

Celebration Bar Review

Florida Essay Questions Book

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FEDERAL CONSTITUTIONAL LAW

ESSAY QUESTIONS

QUESTION #1

In order to make the City more attractive to tourists, the City Council of Sandy Beach, Florida, adopted Ordinance No. 81-26, which in pertinent part provides as follows:

SECTION 1. CERTAIN SIGNS PROHIBITED. It shall be unlawful hereafter for any person, corporation, association or any other entity to maintain any signs which fall within the following prohibited categories:

[(a)-(b) omitted]

(c) any sign located on the roof of any building or other structure if such sign shall project more than fifteen feet from ground level . . .

SECTION 2. DEFINITIONS. For the purposes of this Ordinance, the following definitions shall apply:

(a) "Sign" shall mean any display of characters, letters, illustrations, ornamentation or other symbol of any kind or nature designed or used as an advertisement, announcement, communication or identification of any type . . .

SECTION 3. ADMINISTRATIVE ENFORCEMENT. The Board of Zoning Regulation is hereby authorized to grant licenses permitting signs otherwise prohibited by the terms hereof as the equities in particular circumstances may require . . .

The Ordinance was not initially enforced against religious organizations, as a result of the Board's belief that the prohibition of rooftop crosses, Stars of David, and other religious symbols was not necessary to achieve the aesthetic aims of the Ordinance. Such organizations were generally issued special licenses by the Board of Zoning Regulation permitting the maintenance of such religious symbols on their buildings.

A subsequent change in the membership of the Board resulted in a sudden reversal of policy with respect to the enforcement of the Ordinance against religious organizations. As a result of the policy change, the First Congregational Church of Sandy Beach was denied a special permit by the Board and was required to remove its rooftop cross which had been erected prior to adoption of the ordinance. Discuss and resolve the federal constitutional issues raised by the above set of facts.

QUESTION #2

Soltown is a wealthy community in northern Florida, located thirty miles from the rapidly growing city of San Angeles. Since 1970, San Angeles has been expanding in the direction of Soltown, thereby creating a housing shortage in the area. In July, 1979, Soltown amended its zoning ordinance. The amendment was enacted pursuant to the following findings made by the Town Council: (1) By the year 2000 the shortage of traditional energy sources will make solar communities a necessity; and (2) Soltown is an ideal site for such a community. The amendment requires that as a condition to the transfer of title to a building, the building must be converted to solar energy. Any new structure must derive its energy from solar power.

The cost of converting an existing house to solar energy is \$15,000. The extra cost of building a new house which will use solar energy is \$7,500.

Fannie Farmer is a Soltown resident who bought a house in 1975 for \$15,000. In May, 1979, Ms. Farmer entered into a contract for the sale of her house to Julia Jones for \$20,000. Ms. Jones borrowed the \$20,000 purchase price, but because her income is only \$6,000 per year and below the poverty level, she could not obtain financing necessary to pay the additional cost of converting the house to solar energy. Ms. Farmer and Ms. Jones completed the sale without the conversion to solar energy, but because of the new ordinance, the Clerk of the Court refused to record the deed.

Ms. Farmer and Ms. Jones have filed a Civil Rights action in Federal Court against the Clerk of the Court. Discuss the Federal Constitutional Law questions involved.

QUESTION #3

The volume of social diseases and the greatly increased number of pregnancies occurring among unmarried young women had reached an alarming state in the county, and the School Board was pressured to take action. Finally, the Board resolved to institute a program entitled "Morality and Sexuality" in all high schools in the county.

The Board adopted a resolution which stated in part:

Sex education is not merely for sex information. It is to be used as a means of character formation. Its aim in the county schools is to foster development of the proper attitudes towards sex, morality, and the relationship between the sexes. Course materials shall include sociological treatises, current works relating to the family institution and materials relating to Judeo-Christian traditions.

The course was instituted in the schools in accordance with this resolution and was made mandatory for all high school students as a requirement for graduation and award of a high school diploma.

James J. James, a devout Mormon, whose daughter Peggy James attended one of the local high schools, would not permit his daughter to take the Morality and Sexuality course as a result of (i) his religious beliefs and (ii) his belief that parents should be free to educate their offspring in the intimacies of sexual matters according to their own beliefs without undue interference by the State. Peggy, as a result, was not allowed to graduate with her class and could not receive a diploma for lack of the required credit.

James J. James demanded of the School Board that it issue his daughter the diploma, but it refused. Accordingly, he decided to bring suit against the Board alleging that the Board's Resolution establishing the course and the practice which had been followed in the schools in compliance with this mandate, violated the Constitution of the United States.

Discuss the arguments which should be made by Mr. James and state what the ruling of the Court should be.

QUESTION #4

On June 21, 1979, John Simpson was arrested pursuant to an arrest warrant issued by a Federal magistrate for receipt and possession of a rifle by one who had been convicted of a crime punishable by imprisonment for a term exceeding one year. Following Simpson's arrest, an F.B.I. agent sought a search warrant for the rifle. In an affidavit, the agent recited the following facts: that on June 10, 1979, Simpson received and possessed the rifle (as described) "after a straw purchase of the firearm by his wife, Sherry, at the Army and Navy Store, . . . Reading, Pa.," that in connection with the purchase of the firearm, Sherry Simpson executed the appropriate Treasury Department form, giving her address as 312 So. Wyomissing Ave., Shillington, Pa.; that upon Simpson's arrest, he was given the Miranda warning and then asked if the .45 caliber rifle was in his van; that Simpson replied that the rifle was in his house (at the above address) and that the details of the rifle transaction had been furnished the agent by an informant who was "credible and reliable."

After issuance of the search warrant, the agent went to Simpson's house, served the search warrant, and procured the rifle. While the agent was in the house, he noticed a bag sitting on a table. The agent asked Simpson if he could examine the bag, and Simpson said "How can I stop you?" The agent picked the bag up, realized it contained marijuana, and immediately advised Simpson that he would also be charged with possession of this drug.

The defendant made proper motions to suppress the rifle and marijuana. Discuss the issues raised under the United States Constitution by the motions and the probable results.

QUESTION #5

A statute of the State of X provides as follows:

No marriage license shall be issued unless the parties seeking such license have complied in all respects with the following requirements:

- (a) The parties shall declare their intent to marry by application for a marriage license no less than one year prior to such marriage:
- (b) A fee of \$60.00 shall be paid upon such application; and
- (c) The parties shall submit at the time of such application medical proof that they are free of sickle-cell trait; provided that where both parties are certified to have sickle-cell anemia a marriage license may nevertheless be issued.

Jane Jones is five months pregnant. Last month she and her fiancée, John Smith, moved into State X from a neighboring state. Smith is white; Jones is black and suffers from sickle-cell anemia, a painful disease which is carried by the hereditary sickle-cell trait, and found only in blacks. Both parties are indigent and cannot afford the marriage license fee. Jones and Smith have both qualified for and are receiving welfare in State X. Jones, however, has been advised by the Welfare Department of State X that no increased welfare benefits will be paid if her child is born out of wedlock, since the welfare regulations provide for benefits only to legitimate children. Having been denied a marriage license, Smith and Jones have brought an action in federal district court seeking a declaratory judgment as to the constitutionality of the statute of State X and Jones is also challenging the Welfare Regulations which deny benefits to illegitimate children.

Assuming there are no questions as to standing, ripeness, mootness and other procedural problems, discuss the issues arising under the United States Constitution and the probable results.

QUESTION #6

A Florida corporation, Restaurant, Inc., has opened a chain of restaurants named "Uncle Tom's Cabins." Civil rights groups have protested, arguing that this name carries racially derogatory implications. Despite Restaurant, Inc.'s denials of intent to insult any group, the City Council of Newtown, Florida enacted the following:

Ordinance No. 116.

No business shall display any sign on its premises which exposes persons of any race, religion or sex to contempt, derision, or obloquy.

Invoking Ordinance No. 116, Sigmund Sign, the sign inspector of Newtown, instituted a civil action in state court on behalf of Newtown to enjoin Uncle Tom's Cabins from displaying signs carrying the restaurants' name and location. Shortly after this suit was filed, Restaurant, Inc. filed a suit in federal district court under 42 USC Section 1983 seeking a declaratory judgment that Ordinance No. 116 was unconstitutional, and seeking a temporary and permanent injunction against city officials proceeding with the state court action.

Discuss all Federal Constitutional arguments that are relevant to each side in the federal court action.

QUESTION #7

While walking through the alley behind 22 Elm Street, Officer Jones noticed suspicious-looking plants growing in large red pots on the patio. After examining the plants more carefully through his binoculars, he concluded that they were marijuana plants. He decided not to make an immediate arrest, however, since other matters were more pressing and he wanted to keep the house under surveillance.

Three weeks after the above observation, work pressures had subsided, and Officer Jones decided to take action. Without checking to see if the marijuana plants were still there, he filed a written application for a search warrant in which he described what he had seen, when and where he had seen it and why he had concluded that the plants were marijuana. He obtained a warrant which directed him to search the residence of 22 Elm Street for "four marijuana plants in large red pots."

The warrant was immediately executed. After knocking at the front door and announcing his purpose, he was admitted into the house by the defendant. Officer Jones immediately walked to the back of the house where the patio is located. He found and seized the four marijuana plants in large red pots. He then returned to the house and walked through each room to see if any additional plants were growing inside. During this cursory search, he found and seized a small quantity of cocaine, which was lying on a bedroom table. The defendant was charged with the illegal possession of marijuana and cocaine.

The defendant filed a motion to suppress the use of the marijuana and cocaine at trial and a motion to dismiss that challenged the constitutionality of the statute making possession of marijuana a crime. At the hearing on these two motions, Officer Jones testified to the facts set forth above, and the defendant testified that the marijuana was only for his own private home use. The defendant also called expert witnesses who testified that marijuana, unlike the other drugs with which it is classified, has no harmful medical effects, does not constitute a health problem of significant dimensions, and that there is no evidence that marijuana use leads to the use of more dangerous drugs.

The motions were denied. The defendant was convicted of possession of marijuana and cocaine and his conviction affirmed by the State's highest court, thereby exhausting state remedies. Discuss the federal constitutional issues that might be raised in the appropriate forum.

QUESTION #8

You are legislative assistant to Harold Finance, a United States Senator. Senator Finance believes that all students in public schools should have equal educational opportunity. He also believes that the best way to assure this is to enact a federal law requiring that every public school district within any given State must expend, annually, the same amount of money per child in school. Each State could determine for itself what those expenditures would be.

Senator Finance is not sure whether his proposed bill, if enacted, would survive constitutional scrutiny by the Supreme Court. He would like you to prepare a memorandum telling him whether or not it would. He also wants to know whether his bill would be more likely to be upheld if, instead of requiring equal per-pupil expenditures, it merely made such equal expenditures a precondition to the receipt by the State of any federal aid for education. He does not want you to discuss any possible questions of standing to litigate.

Prepare the requested memorandum.

QUESTION #9

Jane Brown was hired by the Police Department of River City, population 150,000, located in a Midwestern state. Subsequently an ordinance was duly adopted by River City to the effect that a female officer who became pregnant must be discharged from employment. She would be entitled to a hearing on the sole question of pregnancy.

One year after she was hired, she learned that she was pregnant. She was duly notified by her supervisor that she would be discharged for this reason and her contract would be terminated. She was also notified that if she desired, she could have a public hearing on this issue. She reported the matter to "Women's Weekly" a small circulation magazine emphasizing women's rights, which offered to pay the expenses for a hearing if Ms. Brown demanded one.

The hearing became a matter of great public interest. Because of space limitations the police decided to restrict attendance to reporters. They defined "reporters" to exclude, among others, representatives of weekly advertisers and small circulation magazines. A representative of "Women's Weekly" ignored the police barricade for the general public and was arrested for violating lawful police orders. (Case 1).

At the hearing it was explained by the Police Department that the reasons for the regulation were the demands of readiness, mobility, and administrative convenience. Ms. Brown conceded that she was then three months pregnant. After the hearing she was dismissed.

Within six weeks after giving birth, she had fully recovered and was physically capable of employment. Claiming that her rights under the Constitution had been violated, she brought action in the Federal Court in River City against the Chief of Police, the Police Commission, the Mayor and other officials seeking declaratory relief and an injunction to compel her reinstatement. (Case 2)

Assuming all questions as to standing and jurisdiction have been satisfied, discuss the issues in each case arising under the United States Constitution and the probable result.

QUESTION #10

The economy of the State of Minnesota is dependent upon its famous rice crop. Recently, Minnesota farmers have experienced a serious problem with an insect called the "midge." The midge can be killed by extensive spraying during the early stages of its life; however, once the midge has reached adulthood, it can damage the crop, and is impervious to spraying, moving rapidly from field to field.

To combat this insect menace the Minnesota legislature enacted a statute creating the "Midge Commission." The Midge Commission is a corporate body "with a territorial jurisdiction covering nine counties." It is governed by a board of seven commissioners who are elected biannually by the rice farmers in the nine counties on the basis of one vote for each 100 acres under rice cultivation.

The statute authorizes the Commission to levy property taxes and to carry out a spraying program. The act also specifically authorizes agents of the Commission to enter upon any land within the Commission's territorial jurisdiction to inspect for midge infestation and spray with or without the consent of the owner and without notice to the owner.

Discuss the constitutionality of this act under the United States Constitution.

QUESTION #11

Officer Jones is patrolling by foot. Upon entering Smith's grocery, the owner tells him that \$300 worth of sugar was taken from his store the preceding week by George Mean. Smith explains that he did not report the theft when it happened since he did not know who was responsible. At about the same time George Means is getting into a car which he had parked in front of Smith's Grocery. Smith immediately identifies him, and Officer Jones runs to the car, opens the driver's door and says to George, "OK Sugar Baby, let's get out." As George alights from the car he says, "I'm \$300 sweeter, that's for sure, but you can't prove a thing." Jones searches George's person and finds a handgun for which George has no license. Noticing that the rear of George's car is riding exceptionally low to the ground, the Officer suspects that the stolen sugar is stored in the trunk. Upon opening the trunk with George's key, the officer finds the stolen sugar. George is formally arrested and charged with grand larceny and the illegal possession of a firearm.

George retains you as defense counsel. What constitutional claims might George raise? Discuss the merits of those claims.

QUESTION #12

Northfield Square was a corporation which owned a shopping mall on the outskirts of New Xenia, a Midwestern city of 200,000. The mall was approximately one mile square. It contained areas for parking and an interior, covered walkway providing accommodation to some twenty-four shops, restaurants, bookstores and a cinema. Two major department stores were located in the complex. Access to the mall was "provided by streets connecting it with a number of major highways radiating from the central city." It was located within the city limits of New Xenia, and the city provided water, sewerage and fire protection. Signs posted at various points in the mall were inscribed:

NOTICE: Northfield Square is a privately owned development. The various promenades and walks are not Public Ways but are maintained for the use of Northfield Square tenants and the public transacting business with them. Permission to use such ways may be revoked at any time.

One of the stores was rented to a group known as the "Women's New Freedom," which was a nonprofit association devoted to promoting the Equal Rights Amendment for women and the right to abortion on demand.

From time to time, members of the "Women's New Freedom" association, in the public ways, sidewalks and parking areas in and around the mall, passed out handbills and engaged patrons of the mall in conversation concerning their program.

Another women's group, known as the "Inner Realm," had become active in New Xenia. This group was a local affiliate of a national organization, the Inner Realm Society, which was sponsored by the Conference of Churches. Starting in October 1977, the local Inner Realm society embarked on a campaign to influence the people of the city in regard to their opposition to the Equal Rights Amendment for Women and to abortions under any circumstances. Fifty women bearing placards and handbills entered the mall. They positioned themselves at several strategic locations and offered handbills to the various members of the public who were using the mall and shopping in its store. At no time did they enter any particular store or shop, but confined their activities to the public ways, sidewalks and parking areas in and around the mall. A group of them concentrated outside the New Freedom store, distributing handbills to persons entering and leaving the store and conversing with those who showed interest.

The officers of the Northfield Square Corporation, after this activity had continued for several days, advised the leaders of the Inner Realm group that they were trespassing on corporate property, which was a violation of state law, and that they must forthwith cease all activity, consisting of distributing handbills and marching or face prosecution for trespass.

Similar notice was also given them by the New Freedom group that their activity in front of New Freedom headquarters must end.

In response to these requests, the Inner Realm group ceased its activity, but shortly thereafter the group filed an action against Northfield Square and the New Freedom group, claiming an invasion of their civil rights and asking for a declaratory judgment and a permanent injunction.

Discuss the various bases for relief under the U.S. Constitution which may be asserted by plaintiffs and the probable result.

QUESTION #13

At 10 p.m., July 10, 1976, the police headquarters in Morgan City was notified of a liquor store holdup at 323 Townsend Street. A description of the auto and license number was given. The auto was registered in the name of Roger, address: 175 Center St. Two police officers were ordered to investigate. They drove to the address around midnight. They knocked on the door. There was no response. They announced that they were police officers. There was still no response. They then forced the door and entered, finding A and B in the apartment. While questioning these persons, the police noticed a plastic bag on a table. Thinking it might contain heroin, they took it. A and B were arrested. The contents of the bag proved to be heroin. The police also found a slip of paper on the table with the name "John" written on it and under it the address "1150 Main St." They drove to that address the following week and rang the doorbell. Mrs. John Doe answered the bell and let them in. They asked if they could look around. She did not protest. They looked into a closet and there found two cases of Jim Beam Whiskey, identified as having been stolen the week before (July 10).

A and B were charged with possession of heroin. John Doe and Mrs. Doe were charged with receiving stolen goods. In both trials motions to suppress the evidence were made based upon the United States Constitution. How should the Court rule on them?

QUESTION #14

Holly is a predominantly white upper-middle class city located in the State of Florida. In early 1972 the public schools in Holly were "voluntarily" desegregated to the extent that the very small percentage of non-white students living in Holly would allow. The teaching staffs of the public schools were then and continue to be all white. In July 1972 the Holly School Board adopted a resolution requiring that all teachers of the school district hired after July 1972 must either reside in or become residents of Holly within ninety days of employment by the district. The stated reasons for the resolution were that the district wished to aid its efforts to hire teachers committed to the school system, likely to become involved in community activities affecting the schools, and motivated toward maintaining and improving the quality of the Holly schools.

Able is a black teacher certified to teach in the public schools of Florida. Able has recently applied for a position with the Holly Public Schools. However, Able, who presently lives in a predominantly black rural community adjacent to Holly, does not wish to move to Holly. Moreover, Able is convinced that he could not find suitable housing in Holly.

Able has come to you for advice as to whether he may successfully attack the Holly resolution under the United States Constitution. What do you advise?

QUESTION #15

In junior and senior high schools in the State of X, school counselors regularly advise pregnant students. Information is given to students about the availability of abortion services, and they are counseled as to whether they should obtain an abortion.

Lobbying efforts of a state-wide group, the United Religious Coalition, have led to the introduction in the state legislature of a bill which would regulate such counseling in all public schools. The bill provides that all counselors in such schools must refuse to furnish information about abortion services to any minor student seeking it whose parent or legal guardian has requested that it not be furnished because of religious objections to abortion. Instead, such minor student must be advised to consult her clergyman.

(A) If the statute is enacted, discuss the substantive constitutional issues likely to be raised in an action challenging the validity of the statute under the United States Constitution. What if a school counselor joins in the action as a party plaintiff?

(B) If the statute is not enacted, are there federal constitutional problems if public schools refuse to comply with parental requests that their daughter not be furnished with abortion advice because of the family's religious opposition to abortion? Explain. What if the student disagrees with her parents' position? Explain.

FEDERAL CONSTITUTIONAL LAW

ESSAYS ANSWERS

ANSWER TO QUESTION #1

The Ordinance is Invalid.

The aesthetic purpose of the city ordinance is valid, but the ordinance is unconstitutional because its language is vague and overbroad. The ordinance does not set any guidelines for the Board of Zoning Regulation in connection with granting licenses for otherwise prohibited signs, nor does it spell out exceptions for protected forms of speech, therefore, it gives too much discretion to the licensing board. Further, the ordinance infringes on the First Congregational Church of Sandy Beach's free exercise of religion, and violates the prohibition against the establishment of religion.

Vagueness.

A local government has the power to regulate signs and billboards for aesthetic purposes provided the regulation is enforced in a nondiscriminatory manner and does not violate the First Amendment guarantee of free speech. Sandy Beach has a valid purpose in seeking to create an attractive area for tourists; however, the ordinance is invalid on its face, because its language is so vague that persons of common intelligence would not be able to tell what is prohibited or permissible under the regulation. For example, a sign includes any "ornamentation or other symbol of any kind or nature," but it is unclear whether the language is meant to apply to such "speech" as religious crosses or stars. Due process requires that persons must be able to understand the meaning and application of a regulation for it to withstand constitutional attack, and that requirement is not met here.

Overbreadth.

The ordinance is also susceptible to attack on the ground of overbreadth. The language of the ordinance has the potential effect of regulating the content of protected religious and political speech as well as unprotected speech. When an ordinance regulates more behavior than necessary to achieve its valid purpose, it is constitutionally defective.

The Effect of Vagueness and Overbreadth – Violation of First Amendment Freedoms.

1. Free Speech

The provision authorizing the Board to grant exemptions "as the equities . . . may require" gives the Board too much discretion to control in advance the content of signs. Excessive discretion granted to a licensing board invites content-based censorship, and in this case such censorship took place when the Board membership changed and the Board's policy toward religious organizations was suddenly revised.

The lack of strict standards for exemptions in the language of the ordinance renders the ordinance invalid, and the policy change as applied to the First Congregational Church violated its First Amendment right to free speech.

2. Freedom of Religion

State or local government may not regulate religious activity, such as the church's "speech" embodied in its rooftop cross, unless there is a compelling state need for regulation. The Board had no compelling need to remove the church's message, where the cross had been in existence for a length of time prior to enactment of the ordinance. The order to remove the cross is therefore suspect, and it can be inferred that the Board's motivation was content-based and constituted an infringement on the particular religious belief of the First Congregational Church. The Free Exercise Clause of the First Amendment has been violated.

Violation of the Establishment Clause.

The Board's action against the First Congregational Church of Sandy Beach also violated the Establishment Clause if the Board permitted other religious organizations to keep their religious signs or symbols. The state may not favor or promote one religion over another, and if the effect of the Board's selective enforcement of the ordinance was to do so, the First Congregational Church has a valid establishment claim under the First Amendment.

Potential Taking.

The church may also argue that the order to remove its rooftop cross was a taking requiring just compensation. Due process under the Fourteenth Amendment requires that the State must compensate for the deprivation of private property. In this case, the church owned the "sign" prior to enactment of the ordinance which was retroactively and discriminatorily applied to the sign. Therefore, the church may assert its rights under the Fourteenth Amendment taking clause.

ANSWER TO QUESTION #2

Farmer and Jones will prevail on the ground that the zoning ordinance permits the taking of property without just compensation in violation of the Fifth Amendment as applied to the states through the Fourteenth Amendment. A challenge to the ordinance on the ground that it violates equal protection on the basis of race will be more difficult to prove.

Potential Taking.

A zoning regulation is constitutionally sound if it is substantially related to important governmental objectives and does not have the effect of eliminating the value of the property at issue. Even if a property is not actually condemned, there is a taking if the regulation imposes a severe private burden on the owner without a substantial benefit to the public.

The alleged purpose of the Soltown ordinance, to protect against energy shortages by requiring solar conversion, is questionable because there is no evidence of an emergency or public safety situation. The effect of the ordinance is extreme hardship on Farmer, because application of the ordinance to her property renders her property unmarketable and therefore worthless.

The appreciated value of Farmer's house is \$20,000, but the cost of conversion to solar energy is \$15,000, or the amount Farmer originally paid for the property. The impact of the ordinance is essentially a taking of her property. Because the zoning regulation is of only marginal value to the community at large but the effect on the property owner is severe and amounts to a taking, Farmer is entitled to just compensation under the law.

Potential Violation of the Equal Protection Clause.

Farmer and Jones may also argue that the ordinance has the discriminatory purpose of keeping low-income and minority residents out of Soltown and therefore violates the Equal Protection Clause of the Fourteenth Amendment. An inference of discriminatory purpose may be made based on the wealthy status of Soltown and the prohibitive costs of converting to solar energy or building a solar house. However, exclusionary zoning is generally upheld provided the regulation has a rational basis. Proof of a racial animus requires a showing of a number of factors such as the severity of the impact on minorities, historical evidence of racial motivation on the part of the zoning board, and a change in the standard policy. See, e.g., *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). If Farmer and Jones can show that discriminatory considerations influenced the board's decision to convert the entire town to solar energy, and Soltown cannot justify the distinctions made, the plaintiffs will prevail on equal protection grounds.

ANSWER TO QUESTION #3

While the School Board has a right to control the school curriculum and has a valid purpose in instituting the "Morality and Sexuality" program, it does not have the right to infringe upon a parent or child's First Amendment right to religious freedom. Under these facts, Mr. James will probably prevail in a constitutional challenge to the "Morality and Sexuality" program, as applied to his daughter Peggy, because it interferes with both of their right to the free exercise of religion under the First Amendment. It also violates the Establishment Clause of the same amendment, and denies Peggy the benefit of a high school diploma for declining to enroll in a public school program based on religious conviction.

I. Mr. James' Standing to File Suit.

Mr. James has standing to raise the rights of his daughter in a court proceeding. Third party standing is permissible where a close relationship exists between the party filing suit and the third party whose rights he or she is asserting. As his daughter's legal guardian, Mr. James clearly has such standing.

He also has standing in his own right as a parent seeking recognition of his right to instill his own views of morality in his child without state interference.

II. Basis for Suit.

Parents have a protected privacy interest in controlling the education of their children. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right to send children to private school); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (right to terminate child's education after eighth grade). Here, Mr. James is seeking to control his daughter's access to one course which violates his religious beliefs, not to an entire educational system.

The School Board has authority to institute the kind of morality program at issue, because school boards are empowered to determine curriculum and require the teaching of community values. In light of the current social problems facing the community, the Board's program is a permissible exercise of power. However, the effect of the required nature of the program is to deny Peggy James the benefit of a high school diploma because of her religious convictions. When the state has conferred a government benefit, such as an educational program, on an individual, the benefit cannot be denied or withheld for unconstitutional reasons. See e.g., *Goss v. Lopez*, 419 U.S. 565 (1965) (property right in continued attendance at public school). Here, Peggy James has been denied the benefit of a high school education in the sense that she is being denied a diploma. Despite her education, her ability to obtain employment or enter college is impeded by her lack of the actual documentation. The diploma is being denied to her solely on the ground that she has refused to attend one course which contradicts her religious beliefs and those of her parent.

The First Amendment limits the power of a school board to indoctrinate students in religious values. See *Edwards v. Aguillard*, 96 L.Ed.2d 510 (1987) (public schools may not teach "creation science"); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (voluntary prayer or meditation unconstitutional). A School Board resolution requiring the teaching of "Judeo-Christian traditions" implicates the Establishment Clause of the First Amendment, which prohibits state activity whose primary effect is to advance or inhibit religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Therefore, to the extent the resolution requires the advancement of certain religious traditions, the resolution is invalid on Establishment Clause grounds.

The teaching of secular materials may also violate the Constitution because under the Free Exercise Clause of the First Amendment an individual may not be compelled to be indoctrinated against her religious beliefs. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (student cannot be compelled to salute flag). The School Board may not intrude into a student's religious belief and prescribe contrary modes of thought. If Peggy James conscientiously objects to a particular course, the Board must recognize her religious conviction and permit an alternative means for her to fulfill her educational requirements.

Under these facts, where the parent's and student's objection is to only one small part of the curriculum and the objection is based on sincere religious beliefs, the Board cannot constitutionally deny Peggy and James James the opportunity to determine an alternative means for Peggy to learn the program's information without implicating the First Amendment and the family's general right to privacy in the area of education.

ANSWER TO QUESTION #4

The motion to suppress the rifle will be denied because the search warrant was properly issued based on probable cause; however, the motion to suppress the marijuana will be granted because the seizure does not fall into any of the exceptions to the requirement of a search warrant under the Fourth Amendment.

I. Motion to Suppress the Rifle.

The seizure of the rifle was valid because it was made pursuant to a properly issued search warrant. The requirements for a valid warrant are (1) the personal appearance by the officer before a neutral and detached magistrate, (2) probable cause to search, and (3) an allegation that property to be seized is unlawfully concealed, along with a description of the place to be searched and the object or objects of the search. Here, the issuance of the warrant was based on information obtained from the defendant Simpson at the time of his arrest and from a "credible and reliable" informant. Probable cause to search exists where the officer has personal knowledge or trustworthy hearsay from another. Under *Illinois v. Gates*, 462 U.S. 213 (1983), the reliability of the information presented to the magistrate is to be judged by a "totality of the circumstances." Therefore, the information the F.B.I. agent obtained from the two sources regarding the straw purchase of the rifle, Simpson's possession of the contraband, and its location at his house is sufficient to establish probable cause. The agent was properly on the premises and lawfully seized the rifle pursuant to the warrant.

Even if there was not probable cause to search, the rifle may still be used as evidence under the good faith exception to the exclusionary rule established by *U.S. v. Leon*, 468 U.S. 897 (1984). Under *Leon*, evidence seized by police officers relying on a facially valid search warrant issued by a neutral magistrate will not be suppressed even if the warrant is later found to have been issued without probable cause. If the agent in this case reasonably relied on the judicial authorization of the warrant, the rifle will not be suppressed.

II. Motion to Suppress the Marijuana.

The marijuana was unlawfully seized because its seizure was not authorized by the search warrant and does not fall within any exception to the requirement of a search warrant.

The search warrant stated with particularity probable cause to seize the rifle only. At the time the agent spotted the bag, the purpose of the search warrant had been accomplished by seizure of the rifle.

The agent's confiscation of the bag did not constitute a valid seizure incident to an arrest because the bag was not within Simpson's reach or control at the time. Likewise, the seizure does not come under the plain view exception to the search warrant requirement because even though the agent had made a prior valid intrusion into the protected area to seize the rifle, and his discovery of the bag was inadvertent, he had no probable cause to seize the bag because the need for seizure was not immediately apparent. The facts state that the agent did not know the contents of the bag until he opened it. Because he had no knowledge that the bag contained contraband, he had no right to examine it or subsequently seize it.

Simpson cannot be said to have consented to the agent's examination of the bag by saying "How can I stop you?" A consent search requires the voluntary consent of the defendant without any threat or compulsion. Simpson's comment was more in the nature of coerced acquiescence than a valid waiver of his rights under the Fourth Amendment. Therefore, because seizure of the marijuana does not fall within this or any other exception to the warrant requirement, the seizure was the fruit of an invalid warrantless search, and the evidence will be suppressed.

ANSWER TO QUESTION #5

Jones and Smith will prevail in their challenge to the constitutionality of the marriage regulation because its provisions impermissibly interfere with the plaintiffs' fundamental right to marry. The regulation imposes monetary and racial barriers to getting married, but there is no compelling state need for these barriers. Jane Jones will also prevail in her challenge to the welfare regulations because the state's withholding of benefits to illegitimate children does not further any important governmental purpose, and is therefore unconstitutional.

I. The Marriage Regulation.

The Supreme Court has recognized a fundamental right to marry. *Loving v. Virginia*, 388 U.S. 1 (1967) (miscegenation statute unconstitutional); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (state requirement that person under support order obtain court permission to marry unconstitutional); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (removal of custody of child when mother's second marriage is to a man of a different race unconstitutional). The State X regulation infringes upon Jane Jones and John Smith's right to marry on both racial and monetary grounds. Each provision of the regulation can be challenged successfully under the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment.

One-Year Waiting Period.

The requirement that parties apply for a license "no less than one year prior to such marriage" burdens parties' fundamental right to marry without a compelling need for the state to impose such a burden. Statutes which affect fundamental interests are subject to strict scrutiny under due process and equal protection theories.

Here, it is unlikely the state will be able to show that a one year waiting period is necessary for any justifiable reason such as the need to process paperwork or to give couples an opportunity to reflect on their decision. A short waiting period of several days or a week could be found constitutional on such grounds, but one year is excessive in general and in particular in terms of a person such as Ms. Jones who is attempting to legitimize her soon-to-be born child. The extreme burdensomeness of the year long waiting period and the lack of a compelling purpose for such a lengthy waiting period render the provision unconstitutional.

Filing Fee.

The \$60 fee required for application is also unconstitutional because it burdens the parties' freedom of choice to marry. The Supreme Court has recognized a fundamental right to divorce free from burdensome fees. *Boddie v. Connecticut*, 401 U.S. 1 (1967) (statute requiring payment of court costs in divorce unconstitutional as applied to indigents). State X has a monopoly on granting Ms. Jones and Mr. Smith and others a marriage or divorce, and therefore the state's imposition of a monetary burden on people who cannot afford the fee violates due process by denying some people access to governmental licenses. It also violates equal protection by treating indigents differently than others. The \$60 fee, as applied to indigents, is unconstitutional, and State X must waive the fee for Jones and Smith.

Sickle-cell Test.

The provision requiring medical proof that a person is free of the sickle-cell trait is tantamount to a racial classification, because the disease is suffered only by blacks. Suspect classifications such as race are subject to strict scrutiny, and a statute discriminating on the basis of such a classification is unconstitutional unless the state can show a compelling need. State X will issue a marriage license if both parties suffer from sickle-cell anemia, but it will deny a license if only one person carries the trait. Therefore, the effect of the provision is to ban interracial marriage. Such discrimination has been found unconstitutional in *Loving v. Virginia*. See *supra*. Clearly, State X does not require the testing to prevent further spread of the disease, because the state permits the marriage of persons who may pass it on. The provision does not have a disclosure function used by the state to regulate the spread of sickle-cell anemia, but rather a prevention function to eliminate interracial marriages. Therefore, the testing provision violates equal protection without a compelling state need and is unconstitutional.

II. Welfare Regulations.

Illegitimacy is a quasi-suspect classification, and the state may not deny benefits to illegitimate children without showing the classification has a close relationship to the furtherance of an important governmental objective. The Supreme Court has found that a state may not withhold welfare benefits from illegitimate children. *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973). Because of this explicit finding, State X may not deny benefits to Ms. Jones's child without violating the Equal Protection Clause of the U.S. Constitution.

ANSWER TO QUESTION #6

The federal district court will probably dismiss Restaurant, Inc.'s suit under the doctrine of abstention, but if the federal court reaches the merits, Restaurant, Inc. will prevail on First Amendment grounds, because the language of Ordinance No. 116 is vague and overbroad and has the effect of chilling protected speech.

I. Abstention.

When Restaurant, Inc. filed suit in federal district court, the corporation was already the defendant in a pending state court proceeding brought by Sigmund Sign on behalf of Newtown. Under the abstention doctrine, a federal court will abstain from deciding a constitutional question when the case can be decided on another ground in a lower court. Pursuant to the Younger abstention doctrine, a federal court will defer to a state court in a pending state criminal or civil proceeding, except where the state action has been brought in bad faith or other extraordinary circumstances exist. See *Younger v. Harris*, 401 U.S. 37 (1971) and cases extending its principles. In the interests of comity, the federal court must dismiss the federal complaint on the theory that the state court will provide the defendant in the pending state action an opportunity to raise his claims.

Therefore, under these facts, Newtown will argue that the federal court should not interfere because Restaurant, Inc. has an adequate state remedy and may raise its constitutional claims as defenses in state court. It is likely the federal court will be deferential here so that the state court will have an opportunity to resolve the issues, including Restaurant, Inc.'s First Amendment defenses. The federal court will abstain and dismiss the federal complaint.

Even if the federal court chooses not to apply the Younger abstention doctrine, it may apply Pullman abstention, under which the federal court would retain jurisdiction but delay hearing the claim until the state court had an opportunity to interpret the state government ordinance at issue. *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941).

Newtown might also argue that the Eleventh Amendment bars suit in federal court by a citizen against the state; however, immunity from suit does not apply to subdivisions of a state, such as cities. The federal suit will not be dismissed on the ground of sovereign immunity in any case, but rather under the abstention doctrine.

Constitutionality of the Ordinance.

A. First Amendment/Protected Speech

Assuming, in the interests of discussion, that the federal court reaches the merits of the corporation's suit, Restaurant, Inc. will prevail because the ordinance prohibiting use of the name of the chain impermissibly regulates protected speech. Newtown will argue that the name of the chain is commercial speech subject to broad regulation.

While commercial speech does not enjoy the same protections as political speech, the Supreme Court has afforded commercial speech some First Amendment protection. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). States may regulate the content of such speech under their police power to prevent fraud, deception, or illegal purposes. If Ordinance No. 116 is substantially related to achieving a valid city objective and no alternative means exist to achieve the objective without city interference, then the ordinance is a valid exercise of Newtown's police power in the area of commercial speech.

B. Vagueness

However, Restaurant, Inc. can argue successfully that even if no alternative means exist to achieve Newtown's goals, the ordinance is unconstitutional on its face. Ordinance No. 116 prohibits all speech on signs which exposes any person "to contempt, derision, or obloquy." The language is so vague that persons of common intelligence would have to guess at its meaning and would differ as to its application. Due process requires that a person must be able to understand from the language of a statute what activity is permitted and prohibited. Ordinance No. 116 fails to pass constitutional muster because of impermissible vagueness.

C. Overbreadth

The ordinance is also unconstitutional because it is overbroad, impinging on political and other protected speech as well as applying to some speech which may be regulated. Because the language of the ordinance sweeps broadly to cover speech relating to every race, religion and gender, its effect is to chill protected speech. Even though the title of the chain of stores was offensive to some, Newtown's ordinance implicates the First Amendment right of free speech and may not be applied to Restaurant, Inc. to enjoin its use of the name "Uncle Tom's Cabins."

ANSWER TO QUESTION #7

The defendant's federal constitutional challenge to validity of the search for the pots of marijuana will fail because the evidence was seized pursuant to a valid warrant; however, his challenge to seizure of the cocaine will succeed, because the search which led to that seizure was beyond the scope of the search warrant and does not fall under any exception to the Fourth Amendment warrant requirement. The defendant's constitutional challenge to the criminal statute will fail because the federal court will defer to the state's regulation of controlled substances under the state's power to legislate in the area of public health and safety.

Search and Seizure.

Marijuana.

The defendant had a reasonable expectation of privacy in his home because a dwelling house is a constitutionally protected area. *Lanza v. New York*, 370 U.S. 139 (1982). However, there is a reduced expectation of privacy outside the home in areas close to the dwelling (the "curtilage").

Anything which is in plain view in this "curtilage" and is seen by the police from a public vantage point has not been searched for Fourth Amendment purposes, and a search warrant may be obtained based on the officers' observations. If Officer Jones was standing in a public alley behind 22 Elm Street when he noticed the plants, he had probable cause to obtain a search warrant based on his personal knowledge. The subsequent seizure of the pots was made pursuant to a facially valid warrant.

The defendant may argue that the warrant is invalid because it was based on stale information obtained three weeks before the seizure. While staleness may undermine the basis of probable cause on which the warrant was issued, Officer Jones can argue that the good faith exception to the exclusionary rule of the Fourth Amendment applies, that is, he objectively relied on a facially valid and properly issued search warrant. *U.S. v. Leon*, 468 U.S. 897 (1984). The court must decide, on balance, whether the staleness element renders the warrant constitutionally defective.

Cocaine.

The cocaine was not seized pursuant to the search warrant, because the officer had already secured the pots on the patio and had no right to return to the house to make a "cursory search." Because he had no right to be in the house, he could not seize the cocaine under the plain view exception to the warrant requirement. The defendant did not consent to the officer's intrusion into the Fourth Amendment protected area, and therefore the consent exception is similarly inapplicable. The cocaine was seized illegally, rendering the defendant's arrest for possession unconstitutional. His conviction must be overturned.

II. Criminal Statute

The defendant's challenge to the statute making it a crime to possess marijuana in the privacy of one's home will fail on both substantive due process and equal protection grounds, because the states have historically regulated in the areas of public health and safety, and the federal courts have deferred to the states' determination that certain substances are harmful to individuals and the community. The Supreme Court has declined to find a right to privacy regarding certain activities historically regulated by the states where there is a rational basis for discrimination against the activity. *Bowers v. Hardwick*, 92 L.Ed.2d 140 (1986) (upholding statute prohibiting consensual sodomy). Similarly, a federal court is unlikely to find a right to criminal use of illicit drugs within the home in the face of a contrary state statute. The challenged criminal statute is valid, and the defendant's conviction will stand.

ANSWER TO QUESTION #8

To: Senator Harold Finance

From: Legislative Assistant

Re: Constitutionality of federal law requiring equal per-pupil expenditures

Brief Answer:

The proposed federal law requiring equal per-pupil expenditures among school districts within each state will withstand constitutional scrutiny if it is based on the Congressional commerce power or spending power.

Discussion:

There are three potential sources of Congressional power on which the law could be based:

I. The Fourteenth Amendment Civil Rights Enforcement Power

Under §5 of the Fourteenth Amendment, Congress has the power to enact legislation directed at the states to prevent them from violating the civil rights of citizens of the United States. Enforcement of the proposed law mandating equal educational expenditures may be difficult under this section, because the Supreme Court has narrowly delineated Congressional power to enact legislation under the section, limiting it to enforcement of clearly recognized civil rights. For example, the Court held that the financing of school districts based on local property assessments was not a violation of equal protection by the State of Texas. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). Based on the *Rodriguez* case, it is unlikely the proposed law mandating equal educational opportunity would withstand constitutional scrutiny under this theory.

II. The Commerce Power

The Congressional commerce power gives Congress broad power to regulate commerce among the several states. The proposed federal education law is enforceable through the commerce power, because the law would have a direct and beneficial effect on commerce by injecting well-educated citizens into the economy. Thus, there is a rational basis for the law, and the Supreme Court would uphold it. Enforcement of the law through the commerce power would not be unconstitutional as an infringement of state sovereignty, because the Court has held that the Tenth Amendment is not a positive limitation on federal power. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976). Thus, Congress has the power to regulate local government matters such as school district expenditures through the Commerce Clause.

III. The Spending Power

Congress has broad power to spend money for the general welfare. Art. 1, §8, cl. 1. This broad power includes the power to spend to accomplish ends which Congress cannot achieve through its regulatory power.

For example, in *Oklahoma v. U.S. Civil Service Commission*, 330 U.S. 127 (1947), the Supreme Court held that Congress could condition receipt of highway funds by the state upon the resignation of the state highway administrator. Thus, Congress was able to achieve indirectly through the spending power the result it could not have legislated (i.e., removal of a state public official). The proposed federal law on educational expenditures likewise could be enforced through the spending power by conditioning state receipt of federal monies on equal expenditures among school districts.

Conclusion

The proposed legislation can be achieved through direct regulation under the commerce power or indirectly through the spending power by preconditioning receipt of federal aid to education on compliance. Use of either power to enact the legislation would withstand constitutional scrutiny.

ANSWER TO QUESTION #9

I. Case 1.

The "Women's Weekly" representative was impermissibly barred from the public hearing in violation of her First Amendment right of nondiscriminatory access to a place of expressive activity. State or local government may restrict the time, place and manner of speech if the restrictions are content-neutral. The nature of the forum determines the extent of regulation that the government may impose. An open meeting, such as the public hearing regarding Ms. Brown's discharge, is a public forum where the government has the right to regulate speech under only a narrow set of circumstances. For instance, limiting access for a valid public safety purpose or to maintain law and order are permissible governmental intrusions into the First Amendment right of free speech. Therefore, restricting attendance at Ms. Brown's hearing is constitutionally permissible for safety purposes.

However, the method by which the police restricted access to the hearing was unconstitutional because it distinguished certain reporters and excluded them on the basis of the content of the newspapers they represented. Once the hearing was open to the public, the police could not use their discretion to regulate the content of media coverage of the hearing without demonstrating a compelling interest. *Perry Educational Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). There was no valid reason to bar reporters representing "weekly advertisers and small circulation magazines," and therefore the First Amendment rights of the "Women's Weekly" representative were violated and she will prevail in her action.

II. Case 2.

The ordinance requiring Brown's dismissal on the ground of pregnancy is unconstitutional under the Fourteenth Amendment's Due Process Clause, because it creates a conclusive presumption of unfitness. It is also unconstitutional under the amendment's Equal Protection Clause, because it unjustifiably discriminates against Brown and other similarly situated police officers on the basis of gender.

A hearing which forecloses issues by conclusively presuming them to be true violates the Due Process Clause. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) (conclusive presumption that pregnant women are not capable of teaching unconstitutional). Pursuant to the ordinance at issue, Ms. Brown was entitled to a hearing "on the sole question of pregnancy." Once pregnancy was established, the department could summarily dismiss Ms. Brown. Therefore, the ordinance creates an irrebuttable presumption that any police officer found to be pregnant is unqualified to perform her duties. Due process requires that before the government can deprive an individual of employment, the government must make an individualized determination of the conditions of the employee's pregnancy and its effect on her ability to discharge her duties. While the River City Police Department may have valid safety reasons to bar pregnant officers from certain duties, River City is obligated to examine each employee's situation and capabilities. The hearing at which Brown was discharged clearly violated her due process right to an individualized examination.

The ordinance violates the Equal Protection Clause, because it discriminates on the basis of gender without serving any important governmental objective. In the past, the Supreme Court has applied the rational purpose test to discrimination against pregnancy. *Geduldig v. Aiello*, 417 U.S. 484 (1974) (medical insurance plan excluding pregnancy from coverage constitutional). However, a federal statute regarding pregnancy discrimination has been enacted, and this gender-based classification is now viewed with greater scrutiny by the Court under the intermediate standard of review. Ms. Brown's dismissal involves the loss of employment as a penalty imposed because of pregnancy, with no justification linked to job performance or ability. While a temporary leave could be justified in a particular case, summary dismissal of any female police officer for pregnancy is a violation of equal protection. Brown will prevail in her challenge to the application of the ordinance to her, and the court will order her reinstatement.

ANSWER TO QUESTION #10

The statute creating the Midge Commission is constitutional because the commission governs only a specific segment of the electorate and addresses a special problem peculiar to the electorate it serves; therefore, equal protection of the right to vote is not violated. The powers granted to the commission to control the midge threat do not violate the Fourth Amendment rights of the farmers served by the commission, because that governmental body has a compelling interest in preventing the destruction of the entire rice crop of the state.

The Residency Requirement/Power to Tax.

Generally, a residency requirement is the only qualification the state can impose on the right to the franchise. *Kramer v. Union Free School District*, 395 U.S. 621 (1969) (limitation of franchise to property owners or lessees, or parents of school children in school district election unconstitutional).

Property and interest qualifications are unconstitutional, except in the limited situation where the governmental body exercises authority over a specific problem and the voting qualifications of the electorate bear a close relationship to the problem. *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973) (water resources; voting rights according to assessed value of land). The Midge Commission governs all rice farmers within its jurisdiction solely in regard to the midge threat. Therefore, the electorate is composed only of rice farmers who are all facing the same natural disaster. In this case, voting power based on property ownership or acreage is constitutionally permissible. It is not unreasonable to impose a proportionate property tax upon users to fund the commission's activities.

Power to Spray and Enter Upon Land.

The commission's authority to enter farmers' land to spray does not implicate the Fourth Amendment because any "search" would be related solely to an examination of the crop to discover any midge infestation. Only open fields would be affected, rather than the areas of the home in which a person has a reasonable expectation of privacy. The commission's inspections are in the nature of administrative searches, which are permissible pursuant to regulatory health and safety schemes. No warrant is required where there is a substantial governmental interest in the regulatory scheme, warrantless inspections are necessary to carry out its purpose, and the persons to be inspected have notice of the existence and scope of the inspection program. See, e.g., *Donovan v. Dewey*, 452 U.S. 594 (1981) (inspection of coal mines). Therefore, the Midge Commission may enter rice farmers' fields to inspect and spray with or without consent and without notice in order to protect the entire crop and the electorate it was created to serve. The act creating the commission is constitutionally sound.

ANSWER TO QUESTION #11

George Mean may raise Fourth Amendment challenges to the "stop" to which he was subjected, the searches leading to seizure of the gun and the sugar, and the validity of his arrest. He may also challenge use of his own statement against him under the Fifth Amendment. However, it is unlikely he will succeed in any of his claims because his arrest was valid under the circumstances, and the seizures were made incident to that arrest.

I. Stop of Defendant.

A police officer may "stop" a person short of an arrest where the officer has a reasonable suspicion, based on objective facts, that a crime is being planned or executed. *Terry v. Ohio*, 392 U.S. 1 (1968). The temporary intrusion on Fourth Amendment rights permitted by Terry has been extended to situations in which the officer suspects that the detainee has been involved in a completed felony. *U.S. v. Hensley*, 469 U.S. 221 (1985). When Officer Jones accosted George Mean, Officer Jones had reason to believe that Mean had committed a felony. Officer Mean based this suspicion on the information supplied by Mr. Smith regarding the theft of the sugar and Smith's identification of the suspect.

If Officer Jones began the arresting process when Mean got out of the car, every action the officer took subsequently was valid for purposes of the Fourth and Fifth Amendment.

Mean, however, will argue that the self-incriminating statement he made as he alighted from the car is inadmissible, because he was not given Miranda warnings. The Miranda exclusionary rule applies only to custodial interrogation. Even if Mean was significantly deprived of his freedom (i.e., in custody) when he made the statement, his comment was not a product of interrogation. Mean spontaneously volunteered the statement before Jones had subjected him to any questioning. Therefore, the statement is admissible.

Search of Person/Seizure of Handgun.

Mean's self-incriminating statement gave Officer Jones further ground on which to form a reasonable suspicion that he was a felon and a danger to public safety. Mean will argue that the arrest and subsequent search were invalid; however, Jones's detention of Mean was based on probable cause, and the officer had constitutional authority to conduct a warrantless full personal search incident to the arrest. A police officer may search the person of a suspect to confiscate weapons which may endanger the officer. Therefore, the handgun was seized properly, and Mean's Fourth Amendment claim will fail.

