



July 2013 MEE Questions and Analyses



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*Used as one of the six questions on the July 2013 Uniform Bar Examination in Alabama, Arizona, Colorado, Idaho, Missouri, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming.

Preface

The Multistate Essay Examination (MEE) is developed by the National Conference of Bar Examiners (NCBE). This publication includes the questions and analyses from the July 2013 MEE. Each test includes nine 30-minute questions; user jurisdictions may elect which of the nine questions they wish to use. (Jurisdictions that administer the Uniform Bar Examination [UBE] use a common set of six MEE questions as part of their bar examinations.) In the actual test, the questions are simply numbered rather than being identified by area of law. The instructions for the test appear on page iii. For more information, see the *MEE Information Booklet*, available on the NCBE website at www.ncbex.org.

The model analyses for the MEE are illustrative of the discussions that might appear in excellent answers to the questions. They are provided to the user jurisdictions to assist graders in grading the examination. They address all the legal and factual issues the drafters intended to raise in the questions.

The subjects covered by each question are listed on the first page of its accompanying analysis, followed by roman numerals that refer to the MEE subject matter outline for that subject. For example, the Federal Civil Procedure question on the July 2013 MEE tested the following areas from the Federal Civil Procedure outline: I.A.1., B. & E., Jurisdiction and venue—Subject matter jurisdiction—Federal courts, Jurisdiction over parties, and Venue, forum non conveniens, and transfer. Subject matter outlines are included in the *MEE Information Booklet*.

Description of the MEE

The MEE consists of nine 30-minute essay questions, any of which a jurisdiction may select to include as part of its bar examination. (UBE jurisdictions use a common set of six MEE questions as part of their bar examinations.) It is administered by participating jurisdictions on the Tuesday before the last Wednesday in February and July of each year. The areas of law that may be covered by the questions on any MEE are Business Associations (Agency and Partnership; Corporations and Limited Liability Companies), Conflict of Laws, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Family Law, Federal Civil Procedure, Real Property, Torts, Trusts and Estates (Decedents' Estates; Trusts and Future Interests), and Uniform Commercial Code (Negotiable Instruments and Bank Deposits and Collections; Secured Transactions). Some questions may include issues in more than one area of law. The particular areas covered vary from exam to exam.

The purpose of the MEE is to test the examinee'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 examinee to demonstrate an ability to communicate effectively in writing.

Instructions

The back cover of each test booklet contains the following instructions:

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin.

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 your answer, simply draw a line through the material you wish to delete.

If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions.

Read each fact situation very carefully and do not assume facts that 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, a knowledge of 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.

Answer all questions according to generally accepted fundamental legal principles unless your jurisdiction has instructed you to answer according to local case or statutory law. (UBE instructions: Answer all questions according to generally accepted fundamental legal principles rather than local case or statutory law.)

July 2013 MEE

▶ *QUESTIONS*

Federal Civil Procedure

Agency and Torts

Family Law

Evidence

Negotiable Instruments

Corporations

Contracts

Real Property

Decedents' Estates

FEDERAL CIVIL PROCEDURE QUESTION

A woman was born and raised in the largest city (“the city”) of State A, where she also attended college.

Three years ago, the woman purchased a 300-acre farm and a farmhouse in neighboring State B, 50 miles from the city. She moved many of her personal belongings to the State B farmhouse, registered her car in State B, and acquired a State B driver’s license. She now spends seven months of the year in State B, working her farm and living in the farmhouse. She pays income taxes in State B, but not in State A, and lists State B as her residence on her federal income tax returns.

However, the woman has not completely cut her ties with State A. She still lives in the city for five months each year in a condominium that she owns. She still refers to the city as “home” and maintains an active social life there. When she is living on the farm, she receives frequent weekend visits from her city friends and occasionally spends the weekend in the city at her condominium. She is a member of a health club and a church in the city and obtains all her medical and dental care there. She is also registered to vote and votes in State A.

A food product distributor sells food items to grocery stores throughout a five-state region that includes States A and B. The distributor is a State C corporation. Its corporate headquarters are in State B, where its top corporate officers, including its chief executive officer (CEO), have their offices and staff. The distributor’s food processing, warehousing, and distribution facilities are all located in State A.

Three years ago, the woman and the distributor entered into a 10-year written contract providing that the woman would sell all the produce grown on her farm each year to the distributor. The contract was negotiated and signed by the parties at the distributor’s corporate headquarters in State B.

The woman and the distributor performed the contract for two years, earning her \$80,000 per year. Recently, the distributor decided that the woman’s prices were too high. At a meeting at its corporate headquarters, the distributor’s CEO asked the woman to drop her prices. When she refused, the CEO informed her that the distributor would no longer buy produce from her and that it was terminating the contract.

The woman has sued the distributor for anticipatory breach of contract. She seeks \$400,000 in damages. She has filed suit in the United States District Court for the District of State A, invoking the court’s diversity jurisdiction.

State A’s long-arm statute provides that “a court of this State may exercise personal jurisdiction over parties to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution.”

The distributor has moved to dismiss the woman’s action for lack of subject-matter jurisdiction and for improper venue.

1. Should the court grant the motion to dismiss for lack of subject-matter jurisdiction? Explain.
2. Should the court grant the motion to dismiss for improper venue? Explain.

AGENCY AND TORTS QUESTION

After a dump truck unloaded gravel at a road construction job site, the trucker negligently drove away with the truck bed still in a raised position. The raised truck bed hit an overhead cable, causing it to fall across the highway.

The telephone company that owned the fallen cable sent one of its employees to the scene in a company vehicle. The employee's responsibilities were expressly limited to responding to cable-damage calls, assessing damage, and reporting back to the telephone company so that a repair unit could be dispatched.

The foreman of the road construction job site asked the telephone company employee if the foreman's crew could lift the cable off the highway. Fearful that the cable might be damaged by traffic, the telephone company employee said, "Go ahead, pick it up. Just don't damage the cable." The foreman then directed his crew to stretch the cable over the highway so that traffic could pass underneath.

Shortly thereafter, a bus passing under the telephone cable hit the cable and dislodged it, causing the cable to strike an oncoming car. The driver lost control of the car and hit a truck carrying asphalt to the road construction site. As a result of the collision, hot asphalt spilled and severely burned the foreman.

The foreman is now threatening to sue the telephone company on the ground that it is responsible for its employee's negligence in authorizing the road construction crew to stretch the cable across the highway. The telephone company argues that, even assuming that its employee was negligent, the telephone company is not liable because:

1. the telephone company employee's acts were outside the scope of his employment and thus cannot be attributed to the telephone company;
2. there is no other agency theory under which the foreman could hold the telephone company liable for its employee's acts; and
3. the telephone company employee's acts were not the proximate cause of the foreman's injuries.

Assess each of the telephone company's responses.

FAMILY LAW QUESTION

Seven years ago, a married couple had a daughter.

Recently, the mother joined a small religious group. The group's members are required to contribute at least half their earnings to the group, to forgo all conventional medical treatments, and to refrain from all "frivolous" activities, including athletic competitions and sports. The mother has decided to adhere to all of the group's rules.

Accordingly, the mother has told the father that she has given half of her last two paychecks to the group and that she plans to continue this practice. The father objects to this plan and has accurately told the mother that "we can't pay all the bills without your salary."

The mother has also said that she wants to stop giving their daughter her prescribed asthma medications. The father opposes this because the daughter has severe asthma, and the daughter's physician has said that regular medication use is the only way to prevent asthma attacks, which can be life-threatening. The mother also wants to stop the daughter's figure-skating lessons. The father opposes this plan, too, because their daughter loves skating. Because the father works about 60 hours per week outside the home and the mother works only 20 hours, the father is afraid that the mother will do what she wants despite his opposition.

The mother, father, and daughter continue to live together. They do not live in a community property jurisdiction.

1. Can the father or the state child welfare agency obtain an order
 - (a) enjoining the mother from making contributions from her future paychecks to the religious group? Explain.
 - (b) requiring the mother to take the daughter to skating lessons? Explain.
 - (c) requiring the mother to cooperate in giving the daughter her prescribed asthma medications? Explain.

2. If the father were to file a divorce action against the mother, could a court award custody of the daughter to him based on the mother's decision to follow the religious group's rules? Explain.

EVIDENCE QUESTION

The city police department received a 911 call regarding a domestic violence incident. The caller said that she was staying with her sister and her sister's boyfriend. The caller said that she had called the police because her sister's boyfriend was becoming violent. The police department records all 911 calls. The relevant portions of the 911 recording are as follows:

Caller: My sister's boyfriend is out of control right now. He just threw a broken beer bottle at my sister. It hit her on the arm. Now he's holding a chair like he's going to throw that at her, too.

Police Dispatcher: Where is your sister?

Caller: She's running toward the bathroom.

Police Dispatcher: Is she injured?

Caller: I see some blood on her arm.

Police Dispatcher: Does he have a gun?

Caller: I don't see a gun.

A nearby police officer arrived on the scene five minutes after the caller telephoned 911. The police officer found the boyfriend pacing in the front yard and ordered him to sit in the rear seat of the patrol car. The boyfriend sat in the patrol car, and the officer locked the door from the outside so that the boyfriend would stay in the car while the officer spoke to the sister.

When the sister saw that her boyfriend was locked in the patrol car, she came out on the porch to speak with the officer. The sister was in a highly agitated and emotional state, and she had several fresh cuts on her right arm. The officer asked her how she got the cuts. The sister replied, "My boyfriend threw a bottle at me which cut my arm." The sister declined the officer's offer of medical assistance but said that she wanted to press charges against her boyfriend. The sister was in tears throughout her conversation with the officer.

The boyfriend was charged in state court with battery and disorderly conduct. The prosecutor made every effort to secure the appearance of both the sister and the caller at trial, but when the trial began, the sister and the caller did not appear.

The prosecutor is attempting to convict the boyfriend without trial testimony from the sister or the caller. The prosecutor plans to introduce the caller's statements to the police dispatcher and to call the officer to testify and to repeat the statements the sister made to him at her house to prove that the boyfriend attacked the sister.

The 911 recording containing the caller's statements to the police dispatcher has been properly authenticated. Defense counsel has objected to the admission of (1) the caller's statements to the police dispatcher on the 911 recording and (2) the officer's testimony repeating the sister's statements to the officer (at her house). Defense counsel asserts the following:

- a) The caller's statements to the police dispatcher are inadmissible hearsay.
- b) Admission of the caller's statements to the police dispatcher would violate the boyfriend's constitutional rights.
- c) The officer's testimony repeating the sister's statements is inadmissible hearsay.
- d) Admission of the officer's testimony repeating the sister's statements would violate the boyfriend's constitutional rights.

This jurisdiction has adopted rules of evidence identical to the Federal Rules of Evidence and interprets the provisions of the Bill of Rights in accordance with relevant United States Supreme Court precedent.

How should the trial court rule on each defense objection? Explain.

NEGOTIABLE INSTRUMENTS QUESTION

A man asked a friend for a loan. The friend was willing to make the loan so long as the man paid interest at a rate that would enable the friend to make a profit on the transaction. After some discussion, they agreed that the friend would lend the man \$4,000, to be repaid one month later together with interest at a rate two percentage points higher than the “prime interest rate” charged by First Bank. (First Bank’s prime interest rate is reported daily in the financial press.)

At dinner that evening, the friend handed the man a check for \$4,000, payable to his order, that was drawn on the friend’s account at First Bank. In exchange, the man handed the friend a document signed by him and dated that day. The document read, in its entirety, as follows: “The undersigned hereby agrees to pay to bearer the sum of \$4,000, plus interest at a rate two percentage points higher than the prime interest rate charged by First Bank on the date hereof, no later than one month from the date hereof.”

After dinner, as the two waited for a bus together, they were robbed. The robber took the check from the man and the document described above from the friend.

The next day, the robber forged the man’s signature on the back of the check and then sold the check to a check-cashing business, handing the check to the manager of the business in exchange for \$3,500 in cash. The business and its employees acted in good faith and had no reason to believe that the check did not belong to the robber or that the man’s signature had been forged. The following day, the robber sold the document that he had stolen from the friend to a local investor, handing the investor the document in exchange for \$2,500 in cash. The investor acted in good faith and had no reason to believe that the document did not belong to the robber.

