# *July 2020*
# *MEE Question 1*
# *Evidence*

**JULY 2020 MEE**
**QUESTION 1 – EVIDENCE**

A woman brought a tort action against a trucking company in a federal district court in State A one month after a traffic accident in State A. The woman had been driving a car that collided with a truck owned by the trucking company and driven by one of its employees. As a result of injuries sustained during the accident, the woman is permanently disabled and unable to work.

The diversity action, which is properly before the federal court, requires a determination of fault. The woman alleges that, at the time of the accident, the truck driver was driving under the influence of prescription narcotics and lost control of his truck on the highway, which caused the collision. The trucking company argues that the woman caused the accident by driving her car at an excessive speed.

The woman will seek to introduce the following three items of evidence:

1. In-court testimony from a trucking company representative that, less than one hour after the accident, the trucking company began an internal investigation into the accident, which resulted in the truck driver's being fired the next day.

2. A handwritten letter the woman received while she was recuperating in the hospital. The letter, dated one week after the accident, read: *"I am terribly sorry about the accident that I caused. It was all my fault. I was taking pain pills prescribed by my doctor and shouldn't have been driving."* The letter was signed with the name of the truck driver. The woman no longer has the original (hard copy) letter, but she has a photograph of the letter that she took with her cell phone.

3. In-court testimony from the truck driver's doctor that the truck driver has suffered from chronic pain for years and that she had prescribed a powerful narcotic to treat that pain one month before the accident. The doctor is licensed in State A, where she has treated the truck driver for many years.

The truck driver will be unavailable to testify at trial because neither party has been able to procure his attendance and his whereabouts are unknown. The woman's cell phone has been examined by a neutral computer expert, who reports that the photograph of the letter is clearly legible and that the image has not been altered in any manner. The doctor has informed the parties that she does not want to testify about her communications with her patient, the truck driver, and that she has had no contact with her patient since the week before the accident.

The defense team will seek pretrial to exclude all three items of evidence proffered by the woman. Assume that the judge will find all three items relevant under Rule 401 of the Federal Rules of Evidence and will refuse to exclude any item of evidence under Rule 403 of the Federal Rules of Evidence.

With respect to each item of evidence that will be proffered by the woman, identify and explain the most plausible objections that the trucking company's defense team could make, any plausible responses the woman's attorney should make to those objections, and how the court should rule.

# *July 2020*
# *MEE Analysis 1*
# *Evidence*

**JULY 2020 MEE**
**ANALYSIS 1 – EVIDENCE**

This analysis addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses are expected to be and should not be construed as a model answer. Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.

## ANALYSIS

Legal Problems:

(1) In a tort action alleging negligence by a company employee, should a court exclude evidence that a defendant company fired the allegedly negligent employee one day after conducting an internal accident investigation?

(2)(a) What evidence should a court require to authenticate a handwritten letter purportedly written by an unavailable person?

(2)(b) If a writing (i.e., the letter) has been authenticated, but the original hard copy has been lost, should a court find an unaltered cell-phone photograph of the writing admissible under the "best evidence" rule?

(2)(c) If a writing (i.e., the letter) is authenticated and satisfies the "best evidence" rule, should hearsay statements contained therein be admitted as statements against interest by an unavailable declarant?

(3) Does the physician-patient privilege prevent a doctor from testifying about the condition and treatment of a patient now unavailable for trial if the patient voluntarily disclosed his own relevant medical information to a person injured in an accident, prior to the onset of litigation?

## DISCUSSION

### Summary

As to the evidence of the trucking company's investigation of the accident and firing of the truck driver, the trucking company could plausibly object to the admission of this evidence because the investigation and firing were subsequent remedial measures taken by the defendant and are inadmissible under FRE 407. The court should rule in favor of excluding this evidence.

The defense could plausibly object to admission of the truck driver's letter based on the following arguments: (1) it cannot be authenticated, (2) the photograph of the letter does not satisfy the best evidence rule, and (3) the letter itself is hearsay. The woman's attorney should respond as follows: (1) the cell-phone photograph of the handwritten letter can likely be authenticated through testimony from any lay or expert witness who can identify the truck driver's handwriting; (2) although the original (hard copy) letter has been lost, the unaltered cell-phone photograph satisfies the best evidence rule; and (3) although the letter is hearsay, it should be admitted under FRE

804(b)(3) as a statement against interest by an unavailable declarant. The court should reject all three defense objections and admit the image of the letter.

Finally, the defense could plausibly object that admission of the doctor's testimony would violate the physician-patient privilege. The court's decision will depend on applicable state law, but all jurisdictions recognize some form of physician-patient privilege. The court should apply the privilege and rule that the doctor need not testify. However, the court could admit the doctor's testimony based on a specific finding that the truck driver's voluntary disclosure of his use of pain pills in the letter to the woman effected an implied waiver of the physician-patient privilege limited to this relevant medical information.

**Point One (15%)**

In a case alleging negligence by a company employee, a court should exclude evidence that a defendant company fired the allegedly negligent employee one day after conducting an internal accident investigation because the investigation and firing are "subsequent remedial measures" under FRE 407.

Federal Rule of Evidence 407 excludes evidence of "measures" a defendant has taken "that would have made an earlier injury or harm less likely to occur." Such evidence is inadmissible if offered to prove "negligence" or "culpable conduct." *See* Fed. R. Evid. 407 (2015). The justification for Rule 407 is twofold. First, the probative value of any subsequent remedial measure as an admission of fault is limited. Second, exclusion fosters "a social policy of encouraging people to take . . . steps in furtherance of added safety." *See id*. (advisory committee's note).

Here, proof that the defendant company immediately investigated the accident and one day later fired the truck driver is relevant only insofar as it suggests that, at the time of the accident, the truck driver acted in a culpable or negligent fashion. The company should object to the admission of this evidence for that purpose, and this defense objection should be sustained by the court. The general rule in both state and federal courts is that post-incident discipline constitutes a subsequent remedial measure. *See Alfieri v. Carmelite Nursing Home, Inc.*, 29 Misc.3d 509, 514–16, 907 N.Y.S.2d 577 (2010) (surveying cases). More specifically, the termination of employees under similar circumstances is typically viewed as a subsequent remedial measure. For example, in *Mahnke v. Washington Metropolitan Area Transit Authorit*y, 821 F. Supp. 2d 125, 152 (D.D.C. 2011), the court found evidence regarding a bus driver's termination following an accident with a pedestrian inadmissible as a subsequent remedial measure. *See also Dukett v. Mausness*, 546 N.E.2d 1292 (Ind. Ct. App. 1989) (excluding evidence that cab company fired driver the day after an accident); *Hull v. Chevron U.S.A., Inc*., 812 F.2d 584, 587 (10th Cir. 1987) (evidence of termination of negligent employee and change in safety policies not admissible because it would "trespass inferentially into the Rule 407 prohibited terrain of proof of culpable conduct").

Under Rule 407, evidence of subsequent remedial measures is admissible only if offered "for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures." Nothing in the facts indicates that these issues will arise.

**Point Two(a) (15%)**

The cell-phone photograph of the handwritten letter may be admitted if the letter can be authenticated.

The photograph of the letter is relevant only if the letter was actually written by the truck driver. Under Federal Rule of Evidence 901(a), "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Generally, a handwritten letter can be authenticated by testimony of either a witness with knowledge (e.g., the truck driver's testimony that he wrote the letter) or testimony from a lay or expert witness identifying the handwriting. Specifically, under Rule 901(b)(2), handwriting can be authenticated by "[a] nonexpert's opinion that handwriting is genuine, based on familiarity with it that was not acquired for the current litigation." *See, e.g., Smith v. State*, 902 A.2d 1119, 1124 (Del. 2006) (noting that there is generally no minimum number of observations of someone's handwriting required to constitute familiarity but that there must be a minimum factual basis, which some courts have held to be observation of handwriting on one occasion).

Here, although the woman is unable to authenticate the letter, there are likely lay or expert witnesses who could authenticate the truck driver's handwriting.

Of course, in the unlikely event that the letter cannot be authenticated, the photograph of the letter should not be admitted for any purpose.

**Point Two(b) (25%)**

<u>If the court finds that the truck driver's letter has been authenticated, it should admit the photograph of the letter because the photograph satisfies the "best evidence" rule.</u>

If the court finds that the letter has been authenticated, it must then address the fact that the woman has lost the original (hard copy) letter. All she has is a photograph of the letter taken with a cell phone. Under the "best evidence" rule, when a party seeks to prove the content of a writing, she must do so by producing the writing itself. *See* McCormick on Evidence § 229.

The federal version of the "best evidence" rule is contained in Rule 1002, which provides that "[a]n original writing . . . is required in order to prove its content unless these rules . . . provide[] otherwise." Fed. R. Evid. 1002. However, original writings are not always available or extant, so Rules 1003 and 1004 provide widely used exceptions to the "best evidence" rule.

First, under Rule 1003, "a duplicate" of a document "is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity . . . ." Fed. R. Evid. 1003. The woman should be able to admit the photograph as a duplicate. The photograph has been found by a neutral computer expert to be clearly legible and not altered in any manner. Under these circumstances, the photograph is a duplicate of the letter, no different from photocopies, which are routinely admitted under Rule 1003. *See, e.g., U.S. v. Stockton*, 968 F.2d 715, 719 (8th Cir. 1992) (photographs of notes taken by DEA agents are admissible as duplicates to prove content of the notes); *cf. Cobb v. Commonwealth*, 2013 WL 5744363 (Va. Ct. App. 2013) (a cell-phone service provider's printout of text messages sent to cell phone is an admissible duplicate of the original writing).