III. Search of Trunk.

Mean will argue that even if Jones had a right to search his person, he had no right to search the locked trunk. However, this search also qualifies as a valid warrantless search incident to an arrest, because Jones had probable cause to suspect that contraband was inside the trunk based on his observation of the rear of the car. In addition, the mobility of the car necessitated an immediate search. *U.S. v. Ross*, 456 U.S. 798 (1982). Mean could argue that he was coerced into turning over the key to the trunk. The facts do not indicate whether Mean consented to the search or whether he was compelled to hand Officer Jones the key. However, because there is a lesser expectation of privacy in an automobile, Officer Jones was justified in conducting a warrantless search in any case, and Mean's nonconsent does not render the fruits of that search inadmissible.

ANSWER TO QUESTION #12

The First Amendment rights of the Inner Realm group have not been infringed, and its request for an injunction will be denied, because Northfield Square, as a private shopping mall, has the right to deny individuals and groups access to the property to engage in expressive activity.

The First Amendment protects the right of the people to peaceful assembly and expressive activity in a public forum. Therefore, groups such as the Inner Realm group have a right to speak on public streets and sidewalks. However, the right does not extend to private property, where private owners may interfere with free speech rights with impunity.

In *Marsh v. Alabama*, 326 U.S. 501 (1946), the Supreme Court found that where a private company owns an entire town, the company is the functional equivalent of a municipality and is a public forum for First Amendment free speech purposes.

The Court extended the public forum concept to private shopping centers in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968). However, in *Hudgens v. NLRB*, 424 U.S. 507 (1976), the Court overruled *Logan Valley* and the application of First Amendment free speech rights in private shopping centers except in the limited situation in which the management of a center exercises control functionally equivalent to a municipality.

Northfield Square, as a private mall, has a right to deny access to anyone for the purpose of expressive activity, absent evidence the management is operating as a governmental unit. Northfield Square may also allow some individuals or groups to communicate their ideas on the property and discriminate against others on the basis of content. The only means by which the Inner Realm group could speak on the premises legally and without Northfield Square's permission would be pursuant to a state constitutional law providing that private shopping centers are public forums for First Amendment purposes. The Supreme Court will uphold a state constitutional law granting greater free speech rights than the Court has found in its decisional law. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). However, it is clear from the facts that the Inner Realm group's presence in the mall is "a violation of state law," and therefore the state has no constitutional provision granting the group access to the mall for free speech purposes. The group's activities in the mall constituted a trespass, and the group's suit will fail.

ANSWER TO QUESTION #13

I. A and B

The motion to suppress the heroin will be granted because the evidence was seized during an impermissible entry into the home of A and B.

A and B have a reasonable expectation of privacy in their home and are protected by the Fourth Amendment against unreasonable searches and seizures. The police officers who entered the home had no probable cause to do so, because they had no reliable information that the occupants of the particular apartment at 175 Center Street were the persons who had committed the crime. Because the officers had the name and address of the person to whom the auto was registered, along with information linking the auto to the liquor store holdup, they had sufficient objective information to seek a search warrant before proceeding to the address. They also had time to obtain the warrant because they were not in an emergency situation in which delay would frustrate the search, nor were they in hot pursuit of Roger. In either situation, the police would have had the right to search without a warrant. However, if the officers here had probable cause to believe Roger was present in the dwelling, they were required to obtain a warrant to arrest him or to search the premises in order to obtain entry. *Payton v. New York*, 445 U.S. 573 (1980).

Because the officers had no right to enter A and B's apartment, the officers had no right to search the premises. Their seizure of the heroin does not fall within the plain view exception to the warrant requirement, because the exception only applies where the officers have made a valid intrusion into the Fourth Amendment protected area. The seizure does not qualify under the search incident to arrest exception either, because A and B were not under arrest when the heroin was seized. Similarly, the consent exception does not apply, because there is no indication that A and B voluntarily waived their Fourth Amendment rights without threat or compulsion. The officers' presence in the apartment was unconstitutional, rendering seizure of the drug invalid. The evidence against A and B will be suppressed.

II. Mr. and Mrs. Doe.

The motion to suppress the evidence seized at the Doe home will be denied.

The Does do not have standing to raise the constitutional issues presented by the search of the Center Street apartment, because they do not live there and had no other reasonable basis for an expectation of privacy at that location.

As to the Does' house, Mrs. Doe gave her apparent consent to a search. Of course, a failure to protest by Mrs. Doe does not, in itself, show that consent was given voluntarily and without compulsion. Also, it is unclear whether the closet in which the police found the whiskey was an area of joint access or whether it was under one spouse's exclusive control. If the closet was under Mr. Doe's control, Mrs. Doe's "alleged" consent to the search, even if voluntary, would be an ineffective waiver of Mr. Doe's Fourth Amendment rights. *U.S. v. Matlock*, 415 U.S. 164 (1974).

ANSWER TO QUESTION #14

Able will be able to attack successfully the municipal residency requirement of Holly, because the purpose of the requirement is to discriminate on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment.

In general, a municipal residency requirement as applied to public employees will be upheld where the municipality can show a substantial justification for it. For example, the municipality may require police officers or firemen to reside in the community so that they will be familiar with the area and people they serve. The same argument could be made regarding public school teachers. As applied to private employees, the Supreme Court has found that discrimination on the basis of municipal residency implicates the Privileges and Immunities Clause of Article IV. *United Building & Construction Trades Council v. Mayor and Council of the City of Camden*, 465 U.S. 208 (1984).

Holly requires public school teachers to reside in Holly on the stated grounds that such teachers thereby will be more committed to and involved in the community and schools. If those goals are the legitimate justifications for the requirement, then the Holly resolution is valid.

However, when the requirement is placed in the context of a recently desegregated school district, the facts permit an inference of unlawful, purposeful racial discrimination. The Holly school district was desegregated in 1972. The municipal residency requirement was imposed that same year, and five years later there are no non-white teachers on the staff. This suggests a linkage between the desegregation and the residency requirement. The inference can be drawn that the intent of the resolution was to bar employment of otherwise qualified teachers such as Able from the predominantly white upper-middle class school district. School desegregation requires the integration of teaching staff as well as students, and if the resolution's purpose is to thwart the goal of desegregation the Equal Protection Clause is implicated.

Able probably has a prima facie case against Holly under the Fourteenth Amendment. He need only show a discriminatory purpose behind the residency requirement. The burden of proof then shifts to Holly to show a lack of such purpose.

ANSWER TO QUESTION #15

(A) If the statute is enacted, the provision requiring the approval of parents prior to the dissemination of abortion information may be successfully challenged by a mature minor seeking such information. The provision requiring referral to a clergyman is also susceptible to constitutional challenge, because it violates the Establishment Clause of the First Amendment. However, a school counselor would not be able to challenge the statute successfully on First Amendment free speech grounds.

The Right to Privacy.

The family has a constitutionally protected right of privacy. The Supreme Court has recognized a parent's right to make choices regarding a child's education. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). However, in the area of abortion, the Court has found that a statute requiring that a physician notify the parents of a minor female contemplating abortion is constitutional only if the child is immature. *H.L. v. Matheson*, 450 U.S. 398 (1981). Unemancipated minors who can demonstrate maturity are not subject to the notification requirement. *Id.* Thus, it is likely that a mature minor seeking abortion counseling could obtain a court order requiring the school to furnish such counseling despite his or her parents' objection. An immature minor could be denied access by the court.

The Establishment Clause.

The provision requiring referral to a clergyman violates the Establishment Clause because its primary effect is to advance religion. The Supreme Court has found statutes that promote religious indoctrination of students to be unconstitutional. *Edwards v. Aguillard*, 96 L.Ed.2d 510 (1987) (teaching of "creation science"); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (period of silent meditation or voluntary prayer); *Stone v. Graham*, 449 U.S. 39 (1981) (posting of Ten Commandments). The public schools in State X have no power to inculcate religious beliefs, and the referral provision is unconstitutional.

A school counselor probably does not have standing to join in an action because the state, as a public employer, has the authority to determine the school curriculum and require its employees to teach it. The counselor's right to free speech is not impinged by the statute because he may exercise his First Amendment rights outside the scope of the curriculum.

(B) If the statute is not enacted, the public schools may refuse to comply with parental requests to withhold information from a minor only if the child is mature. Parents have a privacy interest in determining their children's education; however, a minor of sufficient maturity may make certain decisions affecting family integrity without parental notification or approval. See *H.L. v. Matheson*, *supra*. If a mature minor in the public school system of State X demands abortion counseling contrary to the religious beliefs of a parent, the school may supply the counseling with constitutional impunity.

In the case of an immature minor, the school's failure to comply with a parental request would violate the parents' right to free exercise of religion under the First Amendment. The Supreme Court has upheld parental objection to specific portions of the school curriculum when the objection was founded in sincere religious belief. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (flag salute). It is likely that here, where the objection is to only a small part of the overall curriculum and alternate means exist for the parents to provide their children substitute instruction, the school system cannot compel indoctrination against the family's religious beliefs without violating the Free Exercise Clause.

FLORIDA CONSTITUTIONAL LAW ESSAY QUESTIONS

QUESTION #1

The City Commission of a large Florida municipality has determined that steps must be taken to attenuate the effect of the world energy crisis on municipal inhabitants. The municipal electric system owns two oil-fired electric generating plants, whose cost of operation increases with the rising cost of crude oil.

In 1979, the City Commission adopted a resolution providing for the issuance of \$30,000,000 in municipal bonds, secured by revenues derived from the municipality's sale of electricity. The funds from the bond issue will be used to finance the purchase by the municipality of a 2% share in a nuclear generating plant being built by a consortium of investor-owned utilities.

This year, with the price of oil continuing to rise, the City Commission authorized the issuance of \$20,000,000 of municipal bonds to finance the municipality's participation in a project to build a coal slurry pipeline in Florida. This step was taken upon the advice of consultants who recommended that the municipality consider coal as a source of power for electrical generation.

The other joint venture participants, an investor-owned utility and a coal company, will be entitled to use 80% of the pipeline's capacity upon its completion in 1981. Under the terms of the joint venture agreement, the municipality has the option to use its share of pipeline capacity for its own purposes or to lease that share to one of the other joint venturers. The City Commission hopes that construction on the first coal-fired generating plant for the municipal electric system could be started within the next ten years. The municipality therefore plans to lease its share of pipeline capacity to the participating investor-owned utility for a fifteen-year term. A section of the coal slurry pipeline will run through the limits of the municipality, and the City Attorney has filed a condemnation suit against a private landowner to obtain the necessary right-of-way.

The Florida legislature passed a statute in 1975 authorizing municipalities to participate in projects for the generation and transmission of electrical energy with private entities.

Discuss all constitutional issues raised by this set of facts.

QUESTION #2

By Joint Resolution passed by more than three-fifths (3/5) of the membership of each house of the 1974 Legislature, the Legislature has proposed a series of amendments to the Constitution of Florida which are in substance as follows: (1) Section 1 of the Joint Resolution proposes a repeal of Section 2 of Article IV of the 1968 Florida Constitution, thereby abolishing the office of Lieutenant Governor; (2) Section 2 of the Joint Resolution proposes an amendment to Section 3 of Article IV of the 1968 Florida Constitution which substitutes the Secretary of State for the Lieutenant Governor as the person to succeed to the office of Governor upon a vacancy in that office; (3) Section 3 of the Joint Resolution proposes an amendment to Section 5 of Article IV of the 1968 Florida Constitution which would make the offices of Secretary of State, Attorney General, Comptroller, Treasurer, Commissioner of Education and Commissioner of Agriculture appointive rather than elective, with the appointment to be made by the Governor and confirmed by a majority vote of the Florida Senate; (4) Section 4 of the Joint Resolution proposes a repeal of Section 9 of Article IV of the 1968 Florida Constitution, thereby eliminating the Game and Fresh Water Fish Commission as an agency established by the Constitution; and (5) Section 5 of the Joint Resolution proposes an amendment to Section 10 of Article IV of the Constitution which would make all of the justices and judges of the State appointive by the Governor rather than elective, the appointments to be made in the manner provided by Section 11 of Article V, and the justices and judges to serve for life unless removed from office in the manner provided by Section 12 of Article V of the Constitution. The Joint Resolution specifically provides that the voters must vote to accept all or reject all of the proposed amendments. No reference to this provision was made in the title to the Joint Resolution. The Joint Resolution was duly filed with the Secretary of State and is to be submitted to the voters at the next general election.

The Governor, being uncertain as to the validity of the Joint Resolution, has sought an advisory opinion from the Justices of the Supreme Court of Florida. As a clerk to Justice Knowall of the Florida Supreme Court, you have been asked to prepare a memorandum on the validity of the Joint Resolution and the authority or jurisdiction of the Justices of that Court to render an advisory opinion on the question.

QUESTION #3

On April 1, 1981, police in Orliami, Florida, discovered the bodies of Charlie Clerk and Cecil Customer on the floor of the Acme Liquor Store. Clerk and Customer had each been killed by a single gunshot to the back of the head. The store's cash register was open and empty. There were no witnesses to the killing.

Three days later, while on routine traffic patrol, Officer Law stopped a car in downtown Orliami because it was being driven by a man who "looked suspicious." Without an arrest warrant, Officer Law arrested the driver, Billy Buddy, who was the sole occupant and registered owner of the car. Officer Law then, without a search warrant, searched the car. Concealed under the front seat, he found a revolver and a note. The note read as follows:
April 2, 1981

Dear Billy,

I had to kill those two people in the liquor store yesterday so they couldn't identify me to the cops. I'm never going back to prison again, and I'll kill anybody who tries to put me there.

(signed) Fred F.

Police experts determined that the revolver found in Buddy's car had been used to kill Clerk and Customer. Fingerprints found on both the note and the revolver matched those of Fred Fiend, an unemployed drifter who had been sharing a hotel room in Orliami with Buddy. Fiend had previously served time in prison for the armed robbery of a liquor store.

Based on this evidence, Fiend was arrested, indicted, and held without bond for first degree murder, a capital offense. Fiend's attorney has now moved in the Circuit Court to have a reasonable bail bond set to allow Fiend to be released from jail pending trial.

Discuss the constitutional issues under the Florida Constitution which will arise at the hearing on Fiend's motion to be released on bond.

QUESTION #4

On June 5, 1975, Wife and Husband purchased a home in the town of Breezeair, Florida. The home and one-half-acre lot were purchased by Husband and Wife as tenants by the entireties, and they resided in the house together with their two minor children, Son and Daughter.

In 1977, Husband discovered he had cancer. Wife got a job and provided the family's primary support. Wife's well-to-do brother, Brother, who lived in nearby Golfcourse, also helped the family with the crippling medical expenses. Six months before Husband died, Husband and Wife deeded the property to Wife and Brother as tenants in common. At the time, Husband told Brother, "I do this to show my thanks for the way you've helped my family."

Husband died in 1978. Wife, Daughter and Son continued to live in the house as before. Brother continued on occasions to help the family with expenses, although Wife continued to work.

In 1979, Brother brought suit against Wife for partition and forced sale of the property. Wife wishes to prevent this action and retain her family home.

Discuss the relevant constitutional issues, Wife's legal arguments, and the probable result of the suit.

QUESTION #5

In an effort to revitalize the downtown area and to provide a forum for educational, civic and commercial activities, the City Commission of Gotham City, a Florida municipality, adopted an ordinance authorizing and providing for the issuance of \$5 million in bonds to finance the construction of a convention center complex and an accompanying garage facility to serve the parking needs of the complex and the downtown area. From the outset, it was contemplated by the City that a portion of the convention center and parking areas within the garage would be leased on a long term basis to a private school located adjacent to the complex. The ordinance provided that the bonds would not be a general indebtedness of the City and that no bondholder shall ever have the right to compel the levy of ad valorem taxes to pay the bonds. Instead, the bonds were to be payable from revenues from the facility and a pledge of excise taxes levied by the municipality pursuant to law.

Later that year, the City Commission determined that another bond issue would be required since additional funds would be necessary in order to provide for the daily maintenance of the convention center. However, because of the mounting controversy which had arisen in connection with the complex, the second bond issue was submitted to an election by the people of the City. At a duly held election, the second bond issue providing for bonds payable from general tax revenues of the City and maturing two years after issuance was overwhelmingly approved.

Discuss and resolve all constitutional issues raised by the foregoing facts.

QUESTION #6

In the Summer of 1980, the Florida Legislature passed a law which provided that in the State of Florida, the legal drinking age would be raised from 18 to 19, effective October 1, 1980. As part of this law, no person under 19 years of age would be permitted to drink alcoholic beverages, permitted to serve alcoholic beverages or allowed in establishments that served the same. For all other purposes 18 years of age was legal age. Exempt from this law were all those who were in the military service, and such persons were permitted to drink at the previous legal drinking age of 18.

John was 18 on February 20, 1980, was employed full time by employment contract as a bartender, and was making at least \$100 a night in tips in addition to salary at Cin City Lounge. His twin brother Joe was in the Army. Joe came home on leave on October 2, 1980 and wanted John to go drinking with him. John agreed, and they decided to go to John's regular hang-out and place of employment, Cin City Lounge. Upon entering, John and Joe sat down and a waitress approached them saying, "I cannot serve you any alcohol, John, and you must leave these premises." Then she asked Joe what he wanted to drink. John, thinking that he had done something wrong, asked the manager what was the matter. The manager said he was just following the law and as a matter of fact he had to fire John effective immediately. John is now an unemployed bartender. John's father is mad and he wants to bring a lawsuit enjoining enforcement of the law.

Discuss the Florida Constitutional arguments available to both John and his father to challenge the law and any rebuttal arguments which the State may present.

QUESTION #7

John Jones and his friends were sitting in a state park in Pleasant County, Florida, enjoying the scenery early one evening. A local deputy sheriff, in uniform, passing through the park, smelled a strong odor of marijuana and saw a joint on the ground, but was unable to place the particular marijuana joint in the particular possession, physical or constructive, of any single group member. The deputy asked some members of the group what they were doing in the park, and failing to receive what he considered satisfactory answers, he arrested one of the group, Sam Smith, on a charge of vagrancy (loitering). The statute under which Smith was charged read as follows:

"It is unlawful for any person to loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity."

The arrest caused a crowd to gather, and, after a number of people had arrived upon the scene, John Jones started shouting various epithets and obscenities at the deputy, using fighting words directed at the officer, and making other threatening gestures toward him. Back-up units were called to the scene, and John Jones was arrested for breach of the peace. The statute under which Jones was charged read as follows:

"Whoever commits such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them shall be guilty of a breach of the peace."

Sam Smith has been tried and convicted on the charge of vagrancy. John Jones has been tried and convicted on the charge of breach of the peace. The trial court ruled that both statutes involved were constitutional, and counsel for the defendants have timely filed appeals directly with the Florida Supreme Court. You will be handling the appeals for the State. Discuss the constitutional arguments under the Florida Constitution you expect defense counsel to raise on both convictions and your responses thereto, as well as the appeal procedure.

QUESTION #8

In response to escalating school violence, the Everglades County School Board is considering adopting a multifaceted policy to address school safety. The draft policy contains the following provisions:

1. Elementary schools shall provide instruction in moral values, including, but not limited to, the study of famous moral leaders such as Buddha, Ghandi, Jesus, Martin Luther King, Jr., Mohammed, and Moses.

2. Students deemed by administrators to be at-risk for violent behavior shall be referred to counseling. At the discretion of the parent or guardian, counseling will be provided either within the public school system, or vouchers will be provided to pay up to \$2,000 per annum for private counseling with a licensed social worker, psychiatrist, psychologist, pastoral counselor, or ordained clergyperson.

3. Local school administrators shall conduct periodic unannounced searches in middle and high schools. Such searches shall involve lockers, backpacks, and purses selected on a random basis. In addition, hand-held metal detectors may also be used to check students for weapons.

Assume you are the attorney for the Everglades County School Board. Discuss the advice that you would give the School Board as to the potential Florida and Federal constitutional challenges to these provisions and the likely outcomes of such challenges.

QUESTION #9

Helper is a plumber. At the request of Bob, he performed services and supplied materials to repair the plumbing at a house occupied by Bob in the city of One Egg, Florida. The house and grounds, which encompass two acres, are owned by the First National Bank of One Egg, as trustee. Bob and his two brothers, both of whom live in Cleveland, are the only beneficiaries of the trust. Living with Bob in the house are four other members of an eastern religious sect, of which Bob is the spiritual and temporal leader. None of the others are related to Bob. The group is supported entirely by Bob's trust income, which he donates every month.

Helper's bill was \$4,000. Bob refused to pay the bill. Helper wants to sue Bob and levy on the house. The statutory time within which Helper could have filed a mechanics' lien has expired.

Discuss and resolve all constitutional issues raised by these facts.

QUESTION #10

In the Spring of 1977, the Florida Legislature passed an act with the following title:

An act relating to mobile home parks; providing legislative findings; limiting the act to mobile home parks containing fifty or more dwelling units; creating a State Mobile Home Tenant-Landlord Commission; providing for the powers of the commission; requiring the commission to hold hearings upon petition of fifty percent or more of mobile home park tenants who are subject to increases in rental fees or service charges; directing the commission to resolve rental or service charge increase problems; providing for appeal procedure and enforcement; providing an effective date.

The act then provided the following:

Section I. Legislative findings . . . The Legislature finds that there exists, in connection with rental agreements between mobile park owners and tenants, a possibility for inequitable treatment of mobile home park tenants; mobile home park tenants are not realistically in a position to prevent mobile home park owners from charging any rental payments that the owner desires; mobile home park owners should be answerable to some state agency or governmental entity for an unconscionable increase in rental charges to its tenants; and there is a very real need to provide a state agency to help citizens with these problems.

The act, by its terms, applies only to mobile home parks of fifty or more units and empowers the State Mobile Home Tenant-Landlord Commission, upon petition of fifty percent or more of the tenants of a mobile home park covered by the act, to hold a hearing on whether a proposed rental or service charge increase in excess of the net U.S. Department of Labor Consumer Price Index increases "is so great as to be unconscionable or not justified under the facts and circumstances of the particular situation."

Following a hearing, conducted pursuant to the Florida Administrative Procedure Act, chapter 120, Florida Statutes, the Commission has the authority to set the rate that can be charged by the mobile home park owner and order a reduction or rebate of any overcharge. The act also provides for an appropriate appellate procedure for review of Commission rulings and the right to seek enforcement of such rulings in the Circuit Court. The act finally provides:

Section 14. This act shall take effect July 1, 1977; provided that the commission shall examine any rental or service charge increase which took effect on or after January 1, 1977, upon petition of the tenants as required by the act within sixty days after July 1, 1977.

On January 1, 1977, Mobile Home Sites, Inc., a Florida corporation, the owner of a mobile home park containing fifty-one units, entered into new written lease agreements with each of its tenants whereby the rental charge per unit was increased from \$100 to \$130 per month, which increase is in excess of the applicable net Consumer Price Index increases. The tenants of the park on August 17, 1977 unanimously petitioned the Commission for review of the increase. A hearing before the Commission is set for the near future.

Discuss the constitutional arguments available to Mobile Home Sites, Inc. to challenge the statute under the Florida Constitution.

QUESTION #11

The State of Florida created the "State Plant Board." Under the statute, the Board was authorized and required to make investigations and prevent the introduction, control, and spread of insect pests and plant diseases. The Board was authorized by the legislature to make rules and regulations necessary to carry out this purpose. Six months after the act was signed and properly passed, the Board made an investigation in Citrus County and found

that citrus trees were infected with insect pests, more commonly known as the "Mediterranean fruit fly."

The act authorized the Board to quarantine any section of citrus that was infected, to go upon the property of the grove owners for the purpose of inspection and eradication, and to supervise or cause the treatment, cutting, and destruction of the citrus plants or other plants when necessary to prevent or control the dissemination of insect pests and diseases.

Violation of the administrative rules or noncompliance with the quarantine is declared by the statute to be a second degree misdemeanor, punishable by \$500 fine and/or sixty days imprisonment.

Owner has approximately 2,000 acres of citrus bearing trees in Citrus County. The State Plant Board made a fact-finding investigation in Citrus County and found numerous citrus trees infected by insects as well as the Mediterranean fruit fly. The Board subsequently declared all of Citrus County a quarantined area and took steps to enforce it. Owner refused to allow any of the agents of the State Plant Board to enter his property for inspection or eradication of infected trees, if any.

The Board filed suit against Owner to enjoin him from interfering with the agents' activities and preventing them from entering upon his property. Owner was convicted under the statute and enjoined from interfering in any way with the State Plant Board.

Owner comes to you as an attorney and asks on what grounds under the Florida Constitution he can seek to have the lower court's decision reversed. Assume that Owner has standing and has also exhausted all of his administrative remedies, and advise him of the issues he can raise on appeal and the probable disposition of same.

QUESTION #12

Sam and Susan, husband and wife, live in a house on a 125 foot by 200 foot lot in Sobriety, a small town in northwest Florida. Sam has been totally physically disabled from a stroke for several years now and the condition is a permanent one, but his mind is still as sharp as a tack. The house had been previously owned as an estate by the entirety by Susan and her first husband, who died many years ago. Susan has two sons by that first marriage but both are grown now and living far away, and much to Susan's chagrin, she seldom hears from them. Susan has been teaching school to support herself and Sam, who has practically no income of his own. Susan has also managed the household and has become used to making most of the important family decisions.

Sam has two daughters by a previous marriage, Mary and Margaret, and they have been most helpful and sweet to Susan and she has grown to love them as her own children.

Susan comes to you, a practicing attorney in Sobriety, and tells you to fix whatever papers are necessary to see that Mary and Margaret will get the house at her (Susan's) death. They have promised to take care of Sam but will have to put him in a nursing home because of their own family situations.

This is agreeable with Susan and she wants them to have the proceeds from the rental or sale of the house to help pay for Sam's support. Sam knows of the plan but will do nothing to help it since he is violently opposed to being placed in a nursing home.

Discuss the various problems involved and the alternatives available to Susan to accomplish her desires.

QUESTION #13

The Leon County, Florida, property appraiser has consistently assessed all real property in Leon County at sixty-five percent of its fair market value. In response to criticism that all real property should be appraised at one hundred percent of fair market value, she has announced that she sees no need to increase the real property valuations because the present valuations are uniform and just, and that all real property was appraised at exactly sixty-five percent of fair market value. She argues that increasing valuation to one hundred percent of fair market value would not alter the proportionate share of the total real property tax that any real property would have to bear.

She also points out that real property in all the surrounding counties is appraised at fifty percent of its fair market value.

Able, Inc. owns real property in Leon County, which is currently appraised at \$30,000 – sixty-five percent of its fair market value. Baker owns real property in Leon County which is used for business purposes and which is appraised at \$30,000. Baker, however, claims that his property is valued at eighty percent of its fair market value. Charles owns a home in Leon County which is appraised at sixty-five percent of its fair market value. Able, Inc., Baker and Charles have all protested to the property appraiser. Able, Inc., contends that it bears an unfair tax burden. Charles contends that he is being discriminated against as opposed to the taxpayers in surrounding counties. Baker contends that he is being discriminated against in favor of both property owners within Leon County as well as those in surrounding counties.

The property appraiser asks you if there is merit to the contentions of Able, Inc., Baker or Charles, and if she should increase the valuations to fair market value or lower the valuations in accordance with the practices in surrounding counties. State your advice to the property appraiser on these points. Give reasons.

QUESTION #14

Thelma, a resident of Apple City, located in Bajo County, Florida, decided it was time to hold a yard sale. Thelma placed all her goodies in her driveway, along with a "Yard Sale" sign, and opened up for business.

A long existing Apple City ordinance prohibited yard sales. A 1979 Florida statute, enacted without notice or publication and without a referendum, made it a third degree felony to conduct a yard sale in counties having a population of not less than 85,600 and not more than 87,100. According to the latest census, Bajo County had a population of 86,000. However, Bajo County enjoyed home rule under a duly enacted charter and,

pursuant to that charter, an ordinance was enacted in 1980 permitting yard sales in Bajo County between the hours of 9:00 a.m. and 2:30 p.m.

At noon, after conducting the sale for three hours, Thelma was placed under arrest for conducting a yard sale in violation of a municipal ordinance and state statute.

Thelma retains you to defend her. Discuss the defenses available to her.

QUESTION #15

The City of X in the County of Y, Florida, has a population of 20,000. Among the services provided by the City of X is an emergency ambulance-rescue service which is financed by city property taxes. The County of Y also has an emergency ambulance-rescue service. The two services are linked by a communications system, but the county service does not respond to calls in the city unless requested by the city. Last year there were 1,000 emergency calls in the city. At the city's request, the county service responded to five of these calls when, in each of these instances, all of the city's units were busy. At the county's request, the city responded to eight calls in the county.

The county also maintains a number of parks throughout the county, all of which are open to the public without charge. Some are large parks and others are small neighborhood parks used primarily by those living in the immediate vicinity of those parks. None of the parks are within the limits of the City of X. The city, however, maintains several parks financed by city property taxes.

Both the county emergency ambulance-rescue service and the parks are financed by county-wide property taxes levied by the county on all property owners, including those owning property in the City of X.

The city, which is given the right by statute, wishes to challenge the right of the county to impose property taxes on the city's property owners to finance the county emergency ambulance-rescue service and the parks. Advise the city as to the law applicable to the situation and the probable outcome as to the various challenged services. Do not discuss standing.

QUESTION #16

Assume for this question that the Florida Legislature enacted the Traffic Hearings Act, effective April 1, 1989. The Act creates the Division of Traffic Hearings within one of the existing departments of the executive branch. The Division employs traffic hearing officers in each county to hear the types of traffic cases described in the Act. Decisions by traffic hearing officers are "not reviewable by any court or other tribunal," according to the Act.

State Attorney brought proceedings against Driver before Traffic Hearing Officer in the appropriate county. After a hearing, Traffic Hearing Officer imposed a fine of \$500 and 24 hours' imprisonment. These were the penalties requested by State Attorney, and they are below the maximum penalties provided by the Act. Driver immediately sought relief in the circuit court, which ordered a stay of enforcement pending outcome of the case. Victim, claiming to have suffered bodily injury from Driver's offense,

demanded the right to intervene in the circuit court in order to argue that Driver should receive a more severe punishment.

Driver asks you to analyze and evaluate the issues likely to arise under the Florida Constitution.

QUESTION #17

Assume that the Florida Legislature has enacted the following statutes regarding restaurants, defined for these purposes as business establishments that prepare foods and sell them for consumption on or off the premises. The first statute: (1) requires all restaurants in the state, except those with seating capacity for 20 customers or less, to maintain products liability insurance of at least \$50,000 per occurrence, (2) prohibits the filing of any products liability suit against a restaurant unless the would-be plaintiff has attempted to settle the claim by nonbinding mediation during the six months immediately following the occurrence, and (3) provides the manner of selecting mediators and the procedure to be followed.

The second statute, enacted one year later, exempts all restaurants in Hypo County from the first statute. Notice was not given in Hypo County before enactment of the second statute. After its enactment, the Hypo County Commission hired an independent firm to conduct a public opinion poll of all residents of the county. The poll indicated 90% approval of the second statute.

Neither statute was accompanied by any legislative findings or legislative history describing the evil to be remedied or the social need to be served.

You are attorney for a restaurant with seating for 300 customers, located in Hypo County. Litigation, brought by other parties, is pending to challenge the validity of both statutes. Advise your client as to the likely outcome of this litigation.

QUESTION #18

Until a disease suddenly destroyed aquatic life off the coast of the City of Merry, Florida, the City's economy and the people of Merry were primarily dependent upon the fishing industry. After the devastation of the fishing industry in 1982 caused by the aquatic disease, the City began considering two proposals to make use of an artificial island owned by the City. The island had been constructed through the use of the City's ad valorem tax revenues. The City desires to have a first-class tourist attraction constructed and operated on the island by a private corporation in order to promote tourism and relieve unemployment, thereby assisting an economic recovery of the City.

Under the first proposal, the City would sell the island to a private corporation under an agreement which would require that the private corporation construct and operate a first-class tourist attraction on the island. The agreement between the City and the private corporation would provide that the City would exempt the real property and improvements on the island from ad valorem taxation by the City. Because certain City officials are concerned about the City's ability to enforce the requirement that the private

corporation maintain the island as a first-class tourist attraction, the agreement would also require that all persons who become employed at the tourist attraction become members of a national labor union of tourist attraction workers which is known for its efficiency and the expert training of its members.

Under the second proposal, the City would lease the island to a private corporation for a term of ten (10) years, and the private corporation would be required to construct and operate the tourist attraction at no expense to the City. There would be nothing in the lease which would allow mortgages, liens, or similar obligations to attach to the island or the City's revenues or other property in the event the private corporation defaults on its obligations under the lease. The lease would also exempt the real property and improvements from ad valorem taxation by the City for the term of the lease and the lease would require that all employees at the tourist attraction become members of a national labor union of tourist attraction workers.

The City has never held a public referendum of any kind concerning the exemption of real property and improvements from ad valorem taxation. The City retains you to review the proposed sale and lease of the island in order to evaluate the validity of the proposed terms of the sale and lease under the Florida Constitution and laws of Florida. Advise the City on all Florida constitutional law issues raised and advise the City as to any other matters necessary to achieve its objectives of having the tourist attraction constructed on the island by a private corporation without imposing ad valorem taxes on the private corporation. Do not discuss issues concerning the United States Constitution or federal laws.

Assume that all legal requirements for the sale or lease, such as competitive bid requirements, would be complied with by the City and the private corporation.

QUESTION #19

The police, suspecting Freddy Cennester of being a major drug dealer, talked to Flossie, Freddy's girlfriend, who believed that Freddy was cheating on her. Flossie signed a consent form giving the police permission to record her conversation and, "wired" for sound, invited Freddy to dinner in her penthouse apartment. Their conversation was recorded by the police.

The police also talked with Ree Vinge, one of Freddy's lieutenants. Ree telephoned Freddy at the latter's home, discussed "business," and arranged a meeting between Freddy and an undercover police officer three days later at a local bar. With Ree's consent, the phone conversation was recorded by the police, as was the undercover officer's meeting with Freddy.

Later, two detectives used the same undercover officer, equipped with a "body bug," and listened to a conversation the officer had with Freddy at Freddy's home. Because of faulty equipment, the police made no recording of this conversation.

All of Freddy's conversations were incriminating. In no instance did the police obtain a warrant to intercept the conversations.

Freddy was finally arrested and brought to trial, where, over timely objections by defense counsel, the State tried to use all the recordings against him. Flossie, having now forgiven Freddy, invoked her right against self-incrimination and refused to testify, despite the court's orders that she do so. Earlier, however, defense counsel had taken Flossie's deposition, during which she testified about her conversation with Freddy and her consent for the police to record that conversation. The State, over Freddy's objection, introduced both Flossie's consent form and her deposition testimony into evidence. Ree Vinge testified that he consented to the recording of his phone call to Freddy; and the undercover officer authenticated the recording of his meeting with Freddy at the bar and testified about the conversation at Freddy's home. The two detectives who also listened to the latter conversation testified as to what they had heard. All the tape recordings were admitted into evidence.

Freddy was convicted. Subsequent to the trial, the people of Florida approved an amendment to the Florida constitution mandating conformity of the State's exclusionary rule with the United States Supreme Court's interpretation of the Fourth Amendment to the United States Constitution. That amendment to Article I, Section 12 of the Florida Constitution became effective after Freddy's trial but prior to his consulting you about a possible appeal. Discuss the constitutional issues under the Florida constitution that are presented by Freddy's case and indicate how you expect them to be resolved on appeal.

QUESTION #20

The State Attorney of Ocean County received an anonymous letter alleging that the elected Property Appraiser had solicited bribes from property owners in exchange for reducing the appraised value of their property. State Attorney decided to conduct an investigation. State Attorney, without Appraiser's knowledge and without judicial approval, installed a mechanical device on Appraiser's telephone line to keep a record of all telephone numbers called from Appraiser's telephone. Using these numbers as leads, State Attorney interviewed two property owners, each of whom gave sworn statements that Appraiser had asked them for bribes.

State Attorney sent this information to the Governor, who immediately issued an executive order suspending Appraiser from office "because of conduct that raises serious questions as to his fitness to hold office." Governor appointed an interim replacement for a new term. Property Appraiser petitioned the Governor for a hearing to be reinstated. The Governor rejected Property Appraiser's request and issued an order removing Property Appraiser from office permanently. Ten months later, Property Appraiser filed suit in Circuit Court seeking relief from and review of the Governor's suspension and removal. Appraiser also seeks damages against State Attorney and Ocean County.

Discuss the issues likely to arise under the Florida Constitution regarding: (1) the jurisdiction of the Circuit Court, (2) the Governor's suspension and removal, and (3) the merits of Appraiser's claims.

QUESTION #21

The Florida Workers' Compensation Act provides that death benefits under the Act are payable only if the employee's death occurs within five years of the date of injury.

On December 31, 1980, Harry Hardhat is laying brick at a construction site in Tampa when a fellow employee working on the floor above him drops a brick on his head causing Harry a serious brain injury. After lingering in a coma and receiving workers' compensation medical and wage loss benefits for years, Harry finally dies from the effects of the injury on January 10, 1986.

Harry's widow retains you to file a claim for workers' compensation death benefits. You realize that your only chance is to convince the court that the five-year limitation on death claims is unconstitutional. Discuss the arguments you would make on behalf of Mrs. Hardhat under the Florida Constitution, the employer's likely response and the most probable outcome.

FLORIDA CONSTITUTIONAL LAW SELECTED ESSAY ANSWERS

ANSWER TO QUESTION #7

I. Vagrancy Conviction of Sam Smith.

Defense Counsel's Argument.

Sam Smith's defense counsel will challenge the conviction on the grounds that the statute under which he was convicted did not apply to him, and he was therefore arrested without justification. It is unlikely that defense counsel will challenge the constitutionality of the statute itself, because it is narrowly drawn and is almost identical to a statute previously upheld by the state supreme court. See *State v. Ecker*, 311 So.2d 104 (Fla. 1975). Instead, counsel will argue that under the facts, Sam Smith did not violate the statute. At the time of the arrest Sam Smith was sitting in the park with friends at a time (early evening) and in a manner in which other citizens were enjoying the public place. The presence of the joint on the ground in the vicinity of the group did not create an immediate danger to public safety or property, nor was Smith himself linked to the joint. The circumstances did not warrant a "justifiable and reasonable alarm or immediate concern for the safety of persons or property in the immediate vicinity". Therefore, Mr. Smith did not violate the provisions of the statute and the deputy had no justification to arrest him.

B. The State's Argument.

The State will argue that the statute is narrowly drawn and has the rational purpose of protecting public safety, and therefore should be upheld as constitutional. The State will argue further that the unsatisfactory responses of the group to the deputy's queries and the surrounding circumstances created a justification for arrest under the statute. If illegal activity was occurring where the group was congregated, the State may be able to sustain the conviction.

II. Breach of Peace Conviction of John Jones.

Defense Counsel's Argument.

Overbroad.

The defense Counsel for John Jones will argue that the statute under which the defendant was convicted is unconstitutionally overbroad, because it prohibits protected speech as well as unprotected speech. For example, prohibition of any act that "affects the peace and quiet of persons" may chill protected expression. Therefore, counsel will argue that the statute is unconstitutional on its face. The State will have difficulty overcoming the overbreadth challenge, because the statutory language prohibits a substantial amount of expression protected by Article 1, §4.

Vague.

The statute may also be challenged as unconstitutionally vague, because people of ordinary intelligence could interpret the prohibitions in different ways and guess at the statute's application to various forms of conduct. Therefore, the statute should be struck down because it is not narrowly drawn.

The State's Argument.

The State will argue that even if certain conduct may not be prohibited explicitly by the statute, John Jones's conduct, specifically his use of fighting words, was clearly in violation of the statute. In the face of a constitutional challenge, the State must argue that Jones is a hard-core violator whose conduct tended to incite an immediate breach of the peace and necessitated the calling of back-up units to the scene. Therefore, the statute as applied to Jones is not vague and his conviction should be sustained.

"MODEL" ANSWER TO QUESTION #8

Note that this answer has been drafted by a CBR editor in the format and style that is demonstrated in the Essay Writing Workshop and "Webinar". It is not a perfect answer, and there are clearly other ways to approach this question, but you may use this answer to help you visualize the structure and writing approach we teach.

I. Provision 1

The first provision drafted by the Everglades County School Board provides for instruction in moral values by studying the teachings of several moral leaders.

The opponents of this provision (parents and students, presumably) would argue that it is improper to teach religion in a public school because a majority of the moral leaders named are clearly religious leaders and even considered Gods among their followers. They will rely on the establishment clause and the Florida and Federal Constitutions.

The Establishment Clause provides that where there is state action involving religion, the action must have a primary secular purpose. Furthermore, its purpose or effect must be neither to inhibit nor advance religion, and the state action must not create an excessive entanglement between religion and government. Further, the opponents would assert that the “moral” teachings of these leaders would clearly be based on religious and non-secular thinking and reasoning, thus violating the establishment clause. The School Board would argue that although these leaders may be religious leaders, their teachings would be to promote a secular, non-religious purpose, which is the promotion of moral values. Further, these teachings are not being used to advance or inhibit any certain religion or in any way used toward a religious agenda.

The opponents of this provision would likely prevail. Religious teachings are undoubtedly being used to teach moral values., because most of the named leaders base their teachings on their religious beliefs, i.e. Islam, Christianity, and Buddhism. Even if religion is being used for a secular purpose, it must be shown that this secular purpose could not be achieved just as well without using religious teachings. In this case, the school board could likely teach moral values using leaders that do not advance any religion. Students may learn moral values from the teachings/books on Abraham Lincoln and Ellie Wiesel, neither of which advance any religious beliefs. Thus, the school board should be advised that Provision 1 is likely to be found unconstitutional, at least in part. Martin Luther King, Jr.’s teachings may be taught, but the other named leaders advance religion too much and thus it would be unconstitutional to use their teachings in the public schools.

II. Provision 2

A. Vagueness

The second provision allows school administrators to classify certain students as “at risk” for violent behavior and allows referral of these students to counseling.

Opponents (again, parents and affected students) will assert that this provision should not be implemented because the school administrators are given total discretion in determining who is “at risk” for violent behavior, without any limits or scope to that power. The parents will rely on the Constitutional rule that actions that are vague and overbroad are unconstitutional. A government enacted policy or regulation must be clearly defined and easily understood. In other words, a policy should be clear enough on its face to put a reasonable person on notice of what is being covered. The school board would argue that the provision is not vague in that “at risk” students are easily detectable and that the school officials are trained to pick out such students.

This part of the provision regarding school administrators classifying “at risk” students will likely be found unconstitutional because it is too vague and gives the school administrators too much discretion. “At risk” is not clearly defined and the provision does not articulate how such students would be identified. The provision needs to be much more specific i.e., such as a student discovered carrying a gun or knife will be referred to counseling.

B. Establishment Clause

Provision 2 also provides that the public school will provide counseling or private counseling may be obtained which would be paid for by the state by vouchers. Private counseling may be with a social worker, psychiatrist, psychologist, pastoral counselor or clergyperson.

Opponents of this part of provision 2 will assert that the policy should not be enacted because state funds would be used to pay religious clergy as well as Rabbis and Priests to conduct counseling and therapy for the students. These pastoral counselors are often not licensed therapists but are local religious leaders.

Because they may impart their religious beliefs as part of their therapy and the state is providing funding for the therapy, arguably the school board is promoting religion and entangling religious interests with government. They will point to the Establishment Clause prohibition on the entanglement of state and religion. Supporters of this provision will point to the fact that the U.S. Supreme Court has upheld these voucher programs because the money is going to the parent or guardian and it is their choice where the money is spent, whether it is a religious clergy or a licensed therapist, so long as it is spent for a valid government purpose, i.e. to receive appropriate counseling. On the other hand, opponents will note that the Florida Constitution has a much stricter reading of its Establishment Clause and the Florida Supreme Court has prohibited direct and indirect state funding to religious institutions. In other words, even though the U.S. Constitution does not prohibit voucher programs (under the Zelman case), states are not obligated to finance religious education.

Therefore, states can decide for themselves whether voucher programs are legal, and Florida has specifically struck down these voucher programs (Bush, et al v. Holmes, et al.)

The state voucher part of provision 2 would likely be found to violate the Florida Constitution given the strong state precedent against any kind of state funding to support religious institutions. Since Florida’s school voucher program is very strict at this time, the reference to pastoral counselors and ordained clergy persons should be severed from this provision.

III. Provision 3

Provision 3 of the draft policy provides that school administrators are to conduct periodic unannounced searches of lockers, backpacks and purses. Also, metal detectors may be used to check for weapons.

Opponents of this provision will argue that this is an unnecessary violation of student privacy by subjecting students to arbitrary searches of their personal property. They will contend the proposed policy violates the students' fundamental right to privacy and the 4th amendment's protection against unreasonable searches and seizures. The 4th amendment provides that citizens are protected from unreasonable searches and seizures conducted by government officials. Additionally, probable cause must be shown in order to obtain a warrant to search a person or his things. This rule applies to state governments through application of the 14th amendment. Supporters of this provision would assert that it should stand because a search occurs when the government activity violates a student's reasonable expectation of privacy, and in this case, there is no reasonable expectation of privacy in the students' belongings because the searches are justified in order to maintain order and safety in the school. Further, because of the increasing violence in the schools, these searches are necessary in order to maintain safety in the schools. Also, proponents will argue that generally public school children have a lesser expectation of privacy than private citizens. However, even though it has been held that public school students have a lesser expectation of privacy, this has been with regard to student athletes and drug testing, not the general student population.

This provision is probably valid in part and invalid in part. Random searches cannot be conducted of all students without probable cause that a crime has been committed. As stated, this rule applies when there is a reasonable expectation of privacy. Since backpacks and purses are likely purchased by the students themselves to carry their personal items, there is clearly a reasonable expectation of privacy of those types of items. Thus, officials should not be allowed to randomly search purses and backpacks without some kind of showing of probable cause. Since there has not been probable cause shown that any of the students are carrying weapons or drugs on their person, these random searches are unconstitutional. However, the part of the provision pertaining to lockers and the metal detectors would likely be valid. There is a lower expectation of privacy in a school-provided locker especially since the school maintains the key/combo to each locker. Also, the use of metal detectors would be valid, so long as their use is completely random and not based on race or sex.

ANSWER TO QUESTION #9

The issues that we have to address are whether or not Bob's house in One Egg falls under the homestead protection of the Florida Constitution and if it is protected, whether or not Helper can levy on the house notwithstanding this protection.

I. Does Bob's Home Qualify as Homestead Property?

Article 10, §4. of the Florida Constitution provides that a residence owned and inhabited by a natural person is protected from levy by creditors. In this case, First National Bank (as trustee) is the owner of the house. Therefore, although a natural person(s) lives in the house, a natural person does not own the house, and the house does not qualify as homestead property. Helper may sue the bank as trustee, obtain a judgment, and levy against the property as a general judgment creditor.

II. Exception to Homestead Protections.

Even if Bob could be characterized as a person covered by homestead protections, at least to the extent of the residence and one-half an acre of the two acres located within the municipality of One Egg, Helper could still be able to levy against the homestead for the debt. If he falls within one of the exceptions to the Homestead protections. One of these exceptions is that homestead property is not exempted from forced sale or the imposition of a lien in connection with improvements or repairs completed upon the homestead property.

In other words, a contractor or subcontractor can levy on homestead property by complying with the provisions of Florida's Mechanic's Lien Statute. Helper, however, is foreclosed from reaching the property through such a lien because the statutory time for filing has expired.

Expiration of Exemption.

The Homestead exemption is limited to the residence of the Owner of his family. Therefore, if Bob dies, or no longer uses the home as his residence, Helper may could levy against the homestead as a general judgment creditor as long as the four unrelated members of Bob's religious sect, supported by Bob's trust income, do not qualify as dependents entitled to homestead protection. A general judgment creditor may not reach the homestead when a spouse, minor child other dependent resides in the house. If the sect members do not qualify as dependents, then Helper can levy on the house.

ANSWER TO QUESTION #11

Owner may challenge his conviction under the statute and the injunction on the following grounds.

I. Improper Delegation of Legislative Authority.

Owner may claim that the statute authorizing the State Plant Board grants too much power to the Board and is therefore unconstitutional. The Florida legislature may delegate duties to administrative agencies only where such duties may be lawfully delegated, administrative discretion in enforcement is subject to adequate guidelines, and the statute granting enforcement power is narrowly and precisely drawn. Under these facts, the legislature has not improperly delegated authority to the Board, because the legislature may grant duties and powers to such an agency to protect the health of the citrus crops of the state, and the statute specifically outlines and limits all powers of the Board. The Board has not used its discretionary power improperly in enforcing the law against Owner, because the Board made a determination that the inspection of Owner's property was necessary to carry out the regulatory scheme of the statute and properly enforced its powers through the judicial branch. Therefore, Owner's argument will fail.

II. Taking Without Full Compensation.

Owner will argue that the injunction effectively deprives him of his land, because even if the state does not take his land, the Board's actions interfere with his use sufficiently to constitute an ouster. Art. 10, §6. Owner's argument will likely fail, however, because the Board's purpose and actions in attempting to stop the spread of a destructive insect are reasonably related to public health and safety. Therefore, the impairment of Owner's use of the land is not a taking requiring compensation, and the Board's interference with use is lawful under the government's police power.

III. Right to Privacy.

Under Article 1, §23, Owner has a right to be free of governmental intrusion; however, the police power may override the right to privacy. In this case, the Board's duty to protect public health and safety overrides Owner's privacy interest.

IV. Equal Protection.

Owner is guaranteed the right to acquire, possess and protect his property under Article 1, but there is no evidence that the Board has denied Owner equal protection through improper classification or treatment. The Board has authority to inspect and eradicate the trees of any grove owner within the state under the police power. It was reasonable for the Board to seek to examine Owner's crops upon finding the insect pest in the county, and Owner will be unable to prove any discriminatory purpose or effect of the Board's actions.