A few days later, the manager of the check-cashing business took the check to First Bank, handed the check to the teller, and asked that the amount of the check be paid. But the teller refused to pay because the friend had contacted First Bank and stopped payment on the check. Accordingly, the teller handed the check back to the manager.

On the date on which the document signed by the man called for him to pay, the investor contacted the man and demanded payment. The man responded that he would not pay because his promise had been made to his friend, not to the investor, and, moreover, he should not have to pay because the friend’s check had been stolen from him with the result that he never received the money that his friend was supposed to loan him.

1. Does the check-cashing business have a right to recover the amount of the check from the friend? Explain.
2. Is the document signed by the man a negotiable instrument? Explain.
3. Assuming that the document is a negotiable instrument, does the investor have a right to recover from the man the amount that the man promised to pay in the document he gave to the friend? Explain.

CORPORATIONS QUESTION

On February 2, Alice, Bob, and Carla formed ABC Hospitality, LLC (ABC), a member-managed limited liability company, for the purpose of building, owning, and running a 100-room luxury hotel in their hometown. ABC soon began to experience unexpected financial problems, prompting Bob to look for other investment opportunities.

On March 10, Bob told Alice and Carla that, although he would remain as a member of ABC, he would no longer contribute any capital to ABC, and he was also becoming a co-owner of the Metro Inn, an existing 200-room hotel in the same town near the ABC hotel project. Alice and Carla objected to Bob's plan, fearing that he might put the interests of the Metro Inn ahead of his existing obligations to ABC. In response, Bob cited § 5.1 of ABC's Operating Agreement, which states as follows:

Members of ABC shall not in any way be prohibited from or restricted in managing, owning, or otherwise having an interest in any other business venture that may be competitive with the business of ABC.

Shortly after Bob became a co-owner of the Metro Inn, ABC's financial situation worsened. Alice and Carla worried that ABC would not be able to pay a bill it owed to its concrete supplier. Alice proposed to pay the concrete supplier's bill from her own personal funds and then obtain reimbursement from ABC once the hotel project was completed. Alice wanted to do this so that she could file a personal financial statement which underreported her assets and so enable her son to qualify for student financial aid. Carla agreed to this proposal. Alice and Carla also agreed to alter ABC's financial records so that it would appear as if ABC had paid the concrete supplier's bill out of its own accounts, without showing the obligation to reimburse Alice for that amount.

In the weeks following Alice's payment to the concrete supplier, several other of ABC's bills became due. Alice tried to pay as many of these bills as she could using her personal funds, but despite her best efforts, it soon became clear that ABC was rapidly approaching insolvency. On August 15, the hotel's designer left a message for Carla seeking payment of an overdue bill.

Alice and Carla were concerned about the solvency of the company. Without responding to the designer, Alice and Carla, acting with Bob's consent, sold all of ABC's property and remaining assets. Alice and Carla each kept one-third of the sale proceeds and gave the remaining one-third to Bob. They did not file articles of dissolution with the state. When the designer later called Carla again about the bill, she responded that ABC had been "dissolved" and that no payment would be forthcoming.

1. Did Alice and Carla have any legal basis to object to Bob's co-ownership of the Metro Inn? Explain.
2. Under what theory or theories could Alice, Bob, or Carla be personally liable to the designer? Explain.

CONTRACTS QUESTION

On May 1, a manufacturer and a chef met at a restaurant trade show. The manufacturer showed the chef some carving knives that were on sale for \$100 each. After examining the knives, the chef said, "I love these knives! I'll take 10 of them. Please send them to my restaurant within the month. As soon as I receive them, I'll send you a check for \$1,000." The manufacturer said, "I'll ship the 10 knives to your restaurant in a few weeks," and he took the chef's address for shipping purposes.

On May 15, the manufacturer sent six knives to the chef. Enclosed in the shipping box was a document on the manufacturer's letterhead that stated in its entirety: "It is a pleasure to do business with you. Enclosed, pursuant to our agreement, are six knives. Please remit \$600 at your earliest convenience."

On May 17, the chef sent the manufacturer a check for \$600 and included in the envelope an unsigned note to the manufacturer, handwritten on plain paper, requesting the remaining four knives. The manufacturer did not respond to the note.

The knives were particularly well-suited for the chef's uses, and the \$100 price was a bargain, so the chef was very eager for the manufacturer to deliver the remaining four knives. On June 17, the chef wrote to the manufacturer claiming that the manufacturer was contractually bound to sell the chef 10 knives and that the manufacturer had breached that contract by furnishing only 6 knives. The manufacturer did not reply to the chef's letter.

Is there an enforceable contract against the manufacturer that binds him to sell 10 knives to the chef? Explain.

REAL PROPERTY QUESTION

Two years ago, a builder constructed a house for a woman and conveyed that house to her for \$300,000 at the closing by a warranty deed, which was promptly recorded. The sale contract contained no express warranties relating to the condition of the house. To finance the purchase, the woman borrowed \$200,000 from a local bank secured by a mortgage on her new house. The mortgage note provided that in the event of the woman's failure to make two consecutive monthly mortgage payments, the balance would become immediately due and payable. The mortgage was promptly recorded.

One year ago, the woman accepted a new job and moved. At that time, her house was worth \$360,000 and there was a balance on the mortgage of \$195,000. She sold the house to a man and delivered a quitclaim deed to him in exchange for \$160,000. The quitclaim deed was promptly recorded and made no reference to the woman's mortgage obligation. The mortgage obligation was not discharged at the closing. However, the man immediately began to make the woman's monthly mortgage payments to the bank after the closing.

Nine months ago, water seeped into the basement of the house during a major storm, causing substantial damage. It is undisputed that the seepage was due to defective concrete used by the builder and not to any negligence on the builder's part. The man called the builder, told him about the seepage, and demanded that the builder fix the concrete. The builder responded: "That's your problem." The man then repaired the concrete at a cost of \$80,000.

Thereafter, the man sued the builder to recover the \$80,000 he had spent to repair the concrete. While the case was pending, the man stopped making mortgage payments. The bank sued the man to foreclose on the mortgage and, if necessary, obtain a deficiency judgment against him on the note if the sale proceeds were insufficient to discharge the mortgage debt. The man has joined the woman as a third-party defendant in the lawsuit.

1. Is the man likely to prevail against the builder to recover the \$80,000 he spent to repair the concrete? Explain.
2. Is the man personally liable for the outstanding balance on the mortgage note between the woman and the bank? Explain.
3. If the bank is successful in its foreclosure action, will the man be able to recover damages from the woman? Explain.

DECEDENTS' ESTATES QUESTION

Twenty years ago, John and Mary were married. One month before their wedding, John and Mary signed a valid prenuptial agreement in which each of them waived "any property rights in the estate or property of the other to which he or she might otherwise be legally entitled upon the termination of their marriage by death or divorce."

Seventeen years ago, John executed a valid will, which provided as follows:

I, John, leave my entire estate to my wife, Mary. However, if I should hereafter have children, then I leave three-fourths of my estate to my wife, Mary, and one-fourth of my estate to my children who survive me, in equal shares.

Fifteen years ago, John had an extramarital affair with Beth, who gave birth to their child, Son. Both Beth and John consented to Son's adoption by Aunt. At the time of the adoption, Beth, John, and Aunt agreed that Son would not be told that he was the biological child of Beth and John.

Three years ago, Aunt died, and Son moved into John and Mary's home. At that time, John admitted to Mary that he had had an extramarital affair with Beth which had resulted in Son's birth.

Three months ago, Mary filed for divorce. Nonetheless, she and John continued to live together.

One month ago, before John and Mary's divorce decree was entered, John was killed in a car accident. John's will, executed 17 years ago, has been offered for probate. John's will did not designate anyone to act as the personal representative of his estate.

John was survived by Mary, Son, and John's mother.

1. To whom should John's estate be distributed? Explain.
2. Who should be appointed as the personal representative of John's estate? Explain.

July 2013 MEE

▶ *ANALYSES*

Federal Civil Procedure

Agency and Torts

Family Law

Evidence

Negotiable Instruments

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Real Property

Decedents' Estates

FEDERAL CIVIL PROCEDURE ANALYSIS

(Federal Civil Procedure I.A.1., B. & E.)

ANALYSIS

Legal Problems

(1)(a) What requirements must be met for a federal court to have jurisdiction in a case based on diversity?

(1)(b) For purposes of diversity jurisdiction, is the woman a citizen of State B, where she maintains a home and conducts her farming business, or of State A, where she has lived for most of her life and to which she returns for several months each year, and which she calls “home”?

(1)(c) For purposes of diversity jurisdiction, is the distributor a citizen of State A (where it has its food processing, warehousing, and distribution facilities), State B (where it has its corporate headquarters), and/or State C (where it is incorporated)?

(2) Is venue proper in State A, even though the acts and omissions giving rise to the woman’s claim occurred in State B and the distributor’s corporate headquarters and state of incorporation are outside State A?

DISCUSSION

Summary

Because the woman’s claim is based on state law and the amount in controversy exceeds the jurisdictional amount (\$75,000), the key issue in determining whether subject-matter jurisdiction exists is whether the plaintiff, the woman, and the defendant, the distributor, are citizens of different states. The woman is most likely a domiciliary and therefore a citizen of State A, where she has lived continuously all her life and which she still calls “home.” While an argument can be made that she has become a citizen of State B, the fact that she spends the majority of her time each year in State B and treats it as her residence for certain purposes probably does not amount to an abandonment of her State A domicile under the circumstances.

For diversity purposes, corporations may have dual citizenship. The distributor is a citizen of State C, where it is incorporated. The distributor is also a citizen of State B, the state where it has its principal place of business. Because the distributor is a citizen of States B and C, and the woman is probably a citizen of State A, complete diversity exists and the court should not dismiss the action for lack of jurisdiction.

Assuming that diversity jurisdiction exists, venue is proper in State A, and the court should not dismiss for improper venue. In an action founded solely on diversity, venue is proper in a district in which the defendant resides. Corporate defendants are deemed to “reside” in any state where they are subject to personal jurisdiction. Although the distributor is incorporated in State C and its headquarters are in State B, it conducts sufficient business activities to subject it to personal jurisdiction in State A, and thus is deemed to reside there for venue purposes.

Point One(a) (10%)

A federal court has jurisdiction of a complaint based on state law if the amount in controversy exceeds \$75,000 and there is complete diversity between the parties. Here, the amount-in-controversy requirement is satisfied.

Federal district courts have original jurisdiction over state-law–based suits involving citizens of different states where the amount in controversy exceeds \$75,000. 28 U.S.C. § 1332. In determining the amount in controversy, a court will accept the plaintiff’s good faith allegations as to damages unless it appears to a legal certainty that the plaintiff cannot recover that amount. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938). Here, the woman’s claim for \$400,000 in damages appears to have been made in good faith, given that the woman had earned \$80,000 a year in the first two years of the contract and that the distributor breached the contract with eight years remaining. Certainly, there is nothing to suggest that the woman will recover less than \$75,000 to a legal certainty. Accordingly, the key issue is whether the woman and the distributor are citizens of different states.

Point One(b) (35%)

The woman is probably a citizen of State A. But an argument can be made that she has acquired a new domicile in State B and therefore has become a citizen of State B.

To determine an individual U.S. citizen’s state citizenship for diversity purposes, courts look to the state of the individual’s domicile when the complaint was filed. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830–31 (1989). A person’s domicile is generally determined by two elements: (1) residence in a state, and (2) an intent to remain in that state. In cases like this one, where an individual resides for extended periods in more than one state, the determination of domicile often turns on “a complex inquiry into an individual’s intent.” *Ner Tamid Congregation of North Town v. Krivoruchko*, 620 F. Supp. 2d 924, 931 (N.D. Ill. 2009). Courts look at a variety of facts, none of which is dispositive on its own (and many of which can be manipulated by the individual concerned) in an attempt to determine the individual’s true, fixed, permanent home and the place to which the individual intends to return when absent. Relevant facts include the individual’s residence, the location of the person’s property, the person’s voting behavior, the location of bank accounts, the individual’s memberships and personal associations, automobile registration, place of employment, and other matters. 13E CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3612 (3d ed. 2009).

It is unclear whether the woman is domiciled in State A or State B. The woman was clearly a domiciliary of State A, the only state in which she had ever lived, until she bought the farm and farmhouse in State B. Despite her purchase of the State B farm, she maintains many social connections with State A, continues to secure medical and dental treatment in State A, returns to State A to live every winter, and continues to vote and attend church there. One could argue that these facts show that the woman never intended to abandon her State A domicile, but always retained the intent to return there.