Second, Rule 1004 allows the contents of writings to be proved by "other evidence" under certain circumstances. One circumstance where "other evidence" is allowed is when "all the originals are lost or destroyed, and not by the proponent acting in bad faith." Fed. R. Evid. 1004(a). Although the

facts do not specify how the original (hard copy) handwritten letter was lost, there is no evidence that the woman acted in bad faith.

Thus, the court should conclude that the photograph of the letter satisfies the "best evidence" rule.

**Point Two(c) (25%)**

<u>If the letter is authenticated and the cell-phone photograph satisfies the "best evidence" rule, the hearsay statements in the letter should be admitted as statements against interest by an unavailable declarant.</u>

If the letter is authenticated and the cell-phone photograph satisfies the "best evidence" rule, the contents of the letter are relevant to this tort action because they support the woman's argument that the truck driver caused the accident by driving under the influence of narcotic pain pills. However, if offered by the woman for this purpose, the letter is hearsay because it is an out-of-court statement offered to "prove the truth of matter asserted in the statement." Fed. R. Evid. 801(c).

Although the letter is hearsay, the woman should argue and the court should find that the letter is admissible under Rule 804(b)(3) as a statement against interest by an unavailable declarant.

First, the truck driver is an unavailable declarant because neither party has been able to procure his attendance at trial and his whereabouts are unknown. A witness is unavailable when he is "absent from the trial . . . and the statement's proponent has not been able . . . to procure the declarant's attendance or testimony." Fed. R. Evid. 804(a)(5).

Second, Rule 804(b)(3) defines the "statement against interest" exception to the hearsay rule as a statement that "a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it . . . had so great a tendency . . . to expose the declarant to civil or criminal liability . . . ."

The truck driver's letter was a statement against interest because he wrote, "I am terribly sorry about the accident that I caused. It was all my fault. I was taking pain pills . . . and shouldn't have been driving." Taken in context, the letter was an unequivocal admission of fault potentially subjecting the truck driver to both civil and criminal liability and was the type of statement that a reasonable person would make only if the person believed it to be true.

[NOTE: Some examinees might argue incorrectly that the woman should also argue that the letter should be admitted as a statement made by a party opponent or by the defendant's "agent or employee on a matter within the scope of that relationship and while it existed." Fed. R. Evid. 801(d)(2)(A) and (D). This is incorrect. The truck driver is not a party. The truck driver was also fired a day after the accident and the letter is dated a week after the accident, i.e., at a time when the employment relationship no longer existed. Similarly, an argument that the letter should be excluded as an offer of settlement from the truck driver to the woman under Fed. R. Evid. 408 is incorrect because the statement was not made during compromise (i.e., settlement) negotiations.]

**Point Three (20%)**

<u>Because of the physician-patient privilege, the court probably should not compel the doctor to testify, but this will depend on applicable state law.</u>

The woman will seek to have the truck driver's doctor testify that the truck driver suffered from chronic pain and, one month before the accident, had been prescribed a powerful narcotic to treat that pain. The doctor has stated that she does not want to testify, and the trucking company should object to this testimony on the ground of physician-patient privilege.

This is a diversity action filed in federal district court, so "state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." Fed. R. Evid. 501.

Although the problem does not specify the physician-patient privilege law of the relevant state (likely State A), all states recognize this privilege, *see* Laurie L. Levenson, *Evidence*, in The Journalist's Guide to American Law 330 (J.L. Nockleby ed. 2013), and the privilege invariably belongs to the patient. When a patient, like the truck driver, is unavailable at the time of trial and cannot effectuate a waiver, the physician typically has an ongoing duty to assert the privilege and thus refuse to disclose confidential information. *See, e.g., State ex rel. Maloney v. Allen*, 26 S.W.3d 244 (Mo. Ct. App. 2000). The privilege generally covers communications made by the patient to the physician for the purpose of securing treatment, which would include any statements by the truck driver to his doctor describing his pain and medical records describing medications. *See generally Liew v. New York University Medical Center*, 55 A.D.3d 566 (N.Y. Sup. Ct., App. Div.); *Sun Health Corp. v. Myers*, 205 Ariz. 315 (Ariz. Ct. App. 2003). Given these general principles, the court should find that the State A physician-patient privilege precludes the doctor from testifying about the truck driver's chronic pain or the prescribed narcotics.

The woman may respond that the truck driver partially and impliedly waived the physician-patient privilege when he disclosed his use of "pain pills" in the letter to the woman. However, the disclosure of medical information to third parties is usually not considered an implied waiver. *See, e.g., Lezell v. New York*, 538 N.Y.S.2d 902 (N.Y. Ct. Cl. 1989) (disclosure of bare facts of medical history does not waive privilege in medical records and physician-patient communications).

However, some cases suggest that certain voluntary disclosures of otherwise privileged information by the patient could be viewed as an implied waiver of physician-patient privilege for communications relevant to the information disclosed. *See, e.g*., *Liverano v. Devinsky*, 717 N.Y.S.2d 629 (N.Y. App. Div. 2000) (defendant's voluntary disclosure to media that he suffered from glaucoma was deemed to waive the physician-patient privilege in his ophthalmological medical records); *Farrow v. Allen*, 608 N.Y.S.2d 1 (N.Y. App. Div. 1993) (physician-patient privilege applies only to protect communications made in confidence and in context of physician-patient relationship, but if patient reveals information to third party wholly unconnected to treatment and not subject to any privilege, communication no longer deemed a confidence and privilege deemed waived as to that information). However, a court adopting this view would limit the scope of the doctor's testimony to the relevant medical information (the pain pills).

# *July 2020*
# *MEE Question 2*
# *Corporations & LLCs*
# *Constitutional Law*

**JULY 2020 MEE**
**QUESTION 2 – CORPORATIONS & LLCS / CONSTITUTIONAL LAW**

A shareholder of Retailer Inc., a publicly traded corporation in the retail business, is concerned about reports in a respected national business magazine that Retailer has been making large donations to a secretive political group, Americans Fighting Against Wrongdoing (AFAW). AFAW places television election advertisements supporting state and federal political candidates who AFAW believes are committed to fighting wrongdoing. The shareholder believes that Retailer's donations to AFAW do not promote Retailer's business in any way.

The shareholder, who owns 100 shares of Retailer stock, has decided to take action. The shares, which the shareholder has held for the past 10 years, have a current market value of $5,000.

The shareholder has sent a letter to Retailer requesting that she be allowed to inspect all minutes of the meetings of Retailer's board of directors relating to donations made by Retailer to AFAW. The shareholder explains that her purpose is to confirm these donations and seek to have the board desist from further waste of corporate assets.

The shareholder has also sent a second letter to Retailer requesting that a proposed shareholder resolution be presented for a vote of the shareholders at the upcoming annual shareholders' meeting. The resolution reads: "We the shareholders of Retailer Inc. hereby resolve that Retailer's board of directors shall not approve any political expenditures by Retailer unless such expenditures are specifically authorized by a majority vote of all outstanding shares of Retailer." The shareholder explains, "This resolution is to stop the board from wasting corporate assets, including by making further donations to AFAW."

Retailer is incorporated in State X, which has adopted the Model Business Corporation Act (MBCA).

1. Under State X law, is the shareholder entitled to inspect the requested board minutes? Explain.

2. Under State X law, is the shareholder's proposed resolution a proper subject for submission to Retailer's shareholders for their vote? Explain.

3. Assuming that the resolution is proper for submission for shareholder action under State X law, would the resolution (if approved) infringe Retailer's First Amendment rights? Explain.

# *July 2020*
# *MEE Analysis 2*
# *Corporations & LLCs*
# *Constitutional Law*

**JULY 2020 MEE**
**ANALYSIS 2 – CORPORATIONS & LLCS / CONSTITUTIONAL LAW**

This analysis addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses are expected to be and should not be construed as a model answer. Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.

## ANALYSIS

Legal Problems:

(1) Does State X law permit inspection by a corporate shareholder of board minutes dealing with the corporation's political expenditures when the shareholder's stated purpose is to prevent an alleged waste of corporate assets?

(2) Under State X law, is a shareholder's resolution prohibiting a corporation's board from approving any political expenditures unless previously authorized by the corporation's shareholders a proper subject for shareholder action?

(3) Would such a shareholder resolution, if approved by a majority vote of the corporation's outstanding shares, infringe the corporation's First Amendment right to free speech?

## DISCUSSION

### Summary

The requested board minutes that relate to Retailer's donations to AFAW are subject to inspection under the MBCA inspection statute. The shareholder's inspection demand was based on credible news reports and identified categories of documents related to the shareholder's proper purpose to expose the impropriety of these donations.

The shareholder's resolution requiring the board to obtain shareholder authorization before approving political expenditures by Retailer is not a proper subject for shareholder action. The resolution ("board of directors shall not approve . . .") is phrased as a binding limitation on the board's discretion. Although the MBCA recognizes the fundamental right of shareholders to propose resolutions for shareholder action, such a proposal must generally be phrased as a precatory recommendation (not a mandate) for board action.