V. Unreasonable Search and Seizure.

Owner may also argue that the Board's power to search his crops without a warrant violates his right against unlawful searches and seizures. Art. 1, §12. However, such a warrantless administrative search in an open field is justified where necessary to carry out the purpose of a regulatory scheme relating to public health and safety and the persons affected are on notice of the nature and extent of the scheme.

“MODEL” ANSWER TO QUESTION #12

Note that this answer has been drafted by a CBR editor in the format and style that is demonstrated in the Essay Writing Workshop and “Webinar”. It is not a perfect answer, and there are clearly other ways to approach this question, but you may use this answer to help you visualize the structure and writing approach we teach.

I. Susan and Sam’s Sobriety Home

A. State of Title

Susan owned her current home in tenancy by the entirety with her first husband, now deceased. Susan and her first husband had two sons, who are now grown and no longer living with Susan.

Susan will assert that after her first husband died, she was automatically vested with the fee simple absolute by operation of law. Specifically, joint ownership, such as tenancy by the entirety, has a right of survivorship between real property owned by married couples. Her sons from her first husband will assert that, upon their father’s death their mother only retained a life estate with a vested remainder in both sons. Normally, homestead property is subject to certain restrictions that limit an owner’s right to convey or devise the property.

Susan owns her current residence in fee simple absolute. Property that is titled as tenancy by the entirety can be characterized as homestead property during the life of both spouses such that the property cannot be conveyed, but upon the death of one spouse, there are no longer restrictions imposed on the home. The homestead limitations lift by operation of law upon the death of one spouse and the surviving spouse is vested with the entire fee simple absolute regardless of whether or not the couple had minor children at the time of their death. As such, once her first husband died, Susan received the home in fee simple absolute.

B. Homestead Eligibility

After Susan's first husband passed, she subsequently married Sam. Sam has two daughters, Mary and Margaret, who are minors, from a previous marriage.

Sam will assert that regardless of whether he is on the title to the home, Susan is prohibited from transferring the home during her lifetime because it is homestead property. If real property meets homestead eligibility requirements a spouse is prohibited from transferring the homestead if they have minor children or a surviving spouse. Susan will assert that the home was her property, separate from Sam at the time of their marriage and he cannot limit her rights as the fee simple absolute owner of the home. Generally, the holder of a fee simple absolute is unrestricted as to transferring property, i.e., by devise, conveyance, gift, etc.

Although Susan does own the home in fee simple absolute, she cannot convey or devise the home to Mary and Margaret so long as Sam survives her, because of the homestead protections. Generally, if the following elements are established, homestead protections will attach to the real property: (1) real property owned by a natural person; (2) claimant is a Florida resident, or made/will make Florida her domicile; (3) claimant must either hold legal or equitable legal title; and (4) the size and contiguity requirements set forth in the Florida constitution are satisfied. Both Sam and Susan satisfy elements (1) and (3). Although it is unclear as to whether Sam satisfies the Florida resident requirement, Susan certainly does. She has lived in Florida for "several years" – enough time for her first husband to pass, her sons from her first husband to grow up and move away, and for her to subsequently marry Sam who has been disabled for "several years." Further, element (4) is established, although it is unclear if Sam and Susan live in a municipality or in unincorporated county land. However, this is not a problem because it seems the residence is not in excess of a ½ acre. If the residence was located in a municipality, element (4) provides homestead protection up to a ½ acre. If it were outside a municipality the protection would extend to cover the home and up to 160 acres. Thus, Sam can prohibit conveyance of the property as Susan's spouse.

II. Transferring the Home

After Susan's first husband passed, she subsequently married Sam. Sam has two daughters, Mary and Margaret, from a previous marriage. Susan has been the sole income provider after Sam suffered a stroke whereby he became physically disabled. This permanent disability has prohibited Sam from earning any income. Susan seeks to provide Mary and Margaret with ownership of their home, which is a homestead property, should she predecease Sam. Besides having established a close relationship with Mary and Margaret, Susan wants Sam's daughters to receive the home in order to fund his care after Susan dies.

A. Conveyance

Susan wants to convey title to the home that Sam and she currently reside in to Mary and Margaret so that his daughters can either (1) sell the home or (2) rent the home and use its proceeds to fund Sam's care after Susan's death. Because of Sam's permanent disability, Susan is his sole caregiver and should she predecease him, Mary and Margaret would need money to pay for his care in a nursing home. Sam vehemently opposes the idea of living in a nursing home.

Sam will argue that Susan is prohibited from transferring, gifting, selling, or otherwise alienating the home because it is afforded homestead protections under Florida's constitution. Specifically, homestead property cannot be alienated where the owner has a surviving spouse (or minor children). Susan will counter contending that a transfer to Mary and Margaret will not be prohibited because they are her stepdaughters, the lineal descendants of Sam.

Although Susan is the holder of a fee simple absolute, she is unable to convey or otherwise alienate the family residence so long as she has a surviving spouse unless Sam joins in the transfer. Under Florida's constitution, once real property is established as homestead, certain protections inure to specific individuals, such as the owner's surviving spouse or minor children. Here, even though Sam may not be the record title owner of the home, he retains an equitable interest in the home because he is the owner's spouse. Assuming all elements are met, Susan cannot convey the property without Sam joining in the conveyance.

B. Devise

Susan wishes to devise the homestead property to her stepdaughters, Mary and Margaret, to which Sam opposes.

Susan will argue that she is entitled to devise the home to Mary and Margaret via her will because she owns the residence in fee simple absolute. Generally, the holder of the fee simple absolute is free to alienate the property in whichever manner they so choose. Sam, however, will contend that Susan is prohibited from devising the homestead property to Mary and Margaret in her will.

The outcome of a devise of the home to Mary and Margaret in Susan's will is contingent upon whether Sam or she predeceases the other. In the event that the fee simple absolute holder predeceases Sam, any devise of the homestead to anyone other than owner's spouse would be void because a surviving spouse is entitled to either a life estate, if owner also survived by minor children, or the entire fee simple absolute (i.e., was only survived by their spouse).

Thus, if Susan predeceases Sam, any devise of the homestead would be void. However, if he predeceases Susan, she may validly devise the homestead to Mary and Margaret because after Sam's death, she received the entire fee simple absolute. Thus, the validity of a devise under her will is contingent upon whether Susan or Sam dies first.

III. Alternatives to Conveyance and Devise

Susan and Sam have been married for several years and have lived in their family home, which has been owned by Susan during the entirety of their marriage. The home is a valid homestead property afforded certain protections under Florida's constitution. Susan wishes to draft a plan whereby her stepdaughters, Mary and Margaret, would receive the family home upon her death as a means to provide the daughters with a source of income to fund Sam's care. He suffers from a complete and permanent physical disability and would require care in a nursing home after Susan's death. Sam refuses to live in a nursing home.

As Sam correctly states, Susan cannot convey or devise the home while she has a spouse because the homestead protections prohibit it if the other spouse does not join in on the transfer. However, if Susan and Sam are able to come to an agreement and draft a valid and enforceable written antenuptial agreement whereby Sam disclaims his interest in the homestead, she could transfer the home to Mary and Margaret. Generally, unless the spouse joins in the conveyance, no transfer of the homestead is allowed. However, there is an exception where spouses, either before or after they are married, enter into a disclaimer agreement.

In the event that Sam and Susan are successful in coming to an agreement and draft an antenuptial contract stating that he disclaims his interest in the homestead, Sam and Susan are free to convey or devise the property to Mary and Margaret in such a manner that they have a source of income to fund Sam's care in some alternative to a nursing home.

ANSWER TO QUESTION #13

Able, Inc.

The Leon County government has the power to levy real property taxes at a uniform rate within the county. Art. 7, §2. The county appraises all real property at 65% of fair market value. Able, Inc. claims that this percentage applied to its property constitutes an "unfair tax burden." In order to prove it is being denied equal protection under the law, Able Inc. must show that all or substantially all other property in the county is being taxed at a lower rate. Fla. Const., Art. 1, §9; U.S. Const., 14th Amend. Able, Inc. will not be able to prove discriminatory intent, because the valuations throughout the county are uniform.

Baker.

Baker may have an equal protection claim if his property is in fact assessed at 80% of fair market value while all or substantially all other property in the county is taxed at a lower rate. If Baker proves such discrimination, he may compel the property assessor to lower Baker's valuation to 65% of fair market value. However, Baker's claim of discriminatory rates between counties will not lie.

Charles.

Charles's discrimination claim will fail because there is no inequality of valuation within the county. Charles's claim that taxpayers in surrounding counties pay lower rates does not state a cause of action

In theory, all property is subject to "just valuation," that is, assessment at fair market value. Art. 7, §4. However, county governments assess properties at lesser rates, and such assessment has been permitted where the rates are uniform within the taxing unit. The Leon County property appraiser will be compelled to raise the rates of all taxpayers or lower the rate of a protesting taxpayer only upon proof of unequal valuations within Leon County.

ANSWER TO QUESTION #15

The County of Y may levy taxes on city owners to finance the county rescue service, but the City of X will be able to challenge successfully the imposition of property taxes to finance the county park system.

The Florida Constitution prohibits the levy of taxes on property within a municipality to finance county services benefitting solely areas outside the municipality. Art. 8, §1(h). The county rescue service, while providing service to outlying areas, also provides a "real and substantial" benefit to the City of X by responding to emergencies when the city's service is overextended. A benefit which is real and substantial is one which is not merely illusory or inconsequential. See *Escambia County v. City of Pensacola*, 469 So.2d 1379 (Fla. 1985).licensee

Under this definition, the county service's response to five city emergency calls in one year was a sufficient benefit to the city to support taxation within the City of X. Conversely, the county-operated parks outside the City of X provide no benefit to property owners in the city, and therefore the county may not levy taxes on such property owners to support the public parks.

ANSWER TO QUESTION #18

For the construction on the island to move forward and meet state constitutional requirements, the City should (1) obtain approval of a referendum measure allowing ordinances which provide ad valorem exemptions for developments of this type; (2) approve an ordinance with such an exemption; (3) remove all language requiring union membership of future employees; and (4) include language in any contract ensuring that the City has not loaned its credit to the corporation.

Generally, all property is subject to taxation unless expressly exempted. One exemption is for property owned by a municipality and used exclusively by it for public purposes. In Florida, it is the character of the use, not the character of the owner, which determines exemption status. The leasing of a street and bridge has been held to have sufficient public character to merit exemption for the lessee.

Here, the city of Merry has declared that the "purpose" of the construction would be to relieve unemployment and assist economic recovery. These proposals nevertheless involve a sale or lease to a private corporation presumably out to make a profit. Logically, if one purpose of this use of the land is for a private corporation to make a profit, then it is not being used "exclusively for public purposes." The issue is perhaps better characterized as one of constitutional interpretation, since the point can be argued some distance in either direction, but a strict reading seems best advised in such a situation. The corporation's profit-making purpose should be argued to require a finding that the property would not be used exclusively for a public purpose. It follows that the corporation will be exempt from ad valorem taxation only if the City approves an express exemption.

A Florida municipality may grant by ordinance community and economic development ad valorem exemptions to new businesses and expansions of existing businesses. But the ordinance may be passed only after a referendum authorizing such ordinances. Thus, neither plan may move forward until (1) the public approves a referendum measure allowing the exemption needed; and (2) the city passes the appropriate ordinance (within ten years after the referendum, unless the referendum is renewed). The City must thus first move forward on such a referendum measure in order to later proceed under either plan.

Article 1, section 6 of the Florida Constitution provides worker protection from discrimination in employment based on either membership or nonmembership in a labor organization. Closed shops and union shops are therefore both unconstitutional. The provisions in the proposals regarding union membership must therefore be removed since they unconstitutionally require union membership as a condition of employment.

Finally, article 7, section 10 prohibits a Florida city from giving, lending or using its credit to aid any corporation. In order to proceed on the second proposal, which does not discuss the city's financial obligations should the private corporation default, the City must therefore add language making clear that the city will under no circumstances be subject to any liens, mortgages or other obligation. In other words, the city must ensure that it would not be unconstitutionally lending or using its credit to aid a corporation.

ANSWER TO QUESTION #19

The new constitutional provision will apply to Freddy's appeal, since it is not an ex post facto law. I would expect the court to affirm Freddy's conviction on appeal.

Will the New Amendment to the Constitution Apply to Freddy?

The U.S. Supreme Court essentially asks two questions regarding ex post facto laws: (1) does the law attach legal consequences to crimes committed before the law took effect? and (2) does the law affect the prisoners who committed those crimes in a disadvantageous fashion? Although the answer to the first question in Freddy's case is debatable, the answer to the second is clearly "no." The law, if it applies at all, will clearly work to most prisoners' advantage by expanding the category of excludable evidence. Moreover, this analysis is not applied at all regarding procedural changes such as this.

Article 1, section 12 of the Florida Constitution prohibits "unreasonable interceptions of private communications by any means" without a warrant based on probable cause. Florida's exclusionary rule makes evidence obtained in violation of law and all evidence "derived from" that evidence inadmissible at trial.

Outcome of the Application of the New Amendment.

Since it is not an ex post facto provision, the new amendment to the Florida constitution will require application of U.S. Supreme Court case law regarding the Federal exclusionary rule. Although the Federal Constitution does not discuss interceptions of private communication specifically, this does not alter the exclusionary rule principle. If the recordings here were obtained "in violation of law," they must be excluded since Florida constitutional law is a "law" that can be "violated."

No good faith exception (such as for police relying on a law later declared unconstitutional) applies here, since the constitution on its face has remained quite clear throughout regarding searches conducted by "intercept[ing] private communications." Warrantless searches are permitted, however, in several circumstances. For example, a warrant is not needed where a party with standing to object to the search consents to the search. In the case of attempts to record a conversation, the consent of one party (usually the "other" party) to the conversation is sufficient. Assuming that Flossie and Ree Vinge gave voluntary and intelligent consent to the recordings, Freddy's incriminating conversations with them and with the undercover policeman were thus legally obtained and fully usable at trial.

Freddy's conviction is therefore likely to be upheld on appeal.

ANSWER TO QUESTION #20

I. Governor's Suspension and Removal of an Elected Official.

The property appraiser is an elected official, and as such is subject to suspension by the governor by executive order filed with the secretary of state. Further, the governor may fill the vacancy by appointment for the period of suspension and he may reinstate the appraiser at any time prior to actual removal. Grounds for removal include malfeasance, misfeasance, and commission of a felony. Therefore, soliciting bribes would be grounds for removal. Although the governor has the power to suspend the appraiser, only the senate by majority vote can actually remove him from office.

Therefore, in this case, the Governor could suspend Appraiser based on the allegations against him, and he can appoint an interim replacement, but he has no authority to remove him permanently. There is, therefore, some merit to Appraiser's claim for review of his removal from office without the vote of the senate.

II. Wiretapping.

Article I Section 2 of the Florida Constitution applies to unreasonable interceptions of private communications. Further, the Florida constitution has codified the exclusionary rule by providing that no evidence obtained in violation of law is admissible. Therefore, in this case, the wiretap was illegal and any evidence that was obtained cannot be used against Appraiser. While Appraiser can, therefore, exclude such evidence for trial, the information obtained could still be the basis upon which the Governor suspends him. Clearly the State Attorney acted in violation of Appraiser's constitutional rights. However, Appraiser's remedy is that the evidence would be excluded. He would not be entitled to damages, because the State Attorney and the county are cloaked in governmental immunity. In the absence of a general law abolishing or limiting state sovereign immunity, the immunity of state and political subdivisions is absolute and this applies to both governmental and proprietary functions of counties.

III. Jurisdiction of Circuit Court.

The circuit court is the general trial court. They have jurisdiction over actions at law over \$15,000. The circuit court also has the power to issue writs of mandamus and quo warranto as do the supreme court and courts of appeal. Because it is within the Governor's power to suspend Appraiser, the court cannot interfere. This is based on the concept of separation of powers which prohibits one branch of government from exercising a power that belongs to another. Here, however, the governor may have exceeded his authority by removing Appraiser from office. The court then, can issue a writ compelling the governor to comply with the proper procedure. In that case, the senate will decide whether there is sufficient grounds to remove appraiser. If they find that there is not, then the governor must reinstate Appraiser.

IV. Conclusion.

If the State Attorney and County are immune from suit, Appraiser will not be able to seek damages since the State Attorney was acting within the scope of his employment when he used the wiretap. Appraiser may seek to have the evidence obtained from the wiretap excluded. Appraiser may seek relief from the order removing him from office.

ANSWER TO QUESTION #21

The five-year limitation on death benefits under the Florida Workers' Compensation statute will most probably be upheld in the face of a constitutional challenge by Mrs. Hardhat based on a finding that the Act does not violate the access to courts provision of the Florida Constitution.

Workers' Compensation statutes have been passed by legislatures throughout the country as an alternative to recovery under the common law negligence system. Where employees were injured during the course of their employment and sought to recover for their injuries from their employer, it was generally found that the common law system of protracted and expensive litigation was unworkable.

Under the Act, an employee receives compensation for a work-related injury without having to prove that the employer was negligent. In Florida, as in most states, the employer's defenses of contributory negligence, assumption of the risk and the fellow servant rule are unavailable. This statutory framework essentially establishes a "no fault" or strict liability system.

I. Mrs. Hardhat's Arguments.

The system appears to have worked well for several years for Harry Hardhat and his wife. Harry received medical and wage loss benefits for five years as a result of the injury he received at work. It is likely that within a matter of several weeks of his injury, Harry began receiving his benefits as provided under the Workers' Compensation statute. Were Harry required to litigate the matter as a regular civil action, he would have faced a wait of perhaps several years prior to receiving any monies. Under the Act, the benefits that Harry received were not discounted or denied based on the fact that they were caused by the apparent negligence of another employee. This fact would have provided Harry's employer with a strong defense to a civil action by Harry if the case were handled outside the Workers' Compensation statute.

The Workers' Compensation statute replaces the causes of action that an employee could bring against an employer and substitutes its own provisions and regulations. The Florida Constitution guarantees the continuation of common law causes of action, but does allow for change where a reasonable substitution of a remedy is made. Generally, the Act replaces common law negligence actions in a reasonable fashion by substituting a strict liability standard in recognition of an injured employee's need for timely and somewhat certain financial compensation when out of work due to an injury received there.

In return, the employee gives up the potential of a substantial future monetary judgment against the employer in a cause of action based on negligence.

Harry's death prompts Mrs. Hardhat to seek recovery of death benefits under the Act. The Florida Workers' Compensation statute imposes a five-year limitation on bringing such actions. This statutory limitation period begins to run from the date of injury to the employee. Applying the statute to the facts presented, it is noted that Harry was injured on December 31, 1980, and the widow would thus be entitled to death benefits if Harry died on or before December 31, 1985. Harry died on January 10, 1986. Under the Workers' Compensation Act, the statutory time limitation to bring an action for the death of Harry expired before he did. Mrs. Hardhat will recover no death benefits under the Act.

The statute of limitations in a Florida negligence action is four years, and in a wrongful death action it is two years. Under these provisions, the period within which to bring a suit begins to run when the cause of action accrues. Applying the wrongful death statute of limitations to the instant case it is seen that the cause of action for Harry's death accrues on January 10, 1986, the date of his death. Harry's widow would thus be entitled to file suit up until January 10, 1988 and potentially could recover monies from the employer were the case a civil action for wrongful death. However, her case comes within the provisions of the Workers' Compensation statute and the time limitation for filing an action has passed.

It would be argued on behalf of Mrs. Hardhat that the result of the application of the Workers' Compensation statute is that the court is not open to her to redress her husband's death. This circumstance appears to be in direct contravention of the Florida Constitution, which provides in Article 1, Section 21, that the courts must be open to every person for redress of any injury.

Case law in Florida construing this section of the Constitution has found statutes similar in effect to the Workers' Compensation Act unconstitutional. Restrictions on the right of access to the courts are liberally construed in favor of the right of access. Specifically, the courts have found that where a statute of limitations operates as an absolute bar to a cause of action before it accrues, the limitation period is unconstitutional as it violates the constitutionally protected right of access to the courts.

It would be submitted on behalf of Mrs. Hardhat that the statute of limitations on death benefits contained in the Florida Workers' Compensation Act has operated to bar her claim for the death of her husband before it accrued and is therefore unconstitutional.

The Employer's Argument.'

The employer, or his Workers' Compensation insurer, will argue that the Florida Act is not unconstitutional in that it provides a reasonable substitution of a statutory remedy for the common law negligence cause of action and does not bar access to the courts as that term should be construed.

In support of this argument it would be submitted that the constitutional language mandating that the courts be open to every person for redress of any injury guarantees only the continuation of common law causes of action or requires a reasonable substitution of a remedy therefore.

The Workers' Compensation statute reasonably substitutes a standard of strict liability on the employer in place of a cause of action based on negligence. The employee gives up the potential of a large recovery in negligence for the assurance of timely and relatively certain payment under the Act. This is a reasonable substitution. The Workers' Compensation statute is therefore constitutionally permissible and not an unreasonable burden or an unreasonable restriction on Mrs. Hardhat's access to the courts.

Alternatively, should the legislation be construed as a reduction in Mrs. Hardhat's cause of action, no substitute remedy is constitutionally required at all. It is only where there is an elimination of a right or complete deprivation of a right of redress that the Constitution requires that a reasonable remedy be substituted for that which was taken away. Although the Workers' Compensation statute may ultimately result in less monies being recovered by Mrs. Hardhat, this would not rise to the level of a constitutionally protected right.

Mrs. Hardhat argues that the application of the Act to the facts of her case deprives her from recovering any death benefits as a result of her husband's death beyond the statutory five-year limitation period. It is on this basis that she alleges that she is denied access to the courts in contravention of the Florida Constitution.

The employer's strongest response would include the analysis that Mrs. Hardhat's cause of action in seeking death benefits under the Workers' Compensation statute would be litigated outside of the Act in a civil action for wrongful death. Wrongful death is not a common law cause of action, but is a creature of statute in Florida. The Florida Constitution guarantees the continuation of common law causes of action only and does not guarantee the continuation of statutory causes of action. The access to courts language of the Constitution prohibiting the deprivation of a right to sue and requiring a substitution of a remedy does not apply in this case. Therefore, even if it is found that the effect of the Workers' Compensation statute is to deny or prohibit Mrs. Hardhat access to the courts for redress of a wrongful death claim this is not an unconstitutional result.

CONTRACTS ESSAY QUESTIONS

QUESTION #1

Owner contracted with Builder to construct a swimming pool, patio and deck in the back yard and a two-car garage adjacent to Owner's home. To match the architectural character of the existing property, the Builder agreed to utilize rust colored bricks to construct the garage and patio, and to use cedar for the pool deck and white tile around the pool.

Builder commenced construction of the pool, patio and deck first. Owner watched the ongoing construction closely and was pleased with the match of the rust colored brick used for the patio with the present brick on his home. Satisfied with the progress, Owner decided to take a three-week vacation to the Florida Keys.

As he was leaving for his vacation, Owner noticed pallets of yellow tile being unloaded from one of Builder's trucks. Owner approached Builder and reminded him that all construction must be completed exactly according to the plans and specifications to preserve the aesthetic character of the home. Builder apologized for the mistake and said he would continue as agreed.

When Owner returned three weeks later, he saw that red brick rather than rust colored brick had been used to construct the garage, pine had been used to construct the deck and several cracks had appeared in the pool. Owner informed Builder that he would not pay until the cracks were fixed, the deck was rebuilt in cedar and the garage reconstructed with the rust colored brick. It will cost \$2,600 to repair the pool, \$2,500 to replace the deck and \$25,000 to demolish and reconstruct the garage.

Builder refused all requests and demanded immediate payment. Builder established that sufficient rust colored brick to construct the garage was not available and since he was unable to contact Owner in the Keys, Builder determined that red brick of equal quality would suffice. Owner refused to pay and he sued Builder.

Discuss the issues in a suit for damages by Owner against Builder.

QUESTION #2

Alan Able for the past year has run a successful business which supplies and installs chalkboards, bulletin boards, etc. Able learns that Nifty Contractors is accepting subcontracting bids for chalkboards incident to a project to construct a school building on which Nifty itself intends to bid.

Able telephones to Nifty's president a bid of \$101,000 to supply and install the chalkboards. Nifty receives two other bids of \$123,000 and \$137,000 for the chalkboards and uses Able's bid in submitting its own bid.

Nifty is awarded the contract to construct the school building and, pursuant to bidding regulations, publishes in a trade journal the names of the subcontractors whose bids it used in submitting its own successful bid. When Able sees this item he realizes that, in submitting his bid, a clerk added a column of figures incorrectly to get "\$101,000" instead of "\$131,000." Able immediately phones Nifty's president and says that he cannot do the work for \$101,000 as he would then "only make a few cents on the job," and withdraws the offer.

Nifty's president consults you as to whether Able is bound to furnish the chalkboards for \$101,000.

Discuss; however, omit discussion of any applicable statutory bidding regulations.

QUESTION #3

Several years ago, Manufacturer orally contacted Distributor for the purpose of entering into an arrangement whereby Distributor would be the exclusive wholesale distributor of Manufacturer's widgets, each of which bears Manufacturer's name. Pursuant to this arrangement, Distributor would purchase widgets from Manufacturer and resell them to retailers for final sale to the public. Based on this arrangement, Distributor has contracted with over five hundred retailers for the purpose of reselling the widgets.

There are no documents relating to the arrangement other than one letter to Distributor from Manufacturer signed by manufacturer's president reciting the general substance of their exclusive franchise arrangement. The letter does not mention specific terms. Nothing was signed by Distributor.

Recently, Distributor saw a newspaper advertisement in which another wholesaler advertised a different, but similar, type of widget. Although this similar widget did not bear the name of Manufacturer, it was, in fact, made by Manufacturer but was marketed under a different name. Distributor feels that the second widget is competing with the widget it is authorized to distribute.

Manufacturer is now demanding that Distributor increase its sales by 100% within its current fiscal year, notwithstanding that Distributor has increased its sales by 30% within the last twelve months and expects to increase its sales by 50% in the next year.

Distributor asks your opinion as to his rights under his arrangement with Manufacturer. Discuss Distributor's rights.

QUESTION #4

Peter Purchaser went to Mike Mechanic's garage three weeks before his 18th birthday to discuss a 1965 Mustang which Mike owned.

Peter told Mike that he wanted to purchase the car and have the engine rebuilt, the brakes repaired, and the body sanded and painted. Peter also stated that he wanted Mike to install a new stereo system which Peter owned and that he wanted all the work completed before his 18th birthday. Mike Mechanic replied: "Look kid, I am not even sure I can even get to that car. If I want to do this, it will take at least seven weeks to get in all the parts and do the work." Peter told Mike that seven weeks would be okay and he wanted him to do the work.

Mike then wrote a service ticket which estimated parts and labor, excluding the purchase price of the car, would be \$2,600. Peter and Mike agreed the purchase price, after all additional work was completed, would be another \$4,000. This purchase price and the specific charges for parts and labor were inserted into a service ticket which Mike wrote. In the comment section of the service ticket, Mike wrote in "agreed that I will do the job after looking at the car and deciding if it's worth my time." Peter signed the service ticket and paid Mike the \$2,600 for parts and labor. Peter asked if he could leave the stereo at the garage so that Mike could install it with the rest of the work, but Mike told him: "Bring it back if I do the rest of the work and I'll put it in then."

Peter went to the garage on his 18th birthday to inspect the progress of the work. He talked with Mike and expressed his pleasure with the progress to date. Mike requested a payment of \$400 to be applied to the purchase price of the Mustang. Peter and Mike argued about the payment, but eventually Peter paid Mike the \$400.

Three weeks later Peter received a call from Mike telling him that the repairs were finished and he was ready for Peter to bring in the stereo system for installation.

On the way to the garage, Peter saw a 1962 Corvette for sale. Peter immediately fell in love with the Corvette and told Mike: "The deal is off. Please send me back my money."

Mike Mechanic sues Peter for damages or specific performance to require Peter to purchase the Mustang for \$4,000 (less the \$400 payment). Peter counterclaims for a refund of the \$3,000 he has paid. Ignoring any mechanic's or repairman's lien and/or consumer rights statutes, please discuss the issues in the lawsuit.

QUESTION #5

Al, a college student, needed a car for his summer job. On April 16, Al and Bob orally agreed that Al would buy Bob's car for \$1,400 at the end of the spring term on June 3. On April 17, Bob sent Al a letter confirming this agreement. Al did not reply to Bob's letter.

Al knew that Carl, a high school senior in Al's hometown, would be coming to the college in the fall. On April 29, Al mailed Carl a letter in which Al told Carl of his arrangement with Bob and offered to deliver to Carl on September 1, Al's stereo and the car Al was acquiring from Bob, in exchange for Carl's promise to assume Al's obligation to pay Bob \$1,400 on June 3. Carl received Al's letter on May 1 and mailed a letter to Al the same day rejecting Al's offer. The next day Carl mailed Al a letter stating that he had reconsidered and was accepting Al's offer. Al received Carl's letter of acceptance on May 3. He received the rejection letter on May 4. He did not respond in writing to either letter.

On June 3, Carl informed Al that he did not have \$1,400 to pay Bob. Later that day, Bob attempted to deliver the car to Al. Not having the money to pay for it, Al refused to accept the car.

Discuss the issues involved if Bob brings an action against: (1) Al, (2) Carl, and discuss whether Bob would be successful.

CONTRACTS ESSAY ANSWERS

ANSWER TO QUESTION #1

This question involves three separate issues: (1) the construction of the pool, (2) the construction of the deck and (3) the construction of the garage. It is clear from the facts that Owner wanted rust brick on the garage, cedar used on the deck, and white tile on the pool. It is also clear from the facts that during the construction Owner was on vacation in the Keys. Further, Builder has offered an excuse only as to his use of the red brick on the garage.

Construction of the Pool.

Owner is complaining that the pool is cracked. This is not an issue of aesthetics, but rather one of utility, and it goes to the substance of the contract, because a cracked pool is not usable. Additionally, there has been no excuse offered by Builder which might excuse him from liability. Therefore, because there has been inadequate performance by builder as to the construction of the pool, Owner is entitled to the costs of repair, which is \$2,600.

Construction of the Garage.

The facts indicate that Owner sought to maintain the architectural character of his home by contracting to have the garage built with rust brick. Clearly, there has been a breach by Builder since he built the garage out of red brick. The fundamental issue, however, is whether this has been a material breach or substantial performance. As a general rule in construction cases, property that has already been built is not destroyed if there is not significant loss in value. The facts do not indicate the loss in value; however, because Owner desired to match the architectural character of his house, Owner may have experienced a loss. Owner explicitly demanded exact performance, therefore, the general rule will not apply. Prior to leaving on vacation, Owner told Builder that exactness was required. The facts do not indicate whether this was part of the original contract, but the statement and the assent by Builder would not be excluded at trial by the parol evidence rule since it was made subsequent to the contract. Although the statement would not be construed as a modification since it was not the result of a change in circumstances, it could be used to show Owner's intent and Builder's agreement to use only rust brick.

Builder has offered as an excuse that rust brick was not available. However, he did not stop building and finished the job knowing that exact performance was required under the terms of the agreement. The issue then is whether Builder was reasonable in using the red brick. There are no facts to indicate that time was of the essence to the contract. Therefore, there is no reason why Builder could not wait until Owner returned to inquire as to how Owner would like to proceed since the facts do indicate that the use of rust brick was important to Owner and that Builder was aware of that importance.

Therefore, even though \$25,000 is a considerable sum of money, and notwithstanding the general rule that a building will not be ordered destroyed once it has been built and the garage is not otherwise defective, Builder will have to pay so as to give Owner what was required under the contract.

Construction of the Deck.

Again, as a general rule in construction cases, property that has already been built will not be destroyed if there is no significant loss in value. In this case Builder was aware of the reason why Owner demanded exact performance and required the deck to be built out of cedar and not pine. Unlike the problem with the garage, however, Builder has offered no excuse for using pine instead of cedar. Therefore, absent an excuse and based on Builder's knowledge of the requirements of the contract, Builder will be required to pay the \$2,500 to repair the deck.

Therefore, Builder will have to pay the cost of all repairs.

ANSWER TO QUESTION #2

There are two issues in this question. The first deals with contract formation and the other deals with the issue of mistake.

Formation of a Contract.

Nifty's Claim of Promissory Estoppel.

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided by its enforcement. This is known as the doctrine of promissory estoppel and in effect it provides that a promise is enforceable if it is justifiably relied on by the promisee to his detriment. In most cases, the courts will refuse to permit a subcontractor to revoke a bid where the general contractor uses the bid in his own bid. In trade practice it is reasonable to expect that a contractor such as Nifty would rely on a bid. Therefore, once Nifty relied on the bid from Able, that bid could not be revoked without causing damage to Nifty. Able, therefore, will be required to supply and install the chalkboards for \$101,000.

Defense to the Formation of a Contract.

Unilateral Mistake.

In this case, there was a unilateral mistake on the part of Able. A unilateral mistake occurs when only one party to a contract is mistaken about a material fact which was a basic assumption upon which the contract was made. Clearly, in this case, the mistake was as to a material matter, the price of the bid. However, relief is not available unless the other party knew or should have known of the mistake or was under a duty to disclose the fact as to which there was a mistake. In this case, there are no facts to indicate that Nifty knew of the mistake or had any reason to know that the bid was wrong. Further, the error was not a result of any breach of duty on the part of Nifty.

Also, enforcement of the contract would not be unconscionable because there would not be a great and grievous loss to Able. In fact, Able would still make a profit on the contract.

In conclusion, since Able had full control over the bid and since Nifty was justified in relying on that bid, Able will be bound to perform on the contract.

ANSWER TO QUESTION #3

General Enforceability of Output Contract.

This question deals with an output contract. A promise by a seller to sell his entire output to a particular buyer is an output contract and is specifically enforceable under the Uniform Commercial Code (UCC). The consideration for the contract is the seller's promise not to sell to anyone else.

Further, under the UCC, an output contract is enforceable to the quantity of goods produced by the seller in good faith, as long as that quantity is not unreasonably disproportionate to any estimates given or the prior practice of the parties. Therefore, in this case, under this output contract, Distributor has the right to have Manufacturer sell it all of the widgets that it produces.

The Statute of Frauds.

A contract for the sale of goods where the price is \$500 or more is not enforceable unless there is a written memo signed by the party to be charged or unless one of the exceptions to the writing requirement applies. A writing is sufficient to satisfy the Statute of Frauds if it indicates that a contract is intended, contains the quantity of the goods sold and is signed by the party to be charged. The writing need not state all material terms. For example, the price term can be omitted and supplied orally. Where, as here, both parties are merchants, and a memorandum sufficient against the sender is sent to the other party and the other party has reason to know its contents, the memorandum is enforceable against both unless the recipient gives written notice of objection within ten days. In this case, the facts indicate that the letter from Manufacturer to Distributor contained the general substance of the exclusive franchise agreement. Further, there is no indication that Distributor sent a written objection. Therefore, both parties will be bound to the agreement unless it can be determined that the letter itself would not provide a reasonably certain basis for granting relief by the court. Under these facts, however, there is a pattern of performance from which it can be determined what relief would be appropriate.

Breach of Contract.

If this contract is binding, under its terms, Manufacturer was in breach if it sold widgets to any other distributor. Therefore, Distributor could sue for damages, specific performance, or terminate the contract. Also, Distributor can argue that Manufacturer has no right to demand an increase in sales by 100% since that would be unreasonably disproportionate to the prior practice of the parties.

“MODEL” ANSWER TO QUESTION #4

Note that this answer has been drafted by a CBR editor in the format and style that is demonstrated in the Essay Writing Workshop and “Webinar”. It is not a perfect answer, and there are clearly other ways to approach this question, but you may use this answer to help you visualize the structure and writing approach we teach.

I. Agreement to Purchase the Car

A. Is the Peter–Mike Agreement Voidable?

Peter signed an agreement with Mike to rebuild, repair and fix up a 1965 Mustang for Peter. Peter was 17 years old when the agreement was made. On Peter’s 18th birthday, he inspected Mike’s progress and gave Mike \$400 toward the car’s purchase price.

Peter will argue that since the agreement was entered into prior to his 18th birthday, he should not be held to the agreement. Generally, in Florida, the age of majority is 18 and any contract entered into by a minor is voidable only by that minor. Mike will argue that the contract was for the necessity of transportation. Necessities contracts are not voidable by minors. Peter will respond that this is a unique auto and could be considered an investment, a collectible, and/or an antique and is not just for transportation and therefore, not a necessity. Mike will counter that even if it is not a necessity contract, Peter on his 18th birthday, came by the garage and approved the progress Mike had made on the car. He also gave him \$400 toward the purchase price. Therefore, Mike will contend that Peter ratified their contract on his 18th birthday, when he was at the age of majority, and therefore is liable on it. Ratification of a contract may be made after the age of majority by doing positive acts signifying assent to the contract. Also, if a party is to avoid a contract, it must be done within a reasonable time after reaching the age of majority. Arguably, 3 weeks later, when Peter called off the deal, is too long.

Mike will prevail and Peter is liable on the contract. In this case, Peter went to the garage on his 18th birthday and ratified the contract by expressing pleasure with the work that Mike had done. He even gave him \$400 and then took no further action for 3 weeks. Furthermore, it is clear that Peter did not take steps to avoid the contract until 3 weeks after his birthday. This is not a reasonable time especially given the fact that he did not even attempt to avoid the contract until he spotted a 1962 Corvette for sale that he wanted more. Given the facts presented here, Peter is liable on the contract.

B. Did a Contract between Peter and Mike exist?

Peter and Mike had an agreement wherein Peter would purchase a 1965 Mustang from Mike. They agreed that Mike would rebuild the engine and do several other repairs. This agreement was in writing and stated that parts and labor would cost \$2,600 and the purchase price would be an additional \$4,000. Peter gave Mike \$2600 for parts and labor. Mike finished the repairs but Peter called off the deal.

Peter will argue that there was no contract between them because even though the price and other terms were in writing, Mike noted on the service ticket that he would only do the job if it were worth his time. In other words, Mike made a definite promise, but reserved the right to cancel. This is an illusory promise and is not good consideration for a binding contract. Mike will argue in response that the contract became absolutely binding because Peter inspected the work 3 weeks after their agreement and obviously observed all the progress that Mike had made on the car. At this time, Peter even paid Mike \$400 toward the purchase price of the car. Mike will contend that at this point consideration was given and exchanged and there was no illusory promise.

Mike will prevail. There was a binding agreement between the parties that was reduced to a writing and signed by Peter. Furthermore, since this contract primarily involved the sale of goods (the car) over \$500 the statute of frauds will apply. The statute of frauds was satisfied because as stated, the agreement was reduced to writing. Moreover, since this contract involves the sale of goods, the UCC governs. Neither Mike nor Peter hold themselves out as specialists in either the buying or selling of cars (Mike is a mechanic, not a car salesman), so the special rules for merchants will not apply. Finally, even though the contract formation was initially questionable, once Peter inspected the progress, expressed pleasure with it, and gave Mike \$400 toward the car's purchase price, a binding contract was undoubtedly formed.

C. Was there a breach of the Mike–Peter Contract?

After the repairs were finished, Peter told Mike that the deal was off.

Mike will argue that Peter breached their contract by telling him that the deal is off and asking for his money back. Peter obviously had no intention on following through with his end of the bargain, which was to show up with the balance of the purchase price. Generally, when one party fails to complete its promise and there is no agreed termination of the contract, that party is in breach. Peter will assert that he is not in breach because Mike did not complete the entire job, as he did not install the stereo system. A party must perform its duties under a contract before claiming damages for a breach.

Mike will prevail and Peter is clearly in breach of contract. Peter and Mike agreed that when the repairs were done, Peter would, at that time, bring in the stereo system for installation. That was done, and, in fact, Peter was on his way to Mike's garage with the stereo. Mike has, without a doubt, performed his end of the bargain and Peter did not. Thus, Peter is liable for breach of contract.

D. Remedies

1. Damages

Peter breached the contract by telling Mike that the deal is off. Mike will assert that he is entitled to \$3600, which is the balance Peter owes him for the purchase price of the car. This amount is Mike's expectancy damages and would put him in the position he would have been if the contract

had been performed. However, Peter would contend that obviously he would be entitled to possession of the vehicle if he paid the \$3600. Additionally, if Mike were to sell the car for \$4000, then Peter would owe him nothing because Mike obtained his position that he would have been in if the contract were performed. In fact, Peter would assert that Mike would be liable to give back Peter \$400 to avoid a windfall by Mike. Moreover, Peter would argue that since Mike never put the stereo system in, he would be entitled to an amount equal to the labor costs of that job. Mike would argue that he is entitled to costs and expenses associated with re-selling the car and possibly lowering the sale price due to the fact that there is no stereo and/or the cost of buying and installing a stereo system.

Any additional cost/expenses associated with Peter's breach would be awarded under consequential damages as long as they are reasonably certain and foreseeable.

Mike is entitled to expectancy damages, which is the contract price minus the market value of what he can re-sell the car for. Since the damages are reasonably foreseeable and certain in this case, Mike should have no trouble proving that he is entitled to the \$3600 that he is owed. Also, as long as he can show any additional expenses associated with selling the mustang (i.e. advertising, auction) then he should be able to recover these expenses, so long as they are reasonable and foreseeable. As far as Peter's claim for the stereo labor cost refund, he will not succeed. Mike substantially performed on his end of the bargain and was willing and able to install the stereo, but for Peter's breach.

2. Specific Performance

Since Peter breached the contract, Mike may want specific performance of the contract.

Mike will argue that specific performance is proper in this case because the 1965 Mustang is a unique item and he may not be able to sell it on the open market. The UCC provides that specific performance may be granted if the goods are unique. It is in the court's discretion whether to grant specific performance. Peter will argue in response that the car is not unique and that Mike will be able to find another buyer. Even so, specific performance is not appropriate in this case because the vehicle is unique from a buyer's standpoint, not the seller's. If the court finds that Mike will not be able to find another buyer, then it will simply order Peter to buy the car pursuant to the contract and Mike will receive his money.

Specific performance is likely not appropriate in this case because there are not facts indicating that Mike will not be able to find another buyer. The court would prefer to simply enforce the contract, rather than force the physical transfer of the vehicle.

Thereby it would order Peter to pay Mike \$3600 and if Mike were smart, he'd take the vehicle and re-sell it himself. Otherwise, he will have to pay and receive nothing in exchange.

ANSWER TO QUESTION #5

I. Bob vs. Al.

A. The Existence of a Contract/Statute of Frauds.

Based on the facts in this question, there was mutual assent and consideration between Bob and Al. However, the issue in this case involves the Statute of Frauds. This agreement involves a sale of goods. A sale is a transaction wherein the seller transfers ownership to the buyer for a price. The Uniform Commercial Code (UCC) applies whenever there is a sale of goods, even if the sale is between nonmerchants.

Also, the Statute of Frauds will apply if the price of the goods is \$500 or more. The Statute of Frauds requires that there be a writing that indicates that the parties had the intent to contract. Further, the writing must contain the quantity of goods and be signed by the party to be charged.

In this case, there is a writing. Bob wrote a letter to Al. However, Al did not sign any writing and, therefore, cannot be bound. Had this contract been between merchants, both would be bound even though only one signed the agreement, if the second party did not object within ten days to a writing sent to him, the contents of which was known to him. However, Bob and Al are not merchants, so that exception will not apply. Another exception to the Statute of Frauds is where a party admits at trial that there was a contract. Therefore, if this matter proceeds to trial and Al admits that there was a contract, he would be liable under its terms even though he did not sign any writing. Under these facts, however, since there is no exception to the Statute of Frauds, the contract is void.

Bob vs. Carl.

In determining whether Carl owes Bob any money, there are two issues to resolve. First, it must be determined whether there is an enforceable contract between Carl and Al. Second, it must be determined if Bob was an intended third-party beneficiary on the Bob-Al contract.

Carl sent two letters to Al. He sent a rejection on May 1 and an acceptance on May 2. The "mailbox rule" provides that an acceptance is good when it is mailed and a rejection is good when it is received. In this case, the acceptance was mailed on May 2 and the rejection was received on May 4. Therefore, the acceptance was good since it was sent first. It is important to note that the acceptance was received first. In fact, the acceptance was both mailed and received before the rejection was received. Therefore, there is little danger of confusion as to the intent of the parties. Based on these facts, the contract between Carl and Al was valid.

Although Bob was not a party to the Carl-Al contract, he is an intended third-party beneficiary on that contract. An intended third-party beneficiary situation occurs when contracting parties intend to benefit a third person or when the contract is made to satisfy one of the party's obligations. In this case, Bob is an intended third-party beneficiary because the contract was

made to pay off the \$1,400 debt to Bob. As an intended third-party beneficiary, Bob is entitled to sue on the contract. Further, as a general rule, an intended third-party beneficiary can sue even though the underlying contract is unenforceable due to the Statute of Frauds.

Therefore, even though Bob may not prevail against Al unless Al admits in court that there was a contract, Bob will prevail against Carl on an intended third-party beneficiary theory.

CRIMINAL LAW ESSAY QUESTIONS

QUESTION #1

John and Mary fell in love. Mary invited John to live with her, gave him a key to the house which she owned, and helped him move his things in. Three months later, John became angry with Mary and said to her, "I'm leaving you!" He packed some of his clothes and left.

Three days later, John returned to pick up his remaining belongings. He discovered the door lock changed. Looking in the front window, he saw Mary sitting on the couch with Bill. In a rage, John yelled, "Mary, I'm going to teach you a lesson!" John obtained a tire iron from his car, kicked open the front door, and stormed into the house. Waving the tire iron at Bill, he said, "Get out or I'll beat you up, too!" Bill promptly left. John then hit Mary on the leg with the tire iron, breaking her kneecap. As she lay writhing in pain on the floor, John threw the tire iron on the sofa and ran out of the house.

Neighbors heard Mary screaming, came to the house, and took her to the hospital. Nobody notified the police of the incident at that time.

One day following the incident, Bill called the police and told them what he had seen. Bill also told the police that John was at that moment sleeping in room 8 of the Downtown Hotel. The police promptly went to the hotel and asked the desk clerk for the key to room 8. The clerk gave them the key, which they used to open the room door. John was found sleeping in the room. When the police awakened John, he immediately asked, "Did you find my tire iron that I threw on Mary's sofa?" The police then arrested John. From the hotel, the police went directly to Mary's house, which had not been entered since Mary was taken to the hospital, walked in the unlocked door and retrieved the tire iron. The police then went to the hospital to talk to Mary. She cooperated fully with them.

As the assistant prosecutor, your superior asks you to discuss the crimes chargeable and an evaluation of any challenges that are likely to be made to the evidence.

QUESTION #2

Accused had trouble with intruders driving through his lawn causing damage. One night he heard his daughter outside screaming: "Help, leave me alone!" Accused hurried outside, loading his gun and releasing the safety. As he ran onto the lawn, a car was driving out of his yard.

Accused screamed: "I'll teach you not to do this to us!" A shot was fired and Neighbor across the street fell down dead.

Canvassing the neighborhood, Officer was greeted at the door by Accused. Officer said: "We're investigating the shooting of Neighbor and we think the shot came from here." Accused paled and stated: "Oh no, I didn't mean to shoot Neighbor, I only wanted to teach the driver a lesson."

Accused was arrested and sat on his couch to put on his shoes. Officer noticed an uneven bulge under the cushion of the couch, and asked Accused if he could look under the cushion. Accused declined. Officer reached under the cushion anyway, seizing a pistol.

As Assistant Prosecutor, your superior asks you to discuss the highest degree of crime chargeable, the applicability of lesser offenses, and for an evaluation of the defenses likely to be encountered.

CRIMINAL LAW ESSAY ANSWERS

ANSWER TO QUESTION #1

I. Possible Crimes Chargeable.

Burglary.

John could be charged with burglary in the third degree, because there was a breaking and entering with intent to commit a crime. He could be charged with second degree burglary of a dwelling since Mary and Bill were present when John entered. He could also be charged with first degree burglary because there was an assault and battery and John was armed (the tire iron was a "weapon"). John can also be charged with criminal trespass since there was an unauthorized entry while armed.

Assault and Battery.

He can be charged with assault against Mary, assault against Bill, battery on Mary, and aggravated assault on Bill, aggravated assault on Mary, aggravated battery on Mary.

Other Potential Charges.

John's actions could also be charged under culpable negligence (a wanton and reckless disregard for life).

John's use of a weapon is separately chargeable as part of the crime against Mary and the crime against Bill.

John may be charged with attempted murder of Mary and attempted felony murder of Mary.

II. Challenges to the Evidence:

The arrest was illegal. John had a reasonable expectation of privacy, even in a hotel room, and the desk clerk acted improperly in giving the room key to the police. While the police had no warrant, and there were no exigent circumstances surrounding the arrest, no evidence was found in the hotel room, so there is nothing to suppress.

John's statement to the police when he awoke was made voluntarily, and he was not in custody at that time, therefore the statement is admissible. John had no expectation of privacy in Mary's apartment, so the police were acting properly when they re-entered and found the tire iron.

ANSWER TO QUESTION #2

I. Crimes Chargeable.

First Degree Murder of Neighbor.

Accused acted with premeditation and, under the doctrine of transferred intent, can be charged with Neighbor's death. There is, however, a very weak intent element in the facts as given.

Second Degree Murder.

Accused acted with a depraved heart by deliberately firing a shotgun to run off an intruder to his property.

Manslaughter.

Accused's actions were reckless when he fired the shot under the circumstances in a residential neighborhood. This is probably the strongest case and the highest chargeable crime for which a conviction could be obtained.

D. Aggravated Assault Toward the Driver of the Car.

E. Assault against Neighbor.

F. Battery against Neighbor.

G. Aggravated Battery Against Neighbor for Assaulting him with a Deadly Weapon.

H. Culpable Negligence for Shooting Neighbor.

I. Culpable Negligence for Attempting to Shoot the Driver.

J. Having a Concealed Weapon.

K. Carrying a Concealed Weapon Without a License.

Use of a Weapon to Commit a Felony Against Neighbor.

