one of which was the City of Eden. To perform these contracts, PC decided to expand its operation by hiring an additional attorney, adding office staff, and increasing its office space. When First Bank refused to increase PC’s line of credit to finance the expansion, PC approached Second Bank about obtaining a separate business expansion loan.

Second Bank agreed to loan PC \$100,000, provided the loan was secured by a first security interest in PC’s accounts receivable. However, the arrangement fell through when Second Bank discovered that First Bank had already filed a financing statement covering PC’s accounts receivable. First Bank ignored repeated requests from PC to terminate or amend the financing statement, and Second Bank was unwilling to make a loan until First Bank’s filing was changed. As a result, PC was not able to secure financing from Second Bank.

Because of its inability to secure this financing, PC was unable to hire additional staff and could not adequately perform the contracts. After PC’s attorneys failed to attend two important city council meetings because they were occupied with other duties, the City of Eden terminated its contract with PC, a contract that PC had expected to generate \$250,000 in revenue over two years.

Also in 2003, Luke, a former employee of PC’s, sued PC and won a judgment for \$50,000. Luke immediately obtained a judicial lien against all of PC’s assets, including its equipment and accounts receivable.

1. As between Luke and First Bank, who has the superior claim to PC’s equipment? Explain.
2. As between Luke and First Bank, who has the superior claim to PC’s accounts receivable? Explain.
3. What claims, if any, does PC have against First Bank under the Uniform Commercial Code? Explain.

Question 6

One year ago, Randy and Sandy formed a partnership to manufacture widgets. They did not enter into a written partnership agreement. Randy contributed \$10,000, and Sandy contributed \$5,000 to the partnership. They participated equally in the management of the partnership and shared the profits equally.

The widget market has since declined, and business has been slow. Last Monday, Randy told Sandy, "I don't want to do this anymore. I am quitting this partnership." Randy then left town on an extended vacation. At that time, the partnership still had some short-term widget contracts to fulfill and owed trade creditors \$30,000.

The next day, Barney, a widget broker, met with Sandy at the widget factory. Barney knew about Randy and Sandy's partnership but had not previously done business with the partnership. For over a month, Sandy had been soliciting a long-term contract to produce widgets for Barney. Without telling Barney about Randy's statement the previous day, Sandy, on behalf of the partnership, entered into a contract with Barney to produce 500,000 widgets a year for three years.

After Randy's departure, Sandy, using her own funds, paid the \$30,000 owed to trade creditors.

1. What is the effect of Randy's statement, "I don't want to do this anymore. I am quitting this partnership"? Explain.
2. Is the partnership bound by the contract with Barney? Explain.
3. What contribution, if any, can Sandy claim from Randy for Sandy's \$30,000 payment to trade creditors? Explain.

Question 7

Testator, a widower, died one year ago at the age of 86 survived by his only two children, Angela and Brian (ages 40 and 45), twelve grandchildren (ranging in age from 17 to 27), and six great-grandchildren (ranging in age from 2 to 7). Testator's will bequeathed his entire estate to his "great-grandchildren living when my will is probated." Testator's will was probated two months after Testator died.

Before he died, Testator created a revocable trust with Friend as trustee. Friend was a longtime confidante of Testator and his family, with intimate knowledge of all of their financial and personal affairs. The trust provided that upon Testator's death the trust income could be paid to and among Testator's issue in such shares as Friend determined, with any unpaid income to be accumulated. It also provided that upon the death of Angela and Brian, the trust would terminate, and the corpus would be distributed to Testator's then living issue.

The trust contained no provisions relating to its administration. Because Friend was not very experienced in the administration of trusts and particularly in selecting appropriate trust investments, she interviewed a number of possible bank trust officers to assist her in administering the trust. Then she contracted with Bank, an institution wholly unfamiliar with Testator's family, to make all determinations regarding the distribution of trust income and how the trust's assets should be prudently invested.

Bank immediately sold all of the trust assets and reinvested all of the proceeds in XYZ Corporation, a telecommunications company whose shares are publicly traded. Bank paid \$60 per share for this stock. Today, however, each share is worth only \$21. The loss in value is due to the general decline in the telecommunications industry and not to any inherent weaknesses in XYZ.

Twice, after contracting with Bank, Friend called Bank to see how things were going. On these two occasions Friend was advised that "all is well." Friend never made further inquiries.

The common-law Rule Against Perpetuities, as modified by the wait-and-see doctrine, applies in this jurisdiction.

1. To whom should Testator's probate estate be distributed? Explain.
2. What fiduciary duties, if any, did Friend breach with respect to the trust? Explain.

February 2004
Analyses

DECEDENT'S ESTATES II.A, II.J

Question 1 Analysis

- Legal Problems:
- (1) Do Mary and Grandchild each have standing to contest Testator's will?
 - (2) Can Testator's will be successfully contested on the grounds of:
 - (a) lack of mental capacity?
 - (b) lack of due execution?

DISCUSSION

Summary: Mary has standing to contest the will because, if the will were denied probate, she would be Testator's sole heir. On the other hand, Grandchild lacks standing to contest the will because if the will were denied probate, Grandchild would not be entitled to any share of Testator's estate. Mary, who is entitled to contest the will, is not likely to be successful on the ground of lack of mental capacity but might prevail on the ground of lack of due execution in states applying the strict compliance doctrine.

Point One: Mary has standing to contest the will. However, Grandchild does not have standing to contest the will.
(20-30%)

Wills can be contested only by persons who would be better off financially if the will were denied probate than they would be if the will were admitted to probate. *See generally* William M. McGovern & Sheldon F. Kurtz, *WILLS, TRUSTS, AND ESTATES* 464 (2d ed. 2001). If the rule were otherwise, wills would be subject to suits by persons seeking to extort money from legitimate beneficiaries who want to avoid litigation.

Under the laws of all states, an intestate's children take to the exclusion of their own descendants. Thus, if Testator's will were denied probate, Testator's entire estate would pass to Mary; nothing would pass to the grandchildren or great-grandchild. Mary, therefore, would have standing to contest the will because as Testator's only child she would be her only heir if the will were denied probate. On the other hand, Grandchild would not be financially better off if the will were denied probate and, thus, would lack standing to contest the will.

Point Two (a): Testator probably had the mental capacity to execute a will at the time she executed it.
(30-40%)

In order to execute a will, a testator must have mental capacity. A testator meets this requirement if the testator knows (1) the nature and extent of her property, (2) the persons who are the natural objects of the testator's bounty and have the highest moral claims to the testator's property, (3)

the disposition the testator is attempting to make, and (4) the interrelationship of these items in connection with the testamentary plan formulated in the will. *See generally* Jesse Dukeminier & Stanley M. Johanson, *WILLS, TRUSTS AND ESTATES* 163 (6th ed. 2000).

All persons are afforded the presumption that they have mental capacity. As a result, the burden of proving that the testator lacks mental capacity rests on the contestant to the will. Here, there are two arguments to support a will contest on mental incapacity grounds, although Bank has good responses to both arguments.

First, Testator arguably did not know the nature and extent of her property. Testator could not identify the stocks that she owned or name the stockbroker who managed them. Also, she could not recall the addresses of her two residences. On the other hand, she did know what she was worth and she did know that she owned two residences. Thus, whether she lacked mental capacity on this ground may ultimately depend on how precise a testator must be regarding the nature and extent of her property. Courts often are very lenient and uphold the wills of elderly testators who at least grasp the big picture about their financial affairs. Furthermore, because of the burden of proof, in a very close case the contestant will lose.

Second, Testator could not identify one of the persons with a high moral claim to her property, namely her great-grandchild. On the other hand, Testator could identify her more closely related relatives, and in particular Mary, whom she was intending to disinherit. Her failure to recall whether she had a great-grandchild probably would not be dispositive of her mental capacity. Courts have not required elderly testators to know the number of their remote descendants, particularly in a mobile society where people may have infrequent contacts with grandchildren and great-grandchildren.

Point Two (b): Testator's will was not duly executed under the strict compliance doctrine but (30-40%) could be upheld as valid if the court either adopts the substantial compliance doctrine or infers that Testator requested the witnesses to sign.

At common law, if the execution of a will did not strictly adhere to the required formalities, the will would be invalid and the testator would have died intestate. The facts state that under the governing law, a properly executed will must be signed by the testator in the presence of two witnesses after the testator has declared the instrument to be her will and has requested that the witnesses act in such capacity. Here, the signing, witnessing, and declaration requirements have been satisfied, but the facts state that Testator did not specifically request the witnesses to act as such. Thus, courts adhering to the strict common-law approach (known as the strict compliance doctrine) would invalidate the will. *See generally* McGovern & Kurtz, *supra*, at 170-72.

On the other hand, statutes in some states and a judicial decision in at least one state have tempered the harsh consequences of the common-law rule by adopting a "substantial compliance" approach to determining whether a will has been validly executed. *See generally* John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975). Under this approach, if the execution of a will substantially complies with most of the formalities, or at least the most important of them, the will is valid. *See, e.g., In re Will of Ranney* 124 N.J. 1, 589 A.2d

1339 (1991) (will valid even though witnesses only witnessed the self-proving will affidavit and did not witness the actual will).

Similarly, § 2-503 of the Uniform Probate Code (UPC) grants a court a so-called “dispensing power” under which a court can probate a will when its execution failed to comply with all of the execution formalities so long as the evidence is clear and convincing that the decedent intended the document to be her will. In this case, the failure to request that the witnesses act as such when they signed in the physical presence of Testator can easily be ignored under this statute if, as the facts suggest, Testator clearly intended Charity to take under her will. The statement “My family has enough” is evidence of Testator’s intent.

It might also be argued from the context and surrounding circumstances that Testator implicitly asked the witnesses to sign even if she did not do so expressly. She saw them sign, and she declared the instrument to be her will. At least one court has adopted that approach and thus avoided an all-out adoption of the substantial compliance theory. *See Matter of Graham’s Estate*, 295 N.W.2d 414 (Iowa 1980).

Question 2 Analysis

- Legal Problems:
- (1) Does the payee of a certified check have rights against the drawer when the check is stolen and payment is received by a person not entitled to enforce the instrument?
 - (2) Does the payee of a stolen certified check have rights against the banks that collect or pay the stolen check when the payee's indorsement was forged and the check is paid to a person not entitled to enforce it?
 - (3) Does a bank that pays a forged-indorsement check have the right to recover the amount of payment from a bank that presented the check for payment?

DISCUSSION

Summary: Sally cannot recover from Bill because he has no liability on a certified check, and his underlying obligation was discharged when Sally took the certified check from him in satisfaction of that obligation. Sally does have a conversion claim against both banks because they allowed Thief, a person not entitled to enforce the check, to receive payment on it. As between the banks, Local Bank can recover from Depository Bank, which should bear the loss because it took the check from Thief and breached a warranty (no unauthorized indorsements) when it presented the check to Local Bank for payment.

Point One: (30-35%) Because Bill paid Sally with a certified check, his underlying obligation to pay for the car was discharged when Sally accepted the check. Moreover, Bill's obligation as drawer of the check was discharged when the check was certified by Local Bank.

When Sally accepted a certified check from Bill in payment for the car, Bill's underlying obligation to pay for the car was discharged "to the same extent discharge would result if an amount of money equal to the amount of the instrument were taken in payment." *See* UCC § 3-310(a). The certified check is treated as the equivalent of cash. Sally's acceptance of the certified check fully discharges Bill's obligation on the underlying transaction.

Bill's obligation as drawer of the check was fully discharged by Local Bank's certification of the check. *See* UCC § 3-414(c). This is because the certified check is an obligation of Local Bank, *see* UCC § 3-413, and the Code assumes that the holder of a certified check takes or holds the

check in reliance on the certifying bank's obligation rather than on the drawer's obligation. UCC § 3-414, cmt. 3.

Point Two: As the owner of the check, Sally has a conversion claim against both Depository Bank and Local Bank.
(30-35%)

UCC § 3-420(a) provides that a bank that makes or obtains payment for a person not entitled to enforce the instrument is liable for conversion of the check. The liability runs in favor of the true owner or the person entitled to enforce the instrument, and is "presumed to be the amount payable on the instrument." UCC § 3-420(b).

Sally is the owner of the check. In addition, Sally is the only person entitled to enforce the instrument because the check was payable to Sally at the time of the theft. *See* UCC §§ 3-201(a), (b), 3-301. Absent Sally's indorsement, Thief could not become a person entitled to enforce the check. Thus, when Local Bank made final payment on the check for Thief's benefit, it became liable in conversion to Sally, the true owner of the check. UCC § 3-420(a). Similarly, Depository Bank, which ultimately gave Thief final credit for his deposit of the check, is liable in conversion to Sally because it obtained payment for a person not entitled to enforce the check (i.e., Thief).