The First Amendment, as interpreted by the Supreme Court in *Citizens United*, treats independent political expenditures by for-profit corporations as protected speech. Nonetheless, the corporation's First Amendment rights are not infringed by a shareholder resolution to restrict its political activity because the restriction would be imposed by private actors, not by state action. Indeed, in *Citizens United*, the Court made clear that shareholders can place limits on corporate speech by exercising their rights to participate in "corporate democracy," thus making "corporations . . . accountable for their positions."

[NOTE: Governance of the internal affairs of Retailer, because it is incorporated in a Model Business Corporation Act jurisdiction, is subject to the MBCA rules related to shareholder rights to information and to initiate corporate action. *See* MBCA § 15.01(a)(1) (preserving the judicially developed doctrine that internal corporate affairs are governed by the law of the state of incorporation). Here, the question specifically calls for an analysis of State X law and does not raise any issues under other laws, including the federal shareholder proposal rule (Securities and Exchange Act Rule 14a-8). Thus, the examinee's answer should focus on the applicable rules supplied by the MBCA.

The question is based on the 2016 Revision of the MBCA. The result and analysis for the question, however, would be the same under earlier versions of the MBCA.]

**Point One (35%)**

The shareholder has a right to inspect the requested board minutes. Her request is specific and based on credible press reports of large, questionable donations by Retailer. Further, her stated desire to expose the wastefulness of these donations is a proper purpose.

Generally, a corporation is required to keep minutes of meetings of its board of directors. *See* MBCA § 16.01(a)(5), (b). Thus, the documents requested here by the shareholder should be in existence and available from Retailer.

Under the MBCA, any shareholder has a right to inspect and copy board minutes by making a demand for inspection. MBCA § 16.02(b)(3). To inspect such records, the shareholder's demand must be made in "good faith" and for a "proper purpose"; the shareholder's purpose and the requested records must be described with "reasonable particularity"; and the requested records must be "directly connected" with the shareholder's purpose. *Id.* § 16.02(c).

Although the MBCA does not define "proper purpose," case law has defined it as a purpose that is "reasonably relevant" to the demanding shareholder's interest as a shareholder. *See* Official Comment, MBCA § 16.02(c). Courts have generally accepted as proper a shareholder's purpose to protect his financial interest in the corporation, his interest in voting or selling shares, or his bringing of a lawsuit to protect these interests. Thus, an investigation by a shareholder into possible corporate wrongdoing, whether to bring a shareholder lawsuit or initiate other remedial action, constitutes a "proper purpose." *See Security First Corp. v. U.S. Die Casting and Dev. Co.,* 687 A.2d 563, 567 (Del. 1997).

To show "good faith," courts have required shareholders seeking to investigate corporate wrongdoing to present evidence establishing a "credible basis" for belief in possible wrongdoing; mere suspicion of wrongdoing is not enough. *See Seinfeld v. Verizon Communications, Inc.*, 909 A.2d 117 (Del. 2006) (disallowing inspection of documents based only on allegations of unauthorized and excessive compensation). Further, when a shareholder who demands inspection has interests that relate both to the shareholder's financial investment and to other interests (such as a social or political interest), courts have generally permitted inspection if the shareholder is able to identify "shareholder" interests. *See Conservative Caucus v. Chevron Corp.,* 525 A.2d 569 (Del. Ch. 1987) (permitting inspection of shareholders' list by shareholder seeking voting support from other shareholders for a proposal that corporation stop doing business in communist Angola given alleged economic risks such business created for corporation).

Finally, the shareholder seeking inspection must identify documents "with reasonable particularity" and show how they are "directly connected" to the articulated purpose of the inspection. *See Saito v. McKesson HBOC, Inc.*, 806 A.2d 113 (Del. 2002) (allowing inspection of documents, based on demand for "categories of documents" relating to challenged merger). According to the Official Comment accompanying the MBCA inspection statute, if the corporation disputes the "connection" of the demanded records to the shareholder's purpose, the court may examine the records privately to make this determination. *See* Official Comment, MBCA § 16.02(c).

Here, the shareholder's demand for board minutes that relate to Retailer's donations to AFAW appears to satisfy the inspection statute. The demand, stated in terms of categories of documents, permits the corporation to identify the documents sought by the shareholder. Moreover, the shareholder's stated purposes—to expose the impropriety of these donations (because they are said not to promote any corporate interest) and to have the board desist from further donations—are related to the shareholder's financial interest in the corporation. Even if the shareholder has other non-corporate reasons for demanding inspection, such as political views about the corporation's participation in politics, her stated purpose to expose corporate waste is sufficient.

Moreover, to obtain inspection, the shareholder need not demonstrate that Retailer's donations to AFAW actually constituted "waste." That is, the donations may or may not have constituted "an exchange that is so one-sided that no business person of ordinary, sound judgment could conclude the corporation has received adequate consideration." *In re Citigroup Shareholder Derivative Litigation*, 964 A.2d 106, 136 (Del. Ch. 2009). To obtain inspection, the shareholder need only have a "good faith" interest in exposing and preventing further corporate wrongdoing. Here, given the press reports about these donations, the shareholder appears to have a "credible basis" for her belief that the donations to AFAW promote no corporate interest. The records, once produced for inspection, will allow the shareholder to decide whether or not to pursue further action to have the board discontinue these donations.

[NOTE: Under the MBCA, the number of shares owned by the shareholder and the time that she has held them are not relevant to her inspection rights. *See* MBCA § 16.02(a), (f). Thus, an answer that discusses the ownership and holding-period requirements of SEC Rule 14a-8 (ownership of $2,000 or 1% of outstanding shares during 12-month holding period) should receive no credit for this discussion.]

**Point Two (35%)**

<u>The shareholder's proposed resolution, as phrased, is not a proper subject for shareholder action. The resolution improperly *mandates* that Retailer's board of directors not approve corporate political expenditures unless authorized by the shareholders.</u>

The MBCA does not specifically permit the submission of shareholder resolutions for shareholder action at shareholders' meetings. Nonetheless, the practice is widespread and generally accepted under common law principles as a fundamental right of shareholders. *See* Official Comment, MBCA § 7.08 (recognizing that corporate bylaws may specify that "to propose a resolution for adoption" a shareholder may be required to give advance notice of the proposal).

The case law on proper subjects for shareholder resolutions is scant. The leading case, decided by the New York Court of Appeals, permitted a shareholder proposal stating support for the corporation's former president and recommending his re-hiring by the corporation's board of directors. As the court explained,

> The stockholders, by expressing their approval of Mr. Auer's conduct as president and their demand that he be put back in that office, will not be able, directly, to effect that change in officers, but there is nothing invalid in their so expressing themselves and thus putting on notice the directors who will stand for election at the annual meeting.

*Auer v. Dressel*, 118 N.E.2d 590, 593 (N.Y. 1954). Thus, shareholders may express their views on corporate matters in non-binding, precatory resolutions.

The U.S. Securities and Exchange Commission's rules on the inclusion of shareholder resolutions in proxy materials state that a company may exclude from proxy materials a shareholder proposal that is "improper under state law." SEC Rule 14a-8(i)(1); *see also SEC v. Transamerica Corp*., 163 F.2d 511, 514 (3d Cir. 1947), *cert. denied*, 332 U.S. 847 (1948) (whether shareholder proposal is proper is answered not by federal but by state corporate law). A note accompanying the SEC rule takes a similar view of state law requirements as the view expressed by the New York court in *Auer*:

> Depending on the subject matter, some proposals are not considered proper under state law if they would be binding on the company if approved by shareholders. In our experience, most proposals that are cast as recommendations or requests that the board of directors take specified action are proper under state law. Accordingly, we will assume that a proposal drafted as a recommendation or suggestion is proper unless the company demonstrates otherwise.

Consistent with this note, SEC staff has taken the view that shareholder proposals cast as recommendations or requests that the board of directors take specified action are generally proper under state law. *See Bank of America Corp*., SEC No-Action Letter (Feb. 15, 2013) (shareholder proposal requesting that corporation's board prepare a report on the corporation's political activities and expenditures). However, a shareholder proposal that would bind the corporation or the corporation's board is generally not considered proper under state law.

An exception to this principle, however, arises when the shareholder resolution seeks to require corporate action by means of an amendment to the corporation's bylaws. Amending the bylaws is a power that shareholders generally share with the corporation's board of directors. *See* MBCA § 10.20. Thus, the Delaware Supreme Court has stated that a shareholder proposal to amend the corporation's bylaws to *require* the corporation to reimburse reasonable expenses of a shareholder nominating a "short slate" of directors is a proper subject for shareholder action. *See CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227 (Del. 2008).

Here, the shareholder's resolution is phrased as a binding limitation on Retailer's board not to approve any political expenditures unless authorized by the shareholders. Thus, this resolution (as phrased) is not a proper subject for shareholder action. Because it does not seek to amend Retailer's bylaws, its mandatory nature makes it an improper subject for shareholder action under State X law.

**Point Three (30%)**

A shareholder resolution restricting Retailer's political activities is private action, not state action, and thus would not infringe Retailer's First Amendment rights.