M. Use of a Weapon to Commit a Felony Against the Driver.

Attempted Murder of the Driver.

The intent element is very weak.

O. Attempted Felony Murder of the Driver.

II. Possible Defenses.

Accused may offer a necessity-based defense-of-others theory. This will be weak, because the driver was leaving Accused's property, and because Accused's words were avenging in nature. He may argue that he was attempting to prevent a crime, but for the same reasons that the defense-of-others theory is weak, this theory is also deficient. Accused may claim that he was acting in defense of property, but he may only use nondeadly force in such circumstances, unless there is imminent danger to himself or his family. The facts here do not suggest such imminent danger.

Accused may also raise constitutional criminal defenses to keep his statement out and to keep the pistol out. His statements to the police, however, were made voluntarily and before he was arrested so that they were not the product of a custodial interrogation. As to the search and seizure of the pistol, the police have the right under the Chimel standard to conduct a search within the suspect's immediate wingspan for protective safety. The gun was under the couch where Accused was sitting and therefore within his possible grasp and control. The search was legal.

DOMESTIC RELATIONS ESSAY QUESTIONS

QUESTION #1 (DISCUSSED ON TAPE)

Felix and Martha married at age 19 during their sophomore year of college. Martha quit college and worked full-time as a waitress. Felix finished college and then medical school. Martha's wages and student loans were their sole source of support. During Felix's first year of orthopedic surgery residency Martha became pregnant. She quit working. She never finished college and never again worked outside the home.

After 22 years of marriage, the couple separated. They had four children whose ages were 15, 14, 12 and 5 at the time of the separation. Felix moved into the couple's beach condominium with his girlfriend, Peggy. The children spent weekdays at the marital home with their mother and weekends at the condominium with their father and his girlfriend. The 12 and 5 year old children observed Felix and Peggy engage in sexual intercourse. Felix and Peggy were unaware of this and thought the children were asleep.

The couple jointly owned a home with an equity valued at \$300,000. The couple acquired additional real estate during the marriage, with equities valued at \$250,000, consisting of the condominium and some business property. Felix's annual income at the time of the dissolution was \$250,000 per year. Martha had no income and no separately owned assets.

The trial court awarded Martha \$2,000 per month as permanent alimony; \$1,000 per month rehabilitative alimony until the youngest child reached age 18; and \$750 per month, per child, as child support to be paid until the child reached age 18. Additionally, the court directed Felix to pay for four years of college education for each child after reaching age 18. The court awarded Martha permanent custody of the four children. The court, outraged by Felix's apparent misconduct, denied him right of visitation with his children.

The trial court made an equitable distribution of the marital assets by awarding the marital home to Martha and the remaining real estate to Felix. The trial court further determined that Felix's medical degree had an assessed present value of \$1,000,000. The court awarded \$250,000 to Martha as a special equity in Felix's medical degree payable in ten annual installments of \$25,000.

Felix wants to appeal:

- (1) The awards of permanent and rehabilitative alimony;
- (2) The order compelling him to pay for college education;
- (3) The denial of visitation rights;
- (4) The equitable distribution award of the marital home; and
- (5) The special equity award of \$250,000.

Discuss his chances of prevailing on each of these points.

QUESTION #2 (DISCUSSED ON TAPE)

Husband and Wife met at a party on his sailboat in Miami. Husband, then age 40 and once divorced, was a very wealthy real estate broker whose net worth at the time was \$10,000,000. Wife, then age 18, was a waitress at a local restaurant.

After a whirlwind courtship, Husband asked Wife to marry him. She accepted and they set a wedding date for two weeks later. The day before they were to be married, Husband told Wife that she needed to sign some papers at his lawyer's office. He picked her up at 3 p.m. and drove her to see his lawyer.

The lawyer gave Wife an agreement to review and sign. It provided that, in the event of divorce, Husband would pay Wife alimony of \$20,000 per year for a period of years equal to the number of years they remained married. It made no reference to property, children or child support.

Wife did not request and was not given other information. Husband's lawyer offered to explain the agreement to her. She declined, stating that if Husband wanted her to sign the agreement, that was fine with her. She signed the agreement without reading it. They were married the next day.

Shortly after their marriage, Wife went to work at Husband's real estate office as a bookkeeper. She obtained her real estate license, attracted many clients and demonstrated a real talent for the real estate business. Wife drew a salary of \$200 per week.

Through her efforts, the net sales of the agency quadrupled in just five years. Wife persuaded Husband to invest his \$10,000,000 of assets and part of his earnings in several real estate ventures. Husband had lost most of his assets in his first divorce and consequently all the investments were held solely in Husband's name. Those investments proved to be highly profitable. Fifteen years after the marriage, Husband's net worth was \$40,000,000.

Husband and Wife had two children, a son, age 5, and a daughter, age 10. After the birth of each child, Wife stayed home for only a brief time. The children were raised by a nanny, because both Husband and Wife continued to work full time in the real estate agency and in the management of the investments. Over the years, the couple drifted apart. They stayed together solely because of their children. Fifteen years after their marriage, Husband met another woman and fell in love with her. He asked Wife for a divorce.

Husband worships his children and wants to see them as often as possible. Husband is very close to his son who is brain damaged, with an IQ of 50. He also knows that Wife is a wonderful mother. He does not want to take the children away from their mother, who will be the primary custodial parent.

Husband tells Wife that if she will agree to stay in the Miami area and let him have visitation with their five-year-old son and ten-year-old daughter three days each week, that he will tear up the prenuptial agreement. He offers to sign a property settlement agreement providing for rehabilitative alimony of

\$10,000 per month for five years, and child support of \$4,000 per month per child until each child reaches age 18. Additionally he will pay her as lump sum alimony, his interest in the couple's only jointly held asset, the marital home, which is valued at \$3,000,000. Wife owns no other property.

Wife does not want to get into protracted litigation. She is inclined to accept Husband's offer and to sign the property settlement agreement. She comes to you for advice. How would you advise her regarding her legal rights?

QUESTION #3 (DISCUSSED ON TAPE)

Husband and Wife were divorced in Dade County, Florida, in April of 1985. They had two children, Son (currently age 17) and Daughter (currently age 12), for whom shared parental responsibility was awarded in the final judgment, with primary physical residence granted to Wife and reasonable visitation granted to Husband. There were no restrictions in the final judgment on the Wife's ability to relocate with the children, and she moved with them in 1987 to Little Rock, Arkansas, where they continue to reside. Since the dissolution, Husband has remarried and fathered a child; he and his new family now reside in Ocala, Marion County, Florida.

Based on false information knowingly provided by Husband in his original financial affidavit, he has been paying \$200 per month per child as child support as ordered since the dissolution. Because of her employment, Wife has been required to provide day care for Daughter at a cost of \$45 per week.

Neither Wife's nor Husband's income or living expenses have changed significantly since the dissolution; nor have the children's needs significantly increased. Because of a diagnosed learning disability, however, Son will be required to repeat the twelfth grade, making him 19 years old when he graduates. He is unemployed and will continue to be dependent on his parents for support until that time.

Husband has without fail paid the child support which he was ordered to pay, and has always exercised his visitation rights with the children, even when they were out of state. He has always cooperated in picking up and returning the children on time, and has never attempted to remove the children wrongfully. There have been no instances of abuse or neglect by Husband, who is regarded by all as a good father. Although the final judgment awarded him visitation with the children on alternating weekends, because of the distances involved, he in fact sees them only a couple of weekends a year. He would like to have visits of at least one week at Christmas, and perhaps two to four weeks in the summer. Husband's mother, with whom Wife does not get along, also lives in Marion County, Florida, but Wife does not permit her to see her grandchildren. Since the initial move to Arkansas, the children have not been back to the state of Florida. There have been no legal proceedings since the original final judgment.

Wife hires a lawyer and files a motion in the Dade County dissolution case for relief from the final judgment of dissolution of marriage. The basis for the motion is Husband's fraud on the court in submitting a false financial affidavit, and, on that basis, Wife requests a child support award consistent with the current guidelines, which would result in an increase of approximately \$100 per

month per child. In her motion, Wife also asks the court to award child support for Son to continue until his graduation from high school.

Husband comes to you as a lawyer, acknowledging that he lied on his financial affidavit in the dissolution case, and indicating that he wishes to defend against the Wife's action. Additionally, Husband wishes (a) to transfer the case to Marion County; (b) to reduce the child support because of the needs of his own child by his second marriage; and (c) to obtain increased visitation for himself and visitation for his mother in Marion County.

What advice do you give him?

QUESTION #4 (DISCUSSED ON TAPE)

John Jones and Mary Smith, unmarried adults, lived together for several years in Tampa, Florida until Mary became pregnant by John. John, hearing the news, left Mary.

Several months later, Mary delivered a baby girl. She brought a paternity action against John, which John contested, but the court ultimately adjudged John to be the father of the child. John was ordered to pay Mary \$150 per month as child support.

John left town immediately after making the first support payment, leaving no forwarding address and failing to pay any more of the ordered support.

Six months later, Mary, by then an alcoholic, was neglecting her child. A court found that it would be in the child's best interest to place the child into the temporary legal custody of an adult relative. Immediately following the removal of the child from her custody, Mary signed a consent for the child's adoption by Peter Parker, an unmarried adult not related to either John or Mary.

Peter, confined to a wheelchair since childhood because of polio, has retained you to represent him in finalizing the adoption. He is especially concerned because Mary, in a drunken state, has telephoned him indicating that she will seek to withdraw her consent.

Advise Peter of all the legal issues which might confront him upon the filing of his Petition for Adoption in Florida.

QUESTION #5 (DISCUSSED ON TAPE)

John inherited a 100-acre farm located in Marion County, Florida, five miles outside the Ocala city limits. He bought a tractor from Fred, but stopped making the payment. Fred sued and obtained a judgment against John. After entry of the judgment against him, John married Susan and they both lived and worked on the farm. Fred recorded the judgment against the farm about one month after the marriage.

John and Susan bought a 20-acre parcel of land adjoining the farm and got an unsecured loan from XYZ Bank to plant new crops. A freeze damaged the crop and John and Susan defaulted on the loan. XYZ Bank sued and obtained a

judgment against both John and Susan, which judgment was immediately recorded.

The couple soon began to argue over their money problems. Susan left John and moved to the big city. Susan filed for and received an uncontested dissolution of marriage. The divorce decree did not address the property rights of either John or Susan regarding the farm and the adjoining parcel of land.

The judgment creditors learned of the divorce. Both Fred and XYZ Bank filed a Writ of Execution and sent the Sheriff to levy on the farm and adjoining parcel and to have the property sold at public sale. Does John have any defense to the levy? Does either Fred or XYZ Bank have a lien on the property? Discuss.

QUESTION #6

Husband and Wife are both in their mid-thirties and have been married for six years. They have two children: Son, age 5, and Daughter, age 4. Husband is a dentist and has had his own dental practice for ten years and earns \$95,000 per year. Wife is a stay-at-home mother. Wife was a school teacher and earned \$35,000 per year before she stopped working after the birth of Son. The family lives in a modest home with a small mortgage that was purchased during the marriage and titled in joint names.

Husband opened a stock account two years ago from monies the parties received from a tax refund. The account is now worth \$20,000. Wife has \$20,000 of U.S. Savings Bonds her mother gave her last year.

One day Husband came home very upset because he learned that Wife was having an affair with Neighbor, when the children were at preschool. Husband punched Wife, breaking her cheek bone and causing her great pain. Son witnessed the incident.

In the past, Husband always acknowledged that Wife was a great mother. After finding out about the affair, Husband now feels he should get custody of the children if a divorce is granted. Husband does not want a divorce. Instead, he wants to go to counseling with Wife.

Wife is opposed to counseling, wants a divorce, and custody of the children. Wife wants to continue to live with the children in the marital home. Wife also wants to keep the savings bonds, receive all of the marital assets to which she is entitled, and obtain financial assistance from her Husband. Wife also wants Husband to pay for the divorce.

Wife comes to your office to discuss the filing of a divorce action. Identify and discuss with Wife all of the pertinent issues that will come up in her divorce action and include your advice as to how each of these issues will likely be decided.

In addition to the divorce action, Wife wants to sue Husband for punching her. Advise Wife as to this matter. Do not discuss any possible criminal prosecution of Husband.

DOMESTIC RELATIONS ESSAY ANSWERS

ANSWER TO QUESTION #1

I. Alimony Challenges

a. Permanent

After 22 years of marriage, Felix and Martha separate. They married at age 19 during their sophomore year of college. Martha dropped out of college and Felix continued with college and then medical school. Martha worked for a brief time to support them, but then stopped working when she became pregnant. Martha has not worked outside of the home for 15 years.

Felix will argue unsuccessfully that he shouldn't have to pay permanent alimony for Martha's lifetime as Martha is still relatively young and still has the ability to enter the workforce. The court will consider the earning capacities, educational levels, vocational skills, and employability of the parties and, when applicable, the time necessary for either party to acquire sufficient education or training to enable such party to find appropriate employment. Martha will argue that permanent periodic alimony is appropriate because at the time of the decree she did not have the education to find appropriate employment to support herself and a household of four children. Permanent periodic alimony is awarded to provide for the needs and necessities of life as they were established during the marriage of the parties for a party who lacks the financial ability to meet his or her needs and necessities of life following the dissolution of a long-duration marriage.

Martha will win this argument on appeal because the duration of the marriage, her educational background, and her inability to financially support herself at the time of the trial court's award. Here, Felix and Martha were married for 22 years and Martha quit college (to briefly work) and then have children with Felix while he finished college and graduated from medical school. The appeals court will support the trial court's decree of permanent alimony because Martha has limited to no work experience, has not completed higher education, and is also responsible as the primary caregiver of four children under the age of 18. This would not leave Martha with a sufficient ability to re-enroll in college or vocational training to be able to support herself at this time. If Martha remarries or has some other type of change in circumstances, then the order can be revisited in the form of a request for modification by Felix. Therefore, the award of permanent periodic alimony will withstand a challenge on appeal and Felix will be required to pay \$2,000 in alimony to Martha.

b. Rehabilitative

After 22 years of marriage, Felix and Martha separate. They married at age 19, at which point Martha dropped out of college and Felix continued with college

and then medical school. Martha worked for a brief time to support them, but then stopped working when she became pregnant. Martha has not worked outside of the home for 15 years.

Felix will argue that rehabilitative alimony is inappropriate because it was a 22-year marriage and Martha never really worked outside of the home.

Rehabilitative alimony is awarded to assist a party in establishing the capacity for self-support through the redevelopment of previous skills or credentials or the acquisition of education, training, or work experience necessary to develop appropriate employment skills or credentials. Martha will unsuccessfully argue that she should receive both permanent periodic and rehabilitative alimony so she can find employment later when all of the children are grown. Felix will respond that since she currently wants to be the kids' primary caregiver she is not entitled to rehabilitative alimony. Rehabilitative alimony is improper where a wife has expressed desire to attend full-time to the domestic responsibilities of caring for young children.

Felix will win this argument on appeal because rehabilitative alimony is inappropriate. The appeals court will strike down the order for rehabilitative alimony because of the length of the marriage, 22 years; Martha's lack of work experience, 15 years out of the workforce; and Martha's responsibility for the care of four children under the age of 18. With Felix being a full-time doctor, his schedule (generally) would not allow him to care for the children full-time while Martha went back to school or obtained job or vocational training. Therefore, Felix will win this argument on appeal and will not have to pay \$1,000 per month to Martha in rehabilitative alimony.

II. College Education

The trial court directed Felix to pay for four years of college education for each child after reaching age 18.

Felix will argue that he cannot be ordered to pay for his children's college education without proof that he has a previously written agreement with Martha to that effect. In Florida, parents are not obligated to pay for the college education of their children. Martha will unsuccessfully argue that he should pay for the children's college education because he can afford it with his doctor's salary. Without an existing written agreement between the parents that a child's college education would be paid for in the event of a divorce, a spouse cannot be ordered to pay for a child's college education.

Felix will win this argument on appeal because the trial court overstepped its authority in ordering that Felix pay for his four children's college educations. In Florida, parents do not have an obligation to pay for their children's college education even if they have the financial means to do so. Therefore, the appeals court will strike down the part of the decree that orders Felix to pay for his four children's college educations.

III. Visitation Rights

Felix moved into the couple's beach condominium with his girlfriend, Peggy. The children spent weekdays at the marital home with their mother and weekends at the condominium with their father and his girlfriend. The 12 and 5-year-old children observed Felix and Peggy engage in sexual intercourse. Felix and Peggy were unaware of this and thought the children were asleep. The court ordered that his visitation rights should be denied based on the children observing Felix and Peggy engaging in sexual intercourse.

Felix will argue that the one instance of two children accidentally observing him and his girlfriend should not sever his visitation rights. The parent who is deprived of custody is entitled to time-sharing with the child or children, as long as he conducts himself in a manner not adversely affecting the child's welfare. Martha will argue that visiting their father after they observed him and Peggy engaging in sexual intercourse would not be in the best interest of the children. It is deemed to be in the best interest of the child or children to have a relationship with both parents, which involves time-sharing between the two parents.

Felix will win this argument on appeal because one accidental observation by his children of him and Peggy engaging in sexual intercourse would not rise to the level of termination of visitation/time-sharing rights. Martha's argument will fail because no further facts were given stating that the children were adversely affected by this observation and the presumption is that it is in the best interest of the children to spend time with both parents. Therefore, the appeals court will strike down the section of the decree stating that Felix's visitation and time-sharing are denied.

IV. Equitable Division of Marital Home

The couple jointly owned a home with an equity valued at \$300,000. The couple acquired additional real estate during the marriage, with equities valued at \$250,000, consisting of the condominium and some business property.

Felix will argue that he paid for the home and is the sole financial provider for the family. In distributing marital property, the court will look at each spouse's contributions to the marriage. Martha will argue that she is primarily raising the children and desires to continue to raise them in the marital home. In distributing marital property, the court will also look at the desirability and financial feasibility of retaining the marital home as a residence for any dependent children.

Felix will lose this argument on appeal because Martha is primarily raising the children and wants to continue raising the children in the marital home. Here, Martha has been the primary caregiver to the couple's four children while Felix has built his career as a doctor. Martha has not worked outside of the home for the past 15 years. The appeals court will look favorably on the trial court's

decree that Martha be awarded the marital home because she is the primary caregiver and she does not have the financial ability to (1) pay for the current marital property or (2) purchase a separate home for her and the four children to live. She has no income whereas Felix has an annual income of \$250,000 per year. Therefore, the trial court's order that Martha be awarded the marital home will withstand a challenge on appeal.

V. Special Equity Award

The court awarded \$250,000 to Martha as a special equity in Felix's medical degree payable in ten annual installments of \$25,000.

Martha will argue that she deserves the special equity award because she supported Felix through law school, so the profits from that degree should be shared with her. Felix will respond that the award of \$250,000 to Martha as special equity in his medical degree was incorrect because a degree is not split like material property. Professional degrees are not property rights subject to equitable distribution. Support of a spouse in their education irrelevant in determining a special equity award in the case of a professional degree.

Felix will win his argument on appeal because his medical degree is not a property right subject to equitable distribution. The trial court erred in its special equity award to Martha based on Felix's medical degree as his medical degree is not a property right subject to equitable distribution.

ANSWER TO QUESTION #6

This memorandum will discuss Wife's divorce action, including any potential claims for alimony, child support and custody. In addition, this memorandum will discuss Wife's possible cause of action against Husband resulting from the "punching" incident.

Divorce: Florida is a no fault divorce jurisdiction. A divorce may be granted where the parties contend that their marriage is irretrievably broken. However, where there are minor children or where one of the parties contests that the marriage is irretrievable broken, the Judge may order the parties to undergo marriage counseling. Here, where there are minor children and Husband does not want a divorce the Judge may consider ordering the parties to undergo counseling before continuing with the Divorce action.

Distribution of the Assets

Florida is a equitable distribution jurisdiction. This means that marital property is divided equally among the parties (50/50). However, where 50/50 distribution is not appropriate (i.e., where it would be inequitable for example), the court may divide the property so that it is fair and equitable to the parties. For example, the court can consider any party's interest in a particular piece of property such as a business or sentimental valued property, also the court may consider one parties desire to retain the marital home. (Note that the court can

order that the primary residential parent may retain the home until the children reach the age of 18 and then order the sale of the home for equitable distribution). In order to effectuate equitable distribution, the court must first distinguish marital and non-marital property.

Marital Property is property (including debts) during the marriage, interspousal gifts, enhancement or appreciation of non-marital property by the efforts of either spouse during the marriage.

Non-Marital Property is property (including debts) acquired by either spouse before marriage, non-interspousal gifts, bequest, or devise.

Here, Husband has a dental practice acquired prior to the marriage, but Wife may have an interest in the practice in that she may be entitled to the appreciation in value of the practice that occurred from Husband's efforts after marriage. However, Husband may have special equity in the practice and upon distribution, the judge may allow Husband to keep the entire practice since it is his business and livelihood that he has built.

The home, purchased during the marriage is presumed to be marital property, and here the facts indicate that the home is in fact marital property as it was purchased during the marriage and Wife and Husband hold as joint tenants. Husband's salary is also marital property. The stock account worth \$20,000 is marital property as it was acquired with marital funds. However, Wife's savings bonds worth \$20,000 are a non-interspousal gift and thus are not marital property - they belong to wife as non-marital property.

The court can allow the primary residential parent to retain the marital home where it is in the best interests of the children since this also will foster continuity.

Spousal Support

Wife is requesting that Husband provide her with financial assistance. Wife may be entitled to Alimony. In Florida there are four types of Alimony. Alimony can be requested by either party in a divorce proceeding. In determining whether to award alimony the court may consider among other things:

- the duration of the marriage
- age of the parties
- financial need
- adultery (however note that adultery cannot be the basis for awarding or denying alimony unless the adultery depleted marital assets)
- standard of living during the marriage
- contribution to the marriage
- need for rehabilitation - i.e., allow the recipient spouse support so that she/he can become self-sufficient.

Permanent Periodic Alimony: This type of alimony is paid to a spouse in permanent periodic payments. This type of alimony is modifiable upon a showing of substantial change in circumstances. It terminates upon the death of either party or upon the remarriage of the recipient spouse.

Temporary Alimony: Temporary alimony is paid during the pendency of litigation.

Lump Sum Alimony: Lump sum alimony is paid in one lump sum. Typically it is available where there is a showing that one the spouse is in ill health and permanent periodic alimony will not serve its purpose of if there is extreme hostilities between the parties.

Rehabilitative Alimony: Rehabilitative alimony is alimony paid to the recipient spouse for a reasonable period of time for the purpose of rehabilitating that spouse back into the workplace so that the spouse can become self-efficient.

Here, Wife may be awarded temporary alimony for the pendency of the litigation and rehabilitative alimony. The facts indicate that Wife was a school teacher prior to staying home with the children, thus she has the ability to become self-sufficient. In addition, Wife is in her mid-thirties and should be able to work due to her young age. Wife may argue that she is entitled to permanent periodic alimony since she is entitled to remain in the lifestyle she lived with her husband's salary if \$95,000 a year. A teacher's salary is a dramatic change in her standard of living. However, her argument is weak. The marriage was relatively short (not meeting the long term marriage (17 years) presumption for this type of alimony). She and Husband were only married six years. In addition, she will be receiving rehabilitative alimony and she may find a job that pays more than a teacher's salary. Wife also wants attorney's fees. Wife may be entitled to such fees, however, her award of temporary alimony may assist her in this matter.

Child Custody

Child support and custody are always determined under the best interests of the child standard. Both parents are responsible for the support of their children. There is no presumption in favor of any parent, Husband or Wife could be awarded custody. Always considering the best interests of the child the court may also consider among other things the following:

- ability of parent to provide necessities to the child (food, clothing, shelter)
- desirability of continuity
- the child's preference (if of an adequate age and understanding)
- the likelihood that the parent will comply with visitation and foster a loving relationship with the other parent
- fitness of the parent

One parent will be the primary residential parent. This parent will retain physical custody of the children. However, regardless of who becomes the primary residential parent the court generally orders shared parental responsibility. This means that both parents have equal say in the child's medical and educational needs and access to the child's records.

Here, both parents want custody of the children and they both appear to be fit for the role of primary residential parent. Here, Wife has a strong argument for primary residential parent since she has stayed home with the children since their birth, thus continuity is best served if children are to remain in the home with her. In addition, Wife may argue that Husband is not fit to be primary residential parent. Generally a person's fitness (for example morality or

physical disability) is taken into account if that parent's behavior would subject the child to harm. Here, Husband hit Wife in front of Son, thus the judge may consider this behavior harmful (physically or emotionally) to the child and deny Husband custody.

Husband may argue that Wife is morally unfit where she has committed adultery. However, this argument is likely to fail where there is no showing that the Wife's behavior is harmful to the children. Additionally, the children were never home when it happened.

Here, the children are too young for the court to consider their preference. Wife will also argue that the children should stay with her in the marital home as they may have friends in the neighborhood, although they are too young to argue that they go to school in the neighborhood.

Generally, the court will not split the children up. It is in the best interests of the children to remain together since they always have and this would force continuity for the children and also this would allow the children to have each other for support.

Also, the court may order DCF to conduct an investigation and make a suggestion to the court for the award of child custody.

Child Support

Both parents have a responsibility to support their children. In Florida child support is awarded pursuant to the statutory guidelines taking into account income and number of children. The duty of child support continues until the child reaches the age of 18 or can continue if the child has a disability or is still in high school from age 18-19. There is no obligation to continue support for the children's college education although the parties may expressly agree. Income may be imputed onto a parent if the parent is voluntarily unemployed or underemployed.

A judge may deviate from the guidelines by 5%, however a deviation beyond 5% must be accompanied by writing findings justifying such a deviation. A judge must deviate by 5% if the child spends a significant amount of time with the payer spouse.

A child support order must also contain a provision providing medical insurance for the children if it is reasonable ascertainable.

Child support is modifiable upon a showing of a substantial change in circumstances.

Wife's Suit for "Punching"

First Wife may have a suit against Husband for battery. Florida has abolished spousal immunity. Here, husband intentionally caused a harmful or offensive contact of Wife when he punched her causing damage, specifically breaking her nose. Wife can also file for an injunction based upon Florida's domestic violence provisions. If Wife was to receive a temporary restraining order against Husband, she would still be entitled to support.

PROPERTY ESSAY QUESTIONS

QUESTION #1

Lars and Loretta Laker own as tenants by the entireties a single-family residence in St. Petersburg, Florida. They seek your advice on February 20, 1990, regarding problem tenants in the house.

Yesterday the Lakers were served a summons, complaint, and notice of lis pendens in an action brought by the tenants, Todd and Tina Thompson. The Thompsons are seeking specific performance of an agreement for purchase and sale of real property and damages for breach of contract. The agreement, hand-written by Lars Laker on January 28, 1989, in the kitchen of the subject house, is reproduced below:

received \$720 on 1/28

Rent for 1 year. \$600 per month.

Option fee paid monthly, \$160 per month.

Total monthly payment \$760.

Thompsons may exercise option at any time during the 12-month period. If Thompsons purchase, the entire \$160 option fee plus \$300 of rent will be credited against option price.

Sales price \$50,000

Thompsons pay all closing costs when/if they exercise option to buy.

The fair rental value of the property is \$450 per month. Lars, Todd and Tina signed the document on January 28, 1989, and the Thompsons moved into the house on February 1, 1989. Despite Lars' protests, the Thompsons were frequently late with the rent; specifically, the April rent was paid on April 6; the July rent on July 9; the August rent on August 11; the September rent on September 9; and the November rent on November 10. On November 20, Todd told Lars that he intended to exercise the option to purchase the property and would be able to close the sale on January 31, 1990.

On December 1, 1989, Lars, who was annoyed with the Thompsons for their tardy payments and who was aware that the value of the property had appreciated substantially since the agreement was made, told Todd that he would not sell him the property for less than \$55,000. Todd insisted that the deal was for \$50,000 and he would pay only \$50,000. On January 10, 1990, Todd sent the Lakers a letter demanding conveyance of the property for \$50,000 pursuant to the terms of their option to purchase. The Lakers responded by certified mail on January 15 and stated that they would convey the property for \$55,000.

The Thompsons neither responded to the Lakers' letter nor paid the rent in February, 1990. On Saturday, February 17, Lars posted a 3-day notice on the premises which gave the Thompsons until Tuesday, February 20, to pay rent or deliver possession of the premises.

Lars is very angry and wants you to evict the Thompsons. Also, he has told you that he intends to change the locks on the subject house tomorrow, February 21, 1990, unless you approve his changing the locks at an earlier time.

Advise Lars regarding legal methods to force the Thompsons to vacate the house. Also advise him regarding the likelihood of success, the probable outcome of the suit filed by the Thompsons, any potential liabilities of the Lakers, defenses available to the parties, and damages.

QUESTION #2

Builder owned a tract of land with a small cottage on the property. Builder used the cottage as a vacation home. Because of this intermittent use, Builder was not aware of a termite infestation of the cottage until there was extensive damage to the structure. Upon discovery of the termites, Builder had them exterminated and made some minor repairs to the damage. Thereafter, in order to make the property more attractive for resale, Builder installed aluminum siding to the exterior of the cottage which concealed all visible evidence of the termite damage to the outside of the cottage, although there was crawl space beneath the cottage where the termite damage was still readily visible. Builder also constructed a large centrally air conditioned house on the property. Immediately after completing this work, Builder listed the property, including the land and both buildings, for sale, with a real estate broker.

While Purchaser was being shown the property by the broker, Builder assured Purchaser that the cottage was "in pretty good condition." Purchaser bought the lot and both structures. Purchaser used the cottage as a guest house and occupied the new house herself. Sometime after the purchase was closed, Purchaser discovered that the termite damage to the cottage was extensive. Also, from the inception of her occupancy of the new house, Purchaser found that the air conditioning system did not work properly. Not only did it not cool the new house, which had very few windows which could be opened because of its unique design, but at night the system made so much noise that it disturbed Purchaser's sleep. After attempts to get Builder to repair the termite damage to the cottage and to correct the problems with the air conditioning, Purchaser hired her own contractor who did the work. The cost of repairing the termite damage was \$10,000 and the cost of repairing the air conditioning was \$5,000.

Purchaser comes to you to find out if she has any rights and remedies against Builder. Discuss.

QUESTION #3

Testator died in 1978, survived by an adult Son, who is his sole heir at law, and one Brother and one Sister. By his will, Testator devised Greenacre (undeveloped land to which he had marketable title at his death) "to my Brother for life and then to my Sister and her heirs as long as she remains married to John C. Campbell." No other provision of the will is pertinent.

Since 1980, Farmer has farmed Greenacre, and he has in his possession unrecorded quit-claim deeds to Greenacre duly executed in 1979 by Brother and Sister and their spouses which name Farmer as grantee. By a written standard form "Earnest Money Contract," Farmer has agreed to sell Greenacre to Client. Client, a real estate developer, wants "absolute" title and plans to develop Greenacre as a shopping center. He has consulted you for legal advice.

Nothing has been recorded pertinent to Greenacre since Testator's death except his probate proceedings, whereby Greenacre was conveyed in accordance with Testator's will. Client seeks your counsel, particularly with respect to the following matters:

- (1) Does Farmer have "marketable title" to Greenacre?
- (2) What must Client do to obtain "marketable title" to Greenacre?

Respond to these concerns, discussing all issues raised by the facts.

QUESTION #4

In 1965, Allen, the record owner of Blackacre (a lot in Florida), conveyed Blackacre to Bryant, who failed to record the conveyance. Allen remained in possession of Blackacre, and in 1970 sold Blackacre to Cameron. Cameron had no knowledge of Allen's prior conveyance to Bryant and promptly recorded his deed from Allen. Allen relinquished possession of Blackacre to Cameron.

In 1975, Cameron sold Blackacre to Donovan, who had no knowledge of any other conveyances. Donovan attempted to record his deed but it was misplaced by the clerk of the circuit court after the official register numbers were affixed to it, and the deed was never recorded. In 1980, Donovan sold Blackacre to his son Elliott. Elliott had no knowledge of any other transactions and promptly recorded his deed. In 1981, Elliott sold Blackacre to Franklin for \$15,000. Franklin had no knowledge of any other transactions and promptly recorded his deed.

Meanwhile, in 1976, Allen gave Blackacre to Gomillion for a birthday present, and Gomillion promptly recorded his deed. In 1980, Gomillion conveyed Blackacre to Bryant, who promptly recorded this deed as well as his prior 1965 deed from Allen.

Franklin sues Bryant in a quiet title action in Florida. What result and why?

QUESTION #5

Dr. Sadie Seller owned Greenacre, which is the southeast quarter of section 5 of a certain township in central Florida. She agreed to sell Greenacre to Buier Cattle Ranch, Inc. but wanted to keep the four acres in the southwest corner of Greenacre to grow poyfruit, an experimental plant Sadie and her associates were trying to develop in response to world hunger problems. The plant seemed to thrive when fertilized with soil and chemicals from a quagmire, Marsh Bog, located on Greenacre along its eastern boundary. Therefore, the deed, properly executed, delivered to, and recorded by the president of Buier Cattle Ranch, Inc., on June 30, 1955, provided as follows:

Grantor, Sadie Seller, for \$10 and other valuable consideration, hereby conveys and warrants the SE quarter of section 5 [with further particulars to locate the township, county, and state] to Buier Cattle Ranch, Inc., its successors and assigns forever, in fee simple. Grantor, however, reserves and excepts out of the aforesaid premises for herself, her heirs, and assigns, the four acre grove in the SW corner of said SE quarter of section 5, on which poyfruit is presently grown, for so long as said four acres are used for the purpose of growing poyfruit. This conveyance is further subject to an easement, right, or privilege to remove soil for use on the reserved grove as poyfruit fertilizer from Marshy Bog along the eastern boundary of the premises conveyed, which easement, right, or privilege is hereby retained by the grantor, her heirs and assigns.

Assume that the four acre grove and Marshy Bog are properly described.

For several years Sadie continued her experiments in the poyfruit grove, removing soil from the Marshy Bog and carrying it by pickup truck from the eastern side of Greenacre across to the grove in the southwest corner of Greenacre. In 1978, Sadie sold and conveyed all her right, title and interest in Greenacre to Orange Grove Ltd.

In September, 1979, Orange Grove Ltd. transferred to Nursury Ned all its right, title, and interest in Marshy Bog. Ned began taking soil from the quagmire to fertilize his shrubs and rosebushes on his Floweracres, about a mile east of Greenacre.

Orange Grove Ltd. continued to grow poyfruit on the southwest four acres until January 30, 1980, when it razed the grove. Orange Grove Ltd. has recently announced plans to build a parking lot and large building for a citrus supermarket and wax museum catering to tourists traveling along the highway that abuts Greenacre on the south. It has also announced plans to sell to tourists bags of "magic" fertilizer from Marshy Bog.

What rights, if any, does Buier Cattle Ranch, Inc., have to eject Orange Grove Ltd., from the southwest four acres of Greenacre and to prevent Nursury Ned or Orange Grove Ltd. from coming on to or using Marshy Bog?

QUESTION #6

Wulle owned an unimproved tract of land worth \$25,000 in Ocala County, Florida. On June 1, 1980 he conveyed it by warranty deed to Xavier for \$25,000 cash. Xavier took his deed for recording to the Clerk of the Circuit Court that same day, but the Clerk mislaid it and it was never stamped with an official register number, indexed or recorded. Xavier did not take possession of the land.

On June 3, Wulle mortgaged the land to Young for \$10,000. This money was to be paid to Wulle on June 10. Young did not know about Xavier, and his mortgage was properly recorded on June 4.

On June 5, Wulle conveyed the land to Zimmer by quitclaim deed. At this time Zimmer did not know about Xavier or Young. Zimmer paid Wulle \$5,000 down and agreed to pay him another \$20,000 on July 1.

Zimmer took his deed to the Clerk on June 6. The Clerk looked at it and asked, "Hasn't he sold that land to Mr. Xavier?" Zimmer replied, "Not to my knowledge," whereupon the Clerk shrugged his shoulders and properly recorded the deed.

On June 9, Xavier, Young and Zimmer discovered each other at the land, and soon learned the true facts. Wulle, meanwhile, had skipped town with the money he already had, without waiting for the additional money due from Young and Zimmer.

Discuss the rights of Xavier, Young and Zimmer in the land. Subsequent possible lawsuits against Wulle, the Clerk and Ocala County are not to be considered as part of this problem nor discussed in your response.

QUESTION #7

D (Developer) purchased a large parcel of land and subdivided it into 25 lots. The subdivision plat was recorded together with certain use restrictions, one of which restricted the lots to single family residences only. The subdivision had five lots bordering on a two lane highway which connected two towns five miles apart. The remaining lots abutted a small street constructed by D which ran from the highway into the subdivision.

D built single family residences on lots 1 through 5, which were the lots facing the highway. He then sold the lots and homes to individual buyers, but the deeds were silent as to any restrictions. D later built homes on lots 6 through 20 and also sold these lots and homes to individual buyers. Each of these deeds recited that lots were restricted to single-family residences only.

Ten years passed and the highway in front of the subdivision is now a four lane busy thoroughfare. The adjoining towns expanded from both directions and a number of commercial establishments are located along the highway.

D has since died and his heirs sold lots 21 through 25 to E (Entrepreneur) who intends to build duplexes on each lot. The deed to E did not recite any restrictions.

B (Businessman) has purchased lots 1, 2, and 3 fronting the highway and intends to remove the existing single family residences and to build a small office complex on those lots.

Existing zoning laws would not prohibit any of the contemplated construction.

X, the owner of a large acreage tract across the highway from the subdivision, has filed a suit to prohibit the construction of the office complex and the duplexes, and claims the subdivision restrictions as his sole basis to prevent construction.

Smith and Jones, the owners of lots 5 and 10 in the subdivision, contact you and state that they are opposed to the office complex and the duplexes and feel it will cause excess traffic in the quiet subdivision. They also tell you that X has contacted them and wants them to each pay \$250 to him toward attorney fees for his already pending lawsuit. They ask you the following questions:

(1) Should they give the money to X for his lawsuit rather than filing their own suit?

(2) Can E build duplexes on lots 21 through 25 in the subdivision?

(3) Did the failure of D and his heirs to recite the single family residence restriction in the deeds relieve the present owners of these restrictions?

(4) Can B under any theory remove the single family residences from lots 1, 2, and 3 and build his office complex?

(5) What type of action would you recommend Smith and Jones take in opposition to the contemplated construction, and what results would you expect?

In your general response to the foregoing question, consider the questions raised by Smith and Jones as well as other issues you may feel applicable. Please give legal reasoning for your conclusions.

QUESTION #8

Alfred owned 40 acres of land on the north shore of Lake Crystal, a 300-acre lake near Orlando. In 1968 he signed an agreement with his northerly neighbor Barbara in which he allowed "Barbara and her heirs, her family and guests, to cross my land by means of the footpath presently there for access to Lake Crystal." Barbara paid \$500 for this right, and the agreement further provided that "Alfred and his heirs will maintain the footpath in a state of reasonable repair." This agreement was recorded.

In 1971 Barbara conveyed her land to Charles. Their deed did not mention the footpath, but Charles began using it to reach the lake, and Alfred never objected. In 1973, Alfred sold his land to Donald. This deed was silent regarding the footpath, but Donald also never objected to Charles' use of it.

In 1975 Donald cut off the footpath in the process of building a paved driveway to the road at the western edge of his land. Charles, however, continued to walk across Donald's land for beach access, using the path as far as he could, then going across the driveway, then continuing on the path. Again, Donald never objected to this use.

In 1979 Charles began subdividing his land. He advertised that each buyer of a half-acre lot would be granted access to Lake Crystal. Before Charles sold any lots, Donald sued for a declaration that neither Charles nor any buyer would have a right of access across Donald's 40 acres to the lake. Charles counterclaimed for a declaration of his right-of-way, plus an order compelling Donald to pave the footpath so that Charles and his future buyers could have vehicular access to the lake.

Resolve the case by discussing the relevant legal issues.

QUESTION #9

Farmer owned all of the land surrounding Lake Charming. In 1963, he subdivided it into lots by recording a plat of all of his land. Each of the lots was designated by title instead of by number. For instance, one lot was designated Whiteacre, another lot Blackacre, still another Greenacre, etc. The recorded plat restricted the use of all of the lots to "single family dwellings."

In 1965, Farmer sold Whiteacre to White. Whiteacre was located on a hill overlooking Lake Charming. In that same year White built a summer home on Whiteacre taking advantage of the beautiful view.

In 1970, Farmer sold Blackacre to Black. Blackacre was the lot that separated Whiteacre from Lake Charming.

In 1975, Black sold Blackacre to Developer.

The deeds from Farmer to Black and to White both contained the statement: "subject to restrictions of record." Black's deed to Developer contained no such statement. All of the deeds were duly recorded.

In 1973, Blackacre and all of the property that was still owned by Farmer that abutted Lake Charming was zoned for commercial use which permitted the construction of hotels and apartment buildings. White has been advised that the Developer proposes to construct a hotel on Blackacre. The construction of the hotel would substantially obstruct the view of Lake Charming from his summer home, cause increased traffic in the neighborhood, and, in his opinion, destroy the rural residential atmosphere of the subdivision.

White comes to see you and relates to you all of the foregoing facts. What are White's rights and remedies, if any? Discuss.

QUESTION #10

A was the owner in fee simple of Blackacre, which was landlocked on its west, north, and east sides, but whose south boundary fronted on Main Street. A was also the owner in fee simple of Greenacre, which was adjacent to the eastern boundary of the north half of Blackacre, and was landlocked on all sides. In 1960, A conveyed Greenacre in fee simple to E. In 1965, A conveyed the south half of Blackacre (hereinafter referred to as "Whiteacre") to B and reserved a twenty foot right-of-way for ingress and egress over the west twenty feet of Whiteacre. At the time of the conveyance of Whiteacre to B, A was operating a restaurant on the north half of Blackacre. A continued to operate the restaurant on Blackacre and to use the right-of-way through Whiteacre until 1970, when A conveyed the north half of Blackacre and the restaurant to E, the owner of Greenacre, which was adjacent to the eastern boundary of the north half of Blackacre, and which was landlocked on all sides. E immediately erected a 100 lane bowling alley on Greenacre, as well as a home, and a bowling shop on Blackacre. The public, patrons and employees of the bowling alley, bowling shop and restaurant used the right-of-way through Whiteacre until 1973, when B erected a barrier of iron posts and cement blocks thereon, interfering with the full use and enjoyment of the right-of-way by E. E immediately filed a petition in circuit court for an injunction restraining B from interference with E's use of the right-of-way, and B filed a response thereto. Discuss the following:

- (1) What defenses are available to B?
- (2) How should the court rule, and why?
- (3) How should the court rule in connection with landlocked Greenacre, and why?
- (4) Did the use of the easement by the public create any rights for the public in the easement?

QUESTION #11

On October 31, 1975, Landlord and Tenant duly executed a lease-option agreement for a term of two years with an option to renew or extend the lease for an additional two years. The lease also contained an option to Tenant to purchase the leased property for \$50,000 during the term of the agreement.

The initial term of the lease was to run from November 1, 1975, through October 31, 1977. The premises were restricted for use only as a laundry and dry cleaning business. The lease provided that in the event Tenant exercised his option to extend his lease beyond the original two-year term, the rent would increase from \$500 to \$600 per month. General provisions providing for eviction and termination of the lease for nonpayment of rent, adjudication of the Tenant as a bankrupt, and the breach of the covenants or conditions were also contained in the lease.

Tenant paid all lease payments as they became due and on October 30, 1977, delivered a check to Landlord in the sum of \$600 as payment of the November 1977 rent. Tenant occupied the premises until March 1978, at which time he validly executed a written instrument transferring all of his right, title and interest in the original lease–option agreement between himself and Landlord dated October 31, 1975, to Smith. Tenant had made monthly rent payments of \$600 per month until he transferred his interest to Smith. All rent checks were cashed by Landlord.

Tenant sold his laundry and dry cleaning business to Smith, as he did not have enough time to devote to it because of problems with his other business, an automobile agency. Smith continued to successfully operate the laundry and dry cleaning business and to pay the monthly rent of \$600. On September 1, 1978, Tenant filed bankruptcy for his automobile agency, a Florida corporation, and it was adjudicated bankrupt.

On November 7, 1978, Smith wrote a letter to Landlord advising him he was exercising the option to purchase the property for \$50,000.

Landlord on November 18, 1978, replied to Smith that he would not sell the property to Smith for \$50,000 because the lease expired on October 31, 1977, and the option renewing the lease for an additional two years had not been exercised, and therefore there was no valid lease. Then Landlord added that even if the option to renew had been exercised, the lease had been terminated because of the bankrupt Tenant. Landlord then advised Smith that as of December 1, 1978, the rent would be \$800 per month and if Smith refused to pay, he would have to vacate the premises by that date.

Smith consults with you regarding his rights under the lease–option agreement dated October 31, 1975, and particularly regarding his rights to continue his tenancy and his rights to purchase the property. How would you advise him?

QUESTION #12

Greenacre is a one–acre parcel of land located in an unincorporated area of Green County, Florida. In 1940, Richard Roe received a quit claim deed to Greenacre from Sam Smith and recorded it. That same year Richard Roe and his wife Ruth gave a recorded mortgage on Greenacre to Best Bank of Florida, the last payment on which was due in 1980. In 1945, Richard and Ruth Roe conveyed Greenacre to Joe Jones by recorded warranty deed subject to a restriction that the property be used only for residential purposes and also subject to a road right–of–way to the State of Florida across one end of the property. In 1948, Joe Jones and his wife Jane conveyed Greenacre to Albert Adams by recorded warranty deed free and clear of all encumbrances and restrictions. In 1965, Albert Adams and his wife Alma conveyed Greenacre to Dan Doe by recorded warranty deed subject only to restrictions of record, if any.

In 1979, Dan Doe comes to you and asks you to approve his title to Greenacre so he can obtain a loan from a local bank to finance the construction of a liquor store and lounge on Greenacre.

You procure an abstract of title on Greenacre which reflects only the transactions set forth above, with these additions: (1) a patent out of the U.S. Government with no reservations; (2) a deed from Clem Clemmons to Harry Horne recorded in 1960 covering Greenacre and other lands, followed by an Abstractor's note to the effect that this deed apparently contains a clerical error and should have described "Blackacre" instead; (3) a notation that Greenacre has been assessed for taxes in the name of Dan Doe since 1975 and that in 1974 the assessment was in the name of Mary Moses; and (4) a notation that Dolly Doe is presently in possession of Greenacre.

Can you approve the title to Greenacre for Dan Doe, and if so, on what basis and with what exceptions, if any? Discuss fully.

QUESTION #13

In 1976, Landlord orally agreed to lease a two-story business building in Florida to Tenant for 5 years, commencing April 1, 1976 and ending March 31, 1981, at an annual rental of \$2,400 payable in advance on April 1 of each year. During May of 1978, a hurricane badly damaged the building, but Tenant cleaned up the mess and continued his business until April 1, 1980. At that time a building inspector ordered the business to vacate the second story of the building because structural damage caused by the hurricane had rendered the upstairs portion of the building unsafe according to the state's building code. Tenant persevered, however, and continued running his business in the remaining portion of the building although he eventually fell behind in his rental payments. (He paid only \$1,200 during the year ending March 31, 1981.) Landlord finally lost patience with Tenant, who is still in possession on April 20, 1981. Landlord comes to you on that date, April 20, 1981, urging you to help him remove Tenant from the building as quickly as possible. In fact, Landlord explains to you that he has already called a locksmith who is planning to change the locks as soon as Tenant leaves his business that day.

Write a memo to Landlord advising him of his options and forewarning him of Tenant's likely responses.

QUESTION #14

Buyer, who is interested in acquiring a new house from builder-seller, points out some broken pavement in the driveway. The seller indicates he will take care of the problem. In addition, he reassures the buyer that the house and the driveway are made of the best material, that he built them himself, and that nothing is wrong with them. The agreed upon purchase price is \$50,000. In the written contract for the sale, builder-seller agrees to repave the drive up to the house, but does not do it. The deed passes without further reference to repaving of the drive. Three months after the closing and after a wet spring season, the drive breaks up even more, and the buyer calls the builder to repave the drive. The builder refuses to repave.

Also, because of the nature of the fill placed on the lot, or the way it was put on the lot, the fill settled in wet weather, causing major foundation damage to the house. The cost of correcting the foundation displacements is \$15,000. The diminution in the market value of the house and lot due to the damage is \$8,000.

Discuss the buyer's warranty and contractual rights and remedies, including damages recoverable, if any, and the nature of the defenses he should expect.

QUESTION #15

In 1970, Adams was the owner of Blackacre, an 80-acre tract of land bounded on the south by State Route 3, on the north by Greenacre, and on the east and west by parcels which afford no access to Blackacre. In 1970, Dobbs was the owner of Greenacre. From the date of the original patent deeds from the state, Blackacre and Greenacre have never been owned by the same person.

In 1970, Adams constructed a dirt road 15 feet wide which ran from State Route 3, across the south 40 acres of Blackacre to the north half of Blackacre. Adams used the road to facilitate farming operations on the north 40. The road did not extend as far as Greenacre, and no vehicular access to Greenacre has ever existed. In 1973, Adams sold the north 40 acres of Blackacre (hereinafter called North Blackacre) to Dobbs. The deed made no mention of the dirt road and restricted use of the property to "agriculture and related activities." From 1973 to 1983, Dobbs made no use of North Blackacre and the dirt road was not used or maintained. As a result, the road became overgrown with weeds and its presence undetectable.