Sally's damages for conversion against either of the two banks would be \$15,000, the face amount of the check, under UCC § 3-420(b). She can recover no more than \$15,000.

Point Three: Local Bank may recover from Depository Bank because Depository Bank
(30-35%) breached a presentment warranty.

As the first party to pay Thief, Depository Bank will bear the loss if Thief is not found. The reason for this result is the operation of the warranty rules in Article 3 of the UCC. Under UCC § 3-417(d)(1), any party (including a bank) that presents a certified check for payment warrants to the person making payment that the person obtaining payment is entitled to enforce the instrument or is acting on behalf of someone entitled to enforce the instrument. That warranty was breached by Depository Bank because Sally was the only person entitled to enforce the instrument (the check was payable to her and she had not indorsed it). Depository Bank clearly was not acting on Sally's behalf—it presented the check on behalf of Thief and credited the amount of the check to Thief's account after receiving payment from Local Bank. Section 3-417(d)(1) is "in effect . . . a warranty that there are no unauthorized or missing indorsements." *See* Comment 2 to § 3-417. Because the check included an unauthorized indorsement, the warranty was breached and Depository Bank is liable to Local Bank.

The amount recoverable for this breach of warranty is the amount Local Bank paid on the check plus expenses and loss of interest resulting from the breach. UCC § 3-417(d)(2). Here the recovery from Depository Bank would be at least the face amount of the check, \$15,000.

FAMILY LAW III.D

Question 3 Analysis

- Legal Problems:
- (1) What property is subject to division on divorce?
 - (2) Will a court consider Harold's adultery or his gifts to Carol in dividing property upon divorce?
 - (3) Will a long-term homemaker's role be relevant to a determination of that spouse's share of the property upon divorce?

NOTE: Applicants answering this question in a community property state should use community property principles. For this purpose, the phrase "marital property" means community property.

DISCUSSION

Summary: The real estate business, the joint bank account, the jointly titled family home, and the pension are all subject to division as "marital property" because they were acquired with funds earned by a spouse during the marriage. In most states, Wendy's stock would not be subject to division because it was acquired by inheritance and is Wendy's separate property. However, a minority of states allow courts to divide even this separate property.

Most states would not consider Harold's affair with Carol relevant to the division of property but would consider Harold's large gifts to Carol as relevant.

All equitable distribution statutes require consideration of both need and contribution. Wendy's homemaking services would be relevant because they provide a basis for arguments about both her need and contribution. Wendy and Harold will make very different arguments about how Wendy's role as a homemaker and mother should affect property distribution. Ultimately, it is impossible to predict the weight the court would place on Wendy's contribution or her need in making the overall property award.

Point One: (25-35%) All of Harold and Wendy's assets that were acquired with funds earned by Harold during the marriage are marital property subject to division on divorce. Wendy's stock, which was acquired by inheritance, would be subject to division only in those states that authorize the division of all property.

A majority of states require the court to first classify the property held at the time of the divorce as marital or separate and authorize the court then to divide the marital property. In the eight community property states, community property is treated much the same as marital property. Definitions of marital and community property are nearly identical. Homer H. Clark, Jr. & Ann L. Estin, *DOMESTIC RELATIONS: CASES AND PROBLEMS* 732 (6th ed. 2000). As a result, all states will allow the court to distribute marital or community property, which includes all property derived from earnings during the marriage. *See* American Law Institute, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* § 4.03, Proposed Final Draft, Part I (1997).

All of the property, except Wendy's stock, will be considered marital property in a common-law state or community property in a community property state. The *real estate business*, the *pension*, the *jointly titled family home*, and the *joint bank account* were acquired with spousal earnings. How the assets are titled is irrelevant.

Wendy's *stock* will not be subject to division in the majority of states. It is Wendy's separate property because Wendy inherited it. *See* ALI *PRINCIPLES*, *supra*, § 4.03. An inheritance is the separate property of the spouse who inherits it, even if the spouse acquires it during the marriage. *Id.*

A minority of states (about fourteen) authorize the courts to divide all the property held by the spouses at the time of divorce without regard to when, how, or by whom the property was acquired or how the title is held—the so-called “hotchpot” approach. *See* Uniform Marriage and Divorce Act (UMDA) § 307, Alternative A, 9 U.L.A. (Part I) 288 (1988). In those states, the stock will be subject to division.

Point Two: In the majority of jurisdictions, adultery is not relevant to division of property at divorce, but dissipation of assets is relevant. Harold's large gifts to Carol would qualify as dissipation. (20-25%)

The majority of states do not allow for consideration of adultery in the division of property. Harry Krause, *FAMILY LAW* 163 (2d ed. 1996). A minority of states could consider Harold's adultery when making a division of property. *See* Ira Mark Ellman, Paul M. Kurtz & Elizabeth S. Scott, *FAMILY LAW: CASES, TEXT, PROBLEMS* 284 (3d ed. 1998) (citing those few states in which the courts will consider adultery as a factor in property division). Therefore, in most jurisdictions the fact that Harold had an affair would not be relevant to the property distribution.

In virtually all states, however, “economic” fault, including dissipation of marital assets, is relevant to property distribution. *See* Ellman, Kurtz & Scott, *supra*, at 414 (mentioning “general agreement that dissipation of assets is a relevant factor in the equitable distribution of property”). *See also* Uniform Marriage and Divorce Act (UMDA) § 307, Alt. A. (directing a court to divide property “without regard to marital misconduct,” yet to consider, *inter alia*, “the contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation in the value of the respective estates”).

Dissipation is generally thought to be “the use of marital property for the sole benefit of one of the spouses for a purpose unrelated to the marriage at a time that the marriage is undergoing an

irreconcilable breakdown.” *In re Marriage of O’Neill*, 563 N.E.2d 494, 497 (Ill. 1990). Harold’s expenditures on Carol were large, were for a nonmarital purpose, inured solely to the benefit of Harold, and were made during the breakdown of the marriage. Therefore, these expenditures would be relevant in dividing the property. The remedy would be either to include the value of the gifts to Carol in the marital estate or to consider the dissipation when making the ultimate distribution of the remaining property. Ellman, Kurtz & Scott, *supra*, at 416.

Point Three: In most jurisdictions, Wendy’s role as a homemaker and parent would be relevant (20-25%) to equitable property distribution, both as a contribution to the marriage and as an indicator of need.

In all equitable distribution states, spousal contribution and need are the primary factors in property division. Homemaking and parenting are recognized forms of spousal contribution. These same services, when they substitute for paid employment over a lengthy period, will also evidence a spouse’s need. *See* ALI PRINCIPLES. Therefore, Wendy’s services would provide the basis for two different types of property distribution arguments.

Most states do not assign any particular value to homemaking services and would permit Harold to argue that Wendy’s contribution was minimal, given her modest homemaking skills and heavy reliance on paid help. *See Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994); *In re Betz*, 880 S.W.2d 618 (Mo. Ct. App. 1994); *Williams v. Massa*, 728 N.E.2d 932, 942 (Mass. 2000). But some equitable distribution states have a presumption that a homemaker’s contribution is equal to a breadwinner’s and that an equal division is most just. *See, e.g., Brown v. Brown*, 914 P.2d 206, 209 (Alaska 1996); Or. Rev. Stat. § 107.105(1)(f). Whether such a presumption can be rebutted by evidence that the contribution of the homemaker was not equal to that of the breadwinner varies by state. *Compare* Wis. Stat. Ann. § 767.255(3)(d) with *Hammond v. Brown*, 1995 WL 546903, *2 (Ohio App. 8 Dist., Cuyahoga County, Sep. 14, 1995).

Wendy will likely argue that her homemaking contributions played a significant role in the acquisition of the marital property. She would emphasize the fact that her role as a full-time homemaker and parent freed Harold to devote time to building his business. She would also emphasize her services in entertaining Harold’s clients.

Wendy will also argue that her role as a long-term homemaker has greatly increased her need for marital property by reducing her capacity for self-support and asset accumulation. This claim would be difficult for Harold to rebut.

Given that equitable property distribution is highly discretionary, it is impossible to estimate how much weight the court would place on Wendy’s need as compared to her contribution. It is also impossible to determine how the court would evaluate Wendy’s and Harold’s contribution-based arguments.

In the small minority of states that require equal division of marital property, arguments about Wendy’s contribution and need would, of course, be unavailable to both parties.

FEDERAL CIVIL PROCEDURE I.A, IV.C

Question 4 Analysis

- Legal Problems:
- (1) Can Husband and Wife join their respective personal injury and loss-of-consortium claims in a single action in the U.S. district court?
 - (2) Can Husband and Wife join their respective claims against the United States and Motorist in a single action in the U.S. district court?
 - (3) Does the U.S. district court have subject matter jurisdiction over the state law claims?

DISCUSSION

Summary: Rule 20(a) of the Federal Rules of Civil Procedure permits Husband and Wife to assert their federal and state law claims against the United States and Motorist because their claims arose out of the same transaction. Although the court would not have diversity jurisdiction in an action by Husband and Wife against Motorist if such an action were brought on its own, the court has supplemental jurisdiction over that claim because it shares a “common nucleus of operative fact” with Husband and Wife’s federal question claim against the United States.

Point One: Federal Rule 20(a) permits Husband and Wife to join their respective personal injury and loss-of-consortium claims in a single action.
(15-25%)

Federal Rule of Civil Procedure 20(a) permits plaintiffs to join their claims in a single action when those claims arise out of a single event and share at least one common issue of law or fact. The rule provides, in relevant part: All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.

The requirements of Rule 20(a) are satisfied by the facts stated in this problem. The claims of Husband and Wife arise out of the same occurrence (the traffic accident) and involve at least one common issue of fact or law (for example, whether either the soldier who was feeling drowsy or Motorist or both were negligent). Accordingly, Husband and Wife may join their claims in a single action.

NOTE: Rule 20(a) does not confer subject matter jurisdiction on the U.S. district court to hear the respective claims of the plaintiffs. It simply provides the mechanism for joining claims over

which the Constitution and the Congress have given it subject matter jurisdiction. Accordingly, the joinder of Husband and Wife as party plaintiffs is proper, provided the U.S. district court has subject matter jurisdiction over the claims by each plaintiff. *See* Point Three below.

Point Two: Federal Rule 20(a) permits Husband and Wife to join their respective claims (15-25%) against the United States and Motorist in a single action.

Just as Rule 20(a) permits plaintiffs to join in an action, it permits a plaintiff or plaintiffs to join defendants where the plaintiff(s)' claims against each defendant arise from a single transaction and share a common issue of fact or law. The rule provides, in relevant part:

All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief . . . arising out of the same . . . occurrence . . . and if any question of law or fact common to all defendants will arise in the action.

Again, the requirements of Rule 20(a) are clearly met on these facts. The claims of each plaintiff against the United States and Motorist arise out of the same occurrence and involve at least one common issue of fact or law (for example, the extent of Husband's injuries). When this is so, the Federal Rules permit (but do not require) a party to join two or more defendants in a single action.

NOTE: As is the case with joinder of plaintiffs, this rule does not confer subject matter jurisdiction on the federal court to hear a claim against a joined defendant. Thus, joinder may be defeated where the court lacks subject matter jurisdiction over the joined claim. *See* Point Three, below.

Point Three: Even though the federal court lacks diversity jurisdiction over Husband's and (50-60%) Wife's claims against Motorist, it has "supplemental jurisdiction" over those claims.

Federal courts are tribunals with limited subject matter jurisdiction in civil cases. Basically, they may decide only "federal question" and "diversity" cases. The claims of Husband and Wife against Motorist do not involve a federal question; they are state tort law claims. Nor do their claims against Motorist qualify for diversity jurisdiction. First, diversity is determined on the date the suit is filed. Although Husband and Wife were citizens of a different state than Motorist on the day of the accident, they were all citizens of State X on the date that suit was filed. Second, their claims do not satisfy the amount in controversy requirement. Neither claim is for an amount in excess of \$75,000, so an effort to pursue their claims in a federal court under its diversity jurisdiction would fail.

However, a state cause of action may be heard in a federal court under supplemental jurisdiction (formerly termed "ancillary" or "pendent" jurisdiction). Where a party has both a federal question claim and a state law claim and both claims arise out of a common nucleus of operative fact, it has long been recognized that the federal court may, in the interest of the economical and efficient administration of justice, decide both the federal and the state claims in a single action. *See United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

Subsection (a) of Section 1367 of the Judicial Code authorizes a federal court to exercise “supplemental jurisdiction” over any state law claim that has a nucleus of operative fact in common with a claim that is itself within the subject matter jurisdiction of the federal court. The statute not only codifies the “pendent claim” jurisdiction as formulated in the *Gibbs* case, but the final sentence of subsection (a) expands supplemental jurisdiction expressly to include “pendent party” jurisdiction. “Such supplemental jurisdiction,” the statute reads, “shall include claims that involve the joinder or intervention of additional parties.”