The Supreme Court has held that independent political expenditures by a for-profit corporation constitute speech protected by the First Amendment. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (invalidating federal statutory ban on corporate expenditures in federal elections); *see also Am. Tradition P'ship v. Bullock*, 567 U.S. 516 (2012) (invalidating Montana statute banning corporate expenditures to influence state elections).

Although the shareholder resolution in this case seeks to restrict Retailer's political expenditures, the shareholder-voted restriction would not violate the Constitution because the restriction is not "state action." The Supreme Court has long held that only government action can violate the protections of individual liberty in the Constitution. Private actors are not obliged to comply with the Constitution, and private conduct that infringes on individual rights (e.g., First Amendment rights) is not unconstitutional. *See, e.g., Civil Rights Cases*, 109 U.S. 3 (1883) (Fourteenth Amendment, which prohibits action by States, does not reach "individual invasion of individual rights"); *Sharp Corp. v. Hisense USA Corp.*, 292 F. Supp. 3d 157, 175 (D.D.C. 2017) ("it is axiomatic" that infringements of First Amendment require state action). Thus, under the "state action" doctrine, a shareholder resolution that restricted Retailer's political contributions would not violate Retailer's First Amendment rights. In fact, the Court in *Citizens United* made clear that shareholder activism aimed at restricting corporate political speech would be lawful.

Although *Citizens United* applied strict scrutiny to the federal ban on corporate political expenditures and rejected the argument that protecting the speech rights of individual shareholders from having management speak on their behalf was a compelling governmental interest, the Court pointed out that "[t]here is . . . little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy.'" 558 U.S. at 361–62 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1978)). The Court explained:

> Shareholder objections raised through the procedures of corporate democracy can be more effective today . . . . With the advent of the Internet, prompt disclosure of expenditures can provide shareholders . . . with the information needed to hold corporations . . . accountable for their positions . . . . Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits.

*Id.* at 370 (internal citations omitted). Thus, while *Citizens United* held that the government may not prohibit corporate political expenditures, the Court made clear that such expenditures can be regulated under corporate law through the assertion of shareholder rights—specifically "procedures of corporate democracy" and other methods that make "corporations . . . accountable for their positions."

[NOTE: A knowledgeable examinee might argue that under the "entanglement exception" to the state action doctrine, private action can violate the Constitution when the government "affirmatively authorize[d], encourage[d], or facilitate[d]" that private conduct. Erwin Chemerinsky, Constitutional Law: Principles and Policies 539 (4th ed. 2011). *See, e.g., Shelley v. Kraemer*, 334

US. 1, 19 (1948) (state court enforcement of a racially restrictive property covenant constituted state action sufficient to bring the 14th Amendment into play).

It is highly improbable, however, that the entanglement exception would apply here. First, the courts have been unwilling to expand the holding in *Shelley v. Kraemer* beyond the racial discrimination context. *See Edwards v. Habib*, 397 F.2d 687, 691 (D.C. Cir. 1968) ("if . . . every private right were transformed into governmental action by the mere fact of court enforcement of it, the distinction between private and governmental action would be obliterated"). Second, the mere fact that the government authorizes a corporation's existence and permits shareholder governance is unlikely to be treated as sufficient entanglement to make the government responsible for shareholder choices. *See, e.g., Moose Lodge Number 107 v. Irvis*, 407 U.S. 163 (1972) (government grant of a liquor license to a private club does not entangle government in discrimination by the club); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 54 (1999) (in arbitration context, government authorization of "a private choice cannot support a finding of state action").]

# *July 2020*
# *MEE Question 3*
# *Decedents' Estates*
# *Trusts & Future Interests*

**JULY 2020 MEE**
**QUESTION 3 – DECEDENTS' ESTATES / TRUSTS & FUTURE INTERESTS**

Ann, a successful entrepreneur, grew up in a small town in State A. Ann's family could not afford to send her to college, but a group of local store owners, sensing Ann's potential, paid Ann's tuition for college and graduate business school. Twenty years later, in honor of the store owners, Ann created a trust and funded it with $1,000,000.

Under the terms of the trust, the trustee (a local bank) must annually use trust income to purchase and install seasonal plantings on all principal streets in the town where Ann grew up. The trustee is authorized to invade trust principal to purchase and install such plantings if the trust income is insufficient. The trust instrument further provides that the trust will last in perpetuity or until such time as the principal of the trust has been exhausted; no individuals are named as trust beneficiaries. Currently the trust's annual income is $40,000 and the annual cost of seasonal plantings is anticipated to be about $35,000.

Last week, Ann died unexpectedly and without a will. At the time of her death she had $100,000 in a bank account in her name alone. Ann's uncle and niece survive her.

The personal representative of Ann's estate properly filed an action to set aside the $1,000,000 trust on the ground that it is invalid under the common-law rule against perpetuities, which applies in State A. The personal representative also requested judicial approval of a proposal to distribute the assets of the allegedly invalid trust, with the other assets of Ann's estate, to Ann's niece but not to her uncle. Ann's uncle contends that he is entitled to half of Ann's estate.

State A has adopted the Uniform Trust Code.

1. May the trust endure for its stated duration (in perpetuity or until its assets are exhausted)? Explain.

2. Assuming that the trust cannot endure for its stated duration, could a court preserve the trust for any period of time to carry out Ann's intentions? Explain.

3. To whom should Ann's estate be distributed and in what shares? Explain.

# *July 2020*
# *MEE Analysis 3*
# *Decedents' Estates*
# *Trusts & Future Interests*

**JULY 2020 MEE**
**ANALYSIS 3 – DECEDENTS' ESTATES / TRUSTS & FUTURE INTERESTS**

This analysis addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses are expected to be and should not be construed as a model answer. Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.

## ANALYSIS

Legal Problems:

(1)(a) Did Ann create a valid charitable trust?

(1)(b) Assuming that Ann created a valid charitable trust, may the trust endure in perpetuity or until its assets are exhausted?

(2) Assuming that the trust cannot endure for its stated duration, could a court preserve the trust for any period of time to carry out Ann's intentions?

(3) To whom should Ann's estate be distributed and in what shares?

## DISCUSSION

Summary

Ann's trust is a valid charitable trust because civic improvement is a permissible charitable purpose. Charitable trusts are not subject to the common law rule against perpetuities and therefore, Ann's trust can last in perpetuity.

A trust may be created for a noncharitable purpose without any definite beneficiaries but having an otherwise valid purpose. However, such a trust cannot be enforced for more than 21 years after its creation. Here, it is unclear whether the trust can be continued under that rule because the facts do not indicate when Ann created the trust.

Ann's estate is distributable to her heirs. Under the civil law consanguinity method, Ann's heirs are her uncle and her niece, who would take in equal shares; under the parentelic distributional method, Ann's only heir is her niece.

**Point One(a) (45%)**

A trust is charitable if it serves a governmental purpose or is otherwise beneficial to the community. Ann's trust for the beautification of the community serves these charitable purposes.

A charitable trust can only be created for a charitable purpose. Charitable purposes include (1) the relief of poverty, (2) the advancement of education, (3) the advancement of religion, (4) the promotion of health, (5) governmental or municipal purposes, and (5) "other purposes the

accomplishment of which is beneficial to the community." Restatement (Second) of Trusts § 368. *Accord*, Unif. Trust Code § 405.

The plantings are for a governmental or municipal purpose, as it is customary for municipalities to engage in beautification programs for their downtown areas. *See generally* Bogert on Trusts § 54 (6th ed.). When a trust discharges a governmental function, thus relieving taxpayers of the duty to provide the function, the trust is charitable. *See, e.g.*, Restatement (Third) of Trusts § 28 cmt. k (trust providing facilities ordinarily supplied by community at taxpayer expense is charitable).

The trust is also one that is "beneficial to the community." *See* Bogert, *supra*, § 54. *See also* Restatement (Third) of Trusts § 28 cmt. a. A trust to aid a profit-making business enterprise is not charitable. *Id*. The facts state that Ann was motivated to create the trust to honor the store owners who financed her education. If the court construed Ann's motivation as limiting trust benefits to a few stores in the town, the trust would not be charitable. But a trust settlor's motivation does not determine the nature of the benefit provided by the trust; only the trust instrument can do so.

Here, the trust instrument provided that plantings should be made on all principal streets, not just in front of stores owned by the individuals who helped Ann. All residents, visitors to the community, and the business owners along the principal streets obtain an aesthetic benefit from the plantings. No trust assets are used to benefit a few individuals or a small group. *See* Restatement (Third) of Trusts § 28 cmt. l ("a trust to beautify a city . . . or otherwise add to the aesthetic enjoyment of the community is charitable"). Thus, Ann's trust is a charitable trust.

**Point One(b) (10%)**

A charitable trust can last in perpetuity; it is not invalid under the rule against perpetuities.

A charitable trust can last in perpetuity. It is not subject to the rule against perpetuities. *See generally* Gray, Rule Against Perpetuities §§ 589–628 (4th ed.).

**Point Two (5%)**

Assuming that the trust cannot last for its stated duration, under the Uniform Trust Code the court could authorize the trust's continuation for up to 21 years after its creation to carry out its noncharitable purposes so long as those purposes are not capricious.