On the other hand, the woman did acquire property in State B, she moved many of her personal belongings there, and she lives there for most of the year. Moreover, she took several steps that suggest her intent to establish a State B domicile, including registering her car there, obtaining a State B driver’s license, filing state income taxes only in State B, and listing State B as her residence on her federal tax returns.

Although the matter is debatable, the facts suggest that the woman did not move to State B with the requisite intent to remain there. Instead, it appears that she always intended that State A would remain her home, although her livelihood requires her presence in State B for much of the year. In cases of this sort, some courts seek to determine the “center of gravity” of an individual’s life. *See, e.g., Galva Foundry Co. v. Heiden*, 924 F.2d 729 (7th Cir. 1991). Despite the fact that the woman lives in State B for two months more of the year than she lives in State A, it appears that the “center of gravity” of her life is State A, and that a court would conclude that she is a domiciliary and therefore a citizen of State A.

[NOTE: Examinees who demonstrate an understanding of the complexity of this issue, and who use the key facts to develop a cogent argument, should receive full credit regardless of their conclusion on this point.]

Point One(c) (25%)

The distributor is a citizen of both State C, where it is incorporated, and State B, where it has its principal place of business (i.e., where its corporate headquarters are located).

By statute, a corporation is a citizen both where it is incorporated and where it has its principal place of business. 28 U.S.C. § 1332(c)(1). The distributor is incorporated in and therefore is a citizen of State C. So the question is where the distributor has its principal place of business.

Until the Supreme Court’s decision in *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), the federal courts were divided about how to identify a corporation’s principal place of business. *See generally* JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 36–37 (4th ed. 2005). Some courts used a nerve-center test that focused on where the corporation’s decision-making authority was located. Other courts applied a corporate-activities/operating-assets test that focused on where a corporation’s business activities occurred.

In *Hertz Corp.*, the Supreme Court decided that a corporation’s principal place of business for diversity purposes would be deemed to be “the place where a corporation’s officers direct, control, and coordinate the corporation’s activities,” its so-called “nerve center.” 559 U.S. at 92–93. In this case, the distributor’s corporate headquarters are in State B, its top officers have their offices and staff in State B, and its decisions regarding the contract with the woman were made in State B. All of these facts suggest that State B is the place where the corporate officers “direct, control, and coordinate” the distributor’s activities, and that State B is therefore the distributor’s principal place of business.

The distributor, therefore, is a citizen of State B (as well as of State C). If the woman is a domiciliary of State A (*see* Point One(b)), there is complete diversity of citizenship and the motion to dismiss for lack of jurisdiction should be denied.

[NOTE: If an examinee previously concluded that the woman is a domiciliary of State B, then that examinee should also conclude that the action must be dismissed for lack of subject-matter jurisdiction because there would not be diversity of citizenship between the woman and the distributor.]

Point Two (30%)

Because the distributor has sufficient contacts with State A to be subject to personal jurisdiction there, the distributor resides in State A for purposes of venue.

The woman brought this action in the United States District Court of State A. The issue, therefore, is whether a State A venue can be justified under the general federal venue statute. When, as here, a federal court’s jurisdiction is based on diversity, 28 U.S.C. § 1391(b) provides

Federal Civil Procedure Analysis

that venue is proper (1) in any district where a defendant resides if all defendants reside in the same state, or (2) in any district where a substantial part of the acts or omissions giving rise to the action occurred, or (3) in any district where any defendant is subject to personal jurisdiction, if there is no other district in which the action might be brought.

A State A venue is appropriate if the distributor “resides” in the District of State A for purposes of the venue statute. According to 28 U.S.C. § 1391(c), a corporation resides where it is subject to personal jurisdiction at the time the action is commenced. So the question is whether the distributor is subject to personal jurisdiction in State A.

Rule 4(k) indicates that a federal district court may exercise personal jurisdiction to the same extent as a state court of general jurisdiction in the state where the district court sits. State A’s long-arm statute extends jurisdiction as far as the Due Process Clause of the 14th Amendment allows. The Due Process Clause permits the exercise of personal jurisdiction over out-of-state defendants like the distributor if they have minimum contacts with the forum state such that the exercise of jurisdiction would not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The nature of the contacts required depends on whether the suit arises out of or is related to the defendant’s contacts with the forum state.

Here, the distributor maintains its business facilities in State A, including food processing, warehousing, and distribution facilities. Regardless of whether the woman’s cause of action is deemed to be related to those contacts, these continuous and substantial business connections with State A would warrant a State A court to exercise jurisdiction over the distributor. Moreover, requiring the distributor to defend this action in State A is not likely to be viewed by the court as unfair or unreasonable. Whether the exercise of personal jurisdiction is fair and reasonable depends on various considerations such as the burden on the defendant of having to litigate in the forum state, the plaintiff’s interest in a convenient forum for obtaining relief, the state’s interest in providing a forum, and the interests of the interstate judicial system in efficient resolution of disputes. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985). Given modern transportation and communication, the distributor’s burden of defending in a state where it does continuous and substantial business is minimal even if the suit is unrelated to the distributor’s business in that forum.

While the woman lives in State B for most of the year, the State A federal court is located close to her home in the city, where she lives for part of the year. Furthermore, because the woman is a part-year resident of State A, State A has some interest in providing a forum where she can obtain redress for legal harms. On the other hand, adjudication in State A is not particularly efficient. Aside from the woman, who resides in State A for part of the year, it appears that the bulk of the evidence and witnesses relevant to her case will be located in State B. Nonetheless, that fact alone would not be enough to defeat State A’s jurisdiction over the distributor in this case.

Because State A could assert personal jurisdiction over the distributor at the commencement of the action (had the issue been raised), the distributor will be deemed to “reside” in State A, rendering the District of State A an appropriate venue under 28 U.S.C. § 1391(b)(1). The motion to dismiss for improper venue should be denied.

[NOTE #1: By failing to raise the defense of personal jurisdiction in its motion, the distributor waived the defense. *See* FED. R. CIV. P. 12(b) & (h). However, the venue statute asks whether the distributor was subject to personal jurisdiction *at the commencement* of the suit, so the distributor’s waiver of possible personal jurisdiction defense does not affect the venue inquiry. An examinee should receive credit for a personal jurisdiction analysis ONLY if it is offered in the context of determining where the distributor “resides” for venue purposes.]

[NOTE #2: Here, neither the second nor the third basis for venue is applicable. As to the second basis for venue (a district where a “substantial part” of the relevant acts occurred), the woman’s claim is based on an alleged breach of contract. The facts state that this contract was negotiated in State B, that performance occurred in State B, and that the decision to stop performing on the contract was made in State B. It does not appear that any of the acts or omissions giving rise to the woman’s claim occurred in the District of State A.

The third basis for venue is applicable only if there is no other district where the case could be brought. Here, as just noted, the actions giving rise to the woman’s claim took place in State B, and there were no impediments to her bringing the claim there. Because there is another district where suit could have been brought, a State A venue cannot be based on the absence of such a district.]

AGENCY AND TORTS ANALYSIS

(Agency II.B.; III. / Torts II.E.1. & F.1.)

ANALYSIS

Legal Problems

- (1) Was the employee acting within the course and scope of his employment when he authorized the foreman to lift the cable?
- (2) Did the telephone company cloak the employee with apparent authority that was relied upon by the foreman, resulting in his injury?
- (3) Were the employee's actions the proximate cause of the foreman's injuries?

DISCUSSION

Summary

The telephone company is liable to the foreman for the telephone company employee's negligence if the employee was acting within the course and scope of his employment with the telephone company when he authorized the foreman to direct the crew to stretch the cable over the highway. Here the employee probably was. Even if the employee was acting outside the scope of his employment with the telephone company, the telephone company would be liable to the foreman if the foreman relied on statements or conduct by the employee that were within the employee's apparent authority. Although the type of harm the foreman suffered (burns) was different from the harm risked by the employee's actions (being stuck by the cable), the employee's actions are probably the proximate cause of the foreman's injuries.

Point One (35%)

The telephone company is liable for torts committed by its employee while acting within the course and scope of his employment with the telephone company. Because the employee was motivated by a desire to serve the telephone company, he was acting within the scope of his employment.

Under the doctrine of *respondeat superior*, employers are liable for the actions of an employee when the employee is acting within the scope of his employment. *See* RESTATEMENT (THIRD) OF AGENCY § 2.04.

Here, the employee had no express authority to authorize the raising of the cable. His only duty was to determine whether a cable was down and, if so, to assess the damage and report to the telephone company. However, the employee's unauthorized conduct may fall within the scope of his employment. *See* RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. c ("conduct is not outside the scope of employment merely because an employee disregards the employer's instructions"). Section 7.07 of the Restatement (Third) of Agency states that "[a]n employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer."

Here, the employee's action (authorizing the raising of the cable) was motivated by a desire to protect the cable from further damage. Thus, the employee was clearly acting with the intent to serve the telephone company's purposes. The cable which ultimately caused the injury to the foreman was the property of the telephone company. The telephone company should have reasonably expected that when the employee arrived at the scene he would take necessary action to prevent further damage to its property if he were in a position to do so. Although it is not certain, the telephone company is probably liable to the foreman under the doctrine of *respondeat superior*.

Point Two (30%)

The telephone company could also be liable to the foreman under an apparent authority theory.

A principal will sometimes be liable for torts committed by its agents even if the conditions of *respondeat superior* liability (i.e., an employer/employee relationship and conduct within the scope of employment) are not satisfied.

For example, a principal can be liable if the principal was negligent or reckless in the selection of the agent. *See* RESTATEMENT (THIRD) OF AGENCY § 7.05(1). Nothing in the facts suggests that the telephone company was negligent in its hiring of the employee.

A principal can also be liable for an agent's torts if the principal has a special relationship with the injured person that imposed a special duty on the principal to take care to protect against the risk that the agent would harm the injured person. *See id.* § 7.05(2). Nothing on these facts suggests that the telephone company had any such special relationship with the foreman.

Finally, a principal is liable for a tort committed by an agent when the agent "appears to deal or communicate on behalf of [the] principal and the agent's appearance of authority enables the agent to commit [the] tort . . ." *See* RESTATEMENT (THIRD) OF AGENCY § 7.08, cmt a. On the facts of this problem, the employee had apparent authority vis-à-vis the foreman. "Apparent authority . . . is created by a person's manifestation that another has authority to act with legal consequences for the person who makes the manifestation, where a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation." *Id.* § 3.03. An agent has apparent authority with respect to a third party *only* "when the third party reasonably believes that the agent . . . has authority to act on behalf of the principal." *Id.* § 7.08, cmt b. Here, the telephone company made manifestations to the foreman about the employee's authority when it sent its employee to the job site in a company vehicle. This would give the foreman a basis to believe that the employee was acting on the telephone company's behalf.

The principal is liable under an apparent authority theory only when the injured person's belief in the agent's authority "enables the agent to commit the tort." As noted, the employee arrived at the job site in the telephone company's vehicle. This was sufficient to create a reasonable belief that the employee was acting on behalf of the company on all matters relating to the fallen cable. As a result of this reasonable belief, the foreman, acting on the employee's authorization, raised the cable, creating the circumstances leading to his injury.

Thus, on an apparent authority theory the company could be liable assuming *respondeat superior* did not apply. *See* Point One.

Point Three (35%)

The employee's acts were probably the proximate cause of the foreman's injuries.

In a negligence action, a defendant is liable only if his conduct was the proximate cause of the plaintiff's injury. Here, it is likely that a court would find that the foreman's harm was proximately caused by the employee's negligence.

Agency and Torts Analysis

Even when a defendant is negligent, his conduct must have

“such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called ‘philosophic sense,’ which includes every one of the great number of events without which any happening would not have occurred.”

RESTATEMENT (SECOND) OF TORTS § 431, cmt. a.