Accordingly, since the State X tort claims of Husband and Wife against Motorist arise out of the same occurrence as their federal question claims against the United States, the federal court in State X has supplemental jurisdiction over these State X claims. The claims against Motorist share a “common nucleus of operative fact” with the claims against the United States, and it is reasonable to expect them to be resolved in one action. Under such circumstances, the courts have routinely held that 21 U.S.C. § 1367(a) confers supplemental jurisdiction over such claims. *See, e.g., Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249 (1st Cir. 1996); *Spiegel v. City of Chicago*, 920 F. Supp. 891 (N.D.Ill. 1996) (supplemental jurisdiction appropriate when disparate tort claims arise from same basic occurrence). Thus, even though the state law claims, standing alone, would be outside the court’s subject matter jurisdiction, they may be joined to the case against the United States, over which the court has exclusive jurisdiction pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b).

NOTE: The statute gives the court discretion to reject claims on prudential grounds, including when the pendent claims raise novel issues of state law, when they substantially predominate over the claims over which the federal court has original jurisdiction, when the claims over which the court had original jurisdiction have all been dismissed, or in other “exceptional circumstances.” However, none of these prudential reasons for denying supplemental jurisdiction is present on our facts.

SECURED TRANSACTIONS III.V; IV.B, K; V.B

Question 5 Analysis

- Legal Problems:
- (1) Did First Bank properly perfect its security interest in PC's equipment so that it has priority over a subsequent lien creditor?
 - (2) Does First Bank's financing statement claiming a security interest in PC's accounts receivable give it a claim to those accounts when the security agreement does not mention those accounts and the financing statement was filed without PC's authorization?
 - (3) Is First Bank liable for any damages PC sustained as a result of First Bank's filing of an overbroad financing statement and its subsequent refusal to terminate or amend the statement?

DISCUSSION

Summary: First Bank will prevail over Luke, the subsequent lien creditor, if First Bank had a prior, perfected security interest in the disputed equipment. First Bank had a prior, perfected interest in PC's equipment, but not in PC's accounts receivable. Thus, First Bank prevails as to the equipment, but not as to the accounts receivable. Luke prevails as to the accounts receivable. Moreover, because First Bank improperly filed a financing statement covering PC's accounts, First Bank is liable to PC for any damages caused by that improper filing.

Point One: (25-35%) Because PC had authenticated a security agreement granting First Bank a security interest in PC's equipment, First Bank perfected its security interest by filing, even though PC did not specifically authorize First Bank to file a financing statement. To that extent, First Bank had priority over Luke as to PC's equipment.

As between a lien creditor and a secured party, the secured party has the superior claim to a debtor's assets if the secured party has a perfected security interest that predates the judicial lien. In this case, First Bank obtained a security interest in PC's equipment, filed a financing statement covering the equipment, and advanced funds to PC on the strength of that arrangement. As a result, First Bank had a perfected security interest in PC's equipment. Moreover, these steps were taken before Luke acquired a lien against PC's assets. Consequently, First Bank has the superior claim to PC's equipment. Uniform Commercial Code UCC § 9-201 (except as otherwise provided in the UCC, a security agreement is effective against other creditors of the debtor); § 9-317(a)(2) (a lien creditor prevails over a secured party only if the lien creditor obtains an interest before security interest is perfected).

It makes no difference that PC did not sign or expressly authorize the filing of the financing statement. Under the old version of Article 9, financing statements were required to be signed by the debtor. Under new Article 9, the debtor's signature is not necessary. *See* UCC § 9-502(a) and cmt. 3. Although filings must still be authorized by the debtor, *see* UCC § 9-509(a), the debtor's authentication of a security agreement covering particular collateral is *ipso facto* an authorization for the secured party to file a financing statement covering that collateral. UCC § 9-509(b)(1) and cmt. 4. Because PC authenticated a security agreement granting First Bank a security interest in equipment, First Bank was entitled to file a financing statement covering equipment, which was effective to perfect First Bank's interest.

Point Two: (25-35%) Luke has a superior claim to PC's accounts because First Bank had no security interest in the accounts and the inclusion of the accounts in its financing statement was unauthorized and ineffective.

First Bank has no security interest in PC's accounts. To obtain a security interest in a debtor's assets, a creditor must receive the debtor's agreement to grant such an interest. In general, no security interest will attach to collateral unless "the debtor has authenticated a security agreement that provides a description of the collateral." UCC § 9-203(b)(3)(A). Here, First Bank has absolutely no claim to a security interest in PC's accounts because the PC-First Bank security agreement did not include accounts receivable in the description of collateral, but mentioned only equipment. There is nothing in the facts to suggest that there was any intention to include accounts. To the contrary, the facts suggest that the security interest was intentionally limited to equipment.

If no security interest has attached, it cannot be perfected no matter what the creditor does. *See* UCC § 9-308(a). Here, no security interest ever attached to the accounts. Because First Bank has no security interest in the accounts and no other basis for claiming a property interest in the accounts, Luke's interest prevails.

The financing statement does not help First Bank in this regard because it is not a security agreement and, also, because it was overbroad. First Bank did not have the right to file a financing statement covering additional collateral unless PC authorized such a filing, which PC did not. A financing statement is effective "only to the extent that it was filed by a person that may file it." UCC § 9-510. Because First Bank was not entitled to file a financing statement covering PC's accounts receivable, the financing statement is not effective to cover those accounts. *See* UCC § 9-317(a)(2). Thus, Luke has a superior claim to the accounts receivable.

Point Three: (25-35%) First Bank violated Article 9 by filing an overbroad financing statement and by refusing to correct that filing. As a result, it is liable to PC for any loss caused by those violations, including losses caused by PC's inability to secure financing from Second Bank.

Revised Article 9 provides generally that "a person is liable for damages in the amount of *any loss* caused by a *failure to comply with this article*." UCC § 9-625(b) (emphasis added). Damages may

be recovered by a person who is a debtor at the time of the failure of compliance with Article 9. UCC § 9-625(c).

On our facts, First Bank filed an overbroad financing statement. The problem, as noted earlier, is that First Bank had no express authorization from the debtor to file the financing statement, and the authorization provided *ipso facto* by debtor's authentication of a security agreement extended *only* to the collateral mentioned in the security agreement, equipment. *See* UCC § 9-509(a), (b). Hence, by filing an overbroad financing statement, First Bank violated its "duty to refrain from filing [an] unauthorized financing statement." UCC § 9-625, cmt. 2; *see* UCC § 9-509(a) (a secured party may file a financing statement *only* if authorized). Moreover, a secured party has a duty to terminate an unauthorized filing when termination is requested by the debtor. UCC § 9-513(c)(4). First Bank also failed to comply with this duty.

First Bank is liable for any loss caused to PC by its breach of these duties. Recoverable losses include losses "resulting from the debtor's inability to obtain . . . alternative financing." UCC § 9-625(b). In this case, those losses may be substantial. First Bank's overbroad financing statement made it impossible for PC to secure a loan from Second Bank. PC's inability to secure financing for its business expansion prevented it from adequately servicing its contracts. As a result, the City of Eden canceled its contract, which had been expected to yield significant revenue for PC. PC must, of course, establish both the amount of the loss and that the loss was caused by First Bank's failure to comply with the Code. Moreover, damages should be limited to an amount "reasonably calculated to put [PC] in the position that it would have occupied had no violation occurred." UCC § 9-625, cmt. 3.

AGENCY & PARTNERSHIP II.A, II.B, VIII.A., IX.A, IX.B

Question 6 Analysis

- Legal Problems:
- (1) Does the statement “I don’t want to do this anymore. I am quitting this partnership,” made by one partner, dissolve an “at will” partnership?
 - (2) May a partner bind a partnership to a contract made after dissolution?
 - (3) What is a partner’s liability for partnership obligations?

DISCUSSION

Summary: The effect of Randy’s “quitting” is to dissolve the partnership and to put it in a “winding up” period, at the conclusion of which it terminates. As the partnership had already dissolved, Sandy lacked actual authority to enter into the contract with Barney on behalf of the partnership. All the same, the partnership is bound by the contract with Barney because Sandy still had apparent authority to bind the partnership. Because they did not agree otherwise, Randy and Sandy share losses equally. Because Sandy paid the trade creditors, she is entitled to a \$15,000 contribution from Randy.

Point One: (35-40%) Randy’s statement “I don’t want to do this anymore. I am quitting this partnership” dissolves the “at will” partnership. This begins a period of winding up (liquidation) during which time the partnership affairs are settled. Once winding up is complete, the partnership terminates.

The facts do not indicate that the partnership had a definite term or limited undertaking. Therefore, this was an “at will” partnership. Any partner may dissolve an “at will” partnership by his or her express will.

Under the Uniform Partnership Act (UPA), dissolution occurs when the parties cease to associate in carrying on the business together. *See* UPA § 29 (“The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.”). “On dissolution the partnership is not terminated but continues until the winding up of partnership affairs is completed.” UPA § 30. Winding up is “the process of settling partnership affairs after dissolution.” Official Comment to § 29. Once all partnership affairs have been settled, the partnership terminates.

When Randy told Sandy “I don’t want to do this anymore. I am quitting this partnership,” Randy dissolved the partnership. The partnership must now undergo a period of winding up (i.e.,

completing the remaining business and settling debts). Once this is done, the partnership is terminated.

Under the Revised Uniform Partnership Act (RUPA), Randy's statement is an event of dissociation. Sandy has "notice of the partner's express will to withdraw as a partner." RUPA § 601(1). Therefore, under RUPA § 801(1) Randy's statement dissolves the partnership and the business must be wound up. Pursuant to RUPA § 802, "a partnership continues after dissolution only for the purpose of winding up its business. The partnership is terminated when the winding up of its business is completed."

Point Two: The partnership is probably bound by Sandy's contract with Barney, even though (35-40%) it occurred after dissolution, because Sandy had apparent authority to enter into the contract.

Under the UPA, upon dissolution, a partner's actual authority to bind the partnership terminates except as is necessary to wind up the business. *See* UPA § 33. The contract with Barney was for new business. When Randy dissolved the partnership (*See* Point One, above), Sandy's actual authority to enter into a contract for new business ended.

Under the RUPA, upon dissolution, a "partnership is bound by a partner's act after dissolution that . . . is appropriate for winding up the partnership business." RUPA § 804. As indicated above, the contract with Barney was for new business. There is an exception under RUPA § 803(c) that permits a partner who has not wrongfully dissociated to preserve the partnership business as a going concern for a reasonable period of time. These facts do not come within this exception. To date, the business has existed for only a year and it only had short-term contracts remaining. The contract with Barney was a long-term contract (three years).

While Sandy lacked actual authority to contract with Barney, under both the UPA and the RUPA, Sandy likely had apparent authority to bind the partnership after dissolution, so long as Barney was not aware of the dissolution and reasonably believed that Sandy was authorized to act. *See* UPA § 35(1) ("After dissolution a partner can bind the partnership . . . by any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction . . . though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and had no knowledge or notice of dissolution . . ."); RUPA § 804(2) ("a partnership is bound by a partner's act after dissolution that . . . (2) would have bound the partnership under § 301 before dissolution, if the other party to the transaction did not have notice of the dissolution"). RUPA § 301(1) provides a partner with apparent authority to carry on in the ordinary course the partnership's business unless the other party to the transaction knows that there is no authority.

The facts support the conclusion that Sandy had apparent authority to enter into the contract. Even though Barney had not previously done business with the partnership, the facts state that he was familiar with the partnership. Sandy, on behalf of the partnership, had been soliciting a long-term contract from him for over a month. Sandy was acting in the ordinary course of the partnership's business when soliciting a contract for widgets. Further, Barney was not aware of the dissolution. Therefore, the partnership is probably bound by Sandy's contract with Barney.