A noncharitable trust ordinarily must have ascertainable beneficiaries. Section 402 of the Uniform Trust Code provides that "a trust is created only if: . . . the trust has a definite beneficiary." (The Restatement (Second) of Trusts §§ 112–122 and Restatement (Third) of Trusts §§ 44–46 have consistent provisions.) However, the Trust Code creates an exception to the definite-beneficiary rule for both charitable trusts and noncharitable trusts that meet the requirements of Section 409.

Under Section 409, a trust "may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary . . .." As the comments note, this could include a trust for a "general noncharitable purpose" which is benevolent. While a trust providing mere beneficence to a group of indefinite beneficiaries would not be charitable, it could be sustained under Section 409 of the Trust Code and the principles set forth in both the Second and Third Restatements.

According to the Section 409 comment, a trust for the care of a cemetery plot is illustrative of a permissible noncharitable purpose (although the comment notes that states may have other statutes specifically dealing with such trusts to deal with the matter of perpetual care). Section 409 finds historical support in Restatement (Second) of Trusts § 124, which provides:

> Where the owner of property transfers it in trust for a specific non-charitable purpose, and there is no definite or definitely ascertainable beneficiary designated, no enforceable trust is created; but the transferee has power to apply the property to the designated purpose, unless such application is authorized or directed to be made at a time beyond the period of the rule against perpetuities, or the purpose is capricious.

It also gives the cemetery trust as an example. *See* comment d. The Third Restatement is consistent. *See* Restatement (Third) of Trusts § 47. Both Restatement sections characterize the transfer as creating a power instead of a trust, whereas Section 409 deems the transfer to create a trust.

Under the Uniform Trust Code, a trust without ascertainable beneficiaries but otherwise having a valid purpose can be created but "may not be enforced for more than [21] years." *Accord* Restatement (Third) of Trusts § 47 (generally duration of trust without ascertainable beneficiaries is 21 years). Neither the Uniform Trust Code nor the Restatement (Third) of Trusts §47, cmt. d (on which Section 409 is based) indicate when the 21-year period begins to run. However, the Restatement comments indicate that 21 years was recommended because that is the time frame used in the common law rule against perpetuities and, following that analogy, presumably the 21-year period under Section 409 runs from the date the trust was created.

Assuming that the trust is not a valid charitable trust, the court could order its continuation for 21 years under UTC § 409. However, whether it can do so here is unclear because the facts do not indicate when the trust was created, an important fact if the 21-year period runs from that date.

[NOTE #1: An important lawyering skill is knowing if essential facts are missing. Here, an essential fact—knowing when the trust was created—was omitted from the facts to test the examinees' ability to demonstrate this important skill.

An examinee might argue that the trust is enforceable for 21 years after the court issues an order, rather from the date of the trust's creation. That argument is not likely to be successful, and an examinee should not receive credit for making it.]

[NOTE #2: The Uniform Trust Code has been adopted in the following jurisdictions: Alabama, Arizona, Arkansas, Connecticut, Colorado, the District of Columbia, Florida, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. An earlier version applies in Iowa.

If the UTC is inapplicable, then under the common law, if the trust is not a valid charitable trust, it would violate the common law rule against perpetuities and therefore be void. *See* Restatement (Third) of Property § 47, Rept. Note. *See also* Restatement (Second) of Property § 123. In such case, the trust assets would be distributable to Ann's heirs. (*See* Point Three).

It is also possible that a court would recharacterize the trust as a "power" and allow the trustee to exercise that power in accordance with the terms of the trust for 21 years.]

**Point Three (40%)**

The answer depends on how State A determines heirship. If State A uses the consanguinity method of determining heirship, Ann's heirs are her uncle and niece, who would take equal shares. If State A uses the parentelic method, Ann's only heir is her niece.

The identity of Ann's heirs is dependent on the method of determining heirship used in State A. There are two methods, the civil-law consanguinity method and the parentelic method adopted by the Uniform Probate Code and like statutes. *See* Unif. Probate Code § 2-103.

Under the civil-law consanguinity method, heirship is determined by degree of relationship; all persons of the same degree of relationship to the deceased individual take equal shares. Both Ann's uncle and her niece are in the third degree of consanguinity and thus, using this method, both would be her heirs and entitled to equal shares of her estate.

Under the parentelic method, descendants of the decedent's parents take to the exclusion of descendants of the decedent's grandparents. Here, Ann's niece is a descendant of her parents, whereas her uncle is a descendant of her grandparents. Thus, under the parentelic method, the niece would be Ann's only heir.

# *July 2020*
# *MEE Question 4*
# *Family Law*

**JULY 2020 MEE**
**QUESTION 4 – FAMILY LAW**

Ten years ago, a husband and wife were married during a one-day stopover in State A while they were traveling by train on a cross-country vacation. After this trip, the husband and wife returned to their home in State B.

Five years ago, the couple had a child, Sarah, in State B. The wife then quit her job and stayed at home to serve as Sarah's primary caregiver.

Two years ago, the husband was seriously injured when he was struck by a car while walking across a street. After the accident, the husband began drinking to excess. He also became physically and emotionally abusive toward his wife and was convicted of assault after a physical attack led to her hospitalization. The husband has not worked since his injury.

Nine months ago, the wife took Sarah and moved to State A, where the wife's sister lives. The wife did not tell her husband that she was leaving, but she called him a week after arriving in State A, gave him her address, and told him that she intended to remain in State A with Sarah. The wife found a job in State A and moved out of her sister's home and into a nearby apartment. The husband made no effort to contact the wife or Sarah.

One week ago, the wife commenced a divorce action against the husband in State A. In this action, the wife seeks custody of Sarah and a share of the couple's marital property. The husband was personally served with a summons and divorce complaint at his home in State B.

The husband has never been to State A except for the one-day stopover when he and the wife were married there. He owns no assets in State A.

State A law allows for both fault-based and no-fault divorce and requires that either the divorce plaintiff or the defendant have been residing in State A for six months before the plaintiff may file a divorce petition. State A has adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).

1. Does a State A court have jurisdiction to grant the wife

    (a) a divorce? Explain.

    (b) sole physical custody of the couple's daughter, Sarah? Explain.

    (c) a share of the couple's marital property? Explain.

2. Assuming that the State A court has jurisdiction, could the court grant the wife

    (a) a divorce based on the husband's fault? Explain.

    (b) sole physical custody of Sarah? Explain.

# *July 2020*
# *MEE Analysis 4*
# *Family Law*

**JULY 2020 MEE**
**ANALYSIS 4 – FAMILY LAW**

This analysis addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses are expected to be and should not be construed as a model answer. Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.

## ANALYSIS

Legal Problems:

(1)(a) Does a state court have jurisdiction to grant one spouse a divorce when the other spouse has minimal or no personal contact with the state?

(1)(b) Does a state court have jurisdiction to grant a parent sole physical custody of a child when the parent unilaterally brought the child into the state without the other parent's knowledge or permission and the other parent has minimal or no contact with the state?

(1)(c) Does a state court have jurisdiction to grant a spouse a share of marital property when the other spouse lacks minimal contacts with the state?

(2)(a) Assuming that the State A court has jurisdiction, could the court grant the wife's divorce petition based on the husband's fault?

(2)(b) Assuming that the State A court has jurisdiction, should the court grant the wife sole physical custody of the parties' daughter, Sarah?

## DISCUSSION

### Summary

The State A court has jurisdiction to grant the wife's petition for divorce because the wife is domiciled in State A and has met State A's residency requirement for filing a divorce action. A state court may grant a divorce to a person domiciled in the state even if it has no basis for asserting personal jurisdiction over the other spouse.

The State A court also has jurisdiction to grant sole physical custody of Sarah to the wife. Personal jurisdiction over a respondent parent is not a precondition to entry of a custody decree.

The State A court does not, however, have jurisdiction over the wife's claim for property distribution. The adjudication of a claim for property division in a divorce action requires personal jurisdiction over the respondent. The husband does not have the minimum contacts with State A required for the exercise of personal jurisdiction in this matter.

Assuming that jurisdiction exists, the State A court could grant the wife's divorce petition because she can establish a fault basis for her divorce petition (i.e., her husband's abusive behavior).

Assuming that jurisdiction exists, the State A court should also grant the wife's request for sole physical custody of the couple's child because she has been Sarah's primary caregiver, Sarah has been living exclusively with the wife for several months, there is no evidence that it is in Sarah's best interest to reside with the husband, and the husband has been physically abusive to the wife, a factor that would weigh heavily against the husband in almost all states.

**Point One(a) (15%)**

Personal jurisdiction over a divorce defendant is not required for issuance of a divorce decree, and thus State A has jurisdiction over the wife's divorce action.

In *Williams v. North Carolina*, 317 U.S. 287 (1942) (*Williams I*), the Supreme Court found that a state could enter a valid divorce decree as long as one spouse was domiciled in that state.

Domicile is based on residence with the intent to remain permanently or indefinitely. Restatement (Second) of Conflict of Laws §§ 70–72. Here, the wife has established a domicile in State A. She has lived in State A for nine months, found a job, and moved into her own apartment. Moreover, she has told the husband that she intends to remain in State A with their daughter. In short, she has abandoned her State B domicile and established a new domicile in State A.

Because the wife is a State A domiciliary and has lived in State A for nine months, thereby meeting State A's six-month residence requirement for filing a divorce petition, the

State A court has jurisdiction to issue a divorce decree to the wife without the necessity of establishing personal jurisdiction over the husband.