In 1984, Adams conveyed South Blackacre to Post, who paid fair value for the property. Adams' deed made no mention of the road and Post had no actual knowledge of its existence. Shortly after Adams' sale to Post, Dobbs discovered that North Blackacre contained valuable mineral deposits. Dobbs now plans to mine the minerals from the property, extend the dirt road to reach Greenacre, and use the road to haul out the extracted minerals by truck.

Post does not want the road reopened, and if it is, he would like its use restricted as much as possible. Dobbs consults you as to his rights. Advise him, giving reasons.

QUESTION #16

In June of 1955, Arnold ("A") conveyed Greenacre, an unimproved residential lot in Citrus City, "to Barbara ('B') and her heirs" by deed that contained the condition that the premises not be used in connection with the sale of intoxicating liquors for a period of 50 years. Shortly after the conveyance of Greenacre, A died testate, naming a deceased brother's son, Youngster ("Y"), as his sole beneficiary, although A's mother ("M") was A's heir-at-law.

In October of 1979, B also acquired Redacre, a lot adjoining Greenacre, without any restrictions on its use. B then successfully petitioned the Board of Zoning Adjustment to rezone a section of Citrus City which included Greenacre and Redacre, from residential to commercial. In May of 1980, B conveyed both lots to Clarence ("C") by a quitclaim deed that made no reference to any restrictions on either parcel. C built a restaurant on Redacre, where he served the finest cuisine, wine and cocktails. The restaurant became very popular, and C paved a portion of Greenacre to provide parking spaces for 25 additional cars.

Discuss the rights and remedies of the various parties as a result of the described use of the properties. (For purposes of your answer, assume that all deeds were promptly and properly executed and recorded.)

PROPERTY ESSAY ANSWERS

ANSWER TO QUESTION #1

Note that this answer has been drafted by a CBR editor in the format and style that is demonstrated in the Essay Writing Workshop and “Webinar”. It is not a perfect answer and there may be other ways to approach this question, but you may use it to help you visualize the structure and writing approach.

I. Evicting the Thompsons

The Lakers rented their property to the Thompsons for \$600 per month plus \$160 per month for the option to purchase the property. The lease period is from 2/1/89 thru 1/31/90 and the Thompsons may exercise their right to purchase the property for \$50,000 at any time during the lease period. The Thompsons have made a few late payments on their rent, but have paid each month's rent by the middle of the month. On November 20th, the Thompsons told Lars of their intent to purchase the property and sent them a certified letter to this effect on January 10th. Lars after realizing that the value had gone up to \$55,000 refuses to go through with the purchase and sale unless the Thompsons purchase for \$55,000 and sent them a letter stating this. The Thompsons have not responded and as of 2/17 are still in the house. Lars wants to evict the Thompsons from his house. He posted a 3-day notice and wants to change the locks.

Lars will argue that he has the right to evict the Thompsons and change the locks for failure to pay rent. He will assert that the Thompsons are holdover tenants and wrongfully in possession of the premises beyond the term of the lease which ended on January 31th. A holdover tenant is one who remains in possession of the leased property after the expiration of the lease. The Thompsons are still on the property as of 2/17 when the lease expired on 1/31. Lars will rely on the fact that he has complied with Florida's law that requires 3-day notice to evict. The Thompsons, however, will assert that Lars must regain possession through the Florida court system. Florida is not a self-help state and the law requires that 3-day notice be personally delivered to tenants. If the Thompsons were not home at the time, Lars will counter that the notice was properly posted on the door.

Thompson's will also argue that since Lars accepted the late rental payment throughout the lease period, he does not have a cause of action for those payments just because he was “annoyed” about receiving late payments. The Thompsons will assert the doctrine of laches which is that a legal claim or right will not be enforced if too much time has gone by in asserting that claim and that delay would prejudice the other party. Here, the late rental payments occurred starting in April and Lars had always accepted them and had not stated any dissatisfaction with the time of payments, which were only a few days late. Moreover, as the Thompsons will assert, they properly exercised their option to purchase the property and they are therefore due the \$160 option fee for the months since February plus \$300.

Since the fair rental value of the property is \$450 per month and the Thompsons have paid \$150 over that amount each month, they will contend that it is reasonable to assume the additional amount was either consideration for the option or an amount that should be credited to their rental account. Since Thompsons will contend that they are owed this money and the option contract is specifically enforceable (as discussed below), they will argue that they do not owe February rent. Finally, Lars could try to argue that both the Thompsons and Lars were mistaken regarding the value of the property, a fact about a basic assumption on which the contract was made.

The Thompsons will prevail. Lars is not entitled to change the locks because Florida law requires him to go through the courts eviction process and self-help is prohibited. Lars', argument of mutual mistake will likely not succeed because property value was not assumed or even part of the contract terms in this case.

II. Enforceability of the Lars-Thompson contract

A. Statute of Frauds

The contract was hand written by Lars Laker and was signed by Lars and the Thompsons. It had provisions for rental payment, the option price and the sale price. Lars will try to get out of the contract and have it deemed unenforceable because it allegedly does not comply with the statute of frauds.

Lars will argue that the contract is not enforceable because it does not satisfy the identification of the party's requirement of the statute of frauds. He will argue that the parties are not specifically identified as required by the statute. Generally, the statute of frauds requires a writing signed by the party against whom enforcement is sought in all contracts related to an interest of land. This includes leaseholds. The Thompsons will assert that although the names do not appear that they are specifically identified in the body of the agreement, the parties each signed the agreement. Also, the agreement refers to the parties and their obligations and that Lars and Thompsons realized their respective obligation with respect to the contract. Furthermore, the Lars will assert that because there is no description of the rental property, this contract is unenforceable and violates the statute of frauds. Specifically, there is no address, house number or lot number.

Lars' argument is weak because the Thompsons may use extrinsic evidence to show that this property was the one meant in the agreement. That is the Thompsons are leasing it and currently occupying the property. There is no other property that would be the subject of the agreement. Since this contract was within the statute of frauds and all relevant aspects of the statute were satisfied, the Lars are not entitled to be released from their obligations under the contract because of the statute of frauds.

B. Option contract

In addition to the \$600 per month rental payment, the Thompsons paid \$160 per month in order to purchase the property within the leased period between Feb. 1 and Jan. 31 for the amount of \$50,000. The property value has since increased to \$55,000.

The Thompsons will assert that since the contract is enforceable, they are entitled to purchase the property for \$50,000. They will argue that this option contract is enforceable because by paying \$160 per month, the Lakers were obligated to keep the offer to purchase for \$50,000 open during the specified time. The offer is irrevocable during that time. Usually, the offeror retains the power to revoke an offer at any time even if the offer states that it will be held open for a specified period of time. However, as in this case, if the offeree pays the offeror for the promise to keep the offer open, the offer becomes irrevocable. The Thompsons, who paid the \$160 to keep the sales offer open, in fact, exercised their option on Nov. 20th, within the stated period of time. The Lakers may try to unsuccessfully argue that the Thompsons were late on paying their rent and therefore, the Thompsons breached the lease. In fact, the Thompsons were only a few days late on their rental payments and usually a court will uphold a grace period for payments. The Lakers stating that they would now sell the property for \$55,000, is really an unsuccessful attempt to wrongly revoke their offer to sell the property for \$50,000.

The option contract is enforceable in favor of the Thompsons for the \$50,000 sale price.

III. Damages and/or remedies and defenses

A. Specific Enforcement

The Thompsons will seek specific enforcement of the contract to purchase the property for \$50,000.

The Thompsons will argue that they rented this particular property in St. Petersburg, lived in it for several months and paid for the option to buy the property. They obviously decided they liked it and therefore decided to exercise their option in November of the lease period. Real property contracts are generally entitled to specific enforcement because of the nature of real estate being unique. The Lakers will try to assert that this property is not unique and there are plenty of single-family residences in St. Petersburg.

It is likely that this contract will be specifically enforceable due to the fact that it is for the sale of real estate and the Lakers will be forced to go thru with the purchase and sale of the property. The Thompsons would also be entitled to their option fees back plus \$300 as stated in the contract.

B. Damages

If a court were to find that the contract is not specifically enforceable, the Thompsons would be entitled to their \$160/month option fee back or \$1920 (160 x 12). They may also be entitled to consequential damages associated with moving out of the property and finding a new place. Consequential damages may be recovered if they may fairly and reasonably be considered arising from the breach. Certainly, due to Lars' breach of contract, the Thompsons would incur the expenses of moving, which Lars should be responsible for should they not obtain specific enforcements. Lars may be entitled to February rental and can offset this amount against the \$1920.

Finally, since the fair market rental value was only \$450 and the Thompsons were paying \$600 per month (plus \$160 for the option, totaling \$760), the Thompsons may assert that they are entitled to damages because the rental amount and agreement was unconscionable. If a court were to find any provision of a rental agreement unconscionable, it may refuse to enforce all or part of the agreement or limit the application of the unconscionable part. The Thompsons will try to claim that they are due \$150 (amount over the FMV) x 12 months or \$1800 over and above other damages due to them. Lars will argue that both parties were of equal bargaining positions and that there is no evidence that he knew for a fact of the fair market rental value. Lars will likely succeed on this argument and not be liable for the extra \$1800 in damages because there is no evidence from these facts that Lars had superior bargaining power, took advantage of the Thompsons or that the contract terms were so blatantly unfair.

ANSWER TO QUESTION #9

White's Rights and Remedies.

In order for White to be able to enforce the plat restrictions against Farmer and Developer, he will have to show that there is a common scheme, because the deed to Blackacre did not make mention of the use restrictions contained on the plat.

A. Is there a Common Scheme?

If land is developed under a common scheme which includes restrictions on some lots, the owners of those lots can force the same restrictions on the owners of other lots which were not expressly burdened. A common scheme will be found where there is at least similar restrictions imposed by a common grantor upon a significant number of lots in a given area. In order to find a common scheme, there must be similar restrictions imposed such that a scheme of development can be inferred. The restriction need not be identical, but should be relatively similar. In this case all of the lots in the original plat had the restriction "single family dwellings." The imposition of such restrictions on land through the common scheme theory is not fully justified by the doctrine of covenants running at law or the doctrine of equitable servitudes although it resembles the latter.

Uniformity and consistency are required to support inferences that the owners of restricted lots expected the same to be imposed on later sold lots and the purchasers of unrestricted later sold lots had at least inquiry notice that their lots were part of a common scheme. The nature and location of the property will also affect the reasonableness of these inferences. In this case, the restriction appeared in the recorded plat. Therefore, subsequent purchasers were on notice of the existence of the restriction.

Any owner of land burdened by the common scheme restrictions can enforce those restrictions on any land which is part of the common scheme regardless of who owns it. In this case there are sufficient facts to find a common scheme. Further, all deeds prior in time to the deed from Black to Developer contained the restrictive language. Therefore, the fact that the restriction was not in the deed from Black to Developer does not mean that the restriction cannot be enforced.

White can, therefore, seek to enforce the restriction against Farmer, Developer and all owners of property that were part of the scheme. The fact that the property was rezoned might pose a problem however. Zoning is rarely an effective form of land use planning because it is enforced by public authority and is subject to administrative variances. It will be necessary for White to seek his remedy with the zoning board. If the property was zoned commercial because there was a change in the neighborhood, White may be unsuccessful notwithstanding the original restriction.

ANSWER TO QUESTION #10

I. Defenses Available to B.

When the property was conveyed to B and A reserved a 20' right of way for ingress and egress over the west 20 feet of Whiteacre, and express easement appurtenant was created. An appurtenant easement is one held by virtue of the owner's status as owner of the benefited land and is automatically transferred with the land. Here A as grantee conveyed Blackacre with the easement.

With an easement by grant or reservation, the rights of the easement holder are determined by the language of the grant. If it fails to determine location and scope, or if it is an easement by necessity, the owner of the servient estate, B in this case, has the right to reasonably fix the location and control the use of the easement. If it is an easement by implication, then the scope is determined by prior use. The easement in this case the location of the easement was set and the purpose was determined to be for ingress and egress to Blackacre. A maintained a restaurant on Blackacre, so it is reasonable to assume since the property was otherwise landlocked, that the restaurant customers used to easement. However, once E owned both Greenacre and Blackacre, he increased the use of the easement by adding a shop, a home and a bowling alley.

Courts will generally permit reasonable change in use when circumstances change. If the original use becomes more intense because the dominant estate is more fully developed, there is not necessarily an overburdening of the easement unless the intensity of the use is beyond the reasonable contemplation of the parties.

Therefore, B's best defense, although not a strong one, would be that the use of the easement for more than restaurant traffic and to accommodate two parcels of land was not in the contemplation of the parties and as a result the easement is overburdened. The fact that the public used the easement is not sufficient to create an easement for the benefit of the public.

The court will probably grant Greenacre an easement over the property for ingress and egress since it is otherwise landlocked. Further, it will find that the fact that there was a business on the property before only indicates that the property is not overburdened and that the current use was not unforeseen by the parties.

ANSWER TO QUESTION #11

Tenant's Rights.

Assignment.

Unless there is a lease provision to the contrary, the interests of the landlord and tenant are freely transferable. Of course, when there is an assignment, the assignee merely gets the interest of her assignor. Further, the assignor is still liable on the lease only the liability is secondary to that of the assignee. Here, because tenant transferred the remainder of his obligation to Smith, this is an assignment and not a sublease. Therefore, Smith is liable on the lease.

The Option to Renew.

An option to renew a lease gives the tenant the right to require the landlord to give her a new lease, whereas an option to extend a lease gives the tenant the right to increase the terms of the lease. Here, there was a 2 year lease which expired on October 31, 1977. There was no new lease. However, the tenant remained in possession and paid the increased rent. The argument to be made, then is that the lease was extended for the 2 year period set forth in the original lease agreement.

Termination of the Lease.

On September 1, 1978, Tenant was not adjudged bankrupt because it was the automobile dealership that was adjudicated bankrupt, not Tenant personally. Therefore, the lease was not terminated on that basis. Smith, as the assignee of Tenant's interest in the property was subject to the lease provision which provided that the lease would terminate in the event that Tenant was adjudicated bankrupt. Therefore, the lease agreement was not terminated under the facts of this case.

However, had Tenant been adjudicated bankrupt, the lease would have terminated by its own terms and Smith would be holding over on that prior lease. In that case, his tenancy could be terminated upon 15 days notice.

Smith then, may very well have the right to continue in possession and exercise the option. Further, Landlord has no right to raise the rent until the lease ends.

ANSWER TO QUESTION #12

Does Dan Doe Have Good Title to Greenacre?

Marketable Record Title Act.

The purpose of the Marketable Record Title Act is to wipe out title defects which are 30 years old (except interests of the United States and the state government). The title examiner begins at the "root" – the last transaction to have been recorded at least 30 years prior to the time when marketability is to be determined. If a mortgage or encumbrance is to attach to the property and affect marketability it must be referred to by specific book and page reference. In this case, it will be necessary to have a recorded chain free from defects from 1949.

Title Matters Regarding Greenacre.

The United States patent was the transaction that began the private ownership of Greenacre. The Marketable Record Title Act does not wipe out interests of the US government, but the US government did not reserve any rights in Greenacre.

The State of Florida has a right of way across the property which is an interest which would not be extinguished by the 30 year period.

The deed from Clem Clemons to Harry Horne recorded in 1960 appears in the chain. This deed is less than 30 years old in 1979, so the Marketable Record Title Act will not get rid of it. However, it is a "wild deed", because it purports to affect title to Greenacre although none of the parties named in the deed have ever had record interest in the property. A wild deed does not render the property unmarketable if over 7 years have passed and no further instruments are recorded based on that deed. In this case the Clemons/Horne deed is over 7 years old and there were no subsequent instruments based on it. Further, there is a notation that the deed was recorded in error.

The notation regarding the tax assessments means that in 1975 Dan Doe had some interest in the property and in 1974 Mary Moses had some interest. It would be necessary to determine what interest, if any, Mary Moses had or has in Greenacre in order to tell Dan that his title is clean. The facts do not give enough information with regard to Mary Moses to determine the extent of her alleged interest. The tax assessment does however put us on notice of a possible title problem.

The notation as to Dolly Doe being in possession of the property could raise a problem. There may be an unrecorded deed or there might be an issue of adverse possession.

C. Dan's Chain of Title.

The quit claim deed by which Roe took Greenacres conveyed to Roe only what Smith had. There were no warranties as to title. Then Roe took a mortgage which encumbered the property until 1980. This mortgage was recorded, therefore, anyone that took title subsequent to 1940 took subject to the Best Bank mortgage. When Jones took the property by Warranty deed, Roe became liable for any defects or encumbrances that existed at that time, whether attributable to him or his predecessors. Doe also took by warranty deed, thereby leaving Adams liable on everything in the chain up to 1965 when Doe took possession.

Conclusion.

Therefore, a chain has been established. Title can be approved subject to the following exceptions: the right of way to the State of Florida, the mortgage to Best Bank, Mary Moses and Dolly Doe.

ANSWER TO QUESTION #13

MEMORANDUM

TO: Landlord
RE: Evicting Tenant

Validity of an Oral Lease.

Tenancy at Will/Periodic Tenancy.

Under Florida statute, any oral agreement to create a leasehold interest results in a tenancy at will. Since your "lease" was simply an oral agreement, and tenancies at will are terminable without notice by either party, you may terminate this leasehold and begin eviction proceedings immediately against Tenant. You may not, however, lock him out today.

In the old days, under common law, a tenant who took possession under an invalid lease would hold the property under what was called a periodic tenancy, if the tenant paid the rent and the landlord accepted it, as long as the period of time involved was identifiable. That would have applied here, since rent was due annually, and (until recently, presumably) has been paid on time. In Florida, parties to yearly tenancies of nonresidential property are entitled to 90 days notice of termination. Nevertheless, the statute makes clear that a tenancy at will existed between you and Tenant, terminable at will by either of you. You have chosen, within your rights, to terminate the arrangement.

Self Help/Eviction.

Self-help is not available to you to evict or end tenant's possession. The main obstacles to immediate ejection of Tenant are Florida's legal notice requirements. Before an action for eviction will lie, you must give Tenant three days' notice in writing specifying the amount of rent due. The notice must be delivered personally, which may prove difficult, since he is likely to make himself scarce if he gets wind of your intention.

But the law also allows you to complete service by affixing a copy to a conspicuous place on the residence, if you have first made two attempts at least six hours apart to serve him personally and failed, and he cannot be found within the county or no person at least fifteen years old resides at his abode. In order to affix the notice to the property, the person who made the attempts must file an affidavit stating that these attempts have been made. In addition, if service is rendered by affixing, you must also ensure that the clerk of court mails a copy to Tenant's residence and last known business address. Finally, five days must elapse from the date of service before you can obtain a final eviction judgment. For affixed notices, the five days begin with the date of the posting or mailing, whichever is later.

Tenant's Defenses.

Although Florida law does not allow a tenant to offset rent by the cost of any repairs performed, tenants may raise material noncompliance with building codes (such as that which resulted in the shutdown of the second floor) as a complete defense to an eviction action. However, Tenant has apparently not provided the requisite notice entitling him to raise this defense (delivery of written notice to you specifying the noncompliance and stating his intent not to pay rent for that reason). Therefore, it does not appear that this defense is available to Tenant. You are unlikely to recover the \$1,200 of unpaid rent from last year, since the tenant will point out that your material noncompliance with building codes rendered him unable to use about half of the leased premises. Thus, the court will probably abate about half of the rent.

If the tenant holds over, you may also recover in your eviction action double the amount of rent due for the period during which the Tenant refused to surrender possession. Please note once again that you may not within the law have the locks changed this afternoon.

ANSWER TO QUESTION #14

Buyer's Warranty/ Contractual Rights/Damages Regarding the Driveway.

Warranties.

There are no implied warranties of fitness and quality in real estate sales transactions. After accepting a deed, the purchaser may only sue on the covenants contained in the deed, which usually relate to issues of good title.

Contractual Rights.

Generally, conveyance discharges the obligations arising from the contract to convey, except those expressly made to survive the closing. Under Florida law a covenant in the purchase and sales contract survives if it was not intended to be merged into the deed. Since the intent of these parties is not clear, this point may go either way.

On one hand, the agreement to repair the driveway was not expressly stated to survive the closing, and it does not appear that the buyers agreed to a separate payment for that service. By accepting the deed and making payment, the buyers seem to have accepted seller's nonperformance of the driveway work.

On the other hand, a driveway seems a material subject of a deed. The buyers probably considered the obligation to repair it something the seller could not avoid.

Damages.

If the obligation did survive, the damages will be the cost of repair of the driveway. They are presumably not disproportionate to the value of the house. This is a contract where the buyer is the promisee, and promisees are entitled to expectation damages – the cost of having the driveway repaired.

Buyer's Warranty/ Contractual Rights/Damages Regarding the Foundation.

Warranties.

Presumably, the buyer is entitled to a structure fit for inhabitancy. If the seller knew of the defect in the fill and failed to disclose it, this would constitute fraud, and might entitle buyer to rescind the transaction. However, no indication of such knowledge is provided, and liability appears unlikely. Seller's express warranties of fitness are again irrelevant once title has passed, unless they are contained in the deed as covenants.

B. Contractual Rights/Damages.

In Florida, where a builders contracts to build a house to specifications, and fails to meet the specifications, the buyer is entitled to recover the cost of rebuilding properly. In many jurisdictions, only the difference in value with the promise breached and not breached would be recoverable. Here, that would be \$8,000. However, this house was not built to specifications, and this rule is thus inapplicable. Any remedy will be a contracts remedy. Any recovery will consist of the diminution in value, rather than cost to repair (\$15,000), since the court would rule that economic waste would occur from awarding the larger amount.

ANSWER TO QUESTION #15

I. The Estate.

The first question to review with the client, Dobbs, is a consideration of what conditions may exist in his title that would limit or prohibit his proposed use of North Blackacre for the mining of mineral deposits discovered there.

A. Qualified Estate.

In 1973, when Adams conveyed North Blackacre to Dobbs, the deed of conveyance contained language restricting the use of the property to "agriculture and related activities." If this language is construed to create a qualified estate in Dobbs, he would place his title to North Blackacre in jeopardy were he to proceed with the proposed mining operations.

It could be argued that Adams intended to create a qualified determinable estate in Dobbs. In a determinable estate, the grantee's use of the property is limited to the condition stated by the grantor and use contrary to that limitation results in an automatic termination of the grantee's estate and an automatic reversion of the entire estate to the grantor. Typical language for the creation of such an estate would include the words: "so long as," "until," or "during." These words are not evident in the deed from Adams to Dobbs. The absence of such exact language is not dispositive of the issue, for it is the intent of the grantor that controls. It is clear that Adams intended that Dobbs' use of North Blackacre be limited to agriculture and related activities as he used these words in the deed when he conveyed the property to Dobbs. However, there is no evidence presented that it was Adams' further intent that the property should revert to him if Dobbs utilized the property contrary to the agricultural use limitation. This interpretation of the intent of the parties would likely prevail. Courts have not been disposed to find qualified estates and strive to otherwise construe such language of limitation.

It is also unlikely that a court would find that Adams conveyed to Dobbs the second type of qualified estate, a fee simple subject to a condition subsequent. Such a grant would take the form, "to Dobbs, but if the property is used for other than agricultural or related activities, then Adams shall have a right of entry." Adams did not expressly retain such a right of entry nor did he use other recognized conditional language. This, coupled with the recognition that courts are reluctant to construe language in a deed as creating a qualified estate, would result in a finding that Adams did not create a fee simple subject to a condition subsequent in Dobbs.

B. Precatory Language.

Most favorable to Dobbs would be a construction of the term limiting the use of his land to agriculture and related purposes as merely precatory language. The language would thus be determined to be simply a request by Adams that Dobbs so limit his use of the land.

Precatory language is not binding on a grantee and is not enforceable at law. Under this interpretation Dobbs would argue that he took title to North Blackacre in fee simple and his proposed use of North Blackacre for mining purposes should be allowed. Examples of this precatory language include: "in hopes that," "desiring," or "requesting that." This language and tone is not present in Adams' grant which appears on its face to be more mandatory in nature.

C. A Covenant.

The more likely construction of the language in the North Blackacre deed would be that a covenant was thereby created. This determination would be based on findings that the requirement that a covenant be in writing was satisfied by the deed document, the requirement of consideration was satisfied by the exchange of title for payment for the land, and that the required assent of Dobbs was evidenced by his acceptance of the deed with the limitation therein stated.

It must also be found that the covenant was intended to run with the land. There is no explicit language in the deed indicating this intent. Intent need not be express but will be implied by the court from the instrument and circumstances presented. To reach this conclusion, it must be determined whether this covenant is a private agreement between Adams and Dobbs as individuals; or, if it is their interests as owners of North and South Blackacre that is affected. To support a finding that the covenant runs with the land and not simply between the individuals, the terms of the covenant must be found to touch and concern the land of both parties. Clearly, the limitation on Dobbs' use of North Blackacre to agricultural and related activities burdens his land. A strong argument can be made that Adams' land is benefited by this agricultural limitation in that such a use is reasonably quiet, pollution free, involves few people and vehicles, and the use would otherwise not negatively impact on South Blackacre.

If this touch and concern argument does not prevail, the covenant would be found not to run with the land and would be enforceable against Dobbs by Adams only. If this touch and concern argument does prevail, the covenant would be found to run with the land and would also be enforceable against Dobbs by Post as Adams' successor in interest. Should Dobbs proceed to use the land contrary to the covenant, Post could effectively argue that the covenant runs at law and seek damages as the required elements of a covenant are met, there was horizontal privity between Adams and Dobbs, and there is vertical privity between Adams and Post. Post could also effectively argue that the covenant is an equitable servitude and seek specific performance limiting Dobbs' use of the land as the required elements of a covenant are met, Post can trace his title back to Adams, and Post can demonstrate that South Blackacre is benefited by the covenant. Dobbs' business planning should be tempered by this strong possibility.

II. The Road.

The second significant area for review with Dobbs would include counsel that in order to extend the dirt road on North Blackacre to reach Greenacre, and use the road to haul out minerals extracted from North Blackacre by truck, he must establish that he has a right to use the road.

A. An Easement.

If Dobbs is found to have a right to use the road it will likely be based on a determination that he has obtained an easement of passage over South Blackacre and that his right has not been terminated.

If an easement does exist it was not obtained by an express grant, for no mention was made of the road or any rights to use it in the deed from Adams to Dobbs.

An easement can be implied by operation of law without a writing based on the presumed intent of the parties. In support of a finding of this intent Dobbs can meet the required element that North and South Blackacre were in common ownership at the time the easement was created, in 1970, when Adams owned the entire property as one parcel.

Dobbs can also make the required showing that a quasi easement existed and was reasonably necessary while North and South Blackacre were in common ownership in that the road was used by South Blackacre to facilitate farming on North Blackacre. Dobbs will also be able to meet the requirement that the quasi easement was apparent at the time Blackacre was divided into the North and South parcels sufficient to charge Adams with knowledge of it. This can be established by virtue of the fact that the road was constructed in 1970 by Adams himself, it was then used by Adams and just three years later was conveyed to Dobbs. Based upon a presentation of all of these facts it would be argued that by implication Dobbs expected to have the continued use of the road and that Adams expected Dobbs to use it. This implied easement could be defeated by a showing that Adams and Dobbs did not in fact intend to create an easement, but the given facts do not establish this.

Dobbs might also argue in the alternative that he has an easement of passage in the dirt road by necessity. Here, Dobbs would not have to make a showing of a quasi easement, but would have to demonstrate that the use of North Blackacre was practically impossible without use of the road at the time he received title. Florida statutes specifically recognize an implied grant of an easement by necessity if no other reasonable and practicable means of ingress and egress exists and the easement is reasonably necessary for the beneficial use and enjoyment of the subject land. This might be persuasively argued as there appears to be no alternate road access that exists to reach North Blackacre. To the contrary, Post would submit that since Dobbs owns Greenacre which abuts North Blackacre he is not denied access to the property. The court would have to make a finding of fact here and even if Post prevailed in his argument that Dobbs has no easement by necessity Dobbs would still have a strong case that he has an easement by implication.

B. Scope of the Easement.

If Dobbs is successful in demonstrating that he is possessed of an easement over South Blackacre, Post will pursue a limitation on Dobbs' use of the road.

Should Dobbs be found to have an easement by implication, his use of the road will be limited to the scope of Adams' prior use of the road. Some reasonable extension or change in use is generally allowed in these circumstances. However, a change in use of the road from that associated with a farming operation to that of a mining operation would likely be considered to be an intensification of use and an unpermitted overburdening of the easement. If Dobbs can show that his use of the road will be comparable to that of Adams, his use of the easement could not be enjoined by Post but would be so limited. Post would be successful in enjoining Dobbs' proposed extension of the road to reach Greenacre, as this has consistently been found to be an automatic overburdening of an easement when it is extended from its original use to provide a way to another property.

Should Dobbs be found to have an easement by necessity, his use of the road will be limited to the necessity that created the easement. Dobbs' necessity argument is primarily based on a lack of access. It would be reasonable to conclude that an expansion in the scope of the easement from access, to an accommodation of mining operations, would be considered an overburdening of the easement and would not be allowed.

C. Termination.

Should Dobbs be found to have an easement by necessity and proceed to extend the dirt road to reach Greenacre as he has proposed, his easement by necessity would thereby be terminated as the necessity of use of the road over South Blackacre for access to North Blackacre has ended by his provision of the alternate access.

Post might also pursue the available argument that whatever easement may have existed in favor of Dobbs has been terminated by the fact that Dobbs did not use the road for some ten years. Mere non-use of the road would not serve to terminate the easement. Post must show that Dobbs did not use the road and that this non-use was coupled with either an intent to abandon his rights in the road, or, that Post relied to his detriment on Dobbs' non-use of the road. It appears that Post would be hard pressed on the facts to make a showing of either circumstance.

Post might argue that the easement has been terminated in that it has been destroyed by overgrowth and now stands undetectable. This type of termination is usually found where the estate itself has been destroyed as in a right of passage through a building being ended when the building is destroyed by fire. Dobbs would prevail in an argument that the easement has not been terminated by destruction. Dobbs would be found to be the party obligated to repair the easement and may enter South Blackacre for this purpose.

Post is left to argue that his status as a bona fide purchaser for value of South Blackacre should protect him from a finding that an easement over the property exists in favor of Dobbs. Were this an express grant or reservation of an easement to Dobbs then Post would be correct. However, Dobbs relies on a finding of an easement in his favor by operation of law; by implication or in the alternative by necessity. These easements are by their very nature not recorded and are thus outside of the protections and requirements of the recording system. Post's status as a bona fide purchaser for value of South Blackacre would not serve to terminate Dobbs' easement.

III. Conclusion.

A strong argument can be presented by Adams or Post that Dobbs' use of North Blackacre must be limited to agricultural and related activities as stated in the covenant in his deed. Dobbs will counter that the limiting language in his deed is merely precatory language and is not binding or enforceable against him.

If Dobbs prevails in his argument that his use of North Blackacre is not limited to agricultural and related activities, then his mining operation can proceed, but his use of the dirt road will be limited in scope to that which would be substantially similar to the use of the road previously employed by Adams.

ANSWER TO QUESTION #16

It appears that A conveyed Greenacre to B subject to the condition subsequent that the premises not be used in connection with the sale of alcoholic beverages. Since that interest is devisable, Y, rather than M, would succeed to the rights of A, namely, inheriting the right of entry for condition broken. It would also appear that the condition was broken because the parking of automobiles on a lot which serves as a parking lot to a restaurant serving alcoholic beverages is using the premises in connection with the sale of alcoholic beverages. An argument could be made that the parking use is too attenuated from the actual sale to consider the lot as being used for this purpose. Since the words "in connection with" are very broad, the court should hold that the use constitutes a breach of the condition. However, since under Florida Statutes §689.18, a fee simple subject to a condition becomes a fee simple if the condition is not broken for twenty-one years after the conveyance and since that twenty-one year period expired in 1976, Y would not be able to regain possession of the land as the result of its use as a parking lot. C holds good title by a quitclaim deed, and would be able to continue its use.

It is unlikely that the provision in the deed could be enforced as a covenant running with the land because it does not appear that Y owns any benefited land. It likewise cannot be enforced under a contract theory because C is a remote grantee.

Comment: Even though this question could be answered quickly by one with a knowledge of the Florida statute, an analysis of all the issues presented is important.

TORTS ESSAY QUESTIONS

QUESTION #1

Sally Sly owned a five-unit apartment building in Florida. She rented apartment number one to Gary Grabit, who used it to run a gambling parlor. Sly was aware of Grabit's illegal use of the apartment, but she neither participated in the gambling nor shared in the profits.

Apartment number two, next door to Grabit's, was then rented by Harvey Hardluck and his wife, who occupied the apartment as their residence. On the first evening in their new apartment, there was a heated argument over a bet in Grabit's apartment, in the course of which Grabit intentionally fired a shot at Charlie Cheater. The shot missed Cheater, went through a wall and struck Harvey Hardluck in the arm.

Harvey went to Dr. Quackenbush to have his arm treated, but died when Dr. Quackenbush administered an overdose of Novocain during the treatment.

Harvey's wife comes to you for advice. Under what theory or theories can she sue; whom should she sue; what damages can she hope to recover; and what are the defenses that will probably be raised?

Do not discuss any claim that may be made against Dr. Quackenbush.

QUESTION #2

Charity, an employee of the local chapter of the American Red Cross, acting within the scope of her duties, recently purchased an extension cord to connect the Red Cross blood bank's refrigeration unit to an electrical generator in anticipation of the imminent arrival of hurricane Matthew, which she feared might cause an electrical blackout. She bought the cord, which was manufactured by Electo, Inc., from Harry's Hardware, an owner operated store, without telling Harry why she wanted the cord.

Charity hurried back to the blood bank and connected the extension cord. During a brief test of the generator that afternoon she noticed that the cord gave off a slight odor of burning rubber and was hot to the touch.

Late the next night, as feared, hurricane Matthew arrived and knocked out all electrical power. The emergency generator automatically switched on, but the extension cord overloaded and caused a fire which destroyed the stored blood, valued at about \$16,000. Because of large numbers of injuries caused by Matthew, blood was in great demand and soon all other reserves were exhausted. Unfortunately, before new donors could be found, John Morta, an injured volunteer fireman, died due to the unavailability of blood for transfusion purposes.

In separate tort actions, the Red Cross sues Electo and Harry's for the value of the ruined blood, and Morta's personal representative sues Harry's, Electo and the Red Cross for wrongful death. All parties have stipulated, where appropriate, to the following:

(1) Electo used reasonable care in designing the cord and could not know the design was defective at the time of the manufacture, though the design was in fact defective and no reasonable manufacturer who did have knowledge of the defect would market the cord.

(2) Harry's had no way of knowing of the defect.

(3) There would have been sufficient blood for all needs, including Morta's, had the refrigeration unit's blood not been spoiled.

Discuss the legal issues presented in each of these two lawsuits as to both liability and defenses. Do not discuss implied or express warranties.

QUESTION #3

Builders, Inc., an architectural and construction company, needed additional office space. The company designed a new building for its own use and began constructing the building on vacant land the company owned in Ocean County, Florida. While the building was under construction, a portion of it collapsed. The cause of the collapse could not be determined. It occurred without warning during fair weather and without any apparent external force.

Laborer, a construction worker employed by Builders, Inc. was on an unpaid lunch break at the time of the collapse. He had purchased his lunch from a delicatessen across the street and had returned to the construction site to eat his lunch when a wall fell on him. Laborer was killed instantly. The same collapse dropped a steel beam on Inspector, an Ocean County building inspector, who was conducting a routine inspection of the construction site. Inspector suffered severe head injuries. The construction site was posted as a "Hard Hat Area" and Builders, Inc. furnished hard hats to all employees and visitors. However, neither Laborer nor Inspector were wearing their hard hats when the collapse occurred. The injuries to Laborer and Inspector would have been prevented if they had been wearing hard hats.

Officer, a policeman on patrol in the area, saw the collapse and went to the construction site to provide assistance. While helping to evacuate workers from the site, Officer slipped on some of the rubble of the collapsed building and injured his knee.

Is Builders, Inc. liable for: (a) the death of Laborer; (b) the injuries to Inspector; (c) the injuries to Officer? Discuss.

QUESTION #4

Builder is the general contractor under a contract with High Rise, the owner, for the construction of an apartment building. Builder subcontracts the steel erection work to Erector. Erector leases a crane from Craneco to assist in the steel erection, and Craneco provides one of its employees, Joe Joint, to operate the crane. Joint is normally a good operator, but Joint has a habit of smoking marijuana on the job and has been convicted for possession of marijuana three times. High Rise, Builder, Erector and Craneco all have workers' compensation insurance.

One day, when work is a little slow, Joint accepts the offer of Roach, an employee of Builder, to smoke some marijuana. After getting thoroughly stoned, Joint decides to demonstrate his skill as a crane operator to Roach. Joint asks Roach to set a soft drink bottle on a 15th floor beam and tells Roach that he (Joint) can knock the bottle off the beam with the headache ball of the crane. Joint then swings the boom, missing the bottle with the headache ball, but striking Ron Riveter, an employee of Erector working on the same beam. Riveter falls 15 floors to his death.

Riveter's widow comes to you for advice about a suit for the wrongful death of her husband.

What would you advise her about her potential theories of recovery, the potential defendants and their probable defenses?

QUESTION #5

In 1969, Press-it Industries designed and manufactured a machine. Shortly thereafter, they donated it to Handicap House, a nonprofit corporation.

In 1981, while employed by Handicap House, Harry Hardluck got his hand caught in the machine during a moment of inattention. The machine had been designed and manufactured without a safety guard.

Although Harry's injury was relatively minor, his hand was ultimately amputated because of the malpractice of Dr. I. M. Quack, M.D., in treating the minor injury.

Handicap House did not have worker's compensation insurance, nor was it self-insured for worker's compensation although not exempted by law.

Harry Hardluck comes to you for advice.

Discuss his causes of action, the probable defenses and potential third-party actions.

Discuss the possible claims and defenses among the parties.

QUESTION #6

John Smith owns the Daily News, which is the only newspaper serving Jonesville and surrounding Beaver County. Smith has been conducting an editorial campaign sharply critical of the locally owned Beaver Telephone Company.

At a recent meeting of the Jonesville Rotary Club, Alexander Graham, the President of Beaver Telephone Company, delivered a talk. In his talk, Graham described his Company's efforts to attract new industry to Jonesville and stated that his Company had been handicapped by journalists "who knew nothing about journalism" and "who were writing editorials against the telephone company just to sell newspapers."

A number of advertisers have threatened to withdraw advertising from Smith's newspaper, and the Smiths, although popular guests in the past, have not been invited to a single party since the Graham speech was made.

May Smith recover damages from Graham and upon what theories? What damages may be recovered and what defenses is he likely to meet upon these facts?

QUESTION #7

Mrs. A, a widow, was cleaning the bedroom of her son in their home in the suburbs of Orlando, Florida. She discovered that her ten-year-old son had collected several snakes from the neighborhood. Son, an honor student in science at a school for gifted children, had "tagged" the snakes with a label containing his name and address. Mrs. A told her son to "get rid of the snakes right now," and returned to her chores. Son immediately released the snakes, still "tagged," into the front yard of the A home.

Several hours later, one of the snakes made its way through the open door of a truck parked at the street curb in front of the A home. The truck was owned by a utility company and B, its driver, was out of the truck reading meters in the neighborhood. When B returned to the truck, he did not notice the snake and drove away. After B had driven two blocks, the snake crawled onto his foot. B panicked, and, in an attempt to apply his brakes, pressed heavily on the accelerator. The truck went out of control and struck a tree in front of the C home, and B was injured. Mrs. C's six year-old daughter had been playing near the tree, but, unknown to Mrs. C, had returned indoors, leaving her tricycle near the tree. Hearing the crash, Mrs. C looked out the window and saw that the toppled tree had crushed her child's tricycle. Mrs. C suffered immediate fright, which subsided a few minutes later when she discovered her child safely within the house. However, Mrs. C experienced nightmares about the incident for more than a year after that.

Discuss the issues likely to arise between the Plaintiffs and Defendants in the following lawsuits filed in the courts of the State of Florida.

(1) B against Mrs. A and Son for his injuries suffered when his truck struck the tree.

(2) Mrs. C against Mrs. A, Son, and B for any damages she has sustained.

Discussion should be limited to issues likely to arise between Plaintiffs and Defendants, and should not include issues arising among Co-Defendants.

QUESTION #8

Barry Builder was building a house on a lot he owned across the street from Kiddyland public playground. Green Lumber Company delivered a load of lumber to the building site and placed it in a pile five feet high and two feet wide. A carpenter, Jack Hammer, was the only employee of Builder present on the site that afternoon. He was busy at the time delivery was made. He glanced at the stack, but because he was unable to verify the quantity, he did not sign the delivery slip.

The next day, Patty and Paul Parent, with hangovers from Saturday night's festivities, left their four-year-old son, Peter, to play at Kiddyland. Peter spotted the stack of lumber and went over to play on it. While he was playing around it, the pile of wood fell on Peter, breaking both legs.

Discuss the possible action, if any, against the Parents, Builder and Green Lumber Company and possible defenses to such actions.

QUESTION #9

Subcontractor was conducting an excavation project near a major highway with dynamite it had previously manufactured, sold and delivered to Construction Company under a written guarantee against detonation by car or CB radio. As an extra precaution, Subcontractor posted a large sign beside the highway five miles from the excavation site in each direction which read: "Warning. Dynamiting Next 10 Miles. Turn Off Car Radios and CB Radios." Driver saw the sign but decided to disregard it. As a civil engineer he knew that explosives are normally manufactured safe from radio waves. He was transmitting on his CB radio when his car reached the excavation site. The CB radio waves detonated dynamite at the site and the enormous explosion which followed so frightened Driver that he swerved sharply, lost control of his car, and went into a ditch. It was a Sunday and Subcontractor was conducting blasting operations at that time. Driver suffered serious personal injuries and damage to his automobile.

Driver would like your opinion as to all theories for establishing the liability of Subcontractor and any defenses Subcontractor might have. Do not discuss "No Fault" automobile statutes.

QUESTION #10

During Store Owner's annual "warehouse sale" the warehouse was jammed with shoppers. Loudspeakers blared out special bargains. Store Owner had meant to hire additional store detectives to watch out for shoplifters, but he had forgotten to do so.

At about 3 p.m., a crowd had assembled near one counter in response to an announcement that recorders would be marked 50% off, as soon as a whistle sounded. At the signal, the crowd surged forward, pushing and shoving. Customer 1, part of the crowd heading toward the counter, was injured as she was pushed against the counter.

At 4 p.m., some youngsters spilled soda pop near a refreshment stand on the premises. An hour later, Employee observed Shoplifter putting several cameras into his shirt and ran toward him. On noticing Employee, Shoplifter took flight; and the chase began, through crowded aisles. Employee slipped on the soda pop puddle (which apparently had not yet been discovered by any employee) and crashed into Customer II, injuring her (Customer II). Meanwhile, Shoplifter, having taken unconscious Customer II's handbag, escaped (never to be heard from again).

Employee was aware of Store Owner's instruction "to use utmost care, in dealing with suspected shoplifters, to assure customer well-being."

Store Owner was absent during the sale.

Advise Store Owner as to any legal obligations to Customers I and II.

QUESTION #11

The Central Lime Company uses nitroglycerin for blasting in connection with its business. The company obtains stones from a large open quarry by using nitroglycerin as an explosive to break the stones into small, manageable pieces which are removed from the quarry by trucks. This is the method normally used to mine stones. The quarry is not fenced off, but "No Trespassing" signs are placed in and around the quarry.

The company stores nitroglycerin caps in tins which are placed in wooden boxes. The wooden boxes bear the following warning in bright red letters on the side and the top: DANGER – NITROGLYCERIN. There are no warnings written on the tins. The boxes are stored in a shed which is normally locked but one evening the shed was left unlocked.

Robert Johnson and a friend, each nine years of age, live near the Central Lime Company's quarry. Both Robert and his friend have heard explosions which were caused by the company's blasting operations.

On the evening that the shed was left unlocked, Robert and his friend entered the Central Lime Company's quarry. No employees of the company were present nor had any of the company's employees ever seen children in the quarry. The boys entered the shed, opened one of the wooden boxes, and removed one of the tins.

The boys took the tin to a barn on the property of Robert's parents and stored it overnight. Robert's parents did not learn that the tin was in the barn. The next day, Robert and his friend went to the barn and began to open the tin which carried the nitroglycerin caps. The caps were not labeled or marked in any manner. An explosion ensued and Robert was injured very seriously.

The parents of Robert seek your advice about potential liability for their son's injuries. Would your clients have a cause of action against the Central Lime Company based upon a negligence theory?

Discuss the cause of action and defenses that will probably be encountered.

TORTS ESSAY ANSWERS

“MODEL” ANSWER TO QUESTION #1

Note that this answer has been drafted in the format and style that is demonstrated in the Essay Writing Workshop and “Webinar”. It is not a perfect answer nor does it include every issue that is discussed in the lecture, but you may use this answer to help you visualize the structure and writing approach we teach.

I. Estate of Harvey Hardluck vs. Grabit – Intentional Tort of Battery

Grabit ran a gambling parlor from his apartment. During a fight over a gambling debt, Grabit shot a gun at Cheater. The shot missed Cheater. The bullet went through the wall and struck Hardluck who was in the apartment next door.

Hardluck’s estate would sue Grabit for committing a battery upon Grabit. Generally, to be liable for battery, the defendant must have intended to commit harmful or offensive bodily contact upon the victim. Grabit would argue that he did not commit battery upon Hardluck because he did not intend to injure Hardluck. However, Hardluck’s estate would argue that since Grabit intended to injure Cheater, but instead inadvertently struck Hardluck, that intent against Cheater is transferred over to Hardluck. Under the doctrine of transferred intent, where the defendant has the intent to commit a battery upon someone, his inadvertent touching of a third-person in carrying out that intent will result in battery.

The estate of Hardluck will have a successful battery action against Grabit under the doctrine of transferred intent. It is clear from the facts that Grabit intended to shoot at Cheater, but missed. Since Hardluck was shot due to Grabit’s clear intention to shoot and injure Cheater, Grabit is liable for committing a battery upon Hardluck.

II. Negligence Action against Grabit for wrongful death of Hardluck

As a result of Hardluck being shot in the arm, he went to Dr. Quackenbush. Dr. Quackenbush gave Hardluck too much novocaine and he died as a result.

Hardluck’s wife would contend that Grabit is liable for Hardluck’s death because his gunshot caused his arm injury and ultimate death. Generally, a tortfeasor is liable if he proximately caused injury or death to the plaintiff. In other words he is liable for the foreseeable consequences of his actions. Grabit would argue that he should not be held liable for Hardluck’s death because, although his gunshot may have caused injury to his arm, the doctor’s overdose of novocaine caused his death. Therefore, Grabit would contend that he did not proximately cause Hardluck’s death. Grabit would further assert that he could not foresee that his gunshot intended for Cheater

would ultimately result in Hardluck being given an overdose of novocaine, which caused him to die.

Hardluck's estate, however, would respond by arguing that Grabit, by shooting a gun, could certainly foresee someone, such as Hardluck, being injured. That has been established. Furthermore, it is certainly foreseeable that someone who is injured would seek medical attention. Also, the fact that medical malpractice could occur is undoubtedly a foreseeable risk of seeking medical treatment. In Florida, an independent intervening cause (novocaine overdose), which causes the victim's injury or death will relieve the tortfeasor only when the intervening cause is not foreseeable. Moreover, an intervening cause is considered foreseeable if the harm that occurred was within the scope of the danger attributable to the negligent conduct.

In this case, the estate of Hardluck will prevail in a negligence action against Grabit. The gunshot in Hardluck's arm would cause him to go to a doctor for treatment. Medical malpractice, the negligent intervening act, is a foreseeable risk of going to a doctor. Thus, possible medical malpractice is within the scope of danger that was ultimately attributable to Grabit's conduct. Therefore, even though the novocaine overdose caused Hardluck's death, Grabit would be held at least jointly and severally liable for his death.

III. Negligence Action against Sally Sly for death of Hardluck

A. Negligence Per Se

Sally Sly was the landlord of the apartment building where Grabit shot Hardluck. Sly knew of the illegal gambling operation going on in Grabit's apartment.

Hardluck's estate would assert that Sally Sly is liable for his death. Generally, a landlord owes a duty to tenants to keep the premises reasonably safe. The estate would argue that Sly's behavior of acknowledging and knowing of the illegal gambling amounts to negligence per se. Under negligence per se, Sly would be held negligent and to have breached her duty to Hardluck just by the mere violation of a criminal statute.

Sly would assert in response that she has no liability to Hardluck because she did not participate in the gambling operation and received no profit from the gambling. Furthermore, she will try to argue facts that despite the gambling, the apartment building was secure and safe and there have been no other past instances of violence as a result of the gambling operation. Therefore, she did not breach any duty owed to Hardluck.

Sly would be held to have breached her duty to Hardluck because she knew of the gambling operation in her apartment building. Because this was an illegal operation and the criminal statute was clearly violated, she could be held liable.

B. Proximate Cause

Due to the gambling operation, Hardluck was shot in the arm and died as a result of a novocaine overdose given by Dr. Quackenbush. It has been

established that Sally Sly breached her duty owed to Hardluck by knowingly allowing an illegal gambling operation to take place in her apartment building.

Hardluck's wife would sue Sally Sly for the wrongful death of Hardluck because she allowed for the operation of a gambling parlor which ultimately resulted in Hardluck's death. When a person's breach of duty (which has been established here) results in injury or death, she may be liable for that injury/death if her breach was the legal or proximate cause of the injury or death. Sally Sly would argue that her actions did not proximately cause Hardluck's death because her merely knowing of the gambling operation is too remotely removed from Hardluck's death by a novocaine overdose. Therefore, she could not in anyway foresee the arguments, gunshots, injury or death from her mere knowledge of the gambling. Further, she did not participate in the gambling or initiate any violent act that would precipitate anybody getting injured or dying. She would rely on the well-established rule that tortfeasors are only liable for foreseeable consequences of their actions. The estate of Hardluck would respond by asserting that since Sly clearly knew of the gambling operation, she could foresee that violent arguments could take place. Violence is a known by product of illegal gambling and she should have known this. Her being aware of possible violence would certainly lead her to be able to foresee injuries occurring as a possible result. Of course, if there are injuries, then medical treatment and possible medical malpractice as an intervening act are established foreseeable risks. Again, a tortfeasor is liable for foreseeable intervening negligent acts.