Point Three: Because there is no agreement to the contrary, when Sandy paid \$30,000 to the trade creditors, Sandy became entitled to a contribution of \$15,000 from Randy.
(15-25%)

When Sandy paid the entire \$30,000 debt to the trade creditors, she became entitled to contribution of \$15,000 from Randy. Among partners, unless the parties agree otherwise, profits are shared equally and losses are shared in the same ratio as profits. *See* UPA § 18(a) (“Each partner shall . . . share equally in the profits . . . and must contribute towards the losses . . . according to his share in the profits.”); RUPA § 401(b) (“Each partner is entitled to an equal share of the partnership profits and is chargeable with a share of the partnership losses in proportion to the partner’s share of the profits.”). Regardless of the fact that Randy contributed twice as much capital (\$10,000) as Sandy (\$5,000) to the partnership, the facts indicate that they shared profits equally. Because they did not agree otherwise, Randy and Sandy would share losses in the same ratio as they shared profits.

TRUSTS & FUTURE INTERESTS I.I, II.F

Question 7 Analysis

- Legal Problems:
- (1) Does the bequest under Testator's will violate the Rule Against Perpetuities?
 - (2) Did Friend improperly delegate her duties to Bank?
 - (3) Did Bank, acting as agent of Friend, improperly invest the trust assets by failing to diversify the trust investments such that Friend, as trustee, is liable for any losses resulting from such failure?

DISCUSSION

Summary: The bequest to great-grandchildren under Testator's will is invalid under the common-law Rule Against Perpetuities but valid under the wait-and-see doctrine because it actually vested before the perpetuity period had expired. Friend, as trustee of the revocable trust, breached the duty not to delegate and the duty to diversify trust investments and is liable for the resulting losses.

Point One: (20-30%) The bequest under Testator's will would be void under the common-law Rule Against Perpetuities. However, the bequest is valid under the governing wait-and-see doctrine because it vested two months after Testator's death. Thus, the estate passes to Testator's great-grandchildren who are alive when the will is probated.

Under the common-law Rule Against Perpetuities, "no interest is good unless it must vest, if at all, no later than twenty-one years after some life in being at the creation of the interest." John C. Gray, RULE AGAINST PERPETUITIES § 201 (4th ed. 1942). Furthermore, under the common-law rule, if there was any possibility, however improbable, that an interest might vest too remotely, that interest would be invalid even though in fact it actually vested in a timely manner.

For testamentary bequests, as here, the nonvested interest is deemed created at Testator's death. Thus, the testamentary gift to great-grandchildren is void if there is any possibility it could become possessory more than 21 years after the death of any of Testator's issue who survived him, a possibility that could occur here. For example, within one year after Testator died all of his issue who survived him except the 27-year-old grandchild could die. While that is improbable, it is certainly possible. Then the 27-year-old grandchild who survived Testator could have a child who would be a great-grandchild of Testator. And, then the 27-year-old grandchild could die. At this point, all of Testator's issue who survived him are dead, leaving only the later born great-grandchild. Then, 22 years later (more than 21 years after the death of all relevant lives) Testator's will could be probated. This would result (but for the Rule) in the gift vesting in

Testator's great-grandchildren living when his will was probated. However, since this vesting occurs, as hypothesized, beyond the permissible period, the gift is invalid. It bears repeating that a nonvested interest is invalid if it might have vested too remotely even if, in fact, as here, that did not occur because Testator's will was probated two months after Testator died.

An invalid residuary gift is stricken from the will, and absent an alternative valid gift, the residue passes to the Testator's heirs, here Angela and Brian, his only two children.

This jurisdiction, however, has enacted the wait-and-see rule. Under the wait-and-see rule, the gift to the great-grandchildren is valid if it *in fact* vests within the perpetuity period. Here the will was probated two months after Testator died. Thus, the gift to the great-grandchildren vests in a timely manner. *See generally Merchants National Bank v. Curtis*, 97 A.2d 207 (N.H. 1953).

Point Two: (20-30%) A trustee is responsible for administering the trust. Accordingly, at common law it is a breach of trust to delegate to a third party significant and discretionary duties, such as the duties to make distributions and investments. Under one or more uniform acts, however, at least the trustee's investment duty is delegable to a third party, although a breach of trust for that delegation could nonetheless occur for failing to properly supervise the third party.

The selection by the settlor of a trust of another person to act as a trustee evidences the settlor's trust and confidence in the designated trustee to properly administer the trust, including deciding what, if any, discretionary distributions of trust property should be made to beneficiaries, and how trust assets should be invested. Flowing from this confidence is the duty to exercise due care and the duty not to delegate those duties that the trustee can reasonably be expected to perform. *See* RESTATEMENT (SECOND) OF TRUSTS § 171.

According to the Restatement, a trustee cannot "delegate to another power to select investments." RESTATEMENT (SECOND) OF TRUSTS, § 171, cmt. h. According to Scott, "if . . . [the trustee] entrusts funds to the agent for this purpose and through the . . . negligence of the agent the funds are lost, the trustee is personally liable." SCOTT'S ABRIDGEMENT OF THE LAW OF TRUSTS § 171.2 (1960).

Similarly, Friend, as trustee, cannot delegate such an important function as determining how the trust property shall be distributed among the named beneficiaries, because this is an act that, in light of all the circumstances, it would appear Testator expected Friend to perform. Thus, Friend's discretionary power, as trustee, to distribute trust principal to the income beneficiaries cannot be delegated to Bank. *See generally* RESTATEMENT (SECOND) OF TRUSTS § 171, cmt. d.

Under the Uniform Trust Code, however, a trustee can delegate such duties that "a prudent trustee of comparable skills could properly delegate under the circumstances." Unif. Trust Code § 807; *accord* RESTATEMENT (THIRD) OF TRUSTS § 171 (1992). Likewise, under § 9 of the Uniform Prudent Investor Act and § 3(2) of the Uniform Trustee's Powers Act, a trustee is given broad authority to delegate trust duties, effectively abrogating the common-law and Second Restatement non-delegation rule, at least where a delegation would be deemed prudent under the circumstances. Nonetheless, it is highly unlikely that a prudent trustee who was a longtime friend

of Testator's family and who presumably best knew how to make discretionary distributions among Testator's issue would delegate that function to a corporate agent that had no familiarity with Testator's family.

On the other hand, the Uniform Trust Code and Uniform Prudent Investor Act clearly contemplate the complete delegation of the trustee's investment responsibilities so long as the trustee exercises reasonable care, skill, and caution in selecting the agent and "periodically . . . [reviews] the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation." Unif. Trust Code § 807(a)(3); *accord* RESTATEMENT (THIRD) OF TRUSTS § 171 (1992). Here, there may have been a proper delegation but there is also lack of supervision, which brings Friend outside of the protection of the Third Restatement's black letter rule. *See also* Point Three.

Point Three: Friend probably acted imprudently with respect to the trust investments by failing (35-45%) in her oversight responsibilities to require that the trust investments be diversified.

"A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying." Unif. Prudent Investor Act § 3; *accord* RESTATEMENT (SECOND) OF TRUSTS § 228. This rule reflects the time-honored principle that it is inappropriate to put all of your eggs into one basket. While in a limited number of instances diversification may not be necessary, none of them appear relevant here.

The rationale for diversification is clear. "Diversification reduces risk . . . [because] stock price movements are not uniform. They are imperfectly correlated. This means that if one holds a well-diversified portfolio, the gains in one investment will cancel out the losses in another." Jonathan R. Macey, AN INTRODUCTION TO MODERN FINANCIAL THEORY 20 (American College of Trust and Estate Counsel Foundation, 1991).

Even though it was Bank that failed to diversify, Friend, as trustee, is liable for this failure because (1) Bank was Friend's agent and (2) Friend, as trustee, had a duty to oversee the acts of the agent, including the duty to assure that investments were made in a prudent manner. *See* Unif. Prudent Investor Act § 9(a)(3) (trustee must exercise care, skill and caution in "periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation"). Friend can be liable for the failure to diversify even though Friend committed no breach of trust by initially delegating her investment duties to Bank.

July 2004
Questions

Question 1

Five years ago, Settlor created an irrevocable trust (the “Settlor Trust”). The trust provided that Trustee should pay annually “all of the trust income to my son Zack for life, with Zack to use such income to send Zack’s children to college.” The trust instrument further provided that, upon Zack’s death, Trustee should “distribute the trust corpus in equal shares to Zack’s children, issue of any deceased child to take his or her parent’s share.”

When Settlor Trust was created, Zack was married to Spouse. Zack and Spouse had three living children, Abel, age 23; Brian, age 19; and Carrie, age 15. Abel had one living child, Grandchild. Neither Brian, a college student, nor Carrie, a high-school student, was married or had children.

Two years later, Zack and Spouse had another child, Debbie. Following Debbie’s birth, Zack stopped paying Brian’s college expenses and told Carrie that he would not pay her future college expenses.

Trustee distributed last year’s trust income to Zack. Shortly thereafter, Abel, Carrie, and Zack were all killed in an automobile accident. None of them had a will. Zack had not spent any of last year’s income distribution. Zack was survived by Spouse, Brian, Debbie, and Grandchild.

Under state law, Abel and Carrie are deemed to have predeceased Zack. State law also provides that an intestate’s estate passes to the intestate’s spouse and children in equal shares or, if there is no surviving spouse or children, to the intestate’s parents in equal shares or, if there is no surviving parent, to the intestate’s siblings.

1. Can Brian impress a trust upon the income distributed to Zack from Settlor Trust to pay for Brian’s college education? Explain.
2. To whom, and in what shares, should the principal of Settlor Trust be distributed? Explain.

Question 2

Zeta, Inc., is a corporation with 80,000 shares outstanding. Its articles of incorporation provide for a nine-person board of directors, with staggered three-year terms. Three directors are elected each year. Zeta's articles require cumulative voting. Therefore, when electing the three directors, each share is entitled to three votes, meaning that there are 240,000 votes eligible to be cast. Accordingly, a person who receives at least 60,001 votes would be elected a director. Neither the articles nor Zeta's bylaws contain any other provisions concerning elections, voting, or removal of directors.

Diane is one of Zeta's directors. Although Diane's term does not expire for another two years, at the request of a group of shareholders, Zeta has scheduled a special shareholders' meeting on September 1 to consider removing Diane from office. Proper notice of that meeting has been given to all of Zeta's shareholders.

Sam owns 16,000 of the 80,000 outstanding Zeta shares. On August 1, Sam gave Arnie a proxy to vote Sam's shares at the special meeting. The proxy signed by Sam stated that it was "irrevocable."

On August 15, Betty, another Zeta shareholder, convinced Sam that giving a proxy to Arnie was a mistake. Sam then signed another proxy, dated August 15, which revoked the proxy to Arnie and gave Betty the right to vote Sam's 16,000 shares.

At the special shareholders' meeting on September 1, the shareholders in favor of Diane's removal argued that Diane was too critical of the company's management at board meetings and was "rocking the boat." No one alleged any breach of duty or other wrongdoing by Diane. Both Arnie and Betty attempted to vote Sam's shares by proxy. Counting Arnie's vote of Sam's shares, the result was 117,000 votes to remove Diane and 123,000 votes not to remove her. Counting Betty's vote of Sam's shares, the result was 165,000 votes to remove Diane and 75,000 votes not to remove her.

Zeta's corporate secretary ruled that Diane was not removed as a director because: (1) no valid cause was shown for removing Diane and showing cause was required to remove her; (2) Arnie was entitled to vote Sam's shares and removal therefore failed by a vote of 117,000 votes to remove Diane and 123,000 votes not to remove her; and (3) even if Betty had the right to vote Sam's shares, the resulting vote of 165,000 votes to remove Diane and 75,000 votes not to remove her was insufficient to remove Diane.

Was each of these three rulings correct? Explain.

Question 3

Husband and Wife were married for 12 years. The couple had one child, Boy, age 7. Husband and Wife were both devoted parents.

Wife filed for divorce shortly after she learned that Husband and Secretary were having an affair. In the divorce action, Husband and Wife each sought sole custody of Boy.

The court appointed a child custody evaluator. Both parents told the evaluator they were not willing or able to share custody. Boy told the evaluator that he was very upset because his parents were getting a divorce and that he wanted to live with his father. Based upon the child custody evaluator's recommendation, the court awarded Husband sole custody of Boy and gave Wife liberal visitation rights. Neither party appealed this decree. Husband's and Wife's relationship has remained bitter and hostile.

Three months after the custody decree was filed, Secretary moved into Husband's house. Immediately thereafter, Wife filed a petition seeking to modify the custody decree and obtain sole custody of Boy.

At a hearing on Wife's petition, Boy testified, "I miss my mom and I am sad that my parents are divorced." Husband testified that there had been no change in Boy's behavior since Secretary moved into his home and that Boy got along well with Secretary. Wife testified that Boy should not be exposed to his father's nonmarital cohabitation. There was no other testimony. Neither Husband nor Wife sought joint custody.