**Point One(b) (20%)**

Personal jurisdiction over a divorce defendant is not required for entry of a custody decree, and thus the State A court has jurisdiction over the wife's petition for a custody decree.

Under both the federal Parental Kidnapping Prevention Act (PKPA) (adopted in all states) and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) § 2(a) (adopted in all states but Massachusetts), a state that is a child's "home state" has exclusive jurisdiction over a custody action involving the child. Under both the UCCJEA and PKPA, a home state is the state "in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." UCCJEA § 102(7); 28 U.S.C. § 1738A(b)(4).

Here, Sarah has resided in State A with the wife, her parent, for nine consecutive months. This qualifies State A as the child's "home state" for purposes of issuing a custody decree. Although some courts have held that a parent who wrongfully takes a child from a state without notice to another custodial parent lacks the capacity to unilaterally establish a new home state for the child, the circumstances here are quite different. One week after arriving in State A, the wife called the husband and told him that she had moved to State A with Sarah and that she intended to stay there. Over the following nine months, the husband had ample opportunity to file a custody action in State B and did not do so. In effect, the husband acquiesced in Sarah's move to State A. Thus, State A is now Sarah's home state, and a State A court has jurisdiction to issue a custody order.

[NOTE: In *May v. Anderson*, 345 U.S. 528 (1953), the Supreme Court held that the state where a parent was domiciled was not bound to give full faith and credit to the child-custody determination of a court of the state where the children were domiciled when that state lacked sufficient minimum contacts with the parent to give its courts personal jurisdiction over the parent. However, in 1980 Congress passed the Parental Kidnapping Prevention Act (PKPA). Pursuant to that act, all states must give full faith and credit to the custody decree of a state with jurisdiction under PKPA rules. *See* 28 U.S.C. § 1738A. As noted above, State A is Sarah's "home state," and a State A court would therefore have jurisdiction under the PKPA. Accordingly, its decree would be entitled to full faith and credit in State B and elsewhere, despite the husband's lack of personal connection with State A.]

**Point One(c) (20%)**

Personal jurisdiction over a divorce defendant is required for the distribution of marital property. Thus, because the husband does not have the requisite minimum contacts with State A to establish a basis for personal jurisdiction, the State A court does not have jurisdiction to grant the wife a share of the couple's marital property.

In an *ex parte* divorce where the court issues a divorce decree based on the domicile of the plaintiff and without personal jurisdiction over the defendant, the court lacks the power to adjudicate property and support rights. The divorce decree is thus "divisible"; jurisdiction to terminate a marriage does not establish jurisdiction over other divorce claims. *See Estin v. Estin*, 334 U.S. 541 (1948).

A state may not exercise personal jurisdiction over a defendant who does not have "minimum contacts" with the forum state. *See International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The Supreme Court has held that "temporary visits," like a brief stopover en route to somewhere else, do not satisfy the minimum contacts requirement, even when the defendant marries during the stopover period. *See Kulko v. Superior Court*, 436 U.S. 84 (1978).

Here, the husband has never visited State A except for a brief, one-day stopover to get married while traveling by train. Therefore, State A does not have the requisite minimum contacts with the husband to establish personal jurisdiction over him, and it cannot adjudicate the distribution of marital property in the husband-wife divorce action.

[NOTE: An examinee should get no credit for arguing that the marriage is sufficient to establish jurisdiction.]

**Point Two(a) (20%)**

The State A court could grant the wife's divorce petition on the husband's fault.

In those states that have retained fault divorce grounds, such as State A, a divorce may typically be granted on grounds of cruelty or a like concept. "Cruelty typically has been defined as bodily harm, or reasonable apprehension of bodily harm, that endangers life, limb, or health, and renders marital cohabitation unsafe or improper." John Gregory, et al., Understanding Family Law § 8.03B[3] (4th ed. 2013). Traditionally, the abuse must be physical, successive, and continuing for an extended period of time, or a single severe physical act causing serious bodily harm or reasonable apprehension of serious future danger. *Id*. In recent decades, however, jurisdictions recognize a single, less serious physical incident as sufficient and recognize emotional or mental cruelty. *Id*.

Here, the husband's physical and emotional abuse of the wife would qualify as cruelty. After his accident, the husband became physically and emotionally abusive toward the wife. Although it is unclear when the behavior began, the facts suggest that the husband could have been abusive to the wife for more than a year. Additionally, the facts indicate that one incident of the husband's physical abuse was serious enough to result in the wife's hospitalization and the husband's criminal conviction. Either the ongoing physical and emotional abuse or the single instance of serious physical abuse is sufficient to support a divorce on grounds of cruelty.

The facts do not suggest that the husband could successfully assert any defenses to a fault-based divorce. Thus, on fault grounds, the State A court should grant the wife's divorce petition.

[NOTE: An examinee may argue that the State A court will not grant the wife a divorce because the husband has a recrimination defense (i.e., both parties are guilty of marital misconduct) on the grounds that the wife abandoned or deserted him by moving out of state. Gregory, *supra*, § 8.03C[4]. A court is highly unlikely to credit this defense because the wife has a strong defense that the husband's cruelty gives rise to a constructive desertion claim by the wife (i.e., his cruelty made the marriage intolerable, forcing her to abandon the marriage). *Id*. § 8.03B[4].]

**Point Two(b) (25%)**

The State A court could grant the wife's petition for sole physical custody. The facts suggest that the best interests of the couple's child would be served by the wife's continued custody; there is no evidence that it would be in Sarah's best interests to reside with the husband; and the husband's conviction for assaulting the wife strongly militates against granting him custody of Sarah.

In all states, a custody decision is based on a determination of a child's best interests. Gregory, *supra*, § 11.03[A]. The best-interests inquiry is typically far-ranging, including the following factors *inter alia*: the wishes of the child' s parents, the child's primary caretaker, the mental and physical health of all individuals, the interrelationship of the child and parents, and stability. *Id*. Additionally, nearly every state currently mandates consideration of domestic violence between the parents when awarding custody, and many states have standards under which it is presumed that a parent guilty of serious domestic violence should not be awarded custody of a child. Harry D. Krause, et al., Family Law: Cases, Questions, Comments 671, 689 (6th ed. 2007).

Here, the wife has been Sarah's primary caregiver throughout her life, and Sarah has resided exclusively with the wife for the past nine months. The husband has not visited Sarah during the past nine months or made any apparent effort to do so, while the wife has requested sole physical custody of Sarah, indicating her strong desire to parent Sarah. Furthermore, the husband has a drinking problem, presumably alcohol addiction brought about by the serious injuries resulting from the accident. It seems likely that his addiction has already interfered and will continue to interfere with his ability to care for Sarah, unless he enters treatment, which, apparently, he has not.

Finally and maybe most importantly, because of the husband's chronic physical and emotional abuse of the wife and his assault conviction, the court is likely to rebuttably presume that the husband should not be awarded any physical custody of Sarah. The husband cannot point to any facts that successfully overcome the presumption. Although he apparently has not been abusive to Sarah and it is unclear whether she witnessed or has been affected by the abuse, a court may

nonetheless rely upon the presumption to deny custody. Thus, all facts and factors support the court's granting the wife's request for sole physical custody of Sarah.

# *July 2020*
# *MEE Question 5*
# *Secured Transactions*

**JULY 2020 MEE**
**QUESTION 5 – SECURED TRANSACTIONS**

On February 1, a company borrowed $100,000 from a bank. Pursuant to an agreement signed by both parties, the company granted the bank a security interest in "all of [the company's] present and future inventory, accounts, and equipment" to secure its obligation to repay the loan. Later that day, the bank filed, in the appropriate filing office, a properly completed financing statement listing the company as the debtor and the bank as the secured party and indicating "inventory, accounts, and equipment" as collateral.

On March 1, the company bought a power generator, for use in the company's business, from a manufacturer. The purchase price of the power generator was $24,000. The manufacturer agreed that the company could pay the purchase price in 12 monthly installments of $2,000 each. Pursuant to an agreement signed by both parties, the company granted the manufacturer a security interest in the power generator to secure the company's obligation to make all the installment payments. Later that day, the manufacturer filed, in the appropriate filing office, a properly completed financing statement listing the company as the debtor and the manufacturer as the secured party and indicating the power generator as collateral. The manufacturer delivered the power generator to the company on March 3.

On April 1, the company entered into an agreement entitled "Lease Agreement" with a supplier. The Lease Agreement, signed by both parties, stated that the supplier was leasing to the company a retinal scanner for use in the company's security system for a fixed term of three years with no right of cancellation by either party. The Lease Agreement also provided that, if the company made each of the 36 required monthly lease payments of $3,000, it would have the option to become the owner of the retinal scanner for no additional consideration. The supplier delivered the retinal scanner to the company on April 2. The supplier did not file a financing statement with respect to this transaction.

The company has defaulted on its obligations to the bank, the manufacturer, and the supplier. The bank and the manufacturer are each asserting an interest in the power generator, and the bank and the supplier are each asserting an interest in the retinal scanner.

1. (a) Does the bank have an enforceable interest in the power generator? Explain.

   (b) Does the manufacturer have an enforceable interest in the power generator? Explain.

   (c) Assuming that both the bank and the manufacturer have enforceable interests in the power generator, whose interest has priority? Explain.

2. (a) Does the bank have an enforceable interest in the retinal scanner? Explain.