Intervening actors or events that produce harm different in kind from that which one would normally anticipate may break the chain of causation and lead a court to conclude that the defendant’s acts are not the proximate cause of the plaintiff’s injury. Thus, a plaintiff who negligently exceeds a speed limit and therefore happens to be on the spot where a tree falls during a violent windstorm may still recover for injuries caused by the tree (*see Berry v. Sugar Notch Borough*, 43 A. 240 (Pa. 1899)), and a defendant who negligently drops a passenger off at the wrong train station is not liable for the passenger’s burns caused by a malfunctioning kerosene lamp in the hotel where she is forced to stay for the night. *See Central Georgia Ry. Co. v. Price*, 32 S.E. 77 (Ga. 1898). In evaluating whether intervening acts break the chain of causation, courts typically analyze both their foreseeability and their degree of dependence on the defendant’s negligence. *See* RESTATEMENT (SECOND) OF TORTS § 431.

Here, it was entirely foreseeable that a vehicle would strike the raised cable, causing impact damage to cars and persons within the range of the cable’s fall; that is what made the employee’s conduct negligent. Given that the cable was stretched over a highway, it was also foreseeable that a car struck by a cable would go out of control and cause injuries to other vehicles or bystanders, and that is exactly what happened here: the driver lost control of the car, hitting another vehicle and thereby causing serious personal injury to a bystander, the foreman. Although the source of the foreman’s injuries (burns from hot asphalt) would not normally be anticipated from the fall of a cable, the foreman was within the zone of foreseeable risk and suffered injuries in the course of a foreseeable, reasonably direct chain of circumstances. A court is thus likely to find that the employee’s negligence was the proximate cause of the foreman’s injuries.

FAMILY LAW ANALYSIS

(Family Law II.B; IV.A.; VI.E.)

ANALYSIS

Legal Problems

(1)(a) On what, if any, basis could a court enjoin the mother from making contributions from her future paychecks to the religious group?

(1)(b) On what, if any, basis could a court order one parent to follow the child-rearing preferences of the other parent when both parents and their child are living together in an intact family?

(1)(c) On what, if any, basis could a court order a parent to cooperate in ensuring that a child obtains medical treatments necessary to protect the child's health and life?

(2) In a divorce action, could a court grant custody to one parent based on the other parent's religious practices when those practices pose risks to the child?

DISCUSSION

Summary

There is no basis for a court to order the mother to stop making contributions from her paychecks to the religious group. Because the mother and father live in a common-law jurisdiction in an intact household, the father has no management powers with respect to the mother's earnings. Although, in most states, the mother has a support obligation toward the father that would enable a creditor to recover from the mother the value of "necessaries" furnished to the father, the father may not personally obtain a court order requiring the mother to spend her earnings in a particular way, nor may a state child welfare agency.

Based on the family privacy doctrine, a court may not order one parent to follow the child-rearing preferences of the other parent when the parents live together with their child in an intact family. Thus, a court will not order the mother to take the daughter to skating lessons.

However, based on its neglect jurisdiction, a court could order a parent to take steps to preserve a child's health or safety, even when the parent's actions are religiously motivated. The proper party to initiate a child neglect action is the state, not a parent. Thus, a court could order the mother to follow the physician's medical recommendations and order appropriate services for the daughter if the mother refused to do so and the state's child welfare agency filed a neglect petition on the daughter's behalf.

Although a court may not deny a parent custody based on a parent's religious faith, it may deny custody based on a threat to the child's health or safety. Because failing to take asthma medications appears to be life-threatening, if the father were to file a divorce action against the mother, a court could award the father custody of his daughter if the mother persists in her refusal to provide the daughter with her asthma medication.

Point One(a) (30%)

There is no basis for a court to order the mother to stop making contributions from her paycheck to the religious group. Because the mother and father live in an intact household in a non-community-property state, the father has no management powers with respect to the mother's earnings. Although the mother has a support obligation toward the father that would enable a creditor to recover from the mother the value of "necessaries" furnished to the father, the father could not personally obtain a court order requiring the mother to spend her earnings in a particular way, nor could a state child welfare agency.

Under the common law, when a woman married, her identity was swallowed up in her husband's. As a result of this marital-unity doctrine, a married woman could not own property. Beginning in the mid-19th century, legislatures began to enact so-called "Married Women's Property Acts" that restored to the married woman the rights she had when unmarried, including the right to acquire, own, or transfer property. By the end of the 19th century, every state had passed such a statute.

Under the Married Women's Property Acts, title determines asset ownership and management rights; "[t]he wife is given the power to contract and full rights to her own earnings" HARRY D. KRAUSE AND DAVID D. MEYER, *FAMILY LAW IN A NUTSHELL* 99 (5th ed. 2007). Because each spouse has full management rights with respect to his or her earnings, a court may not overrule the spending decisions of a spouse based on his or her partner's conclusion that those decisions are ill-advised.

Marriage does, however, create support obligations and, since the Supreme Court's decision in *Orr v. Orr*, 440 U.S. 268 (1979), those obligations have been gender neutral. Based on this mutual support obligation, a creditor who has furnished "necessaries" to a husband or wife may, in most states, sue the spouse of the purchaser and recover on the debt. *See* KRAUSE AND MEYER, *supra*, at 94–95.

However, the necessaries doctrine is available only to a *creditor* who has already provided goods or services. Such a creditor has no power to obtain an order altering a spouse's future spending. The doctrine does not go so far as to allow one spouse to enjoin expenditures by the other because, as here, he or she is concerned that the bills of the family won't get paid. Nor, because of the family privacy doctrine (*see* Point 2), may a spouse who disagrees with his partner's spending decisions obtain an order requiring a different spending pattern or obtain a support award.

A state child welfare agency may intervene in family decision making only when the decision at issue endangers the well-being of a child or another family member incapable of protecting his own interests. Here, there is no evidence that the mother's decision to donate a portion of her earnings to the religious group endangers her daughter. Thus, the state agency cannot obtain an order requiring the mother to alter her spending patterns any more than can the father.

Point One(b) (20%)

Because the mother and father are living with their daughter in an intact family and failure to take skating lessons does not endanger the daughter, a court may not require the mother to follow the father's preference with respect to continuing the daughter's skating lessons.

American courts have consistently treated the disputes of intact families as private matters that should be resolved at home. Thus, they have refused to decide such disputes when a spouse has brought one to court:

The inherent jurisdiction of courts of equity over infants is a matter of necessity, . . . assumed by the courts only when it is forfeited by a natural custodian incident to a broken home. . . . The judicial mind and conscience is repelled by the thought of disruption of the sacred marital relationship, and usually voices the hope that the breach may somehow be healed by mutual understanding between the parents themselves.

Kilgrow v. Kilgrow, 107 So. 2d 885, 888–89 (Ala. 1958); *see also McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1958). Even when the spouse who comes to court wishes to enforce a premarital agreement, courts have refused to intervene in the disputes of couples who are living together. *See Kilgrow, supra* (refusing to enforce provision of premarital agreement requiring child’s education at religious school).

Here, the mother and father are still living together with their daughter. Until and unless they separate, a court will not intervene in their dispute regarding the daughter’s skating lessons and issue an order supporting the views of either parent.

Again, the state child welfare agency may intervene in family decision making only when the decision at issue endangers the well-being of a child or another family member incapable of protecting his own interests. Here, because there is no evidence that the mother’s failure to continue skating lessons would endanger the daughter, the state agency cannot obtain an order requiring the mother to continue the lessons any more than can the father.

Point One(c) (30%)

Because failing to take asthma medications poses a serious risk to the daughter’s health and safety, if the mother’s actions prevent the daughter from receiving her prescribed medications, a court may find that the daughter is neglected and order the mother to give the daughter her medications.

Although courts will not intervene in disputes *between* parents in an intact household, the state, pursuant to its jurisdiction over child abuse and neglect, may obtain an order overruling a parental decision and ordering appropriate services, including medical care, whenever the parental child-rearing decisions endanger the child.

The fact that parental rights are constitutionally protected does not alter this result, even when the parental choice is religiously motivated: “the power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.” *Wisconsin v. Yoder*, 406 U.S. 205, 234–35 (1972). *See also Petersen v. Rogers*, 433 S.E.2d 770, 775 (N.C. Ct. App. 1993) (although court may not inquire into parent’s general religious beliefs, it may inquire into “religious practices . . . if such practices may adversely affect the physical or mental health or safety of the child.”); Jay M. Zitter, Annot., *Power of Court or Other Public Agency to Order Medical Treatment Over Parental Religious Objections for Child Whose Life Is Not Immediately Endangered*, 21 A.L.R. 5th 248 (1994).

[NOTE: Here, a child-neglect action would most likely be triggered by the daughter’s physician, who is almost certainly a mandated neglect reporter under state law. However, the father could also file a neglect report. A neglect action is typically commenced after someone with knowledge of a situation that endangers the child files a report with the appropriate state agency. State laws typically require health care workers, among others, to report suspected abuse and neglect. After receiving a report, the agency investigates and files a neglect petition on the child’s behalf if its investigation confirms the allegations of neglect. If the court finds that a child

Family Law Analysis

is neglected, it may order parents to undertake appropriate actions, order a state agency to provide the child with services in the home, or even remove the child from parental custody and place her in foster care.]

Point Two (20%)

Although a court may not deny a parent custody based on the parent's religious faith, it may deny custody based on a threat to the child's health or safety. Because failing to take asthma medications is life-threatening, a court could, in a divorce action filed by the father, award custody to the father if the court finds that the mother will persist in her refusal to provide the daughter with her medications.

A child custody contest between parents is decided on the basis of the child's best interests. Under the best interests test, the court is free to consider a wide range of factors.

With respect to parental religion, the Establishment Clause forbids a court to favor one religion over another. However, although "[t]he court cannot evaluate the religion, [it can] . . . instead evaluate[] the parent's ability to provide for the physical and mental health needs of the child." WALTER WADLINGTON & RAYMOND C. O'BRIEN, *FAMILY LAW IN PERSPECTIVE* 162 (2001). Because of the sensitivity of the constitutional issues at stake, courts have typically refused to consider religion unless the evidence shows that the parent's religious practice would imperil the child's well-being. *See id.* Some courts have additionally required that a custody order "make the least possible infringement upon the parent's liberty interests consistent with the child's well-being." *Osier v. Osier*, 410 A.2d 1027, 1030 (Me. 1980). *See also* Carl E. Schneider, *Religion and Child Custody*, 25 U. MICH. J. L. REFORM 879 (Spring/Summer 1992).

Here, the daughter's physician has said that failure to take asthma medications is life-threatening. Given that the daughter is only seven and needs parental supervision in order to ensure medication compliance, should the father file a divorce action, a court may thus deny the mother custody based on her refusal to administer the medications, and may award custody to the father.

EVIDENCE ANALYSIS

(Evidence V.A., B., D., F. & L.)

ANALYSIS

Legal Problems

- (1) Do the caller's statements to the police dispatcher fit a hearsay exception?
- (2) Would admission of the caller's statements to the police dispatcher violate the Confrontation Clause?
- (3) Do the sister's statements to the officer fit a hearsay exception?
- (4) Would admission of the sister's statements to the officer violate the Confrontation Clause?

DISCUSSION

Summary

The court should allow admission of the caller's out-of-court statements to the police dispatcher on the authenticated 911 recording because they fit the hearsay exceptions for "present sense impressions" and "excited utterances." The caller's statements may also fit the exception for "statements made for medical diagnosis or treatment."

Admission of these statements would not violate the Confrontation Clause of the Sixth Amendment to the United States Constitution. Although the caller is unavailable to testify and the boyfriend will have had no pretrial opportunity to cross-examine her, the caller's statements are not testimonial because the evidence demonstrates that the reasonable and objective primary purpose of both the caller and the police dispatcher was to address an ongoing emergency.

The sister's statements to the officer fit the hearsay exception for "excited utterances."

However, admission of the sister's statements through the testimony of the officer would violate the Confrontation Clause because the sister is unavailable to testify, the boyfriend will have had no opportunity to cross-examine her, and her statements *are* testimonial. The sister's statements are testimonial because the reasonable and objective primary purpose of the sister and the officer was *not* to address an ongoing emergency, but to establish past events potentially relevant to a later criminal prosecution of the boyfriend.

Point One (20%)

If offered to prove the truth of the matter asserted, that the boyfriend attacked the sister, the caller's statements to the police dispatcher are hearsay. However, her statements fit the hearsay exceptions for "present sense impressions" and "excited utterances," and probably fit the exception for statements made for purposes of medical diagnosis.