Sally Sly is liable for Hardluck's death. Sly knew of the gambling operation and the possible violence that could result. Since she could foresee the possibility of violence, then injuries and/or death are undoubtedly foreseeable. As established above, possible medical malpractice is a foreseeable result from seeking medical treatment due to an injury. The fact that Dr. Quackenbush's malpractice may have resulted in Hardluck's death does not absolve Sally Sly of liability.

IV. Possible Damages

A. Compensatory Damages

Hardluck was shot in the arm and was alive until his death from the novocaine overdose.

Hardluck's estate would be entitled to damages for his pain and suffering until the time of his death. It would also be able to recover all medical expenses, loss of earnings if he was working as well as funeral expenses. Hardluck's wife would be able to recover compensatory damages for loss of consortium due to loss of his companionship, care and guidance. She could also receive loss of income, which would be based on his expected earning capacity if he had lived. The defendants have no viable arguments against awarding compensatory damages.

Each possible defendant, under the theory of joint liability, would be liable for the entire amount of damages awarded to the plaintiff.

B. Punitive Damages

It is established that Grabit is liable for intentional battery upon Hardluck. Hardluck's estate will assert that since Grabit acted intentionally, he should be ordered to pay punitive damages to Hardluck's estate. Punitive damages are awarded in order to punish the defendant rather than compensate the plaintiff. Currently, in Florida, there is a cap of \$500,000. Grabit could try to argue that his actions did not amount to intentional misconduct or gross negligence upon Hardluck to warrant punitive damages since he did not intend to injure or kill Hardluck. There must be clear and convincing evidence of intentional misconduct or gross negligence in order for punitives to be awarded.

Grabit will be ordered to pay punitive damages since at the very least his action of shooting a gun inside an apartment building amounts to gross negligence. In addition, it has already been established that since he intended to shoot Cheater, that intent was transferred to Hardluck. Since Grabit acted with intent and with gross negligence, he will have to pay punitive damages as determined by the court.

V. Possible Defense

A. Assumption of the Risk

Harvey Hardluck lived in an apartment in a building where an illegal gambling operation was taking place.

The defendants involved could argue that Harvey Hardluck assumed the risk of his injury and death by choosing to live somewhere where there was illegal gambling. Assumption of the risk is a valid defense when the defendant knows and understands the risk and he consents to bear the risk. Hardluck's estate would respond by asserting that neither he nor his wife were told of the gambling operation or previously knew about it.

They did not know of the risk nor consent to it as the shooting happened during their first night at the apartment.

The assumption of the risk defense would clearly fail. There are no facts or evidence indicating that the Hardluck's were aware of the danger of living in the apartment building nor did they voluntarily consent to live somewhere where there was illegal gambling.

ANSWER TO QUESTION #4

Riveter's widow has two potential theories of recovery. She can seek recovery under the Workers' Compensation Statute and she can sue in tort for negligence.

I. Theories of Recovery.

Workers Comp.

The Workers' Compensation Statute provides recovery to claimants or their survivors for injuries or death which occurs during the scope of employment.

An employee is automatically entitled to benefits when the injury arises out of the course of employment. There is no need to prove negligence or tortious conduct on the part of the employer.

Further, the defenses of contributory negligence, assumption of risk and fellow servant do not apply. The worker and the family give up the right, however, to sue the employer who caused the injury. The benefits include hospital, medical expenses and a percentage of lost wages.

In this case, Widow can collect from Erector, because Riveter was an employee acting within the scope of his employment when he was killed. There will be no need for Widow to prove negligence to collect. Of course, Erector may seek contribution from the other defendants, but has no defense against Widow.

Negligence.

Widow may also bring a negligence claim against Joint, Roach, Builder, Craneco, and High Rise. She cannot bring such an action against Erector if she decides to claim under the Workers' Compensation Statute. In order to prevail against the defendant's other than the employer, Widow will have to prove that Riveter's death was caused by negligence. Widow will want to prove that the actions of Joint and Roach constituted a breach of duty owed to Riveter. Clearly, the act of "playing" with the crane while stoned would be construed as a breach of duty of care. Widow will then want to prove that the other defendants were vicariously liable for the actions of Joint and Roach.

A defendant may be liable under some circumstances for torts committed by another person. An employer is vicariously liable for the torts of their employee acting within the scope of employment. In this case, High Rise hired Builder who in turn hired Erector, who leased the crane from Craneco who also employed Joint.

Roach was employed by Builder. It will be necessary to determine the relationship of each defendant to the other in order to determine their liability.

As a general rule an employer is not liable for the torts of an independent contractor because there is no right to control. The test of an employer/employee relationship is whether with respect to the physical conduct of the employee and performance of his service, he is subject to the right of control by the employer. The right of control must not merely relate to the end result. It must relate to the manner and means for bringing about that result. An independent contractor is one not controlled by the other or subject to the other's right to control. Therefore, Widow will have to establish that each was an employee of the other. She may also seek to establish an agency relationship between the defendants. An agent is a person retained by another to deal with third parties and they may be an employee.

Additionally, when engaged in inherently dangerous activities, an employer cannot remove himself from liability by employing an independent

contractor. Therefore, here, it is possible that liability could move up the chain of defendant's from Joint and Roach to Craneco, to Builder and ultimately to High Rise.

Widow will also want to allege negligent hiring on the part of Craneco. When Craneco hired and employed an employee with a record of drug use, it is possible that there was a breach of duty of care. If that breach was the proximate cause of Riveter's death, then Craneco would be liable to Widow for damages. Additionally, it is possible that the other defendants would be vicariously liable for Craneco's negligence.

II. Potential Defendants.

The potential defendants are Joint, Roach, High Rise, Builder, Erector, and Craneco. However, only Riveter's employer Erector can be named in the Workers' Compensation action. If Widow does file a claim for workers' compensation against Erector, she cannot thereafter bring a negligence action against Erector.

III. Defenses.

On the negligence claims, the defendants will primarily want to counter any claim of vicarious liability. In order to be successful, it will have to be established that the companies were independent contractors and not employees. Further, Defendants will want to assert that it was not negligent in hiring Joint. They will also want to assert that Joint was on a "frolic and detour" when operating the crane. They will have to show that he was not acting in the course of his employment. There is no evidence to support the defenses of last clear chance or contributory negligence. Further, as stated above, there are no defenses available on the Workers' Compensation claim.

ANSWER TO QUESTION #5

I. Harry's Potential Causes of Action.

Harry may bring a malpractice claim against Dr. Quack, a claim for strict products liability and for negligence against the Press-It, and a negligence claim against Handicap House.

The statute of limitations has run on any action by any of the parties regarding the contract of sale for the machine.

Harry vs. Dr. Quack.

Malpractice. Harry may sue Dr. Quack for the injuries he sustained due to Dr. Quack's malpractice in treating the minor injury. He may not, of course, recover for the original injury itself. In tort actions, injuries inflicted by the malpractice of attending doctors are considered foreseeable, and damages may be recovered for them. Dr. Quack's malpractice is not an intervening superceding event such as to prevent recovery in tort in any of the other available actions.

Harry vs. Press-It.

Strict Liability. Privity is not required for strict liability for design or manufacturing defects. If the machine left Press-It's premises in a defective condition which posed an unreasonable danger to consumers, and Harry was injured while engaging in a foreseeable use of the machine, Press-It is liable for Harry's injuries. Since the safety guard could almost certainly have been added to the design at minimal cost, Press-It will likely be found strictly liable.

Negligence. Harry may also make a negligence claim for Press-It's failure to design a product that would reach the consumer in a safe condition. Press-It can be held liable for failing to take precautions (such as providing effective warnings) against consumers operating the machine without a safety guard, if that use was foreseeable, regardless of whether that was the intended use. Press-It will likely allege that Harry's negligence contributed to or caused his injury. If Harry somehow came to fully apprehend the danger despite the complete failure to warn him or Handicap House of that danger, and nonetheless proceeded to work with the machine, he may have assumed the risk.

Harry vs Handicap House.

Handicap House's lack of workman's compensation insurance has serious consequences in Florida. It may not only be liable criminally, but also civilly. An injured worker may choose to pursue either (1) recovery of workman's compensation benefits (which requires no showing of employer fault, and is payable regardless of the worker's contributory negligence); or (2) a common law action against the employer, such as for negligence, in which the employer may not offer the affirmative defense of the employee's contributory negligence. Also, under Florida law, charities are subject to the same liability as any other individual or corporation.

Harry will sue for Handicap House's negligent failure to provide a safety guard.

Had it paid insurance premiums for workman's compensation, Handicap House would have been discharged from all obligations other than the workman's compensation claim (including third party actions) related to Harry's accident.

ANSWER TO QUESTION #6

Theories for Recovery.

Smith may bring a defamation (slander) action against Graham, though he is unlikely to succeed.

Defamation is a wrongful invasion of an interest in reputation. Slander is defamation by oral publication. Specifically, a person who orally publishes a false statement "of or concerning" another person, where the statement has a tendency to harm their reputation, and it harms that person's reputation, is liable in damages for slander at common law. It is enough if, in context, the statements could be reasonably interpreted as factual. The context is not available from the question. Since no information is provided clearly

indicating the falsity of the statement, the best approach is to assume this statement was an opinion. Moreover, these kinds of statements are ordinarily viewed by most people as opinions. Although this answers the question, the candidate should examine whether the remaining elements for a defamation action are met.

As the only person writing editorials in Beaver County regarding Beaver Telephone, the identity of the "journalists" Graham spoke of was clear. Although it may aid Smith at the evidentiary stage, nothing requires that Graham have named Smith. Finally, the statements would be interpreted by a reasonable person to have been "of and concerning" Smith, and to have been defamatory in nature.

Since the statement impugned Smith's professional ability, damages would be presumed under Florida law. Moreover, the loss of advertising revenue, if due to the slander, constitutes a specific economic harm. Smith has also suffered a loss of hospitality.

Possible Defenses.

Under First Amendment analysis, a public figure plaintiff must show actual malice (that the defendant acted with knowledge that the statement was false, or with a reckless disregard for the truth.) Although a prominent businessman, Smith has not thrust himself into any controversy, and is clearly not a public figure. Moreover, the common law privilege of self-defense probably applies here. Where a person is attacked, they have the right to respond to defend themselves, and a defamation action will fail.

Punitive damages are not available if the original publication was in good faith, and the newspaper publishes a retraction within a reasonable period of time.

ANSWER TO QUESTION #7

Mrs. A is liable to B for negligent supervision and under a strict liability theory. Son is liable to B under a strict liability theory and for negligence, as well. No one is liable to Mrs. C for negligent infliction of emotional or mental distress.

B vs. Mrs. A and Son.

Vicarious Liability of A for her Son's Acts / Negligent Supervision.

Negligent acts of a child are no longer imputed to the parent, with certain exceptions. In Florida, a parent could be liable if the child has a habit of engaging in the particular wrongful behavior involved, and the parent, through negligent supervision, allows the child to engage in that behavior. Nothing in the fact pattern suggests that releasing snakes in the front yard was a habit of Son's.

Negligence of Mrs. A.

Although Mrs. A is not liable for Son's negligence, she is liable for her own. She helped bring about the unreasonable risk that the snakes would frighten someone by ordering her son to "get rid" of them. It was foreseeable that Son would increase the risk by releasing them in the front yard.

Strict Liability of Mrs. A and her Son.

Under common law and in Florida, the possessor of a wild animal is liable strictly for harms due to the dangerous propensities which are characteristic of animals of that type. Snakes are wild since they are not ordinarily domesticated. One of a snake's dangerous propensities is to cause people extreme fright. Since B lost control of his vehicle due to fright at the sight of the snake, Mrs. A and Son are strictly liable as owners for the harm caused thereby. Had Son successfully returned the snakes to "the wild," the liability would have ceased. Since he released them in the front yard, this is not an available defense.

Children are held to the standard of children of similar age, experience, education and ability. As an honor student in science at a school for the gifted, Son had full knowledge of the dangers involved in his actions, and was therefore negligent as to B.

Mrs. C vs. Mrs. A and her Son.

The only theory of recovery Mrs. C may advance is negligent infliction of emotional distress. It will fail because, although she has suffered physical manifestations of her distress, her child was not injured in the crash. In Florida, a person in close proximity to an event may recover only if a person is negligently injured, and the injured person is a family member. Although she believed briefly that her daughter had been hurt, she had not been hurt in actuality.

Moreover, each possible defendant has a defense under usual negligence principles. B acted as a reasonable person might be expected to act in a sudden emergency. Mrs. A was most likely not a proximate cause due to the bizarre connection between her acts and the injury to Mrs. C. On a negligence count against Son, it seems clear that too many causal steps separate Mrs. C from Son. Simply stating it makes the result clear. She would have to claim that her emotional distress was caused by her inferring an injury to her daughter, which inference was caused by her viewing a mangled tricycle, whose mangling was caused by an accident which was caused by B's fright which was caused by the snake's presence in the truck, which was caused by Son's release of the snake. In her claim against Mrs. A, Mrs. C would have to allege in addition that all those events were caused by her ordering her Son to "get rid" of the snakes. Similar logic prevents recovery under a strict liability theory, since snakes do not have a "dangerous, characteristic propensity" to cause emotional distress in people who see harm which was caused by their frightening someone.

ANSWER TO QUESTION #8

Peter vs. Builder.

Attractive Nuisance.

Peter may have an action against Builder for negligently maintaining an attractive nuisance on his premises or against Green Lumber for negligence. Children are not responsible for the negligent acts of their parents, an argument that Parents' negligent supervision of Peter was contributory negligence will not reduce Peter's recovery. However, Parents' negligence may render them liable to indemnify anyone held liable, to the extent their fault contributed to the injury.

Negligence.

In Florida, people invited, and people licensed to proceed, onto an owner's property are owed by the owner a reasonable duty of care regarding the conditions of the property, and a duty of reasonable care to seek out unreasonable dangers and either cure them or provide adequate warning. An owner owes people on the owner's property without invitation a duty to warn of dangers the owner knows about, but not a duty to warn of obvious and not inherently dangerous conditions. Owners only owe trespassers a duty to refrain from willful and wanton conduct.

First of all, Peter entered the property without invitation, and Builder is responsible for conditions on his property regardless of whether a delivery slip was signed. bringing into play a duty to warn of known dangers. One question arises as to whether the "obviousness" of a danger changes according to the sensibilities of the person encountering the danger. Common sense answers: "probably," and surely a jury would find it so. Thus, since Peter mostly likely did not consider the dangers posed by a precariously stacked pile of wood to be obvious, the owner, Builder, is liable for the negligent failure to provide adequate warning.

The candidate should also recognize, and note in any answer, that the fact pattern contains a genuine "attractive nuisance" issue. Attractive nuisance analysis (in the rare cases in which it is applicable) is really nothing more than a sub-set of the foreseeability question. Florida has rejected the Restatement view, and holds that a so-called "attractive nuisance" plaintiff must allege that he or she was allured onto the property by the dangerous condition. It is not sufficient that the plaintiff discovered the condition after entering the property. Thus, the "attractiveness" aspect of the foreseeability question is whether it was foreseeable that a child such as four-year old Peter would see the stack of lumber, then enter Builder's property. That the property was located across from Kiddieland provides the candidate the damning evidence that indeed, this eventuality was foreseeable. In addition, it is almost as clear that a stack of wood five feet high and two feet wide is a dangerous condition.

In conclusion, if it was foreseeable that a child who would fail to perceive the danger as "obvious" would furthermore encounter the dangerously stacked lumber, then Builder owed a duty to adequately warn or prevent access.

Peter vs. Parents.

Note at the outset that, although in Florida a failure to supervise renders a parent liable for torts committed by children who are in the habit of committing the particular wrongful act involved, Peter has not here committed a tort.

Parents in Florida are no longer held responsible for the torts of their children. Thus, the arguably negligent failure of Parents to adequately supervise Peter will not reduce Peter's recovery. Under Florida statute, joint tortfeasors must be liable for contribution to the extent of fault, but under case law, parents are liable for negligent acts towards their children only up to the amount of any insurance coverage for such acts. In the absence of such coverage, Builder and Green Lumber are jointly and severally liable for the entire amount of economic damages, but only for the percentage of the total noneconomic loss attributable to their fault.

Peter vs. Green Lumber.

Green Lumber may have been negligent in stacking the wood as they did. A showing that such stacking was common business practice may help, but is not conclusive. It seems plausible that a reasonable deliveryman might expect wood on a construction site to be swiftly moved. Nevertheless, given that the building site was across from Kiddieland, Green Lumber's duty to avoid creating a dangerous condition was slightly higher.

ANSWER TO QUESTION #9

Theories of Recovery.

Strict Liability.

Subcontractor is strictly liable for the consequences of engaging in an ultrahazardous activity, and for negligently failing to adequately warn of the danger. He may also be liable for a failure to close the road or failure to adequately test the dynamite given the location of the excavation site.

Any person engaging in ultrahazardous activity is strictly liable (i.e. fault or negligence need not be shown) for injuries resulting as the natural, foreseeable consequence of that activity. Ultrahazardous activity is defined as an activity involving a risk of serious harm which cannot be eliminated by the utmost care, and which is not commonly engaged in. Conducting an excavation project involving dynamite such as subcontractor did here, despite the apparent use of utmost care in manufacture, fits this description. Since, Driver's swerving into a ditch was a natural and probable consequence of the explosion, Driver has a case for strict liability.

Negligence.

Subcontractor may also be liable under a negligence theory. The warning, since it was given five miles before the site, and did not specify for how long CB's should be turned off, is likely to have been inadequate. Second,

reasonable care would appear to mandate the closing of a major highway while dynamiting is proceeding nearby. Finally, a reasonable excavator intending to detonate dynamite near a highway has a duty to adequately test the dynamite to ensure that radio waves from cars or other sources do not in fact trigger any unwanted explosions

Defenses.

Contributory negligence is sometimes a defense in such cases, however. In other words, if the victim of an ultrahazardous activity tort unreasonably put himself or herself at risk despite knowledge of that risk, the award against the defendant will be reduced by the percentage of fault attributable to plaintiff's negligence. The trick to this question is that although most reasonable people would have known of the risk of using CB radios from the sign, assuming it provided adequate warning, the reasonable civil engineer, with Driver's specialized knowledge may not have "known" of this risk.

Therefore, he arguably, could not have knowingly put himself at risk. In the end, he will probably be found partly responsible, since, a reasonable person might still consider the "knowledge" that explosives are "normally" safe from radio waves to be insufficient to outweigh the risk of tremendous harm that could come from operating a CB in that circumstance.

ANSWER TO QUESTION #10

I. Duty to Invitees.

Store Owner is liable to both Customers I and II for his own negligence and for that of his employees acting within the scope of their employment.

A property owner owes a duty toward invitees and licensees to use reasonable care in keeping the premises safe, and a duty to seek out hidden dangers ("duty to inspect") and either make them safe or provide adequate warning of them. Business customers are invitees. Remember that the whole purpose of a store front is to "invite" customers. Thus, Customer I and Customer II were invitees, to whom owner owed the duties outlined above.

Customer I.

Negligence. Store Owner is liable to Customer I in negligence (both vicariously and directly) for the failure to prevent a rush at the recorder counter. Florida follows the majority rule regarding respondeat superior, which holds an employer liable for torts committed by an employee acting within the scope of the employee's duties. Sale announcements are presumably acts within the scope of employment. In fact, it can be presumed that the "50% whistle-sale" ploy had to have been cleared by Store Owner himself.

Store Owner is liable for the unreasonable creation of a situation in which both the risk of a surge in the crowd at the sound of the whistle, and the injury to Customer I from then being pressed against the counter were foreseeable and preventable. Store Owner may also be directly liable in negligence to

Customer I for these acts and omissions. His absence alone does not absolve him of responsibility.

If Employee failed to exercise due care in choosing to chase Shoplifter through crowded aisles (which posed, among other risks, the risk that, in a crowd, either the pursuer or the pursued would fail to notice an obstruction or dangerous condition, and thereby cause injury to one or more customers), Store Owner is liable to Customer I through respondeat superior. Store Owner will probably offer as evidence of the scope of Employee's employment his instruction "to use utmost care" regarding pursuit of shoplifters, but such evidence is not considered conclusive of that scope.

B. Customer II.

The negligent failure of Store Owner's employees to notice the spilled soda and to either mop it up or erect a warning sign within one hour, which caused Employee to slip and injure Customer II, renders Store Owner vicariously liable to Customer II. Furthermore, as the property owner, Store Owner will directly be held negligent toward his invitee due to the dangerous condition.

Finally, one might argue that the absence of more detectives to watch for shoplifters could be considered a but for cause of the injury to Customer II, since the sight of more detectives may have deterred Shoplifter from stealing the cameras in the first place. This "failure to hire" angle probably stretches proximate cause too far, however.

ANSWER TO QUESTION #11

Causes of Action.

Strict Liability.

Robert's parents should try to base their cause of action in strict liability to avoid the chance that the doctrine of comparative negligence would be applied to reduce their recovery. Strict liability is applicable in products liability and nuisance cases. This is not a products liability case as against Central Lime, since Central Lime was not a supplier or retailer engaged in selling nitroglycerin. Nor is this a nuisance case, since there is no evidence of a continuing substantial interference with the plaintiffs' property and the damages claimed are for personal injury.

Obviously, blasting with nitroglycerin is an ultrahazardous activity, indicating that strict liability could be found under the Restatement of Torts, 2d. Under the Restatement rule, an activity is ultrahazardous if it necessarily involves a risk of serious harm and it is not a matter of common usage. (§520). Blasting is an activity which meets both of these criteria. However, the plaintiff must be a person that "the actor should recognize is likely to be harmed by the unpreventable miscarriage of the activity." (§519). A foreseeable plaintiff would be anyone in the vicinity while blasting operations were going on, but it is questionable whether a trespasser stealing the tins of nitroglycerin and opening them on other property would be a foreseeable plaintiff. Furthermore, Robert was not injured by Central Lime in

the course of the blasting activity itself. For these reasons, strict liability is not the proper basis for recovery.

Negligence.

If Robert and his parents cannot justify the application of a strict liability standard to these facts, their action against Central Lime must be based on negligence. A negligence action requires an analysis of the nature of the duty owed by the defendant to the plaintiff.

The duty here is that of an owner or possessor of property to persons entering on the land. However, in Florida, the duty toward trespassers is only to refrain from willful and wanton conduct. Central Lime's failure to label the tins of nitroglycerin or to lock the shed would fall short of willful and wanton conduct.

Attractive Nuisance.

There may be recovery for Robert's injuries, however, if the attractive nuisance doctrine is applied. The attractive nuisance doctrine would hold the defendant responsible to exercise ordinary reasonable care toward children trespassing on the land if the defendant knew or had reason to know that children were likely to trespass and be seriously harmed by an artificial condition on the land. Here, the company had no knowledge of child trespassers, but such trespassers might be considered foreseeable in an open quarry. Florida requires that the child have been "lured" onto the property by the nuisance, but that requirement would seem to be met here since Robert and his friend had heard the explosions from the blasting operations.

Assuming that Central Lime owed Robert and his friend a duty of due care, the next question is whether Central Lime breached that duty. One indication of negligence is the fact that Central Lime had not fenced off the quarry. Even when blasting operations were not underway, an open quarry, like a construction site, would often be both attractive to trespassers such as children and inherently dangerous. In these circumstances, the posting of "no trespassing" signs would not suffice to reduce the risk of harm to foreseeable trespassers. Other evidence of negligence consists of the facts that the shed was left unlocked on the evening in question and that no label or warnings were on the tins of nitroglycerin themselves, although a warning was on the boxes. It is not clear that a warning on the tins would have affected the outcome here, however, since the boys had an opportunity to see the warning on the wooden box but perhaps the average child that age would not be able to comprehend the nature of the danger warned against. Thus, any negligence found on the part of Central Lime would probably be based on the failure to fence the property and to lock the shed, rather than from a failure to provide warnings.

In a negligence action, the plaintiffs' recovery would be reduced by the degree of their own negligence, since Florida has adopted pure comparative negligence. The boys might be found to have been negligent in not heeding the warnings on the boxes, and their parents may have been guilty of negligent supervision. To the extent that such negligence can be shown, it would reduce but not preclude the plaintiff's recovery. Assumption of the risk

is not a separate defense in Florida and in any event would depend upon whether these particular children are found to have been mature enough to comprehend the risk involved in their activities.

TRUSTS ESSAY QUESTIONS

QUESTION #1 (DISCUSSED IN LECTURE)

In early 1990, Leon drafted a will for Sophie, who had no previous will. It provided a \$500 bequest to Sophie's secretary and the residuary to ". . . my lawyer Leon and my nephew Nino. I wish them to apply the funds for the benefit of such worthy public beneficiaries, in such amounts and at such times, as they, in their sole discretion, may determine, thereby perpetuating my memory." The will also allowed "generous trustees' fees." Sophie died on May 15, 1990, leaving \$100,000 cash and neither spouse nor child.

Nino, liking neither Leon nor the fact that he was not a direct beneficiary, has not participated in the affairs of the estate or trust, beyond signing documents prepared by Leon. (Nino has not taken any trustee's fees, either.)

Leon deposited the \$100,000 in his firm's general checking account. Since 1990, he has disbursed \$10,000 to various charities, \$500 to Sophie's secretary, \$5,000 to his firm for the estate's legal fees, and \$1,000 per year as his trustee's fee.

Nino has a brother and two sisters. There are no other persons with a blood relationship to Sophie. Discuss the issues raised by the above fact situation as they relate to rights and responsibilities and liabilities of the parties mentioned. However, do not discuss violations, if any, of the Rules of Professional Conduct.

QUESTION #2 (DISCUSSED IN LECTURE)

On October 2, 1988, Settlor, a resident of Florida, entered into an inter vivos trust agreement with Trustee T, a Florida corporation with trust powers, and transferred certain assets in trust to Trustee T. Those assets consisted of various life insurance policies insuring the life of Settlor. In respect to the life insurance policies, the Trust Agreement provided that Settlor transferred and assigned to Trustee T "all his rights, title and interest in said policies in trust to collect the proceeds of said policies upon maturity and to pay over the same unto the trustee or trustees named in Settlor's Last Will and Testament to be held by them in accordance with the terms of the Will."

On February 1, 1989, Settlor executed a Will which provided in pertinent part:

Article III

Pursuant to the terms of a certain Trust Agreement heretofore executed by me on October 2, 1988, I direct that Trustee T transfer to my Trustee named herein the proceeds of those life insurance policies held in trust by T. I name X, a Florida corporation with trust powers, as my Trustee hereunder and direct X to hold such sums in trust to manage, invest and reinvest the same in such manner as is reasonable and prudent in X's judgment and pay to my daughter Doris, \$1,500 each month together with such additional amounts

of income or principal, or both, as Trustee X may in its absolute discretion deem advisable. The beneficiary's interest in the trust created under this Article may not be pledged, assigned, sold, transferred, alienated, encumbered or anticipated by such beneficiary in any way; nor shall any such interest in any manner be liable for or subject to the debts, liabilities or obligations of such beneficiary or claims of any sort. Upon the death of my daughter Doris, Trustee X shall distribute equally any undistributed income and principal of the trust to Doris' children who reach the age of 30.

At the time that Settlor executed the Will, Doris was married to Henry Smith. In August 1989, Doris and Henry were divorced. Settlor died in November 1989, leaving Doris as his only living relative. Probate proceedings were initiated in the appropriate county in Florida.

One of the persons interested in the probate proceeding is Henry Smith, who is seeking to reach whatever assets Doris receives from the estate. Doris has not paid Henry the past year's alimony payments which had been set by the Court in the order dissolving the marriage.

Assume that the Will of February 1, 1989, is Settlor's Last Will and Testament and that it was validly executed.

Discuss the rights, interests and liabilities of Doris and Henry.

QUESTION #3 (DISCUSSED IN LECTURE)

Testator died a resident of Florida. His will established a trust under which the trustee, Last National Bank, was to make monthly payments of the trust income to Testator's widow. Testator's trust also gave the trustee the power, in its sole discretion, to invade the trust principal for the comfort, maintenance, and support of the widow. At the widow's death, the trustee was to terminate the trust and distribute the trust principal and accrued unpaid income to Testator's children.

After funding from Testator's estate, which was completed one year after Testator's death, the trust corpus was comprised as follows:

(a) Vintage United States government bonds bearing interest at three percent (3%) per annum constituted twenty-five percent (25%) of the value of the trust corpus.

(b) Ten thousand (10,000) shares of voting common stock of a corporation which owns a highly successful and prosperous professional football team known as the Semitors constituted fifty percent (50%) of the value of the trust corpus. The stock represents a one-third (1/3) interest in the Semitors corporation and pays generous dividends, averaging ten percent (10%) per annum over the last fifteen (15) years. Testator's family has owned the stock for years because Testator's father was a founding stockholder and director of the Semitors corporation.

(c) Five (5) acres of vacant land next to a twenty-five (25) acre undeveloped parcel constituted twenty-five percent (25%) of the value of the trust corpus. Shortly after Testator's death, the owner of the large, adjoining parcel announced that a shopping center would be developed thereon in about two (2) years.

Testator's trust gave the trustee broad discretion to retain any and all assets except the vacant land, which Testator directed to be sold "as soon as possible and feasible." The trust also provided that it was the Testator's firm desire that "my Semitors stock be retained by my trustee, and it shall incur no liability in doing so."

Within a few months after Testator's death and continuing for more than a year after the trust was funded, the widow wrote the trustee numerous letters demanding the sale of the vacant land and urging the retention of the Semitors stock. Nevertheless, the trustee sold three thousand (3,000) shares of the Semitors stock at the going price. After the widow received the trustee's annual accounting, which disclosed the stock sale, she called the trustee numerous times and wrote the trustee several vehement letters demanding the sale of the vacant land and the retention of the Semitors stock. The trustee did not answer her calls or letters. It is now nine months after the widow received the annual accounting, and the trustee has sold two thousand (2,000) more shares of the stock and has retained the rest of the trust assets.

The widow believes that Last National Bank has mismanaged the trust assets. She seeks your advice as to what her rights are. Discuss the issues, the advice you would give the widow, and the basis for your conclusion. Do not discuss any tax issues.

QUESTION #4 (DISCUSSED IN LECTURE)

In January of 1977, S entered into a written irrevocable trust agreement with T as Trustee. The trust provided that the income was payable to A for ten years. After ten years the trust was to terminate, with trust assets to be distributed as follows:

a one-fourth share to B; a one-eighth share to those great guys from our football team that I saw at the twentieth high school reunion; a one-eighth share to C but only if he survives A; and a one-half share to my elementary school for the purchase of visual aid equipment.

The following facts are relevant: C died in 1980; S's elementary school closed down in 1981 due to insufficient enrollment; and in 1982, Victim, a judgment creditor of B, demanded immediate payment of \$20,000 from T. In addition, S died in 1982, leaving his entire estate to X, without having furnished any information to T regarding the football team members who attended the twentieth high school reunion. As of 1983, the trust consisted of \$100,000 which had been prudently invested in money market funds.

T has sought your advice regarding Victim's claim and how the trust assets will be distributed on termination. What are the issues involved? What would be your response to T?

QUESTION #5

In January of 1979 S entered into a written irrevocable trust agreement with T as the Trustee. The sole asset of the trust, which S conveyed to T as Trustee, was Florida income-producing real estate having a value at that time of \$50,000. The trust provided that the income was payable to A for life and on his death the trust was to terminate and the trust assets were to be distributed to B. The trust provided that A's life estate was subject to the usual spendthrift clause, and the Trustee was specifically directed to retain the real property as a trust asset.

In early 1980, the value of the property having appreciated, the Trustee was of the opinion that it should be sold and thereupon obtained the written consent of S to do so. In July of 1980, T individually purchased the real estate for its then fair market value of \$70,000.

In August of 1980, B assigned his remainder interest in the trust to A. Thereupon A requested the Trustee to proceed to terminate the trust and distribute the trust assets to him. The Trustee refused, claiming that he needed the approval of S.

Discuss:

- (1) the validity of B's assignment;
- (2) A's right to compel termination; and
- (3) any other causes of action A might have against T.

Assume that the proceeds from the sale of the real estate were invested, that the real estate now owned by T has a present market value of \$80,000, and that all parties are residents of this state.

QUESTION #6

In 1972 Al executed a written declaration of trust naming Bart and Chuck as trustees and transferred assets worth \$250,000 to them as trustees. The trust provided: "After taking care of the material wants of my immediate family, trustees shall use the trust income to further the development of new forms of transcendental psychic experience for the spiritual enrichment of mankind." The trust declaration, which had been drafted by Chuck, further provided: "In their administration of the trust, trustees shall not be liable except for gross negligence or willful misconduct."

At the inception of the trust, Bart and Chuck decided that no disbursements of income should be made to any member of Al's family unless absolutely necessary to alleviate financial need growing out of an emergency situation. At the same time, they decided to divide the trust management, Bart assuming responsibility for stocks and bonds and Chuck assuming management of the real estate holdings.

Al died in 1973, survived by numerous grandchildren, nieces, nephews, and their issue.

In January 1975, Bart invested trust funds in "Fast Food," a new fast-food franchising operation. The business has not been as successful as was anticipated; the stock has lost value and has paid no dividends. Except for this one investment, trust assets have produced substantial net income after taxes. All income has been retained by the trustees.

In August 1975, Dot, a granddaughter of Al, asked Bart and Chuck to pay her college tuition costs out of the undistributed income. This request was refused on the ground that her situation was not an emergency.

Dot has petitioned the appropriate court to:

(1) order Bart and Chuck to repay to the trust the amount invested in "Fast Food";

(2) declare the trust invalid and order the assets distributed among Al's heirs at law;

(3) in the event the trust is not held invalid, order Bart and Chuck removed as trustees and direct the successor trustees to pay to her such sums as may be necessary for tuition at a college or university.

How should the court rule on each request? Discuss.

QUESTION #7 (DISCUSSED IN LECTURE)

In January 1972, prior to undergoing a serious operation, Dale personally delivered to his brother Bart certificates for 2,000 shares of Corpco stock and said: "I want you to hold these for my son until he is old enough to handle them for himself. Make sure that he gets enough to support and educate himself. I've signed the certificates for you. I have \$50,000 in bearer bonds in my safe-deposit box, and I want you to do the same thing with them. I've marked them for the boy." Bart replied, "All right."

Dale died in July 1974. He never regained his health but remained mentally alert until the day of his death. Dale was survived by his wife Wanda and his son Mel, age 16. Dale's will, properly executed in 1973, recited that he had given 2,000 shares of Corpco stock to Bart to hold for his son, but that he had changed his mind and wanted Wanda to have it, along with all the rest of his property. In his safe-deposit box was an envelope containing \$50,000 in bearer bonds. Written on the envelope were the words: "Bonds for my boy." Dale's family first learned of the transfer of the Corpco stock to Bart upon reading Dale's will after Dale's death.

Bart now refuses to surrender the Corpco stock or any part of it, insisting that it was a gift to him from Dale. Between January 1972 and July 1974, Bart had the 2,000 shares of Corpco stock transferred to his sole name. Thereafter Bart sold 20 shares of this stock to his wife Joyce for \$100 per share, its fair market value at the time, and used the proceeds to finance a vacation trip for himself. Bart sold another 20 shares of Corpco stock through a broker for \$100 per share and used the proceeds to buy a \$100,000 insurance policy on the life of his partner. The partner was killed in an automobile accident, and Bart collected the \$100,000 as beneficiary.

Who is entitled to the bonds in the safe deposit box? Discuss.

What are the rights of Wanda and Mel against Bart and against Joyce? Discuss.

QUESTION #8 (DISCUSSED IN LECTURE)

Trustor asked his brother Bo to serve as a trustee of two parcels of land owned by Trustor; Bo orally agreed to do so. Thereupon, Trustor delivered to Bo (1) a deed to Blackacre, which names "Bo" as sole grantee and made no reference to any trust or beneficiary; and (2) a deed to Whiteacre, which names "Bo, Trustee" as grantee but which made no reference to any beneficiary. At the time these deeds were delivered, it was understood between Trustor and Bo that Bo would pay the net rents Bo received from both parcels to Trustor until Trustor's death and at Trustor's death would convey title to both parcels to Trustor's son John, free of trust. For a period of several years, Bo did pay to Trustor the net rents received.

Later, Trustor transferred title to another parcel, Greenacre, to the Bank of Utopia by a deed which named the bank as grantee and trustee and which, in pertinent part, provided: "Bank shall pay to my son John the rents, issues, and profits semi-annually until he shall have attained the age of thirty-five years; upon John's attaining the age of thirty-five years, trustee shall convey the corpus to him free of trust."

Recently, Bo decided to repudiate his representations to Trustor and entered into a contract to sell Blackacre and Whiteacre to Buyer for \$100,000. Buyer has paid a deposit of \$1,000; closing is scheduled in thirty days; and Trustor finds out what Bo had done.

A judgment creditor of John, Creditor, has instituted proceedings in equity to reach John's interest under the Bank of Utopia trust to satisfy his judgment. John is now twenty-five years of age.

What are the rights of Trustor and Creditor?

QUESTION #9

Seth, by a written declaration of trust and a separate deed, transferred a ten-unit apartment building located in Pensacola, Florida, to Tom, as trustee. The apartment building was worth \$100,000. Tom was to "pay the income to Ben for five years and then transfer the trust assets outright to Rex as remainder beneficiary." Tom was specifically empowered to resign prior to the termination of the trust.

Tom managed the apartment building for four years. The receipts from apartment rentals produced \$30,000 cash per year after payment of operating expenses. Tom paid this \$30,000 each year to Ben. Ben, having no immediate need for the money, deposited the money in a savings account.

Tom made no repairs to the apartment building during the four years and as a result all of the tenants moved out. Tom resigned as trustee and moved to Miami. During the month following Tom's resignation and before the successor trustee Walt was appointed, Gofer, Tom's former employee, wrongfully removed \$10,000 worth of air conditioning units from the apartments. Rex discovered this and informed Tom; however, Tom did nothing. The apartment building is now worth only \$25,000.

What are Rex's rights, if any, against Tom, against Ben, and against Gofer? Discuss.

QUESTION #10

Ann and Bruce need advice about their rights, if any, to the income and/or title to an unincorporated motel and golf course known as the Rizoolti Inn. Ann is the second wife and widow of Charles who died testate leaving everything to her and naming her personal representative. Bruce is Charles' son by his first marriage.

David was Charles' son-in-law and an employee of Charles in the latter's real estate investment and management business. Just before leaving for an extended trip abroad, Charles paid \$15,000 to the prior owners of the inn, as the down payment on its \$100,000 price.

Later, on the day before Charles left on his trip, he said in the presence of Ann, Bruce, and David: "David can put the title in his name so he can manage the place. The income will pay the balance of the price and there will be enough left to pay Bruce's medical school tuition for the next four years." The inn was conveyed to David and David executed the closing documents including the purchase money note and mortgage. Charles died on the trip.

David refuses to convey the property to Ann (or to Charles' estate), and refuses to pay any income either to Bruce or for his benefit. Discuss the rights, if any, of Ann and/or Bruce to the inn and/or its income.

QUESTION #11

Testatrix recently died leaving a home-drafted will which has been admitted to probate and contains the following clauses:

(1) I devise my property at 123 Elm Street to my sister to be her absolute estate forever. It is my request that upon her death my sister shall devise this property to my son.

(2) I bequest \$25,000 to my son, with the request that he use such amounts as in his discretion he deems appropriate to provide for the welfare and comfort of my sister.

(3) I bequeath my antique doll collection in trust to my son which he shall distribute as a remembrance from me among such of my friends as he shall select.

(4) I devise and bequeath the rest of my estate to my son in trust for his own use for life, remainder to such of my issue as my son may appoint by deed or will.

(5) I nominate my son as executor of my estate.

Testatrix' only surviving relatives were her sister, son, and his children, Ann and Bob.

Son asks how, and on what evidence, the court probably will resolve whether any trusts are created of which he is either beneficiary or trustee. Discuss.

QUESTION #12

Sill's will created a trust of his residuary estate with Trox as trustee. The income was payable to Adam until age thirty-five, at which time the principal was to be divided equally between Adam and Ball. If Adam died before thirty-five, the income was payable to Ball until he reached thirty-five, with the principal payable to him at age thirty-five. The trustee was given prudent man investment power. In the residuary estate were 100 shares of Hocorp stock. Hocorp was a small corporation with 250 shares, 150 of which were owned by Major. The book value of the stock in the estate was \$50,000. The stock paid no dividends despite high earnings. At the end of three years, Adam requested an account from Trox and received an informal one which showed that Trox still held the Hocorp stock whose book value had increased to \$60,000 and on which no dividends had been paid. Adam ascertained that Trox had elected himself to the Board of Directors through cumulative voting of trust shares and had managed to get himself elected vice-president at a salary of \$25,000 by agreeing with Major that he would cause no trouble with the corporation.

The account also showed that Trox had invested \$50,000 in Ventura Corp., newly formed to market sporting goods, and \$50,000 in Flyers, Inc., a stock with an erratic market record, which, Trox was informed, was about to make a big profit from a government contract. Trox also bought \$25,000 worth of Exco stock, a sound, prudent investment. For convenience in handling he took title in his own name, retaining the certificate with other trust documents. The present market values of these stocks are Ventura \$75,000, Flyers \$10,000, and Exco \$10,000. Adam and Ball are dissatisfied with this recourse and request advice as to their rights against Trox. They have also agreed to terminate the trust and have demanded that Trox turn the principal over to them. Both are over twenty-one and competent. Trox had indicated that he had no intention of dissolving the trust. Discuss the issues raised by Trox's actions and the requests of Adam and Ball.

QUESTION #13

Donor, a wealthy bachelor about to take a long trip, decided to make some provision for his two nephews before leaving. He gave Broker, his financial advisor, one thousand shares of Corporation stock endorsed in blank "to hold for my nephews until they are old enough to manage the property themselves. Until then, you can give them anything they need for their support and education." Donor suffered a stroke during the trip and returned home seriously disabled physically. Broker had the stock registered in his own name. Thereafter, he sold ten shares on the market for \$2,000, which he used to bet on a horse which won and returned \$50,000. Broker used \$1,700 of his winnings to replace the ten shares of Corporation stock and deposited the rest in his personal bank account which had \$15,000 in it at the time. Broker subsequently withdrew and spent \$15,000 from the account. Several years later Donor died leaving a valid will executed about a year before his death which referred to the transaction with Broker and stated that Donor was revoking the gift, which was to be paid to Ivy College as part of the residuary bequest. The two nephews, now nineteen and twenty years old, and Ivy College demand that Broker pay over the property received from Donor. The stock, originally worth \$200 per share has dropped to a value of \$100 per share.

Discuss the rights of Ivy College and the nephews, and the liability of Broker, who insists that he is entitled to keep the property as his own.

QUESTION #14

In July, 1985, Sam Settlor created an irrevocable trust (the Sam Settlor Trust) with a corpus of \$100,000. Tom Trustee was named trustee of the trust, but the written trust instrument was never recorded. The trust instrument gave the trustee full power to sell trust assets. The trust provided that the net trust income would be paid to Sam's wife, Wilma, for life and at her death the trust would be divided into two equal shares, one for Sam's son Bob, age 29, and one for Sam's daughter Debbie, age 21, with the income from each share being paid to the person for whom the share was established. When each child attained age 30 (or at Wilma's death, if later), his or her share of principal would be distributed per stirpes. Bob was married, with two minor children, and Debbie was unmarried.

In November, 1985, the trust bought a small grove for \$90,000, which it paid in full at closing. The deed was to "Tom Trustee, as trustee of the Sam Settlor trust," and it contained a reservation by the grantor of the unrestricted right to enter the property and remove stumps. In December, 1985, a severe freeze killed the fruit and the trees, which have been left on the property. The trust has not produced any income, and the balance of the original trust money has been used to pay taxes and control weed growth on the land.

On August 15, 1990, Tom Trustee signed a contract to sell the trust land for \$250,000. Wilma died on January 1, 1986 and Bob died on September 1, 1990. Neither Wilma nor Bob left a will. On September 15, 1990, Tom Trustee signed a general warranty deed conveying the land to Peter Purchaser, without reference to the reservation of rights to remove stumps, and Peter paid the full purchase price to Tom Trustee.

Peter has tried to obtain financing to develop the land, but has been turned down because of "title problems," and Peter's lawyer has written to Tom about Peter's problem.

Bob's heirs and Debbie have demanded payment from Tom.

Tom comes to you for legal advice as to his potential liability to Peter and what, if anything, he must pay to Bob's heirs and Debbie. Advise him.

QUESTION #15

Trustor, a widower, executed a valid will, providing in part:

I bequeath my entire estate to the Steward Trust Co. in trust for my son, Sam, for his lifetime and at his death to pay the principal in equal shares to my grandchildren.

My trustee shall have the power to sell and invest the assets of the trust estate and to pay to, or for the benefit of, my son any or all of the principal, entirely according to the trustee's own judgment and absolute discretion. I intentionally make no provision in this will for my daughter, Diane.

Thereafter, Trustor delivered his VIVE Life Insurance Company policy, which designated "estate of insured" as beneficiary, to an officer of the Steward Trust Co., verbally instructing the officer to collect the proceeds at his death in trust for the benefit of Trustor's daughter, Diane, for her lifetime, then to pay the balance to Trustor's grandchildren equally.

Trustor intended to inform VIVE Life of this change, but before he did so, he died suddenly. Trustor was survived by Diane, Sam, and Sam, Jr., an adult son of Sam.

Trustor's will has been admitted to probate. The \$200,000 life insurance proceeds have been paid to his personal representative. However, Sam, Diane, and Sam, Jr. have agreed among themselves to pay Trustor's creditors, taxes, and probate expenses and to divide his net assets equally among themselves. Trustor's net estate is valued at \$400,000, including the insurance proceeds. Steward Trust Co. resists the proposed family settlement arrangement.

How should Trustor's personal representative distribute the estate assets? Discuss.

QUESTION #16

In 1945, Ed resided in Philadelphia, Pennsylvania. He was a widower with three children, Leila, Bob, and Jack. He made a great deal of money during World War II. He established an irrevocable living trust and funded the trust with \$4,000,000 in blue chip stocks such as IBM, A.T.&T., General Motors, etc. naming Bob and Jack as trustees. The trust provided that he and his three children were to receive the income during their lifetimes. Upon the death of all four of them, the then corpus of the trust was to be distributed equally among the then surviving issue of Leila, Bob, and Jack, per stirpes.

Ed moved to Florida and Bob and Jack soon followed. Leila remained in Philadelphia. Ed soon tired of retired life, and an opportunity to purchase a sports arena and professional basketball team presented itself. Bob and Jack wanted to join their father in the venture, but none of them had enough money of their own to acquire the arena and the team. Bob and Jack, with Ed's written consent, borrowed \$5,000,000 from a local bank, pledging as collateral most of the trust assets, then valued at \$10,000,000. The interest rate was nine percent per annum. With the \$5,000,000, Bob and Jack purchased the arena as an asset of the trust.

Ed, Bob, and Jack then set up a partnership to buy the basketball team. They borrowed \$1,000,000 from the trust evidencing the debt with an unsecured promissory note payable in forty years. The interest rate was five percent per annum.

Within the first year of operation, the arena lost \$1,000,000 and the basketball team lost \$500,000. There was no income to pay the interest on the bank loan and the bank demanded the loan be paid.

Bob and Jack sold \$8,500,000 in trust assets to pay off the loan at the bank, to pay interest on that loan, to make up for the losses in the operation of the arena, and to supply operating capital for the arena. They then notified Leila that there would be no more income distributions because of the needs of the arena and team.

Discuss the issues arising from the factual situation.

QUESTION #17

S, an amateur race car driver, is the beneficiary of two trusts administered by T. One of these trusts was created by his mother, and under its terms he is to receive \$15,000 per year for the next five years. The other trust, which contains a spendthrift clause, was created by his father, and under its terms he is to receive \$10,000 per year for the next five years. In order to promote the sport of professional auto racing S executed two documents, the first of which purported to transfer his beneficial interest in his mother's trust to T "in trust to pay the principal and accumulated income thereof to the driver of the race car making the fastest average lap speed at any race held during the next five years at the Daytona International Speedway."

The second document purported to transfer S's beneficial interest in his father's trust to T "in trust to pay the principal and accumulated income thereof to the driver of the race car making the second fastest average lap speed at any race held during the next five years at the Daytona International Speedway."

Discuss the validity of each of S's attempted trusts.

QUESTION #18

Sam Settlor, eager to keep his estate out of the hands of those "shyster lawyers," created a valid living trust, following a form from the book, *How to Avoid Probate*. Following the book's instructions, Sam made himself and his wife, Sally, life income beneficiaries and co-trustees, and he gave his niece, Alice, a vested remainder in the trust corpus. Sam conveyed to the trust as corpus an apartment building which he owned. Real estate values in the area of this building had been declining for years, as Sam knew, and nothing indicated that the trend would change. No other assets were ever added to the trust corpus.

Although following a printed form in creating the trust instrument, Sam failed to include a paragraph which would expressly reserve the power of revocation of the trust.

After seeing the apartment building decline in value for several more years, Sam finally decided to sell the property. Believing that he could more easily sell the apartment building if it were not owned by the trust, Sam consulted his *How to Avoid Probate* book and discovered that he had made the trust irrevocable.

He then, without court approval, purchased the building from the trust at its current fair market value, or 25% less than its value at the time of transfer into the trust.