The court modified the custody decree and awarded Husband and Wife joint custody. Under the modified decree, Boy will reside with each parent for alternating two-week periods and the parents will share decision-making responsibilities. The court held that "this arrangement will give Boy the best of both parents and allow each parent to counteract any negative influence on Boy by the other parent."

Husband appeals the court's determination.

1. Did the court err in modifying the custody decree? Explain.
2. Did the court err in awarding joint custody? Explain.

Question 4

Decedent and his only child, Clara, died as the result of an accident when Clara's car was struck from the rear by a truck. Clara was driving and Decedent was riding in the back seat directly behind her. The emergency medical team that arrived at the accident scene found no evidence that either of them was alive. The emergency room physician examined their bodies as they were being removed from the ambulance. She first pronounced Decedent dead and then pronounced Clara dead.

Clara was survived by her spouse, Son-in-Law, who was named as the sole beneficiary of her estate under her duly probated will. Clara had no descendants.

Decedent died intestate leaving an estate of approximately \$300,000. Decedent left no surviving spouse. Decedent's parents had predeceased him by many years. Decedent's closest surviving relatives are:

1. a brother, Brother;
2. a half-sister, Half-Sister, who is related to Decedent through a common mother;
3. an adopted sister, Adopted-Sister, who was adopted by Decedent's parents; and
4. his paternal grandfather, Gramps.

Three years before Decedent died, he gave Brother a check for \$90,000 to enable Brother to buy a new home.

Among Son-in-Law, Brother, Half-Sister, Adopted-Sister, and Gramps, who will share in Decedent's estate, and what is the value of the share each will receive? Explain.

Question 5

Best Care Hospital, one of five hospitals in City, operates the largest emergency room in City. Best Care advertises extensively about the quality of care provided in its emergency room. It has billboards strategically placed throughout City urging local citizens to come to Best Care “because Best Care’s emergency room doctors are the absolute *best* and will really *care* for you.” In fact, Best Care employs no doctors; instead it contracts with seven doctors in City to staff the emergency room on a 7-day, 24-hour basis. These contracts provide:

1. Each doctor is an “independent contractor,” not an “agent/employee,” and may conduct a private practice but may not work in any other emergency room;
2. Each doctor is responsible for the manner in which he or she provides medical care and for the purchase of malpractice insurance;
3. Each doctor is authorized to purchase supplies and equipment for Best Care’s emergency room from a list of approved vendors located in City and within Best Care’s price guidelines;
4. Each doctor is periodically reviewed by Best Care’s governing board to assure that each doctor provides quality care;
5. Each doctor independently bills patients for services provided; and
6. All emergency services are performed in the Best Care emergency room using supplies and equipment provided by Best Care.

Three months ago, Owen, a local orthopedist and one of the doctors with whom Best Care contracts, ordered a portable X-ray machine costing \$25,000 from Vision, a company located in a town 450 miles from City. Vision is not on Best Care’s approved vendor list and Owen did not consult with anyone at Best Care before he placed the order. When Owen ordered the machine, which was to be custom designed for Best Care, he truthfully told Vision that he was one of the seven emergency room doctors at Best Care and needed the machine for the emergency room. Owen also stated that he was acting on behalf of Best Care. Vision had had no previous dealings with Owen or Best Care and agreed to make the machine according to the custom specifications provided by Owen. When Vision shipped the X-ray machine, Best Care refused to accept delivery, even though the price for the machine was within its price guidelines. Best Care claimed that Owen had no authority to purchase the machine on its behalf. Vision filed an action for breach of contract against Best Care.

Last month, Anita was hit by a bus. When the ambulance arrived, Anita asked the ambulance driver to take her to Best Care, quoting the billboard claim that “Best Care’s emergency room doctors are the absolute *best*.” When Anita arrived at the emergency room, she was treated by Owen. Owen correctly told Anita that she needed immediate surgery. During the operation, Owen negligently severed one of Anita’s arteries, and she bled to death. Anita’s estate has filed a wrongful death action against Owen and Best Care for damages resulting from Owen’s negligence.

Question 5 (continued)

1. Is Owen an independent contractor or servant (employee) of Best Care? Explain.
2. Is Best Care liable to Vision for breach of contract? Explain.
3. Assuming Owen is an independent contractor, is Best Care liable to Anita's estate for Owen's negligence? Explain.

Question 6

Plaintiff, a domiciliary of State X, was severely injured in a car accident in State X. Tortfeasor, the uninsured owner and driver of the other vehicle involved in the accident, was also a citizen of State X. Before any litigation regarding the accident began, Tortfeasor died of a heart attack.

Following Tortfeasor's death, Plaintiff commenced an action against Executor, the legal representative of Tortfeasor's estate. Executor is a citizen of State Y. Plaintiff sued Executor in the federal district court of State Y. The complaint, which alleged that Tortfeasor's negligence caused the accident and Plaintiff's injuries, sought damages in excess of \$500,000.

Executor answered the complaint, denying the allegations of negligence but admitting the court's subject matter jurisdiction. A year later, however, after extensive discovery, Executor moved to dismiss the complaint for lack of subject matter jurisdiction. After the submission of briefs and oral argument on the jurisdictional issue, the federal court denied Executor's motion to dismiss, ruling that "jurisdiction exists and, in any event, the motion was untimely." A trial was held and the jury rendered a verdict in Plaintiff's favor for \$80,000.

The federal court entered judgment on the verdict. No appeal was taken.

When Executor declined to pay the judgment, Plaintiff commenced suit in a state court in State X to enforce the federal judgment. In the state suit, Executor challenged the validity of the judgment, claiming that the federal district court of State Y lacked subject matter jurisdiction.

1. Did the federal district court of State Y err in denying Executor's motion to dismiss for lack of subject matter jurisdiction? Explain.
2. Should the state court in State X enforce the federal judgment? Explain.

Question 7

Seller is in the business of selling new and used road construction equipment. On January 15, Buyer, a road builder, entered into a written purchase agreement with Seller for the sale of a used excavator for \$100,000. The purchase agreement provided that Seller would add certain attachments to the excavator. The cost of the attachments was included in the purchase price. Buyer and Seller agreed that the specially equipped excavator would be ready for Buyer by April 5, in time for the start of the road construction season.

When Buyer signed the contract, Buyer gave Seller a \$25,000 down payment. The remaining \$75,000 was to be paid as follows: \$25,000 on March 1; \$25,000 on April 1; and \$25,000 on May 1.

On January 20, Seller borrowed \$1 million from Finance Co. to finance Seller's business operations. Finance Co. obtained a properly perfected security interest specifically assigning to Finance Co. all payments from Seller's accounts receivable and chattel paper.

On February 20, Seller failed to make a payment due on its loan from Finance Co. Finance Co. declared Seller in default. However, it informed Seller that it would not require immediate repayment of the full amount of the loan, but would instead begin collecting payments on all of Seller's outstanding accounts and chattel paper directly from the account debtors.

Finance Co. properly notified Buyer that Seller had assigned to Finance Co. the right to receive payment under the purchase agreement and that Buyer should make all future payments on the purchase agreement directly to Finance Co. However, Seller told Buyer to disregard Finance Co.'s notification and to continue to make payments directly to Seller. Buyer then sent its March and April payments directly to Seller.

On April 5, Buyer went to pick up the excavator from Seller. Buyer discovered that Seller had not equipped the excavator with any of the attachments required by their purchase agreement. Buyer informed Seller that it would take the excavator, despite its non-conformity with the contract, but that it would find and add the necessary attachments itself and would withhold from its final payment the cost of making the goods conform to the contract. Seller stated that it expected full payment but allowed Buyer to take the excavator.

On May 5, Finance Co. demanded that Buyer immediately pay Finance Co. \$75,000, the full amount of the March, April, and May payments under the purchase agreement. Buyer refused, asserting that it made the March and April payments to Seller and that no remaining payment was due because the cost of bringing the excavator up to contract specifications exceeded \$30,000, substantially more than the amount of the May payment.

How much, if anything, does Buyer owe Finance Co.? Explain.

July 2004
Analyses

TRUSTS I.B; II.C; III.B

Question 1 Analysis

- Legal Problems:
- (1) Did the language in Settlor Trust specifying that Zack “use . . . income to send Zack’s children to college” create a trust in favor of Zack’s children?
 - (2) Is Debbie, a child born to Zack after the creation of Settlor Trust, included in the class gift in favor of Zack’s children?
 - (3) Does the share of Settlor Trust that Abel would have taken had Abel survived Zack pass to Abel’s children or to the surviving members of the class?
 - (4) Does the share of Settlor Trust that Carrie would have taken had Carrie survived Zack pass to Carrie’s heirs or to the surviving members of the class?

DISCUSSION

Summary: If Settlor imposed a trust upon Zack to use trust income to send Zack’s children to college, Brian can impress a trust upon the funds distributed to Zack from Settlor Trust. There is a strong, but not conclusive, argument that Settlor did intend to impose a trust upon Zack. Upon Zack’s death, the trust corpus passed to Brian, Spouse, Debbie, and Grandchild. The trust created a vested remainder in a class of persons (Zack’s children) and that class remained opened until Zack’s death. Thus Debbie is included in the class. Class members’ interests were divested only if they failed to survive Zack and had issue who did survive him. Thus, Abel’s share was divested in favor of his issue (Grandchild). Carrie’s share was not divested and passes to her heir, Spouse, except in a state that has adopted § 2-707 of the 1990 Uniform Probate Code UPC, or a like provision.

Point One: (30-40%) The language of Settlor Trust probably creates a trust for the benefit of Zack’s children in the income of the trust. Thus, Brian can impress a trust upon the income distributed to Zack from Settlor Trust. It can be argued, however, that the college expenses condition was precatory.

Settlor Trust provided that trust income be distributed to Settlor’s son Zack, with Zack “to use such income to send Zack’s children to college.” The question is whether this language merely expressed Settlor’s desire or imposed on Zack a binding obligation in trust. The answer depends on Settlor’s intent: a trust is created “only if the settlor properly manifests an intention to create a trust relationship.” RESTATEMENT (THIRD) OF TRUSTS § 13.

In order to determine a settlor's intent, the courts consider:

(1) the specific terms and overall tenor of the words used; (2) the definiteness or indefiniteness of the property involved; (3) the ease or difficulty of ascertaining possible trust purposes and terms, and the specificity or vagueness of the possible beneficiaries and their interests; (4) the interests or motives and the nature and degree of concerns that may reasonably be supposed to have influenced the transferor; (5) the financial situation, dependencies, and expectations of the parties; (6) the transferor's prior conduct, statements, and relationships with respect to possible trust beneficiaries; (7) the personal and any fiduciary relationships between the transferor and the transferee; (8) other dispositions the transferor is making or has made of his or her wealth; and (9) whether the result of construing the disposition as involving a trust or not would be such as a person in the situation of the transferor would be likely to desire. *Id.*

In cases where courts find "precatory language" not evidencing a trust, the settlor has typically used words such as "like," "request," "hope," or "wish" when stating what should be done with the funds. Settlor Trust did not contain such precatory language; instead, it specified that Zack was to use trust income for college expenses. The beneficiaries, purpose, and funds to be used can all be easily identified from the trust instrument. Thus, there is a strong argument that a trust was imposed upon Zack to use trust income for his children's college expenses. If a trust was imposed on Zack, then Brian can impose a trust on the income distributed to Zack before Zack died. It can also be argued that in light of the language in Settlor Trust, Brian could impose a constructive trust on the income distributed to Zack; otherwise Zack would be unjustly enriched.

The question could be argued the other way. Settlor was vague as to the amount to be spent on college, the period for which college expenses were to be paid, etc. Furthermore, Zack was to receive all of the income for life, including the period after which he had no children in college. This might be evidence that the direction to use the income for the children's college education was precatory.

Point Two: Debbie was born before the class gift to Zack's children closed and thus is a member of the class entitled to share in the trust corpus.
(20-30%)

Settlor created a class gift in the corpus of Settlor Trust with such gift to become possessory upon Zack's death. A class remains open and may admit new members until at least one class member is entitled to obtain possession of the gift. Because Settlor's class gift did not become possessory until Zack's death, Debbie is a member of the class and entitled to take a share of the corpus. *See generally* Cornelius J. Moynihan & Sheldon F. Kurtz, INTRODUCTION TO THE LAW OF REAL PROPERTY 156 (3d ed. 2002). Debbie's share of the corpus is one-quarter for the reasons described in Points Three and Four.

Point Three: Abel's share of the trust corpus passes to Grandchild as provided by the terms of (20-30%) Settlor Trust.