As an out-of-court statement offered to prove the truth of what the caller told the police dispatcher (*i.e.*, that her sister's boyfriend was "out of control," had thrown a broken beer bottle at her sister, and that her sister was bleeding), the caller's statements on the authenticated 911

Evidence Analysis

recording are hearsay. However, the court should overrule defense counsel's hearsay objection because the caller's out-of-court statements fit two hearsay exceptions.

First, the caller's statements fit the hearsay exceptions for "present sense impressions." Pursuant to Rule 803(1), a present sense impression is "[a] statement describing or explaining an event or condition *made while or immediately after the declarant perceived it.*" FED. R. EVID. 803(1) (emphasis added). In this case, the caller described the events to the police dispatcher as they were happening.

Second, the caller's statements also fit the hearsay exception for "excited utterances," pursuant to Rule 803(2). An excited utterance is "[a] statement relating to a startling event or condition, made while the declarant was under the stress or excitement that it caused." FED. R. EVID. 803(2). Here, the caller telephoned 911 while she was watching her sister's boyfriend violently assault her sister. The caller's statements related to the startling event of the assault on her sister. Moreover, because the caller made the statements as she watched the assault, she would have been under the stress caused by the assault on her sister at the time her statements were made.

Third, some of the caller's statements probably also fit the hearsay exception for "statements made for medical diagnosis or treatment." Statements that fit this exception must have been "made for—and [] reasonably pertinent to—medical diagnosis or treatment; and describe[] medical history; past or present symptoms or sensations; their inception; or their general cause." FED. R. EVID. 803(4). Here, the police dispatcher asked specific questions about the sister's injuries and the caller stated that her sister had blood on her arm. Thus, this portion of the caller's statement was relevant to the sister's medical condition and the fact that she might need medical treatment.

[NOTE: The questions from the police dispatcher are not hearsay because they are not assertions.]

Point Two (25%)

The Confrontation Clause does not bar the admission of an out-of-court statement when the objective primary purpose of the interrogation was to address an ongoing emergency.

Even when, as here, an out-of-court statement falls within a hearsay exception, the Confrontation Clause of the Sixth Amendment of the United States Constitution will sometimes preclude the admission of the statement at trial. The Confrontation Clause gives a defendant in a criminal case the right to be confronted by the witnesses against him. U.S. CONST. AMEND. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."). In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that the admission of out-of-court "testimonial" statements violates a defendant's right to confrontation if the witness is unavailable to testify at trial and the defense has not had a prior opportunity to cross-examine the witness. *Id.* at 59. In this case, the caller is unavailable because the prosecutor's efforts to secure her appearance at trial have been unsuccessful, and the defense has not had a prior opportunity to cross-examine the caller.

Thus, the critical constitutional question is whether the caller's statements to the police dispatcher were "testimonial." After *Crawford*, many statements made to police officers in the course of an interrogation are testimonial. *Id.* at 52–53 ("interrogations by law enforcement officers fall squarely within that class [of testimonial statements]"). However, in *Davis v. Washington*, the Court clarified that when witnesses make statements to the police "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," these statements are not testimonial. *See Davis*

v. Washington, 547 U.S. 813, 822 (2006). More recently, in *Michigan v. Bryant*, 131 S.Ct. 1143 (2011), the Court elaborated on the “primary purpose of the interrogation” standard, noting that primary purpose should be determined using “a combined inquiry that accounts for both the declarant and the interrogator.” *Bryant*, 131 S.Ct. at 1160. The *Bryant* Court also specified that “[a]n assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to first responders and to the public may continue,” *id.* at 1158, and that “the duration and scope of an emergency may depend in part on the type of weapon employed,” *id.*, and/or “[t]he medical condition of the victim,” *id.* at 1159.

Here, the caller telephoned the police for assistance while the boyfriend was assaulting the sister. The sister was injured and bleeding, and the boyfriend could have posed a threat to the caller and/or first responders. Thus, it is clear that the caller made statements to the police dispatcher while the emergency was ongoing. This conclusion is reinforced by the fact that the police dispatcher’s questions were aimed at addressing the ongoing emergency (i.e., the dispatcher attempted to ascertain the extent of the concurrent violence, the level of danger, the parties involved, and whether anybody was injured). Based on these facts, the caller and the police dispatcher both had a primary purpose of resolving the ongoing emergency created by the boyfriend’s violent physical assault of the sister. Thus, the caller’s statements were not testimonial and admission of these statements does not violate the Confrontation Clause. *See Bryant*, 131 S.Ct. at 1162; *Davis*, 547 U.S. at 827.

Point Three (25%)

The sister’s statements to the officer fall under the “excited utterance” exception to the hearsay rule.

The court should overrule defense counsel’s hearsay objection to admission of the sister’s statements to the officer. Testimony repeating the sister’s out-of-court statements would be hearsay because the prosecution is seeking to use the statements to prove the truth of the matter asserted by the sister (that the boyfriend had just attacked her). However, the sister’s statements would be admissible pursuant to the “excited utterance” exception to the hearsay rule. FED. R. EVID. 803(2). As discussed above in Point One, an excited utterance is “[a] statement relating to a startling event or condition made while the declarant was under the stress or excitement that it caused.” *Id.* Certainly the boyfriend’s violent attack was a startling event and the sister was clearly still “under the stress or excitement that it caused” when the officer arrived at her house five minutes later. The statements were made within minutes of the boyfriend’s violent conduct, the sister was in a highly emotional and agitated state (she was in tears when she spoke to the officer), and her statements related directly to the boyfriend’s attack, which was the event that caused her to be excited and upset.

[NOTE: The sister’s statements here do not fit the hearsay exception for statements made for the purpose of medical treatment, FED. R. EVID. 803(4), because she specifically declined the medical assistance offered by the officer.]

Point Four (30%)

The Confrontation Clause prohibits the use of the sister’s statements to the officer because they are testimonial. The objective primary purpose of this interrogation was *not* to address an ongoing emergency, but to establish past events potentially relevant to a later criminal prosecution.

Evidence Analysis

The dispositive question is whether admission of this out-of-court statement would be precluded under the Confrontation Clause. As discussed above in Point Two, the Supreme Court defined testimonial out-of-court statements that require confrontation in *Crawford*, *Davis*, and *Bryant*. Unlike the caller's statements to the police dispatcher during the boyfriend's attack, the sister's statements to the officer were made when the emergency was over and described what the boyfriend had done *in the past*. Although just a short period of time had passed and the sister was clearly still upset about the boyfriend's attack, the boyfriend was now locked in the back of the police car and no longer posed any danger to the sister, the officer, or anyone else.

In 2006, in *Davis v. Washington*, the Supreme Court focused on the question of whether the primary purpose of each interrogation was to enable police assistance to meet an ongoing emergency. In 2011, the *Bryant* Court significantly elaborated on the operation of the standard in a range of contexts. The *Bryant* Court cautioned that “[a]n assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to first responders and to the public may continue.” *Bryant*, 131 S. Ct. at 1158.

Here, the facts indicate that the emergency was resolved by the time the sister made her statement. *See State v. Wright*, 726 N.W.2d 464, 476 (Minn. 2007) (finding no ongoing emergency after alleged assailant was placed in a police car). Under these circumstances, the primary purpose of the interrogation was not to resolve an ongoing emergency but to establish past events potentially relevant to a later criminal prosecution of the boyfriend. *See Davis*, 547 U.S. at 822. Because the sister's statements were testimonial, she is unavailable to testify at trial, and the boyfriend has had no opportunity to cross-examine her, the admission of the sister's statements through the trial testimony of the officer would violate the Confrontation Clause.

The facts specify that the prosecutor seeks to admit the caller's and the sister's statements to prove the attack (i.e., as substantive evidence). However, if either statement were admitted for a non-truth purpose (e.g., to prove the caller's or the sister's state of mind), it would not be barred by the Confrontation Clause.

NEGOTIABLE INSTRUMENTS ANALYSIS

(Negotiable Instruments IB.; II.; III.; IV.; V.; VI.)

ANALYSIS

Legal Problems

- (1) May a person in possession of a check on which the payee's indorsement has been forged recover from the drawer if the drawee refuses to pay the check?
- (2) Is a promise to pay to the order of bearer a fixed amount of money plus an interest rate determined by reference to an external standard a negotiable instrument and, thus, a note?
- (3) Must the maker of a note that is payable to bearer pay a person to whom the note has been transferred for value if the maker has defenses against the payment obligation of which the transferee had no notice?

DISCUSSION

Summary

If a check is dishonored, the drawer owes the amount of the check to a person entitled to enforce it. Because the check was stolen from the man and the man's indorsement was forged, the check-cashing business was not a "holder" of the check and was not entitled to enforce it. Thus, the friend, as drawer of the check, has no obligation to the check-cashing business.

The document that the robber sold to the investor was a negotiable note. Because the note was payable to bearer, the investor became a holder of the note when the investor gained possession of it. As a result, the investor is entitled to enforce the note. It can be enforced against the man because the man was the maker of the note. The investor is also a holder in due course and is therefore not subject to the man's defense of never having received the loan.

Point One (30%)

The obligation of the drawer of a check is that, upon dishonor of the check, the drawer will pay the amount of the check to a person entitled to enforce it. Because the check was payable to the man, who did not indorse it or transfer it, the check-cashing business will not qualify as a person entitled to enforce the check, and the friend has no obligation to pay it.

The friend was the drawer of the check. Upon dishonor of a check, the drawer is obligated to pay the amount of the check to a person entitled to enforce it. Thus, the check-cashing business has a legal right to recover from the friend only if the business is a person entitled to enforce the check. UCC § 3-414.

The check-cashing business would be entitled to enforce the check if it was a holder of the check, or if it was in possession of it and had the rights of a holder. UCC § 3-301.

A holder is a person in possession of a check that is payable to that person or to bearer. UCC § 1-201(b)(21)(A). Although the check-cashing business had possession of the check, the check was not payable to that business nor to bearer. As written, the check was payable to the order of the man. The man didn't sign the back of the check—his signature was forged by the robber. If the man had signed the back of the check, the signature would have qualified as an

Negotiable Instruments Analysis

indorsement in blank, which would have had the effect of converting the check to a bearer instrument. UCC § 3-205(b). Or the man could have indorsed the check to the check-cashing business, making it payable to that business. But the robber's forgery of the man's signature does not count as the man's signature. UCC § 3-403(a). As a result, the check is still payable to the order of the man and the check-cashing business cannot qualify as a holder of it.

The check-cashing business would also be entitled to enforce the check if it had "the rights of a holder." UCC § 3-301(ii). A person can obtain the "rights of a holder" by taking the check by "transfer" from a holder. UCC § 3-203(b). Here, the robber did transfer the check to the check-cashing business, *see* UCC § 3-203(a), but the robber was not a holder of the check, nor did the robber have rights of a holder that he could transfer to the check-cashing business. The robber was not a holder because the check was not payable to the robber. The robber did not have the "rights of a holder," i.e., the man's rights, because the man did not voluntarily deliver the check to the robber. *See* UCC § 3-203(a) ("transfer" of an instrument is a voluntary delivery for purpose of giving the transferee the right to enforce an instrument); the robber stole the check and did not become a holder or acquire the rights of a holder. Because the robber did not have the rights of a holder, the robber's delivery of the check to the check-cashing business did not transfer such rights to the business.

Accordingly, the check-cashing business is not a person entitled to enforce the check and the friend has no obligation to it.

[NOTE #1: Some examinees might mention that the check-cashing business could theoretically qualify as a person entitled to enforce a check if the business were a person who was entitled to enforce the check at the time when it was lost, stolen, or destroyed. UCC § 3-301(iii). But no facts support such an argument.]

[NOTE #2: Some examinees might also argue that the friend has no obligation to pay the check because it was not technically dishonored, given that it was never presented for payment by a person entitled to enforce it. This would be a correct analysis, *see* UCC §§ 3-502(b)(2) and 3-501(a), and an examinee who concludes that the friend has no obligation on the check because it was not dishonored should receive full credit.]

Point Two (30%)

The document signed by the man and given to the friend was a negotiable instrument because it was an unconditional promise to pay a fixed amount of money to bearer and contained no other promises or undertakings. The fact that the note bore interest at a rate requiring reference to an external source does not prevent it from qualifying as a negotiable instrument.