   (b) Does the supplier have an enforceable interest in the retinal scanner? Explain.

   (c) Assuming that both the bank and the supplier have enforceable interests in the retinal scanner, whose interest has priority? Explain.

# *July 2020*
# *MEE Analysis 5*
# *Secured Transactions*

**JULY 2020 MEE**
**ANALYSIS 5 – SECURED TRANSACTIONS**

This analysis addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses are expected to be and should not be construed as a model answer. Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.

## ANALYSIS

Legal Problems:

(1)(a) Does the bank have an enforceable interest in the power generator?

(1)(b) Does the manufacturer have an enforceable interest in the power generator?

(1)(c) Which of the two competing security interests in the power generator has priority?

(2)(a) Does the bank have an enforceable interest in the retinal scanner?

(2)(b) Does the supplier have an enforceable interest in the retinal scanner?

(2)(c) Which of the two competing security interests in the retinal scanner has priority?

## DISCUSSION

### Summary

The power generator is equipment in which both the bank and the manufacturer have enforceable security interests. Both security interests were perfected by the filing of financing statements. Under the general priority rule of "first to file or perfect," the bank's security interest would have priority over that of the manufacturer because the bank filed and perfected before the manufacturer. But the manufacturer's security interest is a purchase-money security interest and, because the manufacturer's interest was perfected at the time the company received possession of the power generator, the purchase-money security interest of the manufacturer has priority over the security interest of the bank.

The retinal scanner is also equipment in which the bank has an enforceable security interest. While the agreement between the company and the supplier with respect to the scanner is denominated as a "Lease Agreement," the interest in the retinal scanner retained by the supplier under that agreement is actually a security interest. The bank's security interest in the retinal scanner was perfected by the filing of the bank's financing statement. The supplier's security interest, however, is unperfected. Accordingly, the bank's security interest has priority over that of the supplier.

**Point One(a) (15%)**

The bank has an enforceable, attached, and perfected security interest in the power generator.

The agreement between the bank and the company provides that the bank has a security interest in the company's "present and future inventory, accounts, and equipment." The power generator constitutes "equipment" as that term is defined in UCC § 9-102(a)(33) because it is goods that are not inventory, farm products, or consumer goods. *See* UCC §§ 9-102(a)(44), (48), (34), and (23). Section 9-204 allows parties to agree that the collateral includes property acquired subsequently. The bank's security interest in the power generator is enforceable because all three elements of enforceability were satisfied—value was given (the loan), the company had rights in the power generator (certainly by the time the power generator was delivered to the company and perhaps even earlier), and the company authenticated (signed or its electronic equivalent) a security agreement containing a description of the collateral. *See* UCC §§ 9-102(a)(7), 9-203(b), 9-108.

**Point One(b) (10%)**

The manufacturer has an enforceable, attached, and perfected security interest in the power generator.

The manufacturer also has an enforceable, attached, and perfected security interest in the power generator for similar reasons: it gave value to the company (selling the goods on credit), the company had rights in the power generator, and the company authenticated an agreement granting the manufacturer a security interest. The manufacturer's interest was likewise perfected by filing.

**Point One(c) (20%)**

The manufacturer's security interest in the power generator is a purchase money security interest. It has priority over the security interest of the bank because the manufacturer's security interest was perfected when the company obtained possession of the power generator.

In order to determine priority as between two enforceable security interests, it is first necessary to determine whether the security interests are perfected. Under UCC § 9-308, a security interest is perfected when it has attached and one of the additional steps described in UCC §§ 9-310–9-316 (usually the filing of a financing statement pursuant to UCC § 9-310(a) or the secured party taking possession of the collateral pursuant to UCC § 9-313) has been satisfied. Here, both security interests have attached because they are enforceable and there was no agreement to postpone attachment (*see* UCC § 9-203(a)), and the filing of a properly completed financing statements satisfies UCC § 9-310(a). Thus, both security interests are perfected.

Priority between competing perfected security interests is generally determined by the "first to file or perfect" rule of UCC § 9-322(a)(1), under which the bank would have priority because its financing statement was filed before that of the manufacturer. But there are special priority rules for purchase-money security interests. In particular, a purchase-money security interest in collateral other than inventory has priority over a competing non-purchase-money security interest (even if it was perfected before the purchase-money security interest) if the purchase-

money interest was perfected when the purchaser received possession of the collateral or within 20 days thereafter. UCC § 9-324(a).

The security interest of the manufacturer is a "purchase-money security interest" because the obligation that the interest secures is the company's obligation to pay the purchase price of the collateral. *See* UCC § 9-103. The collateral (the power generator) is not inventory because it is not held for sale or lease and does not otherwise fall within the definition of inventory in § 9-102(a)(48). Thus, the security interest is a purchase-money security interest in collateral other than inventory and is within the rule of UCC § 9-324(a).

Here, the manufacturer's purchase-money security interest was perfected no later than the time that the company received possession of the power generator. This is because, at the time the company received the power generator, the security interest was enforceable and attached (*see* Point One(b)) and a financing statement had been filed with respect to the security interest. *See* UCC §§ 9-308, 9-310. Therefore, the manufacturer's purchase-money security interest in the power generator has priority over the bank's security interest.

**Point Two(a) (10%)**

The bank has an enforceable, attached, and perfected security interest in the retinal scanner.

The bank has a security interest in the retinal scanner inasmuch as the company granted it a security interest in all of the company's present and future equipment and the retinal scanner constitutes equipment. UCC § 9-102(a)(33). The bank's security interest in the retinal scanner is enforceable because all three elements of enforceability were satisfied: value was given (the loan), the company had rights in the retinal scanner (certainly by the time the retinal scanner was delivered to the company and perhaps even earlier), and the company authenticated a security agreement containing a description of the collateral. *See* UCC §§ 9-203(b), 9-108.

**Point Two(b) (25%)**

Although the transaction between the supplier and the company is denominated as a "lease," the supplier's interest in the retinal scanner is, in fact, a security interest. Although the supplier has satisfied the requirements to have an enforceable security interest in the scanner, its security interest is unperfected because the supplier did not file a financing statement.

The transaction between the supplier and the company is described by them as a lease. But under the UCC, "[a] transaction denominated as a 'lease' of goods is sometimes really a lease and sometimes a sale with a retained security interest." Steven O. Weise, *U.C.C. Article 9: Personal Property Secured Transactions*, 63 Bus. Law. 1353, 1354 (2008). Section 1-203 determines whether a transaction that is in the form of a lease nonetheless is a sale of the leased goods, with the "lessor" retaining a security interest in the goods to secure the obligation of the "lessee" to make the required payments for it. Under § 1-203, a transaction in the form of a lease creates a security interest if the lessee's obligation to pay is not subject to termination by the lessee and the lessee has the option to become the owner of the goods for no additional consideration upon compliance with the lease agreement. UCC § 1-203(b)(4). As described in the facts, the transaction between the company and the supplier fits that description precisely. Therefore, the interest of the supplier in the retinal scanner is a security interest.

The supplier's security interest in the retinal scanner is enforceable because value had been given, the company has rights in the retinal scanner, and the lease agreement signed by the company is a security agreement inasmuch as it creates a security interest. UCC § 9-102(a)(74).

**Point Two(c) (20%)**

The bank's security interest in the retinal scanner has priority over the security interest of the supplier because a perfected security interest has priority over an unperfected security interest.

The bank's security interest attached and was perfected by the filing of the financing statement. UCC §§ 9-203, 9-308, 9-310. *See* Point One(c).

The supplier's security interest attached because it was enforceable and there was no agreement to postpone attachment. UCC § 9-203(a). But the supplier's security interest is not perfected. The supplier did not file a financing statement relating to its transaction or take possession of the retinal scanner, and there is no other basis on which to conclude that the security interest is perfected. *See* UCC §§ 9-308, 9-310.

Because the bank has a perfected security interest in the retinal scanner and the supplier has an unperfected security interest in it, priority between those security interests is governed by § 9-322(a)(2). Under that section, a perfected security interest has priority over an unperfected security interest. Therefore, the bank's security interest in the retinal scanner has priority over the security interest of the supplier.

[NOTE: An examinee might note that the security interest of the supplier is a purchase-money security interest. This is accurate but plays no part in the analysis inasmuch as the "superpriority" given by UCC Article 9 to purchase-money security interests applies only to perfected security interests and the security interest of the supplier is unperfected.]

# *July 2020*
# *MEE Question 6*
# *Real Property*

**JULY 2020 MEE**
**QUESTION 6 – REAL PROPERTY**

The owner of a two-story building converted it into three two-bedroom apartments. The owner occupied the ground-floor apartment; the other two apartments were rental units. All the apartment interiors had a similar modern look and design. In the apartments, the owner installed standard modern light fixtures in all rooms except the master bedroom of her own apartment, where she installed a gold-plated chandelier. The chandelier was of an ornate, old-fashioned style and did not match the modern light fixtures in her apartment or the other apartments. But because the owner had inherited the chandelier from her mother, she had a strong sentimental attachment to it. In her living room the owner also placed a 65-inch television on a wall mount affixed to the wall over the fireplace. The conversion was completed last year, and immediately upon completion, the owner moved into her apartment.

The owner then wrote the following advertisement and paid to have it published in the local newspaper:

> Two 2-bedroom apartments for rent. Only professional women (but not lawyers) need apply.