Settlor Trust expressly provided that the "issue of any deceased child . . . take his or her parent's share." This language in a trust instrument is typically interpreted to mean that, when the life tenant is predeceased by a child who otherwise would have shared in the remainder and that child has issue who survive the life tenant, the deceased child's issue are to take the share that the deceased child would have taken had he survived the life tenant. *See, e.g., In re Estate of Houston*, 201 A.2d 592 (Pa. 1964). This interpretation seems consistent with Settlor's intent and would result in Grandchild taking Abel's share.

UPC § 2-707 (1990) and similar statutes achieve the same result by different means. Under the 1990 UPC, all future interests in trust, whether or not the gift explicitly requires survival to take, are treated as if they require survival; Abel's interest is thus contingent on Abel's surviving Zack. However, if, as here, the governing instrument creates an alternative gift, then the takers of the alternative gift (the issue of Abel) succeed to that interest despite the implied survival condition. UPC § 2-707(b)(4) (1990).

Point Four Under the common law, Carrie's interest was vested. Her interest was not divested (20-30%) when she died before Zack because she had no issue who survived Zack. Since Carrie died intestate, her share passed to her mother, Spouse, who is her sole heir. Under the 1990 Uniform Probate Code, Carrie's interest would fail and go to Brian, Debbie, and Grandchild, the surviving members of the class.

Under the common law, a remainder interest to children that was not expressly conditioned on survival was not impliedly conditioned on survival. Here, the remainder to children was subject to a survival contingency, but that contingency applied only when the deceased child had issue who survived the life tenant. (*See* Point Three.) Thus in contrast to Abel's interest, Carrie's interest was not divested because the divesting condition was not applicable as to her. *See In re Houston*, 201 A.2d at 599. As Carrie died intestate, her one-quarter interest would pass to Spouse.

UPC § 2-707 (1990) and like statutes produce a different result. Under the 1990 UPC, Carrie's interest is impliedly conditioned on her being alive when Zack's estate terminated. Because she was not alive, her interest failed. And since she had no surviving issue, there is no alternative gift. Accordingly, the share to which Carrie would have been entitled had she survived Zack goes to Brian, Debbie, and Grandchild, in equal shares.

Question 2 Analysis

- Legal Problems:
- (1) Must shareholders show cause to remove a director?
 - (2) May a shareholder revoke a proxy that states it is irrevocable by issuing a subsequent proxy?
 - (3) What vote is required to remove a director when cumulative voting is authorized by the corporation?

DISCUSSION

Summary: Zeta's shareholders may remove Diane without cause so long as they get the appropriate vote. Under cumulative voting, at least 60,001 votes would be sufficient to elect Diane as a director. Diane cannot be removed if the votes cast against removal would be sufficient to elect her as a director at an annual meeting to elect directors. Under either vote, there were sufficient votes cast against removing Diane and thus, she should not be removed.

Sam's proxy to Arnie was revoked when he issued a subsequent proxy to Betty. Even though the proxy stated it was irrevocable, words alone are not sufficient to create an irrevocable proxy. A proxy is only irrevocable if coupled with an interest, and there are no facts to indicate that this proxy was coupled with an interest.

Point One: Shareholders need not show cause to remove a director.
(35-45%)

Under the common law, shareholders had the inherent power to remove a director, but only for cause. *See Frank v. Anthony*, 107 So. 2d 136 (Fla. Ct. App. 1958); *Toledo Traction, Light & Power Co. v. Smith*, 205 F. 643 (N.D. Ohio 1913). Cause is defined as substantial grounds, such as directorial breach of duty or malfeasance in office. *See Eckhaus v. Ma*, 635 F. Supp. 873 (S.D.N.Y. 1986); *Doolittle v. Morley*, 292 P.2d 476 (Idaho 1956). "Rocking the boat" and being critical of management, as alleged here, do not constitute cause for removal.

However, most modern statutes, including the Revised Model Business Corporation Act (RMBCA), permit shareholders to remove a director without cause. *See* RMBCA § 8.08(a) ("The shareholders may remove one or more directors with or without cause unless the articles of incorporation provide that directors may be removed only for cause"); *Mitchell v. Concerned Citizens of CVEC, Inc.*, 486 So. 2d 1283 (Ala.1986). As Zeta's articles of incorporation contain no special

provisions concerning removal of directors, the shareholders may remove Diane without showing cause. Therefore, the first ruling was incorrect.

Point Two: (35-45%) By issuing a subsequent proxy to Betty, Sam revoked the proxy he issued to Arnie, even though the proxy stated it was irrevocable.

Under the common law and state corporation statutes, a proxy is revocable unless it expressly provides that it is irrevocable and the appointment of the proxy is “coupled with an interest.” See RMBCA § 7.22(d); *Stein v. Capital Outdoor Advertising, Inc.*, 159 S.E.2d 351 (N.C. 1968); *In re Chilson*, 168 A. 82 (Del. Ch. 1933). Thus, unless it was coupled with an interest, Sam could revoke the proxy he gave Arnie even though the proxy states it is irrevocable.

The concept of “coupled with an interest” is not completely clear, but, in general, the proxy holder must have “either (1) a charge, lien, or some property right in the shares themselves; or (2) a security interest given to protect the proxy holder for money advanced or obligations incurred.” James D. Cox et al., *CORPORATIONS* 332 (1997). The RMBCA specifies various categories of people who qualify: (1) a pledgee; (2) a person who purchased or agreed to purchase the shares; (3) a creditor of the corporation who extended it credit under terms requiring the appointment; (4) an employee of the corporation whose employment contract requires the appointment; or (5) a party to a voting agreement created under RMBCA § 7.31.

Sam’s proxy to Arnie was not coupled with an interest. The facts indicate only that Arnie was Sam’s friend. Because the proxy to Arnie was not coupled with an interest, it was revocable in spite of the language to the contrary.

Where two or more revocable proxies have been given, the last given revokes all previous proxies. FLETCHERS CYCLOPEDIA OF PRIVATE CORPORATIONS § 2026. When Sam gave Betty a proxy on August 15, he revoked the proxy he had given to Arnie on August 1. Therefore, the second ruling was incorrect. Betty was entitled to vote Sam’s shares.

Point Three: (10-20%) Under cumulative voting, a director is not removed if the number of votes cast against removal would be sufficient to elect the director at an annual meeting. Here, the number of votes cast against Diane’s removal would have been sufficient to assure her election. Diane would not be removed under either vote.

In a corporation with straight voting, a shareholder vote removes a director if the number of votes for removal exceeds the number of votes against removal. RMBCA § 8.08(c). However, this corporation’s articles require cumulative voting. “If cumulative voting is authorized, a director may *not* be removed if the number of votes sufficient to elect him under cumulative voting is voted against his removal.” RMBCA § 8.08(c)(emphasis added). See Ark. Stat. Ann. § 4-27-808; Miss. Code Ann. § 79-4-8.08; Utah Code Ann. § 16-10a-808(3). Diane could have been elected a director with 60,001 votes, and more votes than that were voted against her removal (123,000 or 75,000, depending on how the proxies were counted). Therefore, the third ruling was correct. Diane could not have been removed.

July 2004, Question 2 Analysis

NOTE: Directors are elected by a plurality of the votes cast, so the directors with the greatest number of votes are elected. According to Zeta's articles, the nine directors have staggered terms, and three directors are elected at each annual meeting. Therefore, under cumulative voting, each share is entitled to three votes (number of shares times number of directors up for election). *See* RMBCA § 7.28(c).

As stated in the facts, a director must receive at least 60,001 votes to assure election under the following formula:

$$\left(\frac{\text{number of voters eligible to be cast}}{\text{number of directors to be elected} + 1} \right) + 1$$

FAMILY LAW

Question 3 Analysis

- Legal Problems:
- (1) Did Secretary's move into Husband's home and Boy's testimony about missing his mother constitute a substantial change of circumstances justifying reevaluation of the custody decree?
 - (2) Was joint custody in Boy's best interests given that his parents did not agree to joint custody and had a hostile relationship?

DISCUSSION

Summary: The trial court erred in modifying the custody order. A substantial change of circumstances that would justify custody reevaluation probably did not exist given the short time that had elapsed since entry of the original custody order. Although a custodial parent's nonmarital cohabitation might, in some states, constitute an unforeseen and substantial change of circumstances justifying custody reevaluation, Wife did not show that the cohabitation negatively affected Boy or his relationship with his father. Nor did Wife show that Boy's feelings of sadness were attributable to the cohabitation or even that they were new.

Assuming that a substantial change of circumstances existed, joint custody would not be in Boy's best interests: the parents did not agree to joint custody, they would not cooperate, and the mother already had liberal visitation.

Point One: (65-75%) Because the motion to modify was made within three months of the original custody order and the evidence did not show that either Secretary's move into Husband's home or Boy's feelings of sadness threatened his well-being, an appellate court would likely find that Wife had failed to establish a substantial change of circumstances.

Custody orders are invariably modifiable, but modification is impermissible unless there has been a change in circumstances since the order was entered. Most states require that the change in circumstances be substantial and unforeseen. For example, the Uniform Marriage and Divorce Act (UMDA), 9A U.L.A. 211 § 409(b) (1979) requires that there be "facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree."

Most states also disfavor modification when sought shortly after a custody decree has been entered; the principle of res judicata and the belief that children's interests are served by stable custody arrangements both contribute to this view. Thus, if a modification petition is filed within two years of the original decree, UMDA § 409(a) authorizes a modification hearing only if the

evidence suggests “there is reason to believe that the child’s present environment may endanger seriously his physical, mental, moral or emotional health.” In states that do not have statutory standards restricting early modification, case law typically disfavors it unless the evidence shows that the child is at risk. Because the modification petition was brought within three months of the original order and the evidence did not show any risk of harm to Boy, appellate courts in most states would likely find that there was an insufficient basis to modify custody.

In some states, appellate courts have held that a custodial parent’s post-decree nonmarital cohabitation represents a change of circumstances sufficient to warrant a modification hearing. *See Todd v. Casciano*, 569 S.E.2d 566, 570 (Ga. Ct. App. 2002); *Word v. Remick*, 58 S.W.3d 422, 427 (Ark. App. 2001). In these states, an appellate court would likely find that the trial court did not err in hearing evidence on modification. But, even in states that authorize a hearing in these circumstances, modification is typically disallowed unless the petitioner shows that the nonmarital cohabitation has an adverse impact on the children. *See* UMDA § 402 (“The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.”); *Todd v. Casciano*, 569 S.E.2d 571. Wife presented no evidence at the hearing to show such an impact nor did she even show that Boy’s feelings of sadness were attributable to Secretary’s presence in the home.

In other states, however, the mere fact of cohabitation may disqualify a parent to have custody. A child’s custody preference is relevant to a custody determination, and alteration of a child’s custody preference thus can constitute a substantial change of circumstance. *See Butland v. Butland*, 1996 WL 362038 (Ohio Ct. App. June 27, 1996). Here, Boy’s testimony does not clearly indicate any alteration of his custody preference; Boy testified that he missed his mother, not that he wanted to live with her. Nor did the evidence show that Boy’s feelings of sadness are attributable to living with his father instead of facing his parents’ divorce. But even if Boy’s testimony were interpreted to mean that he wants to live with his mother, the feelings of young children are typically given less weight than feelings of those who are mature. Consequently, it is highly unlikely that Boy’s statement would be sufficient to qualify as a substantial change of circumstance. *See, e.g., Mulkey-Yelverton v. Blevins*, 884 P.2d 41, 43-44 (Wyo. 1994); *Butland* (whether child’s views qualify as a substantial change of circumstance depends upon the “depth, sincerity, and the extent they reflect changed circumstances within the parent-child relationship or relationship between the parties”).

Point Two: Because the parents did not agree to joint custody and had a high-conflict (25-35%) relationship, an appellate court would likely find that joint custody was not in Boy’s best interests.

Even if there is a substantial change in circumstances, a court may not modify a custody order unless the change will serve the child’s best interests. *See* UMDA § 409(b). It is generally understood that requiring hostile parents to share custody can be harmful to children. Thus, “[w]ith few exceptions, courts and commentators agree that joint custody is a viable option only for parents who are able and willing to cooperate with one another in making decisions for their child.” *Taylor v. Taylor*, 508 A.2d 964, 971 (Md. 1986). *See also Braiman v. Braiman*, 378 N.E.2d 1019, 1020-21 (N.Y. 1978); *Word v. Remick*, 58 S.W.3d at 426.

Most courts will not impose joint custody on unwilling parents. Even in states that do permit the imposition of joint custody over a parent's objection, a court may not order joint custody unless it finds that this arrangement is in the child's best interests. In making such an assessment, it would be reversible error if the court did not consider the extent of parental conflict and the likelihood of achieving both cooperation between the parents and a stable living situation for the child. *See* Annotation, *Propriety of Awarding Joint Custody of Children*, 17 A.L.R. 4TH 1013 (1982 & Supp.).