A negotiable instrument is an unconditional promise or order to pay a fixed amount of money, with or without interest, if it is payable to bearer or to order and does not state any other undertaking or instruction. UCC § 3-104(a). A "promise" is a written undertaking to pay money signed by the person undertaking to pay. UCC § 3-103(a)(12). Based on the facts presented, the man's undertaking clearly qualifies as a "promise." Since the promise was unconditional, it was payable to bearer, the amount of money was fixed in the promise, and the promise did not state any other undertakings or instructions, it qualifies as a negotiable instrument. A negotiable instrument that is a promise qualifies as a "note." UCC § 3-104(e).

The fact that determination of the amount of interest requires reference to the prime interest rate of First Bank does not mean that the promise is not for a fixed amount of money. Interest may be stated at a fixed or variable rate, and may require reference to information not contained in the instrument. UCC § 3-112(b).

Point Three (40%)

The investor was a holder of the note, so the man had an obligation to pay the investor the amount of the note when it was due. The investor qualified as a holder in due course, so the man's defense that he never received the amount of the loan could not be raised against the investor.

As maker of the note, the man had an obligation to pay the amount of the note when due to a person entitled to enforce it. UCC § 3-412. The investor was a holder of the note because the investor was in possession of it and it was payable to bearer. UCC § 1-201(b)(21). Accordingly, the investor qualified as a person entitled to enforce it. UCC § 3-301(i).

If the man's failure to receive the money from the friend would qualify, as a matter of contract law, as a defense to his obligation to repay a loan, he could raise that as a defense to his obligation to pay the investor on the note. But such a defense cannot be raised against a person who qualifies as a holder in due course. This is because a holder in due course is subject to no defenses except the so-called "real defenses" listed in UCC § 3-305(a)(1), none of which is applicable here. The man's defense that he failed to receive consideration for the note cannot be asserted against a holder in due course. UCC § 3-305(a)(2), comment 2 ("instruments issued without consideration or for which promised performance has not been given" can be enforced by a holder in due course).

On the facts of this problem, the investor meets all requirements to qualify as a holder in due course. As described above, the investor was a holder. The investor paid \$2,500 for the note, thus taking it for value. The facts state that the investor took the note in good faith and without notice of any claims, defenses, or defects affecting the note. UCC § 3-302(a). Thus, the investor was a holder in due course.

As a holder in due course, the investor is not subject to the man's defense on the note and has a legal right to recover the amount of the note from the man.

CORPORATIONS ANALYSIS

(Corporations I.D.; III.; V.D.2.; VI.B.; VIII.F.)

ANALYSIS

Legal Problems

- (1) Did Alice and Carla have any legal basis to object to Bob’s co-ownership of the Metro Inn?
- (2) Is the designer entitled to hold Alice, Bob, and/or Carla personally liable to the designer
 - (a) because the winding up was improper, or
 - (b) because of the piercing-the-veil theory?

DISCUSSION

Summary

ABC is a limited liability company (LLC) governed by state LLC law and the terms of its operating agreement. Alice and Carla most likely do not have any legal basis to object to Bob’s ownership interest in a competing business because of the express terms of ABC’s operating agreement.

Alice, Bob, and Carla likely are personally liable to the designer for ABC’s debt up to the amount each member received from the sale of ABC’s assets because the attempted dissolution and winding up of ABC was improper. Alternatively, they may be personally liable to the designer on a piercing-the-veil theory because their siphoning of the proceeds from the sale of ABC’s assets was inequitable, though not necessarily because the company’s books failed to reflect Alice’s payment of company debts.

Point One (30%)

Alice and Carla most likely do not have any legal basis to object to Bob’s decision to own an interest in a competing business in light of the express terms of the ABC operating agreement.

ABC is a limited liability company (LLC). An LLC is a form of business association that combines many of the most attractive features of corporations and partnerships. Like corporations, an LLC generally provides its investors—called “members”—with limited liability for firm debts. Like general partnerships, LLCs provide members with considerable flexibility in developing rules for decision making and control. Because LLCs are a relatively new form of business association bearing many similarities to corporations and partnerships, courts often turn to either corporate or partnership law to analyze issues in the LLC context.

Here, the issue of whether Alice and Carla have any legal basis to object to Bob’s ownership of an interest in a competing firm will turn on the duties and obligations that Bob owes to his fellow LLC members. Courts generally hold that members of an LLC, like partners in a general partnership, are in a “fiduciary relationship.” See *McConnell v. Hunt Sports Enterprises*, 725 N.E.2d 1193, 1214–16 (Ohio Ct. App. 1999). This fiduciary relationship is defined as a relationship in which members owe one another the duty of utmost trust and loyalty. *Id.* As a result, in an LLC, as in a general partnership, direct competition by members would

ordinarily be precluded as a violation of the duty of loyalty. *Id.*; see also ULLCA § 409(b)(3) (members have a duty to “refrain from competing with the company in the conduct of the company’s activities before the dissolution of the company”).

Although the question does not state that ABC’s 100-room luxury hotel project and the 200-room Metro Inn would compete, their similarity and proximity in the same town suggest that they would likely compete. Further, the fact that Alice and Carla are bothered by Bob’s interest in Metro Inn suggests that competition is a strong possibility.

However, here the LLC operating agreement expressly allows members to have an interest in a business that competes with the firm. Under most LLC statutes, members of an LLC can agree to restrict or limit the duty of loyalty, provided the opt-out is specified in the operating agreement. Thus, the operating agreement controls over the provisions of the statute. In this case, when they became members of ABC, Alice and Carla agreed to abide by the terms of the operating agreement, which expressly allow any member (i.e., Bob) to manage, own, and otherwise have an interest in a business that competes with the firm.

States differ slightly on how the opt-out must be structured in order to be effective. Some states, including Delaware, provide for total freedom of contract. See *Elf Atochem North America, Inc. v. Jaffari*, 727 A.2d 286 (Del. 1999) (applying Delaware LLC Act § 18-1101(b)). In these states, the terms of the operating agreement govern, unless they conflict with a mandatory statutory provision designed to protect third parties. *Id.* at 292. Since Bob’s interest in Metro Inn involves only the relationship between the contracting members—Alice, Bob, and Carla—this exception is not implicated.

However, most states that permit opt-outs of the duty of loyalty follow the general approach set forth in the Uniform Limited Liability Company Act (2006). According to ULLCA § 110(d)(1)(C), “If not manifestly unreasonable, the operating agreement may . . . restrict or eliminate the duty . . . to refrain from competing with the company in the conduct of the company’s business before the dissolution of the company.” In addition, so long as it is not “manifestly unreasonable,” the operating agreement may also “identify specific types or categories of activities that do not violate the duty of loyalty.” *Id.* § 110(d)(2).

In this case, the operating agreement is not a general waiver of the duty of loyalty, but specifies the activities that do not violate the duty, namely “managing, owning, or otherwise having an interest” in any competing business. Further, most courts would likely find this provision not “manifestly unreasonable.” See *McConnell*, 725 N.E.2d at 1193.

Whether the provision is “manifestly unreasonable” is a question of fact. Nonetheless, assuming that Alice and Carla each had notice of the provision when they signed the operating agreement, it will be difficult for them to claim surprise. The provision clearly allowed each member to manage, own, or otherwise have an interest in a competing business. This type of provision, which is typical in commercial real estate deals, appears reasonable. Many investors will likely want to be free to invest and exercise ownership rights in other similar real estate ventures in the same area or town.

Point Two(a) (35%)

The designer may be able to hold Alice, Bob, and Carla proportionately liable, up to the amount of the proceeds each received in dissolution, for ABC’s debt to the designer because the winding up of ABC following dissolution was improper.

Like a corporation, the LLC provides limited liability for its members. ULLCA § 304(a). This means that members of an LLC may not generally be held personally liable for the debts of the firm. The general rule, however, does not apply in a few situations, including when (1) the

proper procedures for dissolution and winding up have not been followed, and (2) a court decides to “pierce the LLC veil.”

Here, the designer may be able to hold Alice, Bob, and Carla liable for ABC’s debts on the ground that the winding up of ABC was improper. In the absence of a contrary agreement or court order, dissolution of an LLC requires consent of all the members. ULLCA § 701(a)(2). In this case, the requirement of unanimous consent has been met since Bob gave his consent to Carla and Alice selling all of ABC’s assets and property. Although ABC was properly dissolved by the unanimous consent of the three members, *see id.*, the problem was that the winding up process was flawed.

After dissolution, as part of the winding up process, the LLC must provide notice of the dissolution to creditors so that they can make claims against the dissolving entity. ULLCA §§ 702(b)(1), 703 (notice procedure for “known claims”); *see also New Horizons Supply Cooperative v. Haack*, No. 98-1865, 1999 WL 33499 (Wis. Ct. App. Jan. 28, 1999); LARRY E. RIBSTEIN & ROBERT R. KEATINGE ON LIMITED LIABILITY COMPANIES § 11.6 (2d ed. 2004). The notice sent to creditors must outline the steps that are necessary for enforcing their claims. ULLCA § 703(b). Here, it is clear from Carla’s statement that the designer’s claim was known at the time of dissolution and that ABC did not provide sufficient notice to the designer of the dissolution.

When such procedures have not been followed, and if the LLC’s assets have been liquidated and distributed to the members, then a creditor’s claim against the LLC may be enforced against each of the LLC members to the extent of the member’s proportionate share of the claim or to the extent of the assets of the LLC distributed to the member in liquidation, whichever is less. ULLCA § 704(d)(2). However, a member’s total liability for creditor claims may not exceed the total value of assets distributed to the member in dissolution. *Id.*

While the facts state that no articles of dissolution were filed with the state, the filing of such notice is not required for a proper dissolution of an LLC. *See* ULLCA § 702(b)(2)(A). As a result, the designer can recover proportionately from Alice, Bob, and Carla personally for ABC’s debt up to the amount that each member received in the improper winding up after dissolution.

Point Two(b) (35%)

The designer may be able to hold Alice, Bob, and Carla jointly and severally liable for the debt it is owed from ABC on a “piercing the LLC veil” theory.

As an alternative basis for holding Alice, Bob, and Carla personally liable for ABC’s debts, the designer could pursue a claim for piercing the LLC veil. Piercing the veil in the LLC context is a common-law equitable doctrine that prevents members from hiding behind the veil of limited liability in situations where they have improperly used the LLC form. *See Kaycee Land and Livestock v. Flahive*, 46 P.3d 323 (Wy. 2002). To pierce the LLC veil, courts generally apply the same analysis and factors as in cases where a third party attempts to pierce the *corporate* veil and hold shareholders of a corporation personally liable for firm debts. This requires analyzing whether members have treated the LLC as a separate entity or whether it has instead become the “alter ego” of the members. If the latter is true, members will not be permitted to “enjoy immunity from individual liability for the LLC’s acts that cause damage to third parties.” *Id.* at 327. Each member for whom the veil is pierced becomes subject to joint and several liability to the creditor bringing the claim.

Among the factors that courts have used under the alter ego doctrine in the corporate context is whether the “dominant shareholder siphoned corporate funds,” a factor also used in the LLC context. *See Wilson v. Thorn Energy, LLC*, 787 F. Supp. 2d 286, 295 (S.D.N.Y. 2011). In

arguing for piercing the LLC veil, the designer will likely assert that the three members of ABC improperly distributed to themselves the proceeds of the asset sale, thus disregarding the separateness of firm and personal finances. The use of business funds for personal use is a frequent factor for piercing in both the corporate and LLC contexts.

Alice, Bob, and Carla, all of whom received the proceeds of the asset sale when ABC was liquidated, will have a difficult time arguing that this distribution was not inequitable. Although they did not misrepresent ABC's weak financial situation to the designer, their siphoning of assets would seem to be conclusive. *See* Comment to ULLCA § 304(b) ("key piercing factor" is the disregard of LLC's "economic separateness" from its owners, such as when owner "writes checks on the company's account for personal expenses"). In fact, in the corporate context when courts determine that business assets have been intermingled and used for personal use, piercing follows in about 85 percent of the cases. *See* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1063 (1991).

In addition, courts have identified the intermingling of personal and business funds as a factor for piercing in the corporate context, as well as in the LLC context. *See Sea-Land Services, Inc. v. Pepper Source*, 941 F.2d 519 (7th Cir. 1991). The designer might point to Alice's use of personal funds to pay the concrete supplier and other creditors of ABC, expecting that ABC would later reimburse her. The designer might further assert that Carla and Alice engaged in "fraud" by altering ABC's financial statements to cover up Alice's personal payments, as further justification for piercing the LLC veil on equitable grounds.