Eight individuals applied to rent the apartments. Three were male accountants. Five were women, three of whom were lawyers. The owner told the men that she "[does] not rent to men." She then rented one of the apartments to a female architect and the other to a female physician. Both leases ended last month and were not renewed. The owner then decided to sell the building.

Last week, the owner showed the apartment building to a prospective buyer. While showing her own apartment, the owner commented to the buyer that the chandelier had come from her mother and meant a lot to her. After seeing all three apartments, the buyer agreed to buy the building. The sales contract, signed by both parties, does not mention fixtures, and the owner and the buyer now disagree on whether the chandelier and the wall-mounted television are fixtures included in the sale of the building.

The state has adopted a fixtures code, of which Sections 1 and 2 provide as follows:

> (1) Unless the terms of a residential real estate contract otherwise provide, upon the closing of the contract the seller shall deliver to the buyer the real property described in the contract, including all fixtures that were affixed or attached to the real property at the time the contract was signed.
>
> (2) For purposes of Section 1, a fixture is an item of personal property affixed or attached to the real property by the seller unless a reasonable person would conclude, based upon all the facts and circumstances relating to the specific personal property, that the item of personal property at the time it was affixed or attached was not affixed or attached to the real property with the intent to make it a permanent part of the real property.

1. Did the owner violate the Fair Housing Act of 1968 by refusing to rent to men and lawyers? Explain.

2. Did the owner or the newspaper publisher violate the Fair Housing Act of 1968 by publishing the owner's rental advertisement? Explain.

3. Assuming that both the television and the chandelier are affixed or attached to the real property:

(a) Is the television a fixture? Explain.

(b) Is the chandelier a fixture? Explain.

# *July 2020*
# *MEE Analysis 6*
# *Real Property*

**JULY 2020 MEE**
**ANALYSIS 6 – REAL PROPERTY**

This analysis addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses are expected to be and should not be construed as a model answer. Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.

## ANALYSIS

Legal Problems:

(1)(a) Was the owner's refusal to rent to men or to lawyers the type of act that is prohibited by the Fair Housing Act of 1968?

(1)(b) Did the owner's refusal to rent to men cause her to be liable under the Fair Housing Act of 1968?

(2) Did either the owner or the newspaper publisher violate the Fair Housing Act of 1968 by publishing the owner's rental advertisement?

(3) Assuming that both the television and the chandelier are affixed or attached to the real estate:

(a) Is the television a fixture?

(b) Is the chandelier a fixture?

## DISCUSSION

### Summary

The Fair Housing Act (the Act) disallows discrimination in housing sales or rentals on the basis of sex, among other things, but not occupation.

However, the owner's refusal to rent her apartments to men did not violate the Act because the Act expressly exempts discriminatory rentals in buildings with no more than four residential units, one of which is occupied by the owner.

The Act also prohibits the expression of a preference relating to sex in all advertisements for rental property; this prohibition does not contain an exemption for buildings with no more than four units. The publication of the owner's advertisement limiting acceptable tenants to women was thus a violation of the Act by both the owner and the newspaper publisher.

Assuming that the wall-mounted television and the chandelier in the owner's apartment are both affixed or attached to the real property, they nonetheless are not fixtures because, under the

state's fixtures code, a reasonable person would conclude that the television and the chandelier were not attached with the intent to make them permanent parts of the real property.

**Point One(a) (25%)**

The Fair Housing Act of 1968 forbids discrimination in housing rentals based on sex but not occupation.

Under the Fair Housing Act, it is unlawful to refuse to rent a dwelling to a person based on the person's "race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). Of these, only discrimination on the basis of sex is relevant here. The owner's refusal to rent to men and her statements to the two men that she did not rent to men were discriminatory under the Act. Nonetheless, there is no liability for this behavior. *See* Point One(b).

The Act does not prohibit discrimination based on occupation. 42 U.S.C. § 3604(a). Thus, the owner's refusal to rent to lawyers did not violate the Act.

**Point One(b) (10%)**

Despite the Act's prohibition of discrimination based on sex, the owner did not violate the Act because it exempts from its anti-discrimination rule the rental of units in a building with no more than four units, one of which is occupied by the owner.

Section 3603(b)(2) of the Act provides that the anti-discrimination rule does not apply if the owner occupies one of the units in a multiple-unit dwelling containing no more than four units occupied by persons "living independently of each other." Here, because the owner's building contained only three units, the owner occupied one of the units, and all units were occupied by persons living independently of each other, the exception to the Act's nondiscrimination rule applies. Thus, the owner's refusal to rent to men did not violate the Act.

**Point Two (15%)**

The owner and the newspaper publisher violated the Fair Housing Act of 1968 by publishing a for-rent advertisement that expressed a limitation based on sex.

Section 3604(c) of the Act makes it unlawful

> to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

42 U.S.C. § 3604(c).

This provision applies not only to a landlord who places an advertisement but also to the publisher of the newspaper in which the advertisement is placed. *See generally* Singer, Property 587 (3d ed. 2010). *See also Ragin v. New York Times Co.,* 923 F.2d 995 (2d Cir. 1991). And

unlike § 3603(b)(2), § 3604(c) includes no exception for smaller buildings that are owner-occupied. Thus, both the owner and the newspaper publisher violated the Act when the owner advertised her apartments and specified that only professional women who were not lawyers should apply.

**Point Three (50% total weight)**

Under the state law, neither the television nor the chandelier is a fixture because a reasonable person would conclude, based upon all the facts and circumstances relating to the specific personal property, that at the time each was affixed or attached, it was not affixed or attached with the intent to make it a permanent part of the real property.

**(a) The television (25%)**

Under the state law, a fixture is defined as "an item of personal property affixed or attached to the real property by the seller unless a reasonable person would conclude, based upon all the facts and circumstances relating to the specific personal property, that the item of personal property at the time it was affixed or attached was not affixed or attached to the real property with the intent to make it a permanent part of the real property."

Traditionally, televisions were not fixtures, as they were not attached to the realty. Rather, they sat on the floor or on a piece of furniture. By contrast, televisions today are often wall-mounted, almost never sit on the floor, and infrequently sit on furniture. However, even though the wall-mounted television here is affixed or attached to the real property, a number of factors could cause a reasonable person to conclude that the television was not affixed or attached "with the intent to make it a permanent part of the real property." These factors include the following: (1) televisions are relatively inexpensive and replaced from time to time as new televisions with newer features and better electronics become available, (2) wall-mounted televisions can be easily removed from the wall mount and relocated, (3) wall-mounted televisions are often connected through a WIFI system to other items of personalty such as speakers and soundbars, and (4) televisions are often tied to the specific needs and desires of the person installing them. Based on these factors and given the facts-and-circumstances test in the state statute, a reasonable person would conclude that the television was not affixed with the intent to make it a permanent part of the real property. To the contrary, it can be easily replaced by another television.

**(b) The chandelier (25%)**

Even though the chandelier is affixed or attached to the real property, a reasonable person should conclude that the chandelier was not affixed or attached "with the intent to make it a permanent part of the real property." The argument in favor of this conclusion is that the chandelier is unlike other light fixtures in all the apartments in the building. It is ornate and old-fashioned, and it does not match the other modern light fixtures in the owner's apartment or the other two apartments. Furthermore, when showing the apartment, the owner told the buyer that the chandelier was from her mother and meant a lot to her. Given the facts and circumstances test under the statute, a reasonable person would conclude that the chandelier was not affixed with the intent to make it a permanent part of the real property. Additionally, although it is out of place in the owner's

apartment, the chandelier was nonetheless hung there for sentimental reasons. These facts support a conclusion that a reasonable owner would want to take the chandelier with her should she ever move from the apartment.

[NOTE #1: Under the common law, for example, a fixture is "personal property that is attached to land or a building and . . . regarded as an irremovable part of the real property." Black's Law Dictionary 713 (9th ed. 2009). In determining whether specific property is a fixture for purposes of property law, the installer's intention is relevant; if the installer intended the item to be a permanent attachment, the item is a fixture. *Teaff v. Hewitt*, 1 Ohio St. 511 (Ohio 1853); *see also Green Tree Servicing LLC v. Random Antics LLC*, 869 N.E.2d 464, 469 (Ind. Ct. App. 2007). The manner in which the personalty is affixed or annexed and its peculiar adaptability to the realty serves as objective evidence of the intention to make the personalty a fixture. *See Trenolone v. Cook Exploration Co*., 166 S.W.3d 495, 499 (Tex. App. 2005). Brown on Personal Property 517 (3d ed. 1975). Furthermore, a court is more likely to treat an item of personalty as a fixture if its removal would cause substantial damage to the real estate. *Id*. Typical fixtures include stoves, cabinets, dishwashers, and wall-to-wall carpeting. An examinee, however, should receive no credit for discussing the manner of affixation or attachment, as the facts assume that criterion has been met here.

An examinee's conclusion is less important than his or her understanding of the legal principles and use of the facts to support a conclusion. If an examinee makes a cogent argument that a reasonable person would conclude that the chandelier was affixed with the intent to make it a permanent part of the real property, the examinee should receive credit.

[NOTE #2: A proposed new Restatement of Property would eliminate the common law affixation requirement and focus, as this question does, on intent.]