The joint custody order in this case also fails to address the basis for Wife's modification petition. Boy will still be living in the same home with Husband's nonmarital cohabitant for substantial periods of time.

An appellate court is thus likely to find that the trial court erred both in modifying the custody decree and in ordering joint custody.

DECEDENT'S ESTATES

Question 4 Analysis

- Legal Problems:
- (1) Did Clara survive Decedent such that Decedent's estate passes under Clara's will to Son-in-Law?
 - (2) Is Half-Sister an heir of Decedent?
 - (3) Is Adopted-Sister an heir of Decedent?
 - (4) Does the \$90,000 gift to Brother reduce Brother's share of Decedent's estate?
 - (5) Is Gramps entitled to any share of Decedent's estate?

DISCUSSION

Summary: Under the Uniform Simultaneous Death Act, Clara is deemed to have predeceased Decedent. Likewise, Clara predeceased Decedent under the 120-hour survivorship rule of the Uniform Probate Code (UPC). Therefore, Son-in-Law cannot claim any share of Decedent's estate. Decedent's heirs are his siblings: Brother, Half-Sister, and Adopted-Sister. However, their respective shares of Decedent's estate may differ depending upon underlying state law. The gift to Brother is not an advancement and thus does not reduce Brother's share of Decedent's estate. If Half-Sister takes an equal share, then Brother, Half-Sister, and Adopted-Sister are each entitled to \$100,000. Gramps would take only in a state determining heirship under the civil law method of consanguinity, which very few states apply.

Point One: (30-40%) Under the Uniform Simultaneous Death Act, there is a presumption that Clara predeceased Decedent and there is no evidence here to rebut that presumption. Likewise, under the UPC's 120-hour survivorship rule, Clara predeceased Decedent because she did not survive him by 120 hours. Thus, Son-in-Law is not entitled to any share of Decedent's estate.

Son-in-Law, as the sole beneficiary under Clara's will, would be entitled to Decedent's estate only if Clara had been entitled to inherit Decedent's estate. Clara would be an heir of Decedent only if she survived Decedent, because an heir must be alive at the time of the intestate's death. However, in a situation such as this one, where the two decedents were killed in the same traffic accident, Clara is deemed to have predeceased Decedent if there is insufficient evidence that she and Decedent died other than simultaneously. Unif. Simul. Death Act § 2. Since the evidence here

is insufficient to establish that they did not die simultaneously, under the Uniform Act, Clara is deemed to have predeceased Decedent.

While it might be argued that Clara survived because the truck hit her car from the rear and presumably hit Decedent first, it is also possible that the mere impact at the rear of Clara's car was sufficient to cause both their deaths. Furthermore, the only direct evidence of their deaths was that neither appeared to be alive at the scene of the accident. Thus, there is no direct evidence to establish that Clara survived Decedent. The fact that Decedent was declared dead first should not be controlling because the declarations of death were made simply in the order in which they were removed from the ambulance, and the factual evidence supports the conclusion that neither was alive when they were placed into the ambulance.

Under § 2-104 of the UPC, Clara is also not an heir of Decedent because she failed to survive him by 120 hours.

Point Two: Half-Sister is an heir of Decedent. Depending on state law, she is entitled to either (10-20%) the same share as a whole sibling or a lesser share.

Decedent's heirs will be the descendants of his deceased parents and perhaps Gramps. *See* Point Five. The issue therefore arises whether siblings of the half-blood and adopted siblings inherit along with siblings of the whole blood.

Half-Sister and Decedent are half-bloods because they share only one common parent. Under § 2-107 of the UPC, relatives of the half-blood inherit the same share as relatives of the whole blood. Thus, Half-Sister would take \$100,000.

However, in some jurisdictions they inherit a smaller share. *See, e.g.*, Iowa Code § 633.219.

Point Three: Adopted-Sister is an heir of Decedent. (20-30%)

At common law, an adopted child could not take from or through an adopting parent. Thus, at common law, Adopted-Sister would not be Decedent's heir. By the end of the twentieth century, motivated by a policy to treat the adopted child as part of the adopting parents' nuclear family, most state laws were changed to provide that an adopted child is treated as a biological child for purposes of inheritance. Thus, under the UPC, Decedent's estate is distributed equally to the descendants of his deceased parents. *See* UPC § 2-103(3). The descendants of Decedent's parents include both their biological and adopted children. *See* UPC § 2-114(b). Thus, Adopted-Sister would take \$100,000.

Point Four: Decedent's lifetime gift to Brother is not an advancement and thus does not reduce
(20-30%) Brother's share of Decedent's estate.

At common law, a lifetime transfer to a child who would be the transferor's heir was treated as a down payment on the child's intestate share. Under the common-law rule, the gift to Brother would not be an advancement as Brother is not Decedent's child. *See generally* Joel C. Dobris, Stewart E. Sterk & Melanie B. Leslie, *ESTATES AND TRUSTS* 155 (2d ed. 2003); *see also* 755 Ill. Comb. Stat. 5/2-5.

Many states have broadened the common-law rule to include transfers to any person who is an heir. However, most states also provide that a lifetime transfer to a person who would be the transferor's heir is presumptively a gift and not an advancement. *See* UPC § 2-109.

States differ in what it takes to rebut the gift presumption. Some states permit any competent evidence to be used to rebut the presumption. Others have a heightened evidentiary requirement. For example, under the UPC, the presumption that a lifetime transfer was a gift can be rebutted by a contemporaneous writing of either the decedent or the donee stating either that the gift was an advancement or that it was to be taken into account in computing the distribution of the decedent's estate. UPC § 2-109. Here, however, there is neither a writing nor any other competent evidence that Decedent intended an advancement when he made the transfer to Brother. Consequently, the transfer to Brother would be treated as a gift, not an advancement, and Brother would take \$100,000 of Decedent's estate.

Lastly, in some states an advancement only occurs when the donee would have been an heir of the decedent at the time the transfer was made. *See, e.g.*, Iowa Code § 633.224. If that rule applies here, the transfer could not be an advancement because at the time Decedent transferred the money to Brother, Clara was living and thus would have been Decedent's only heir.

Point Five: Gramps is not entitled to receive any share of Decedent's estate unless heirship in
(5-15%) the state was determined under the civil law method of consanguinity.

Under the civil law method of consanguinity, Gramps as well as Decedent's siblings would be related to Decedent within the second degree of consanguinity and Gramps would share equally with the siblings in the estate. Most states have rejected this method of determining heirship. In those states, including all those that have adopted the UPC and those that follow the parentelic method of descent, Gramps would not be entitled to share in Decedent's estate.

AGENCY & PARTNERSHIP I.A, II.A, II.B

Question 5 Analysis

- Legal Problems:
- (1) Is Owen an independent contractor or a servant (employee) of Best Care?
 - (2) Did Owen have actual or apparent authority to bind Best Care to the contract to purchase the X-ray machine?
 - (3) Is Best Care liable to Anita's estate for Owen's negligence on an apparent (ostensible) agency theory?

DISCUSSION

Summary: Whether Owen is an independent contractor or a servant (employee) is a question of fact. The degree of control is generally the distinguishing factor between an independent contractor and a servant (employee). Traditionally, Owen would have been an independent contractor because Best Care did not retain substantial control over how Owen was to practice medicine; however, recent opinions have moderated this position and look to the right to control rather than actual exercise of control.

Best Care is not liable on the Vision-Owen contract. Owen lacked actual authority to enter into the contract with Vision on behalf of Best Care because Vision was not a vendor in City. Further, Best Care had made no manifestations to provide Vision with a reasonable basis to believe that Owen was acting as an agent of Best Care.

Even if Owen is an independent contractor, he appears to the outside world—and to Anita in particular—to be an employee of Best Care as a result of Best Care's representations made on the billboards. Because of this apparent (ostensible) agency, Best Care would be estopped from denying liability for Owen's negligence and Anita's resulting death.

Point One: Owen was probably an independent contractor and not an employee of Best Care,
(35-45%) but the facts could be argued differently.

Owen is either an independent contractor or a servant (employee). "An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent." RESTATEMENT (SECOND) OF AGENCY

§ 2(3). “A servant [employee] is an agent employed by a master [employer] to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.” *Id.* at § 2(2). A number of factors are relevant in distinguishing an independent contractor from a servant. The crucial factor is the extent of control that the employer may exercise over the details of the work. *See* RESTATEMENT (SECOND) OF AGENCY § 220. Traditionally, doctors were considered independent contractors because of their high level of skill and the use of their independent judgment. *See* *McMurdo v. Getter*, 10 N.E.2d 139 (Mass. 1937). However, in recent years, courts have placed greater emphasis on the employer’s “right to interfere or control rather than [the employer’s] actual interference or exercise of control.” *See* *Knorp v. Albert*, 28 P.3d 1024 (Kan. Ct. App. 2001); *Kelly v. Rossi*, 481 N.E.2d 1340 (Mass. 1985). Other factors used to distinguish between a servant and an independent contractor are: (1) whether the one employed is engaged in a distinct occupation or business, (2) the skill required in the particular occupation, (3) who supplies the materials to perform and the place to perform the service, (4) method of payment, and (5) how the parties characterize the transaction. RESTATEMENT (SECOND) OF AGENCY § 220 (2); *Chapman v. Black*, 741 P.2d 998 (Wash. App. 1987).

These facts could be argued either way. Here, most of the factors suggest that Owen is an independent contractor and not an employee or servant of Best Care. In particular items 1, 2, and 5 of the contract favor characterizing Owen as an independent contractor, while items 4 and 6 of the contract indicate some level of oversight and control on the part of Best Care. The self-labeling in item 1 is evidence, but is not decisive.

Point Two: Owen had neither actual nor apparent authority to bind Best Care to the contract (30-40%) to purchase the X-ray machine. Thus, Best Care is not liable to Vision for breach of contract.

Agency arises where one person consents that another shall act on his behalf and, at least as respects matters within the agency, subject to his control. *See generally* RESTATEMENT (SECOND) OF AGENCY § 1(1).

Actual authority arises where the principal communicates the authority to act to the agent. *See generally* RESTATEMENT (SECOND) OF AGENCY § 7; William A. Gregory, *THE LAW OF AGENCY AND PARTNERSHIP*, 3d ed. § 14. A principal is bound by contracts entered into between an agent with actual authority and a third party. *See generally* RESTATEMENT (SECOND) OF AGENCY § 144.

Item 3 of the contract provides that “[e]ach doctor is authorized to purchase supplies and equipment for Best Care’s emergency room from a list of approved vendors located in City and within Best Care’s price guidelines.” This contract provision gave Owen actual authority to buy equipment for Best Care so long as it was within specified price guidelines from suppliers located in City for Best Care’s account. If Owen had acted within this authority, Best Care would be bound even if Vision was unaware of the authorization. However, Owen exceeded his authority by purchasing equipment from Vision, which was not an approved vendor and was located 450 miles away from City. Therefore, Best Care is not liable under the contract because Owen did not have actual authority.

Further, Best Care is not liable under the theory of apparent authority. Apparent authority 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. There are no facts to suggest that Best Care made any representations that would create a reasonable basis for Vision to believe that Owen was authorized to purchase the X-ray machine.

Point Three: Even if Owen is an independent contractor, Best Care is liable for Owen’s negligence if Anita reasonably believed that Owen was acting as an agent of Best Care.
(25-35%)

While a master is liable for the torts of its servant (employee) conducted within the scope of employment, a principal is not necessarily liable for the torts of its independent contractor agent. See RESTATEMENT (SECOND) OF AGENCY §§ 219, 250. A principal, however, may be estopped from denying liability for the torts of its independent contractor if the principal has created indicia of apparent authority. See RESTATEMENT (SECOND) OF AGENCY § 8B. This is sometimes referred to as the “holding out” theory or ostensible agency. See *Adamski v. Tacoma General Hospital*, 579 P.2d 970 (Wash. Ct. App. 1978) (The hospital may be liable under the “holding out” theory so long as the hospital acted in some way that leads the patient to a reasonable belief that he is being treated by a hospital employee.).