Nonetheless, Alice, Bob, and Carla may be able to argue that the failure to follow corporate formalities in the accounting of Alice's "advances of funds" to the LLC (that is, her undisclosed payment of firm debts, subject to later reimbursement) is not enough to pierce the veil. The LLC statutes in most states, including those that follow the Uniform Limited Liability Company Act, provide that "the failure of a limited liability company to observe any particular formalities relating to . . . management of its activities" is not a proper ground for imposing personal liability on members for debts of the firm. *See* ULLCA § 304(b). Moreover, because Alice and Carla were trying to keep the business afloat during difficult financial times, Alice's undisclosed advances of funds did not harm the firm's creditors, but actually worked to their advantage. In this sense, Alice's payments could be equated to additional capital contributions to the firm, not the improper siphoning of assets. Thus, taken alone, the off-the-books advances by Alice to ABC might not be sufficient to justify piercing, but this does not "cleanse" the inequitable nature of the distribution of proceeds to the three members when ABC was dissolved while the firm's debts remained unpaid.

[NOTE: The question specifically asks whether Alice, Bob, and Carla are "personally" liable to the designer and not whether the three might be liable to the LLC as members who consented to an improper distribution by the LLC—that is, a distribution that rendered the company unable to pay its debts as they became due. *See* ULLCA § 406(a) (imposing liability on members in a member-managed LLC who consent to an improper distribution, as defined in ULLCA § 405).]

[NOTE: California, Idaho, Iowa, Nebraska, Utah, and Wyoming have enacted the 2006 act. (Kansas and Minnesota are considering doing so.)]

CONTRACTS ANALYSIS

(Contracts I.A.1.; II.G.)

ANALYSIS

Legal Problems

- (1) Is there a contract between the manufacturer and the chef for the purchase and sale of 10 knives?
- (2) Is enforceability of the contract between the manufacturer and the chef subject to the statute of frauds?
- (3) Does the document sent by the manufacturer to the chef satisfy the applicable statute of frauds?
- (4) Is the chef's handwritten note to the manufacturer a "record in confirmation" of the contract sufficient to satisfy the statute of frauds?
- (5) Does the manufacturer's shipment of 6 knives and the chef's acceptance of those 6 knives establish the existence of a contract sufficiently to allow its enforcement as to all 10 knives?

DISCUSSION

Summary

The manufacturer and the chef clearly entered into a contract pursuant to which the manufacturer agreed to sell 10 knives to the chef for \$1,000. Because it is a contract for the sale of goods, the contract is governed by Article 2 of the Uniform Commercial Code. Even though the contract exists, a contract for the sale of goods for a price of \$500 or more is not enforceable against a party unless there is a writing sufficient to indicate that a contract has been made that is signed by that party (or unless an exception applies).

Here, the contract price is more than \$500, so a writing signed by the manufacturer is required in order to enforce the contract against it unless an exception applies. The document included with the knives is a writing sufficient to indicate that a contract has been made, but it is not clear whether that writing has been "signed" by the manufacturer. If the document constitutes a writing signed by the manufacturer, the contract is enforceable against the manufacturer for only six knives—the quantity mentioned in that writing—and not for the remaining four knives. Even if the document does not constitute a writing signed by the manufacturer, the fact that the manufacturer delivered, and the chef paid for, six knives would make the contract enforceable for the six knives but not the remaining four knives.

Point One (20%)

The manufacturer and the chef entered into a contract at the trade show when they agreed that the chef would buy 10 knives from the manufacturer for \$100 each.

Because the knives are goods (*see* UCC § 2-105(1)), the situation presented by these facts is governed by Article 2 of the Uniform Commercial Code. UCC § 2-204(1) provides that “[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.” The conversation between the manufacturer and the chef clearly shows an agreement pursuant to which the manufacturer would sell, and the chef would buy, 10 knives at \$100 each. Thus, UCC § 2-204 is satisfied and there is a contract for the chef to buy 10 knives from the manufacturer.

Point Two (15%)

The contract between the manufacturer and the chef is a contract for the sale of goods for a price of \$500 or more and therefore is subject to the statute of frauds in Article 2 of the Uniform Commercial Code.

UCC § 2-201(1) provides that “a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought” Here, the contract between the manufacturer and the chef was for the sale of goods (the knives) for a price of \$1,000. Therefore, it is subject to the writing requirement of UCC § 2-201(1) unless an exception applies.

Point Three (25%)

The document enclosed in the shipping box with the knives is sufficient to indicate that a contract has been made, but it is not clear that it has been “signed” by the manufacturer—the party against whom enforcement is sought. If it is a sufficient writing, it makes the contract enforceable, but only to the quantity of goods stated in the writing: six knives.

UCC § 2-201(1) requires that, for a contract within its scope to be enforceable, there be a writing sufficient to indicate that a contract for sale has been made that is signed by the party against whom enforcement is sought. The facts indicate that the document enclosed with the six knives that were shipped to the chef stated in its entirety: “It is a pleasure to do business with you. Enclosed, pursuant to our agreement, are six knives. Please remit the balance due of \$600 at your earliest convenience.” This document is a writing. *See* UCC § 1-201(b)(43). Further, its contents clearly indicate that a contract for sale has been made: it states that the knives are enclosed “pursuant to our agreement” and expresses “pleasure to do business with” the chef.

In order for the contract to be enforceable against the manufacturer under UCC § 2-201(1), the document must be “signed” by the manufacturer. The facts do not state that the document bore a signature (in the conventional sense of that term) of the manufacturer, but they do state that the document was on the manufacturer’s letterhead. As the term “signed” is used in § 2-201(1), the meaning is broader than simply bearing a conventional signature. “‘Signed’ includes using any symbol executed or adopted with present intention to adopt or accept a writing.” UCC § 1-201(39). The Official Comment to UCC § 1-201 states that “in appropriate cases [the symbol] may be found in a billhead or letterhead.” Accordingly, some cases have held that a document on company letterhead can constitute a signed writing as long as the requisite intent is present. *See, e.g., Automotive Spares Corp. v. Archer Bearings Co.*, 382 F. Supp. 513 (N.D. Ill. 1974). Thus, it is possible, but not certain, that the requirement of a signed writing is satisfied by the document, depending on whether the letterhead was used “with a present intention to adopt or accept” the document.

Contracts Analysis

Although the writing referred to in UCC § 2-201(1) need not contain detailed information about the contract, “the contract is not enforceable . . . beyond the quantity of goods shown in such writing.” Here, the document included by the manufacturer with the knives that were shipped showed a quantity of only 6 knives. Accordingly, even if the document qualifies as a writing signed by the manufacturer, the document is not sufficient to make the contract enforceable beyond 6 knives. Thus, this writing alone does not provide a basis for the chef to enforce the manufacturer’s obligation to ship the remaining 4 knives pursuant to the oral agreement for a sale of 10 knives.

[NOTE: Some examinees may mention that the manufacturer’s shipment of only 6 knives (when 10 knives were ordered) violates the perfect tender rule and that the chef could have rejected those knives. That is true, but irrelevant. The chef was entitled to accept a less than perfect tender, and such acceptance will not preclude the chef from enforcing the contract for the full amount—if the chef can overcome the statute of frauds problem.]

Point Four (20%)

The chef’s note is arguably a letter of confirmation of a contract for the sale of 10 knives. If it is, then it satisfies the statute of frauds because the manufacturer failed to object to it within 10 days. However, because the note was unsigned, it is unlikely to be given this effect.

The statute of frauds can be satisfied in a contract between merchants if the party seeking enforcement of the contract has sent the other party a confirmation of the contract that would itself satisfy the statute of frauds against the enforcing party. In other words, if the chef sends a written contract confirmation to the manufacturer that would bind the chef, the confirmation will also bind the manufacturer if the manufacturer does not object to it promptly (i.e., within 10 days). *See* UCC § 2-201(2).

Here, both the chef and the manufacturer are merchants. The manufacturer deals in goods of the kind at issue, and the chef’s occupation is such that he would have “knowledge or skills peculiar to the . . . goods involved in the transaction” (restaurant-quality carving knives). *See* UCC § 2-104(1).

However, in all likelihood, no confirmation that would satisfy the statute of frauds was sent by the chef on these facts. Although the chef sent a note to the manufacturer requesting the remaining four knives, that note must have been signed in order to satisfy the statute of frauds. While the note was handwritten and accompanied by a signed check, the note itself was not “signed” by the chef as that term is defined in UCC § 1-201(39). It did not contain any “symbol executed or adopted with present intention to authenticate” the writing. A creative examinee might argue that the chef’s decision to handwrite the note indicates an intent to authenticate by using handwriting alone, but the UCC definition of “signed” seems clearly to contemplate some authenticating symbol in addition to the content of the writing itself.

Point Five (20%)

The chef’s acceptance and payment for six knives eliminates the statute-of-fraud problem as to those six knives, but does not make the contract enforceable as to the remaining four knives.

A contract that does not satisfy the statute of frauds is nonetheless enforceable as to “goods for which payment has been made and accepted or which have been received and accepted.” *See* UCC § 2-201(3)(c). In this case, however, payment has been made for only six knives, and only six knives have been received and accepted. Thus, this exception would not enable enforcement of the contract for the remaining four knives but, rather, only for the six knives already delivered.

[NOTE: There are other exceptions to the statute of frauds that are not at issue on these facts, but that might be discussed by some examinees. One of those exceptions applies if the goods are specially manufactured for the buyer and are not suitable for sale to others. *See* UCC § 2-201(3)(a). Here, there is no indication that the knives are specially manufactured.

Another exception applies if the party against whom enforcement is sought admits in pleading, testimony, or otherwise in court that a contract was made. *See* UCC § 2-201(3)(b). Here, there is no indication of such admission by the manufacturer.

Some examinees may also note that the Uniform Electronic Transactions Act (UETA) and/or the federal Electronic Signature in Global and National Commerce Act (E-SIGN) allow the writing requirement of UCC § 2-201 to be satisfied by an electronic communication. This is true, but it does not change the answer or the analysis, as there is no electronic communication that would satisfy the requirements of UCC § 2-201.]

REAL PROPERTY ANALYSIS

(Real Property III.B.4. & F.; IV.A.1. & C.1.; V.B.1.)

ANALYSIS

Legal Problems

- (1)(a) Is there an implied warranty against latent defects in a newly constructed home?
- (1)(b) Does an implied warranty against latent defects protect a remote grantee?
- (2) Is a buyer who purchases real property from a mortgagor personally liable on the mortgage debt even if the buyer has not expressly assumed the mortgage obligation?
- (3) What are the obligations of a grantor who has conveyed title to real property with a quitclaim deed?

DISCUSSION

Summary

Although under the common law, there were no implied warranties in the sale of a home, this caveat emptor approach has been abandoned with respect to builders of new homes who impliedly warrant that the home is free of latent defects. However, courts are divided as to whether this implied warranty runs to remote grantees who are not in privity with the home builder. Some courts require privity; others do not, reasoning that harm to a remote grantee is foreseeable.

A purchaser of real estate from a mortgagor has no liability on the mortgage obligation unless he expressly or impliedly assumes that obligation. Here, the man did not expressly assume the woman's mortgage obligation, but it is unclear if he impliedly assumed it. If the bank successfully forecloses on the man's house, he has no right to recover his loss from the woman because he took under a quitclaim, not a warranty, deed.

Point One(a) (25%)

Because there is an implied warranty against latent defects in the sale of a new home running from the builder to the buyer, the builder would be liable to the woman, the original buyer, for damages caused by the defective concrete.

Under the doctrine of caveat emptor, a home builder makes no implied warranties regarding the condition of the premises. *See generally* HERBERT HOVENKAMP & SHELDON F. KURTZ, *The Law of Property* 534 (6th ed. 2005). Today, however, American courts have largely rejected the caveat emptor approach. This rejection is based on the view that a home buyer does not stand on an "equal footing" with the builder and relies upon the builder's skill and integrity, as well as the fact that ordinary home buyers are not in a position to discover latent defects. *See, e.g., Petersen v. Hubschman Construction Co.*, 389 N.E.2d 1154 (Ill. 1979); *Terlinde v. Neely*, 271 S.E.2d 768, 769 (S.C. 1980). Although courts have variously described the home builder's warranty as an implied warranty against latent defects, an implied warranty of fitness, or an implied warranty of habitability, it is now recognized in almost all states, and it extends to latent defects such as

faulty concrete. *See generally* Sheed, *The Implied Warranty of Habitability, New Implications, New Applications*, 8 REAL ESTATE L.J. 281 (1980).