The following year, Sam agreed to sell the building to Ben Buyer, who, unknown to Sam, was a disbarred lawyer who had previously practiced in the area of estate planning. During the course of their negotiations, Sam informed Ben that the property had previously been held in trust and allowed Ben to thoroughly examine the trust instrument. Ben subsequently bought the property from Sam.

Soon thereafter, Sam informed Alice that he had "fixed things" so that she could get his property after he and Sally died. Alice, who had not previously known of the existence of the trust, immediately demanded an accounting from Sam and Sally with regard to the trust assets. Sam refused, and Sally merely said that she had always "let Sam fool with all that trust stuff" as she did not understand it.

Discuss Alice's rights against Sam, Sally, and Ben.

QUESTION #19 – JULY 2008

Marge and Dave were married five years ago. Dave has two children from a prior marriage who are now adults. The settlement agreement incorporated into the divorce decree from his first marriage required Dave to maintain an existing \$300,000 insurance policy on his life but to designate his children, instead of his ex-wife, as the sole beneficiaries. The divorce decree also provided that Dave would keep this insurance in effect until the youngest child reached the age of 21.

Marge and Dave decided to set up a trust. They conveyed \$1 million of specific stocks and bonds to the trust. The trust provides that the income from the trust is payable to Marge and Dave for ten years. At the earlier of either the end of ten years or Marge's and Dave's deaths, the trust income is payable to Dave's children for ten years. At the end of that ten-year period, the trust shall terminate, all trust property shall be sold, and the proceeds shall be distributed equally among Dave's children. Marge and Dave are designated as co-trustees. Upon their death or inability to serve, Marge's favorite brother, Guy, is named as successor trustee. In the event of Guy's death, National Bank is named as successor trustee.

Marge and Dave bought a small apartment building valued at \$2 million, telling the seller that the property will be in the trust. They titled the property in Guy's name "as trustee." Shortly thereafter, Marge, Dave, and Guy all died in a car crash. Guy's will left all of his property to the Charitable Foundation. Foundation and Dave's children make competing claims to the apartment building. Several apartments are empty. National Bank asks the court for permission to rent the empty apartments to its out-of-town employees.

Dave had only one insurance policy at the time of his death. The policy had been maintained by Dave since his divorce and it was for \$300,000. The policy named Dave's ex-wife as the sole beneficiary. The ex-wife and the children have made competing claims to the life insurance proceeds.

The children want to terminate the trust now. The children ask to be appointed as successor trustees in place of National Bank, citing to the empty apartments as a reason to replace National Bank. Meanwhile, the youngest child, who is 19 years old, confessed to tampering with the brakes of Marge and Dave's car. Pursuant to a plea of no contest, the youngest child was convicted of second degree murder of Marge, Dave, and Guy.

Discuss fully all the pertinent issues and their likely outcomes regarding the characteristics of the trust, the beneficiaries, the trustees, and disposition of the apartment building and the life insurance proceeds.

TRUSTS ESSAY ANSWERS

ANSWER TO QUESTION #5

I. Validity of B's Assignment.

Unless the terms of the trust provide otherwise, a beneficiary's equitable interest can be transferred. However, a spendthrift trust is created with the purpose of providing a fund for the support of the beneficiary and at the same time securing it against his or her own improvidence. Generally, a spendthrift trust prohibits the transfer of the beneficiary's interest. In this case, the facts indicate that the spendthrift provision applied to A's life estate. There is no indication that any such provision applies to B's remainder interest. Therefore, B can freely transfer his interest.

II. A's Right to Compel Termination of the Trust.

Upon the assignment of B's interest to A, A became the sole beneficiary. If there is no purpose other than holding the property, i.e. no duties for the trustee, the trust would terminate and title would vest automatically in A. However, in this case, there is a substantial amount of money which must be invested. Further, there is a spendthrift provision which gives the trust a purpose. Even after the settlor's death, where the settlor has fixed the period for the term of the trust and its purposes have not been accomplished, the trust cannot be terminated even if all beneficiaries approve the termination unless: a) all beneficiaries' interests have vested; b) all beneficiaries' are of legal age, and are not under guardianship; and there are no contingent remaindermen. However, even under those circumstances, if the trust contains a spendthrift provision, courts are likely to find that the settlor's purpose of protecting the beneficiary continues and the trust cannot be terminated.

Therefore, A cannot force the termination of the trust.

A's Potential Actions Against Trustee.

The powers and duties of the trustee are established by the trust agreement and by law. The trustee has the power and duty to make the property productive and the duty to use reasonable care and skill in choosing and managing the investments.

As a fiduciary, the trustee owes a duty of loyalty and good faith in all matters pertinent to the trust. He may not enter into any transaction with the trust as a buyer or seller unless authorized by the trust instrument or given permission by the consent of all beneficiaries after full disclosure. A sale of trust property to the trustee even at fair market value without disclosure will be a breach of trust and the sale may be voided. The trustee may be required to divest any profit made.

In this case Trustee did not seek or receive the consent of the beneficiaries to purchase the property from the trust. It was insufficient to have the settlor's consent. A can pursue an action against Trustee and compel an accounting and claim any profits earned by Trustee.

ANSWER TO QUESTION #6

I. Repayment of Fast Food Investment.

The trustee has the power and the duty to make trust property productive. There is a duty to use reasonable care and skill in choosing and managing investments. The standard is one of a prudent trustee. Although the settlor can change the standard of care to a lesser duty, a grant of absolute discretion does not relieve the trustee from the duty of good faith and reasonable care and the trustee is still subject to accountability and review by the court. If a trustee has doubt as to the meaning of the language in a trust instrument or some other matter involving the trust, he should petition the court. Further, a trustee cannot delegate the performance of his duties to others except those duties that are purely administrative. Therefore, as co-trustees Bart and Chuck will each be responsible for the management of the entire trust.

There is no list of permissible investments, therefore, a trustee may exercise suitable discretion in making decisions in this area. A new business with no earnings history is presumptively improper and the trustee cannot offset losses arising from a breach of duty against gains realized on other investments. However, if there is exculpatory language in the trust instrument holding the trustee harmless for errors of judgment made in good faith, that language will be given effect. Therefore, in this case, given the language of the trust and the totality of the circumstances, it is doubtful that Bart and Chuck will be forced to repay the amount invested in Fast Food.

II. Invalidating the Trust.

A trust must have beneficiaries who are definitely ascertainable within the rule against perpetuities. The settlor may designate a class as beneficiaries, but that class must be definite. There must always be someone presently capable of enforcing the trust, so a trust in favor of "my family" should have specified a life estate in the settlor or someone else in being. Therefore, Dot may challenge the trust on those grounds.

In an emergency or other circumstance unforeseen by the settlor and causing the trust purpose to be improper or frustrated, a court may terminate the trust even though a material purpose of the settlor still exists and even though not all beneficiaries are not able to consent. However, it must be shown that the court action is necessary to preserve the trust property. Therefore in this case, Dot would have to show that the trust property is in danger, and that the purpose of the trust which was to take care of the material wants of the family is being frustrated in favor of the other trust purpose to give money for psychic research. She must demonstrate that, even absent the consent of all beneficiaries, it would be proper for the court to terminate the trust.

III. Removal of Chuck and Bart and the Appointment of a Successor Trustee.

The trust instrument directed Bart and Chuck to use the trust income for the development of transcendental psychic research after meeting the needs of the immediately family. Therefore, the family was not the income beneficiary. Payments to a nonincome beneficiary pursuant to a hardship clause can be made if the trustee determines, in good faith, that such a beneficiary is experiencing sufficient hardship to justify payments from the trust. Where a trustee has the power to invade principal, a decision by the trustee regarding the need for doing so will not be disturbed unless plainly wrong. In this case it appears as though the income beneficiary was the psychic research and that Bart and Chuck had the power to invade principal for the immediate family. Under those circumstances, the judgment of Bart and Chuck would be final.

Therefore, in this case, it is doubtful that the court will order Bart and Chuck to repay the amount invested in Fast Food. The court will only invalidate the trust if it violates the rule against perpetuities. If the trust is valid, the court will not order Bart and Chuck to pay for the tuition because under these facts, the decision of the trustee will not be set aside unless clearly erroneous.

“MODEL” ANSWER TO QUESTION #7

Note that this answer has been drafted by a CBR editor in the format and style that is demonstrated in the Essay Writing Workshop and “Webinar”. It is not a perfect answer and if you listen to Jackson’s lecture, you will see that the writer does, in fact, have a different analysis/conclusion in parts of this answer. Thus, there are clearly other ways to approach this question, but you may use this answer to help you visualize the structure and writing approach we teach.

I. The Bonds

In 1972, Dale told his brother, Bart, about bonds that are marked “for the boy” and are in the safe deposit box. Dale’s 1973 will, however, stated that he wanted Wanda, his wife, to have all his property, including the bonds. Dale died in 1974 and his wife and son survive him.

Wanda will argue that she is entitled to the \$50,000 bearer bonds because Dale, by the provisions of his 1973 will, intended for his wife to receive them upon his death. Bart will argue that the bonds are his because Dale gave him the bonds in 1972 as trustee. A trust is created when the settlor, transfers legal title to another person as trustee for a benefit of a specified beneficiary. Here, Dale would have had to deliver legal title to the bearer bonds to Bart in order for Bart to be trustee of the bonds. There must be a physical conveyance of the trust property to the trustee, so the property is held by the trustee. Mel, the son, could argue that Dale declared himself the trustee (declaration trust) and therefore holds the bonds in trust for Mel because they were marked “for the boy.”

When a settlor declares himself trustee of his property for the benefit of another, no delivery is required because the settlor is the trustee, however there must be clear intent of a declaration trust. There is no indication here that Dale self declared a trust with himself as trustee because “for the boy” is ambiguous language.

Wanda is entitled to the bonds. In this case, since there was no physical delivery of the bonds to Bart, he has no legal title to them and thus they are not his. Dale merely told Bart about the bonds in the safe deposit box, but they were never physically delivered or transferred over to Bart. Therefore, Bart has no entitlement to the bonds. When Dale died, Dale owned the bonds and was simply part of his estate. Mel also has no entitlement to the bonds because it is not clear enough that Dale had declared himself the trustee simply by marking the bond “for the boy.” This was an attempt to create a trust with Bart as the trustee, yet failed because there was no delivery of the trust property. Dale owns the bonds at his death and pass under his will to the beneficiary, Wanda. Thus the bonds go to Wanda.

II. Rights of Wanda and Mel against Bart and Joyce

A. With Regard to the Corpco Stock

In 1972, the Corpco stock was personally delivered from Dale to Bart for the benefit of Mel, the son. Bart was to hold the stock until Mel was old enough to handle them himself, but Dale also indicated that Bart is to make sure Mel has enough for his support and education. Dale’s 1973 will indicated he wanted Wanda to have the stock upon his death. Dale died in 1974.

Bart argues that the stock was a gift to him from Dale and therefore the stock is his outright because Dale gave it to him. He may attempt to argue that no trust was created because the intent was to create a testamentary trust upon his death due to the fact that Dale was going in for an operation and thought he may die, and since Dale survived there is no longer a trust. Mel will argue that the stock does not belong to Bart, but Bart is the trustee of the stock, which was clearly created by Dale for his benefit by an intervivos trust created while he was alive. A voluntary intervivos trust can be created when physical delivery and title of the trust property is transferred to the trustee which was done in this case when Dale personally delivered and signed over the stock certificates to Bart. Bart will attempt to argue that since there is no writing, no trust can be created. However, when the trust property is personal property, only delivery to the trustee is required, and no written trust instrument is required. Wanda will argue that the Corpco stock belongs to her because by the provisions of Dale’s 1973 will, he revoked the trust and made her the beneficiary of the stock. Mel will argue in response that Wanda has no right to the stock because Dale did not properly revoke the trust. Generally, at least at the time this trust was created, the power of revocation had to be expressly reserved in the trust instrument. Dale did not reserve the right to revoke the trust he created for Mel. On the other hand, Wanda will assert that the Corpco stock is hers because a settlor, such as Dale, may revoke or amend an intervivos trust by a will that specifically refers to the trust property. Here, she will argue that Dale clearly referred to the trust in his 1973 will and that he changed his mind and wanted Wanda to have it, thus properly revoking the trust.

Dale properly created an intervivos trust with respect to the stock. The Corpco stock, therefore, belongs to Wanda under the provision of Dale's will. Although there was an intervivos trust with Bart as the trustee and Mel as the beneficiary, this trust was properly revoked by Dale's 1973 will. Dale's will clearly referred to the Corpco stock and without a doubt, Dale changed his mind about the Corpco stock and wanted it to go to Wanda.

B. Remedies entitled by Wanda and Mel against Bart

1. Sale of Corpco Stock to Joyce

Bart sold 20 shares of Corpco stock to his wife, Joyce, and used the proceeds to go on vacation.

Wanda and Mel will argue that Bart breached his duty of loyalty and good faith when he used transferred the stock to his name and sold shares to Joyce.

A trustee owes a duty of loyalty and good faith and is obligated to administer the trust in accordance with the terms and purposes and in the best interests of the beneficiaries. A trustee is not permitted to enter into any transaction with the trust either as buyer or seller unless the trust instrument authorizes him to do so. Bart breached this duty by transferring the stock to himself and in turn selling 20 shares to his wife, Joyce. Mel and Wanda will argue that selling trust property to a family member as Bart did is considered self dealing and clearly a breach of Bart's duty of loyalty with respect to the trust property. Bart will argue that as a trustee he had the active duty to make the trust property productive. He will assert that while he was told to "hold these" for Mel, Dale also told him to make sure Mel gets enough for education and support. By transferring the shares to himself, he had the chance to make the trust property increase in value by selling the stock to Joyce. Since he sold it to her at fair market value, he was acting as a prudent investor for the benefit of Mel, who was thought to be the beneficiary at the time. By doing so, potentially, he was increasing the trust value for the education and support of Mel, in accordance with Dale's instructions.

By simply transferring the ownership of the stock to himself, Bart probably did not breach any duty of loyalty or good faith to Mel and Wanda. That act alone was probably allowed and can be looked at as an active duty of loyalty to make sure Mel had enough money for his education and support. However, Bart clearly breached his duty of loyalty by using the proceeds to go on vacation instead of reinvesting them or, in fact, using the money for the benefit of Mel's education and support. Bart wrongly used the trust property for his own purposes and therefore is obligated to re-pay the trust and put back the money from the proceeds of the sale to Joyce plus interest.

2. Sale of Corpco Stock through Broker

Bart sold 20 shares of Corpco through a broker and used the proceeds to purchase a \$100,000 life insurance policy and later collected on that policy.

Bart will argue that he was acting prudently and in the trust's best interest when he sold the stock. Mel and Wanda will argue that although it was prudent of Bart to sell the stock at fair market value, he clearly breached his

duty of loyalty by purchasing a life insurance policy with the proceeds and then collecting on the policy when his partner died. Again, a trustee owes an absolute duty of loyalty and good faith in all matters pertaining to the trust and must administer the trust in the best interest of the beneficiaries. By keeping the \$100,000 collected on the policy, Bart is self dealing for his own interest and not that of the beneficiaries.

Bart breached his duty of loyalty to the trust by purchasing and keeping the life insurance proceeds. Bart must put the \$100,000 that he collected on the policy back into the trust corpus.

C. Remedies against Joyce

Joyce purchased 20 shares of Corpco stock from Bart.

Joyce will argue that she is not liable to either Mel or Wanda because she was a bonafide purchaser for value. She therefore takes good title to the stock shares because she purchased them without notice that they were part of the trust. Mel and Wanda will try to assert that Joyce was not a BFP because as Bart's wife, she had to have known that they had claims to the stock.

Joyce probably will not be liable for the value of the stock. First, there are not enough facts to determine if Joyce was a BFP, but even if she was not, the sale to her at fair market value, in and of itself, was a prudent and allowable transaction by Bart, the trustee.

ANSWER TO QUESTION #9

Once a trustee has accepted his office he may resign only with permission from the court, consent of the beneficiaries, or by virtue of the trust instruments. In this case, Tom had the right to resign pursuant to the trust instrument. However, Tom is still responsible for acts and omissions while in office. As a fiduciary, the trustee owes a duty of loyalty and good faith in all matters pertaining to the trust. This duty extends to all life tenants as well as remaindermen. A trustee is also bound to exercise reasonable skill and care in managing the trust. The standard is one of the prudent trustee dealing with the property of another. The trustee is not strictly liable and must merely show that he used reasonable care before taking a particular action. In this case, it appears as though Tom did not take the proper steps to maintain the property.

Absent a provision to the contrary, a trustee may not delegate performance of his duties to another. He may employ agents to perform services, but the trustee is responsible for supervising the employee. Therefore, in this case, Tom is responsible for the actions of his employee, Gofer.

One of the trustee's primary duties is to hold and preserve the property against loss or waste. The trustee has a duty to sue others if necessary to recover trust assets wrongfully taken. The beneficiaries also have the right to bring suit. Therefore, here, Tom has a duty to maintain the trust property which he failed to do. He also has an affirmative obligation to recover the loss due as a result of Gofer's actions.

Therefore, Rex has a cause of action against Tom for any damage to the trust property which was a result of Tom's breach of fiduciary obligations. There is no claim against Ben since he was entitled to the income from the trust which was paid to him. However, if Tom overpaid Ben and such overpayment is wrongful, then Tom would be liable to Rex for the amount of the overpayment. Rex can also sue Gofer if Tom, fails to take action on his behalf.

ANSWER TO QUESTION #10

The intent to create an express trust may be expressed orally or in writing. The word "trust" need not be used. However, the language must clearly show elements of a trust relationship. In this case, Charles stated that he intended David to manage the place, to pay the balance of the price, and to pay for Bruce's medical school tuition.

A trust in personal property may be created orally or partially in writing, however a trust in real property must be manifested and proved in writing. If the trust is created by transfer of a deed, it must be signed by the grantor in the presence of two witnesses or effected by a will. A trustee may carry out an oral trust in land, but if he chooses instead to assert that the land was conveyed to him outright, he cannot be forced to perform the trust.

A resulting trust arises where the court decrees a property holder to be a trustee for the conveyance of the property back to the settlor because it finds that the presumed intent of the parties was to have the property held in trust. It is essential that the parties actually have intended to create a trust relationship, but merely failed to execute documents or establish adequate evidence of intent. The intent to create a trust in favor of the settlor or his heirs is implied from the circumstances and the presumption of a resulting trust may be rebutted by evidence that the settlor's intent was that there not be a resulting trust. In this case, since the down payment on the property was paid by Charles, but title was taken in David's name, it could be argued that a trust was established. The problems with this will be evidentiary, since the statements by Charles will not be admissible and Charles is dead.

When one person pays consideration for the transfer of property but title is taken in the name of another, a purchase money resulting trust may arise from the presumed intent that the person paying for the property would receive the beneficial use of the property. Proof regarding intent as to the nature of the transaction may be by parole evidence. Therefore, the argument in this case would be that a purchase money resulting trust arose by virtue of the fact that Charles paid the downpayment. However, Charles did not pay the entire price, since that was to be paid from the profits made on the property itself.

A constructive trust will be imposed on property obtained in violation of a fiduciary relationship. A family relationship by itself will not create a fiduciary obligation. However, in this case David was an employee of Charles, and an employer-employee relationship is a one with attendant fiduciary obligations. Therefore, if it can be shown that David obtained the property in violation of that relationship, a constructive trust will arise. Ann

and Bruce will want to introduce evidence of self dealing by David. In this case, Charles made the downpayment and allowed David to take title as the manager of the property. In that case, David would hold the property in trust for Charles's estate.

Therefore, the best argument is that David holds a constructive trust for the benefit of Charles' estate. No express trust in land can be found without a writing. The arguments for a resulting trust and a purchase money resulting trust are weak, leaving a constructive trust as the only possible solution.

ANSWER TO QUESTION #11

Since the will has been admitted to probate, it should be assumed that it was a valid will.

Five elements are required for the present creation of a private express trust: (1) a settlor with capacity; (2) intent to create a trust expressed with any formalities which may be necessary; (3) specific trust property; (4) a sufficiently identifiable beneficiary; and (5) a proper trust purpose. There is no issue in this case as to the capacity of Testatrix, the trust property or the trust purpose. However, there are issues as to the other elements, and the court will look at those elements in determining .

I. Intent.

Although no particular words are necessary, and the word "trust" need not be used when a trust is created, the language must clearly show that the elements of a trust relationship are contemplated and desired by the settlor. It is also essential that the terms of the trust be declared sufficiently in order to allow for proper administration and enforcement of the trust. There must be an intent to create a trust in the present and not at some future time. Therefore, if the trust property or the beneficiaries are to be ascertained in the future, or the intent is conditioned on some future event, the requisite intent is not present. Here, the devise of the residue of the estate does not satisfy the intent requirement since the beneficiaries of the remainder interest have not been determined.

The settlor must intend to impose enforceable duties on the trustee. The intent to create an enforceable trust should be stated definitely and not in precatory language. Language phrased in the form of a "wish," "hope," "request," or "desire," is called precatory language. Whether such language is to be construed as creating a trust is a fact question to be determined from the totality of the circumstances. A trust may arise where precatory language is found to have been intended as a polite way to phrase an order. The court may examine the nature of the relationship between the settlor and the alleged trustee or beneficiary. A close confidential relationship with such a person would help to explain why more imperative language was not used. In this case, Testatrix was directing her language to her son and her sister and that could explain the tone she used. Also, a natural claim by the alleged beneficiary might also weigh heavily on a finding that a trust was intended. Again, in this case, the alleged beneficiaries and trustees are close relatives.

Here there was use of precatory language in dispositions (1) and (2). However, the court will consider the fact that there was a close familial relationship between Testatrix and the alleged trustees, and also that the beneficiaries have a natural claim against the estate. In disposition (3) Testatrix did not use precatory language which may indicate that in the other paragraphs the language was intentionally meant to communicate Testatrix' wish and was not intended to create a trust.

II. Definite or Ascertainable Beneficiaries.

The person or persons who hold equitable title and who may enforce the trust must definitely be identifiable or ascertainable within the period of perpetuities. The settlor may designate a class of persons as beneficiaries, but the class must be definite. Further, a trust will fail if the description of the individual or class is indefinite. A trust in favor of one's "friends" will fail as will a conveyance to someone such as the executor to be distributed according to the executor's wishes or discretion among deserving persons or institutions. Therefore disposition (3) is not a trust for the benefit of friends. Disposition (4) as a gift to the son for life with the remainder to "such of her issue as son may appoint" is valid. Since the son had a life estate, there is someone capable of enforcing the trust and it is possible to identify what is meant by "issue."

Conclusion.

Sister will take the property on Elm Street free from any claims by son if the language is deemed precatory. Son will likewise take the \$25,000 free of any claim by sister. Son will take the antique doll collection because the gift to "friends as he shall select" is not definite enough. Further, son will take the residue of the estate with the power of appointment meaning that he can devise the remainder to his children Ann and Bob.

ANSWER TO QUESTION #14

Powers and Duties of a Trustee. Tom, as trustee has the power to manage the property which includes the power to sell it and pay claims against it. Further, he has the power to execute all instruments which will facilitate the exercise of his other powers. As a fiduciary, the trustee owes a duty of loyalty and utmost good faith in all matters pertaining to the trust. Also, the trustee is bound to exercise reasonable care and skill in managing the trust. He is not strictly liable for his mistakes in judgment and must merely show that he used reasonable care before taking a particular action.

The trustee has a duty to make the trust property productive. In this case, there is no evidence that Tom's investment in the grove was improper or that he mishandled the trust property.

Possible Liability to Peter.

A trustee is not personally liable on contracts properly entered into in his fiduciary capacity in the course of the administration of the trust unless he fails to reveal his representative capacity and identify the trust estate. In this case, Tom did act openly as a trustee when executing the deed. A trustee is, however, personally liable for obligations arising from ownership or control of property in the trust estate if he is personally at fault. In such instances, the claim is made against the trustee and the question of liability as between the trustee and the trust estate is determined in an accounting, surcharge, indemnification or other proceeding.

In this case Peter has a claim against the estate as a result of the problem with the title to the property. If he can prove his claim, the trust estate would be liable for damages. However, if Tom was at fault, the estate can recover against him personally.

II. Distribution of the Estate.

At Wilma's death the trust was to be split into two new trusts, one for Bob and one for Debbie. They were each to receive income until age 30 or at Wilma's death if later. The remainder would go to their issue. At Wilma's death, Bob was entitled to his share of principal. Debbie would be entitled to income from her share until she turned 30 years of age at which time she would receive the principal. Since Bob and Wilma are dead, Bob's share was vested in his heirs. Upon the resolution of the claim by Peter, the trust should be distributed accordingly.

ANSWER TO QUESTION #15

The life insurance proceeds will be paid into the estate and the estate assets placed in a testamentary trust governed by the provisions of testator's will.

The Life Insurance Proceeds.

A life insurance trust can be created orally, as Trustor attempted to do in favor of Diane and Trustor's grandchildren, but an inter vivos life insurance trust does not arise unless the trustee has a right to the insurance proceeds. In that case, there must also be a trust instrument governing the operation of the trust. An oral trust agreement existed, but since Seward Trust Co. was not officially named the beneficiary of the trust at the time, no inter vivos trust was created for Diane's benefit. The life insurance proceeds will simply be paid to testator's estate.

Since the testamentary trust involves a final vesting at Sam's (a life in being's) death, it does not violate the Rule Against Perpetuities.

The terms do state, however, that the corpus will vest, not in "Sam's children," but in "Testator's grandchildren." Since Testator's son Sam was still alive at the time of execution, some beneficiaries may yet be born. The attack on the trust will therefore be unsuccessful. Beneficiaries can end a trust if no material purposes remain unserved and all beneficiaries are of sufficient age to consent. This attack fails both tests. One major purpose of the trust is clearly to pay income to Sam for his life, and to allow the trustee to invade the corpus for Sam's benefit. This has not been served. Furthermore, unborn beneficiaries are by definition under age, and unable to consent to the release of their rights.

Florida statute also states that a trustee is an interested party where a testamentary trust is involved. Steward Trust's objection alone is therefore sufficient to prevent the ending of Testator's trust.

ANSWER TO QUESTION #16

Leila is entitled to force the restoration of the corpus of the trust, and to recover the income the corpus would have earned if not for the breaches of the duty of loyalty by Jack and Bob. Neither Ed nor Jack nor Bob may claim a beneficiary's right to recover any unpaid trust income, since they themselves caused the harm by engaging in the actions constituting breach.

Breach of Duty of Loyalty.

Trustees are bound by a duty of loyalty to the trust, and must act in the utmost good faith in all matters pertaining to the trust. A trustee must not put himself or herself in a position where his or her interests would be in conflict with the trust's interests. Without specific allowance for it in the trust instrument, the permission of a court or the approval of all beneficiaries, trustees must not buy from or sell to the trust. "Self-dealing" is nearly always a violation.

1. The first breach of the duty of loyalty occurred when Bob and Jack pledged the trust's assets as collateral for loan to finance the purchase of the sports arena in their own names, without the consent of Leila, one of the beneficiaries. Although this did not constitute a sale of trust assets, it did constitute a use of the trust's funds to allow the purchase of an asset whose title would not be in the trust. Note that without the pledge of the trust assets, the sale would not have occurred.

2. A second breach occurred when Bob and Jack sold off the trust assets to satisfy the \$8.5 million in personal liabilities from the arena venture. No benefit to the trust arose from this payment of liabilities, since the trust did not have title to the arena. A good answer will note that had Bob and Jack passed the title in the arena to the trust in exchange for this payment, two breaches of the duty of loyalty would still have occurred. This action would have been both a failure to diversify the investments of the trust assets, and improper self-dealing, since it was a sale of the trustees' personal asset to the trust without the necessary authorization. Leila may recover for the trust the money paid from the corpus, and may personally recover whatever income it would have earned had the breach not occurred.

3. A third breach of the duty of loyalty occurred when the trustees authorized a loan to their private partnership without proper authorization, in order to complete a purchase of an asset that would belong not to the trust, but to the partnership. This constituted self-dealing. A trust may loan money, but not to a trustee without permission.

4. A fourth breach of the duty of loyalty arose from the same transaction. The trustees authorized a loan in exchange for a promissory note, without any security to insure payment, authorized the loan at a very low interest rate, and authorized it for the purchase of a sports team, an investment uniformly considered speculative.

The consent of the settlor to the transactions has no special effect where the trust is irrevocable. Jack's, Ed's and Bob's consents, in fact, work against them. Since they participated in the transactions involved in the breaches of the duty of loyalty, and caused the losses involved, they have lost their right as beneficiaries to share in any damages that may be recovered. Leila, who had no knowledge of any of the transactions, faces no such obstacle.

ANSWER TO QUESTION #17

Assuming that it violates no public policy, S's first trust is valid, but his second is not.

Possible Violations of Public Policy.

No trust may have as its purpose an activity contrary to public policy. These trusts may seem to be subject to the argument that they encourage dangerous driving, an activity that, given Florida's speeding and reckless driving laws, is against public policy.

Two points can be made in opposition to this claim. First, car racing in an authorized setting is a legal activity in Florida. The simple object of car racing is to maintain the highest possible speeds in competition for large cash awards. Striking down such a trust on these grounds would therefore be akin to striking down football's Heisman Trophy because it rewards violent behavior, which is against public policy. It would be somewhat bizarre. Second, the trusts would not reward the person who perhaps recklessly attempts to reach "the fastest speed ever," but rather the person who is able to maintain a high average speed over a five year period. The purpose of the trust appears to be to reward the diligence and talent of the car's maintenance crew as much as, and perhaps more than, the risk-taking of the driver.

Validity of Transfers.

Transfer of Beneficial Interest in Trust Set up by Mother.

The corpus of S's first attempted trust purports to be his beneficial interest in the trust created for him by his mother. Since the corpus of a trust may be any property interest, and a beneficial interest is a freely transferable property interest in the absence of any nonassignability clause, the trust has a corpus.

An easy mistake to make here involves the language of S's first trust. It states that the principal will be paid to the qualifying driver at the end of five years. This does not refer to the principal of the trust of which S is a beneficiary. Although it is true that S cannot make the principal of the trust created by his mother part of the corpus of his first trust, this is irrelevant here. The \$15,000 in yearly income is to accumulate in S's first trust for five years, then be paid out, along with any income derived from that those amounts. The only possible issue involves the rule against accumulations. The rule is not violated here, since the trust lasts five years, clearly within lives in being plus twenty-one years.

Transfer of Beneficial Interest in Trust Set up by Father.

S's second attempted trust has no corpus, and therefore is invalid. The purported corpus is the beneficial income from the spendthrift trust created by S's father. Spendthrift clauses in a trust prohibit anticipatory transfers of beneficial interests, and such clauses are valid in Florida. The purpose of such trusts is to secure the income against the beneficiary's own improvidence. Since he cannot alienate his interest in his father's trust, S's second trust has no corpus, and therefore must fail.

ANSWER TO QUESTION #18

Sam has created an irrevocable trust, since he did not reserve the power to revoke. Alice now has vested rights to the remainder, and the trust cannot be revoked without her consent.

Alice's Rights Against Sam and Sally.

Duty to Make Trust Property Productive.

In an on-going trust, the trustees (Sam and Sally) have various duties toward the beneficiaries. One is the duty to make the trust property productive; another is the duty to use reasonable care and skill in managing the trust property. Sam and Sally would appear to have violated these duties by allowing the trust corpus to decline in value for a number of years with no hope for an upward trend in the value of the investment. Ordinarily, a trustee is expected to diversify trust assets in order to avoid serious declines in the value of any particular asset.

Duty of Loyalty.

Another duty of a trustee is that of loyalty and good faith, which means a duty to avoid self-dealing. Under this duty, the trustee may not sell trust property to himself unless authorized by the trust instrument, the court, or all the beneficiaries. When the trustee purchases trust property without authorization, the beneficiary can void the sale and can compel the trustee to hold the property subject to a constructive trust.

II. Alice's Rights Against Ben.

Where, as here, the property is now in the hands of a third party, the constructive trust remedy can follow the property only if the third party was not a bona fide purchaser. Ben appears to be a somewhat unsavory character with sufficient knowledge and opportunity to examine the trust document and to understand that Sam could not buy back the property from the trust at a loss to the trust without a breach of fiduciary duty. If Ben purchased with knowledge or constructive notice of the rights of Alice, the constructive trust would attach to the property he purchased. In Florida, a third party is not required to investigate the trustee's powers, but here we appear to have actual knowledge of the breach of fiduciary duty.

III. Right to an Accounting.

Alice of course has a right to an accounting. Every trustee has a duty to account for trust property upon reasonable request. There is some question whether Sally ever accepted her appointment as a co-trustee if it was never confirmed by the court and she did not actually participate in the management of the trust property. If she accepted her office, she could resign only if permitted by the trust instrument, the court, or the beneficiaries. The court has discretion to appoint a trustee or successor trustee if Sally refuses to serve. Alternatively, Sam and Sally can be ordered to provide an accounting, on the basis of which Alice can seek her constructive trust or damage remedy.

ANSWER TO QUESTION #19

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| This is a "Model" Answer written in the Celebration Bar Review Proprietary Writing Method. Although it is not a "perfect" answer, it does demonstrate the structural mechanics you should use in drafting essay answers. |
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I. Characteristics of the Trust

Marge and Dave, a married couple of 5 years, set up a trust that conveyed \$1 million of specific stocks and bonds to the trust. Income was to be paid to Marge and Dave for 10 years and then to Dave's two children for another 10 years. The trust property would then be distributed equally to the two children. Marge and Dave would serve as co-trustees, until death or disability, and then Guy (Marge's brother) would serve as trustee.

If Guy died, National Bank is the successor trustee. Marge and Dave later buy an apartment building for \$2 million notifying the seller that the property will be in trust and name Guy “as trustee.” Marge, Dave, and Guy all die.

National Bank would argue that a valid trust was created by Marge and Dave when they conveyed \$1 million of specific stock and bonds to a trust. National Bank will further argue that they are the current sole trustee of the entire property, because Guy, the former trustee of the apartment building, has died. Additionally, National Bank will argue that the apartment building and its income, along with the stocks and bonds, are to be included in the trust document. In this situation, National Bank will state that a valid inter vivos trust was created and that upon Marge’s and Dave’s death, a valid testamentary trust came into being.

To have a valid express inter vivos trust, there must be a writing for real property, but the inter vivos trust may be oral for personal property. Additionally, the settlors need capacity, a clear intent to create the trust, competent trustees, definite beneficiaries, and specific property in the trust. Dave’s two children will argue that the trust should no longer exist, because the trust purpose was met. The children will contend that they are old enough to take care of themselves and they should not have to wait to get the trust property until 10 years from now. A trust can terminate when its purpose is frustrated and no longer necessary.

National Bank will likely succeed on their claim that a valid trust exists. Marge and Dave were both settlors and co-trustees of the trust that was a valid inter vivos trust, because they declared the trust when they conveyed the stocks and bonds into the trust entity. Additionally, Guy served as a co-trustee for the apartment building property illustrating that both the settlor and beneficiaries weren’t the same people, thus avoiding merger of the two and destruction of the trust. Upon their death, a valid testamentary trust was created, because Marge and Dave met all the requirements under the Statute of Wills. Namely, a valid testamentary trust requires settlor capacity, intent to create the trust (i.e., a writing), trust property, valid beneficiaries, a trust purpose, and meeting the necessary rule against perpetuities time restrictions. At the time of creating the trust, Marge and Dave were of sound mind, evidenced intent by using a writing to create the trust, stated themselves as current beneficiaries with Dave’s children as future beneficiaries, purpose of the trust was to generate income, and the proper time restrictions were met since the property interest vested no later than 21 years after the death of all the lives in being. The children’s claim will probably fail, because Marge and Dave originally set the trust up for income for themselves and presumably wanted future beneficiaries to receive income, and not just the underlying property (corpus) of the trust – otherwise they would have explicitly stated it in the trust document.

II. The Beneficiaries

The original trust document stated that Marge and Dave were beneficiaries of their own trust. After 10 years (or Marge's and Dave's death, whichever is sooner), the subsequent beneficiaries were to be Dave's two children. After the end of a second 10 year period, the trust property was to be sold and distributed equally among Dave's two children. Dave's youngest child, now 19 years old, plead guilty to the second degree murder of Marge, Dave, and Guy (the original successor trustee).

National Bank, as current trustee, will argue that the older of Dave's two children, is the current beneficiary of the trust. They will argue that it was valid for Dave and Marge to name themselves as income beneficiaries for 10 years, and then for Dave's children to be income beneficiaries for 10 years after that. They will state that Dave's younger child should not be entitled to the trust property, because he plead guilty to second degree murder after he tampered with the brakes of Marge's and Dave's car. The law allows for settlors to state beneficiaries – they just need to be definite and ascertainable within the period defined by the rule against perpetuities. Here, the two children were named as beneficiaries and are definite and ascertainable, because there are no other children.

Dave's oldest child will argue that he should be the sole beneficiary of the current trust, because all prior beneficiaries are either dead or disqualified. In Florida, one who unlawfully or intentionally kills the settlor is disqualified to receive as a beneficiary. Here, the younger child plead guilty to the murder of Dave and Marge.

Dave's oldest child is likely the only current beneficiary of the trust. The younger child would be disqualified, because he plead guilty to the second degree murder of the settlors. It was valid for Marge and Dave to name themselves as original beneficiaries and settlors. The merger doctrine of settlor and beneficiary would only apply if the sole beneficiary becomes the sole trustee – and in this situation it did not happen, because Marge and Dave died at the same time. Also, Guy was successor trustee for the apartment property further evidencing that the settlors and beneficiary never merged with each other.

III. The Trustees

Marge and Dave created a trust naming themselves as co-trustees and co-beneficiaries for 10 years. Marge's brother Guy, was to be successor trustee, should Marge and Dave die. Additionally, Guy was named "as trustee" of the apartment building that was placed into the trust. If Guy were to die, National Bank was named as successor trustee.

National Bank will argue that they are the valid successor trustee of Marge's and Dave's trust. They will state they are meeting their fiduciary duty to make the trust property productive, because they want to rent out the apartment building to their employees. Additionally, they will state that they are doing what they can to distribute income to the valid beneficiaries.

They will legally argue that they cannot be removed as trustee, because they did not breach any fiduciary duty (of care or loyalty), they have not been uncooperative with any co-trustees, their removal is not in the best interest of the trust, and no substantial change has occurred to justify the termination of the trust. Dave's children (specifically the older child with a valid claim as beneficiary) will argue that they no longer want National Bank to be beneficiary, because the apartments are left empty and not earning income. They would legally argue that the apartment was not earning money creating a change in circumstance significant enough to justifying their entitlement to land.

National Bank is the valid successor trustee of Marge and Dave's trust. National Bank has not breached any fiduciary duty by leaving the apartments unrented, because they just recently assumed responsibilities as trustee of the property. It would be reasonable to give the bank time to rent out the apartments and not just presume, as Dave's children do, that the Bank is breaching its duty to rent out the apartments. Additionally, it doesn't state in the facts that the stocks and bonds weren't earning income - illustrating no breach of duty. Finally, Guy was the specific trustee of the apartment building, and the Bank just recently assumed all responsibility under the trust upon the death of Marge, Dave, and Guy. They need time to generate income on it - and there is no self-dealing by leasing it out to their employees, because they are valid tenants.

IV. Disposition of the Apartment Building

Marge and Dave bought a small apartment building for \$2 million. They told the seller that it should be included in the existing trust. The title of property listed Guy, Marge's brother, "as trustee." Marge, Dave, and Guy later die in a car accident. Guy's will states that Charitable Foundation should inherit his property.

Charitable Foundation will argue that they should have title to the \$2 million apartment building. They will state that the title listed Guy's name and that by the terms of his will they are to receive his property upon his death. The Florida Probate Code allows for charities to inherit under the will of a testator so Charitable Foundation's argument that is the heir to Guy's estate is valid. However, National Bank will argue that Guy did not own the property. The title listed him "as trustee" and not as owner. He was merely a trustee of the property: one who has legal title, but not equitable title. A trustee must hold the property for the best interest of the beneficiaries.

A court will find that the trust of Marge and Dave owns the apartment building, not Charitable Foundation. The title of the document lists Guy specifically "as trustee" which shows that he was meant only to serve as trustee, and not actually own equitable title, to the land. Guy did not have title in the property to dispose of it in his own will, and thus the property was held in the trust of Marge and Dave. National Bank would manage the apartment building to earn income for the current beneficiaries.

V. Life Insurance Proceeds

Per the terms of his divorce agreement with his Ex-Wife, Dave had to maintain a life insurance policy worth \$300,000 on his life, naming his children as the sole beneficiaries. He had to keep the insurance in effect until the youngest child reached age 21. Upon his death, Dave still had an insurance policy worth \$300,000, but it named his Ex-Wife as beneficiary, rather than the children as sole beneficiaries.

Dave's oldest child (the one who did not plead guilty to 2nd degree murder) will contend that they are entitled to the life insurance proceeds, because the Divorce decree stated that they are to be named as beneficiary of the will. Dave's oldest child will contend that the policy was meant for his own support, should anything happen to his father. Upon Dave's death, the oldest child will argue that he is entitled to the money and that his sibling forfeited the proceeds when he plead guilty to second degree murder of Dave. Although the terms of the life insurance policy govern, Dave's child should argue that a constructive trust was created. Typically, a constructive trust exists when property is not completely disposed of as it was intended and serves as an equitable remedy for a dispute. Here, the property was intended to be distributed to the children, so a resulting trust may have been created. Ex-Wife will argue that the \$300,000 was hers, because she is named as the beneficiary of the proceeds of the policy. Dave never switched the beneficiary, and she will state that he meant to keep her as beneficiary. She will argue that the four corners of the document govern and that the divorce decree has no contemplation over this private contract between Dave and the insurance company.

Dave's oldest child will likely get the \$300,000 insurance proceeds. A constructive trust would be created by the court, because Dave neglected to switch the name of the beneficiary from his Ex-Wife to his children. He likely did not intend to give \$300,000 to his Ex-Wife, because they are now estranged. His likely intent was to provide for his children so the court will create a constructive trust to make sure the non-disqualified child (Dave's oldest son) is provided for after his death. This would be an equitable solution.

NEGOTIABLE INSTRUMENTS ESSAY QUESTIONS

Negotiable Instruments, until recently, has not appeared as a subject on the Florida Bar Exam. The following 5 essay questions and answers have been selected from essay exams of other states where the application of the UCC is essentially the same.

QUESTION #1

Duke purchased a motor boat from Earl for \$10,000. When the boat was delivered, Duke paid for it by giving Earl a \$10,000 check drawn on his personal account at B Bank. At the time Duke gave Earl the check, Duke knew he had only \$7,000 in his account, but he hoped to be paid on an outstanding insurance claim in time to cover the check. Earl immediately deposited the check in Earl's account at C Bank, and several days later was advised by C Bank that the check was being dishonored and returned for insufficient funds. Earl complained to Duke, and Duke explained that some funds he had expected had not arrived, but that he could make the check good in two weeks. Earl agreed to wait for two weeks before redepositing the check.

Duke was employed as an accounts payable clerk in the bookkeeping department at Acme Corp. Within a week after Duke assured Earl that he would make the check good, Duke prepared an Acme Corp. check drawn on its account at B Bank payable to Duke Corp., a non-existent entity, in the amount of \$3,000. Because Duke did not have check signing authority, he obtained by deception the signature of Acme's treasurer on the check. Duke took the check, endorsed it payable to the order of Duke, signed the endorsement, "Duke Corp., by Duke, President," and deposited the check in his personal account at B Bank.

Duke then realized that other checks he had written might clear before the check he had given to Earl so that the \$3,000 deposit would not be sufficient. Duke prepared another Acme Corp. check drawn on its account at B Bank payable to Duke in the amount of \$2,000. This time Duke signed the name of Acme's treasurer to the check. Duke endorsed the check and deposited it in his personal account at B Bank.

After waiting the agreed two weeks, Earl redeposited Duke's check and it cleared.

- a. Based on proof of the foregoing facts, may Duke properly be convicted of the crimes of
 - (1) issuing a bad check,
 - (2) larceny, and
 - (3) forgery?

- b. May B Bank be held liable to Acme Corp for paying (1) the \$3,000 check and (2) the \$2,00 check?

QUESTION #2

You are an associate in a Miami law firm. Yesterday, you and Pard, a partner in the firm, attended a meeting with Dad, a long-time client of the firm. Dad disclosed the following facts at the meeting.

Dad's 24-year-old son, Hap, has been addicted to drugs for five years. Hap is unmarried and resides with Dad, who supports him. Hap's only asset is stock, left to him by his grandfather, having a market value of \$50,000. Hap has entrusted the stock certificates to Dad for safekeeping. Dad has placed them in Dad's safe deposit box.

Dad has just learned that, a month ago, Hap removed a check from Dad's personal checkbook, which Dad kept in his desk in his downtown office. Dad maintained his checking account at BanCo, a commercial bank. Hap made the check payable to cash in the amount of \$2,000 and signed Dad's name, as maker. Hap made no attempt to copy Dad's signature and signed Dad's name in Hap's normal handwriting. Hap then endorsed the check in his own name and handwriting and deposited it in an account which Hap opened in Hap's name at ComCo, a commercial bank. Upon presentation by ComCo, BanCo honored the check and charged \$2,000 to Dad's BanCo account. Hap used all the funds to pay off his debts to drug dealers.

Dad inquired of you and Pard whether he can recover from BanCo the \$2,000 charged to his account. However, Dad said that, in view of the relatively small amount at stake and Hap's involvement, Dad would commence an action against BanCo only if he could be reasonably assured that he could recover without protracted litigation. Dad also inquired whether Hap has any civil or criminal liability as a result of the transactions with BanCo and ComCo and whether BanCo, in the event it is required to restore \$2,000 to Dad's account, could attach Hap's stock in an action against Hap to recover \$2,000 from him.

Prepare a memorandum of law for Pard with respect to the following issues:

1. What, if any, crimes did Hap commit with respect to the transactions involving Dad's checking account?
2. Does Dad have a cause of action against BanCo to recover the \$2,000 charged to his account and, if so, what procedure would you employ to attempt to obtain a recovery without protracted litigation?
3. Can BanCo maintain an action against Hap and, if so, can BanCo obtain a warrant of attachment in that action attaching the stock Hap received from his grandfather?

QUESTION #3

February 14, 1984
SEVENTH STATE BANK

FORT PIERCE, FLORIDA

Pay to the order of PAUL PAYEE OR BEARER \$500.00
FIVE HUNDRED AND NO/100THS ----- DOLLARS
(Signed) DAN DRAWER

Using a printed form obtained from Seventh State Bank, Dan Drawer signed the writing above as drawer and typed on the form the amount and the words “Paul Payee or Bearer.” Dan Drawer delivered the form to Paul on February 14, 1984.

Consider the following problems in the alternative, disregarding all prior questions as you answer each:

A. Is this writing a negotiable instrument? Give reasons for your answer.

B. Is this writing a bearer or an order instrument? Give reasons for your answer.

C. Paul endorses the writing “Pay to John Jones, or order—Paul Payee,” and delivers it to John. John then endorses it by simply signing his name, “John Jones,” and delivers it to Ben Baines.

1. What type of endorsement has Paul Payee made, and what effect does his endorsement have upon negotiation of the writing following his endorsement?

2. What type of endorsement has John Jones made, and what effect does his endorsement have upon negotiation of the writing following his endorsement?

D. On February 14, 1984, Dan Drawer and Paul Payee sign a separate written agreement that Paul will not cash or negotiate the writing if Dan will paint Paul’s house.

1. Does this separate agreement affect the negotiability of the writing? Give reasons for your answer.

2. Does this separate agreement affect the rights of any holder of the writing? Give reasons for your answer.

E. Paul endorses the writing in blank and delivers it to Lana Love on February 16, 1984, as a gift. Lana endorses it “Pay to Chuck Charles” and delivers it to Chuck on February 18, 1984, as payment of rent. Chuck endorses it “without recourse—Chuck Charles” and delivers it to Hugh Holder. Hugh presents the writing to Seventh Street Bank, where it is dishonored.

What are the liabilities of the various endorsers?

QUESTION #4

February 14, 1985

FIRST STATE BANK
JACKSONVILLE, FLORIDA

Pay to the order of PAUL PAYEE OR ORDER \$500.00
FIVE HUNDRED AND NO/100THS ----- DOLLARS
(Signed) DAN DRAWER

Using a printed check obtained from First State Bank, Dan Drawer inserted by typewriter the words “PAUL PAYEE OR ORDER,” the date, February, 14, 1985, and the amount in words and figures. Then Dan signed the check and delivered it to Paul, as the purchase price for a calf purchased by Dan from Paul.

Consider the following problems in the alternative, disregarding all prior questions as you answer each:

A. On February 14, 1985, Paul endorsed the check “Pay to Girl Friend or order—Paul Payee,” and gave it to Girl Friend as a gift. Girl Friend fraudulently and expertly changed the amount of the check in words and figures to \$1,500. Then, Girl Friend endorsed the check “Girl

Friend” and delivered it to Fine Furs, Inc., which took the check for value, in good faith, and without notice of any defense or claim against it. On February 15, 1985, Fine Furs presented the check to First State Bank for payment. First State Bank accidentally detected the alteration and refused to pay the check. Fine Furs timely notified Dan, Paul and Girl of the Bank’s refusal. What rights, if any does Fine Furs, Inc. have against each of Dan, First State Bank, Paul, and Girl? Why?

B. Upon receiving Dan’s check, Paul immediately telephoned First State Bank, advised the head cashier that he had received the check, and inquired whether Dan had sufficient funds on deposit to cover the check. The head cashier replied “Yes, the account balance is \$600.” Thereafter and prior to Paul’s presentment of the check for payment, however, the Bank cashed a \$150 check for Dan, leaving only \$450 in Dan’s account. The Bank then refused to cash the \$500 check for Paul. Paul offered to deposit an additional \$50 in Dan’s account if the Bank would cash the \$500 check.