RESTATEMENT (SECOND) OF AGENCY § 267 provides that “one who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.” Here, Best Care publicly advertised, on billboards strategically placed throughout City, that people should come to its emergency room because “Best Care’s emergency room doctors are the absolute *best* and will really *care* for you.” Anita apparently saw and believed the slogan on the billboards because she expressly requested the ambulance driver to take her to Best Care because “Best Care’s emergency room doctors are the absolute best.” It would be reasonable for a prospective patient to conclude, based on the billboards, that all doctors in Best Care’s emergency room are employees of Best Care. As it was reasonable for Anita to believe that Owen was an agent of Best Care, under the general principle that a principal is liable for the torts committed by its agents Best Care would be liable to Anita’s estate for Owen’s actions (negligently severing an artery so that she bled to death).

NOTE: Most jurisdictions provide that a principal who hires an independent contractor to perform an “ultrahazardous” or “inherently dangerous” activity has a nondelegable duty to exercise due care to provide for the safety of persons who may be harmed by that activity. However, the usual tort and agency law definitions of ultrahazardous activity would not cover surgery, and there is no line of authority holding that a doctor’s performance of surgery falls within this rule.

FEDERAL CIVIL PROCEDURE I.A
CONFLICT OF LAWS IV.A, IV.B, IV.C

Question 6 Analysis

- Legal Problems:
- (1)(a) Were the requirements for federal diversity jurisdiction satisfied, even though Plaintiff and decedent Tortfeasor were citizens of the same state?
 - (1)(b) Was Executor precluded from raising the issue of subject matter jurisdiction because it failed to raise the issue earlier in the case and, in fact, conceded jurisdiction?
 - (2) When suit is filed to enforce a federal judgment in a state court, may the defendant collaterally attack the federal judgment for lack of subject matter jurisdiction?

DISCUSSION

Summary: The federal district court of State Y should have dismissed the action for lack of subject matter jurisdiction. The federal court lacked jurisdiction because there was no diversity. Defendant Executor's citizenship is deemed to be the same as decedent Tortfeasor's. Tortfeasor and Plaintiff were both citizens of State X. The lack of diversity defeats diversity subject matter jurisdiction and is not waivable. Defendant may raise subject matter jurisdiction at any time, and the federal court erred in denying the motion. But the issue of subject matter jurisdiction was fully litigated in federal court, so Defendant is precluded from raising it in a collateral attack on the judgment. The state court in State X must therefore enforce the federal judgment.

Point One (a): Even though Plaintiff and Executor were from different states, diversity jurisdiction was unavailable because, under 28 U.S.C. § 1332(c)(2), "the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent." Plaintiff and Executor's decedent, Tortfeasor, were both citizens of State X and consequently the requirements for diversity jurisdiction were not met.

Plaintiff's complaint included only a state-law negligence claim. The court, therefore, had subject matter jurisdiction only if diversity jurisdiction existed under 28 U.S.C. § 1332. To satisfy the diversity statute, the amount in controversy in the action must exceed \$75,000 and the parties must be diverse.

Plaintiff's complaint alleged damages in excess of \$500,000. The facts state that Plaintiff was severely injured and there is nothing to suggest that Plaintiff's damages claim was made in bad faith. Consequently, Plaintiff will be deemed to have satisfied the amount-in-controversy requirement of \$75,000. 28 U.S.C. § 1332(a).

The diversity of citizenship requirement, however, is not satisfied in this case. For purposes of determining citizenship, an individual is a citizen of the state in which he or she is domiciled. *See, e.g., Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974). Plaintiff and decedent, Tortfeasor, were both citizens of State X. Defendant, Executor, was a citizen of State Y. On the face of it, the plaintiff and defendant were citizens of different states, satisfying the diversity requirement. However, diversity jurisdiction should have been unavailable because Executor stands in the shoes of Tortfeasor and takes Tortfeasor's citizenship for purposes of diversity. Under 28 U.S.C. § 1332(c)(2), "the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent." Thus, because Executor was sued as a representative of Tortfeasor's estate, Executor was deemed to be a citizen of the same state as Tortfeasor, State X. Plaintiff, of course, is also a citizen of State X, so diversity jurisdiction should have been unavailable.

Accordingly, the district court erred in denying the motion to dismiss for lack of jurisdiction. The motion was proper when made, and it should have been granted because the parties were not diverse. (*See* Point One (b) below.)

Point One (b): Executor's motion to dismiss for lack of subject matter jurisdiction must be considered on the merits, even if it was raised a year after Executor answered and admitted jurisdiction.
(15-25%)

Although the motion to dismiss for lack of subject matter jurisdiction was filed a year after Executor's answer to the complaint admitted the existence of jurisdiction, the court was nevertheless obliged to consider the motion on its merits. The defense of lack of subject matter jurisdiction is not waivable and may be raised "*whenever* it appears by suggestion of the parties . . . that the court lacks jurisdiction of the subject matter." Fed. R. Civ. P. 12(h)(3) (emphasis added). Accordingly, the court was obliged to consider the merits of Executor's jurisdictional challenge.

Point Two: The state court is required to give the federal court judgment the same credit it would receive in federal court. Because Executor litigated the issue of subject matter jurisdiction before the federal court, lost, and did not appeal, Executor is precluded from relitigating the issue of jurisdiction in state court.
(50-60%)

State courts are required to give full faith and credit to the judgments of other states. U.S. Const. art. IV, §1. Likewise, state, federal, and territorial courts are required to give state court judgments the same credit that they would receive in the courts of the rendering state. 28 U.S.C. § 1738. Although neither Article IV nor the full faith and credit statute explicitly requires state courts to honor federal judgments, "it is well recognized that the same compulsion controls and thus state courts must treat federal judgments as those judgments would be treated by the federal

courts themselves.” Jack Friedenthal et al., CIVIL PROCEDURE § 14.15 at 711 (3d ed. 1999) (footnote omitted); *see also Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938).

In *Durfee v. Duke*, 375 U.S. 106, 111 (1963), the United States Supreme Court announced the “general rule that a judgment is entitled to full faith and credit even as to questions of jurisdiction when the second court’s inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.” *See also Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 78 (1939). Here, Executor raised the lack of subject matter jurisdiction in the federal court action. The issue was briefed, argued, and decided. Although the court’s decision on the issue was mistaken, no appeal was taken and the court’s judgment became final. If the second suit had been filed in federal court, the doctrine of issue preclusion or collateral estoppel would bar the defendant from relitigating the issue of subject matter jurisdiction since the identical issue was fully and fairly litigated in the first suit. Full faith and credit requires that the federal judgment have the same effect in the state court. Thus, the state court should enforce the federal judgment notwithstanding the challenge to the federal court’s subject matter jurisdiction. If Executor had wished to continue the jurisdictional challenge, Executor should have filed an appeal from the decision of the federal district court.

NOTE: The U.S. Supreme Court has ruled that the preclusive effect of the judgment of a federal court sitting in diversity should be determined by the law of the state in which the federal court sits. *See Semtek Int’l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001). Thus, the preclusion rules of State Y would determine whether the State X court should enforce the federal judgment. It is likely, however, that State Y would follow a rule of jurisdictional finality similar to the rule in *Durfee v. Duke*: if the question of subject matter jurisdiction was fully and fairly litigated, the judgment is not subject to collateral attack. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 12.

SECURED TRANSACTIONS II.D, IV.J, V.A.1; SALES VI.C, VII. B

Question 7 Analysis

- Legal Problems:
- (1) Did Finance Co.'s letter to Buyer informing it of the assignment of the purchase agreement to Finance Co. obligate Buyer to make future payments under the contract directly to Finance Co.?
 - (2) Can Buyer reduce the amount it owes Finance Co. by subtracting the expenses it incurred to add the attachments to the excavator?

DISCUSSION

Summary: Once Finance Co. notified Buyer of the assignment of the right to receive payment and demanded payment of the balance, Buyer was obligated to pay Finance Co., notwithstanding Seller's instruction to the contrary. However, Buyer had the right to offset against Finance Co. its damages for Seller's breach of contract, even though Buyer had accepted delivery of the excavator.

Point One: (45-55%) Once Finance Co. properly notified Buyer of the assignment of the purchase agreement and instructed Buyer to make payments directly to Finance Co., Buyer was obligated to make all payments under the contract to Finance Co.; Buyer's payments to Seller did not discharge that obligation.

As a result of the security agreement signed by Seller, Finance Co. had a security interest in all of Seller's accounts and chattel paper. Moreover, the security agreement expressly provided that payments arising from Seller's "accounts and chattel paper" had been assigned to Finance Co. Under Article 9 of the Uniform Commercial Code, a security interest in "accounts" covers any "right to payment of a monetary obligation, whether or not earned by performance, . . . for property that has been or is to be sold." UCC § 9-102(a)(2). Consequently, Finance Co.'s security interest covered the amount owed by Buyer to Seller pursuant to Buyer's agreement to purchase the excavator.

Article 9 gives a secured party or assignee of an account (i.e., Finance Co.) the right to collect directly from the account debtor (i.e., Buyer) in the event of a default by the debtor (i.e., Seller). UCC § 9-607(a)(1). To exercise that right effectively, Finance Co. must send an authenticated notification to the account debtor informing the account debtor that the amount due has been assigned and that payment is to be made to the assignee. The facts state that Finance Co. properly notified Buyer of the assignment of Seller's right to receive payment and directed Buyer to make future payments to Finance Co. *See* UCC § 9-406(a), cmt. 2. *See generally* James J. White & Robert S. Summers, UNIFORM COMMERCIAL CODE § 25-5 (5th ed. 2000).

Once an account debtor receives proper notification to make future payments directly to an assignee, the account debtor may discharge its payment obligation *only* by payment to the assignee. Payments made to the assignor do not result in discharge. UCC § 9-406(a).

The fact that Seller told Buyer to disregard the notice from Finance Co. is no defense. Proper notice from Finance Co. (assignee) is all that is required to obligate Buyer to make payment directly to Finance Co., and nothing in the UCC allows an assignor like Seller to interfere with the rights of the assignee in this way. Rather than ignoring the assignment and relying on Seller for instructions, Buyer should have demanded proof of the assignment from Finance Co. Had it done so, Buyer could have safely paid Seller until reasonable proof was offered. *See* UCC § 9-406(b)(c). What Buyer cannot do is what it did here—ignore the notification of the assignment and continue to pay Seller.

Consequently, Buyer was obligated to make the March and April payments to Finance Co., and it remains liable for those payments. Buyer was not discharged by reason of its payment to Seller. Buyer is also obliged to make the May payment to Finance Co., subject to an offset, as discussed below.

Point Two: Buyer can assert Seller's breach of contract as a defense to payment and offset its (45-55%) damages against the amount it owes Finance Co.

The rights of an assignee of an account (Finance Co.) are subject to “any defense or claim in recoupment arising from the transaction that gave rise to the contract.” UCC § 9-404(a)(1). The account debtor may, of course, waive the right to assert defenses against an assignee, but there is nothing in the facts to suggest that Buyer waived this right.

Here, the facts establish that Buyer has a defense against full payment of the contract price. Seller agreed to supply Buyer with an excavator that was specially equipped. Moreover, Seller agreed to supply the excavator by a particular date, when Seller knew that Buyer needed it to begin work. When that date arrived, the excavator had not been equipped as required by the contract. Buyer nevertheless took delivery of the excavator, despite its failure to conform to the contract.

When a buyer takes goods in spite of a known nonconformity with the contract, the buyer has accepted the goods for the purposes of sales law. UCC § 2-606. Acceptance ordinarily obligates a buyer to pay the contract price. UCC § 2-607. However, acceptance of nonconforming goods does not bar a remedy for breach, so long as the buyer notifies the seller of the breach within a reasonable time of its discovery. Here, Buyer notified Seller of the nonconforming nature of the excavator at the time it took possession of the equipment and told Seller it intended to offset its costs for the attachments. As a result, Buyer is entitled to assert its remedies for breach, despite its acceptance of the goods.

In general, Buyer's remedy is the recovery of damages for the nonconformity, defined as “the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.” UCC § 2-714(1). Moreover, Buyer “may deduct all or any part of the damages . . . from any part of the price still due,” so long as Buyer notifies Seller of the intention to do so. UCC § 2-717. Here, Buyer notified Seller of its intention in this regard.

Buyer's contract claims against Seller may be asserted against Finance Co., as assignee of the contract, to reduce the amount owed by Buyer. UCC § 9-404(b).

Under the contract, Buyer owes \$75,000 to Finance Co. (the amount of the March and April payments, which Buyer improperly sent to Seller, and the amount of the upcoming May payment). Buyer claims \$30,000 in damages from Seller's breach, and it may deduct that amount from the amount owed under the contract. *See generally* James J. White & Robert S. Summers, UNIFORM COMMERCIAL CODE § 10-2 (5th ed. 2000)(techniques for measuring damages under UCC § 2-714). Consequently, Buyer owes Finance Co. \$45,000.

NOTES