Although the implied warranty is typically called an implied warranty of *habitability*, in most states it is not necessary for the man to prove that the house would have been uninhabitable but for his repair. It is enough that the defect is major, given its nature and the dollar value of the problem. In this respect, the content of the implied warranty of habitability for the sale of new homes closely resembles the Uniform Commercial Code implied warranty of merchantability that arises upon the sale of goods by a merchant. Indeed, some of the courts that first developed the warranty of habitability patterned it after the UCC warranty.

Thus, under the law of most states today, the builder would be liable for damages to the woman, the original buyer, for losses caused by the defective concrete.

Point One(b) (25%)

In many, but not all, jurisdictions the home builder's warranty against latent defects extends to a remote grantee like the man.

Not all courts have extended the implied warranty of latent defects to remote grantees. Courts that apply a privity bar have typically done so on the ground that the warranty is contractual in nature and thus should only run in favor of parties in privity with each other. *See Sensenbrenner v. Rust, Orling, & Neale, Architects, Inc.*, 374 S.E.2d 55 (Va. 1988). Other courts, perhaps influenced by the foreseeability standards of tort law, but also relying on the equal vulnerability of both initial and remote grantees, have extended the warranty to subsequent purchasers. For example, in *Redarowicz v. Ohlendorf*, 441 N.E.2d 324 (Ill. 1982), the Illinois Supreme Court stated:

The warranty of habitability is a creature of public policy. It is a judicial innovation that has evolved to protect purchasers of new houses upon discovery of latent defects in their homes. While the warranty of habitability has roots in the execution of the contract for sale, we emphasize that it exists independently. Privity of contract is not required. Like the initial purchaser, the subsequent purchaser has little opportunity to inspect the construction methods used in building the home. Like the initial purchaser, the subsequent purchaser is usually not knowledgeable in construction practices and must, to a substantial degree, rely upon the expertise of the person who built the home. If construction of a new house is defective, its repair costs should be borne by the responsible builder-vendor who created the latent defect. The compelling public policies underlying the implied warranty of habitability should not be frustrated because of the short intervening ownership of the first purchaser; in these circumstances the implied warranty of habitability survives a change of hands in the ownership.

441 N.E.2d at 330 (internal citations omitted). A similar approach has been adopted in Iowa. *See Speight v. Walters Development Co., Ltd.*, 744 N.W.2d 108 (Iowa 2008).

Whether the man, as a remote grantee, is protected by the warranty running from the builder to the woman depends upon which approach governs.

Point Two (35%)

In most, but not all, jurisdictions the man is not liable on the woman's mortgage obligation because he did not expressly assume that mortgage obligation. In some jurisdictions, the man could be held liable on the woman's mortgage obligation on the theory that he implicitly assumed this obligation.

Real Property Analysis

Because the woman's mortgage obligation to the bank was recorded, the man took the home subject to the mortgage, and the bank's interest had priority over the man's. Because the bank has priority, it can foreclose on the home if the mortgage is in default. However, the recording of a mortgage does not make the mortgagor's grantee personally liable for the mortgagor's obligation.

The predominant rule in the United States is that if a remote grantee takes subject to a mortgage which the grantee does not assume, the remote grantee is not personally liable on the debt. *See* GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW 273–74 (5th ed. 2007). Of course, that does not mean that the remote grantee will not want to voluntarily make payments on the mortgage in order to prevent the mortgagee from foreclosing on the debt. But it does mean that if the mortgagee forecloses on the property, it cannot hold the remote grantee personally liable on the debt or liable for any deficiency resulting from a mortgage foreclosure. Following this approach, the man would be personally liable on the woman's mortgage obligation if the man assumed (i.e., made a commitment to pay) the mortgage. There is no evidence of an express assumption agreement here. The deed from the woman to the man made no mention of the woman's mortgage, and the facts do not describe any express agreement.

In some jurisdictions, a remote grantee who did not expressly assume a mortgage may be deemed to have *impliedly* assumed it where, as here, the remote grantee paid the seller only the difference between what the house was worth and the outstanding balance on the mortgage obligation. The rationale for this approach is that “[the grantee’s] retention of the vendor’s money for the payment of the mortgage imposes upon him the duty of protecting the vendor against the mortgage debt. This must be so . . . for it would seem to be almost intolerably unjust to permit him to keep back the . . . [money he would have otherwise paid the vendor to purchase the property].” *Heid v. Vreeland*, 30 N.J. Eq. 591, 591 (1879). States that follow this approach include Connecticut, Illinois, Iowa, Maryland, Michigan, Oklahoma, and South Carolina. *See generally* NELSON & WHITMAN, *supra*, 285.

Here, the man was clearly aware of the mortgage; the mortgage was recorded, and the man paid the woman only \$160,000, considerably less than the house was worth (\$360,000). Moreover, the man began making mortgage payments immediately after buying the house and continued making payments to the bank for a year.

Thus, in a jurisdiction that follows the implied assumption approach, the man may be liable to the bank. In a jurisdiction that requires express assumption of a mortgage obligation, the man would not be liable because there is no evidence that he expressly assumed the mortgage.

[NOTE: If the man is deemed to have impliedly assumed the mortgage, then the woman is merely a surety and would be liable for any deficiency not paid by the man. *See* RESTATEMENT (THIRD) OF SURETYSHIP AND GUARANTY § 1, illustration 29 (1996).]

Point Three (15%)

If the bank successfully forecloses on the man's home, he cannot recover his loss from the woman because she gave the man a quitclaim deed and quitclaim deeds contain no warranties of title on which a buyer can sue.

If a seller conveys land on which there is an unsatisfied encumbrance such as a mortgage, and that encumbrance has priority against the buyer, the seller is liable to the buyer for any loss borne by the buyer only if the seller warranted that there was no such encumbrance against the property. Had the woman conveyed the land to the man by a warranty deed, that deed would have impliedly included a covenant against encumbrances, and the woman would have been liable to the man for a breach of this covenant.

Here, however, the woman conveyed the home to the man by a quitclaim deed. A quitclaim deed contains no warranties of title, and the buyer taking under a quitclaim deed has no claim against the seller for damages resulting from encumbrances against the property having a priority over the buyer's interest. Here the bank has priority over the man's interest because its mortgage was recorded prior to the quitclaim deed to the man, and thus the man had notice of the mortgage from the record. The man also had actual notice of the mortgage as evidenced by his making of mortgage payments to the bank. *See* WILLIAM B. STOEBUCK & DALE A. WHITMAN, *The Law of Property* 905, 908–09 (3d ed. 2000). Thus, the man is not entitled to any damages from the woman for the loss he sustained as a result of the foreclosure.

[NOTE: If the examinee concludes that the man is liable for any deficiency (*see* Point Two), the man would have a claim against the woman to recover that deficiency on the ground that he was her surety to guarantee payment of the deficiency.]

DECEDENTS' ESTATES ANALYSIS

(Decedents' Estates II.F.2., I.12. & L.; III.A.)

ANALYSIS

Legal Problems

(1)(a) Is Mary barred from taking under John's will because she and John signed a prenuptial agreement?

(1)(b) Is Mary barred from taking under John's will because, at the time of John's death, there was a divorce action pending between them?

(1)(c) Under John's will, is John's biological, but adopted-out, child entitled to take a share of John's estate?

(2) Who should be appointed as the personal representative of John's estate?

DISCUSSION

Summary

At least three-fourths of John's estate should be distributed to Mary. A prenuptial agreement waiving a share of a spouse's estate does not bar a surviving spouse from taking a bequest that was voluntarily made after the agreement was signed, and a pending divorce does not revoke a testamentary disposition in favor of a spouse. In states that have adopted Uniform Probate Code § 2-119(c) or a like statute, Son is entitled to one-quarter of John's estate. In other states, it is unclear whether one-quarter of John's estate should be distributed to Son; in these states, the court will construe John's intent, and there are arguments for and against the claim that John intended Son to take under his will. The court will appoint Mary as the personal representative of John's estate because a surviving spouse has first priority to serve in this capacity. Son may not be appointed personal representative of the estate because Son is a minor.

Point One(a) (25%)

A prenuptial agreement waiving rights that a spouse might otherwise assert against the estate of the other does not preclude a surviving spouse from taking a bequest voluntarily devised to the surviving spouse by a deceased spouse. Thus, Mary is not precluded from taking a share of John's estate by the prenuptial agreement that she signed.

A prenuptial agreement in which spouses waive rights to a share of each other's assets upon death or divorce does not bar either party from making subsequent gifts or bequests to the other spouse. *In re Estate of Geyer*, 533 A.2d 423, 427 (Pa. 1987); *In re Hillegass' Estate*, 244 A.2d 672 (Pa. 1968); L.S. Tellier, *Spouse's Right to Take Under Other Spouse's Will as Affected by Antenuptial or Postnuptial Agreement or Property Settlement*, 53 A.L.R. 2d 475 (1957). Such an agreement bars only claims that do not arise from a voluntary gift or bequest. Thus, the prenuptial agreement signed by John and Mary does not bar Mary from taking a share of John's estate under his will.

Point One(b) (25%)

Although divorce bars a former spouse from taking a bequest under a will executed prior to the divorce, the filing of a divorce action does not. Thus, Mary is entitled to take under John's will notwithstanding the pendency of a divorce action at the time of his death.

A bequest may be revoked by operation of law when a change in circumstance occurs that makes it unlikely that the testator would have wanted a beneficiary named in the will to take under the will. All states provide that if, after the execution of a decedent's will, the decedent is divorced, a bequest in favor of the decedent's former spouse is revoked by operation of law. *See* UNIF. PROBATE CODE § 2-804. However, the typical statute does not apply if a divorce proceeding is *pending* when one of the spouses dies. This approach derives from the fact that, until the divorce is finalized, no property division order will be entered; thus the moral and legal claims of each spouse in the property of the other have not yet been satisfied.

Point One(c) (35%)

In most states, Son will be entitled to a share of John's estate only if the court concludes that John intended to include an adopted-out child in the bequest to "my children who survive me." However, John's adopted-out child, Son, is entitled to a share of John's estate under UPC § 2-119(c) or a like statute.

Under the terms of John's will, one-fourth of John's estate is distributable to John's "children who survive me." Son is a biological child of John who survived John. However, John consented to Son's adoption by Aunt, and an adoption typically severs the parent-child relationship between the child and his biological parents. *See* UNIF. PROBATE CODE § 2-119(a). A few states do not sever the parent-child relationship when the child is adopted by a relative of a biological parent. *See, e.g.,* 755 ILL. COMP STAT. 5/2-4(d)(1); UNIF. PROBATE CODE § 2-119(c) (2008) (adopted in North Dakota and Utah). In these states, Son would take under John's will.

In most states, Son would take only if the court concluded that John, when using the words "my children" in his will, intended to include an adopted-out child. The evidence on this question is far from determinative. On the one hand, John gave Son up for adoption to a relative, Aunt, and he took Son into his own home after Aunt's death. John also told Mary that he was Son's father, and he did so after the will was executed. On the other hand, there is no evidence that John attempted to formalize his relationship with Son. It is thus unclear whether Son would take a share of John's estate.

Point Two (15%)

Mary will be appointed personal representative of John's estate.

An individual named as personal representative in a decedent's will has priority to receive letters testamentary from the court overseeing the administration of the estate. *See* UNIF. PROBATE CODE § 3-203(a)(1). Where, however, the will is silent regarding the appointment of the personal representative, the court will appoint a person granted priority under the governing statute if that person is otherwise qualified. Typically, the decedent's surviving spouse is the individual with the first priority. *See id.* § 3-203(a)(2).

Under the Uniform Probate Code, a surviving spouse has first priority only if the spouse is a devisee of the decedent. Mary satisfies that condition. Therefore, Mary will be appointed personal representative of the estate. Even if Mary were not a devisee, she would still be entitled to be appointed under the Code because John's devisees (i.e., "my children") are not qualified to

Decedents' Estates Analysis

be appointed personal representatives because Son is a minor. *See* UNIF. PROBATE CODE § 3-203(a)(4).



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