1. Did the Bank act properly in cashing Dan’s \$150 check after its telephone conversation with Paul? Explain.

2. What would you advise Bank as to acceptance or rejection of Paul’s offer to deposit another \$50 and then honor Dan’s \$500 check?

C. Thief stole the check from Paul, forged an endorsement “Paul Payee,” and on February 16, 1985, cashed the check at Second National Bank. Second Bank then presented the check to First State Bank for payment on February 18, 1985. First State Bank paid the check and charged Dan’s account therefor. What are the respective rights and liabilities of Dan, Paul, First State Bank, and Second National Bank? Why?

D. Paul was the owner of A-1 Cleaners. Upon receipt of Dan's check, Paul endorsed it "for deposit only A-1 Cleaners" and deposited it in the A-1 Cleaners account at Second National Bank. Second National Bank then presented the check without further endorsement to First State Bank, which paid the check and debited Dan's account for the amount thereof. When a dispute later arose between Dan and Paul over the calf purchased by Dan, Dan brought action against First State Bank seeking restoration of the amount of the check to Dan's account, on the ground that the check had not been properly endorsed.

1. Under the Uniform Commercial Code, when may a bank charge any item against its customer's account?
2. What are the merits of Dan's claim against First State Bank? Why?

QUESTION #5

Apply the provisions of the Uniform Commercial Code in Florida and authorities interpreting same, if necessary, in answering the following questions:

A. Dan Drawer completes the blanks in the following check, signs it and delivers it to Paul Payee.

May 1, 1985
FIRST STATE BANK
GAINESVILLE, FLORIDA
Pay to the order of PAUL PAYEE _____ \$500.00
FIVE HUNDRED AND NO/100THS ----- DOLLARS
(Signed) DAN DRAWER

Paul endorses the check "Pay to Pedro Vargas" and delivers it to Vargas. Vargas endorses it "Pay to Second National Bank," delivers it to Second National Bank, and receives \$500 cash therefor. Second National Bank delivers the check to First State Bank.

1. What parties to the check have secondary liability on the check?
2. What are the conditions precedent to the liability on the check of each secondarily liable party.
3. If the check were presented to First State Bank by Second National Bank for "acceptance":
 - a. Would First State Bank be required to "accept" the check? Explain your answer.
 - b. If First State Bank "accepted" the check, what effect, if any would such "acceptance" have on Paul and Dan?
4. What is "protest"? Would protest be required here if First State Bank refused to pay the check?

B. State whether each of the following provisions or characteristics, if contained in an instrument, will or will not destroy its negotiability. Give reasons for your conclusions.

1. A provision indicating a particular account to be debited?
2. A statement that the instrument is subject to the provisions of another contract between the parties?
3. A provision that a sum payable is to be paid with interest at 8% before maturity, and at 10% after maturity?
4. A statement that the sum is payable in Italian lira?
5. A provision that the instrument is payable with interest “at the current rate”?

C. Who is liable on each negotiable instrument signed by Arthur Adams as stated below, and why?

1. “Peter Pringle by Arthur Adams, Agent,” where signed by Adams with Pringle’s authority?
2. “Peter Pringle,” where signed by Adams without authority from Pringle to do so?
3. “Peter Pringle, Arthur Adams,” where signed by Adams with Pringle’s authority?
4. “Arthur Adams,” where signed by Adams with Pringle’s authority?
5. “Adams, Agent,” where signed by Adams with Pringle’s authority?

D. Clepto steals Able’s check book and writes a check payable to Paul Payee, signing Able’s name thereto. Payee negotiates the instrument to Bosley who takes for value, in good faith and without notice. Bosley presents the check to Able’s Bank which pays the instrument prior to discovery of the forgery. Upon discovery of the forgery, Able’s Bank makes demand that Bosley repay to the Bank the amount of the check. Is Able’s Bank entitled to recover the amount of the check from Bosley? Why or why not?

E. Bank certifies a \$1,000 check drawn on Bank by Deputy Drawer, payable to Patrick Payee. Patrick alters the check without authority from Deputy by making it payable for \$5,000 dollars. Then Patrick negotiates the check to Hank Holder, who takes it for value without notice of the alteration. Hank presents the check to Bank.

1. Is Bank obligated to pay the check? Explain.
2. If Bank paid Hank \$5,000 for the check, then brought suit against Hank to recover part or all of such payment, who would win? Why?

NEGOTIABLE INSTRUMENTS ESSAY ANSWERS

“MODEL” ANSWER TO QUESTION #1

Note that this answer has been drafted by a CBR editor in the format and style that is demonstrated in the Essay Writing Workshop and “Webinar”. It is not a perfect answer, and there are clearly other ways to approach this question, but you may use this answer to help you visualize the structure and writing approach we teach.

A. Analysis of Duke's Potential Crimes

1. Issuance of Bad Check

Duke purchased a motor boat from Earl for \$10,000 using a check drawn from B Bank. Duke knew that he only had \$7,000 in that account when he wrote the check. Duke hoped that he would be paid an outstanding insurance claim before the check cleared. Earl immediately deposited Duke's check. After several days, Earl was notified by C Bank that the check was being dishonored and returned for insufficient funds. Duke explained that he could make the check good in two weeks. Earl agreed to wait the two weeks.

Earl is going to argue that Duke should be convicted of issuing a bad check since he purposely wrote the \$10,000 check from B Bank knowing that he did not have the funds to cover that check in his account. Issuing a bad check requires the requisite specific intent to achieve the prohibited behavior. Duke is going to argue that he did not have the specific intent to issue the bad check, because he was hoping to get a check to cover the shortage of funds in his account. Merely hoping that one has sufficient funds in an account by the time the check is cashed does not undermine intent exhibited by knowingly writing a check on an account that did not contain adequate funds.

In this particular case, Duke will be most probably convicted of issuing a bad check. Duke wrote the check and he had the requisite intent to write the check. Duke knew that he only had \$7,000 in the account, not the \$10,000 required to cover the check he wrote to Earl providing the specific intent necessary under the UCC.

2. Larceny

Duke was an accounts payable clerk in the bookkeeping department at Acme Corp. Duke prepared an Acme Corp. check drawn on Acme Corp.'s account at B Bank payable to Duke Corp. for \$3,000. Duke Corp. is a non-existent entity. Duke deceived Acme's Treasurer and had him sign the check. Duke took the check and endorsed it payable to Duke by signing "Duke Corp., by Duke, President" and then deposited the check in his personal account at B Bank. Duke prepared another Acme Corp. check on its account at B Bank for \$2,000. Duke endorsed the check and deposited it in his personal account at B Bank.

Acme Corp. is going to argue that Duke is guilty of larceny since he took the money from Acme Corp. with the intent to permanently deprive Acme Corp. of those funds. Larceny requires the taking and carrying away the property of another with the intent to permanently deprive them of that property. Duke is going to argue that he is not guilty of larceny since he was entitled to possess the check as a clerk in the bookkeeping department. An individual guilty of larceny need only take the property from someone else who had possession and the guilty individual must not be entitled to possession himself. Acme Corp. is further going to argue that Duke would in the alternative be guilty of embezzlement, because he is guilty of converting to his own use property which he had legal custody over as an accounts payable clerk. Embezzlement is the conversion of property which you have legal custody over.

In this particular case, Duke will be found guilty of larceny. Duke did not have possession of the checks since he did not have check signing authority at Acme Corp. Alternatively, should the court find that Duke had possession of the check, he will be found guilty of embezzlement.

3. Forgery

Duke prepared a check from the Acme Corp. account drawn from B Bank payable to himself in the amount of \$2,000. Duke signed the check in the name of Acme's Treasurer. Duke then endorsed the check and deposited it in his personal account at B Bank.

The B Bank is going to argue that Duke is guilty of forgery, because he signed the Treasurer's name on the \$2,000 check. Forgery occurs when an individual signs someone else's name in order to commit a fraud. Duke is going to argue that he is not guilty of forgery for the \$2,000 check since he did not sign another individual's name on that check, he signed his own name.

In this particular case, Duke will be guilty of forgery for signing the Treasurer's name on the \$2,000 check. He will not be guilty of forgery for the \$2,000 check since he did not sign anyone else's name on that check.

B. 1. \$3,000 Check

Duke prepared a \$3,000 check payable to Duke Corp., a non-existent entity, drawn under Acme Corp.'s account at B Bank. Duke obtained Acme Corp.'s Treasurer's signature on this check through deception. Duke endorsed the check payable to himself and deposited it in his personal account at B Bank.

B Bank is going to argue that it is not liable for the \$3,000 check. When a holder presents a bank with a properly negotiated instrument, the bank must pay the holder according to the terms of the instrument. Acme Corp. is going to argue that B Bank had a duty to make sure that the check was written out to a legal entity. B Bank had no way of knowing that the Treasurer was fraudulently induced to sign the check and furthermore, the bank had no requirement to seek that knowledge.

In this instance, B Bank will not be liable to Acme Corp. for the \$3,000 check. B Bank had no knowledge of the fraud and was not required to obtain such knowledge, so B Bank cannot be held liable for the \$3,000 check.

2. \$2,000 Check

Duke prepared a \$2,000 check drawn on B Bank and forged Acme Corp.'s Treasurer's signature on the check. Duke endorsed the check and deposited it in his personal account at B Bank.

B Bank is going to argue that it is a negotiable instrument and it is not liable for payments made on properly negotiated instruments. When a holder presents a bank with a properly negotiated instrument, the bank must pay the holder according to the terms of the instrument. Acme Corp. is going to argue that Acme Corp.'s Treasurer's name was forged by Duke. Liability is imposed on a drawee who disburses funds to a payee on a forged instrument.

In the instance of the \$2,000 check, B Bank will be found liable for payments made on a forged instrument. B Bank will need to repay the \$2,000 to Acme Corp.

ANSWER TO QUESTION #2

(a) Hap's crimes. Hap committed larceny, forgery, and may have committed burglary.

The issue is whether taking a checkbook and forging a signature in order to withdraw funds from a checking account constitutes larceny.

Larceny is defined as the taking and carrying away the personal property of another person with the intent to permanently deprive the person of the property. Burglary is defined as the breaking and entering of a place with the intent to commit a felony therein. Forgery is defined as falsely signing someone else's name to a legally significant document.

Hap took a check from Dad's checkbook without Dad's permission, and using that check took \$2,000 from Dad's account without Dad's consent with the intent to permanently deprive Dad of the money. Therefore, because Hap took \$2,000 from Dad without his consent and with the intent to permanently deprive Dad of the money, Hap committed larceny.

From the facts, it is unclear as to whether Hap unlawfully entered Dad's office when obtaining the check. If Hap unlawfully entered Dad's office, and had the intent to steal the check and the intent to steal Dad's money when he broke and entered Dad's office, he will have committed burglary as well.

Hap committed forgery as well. Hap falsely signed Dad's name to a check, which is a legally significant document, in order to withdraw funds from Dad's account at BanCo.

Therefore, because Hap took the check and \$2,000 from Dad without his consent and with the intent to permanently deprive Dad thereof, Hap committed larceny. Because Hap falsely signed another person's (Dad's) name to a legally significant document, he committed forgery. If Hap broke and entered Dad's office unlawfully with the intent to commit the larceny therein, he committed burglary as well.

Hap also committed the crime of false pretenses. The crime of false pretenses involves gaining possession of property through fraudulent means. Here, Hap gained possession of \$2,000 from ComCo by fraudulently presenting a forged check to obtain \$2,000.

(b) Dad's cause of action against BanCo. Dad has a cause of action against BanCo for negligently honoring the forged check and paying \$2,000 out of Dad's account.

The issue is whether BanCo properly honored the forged check. Generally, a cause of action for negligence lies where a duty to the plaintiff is owed, the duty is breached, and the breach actually and proximately causes damage to the plaintiff. BanCo owed Dad a duty of reasonable care to service Dad's account at BanCo. BanCo breached this duty because it honored a check which was obviously defective on its face. Hap signed Dad's name in Hap's own handwriting, making no attempt to imitate Dad's signature. The bank, BanCo, is held to a duty of reasonableness in honoring checks written by a depositor. It is unreasonable for BanCo to honor this check because if they reasonably inspected the check, they would have noticed that it did not match Dad's signature. BanCo's breach actually caused Dad's \$2,000 loss, and it was foreseeable that Dad would lose money from the bank's negligence.

Because BanCo breached a duty owed to Dad, and because the bank's breach actually and proximately caused Dad's \$2,000 injury, Dad has a cause of action against BanCo in negligence.

(c) BanCo v. Hap. BanCo may maintain a cause of action against Hap for the \$2,000, but may not attach the stock Hap received from his grandfather.

The first issue is whether Hap is liable to BanCo for \$2,000. The second issue is whether BanCo may attach Hap's stock to satisfy a judgment against Hap.

BanCo may maintain a cause of action against Hap. The check is a negotiable instrument, and Hap, as an endorser of the negotiable instrument guarantees its payment. Each endorser of a negotiable instrument is liable for its payment unless the endorsement includes a restriction to release the endorser from liability. Here, Hap made a general endorsement of the check, and therefore became personally liable for its payment. Because Hap, as an endorser of the check, is personally liable for paying the amount of the check, BanCo may maintain a cause of action against Hap.

ANSWER TO QUESTION #3

A. The instrument is negotiable because (1) it is signed by the drawer (Dan Drawer); (2) it contains an unconditional order to pay the stated sum; (3) the amount payable is a sum certain in money (\$500); (4) the draft contains no other promise, order, obligation or power given by the drawer; (5) it is payable on demand or at a definite time; and (6) it is payable to order or to bearer (Paul Payee or Bearer).

B. The writing is a bearer instrument because by its terms it is payable to a specified person (Paul Payee) or bearer.

C.

1. Paul Payee's endorsement is "special" because it rendered the instrument order paper, and the transferee's (John Jones') endorsement is necessary for further negotiation.

2. John Jones' endorsement is a "blank" endorsement because it consists of nothing more than the transferor's signature. Such an endorsement makes an instrument bearer paper, and the transferee may further negotiate the instrument by delivery alone.

D.

1. No, the separate agreement does not render the writing nonnegotiable because the instrument is not "subject to" or "governed by" the separate agreement. However, if in the instrument Drawer had promised to pay in money or to pay by painting the house (money or services), the instrument would be nonnegotiable.

2. The separate agreement could affect a holder of the instrument because he would take the instrument subject to any personal defenses. However, a holder in due course would take the instrument without notice of any claim or defense, for example, the defense of failure of consideration.

E. Paul Payee and Lana Love are secondarily liable on the instrument in the order in which they indorsed it. By their endorsements, Payee and Love became liable to pay the instrument according to its tenor at the time of endorsement if the drawee (Seventh State Bank) refuses to pay and Payee and Love are given notice of dishonor. However, Chuck Charles is not secondarily liable on the instrument because he disclaimed liability on his endorsement by endorsing "without recourse." Such a qualified endorsement disclaims the secondary liability of an indorser (although Chuck may still be liable under his warranties as a transferor).

ANSWER TO QUESTION #4

A. The material alteration of the check (\$500 altered to \$1,500) affected the obligations of each party who signed the instrument.

1. Dan. Dan signed the check prior to the alteration, and his obligation on the instrument was changed without his consent. Therefore, unless his negligence substantially contributed to the alteration, Dan's obligation to subsequent holders in due course remains the same as at the time he signed the instrument. Fine Furs, as a holder in due course, may enforce the instrument according to its original tenor (\$500).

2. First State Bank. As the drawee bank, First State Bank is not liable to Fine Furs unless it accepts the instrument.

3. Paul. Because the material alteration occurred after Paul indorsed the check, his liability to a subsequent holder in due course is limited to his obligation at the time he signed. Therefore, Fine Furs may enforce the check to the extent of \$500.

4. Girl. Girl's obligation on the instrument extends to the amount of the check at the time she indorsed it. Therefore, Fine Furs may recover \$1,500 from her. Girl has breached not only her contract of endorsement but also her warranty that the instrument has not been materially altered. Therefore, Fine Furs may recover from her under either theory.

B.

1. Bank had no obligation to dishonor other checks of Dan so that Bank could pay the check held by Paul. Bank, as the drawee bank, did not accept the check made to the order of Paul, and therefore Bank is not liable on the instrument and could properly pay another check with Dan as drawer upon presentment.

2. Bank properly rejected Paul's offer to deposit additional funds in Dan's account because to do so would have been a violation of the bank-customer relationship between Bank and Dan. Bank has no right to debit or credit a customer's account unless ordered to by the customer.

C.

1. Dan. First State Bank cannot debit Dan's account for payment of an instrument with a forged endorsement. Therefore, Bank improperly paid the check and must recredit Dan's account for \$500 upon demand. Dan remains liable to Paul for \$500.

2. Paul. Paul may recover from: 1) Dan, who remains liable to him; 2) First State Bank, which is liable to Paul for conversion because Bank paid the instrument on a forged endorsement; or 3) Thief.

3. First State Bank. First State may recover from Second State (the collecting bank) on the theory of breach of warranty of good title because Paul's (the payee's) endorsement was forged. However, First State must recredit Dan's account upon demand. The bank may also be the subject of a conversion action by Paul.

4. Second National Bank. The bank is liable to First State for breach of warranty of good title. Second National may enforce an action against Thief to recover the \$500.

D.

1. A bank may charge against a customer's account any item "properly payable."
2. Dan will not recover against First State because the check was properly payable. When Paul wrote "for deposit only A-1 Cleaners" on the check with the intention to authenticate the instrument, that operated as his endorsement.

ANSWER TO QUESTION #5

A.

1. Paul Payee and Pedro Vargas are secondarily liable on the instrument because as transferors they indorsed it. Dan Drawer is secondarily liable as drawer.
2. A drawer or indorser who is secondarily liable becomes liable on the instrument only on dishonor (i.e., the drawee—First State Bank—refuses to pay the instrument on presentment) and notice of dishonor. "Protest" is unnecessary here (for the reasons explained below in part 4).
3.
 - (a). No, First State must pay the check if it is properly payable, but it need not "accept" the check by certifying it. Certification is not an obligation of a drawee bank.
 - (b). If the drawee bank "accepts" the check by certifying it, all other parties, including the drawer (Drawer) and endorsers (Payee and Vargas), are discharged.
4. Protest is a certificate of dishonor necessary to charge the drawer and endorsers of an instrument drawn or payable outside the United States. Protest would not be required here because First State Bank is a U.S. bank.

B.

1. The instrument is rendered nonnegotiable only if the provision indicates the instrument is payable only out of a particular nongovernmental fund. Such a provision renders the order to pay conditional. However, a mere notation on the instrument to charge a particular account (e.g., "charge my expense account fund") does not destroy negotiability.

2. The words “subject to” in an instrument in reference to another agreement destroy negotiability because the words render the promise or order to pay conditional.

3. A provision which refers to different interest rates before and after maturity does not destroy negotiability because the stated interest rates render the amount due (a sum certain in money) ascertainable from inspection of the instrument.

4. An instrument payable in foreign money, such as lira, is negotiable as long as money is the medium of exchange.

5. Florida law permits reference to an external source (for example, the prime interest rate) to establish the rate of interest, without affecting the instrument’s negotiability. However, the outside source must satisfy the Code’s standard of commercial certainty. A provision setting interest “at the current rate” is not sufficient and thus this instrument is nonnegotiable.

C.

1. Pringle is liable and Adams is not. When an authorized representative (Adams) names the party he is representing (Pringle) and indicates he is signing in a representative capacity, he is not personally liable. Pringle is liable as the principal.

2. Pringle is liable. As to third parties, Adams is also liable. However, as between the original parties to the instrument, Adams may show by parol evidence that the parties did not intend Adams to be bound. Then only Pringle would be liable.

3. As to third parties, Pringle is not liable and Adams is. However, as between the original parties to the instrument Adams may show by parol evidence that the parties intended Pringle to be bound and not Adams. Then Pringle will be held personally liable.

4. Pringle is not liable and Adams is. Because he neither named Pringle as the person he represents nor signed in his representative capacity, Adams became personally liable even though he was authorized to sign.

5. Pringle is not liable. As to third parties, Adams is liable. However, as between the original parties to the instrument, Adams may show by parol evidence that the parties did not intend Adams to be bound.

D. Bank cannot recover from Bosley because Bosley is a holder in due course who did not breach any warranties of a presenting party. When an instrument is “finally paid” to a holder in due course, the bank cannot recover against him unless he breaches one of three warranties, including the warranty that the holder in due course has no knowledge that the signature of the drawer is unauthorized. Bosley had no knowledge that Able’s signature was forged, and therefore Bank cannot recover from him.

E.

1. Yes, Bank must pay Hank according to the original tenor of the instrument (\$1,000) because Hank is a holder in due course. Hank had no notice of the material alteration when he took the instrument in good faith and for value, and therefore the payor bank must pay it according to the tenor at the time Drawer signed it.

2. Hank would win because a holder in due course makes no warranty to a payor bank which has accepted an instrument (i.e., certified it) as altered before the holder in due course took it. Bank had a duty to detect the alteration prior to certification and may not now recover against Hank.

SECURED TRANSACTIONS ESSAY QUESTIONS

Secured Transactions, until recently, has not appeared as a subject on the Florida Bar Exam. The following essay questions and answers have been selected from essay exams of other states where the application of the UCC is essentially the same.

QUESTION #1

AAA Equipment Financing (the “Lender”) is in the business of financing major purchases of equipment by manufacturers. ABC Printing (the “Borrower”) is in the printing business and maintains printing plants at various locations in State X. The Borrower’s corporate headquarters and chief executive office are located in Cobb County, State X. On July 1, 1991, the Lender made a loan in the principal amount of \$5,000,000 to the Borrower for the purchase of a printing press to be installed at the Borrower’s plant in Muscogee County, State X. The Borrower executed a security agreement granting to the Lender a security interest in the printing press and providing that the printing press was to remain personal property and was not to become a fixture on the real estate. The Borrower also executed a Uniform Commercial Code Financing Statement describing the printing press as the property covered thereby. On that same day, the Borrower used the loan proceeds to purchase the printing press, and the printing press was delivered and installed with bolts to the floor of the plant. Because of administrative delays, the Lender did not file a Uniform Commercial Code Financing Statement until July 14, 1991. The Financing Statement was filed in the office of the Clerk of the Superior Court of Cobb County.

Unbeknownst to the Lender, at the time of the making of the loan the Borrower was having financial difficulties. In an attempt to raise money to meet its financial obligations, the Borrower was contemporaneously engaged in negotiations for the sale of the Columbus plant, including the real estate, building, equipment, inventory and supplies, to XYZ Printing (the “Buyer”). A significant element in the negotiations and the purchase price was the installation by the Borrower of the new printing press; however, the Buyer was not aware that the Borrower intended to finance the purchase of the new printing press.

On July 19, 1991, the Borrower and the Buyer consummated the sale of the Columbus plant for a sale price of \$7,000,000 cash. On that day, the Borrower delivered possession of the Columbus plant to the Buyer.

In the six months that followed, the Borrower's financial condition did not improve, but in fact deteriorated. The money raised from the sale of the Columbus plant was used to meet other financial obligations, but the money soon ran out, and the Borrower defaulted on its loan from the Lender. One Saturday afternoon, agents for the Lender went to the Columbus plant and asked the security guard to let them in so that they could remove the printing press. Caught off guard, the security guard allowed the Lender's agents to enter the Columbus plant and repossess the printing press. The printing press was stored in a warehouse in Columbus.

Shortly thereafter, the Lender gave the Borrower notice of its intention to conduct a public sale of the printing press, and also gave the Borrower notice of the Borrower's right to redeem the collateral at any time prior to such sale by payment of the outstanding loan amount (\$5,000,000). In addition, the Lender placed an advertisement in the Friday edition of the Columbus paper where sheriff's advertisements are published stating that a public sale would be held at the warehouse where the printing press was being stored on the following Tuesday at 10:00 a.m., identifying the printing press and stating that those attending would be given an opportunity to bid on a competitive basis and that the sale would be made to the highest bidder. The public sale was conducted at the appointed place, date and hour, and the Lender was the highest bidder at the sale with a bid of \$2,500,000. No other bidders were present. The Lender applied its bid to the outstanding loan, leaving a balance of \$2,500,000. Two weeks later, Lender privately sold the printing press to another printing company for \$3,500,000 cash.

Shortly thereafter, the Buyer brought suit against the Lender for conversion of the printing press, alleging that the Buyer had purchased the Columbus plant, including the printing press, from the Borrower for value and that the Buyer had no knowledge of the Lender's security interest in the printing press. The Lender brought suit against the Borrower for the \$2,500,000 deficiency on the loan, after application of the proceeds of the public sale of the printing press.

The Lender seeks your advice regarding the merits of the Buyer's conversion suit against the Lender, and the merits of the Lender's deficiency claim against the Borrower. Discuss (1) whether the Lender properly perfected its security interest in the printing press, (2) whether the Buyer's claim of conversion in respect to the printing press would prevail over the Lender's security interest in, and repossession of, the printing press and (3) whether and to what extent the Lender can collect the deficiency on its loan.

QUESTION #2

Anticipating a future loan to Dan Debtor, Able, on February 1, obtained a proper security agreement from Dan and properly filed a financing statement covering all of Dan's milling equipment. On March 1, Baker made a loan to Dan against the same equipment, obtained a proper security agreement and filed a proper financing statement covering the equipment. On April 1, Able made a loan to Dan against the equipment. On April 15, Dan defaulted in paying Able and Baker, and each of them claimed a priority security interest in the equipment.

Questions:

(A) Who has priority, Able or Baker? Why?

(B) If you had been asked the same question on March 15, would your answer have been the same? Explain.

QUESTION #3

A. The following events all occurred in 1987. On April 1st, Friendly Finance perfected a security interest in all the present and future inventory of Gutenberg, a retailer of printing presses. On April 5th, Gutenberg sold the printing press to the Daily Journal on credit. On July 3rd, Gutenberg obtained a working capital loan from Prime Bank and gave Prime a security interest in all Gutenberg's present and future assets, including its inventory. On the same day, July 3rd, Prime perfected its security interest. The Daily Journal failed to make a payment to Gutenberg that was due on July 1st, and on July 7th, Gutenberg repossessed the press. On July 10th, Gutenberg resold the repossessed press to the Weakly Star. The Star paid the purchase price by negotiating and delivering to Gutenberg certain promissory notes that were payable to the Star and that had been executed and given to the Star by third persons.

On July 15th, Friendly's president comes to your office, states that he is concerned about Gutenberg's financial condition, and asks you the following questions:

(1) What security interests, if any, are held by Friendly and Prime in the press that was originally sold to the Daily Journal, then was repossessed and sold to the Weakly Star?

(2) What action, if any, should Friendly take to improve or preserve its position?

QUESTION #4

Under the provisions of the Uniform Commercial Code in Florida:

A. In what two (2) ways does a “purchase money security interest” arise?

B. How may a security interest be perfected in each of the following types of collateral:

1. Promissory notes and corporate stock?
2. Accounts and general intangibles?
3. Consumer goods?
4. Equipment?

C. On February 1, 1983, Aaron acquires a nonpurchase money security interest in a printing machine used in Cecil’s printing business, and on February 28, 1983, Aaron takes possession of the machine. On February 6, 1983, Barnfield acquires a security interest in the machine. On March 5, 1983, Barnfield makes a proper financing statement filing, and on March 7, 1983, Aaron makes a proper financing statement filing. As between the security interests of Aaron and Barnfield, which one has priority? Give reasons for your answer.

D. On January 2, 1983, Aphid lends Beetle money to purchase refrigerators to sell in Beetle’s business of appliance sales. Beetle signs a security agreement giving Aphid a security interest in the refrigerators. The security agreement provides that Aphid may repossess the refrigerators if Beetle defaults in paying his loan. On February 1, 1983, Aphid makes a proper financing statement filing covering the refrigerators in which Aphid has a security interest. On February 12, 1983, Beetle makes a retail sale to Crickett of one of the refrigerators covered by Aphid’s financing statement. Then Beetle defaults in paying an installment on his loan from Aphid. Aphid demands possession of the refrigerator sold to Crickett. Crickett refuses to surrender possession. Who will prevail as between Aphid and Crickett? Give reasons for your answer.

QUESTION #5

Apply the provisions of the Uniform Commercial Code in Florida and authorities interpreting same in answering the following questions:

Benny Borrower was a stock broker desiring to supplement his income by a second field of endeavor. After several weeks of negotiations, Benny and Hoss Trader agreed that Benny would purchase from Hoss for \$22,000, a stallion to be used by Benny solely in a business of providing stud services to mare owners.

First City Bank (“Bank”) loaned Benny \$20,000 of the purchase price, obtained a security interest in the stallion in a security agreement executed by Benny, and filed a correctly prepared financing statement in the county where Benny lived and kept the stallion.

With actual knowledge of Bank's security interest, Lionel Lender loaned Benny the other \$2,000 of the purchase price, obtained a security interest in the stallion in a security agreement executed by Benny, and, after Bank had filed its financing statement, filed a correctly prepared financing statement with the Secretary of State.

After reducing the outstanding balance of his Bank loan to \$6,000, Benny defaulted in making timely payment of installments of the Bank loan. Bank gave appropriate notices of default, intent to accelerate maturity, acceleration of maturity, and demand for payment of the entire note, but Benny's default continued. Bank employed Repo, Inc. to obtain possession of the stallion.

Employees of Repo, Inc. drove to Benny's home, found the stallion grazing in Benny's fenced front yard near the front gate, which was not locked, entered the gate, lassoed the stallion, placed it in a truck and drove it to City Stables for safekeeping. Bank paid Repo, Inc.'s fee of \$250 for the repossession.

Two days after the repossession, Benny appeared at the Bank, tendered \$6,000 cash to Bank, and demanded possession of the stallion. Bank refused Benny's tender after first demanding an additional \$250 to cover the fee paid to Repo, Inc. Five days later, Bank, without notice to Benny or Lionel, conducted a private sale of the stallion. The highest bid received at the sale was Bank's bid of \$4500, so the stallion was sold to Bank, and Benny's Bank loan was credited with \$4500.

Bank then instituted suit against Benny for the \$1500 still outstanding on Benny's Bank loan, plus expenses of repossession and the expenses of advertising and conducting the foreclosure sale.

Benny filed an answer denying liability on Bank's claim and a counterclaim seeking damages for lost stud fees, statutory minimum damages, attorneys fees, and exemplary damages. Lionel intervened in the suit seeking only to set aside the sale and to establish a lien position superior to Bank's lien position.

Answer the following questions concerning the foregoing:

- A. Did Bank and Lionel or either of them perfect their security interest? Why?
- B. How is priority of lien established as between competing security interests in the stallion?
- C. Did Lionel's security interest have priority over Bank's security interest? Explain your answer.
- D. What was the legal effect of Benny's tender of \$6,000 to Bank prior to the foreclosure sale?
- E. Were the actions of Repo, Inc. lawful? Explain your answer.
- F. Is Bank entitled to judgment against Benny? Explain why, or why not. If so, which amounts sought by Bank is Bank entitled to recover?

G. Is Benny entitled to a judgment against Bank? Explain why, or why not. If so, which amounts sought by Benny is Benny entitled to recover?

QUESTION #6

Apply the provisions of the Uniform Commercial Code in Florida and authorities interpreting same, if necessary, in answering the following questions:

A. Central State Bank has a perfected security interest against all presently owned and after-acquired machinery and equipment of Finest Furniture Manufacturing Company. Finest wants to acquire a new lathe for use in its furniture manufacture. Easy Finance Company is willing to lend Finest the amount of the purchase price for the lathe provided that Easy can obtain a first priority security interest.

Can Easy obtain a first priority security interest? If so, how? If not, why not?

B. On June 1, 1985, Commerce State Bank and Elite Parts Company execute a security agreement granting the Bank a security interest in all Elite's accounts receivable, and Bank advances funds against these receivables. On June 15, 1985, Friendly Finance Company and Elite execute a security agreement granting Friendly a security interest in the same collateral, and Friendly, without notice of Bank's security interest, advances funds against the same collateral. Neither Bank nor Friendly files a financing statement.

1. Who has priority, Bank or Friendly? Why?

2. What would be the effect, if any, upon Bank and Friendly of Elite's bankruptcy? Why?

C. On June 1, 1985, First State Bank and David Debtor create a valid security interest in David's inventory and equipment and include a future advance clause in the security agreement. On June 2, 1985, the Bank perfects its security interest by filing. On June 3, 1985, David obtains a loan from Fancy Finance Company and gives Fancy a security interest in the same inventory and equipment. On the same day, June 3, 1985, Fancy perfects by filing. On June 4, 1985, the Bank, with knowledge of Fancy's security interest, advances an additional loan against the same collateral.

Who has priority as between the Bank and Fancy, and to what extent? Explain your answer.

D. For purposes of this question, assume that Donald Debtor is solvent at all times, and that the sales mentioned in 2, 3, & 4 below were not authorized by First State Bank. The Bank has a valid, perfected security interest in Donald's inventory and non-farming equipment, and the security interest extends to "proceeds." To what extent will the Bank's security interest remain perfected as to "proceeds" without further action by the Bank:

1. if an inventory item is sold for cash to a retail customer?
2. if Donald's business, including all his inventory, is sold in exchange for the promissory note of the buyer?
3. if items of non-farming equipment are sold in exchange for the buyer's assignment to Donald of one of buyer's accounts receivable?
4. if items of the non-farming equipment are exchanged for items of farming equipment?

E. On June 1, 1982, Bank, by filing a financing statement in the office of the Secretary of State, perfected a security interest in "all inventory and equipment on the premises of Dennis Debtor." The security interest secured payment of Dennis's promissory note which provides for installments payable over a ten-year period. On September 1, 1985, Lenny Lender perfects a security interest in the same collateral. On July 5, 1987, Bank files a Continuation Statement covering the same collateral. On August 1, 1988, Amiable Finance Company perfects a security interest in the same collateral. On August 15, 1988, Dennis defaults in payment of his debts to Bank, Lenny and Amiable Finance.

On the date of default who has priority as between Bank, Lenny and Amiable? Why?

QUESTION #7

Apply the provisions of the Uniform Commercial Code in Florida and authorities interpreting same in answering the following question.

Debra Debtor resided and operated a printing company in Broward County. On February 1, 1984, she borrowed \$25,000 from Lawford Lender, executed a security agreement giving Lawford a security interest in Debra's large printing machine, and filed a proper financing statement with the county clerk. The security agreement provided, among other things, that upon Debra's default in payment of her note Lawford could take appropriate steps, including breaking, entering and trespass as necessary to repossess the printing machine.

On March 5, 1984, Debra made a \$10,000 loan from Friendly Finance Company, executed a \$10,000 note payable to Friendly, and executed a security agreement giving Friendly a security interest in the same printing machine. Although Friendly did not file a financing statement, on the date of the loan Friendly notified Lawford of Friendly's security interest.

Debra failed to timely pay an installment on her \$25,000 note that became due on October 1, 1985. At 11:00 A.M. on Friday, October 10, 1985, Lawford, unobserved by Debra or her employees, slipped in an unlocked door at Debra's printing company and removed a part from the printing machine.

On October 15, 1985, Lawford telephoned Debra and advised her: "I have advertised the printing machine in the newspaper, and on October 20, 1985, I am going to take sealed bids at my office to sell it to pay off your note to me." Other notices of the sale consisted of an advertisement in the newspaper and written notices to various dealers in printing machines. In October, 1985, Debra was not in default in performing her obligations to Friendly.

On October 20, 1985, Lawford, at his loan company offices, accepted the only bid he received for the printing machine, a bid of \$10,000 submitted by Best Prices, Inc., a wholesaler of printing machines. On the same date, Best had paid \$20,000 at a sale in Palm Beach County for a printing machine of the same type, quality and condition as Debra's.

You are employed to represent Debra and Friendly, who contemplate suit against Lawford and Best to set aside the sale and/or for damages.

Questions:

A. What issues are raised by this fact situation? List all the issues that you believe are raised, regardless of the weight that you give any particular issue or issues in answering Part B to this question.

B. What will be the result of a suit, and why?

QUESTION #8

Apply the provisions of the Uniform Commercial Code ("UCC") in Florida and authorities interpreting same, in answering the following questions.

David Debtor is a cabinet maker in Jacksonville, Duval County, Florida. On January 2, 1986, David purchased for use in his business a new power saw from Power Tools, Inc. ("Power"). On the same date, David executed a note for the purchase price, executed a properly completed security agreement to secure payment of the note, and took delivery of the saw. On January 15, 1986, Better Bank ("Bank") made a general purpose loan to David, and David gave Bank a security interest in all David's cabinet making tools (including the new power saw). On the same date (January 15, 1986), David also signed a properly completed financing statement for the Bank covering the collateral and filed the financing statement with the Duval County Clerk. On February 10, 1986, Friendly Finance Company, with knowledge of the contents of the financing statement given to Bank, perfected a security interest in all David's cabinet making tools (including the new power saw). On February 15, 1986, Power filed with the Secretary of State a properly completed financing statement covering David's new power saw. On February 20, 1986, the Duval County Sheriff levied execution on the new power saw to satisfy a judgment obtained by Lendy Creditor against David. On July 1, 1986, David filed a voluntary petition in bankruptcy. Power, Bank, Friendly, Lendy and the trustee in bankruptcy ("Claimants") all claim superior rights in the power saw. Answer each of the following questions regarding this fact situation:

- A. In what UCC classification and in what UCC subclassification of collateral does David's power saw fall?
- B. What type of security interest was acquired by Power Tools, Inc.? Why?
- C. Were the security interests of Power Tools, Inc., Bank and Friendly perfected? Explain your conclusion as to each such secured party.
- D. What type creditors are Lendy and the trustee in bankruptcy?
- E. With respect to each claimant, state that claimant's relative priority as to each other claimant, giving reasons for your conclusions. Assume that no one has acquired a "preference" within the meaning of that term under the Bankruptcy Code.
- F. What claimant should be given first priority over all others? Why?

QUESTION #9

On November 1, 1986, Denny Debtor, a retail dealer in road machinery, obtained two loans from Lionel Lender. First he obtained a loan to purchase a road grader to place in stock. Then he executed a security agreement granting Lionel a security interest in the grader, and the security interest was duly perfected, all on November 10, 1986. Second, Denny obtained a \$500 loan to purchase a new washing machine delivered to his home that day. Also on November 1, 1986, Denny executed a security agreement granting Lionel a security interest in the washing machine. Although Lionel did not commit to extend any additional credit to Denny, the security agreement recited that the washing machine would be security for repayment of future loans to Denny as well as for repayment of the initial \$500 loan. No financing statement was filed covering the washing machine.

Denny owed Conrad Creditor, a grading contractor, \$8,000 on account of overpayments made by Conrad to Denny in August, 1986. On December 10, 1986, Denny delivered the road grader and the washing machine to Conrad with bills of sale in satisfaction of Denny's debt to Conrad. At the time of his transaction with Denny, Conrad knew of the existence of Lionel's security interest in the road grader, but he did not know of Lionel's security interest in the washing machine. Conrad planned to hock the washing machine at a nearby pawnshop.

On December 20, 1986, Lionel, prior to learning of Denny's transaction with Conrad, made an additional \$100 loan to Denny. Then on December 30, 1986, Lionel learned of Denny's transaction with Conrad and brought suit against Conrad for conversion.

Answer each of the following questions regarding the foregoing fact situation:

- A. In what UCC classifications and what UCC subclassifications of collateral do Denny's road grader and washing machine fall?

B. Prior to December 10, 1986, did Lionel have a security interest in the washing machine that was enforceable, or perfected, or both? Explain your answer.

C. To what extent, if any, will Lionel prevail in his action against Conrad? Explain your answer fully.

QUESTION #10

Apply the provisions of the Uniform Commercial Code in Florida and authorities interpreting same in answering the following question.

Detra Debtor decided to open a dress shop. She borrowed money for working capital from First Bank, giving First Bank a security interest in the furniture in her apartment. The furniture had been given to her by her father, who had purchased it from Family Furniture on credit, giving Family Furniture a security interest to secure payment of the purchase price. Detra also gave First Bank a security interest in her current and future inventory. Detra's and mother further secured Detra's debt by giving First Bank security interests in a note payable to Grandmother that Grandmother retains in her possession and in an open account indebtedness owed by Able Jones to Grandmother. First Bank filed correctly prepared financing statements with the Secretary of State covering all its security interest. Two weeks later Dandy Dress Company filed a correctly prepared financing statement with the Secretary of State on Detra's inventory and furnished dresses to her on credit. Six months later, Detra defaulted in payment of First Bank and Dandy, and Detra's father defaulted in payment of Family. First Bank now attempts to foreclose on all the furniture, the inventory, Grandmother's note, and Able's indebtedness.

Family claims the furniture. Dandy claims the inventory furnished by it, and Grandmother claims that First Bank cannot foreclose on the note or on the indebtedness owed by Able Jones.

Answer the following questions concerning the foregoing:

A. In what UCC Classifications and in what UCC subclassifications of collateral do the following items fall:

1. Detra's furniture.
2. Detra's inventory.
3. Grandmother's note.
4. Able's indebtedness to Grandmother.

B. What security interests, if any, have attached to the furniture, the inventory, Grandmother's note, and Able's indebtedness to Grandmother? Why?

C. What security interests, if any, have been perfected? Why?

D. Will First Bank be successful in its efforts to foreclose on the various assets? Explain your answer as to each asset.

QUESTION #11

On January 1, 2005, Bob, a cabinet maker, loaned Tommy \$4,000, and in return Tommy signed a negotiable promissory note ("Tommy's Note") payable to the order of Bob at six percent per annum interest.

On February 1, 2005, Bob borrowed \$1,000 from Wilson. Bob signed a promissory note made payable to the order of Wilson and a security agreement giving Wilson a security interest in Tommy's Note. Wilson did not file anything to perfect this security interest.

On February 12, 2005, Bob borrowed \$10,000 from Little Bank. Bob signed a promissory note made payable to the order of Little Bank and a security agreement giving Little Bank a security interest in all of his current and after acquired inventory, the proceeds thereof, and in Tommy's Note. Little Bank immediately filed a proper financing statement with the Secretary of State to perfect this security interest.

On February 15, 2005, Wilson became concerned and asked Bob if he could take possession of Tommy's Note. Bob gave him Tommy's Note.

On March 1, 2005, Bob borrowed \$5,000 from Big Bank. Bob signed a promissory note made payable to the order of Big Bank and a security agreement giving Big Bank a security interest in all of his accounts receivable. Big Bank immediately filed a proper financing statement with the Secretary of State to perfect this security interest.

On March 1, 2005, Bob began making custom cabinets ordered by Homebuilder using the inventory of wood Bob had on hand. On April 1, 2005, Bob delivered the cabinets and invoiced Homebuilder for \$3,000, which Homebuilder failed to pay Bob.

Bob defaulted on his promissory notes to Wilson, Little Bank and Big Bank.

1. Which creditor, Wilson or Little Bank, has the superior security interest in Tommy's promissory note? Explain fully.
2. Which creditor, Little Bank or Big Bank, has the superior security interest in the \$3,000 Homebuilder account receivable? Explain fully.
3. Under the UCC, who has the superior interest in the cabinets Bob delivered to Homebuilder? Explain fully.

QUESTION #12

On December 19, 2005, Quigley purchased a billiard table as a Christmas present for his family from Andy Amusements Co. ("AAC") for \$2,500. Quigley paid \$500 down and financed the \$2,000 balance by signing a promissory note payable in six months at an interest rate of 10% per annum. Quigley also signed a security agreement giving AAC a security interest in the billiard table.

Quigley had not paid anything on the note and on July 1, 2006, AAC sent Quigley a notice of default and demanded that he pay all amounts due. Quigley failed to pay and on August 1, 2006, AAC notified Quigley that it wanted to repossess the billiard table. Quigley allowed AAC to repossess the billiard table. After obtaining possession of the billiard table, AAC sent Quigley a written notice on August 4, 2006, by U.S. mail that the billiard table would be sold at a private sale in its storeroom sometime after August 12, 2006. The text of the notice contained all other information required by law and was received by Quigley on August 7, 2006.

On August 20, 2006, AAC itself purchased the billiard table for \$2,000 (which was a good faith estimate of the fair market value for a used billiard table) by crediting Quigley's account for that amount. AAC did not assess any deficiency against Quigley and provided Quigley an accounting.

Quigley thought that the billiard table ought to have been worth the amount he paid for it, \$2,500, and made demand upon AAC to refund him the \$500 down payment. AAC refused.

1. Did AAC fail to comply with any provisions of the UCC in repossessing and selling the collateral? Explain fully.
2. Assuming that AAC failed to comply with the UCC, what damages, if any, would Quigley be entitled to recover? Explain fully.

QUESTION #13

Wilma, a student in Orlando, Florida, needed transportation to get to school, so she financed the purchase of an automobile with Bank on January 2, 2007. Wilma signed a \$15,000 promissory note at 9 % interest payable in 36 monthly installments of \$477 each month beginning February 1, 2007. Wilma signed a security agreement, pledging the automobile as collateral to secure the promissory note. The note provided for acceleration of the indebtedness upon a default, at the option of Bank.

Wilma paid as agreed, until she failed to make the June 1 and July 1, 2007 payments. On July 5, 2007, Bank sent Wilma written notice that she was in default and that it would accelerate all payments due under the promissory note unless Wilma paid the past due amounts within ten days. Wilma received the notice on July 6, 2007. When no payments were received by July 16, 2007, Bank sent Wilma a notice that all amounts due under the promissory note, \$9000, were due and, if not paid within five days, Bank would take action to repossess the collateral. Wilma received the notice on July 17, 2007.

Wilma made no payments. On July 24, 2007, Lester, a Bank employee, pursuant to instructions from Bank, found the automobile in Wilma's driveway. Lester was able to start the automobile. As Lester drove out of Wilma's driveway, Wilma ran out shouting at Lester to bring back her automobile.

Wilma immediately called Bank and offered to pay in cash the June and July past due payments and any other costs incurred by Bank as a result of her default. Bank refused but unconditionally proposed to keep the automobile in full satisfaction of the debt and offered to send Wilma a written proposal to that effect. Since the fair market value of the automobile was only \$8,900, Wilma said "OK" and told the Bank to send her the proposal, which Bank did on July 24, 2007.

On July 26, 2007, Wilma received the proposal, wrote on the proposal the word "REJECTED", and returned it to the Bank. Bank nevertheless kept the automobile in satisfaction of the debt and so informed Wilma.

1. Did the Bank's repossession of Wilma's automobile comply with the requirements under the UCC as enacted in Florida? Explain fully.
2. What rights, if any, can Wilma assert against the Bank? Explain fully.
3. Assuming that the Bank breached its obligations to Wilma, what are the elements of the damages, if any, that Wilma can seek? Explain fully.

SECURED TRANSACTIONS ESSAY ANSWERS

“MODEL” ANSWER TO QUESTION #1

Note that this answer has been drafted by a CBR editor in the format and style that is demonstrated in the Essay Writing Workshop and “Webinar”. It is not a perfect answer, and there are clearly other ways to approach this question, but you may use this answer to help you visualize the structure and writing approach we teach.

1. Lender's Perfection of Security Interest in Printing Press

Lender made a loan in the amount of \$5,000,000 to Borrower for the purchase of a printing press to be installed in Borrower's Plant in Muscogee County of State X on July 1, 1991. Borrower executed a security agreement granting lender a security interest in the printing press. Also, the Borrower executed a UCC Financing Statement describing the printing press as property covered under the statement. The printing press was purchased and installed in Borrower's Plant. Lender did not file the UCC Financing Statement with the Office of the Clerk of Superior Court of Cobb County until July 14, 1991. Borrower defaulted on its loan with Lender.

Borrower is going to argue that there was no perfection of Lender's security interest. Perfection occurs when a financing statement is filed with the Office of the Clerk of Court and contains the lender's signature, a description of the property being financed, and Lender's and Borrower's names and addresses. Lender is going to argue that its security interest attached to the printing press on July 1, 1991 when the press was purchased with the money provided by Lender. Since the money was used to purchase the printing press, the interest here is a purchase money security interest.

In this particular case, Lender will prevail in obtaining a purchase money security interest in the printing press by filing the financing statement in the county of its principal place of business.

2. Buyer's Claim of Conversion with Respect to the Printing Press

Borrower purchased a printing press with money received from Lender. The financing statement that was filed on July 14, 1991, indicated that the printing press was to remain personal property and it was not to become a fixture attached to real estate. At the time of getting a loan from Lender, Buyer was having financial difficulties. To ease the financial burden, Borrower was negotiating the sale of the plant to Buyer. The sale was to include the real estate, building, equipment, inventory, and supplies. A major point in the negotiation of the sale was the installation of the new printing press. Buyer was not aware that Borrower intended to finance the cost of the new printing press.

Over a period of six months, Borrower's financial condition deteriorated. The money from the sale of the plant was used to meet financial obligations, but soon ran out. Borrower defaulted on his loan from Lender. On a Saturday afternoon, Lender sent agents to the plant and asked security to let them in to take the printing press. Security allowed Lender's agents to come in and take the press.

Lender is going to argue that he had a purchase money security interest in the printing press that attached and was filed within 20 days of Borrower receiving possession of the printing press. A purchase money security interest that is filed within 20 days has priority over all other security interests. Buyer is going to argue that he is a bona fide purchaser and should have possession of the printing press, because he purchased the printing press in good faith without knowledge of Lender's security interest in the printing press. Buyer more than likely is not a bona fide purchaser, but a bulk transferee since he purchased most of Borrower's supplies in the purchase of the plant; thus, Lender would still have priority over Buyer in the sale. Lender is further going to argue that the printing press was not identified as a fixture in the financing statement and is not a fixture; thus not part of the real estate transaction. A fixture is an item that is permanently affixed to the real estate, essentially something that cannot be removed without causing damage to the real property.

In this particular case, Buyer will not prevail in its claim of conversion against Lender. Lender peacefully took repossession of the printing press in accordance with its security interest in the printing press.

3. Lender's Ability to Collect Deficiency on its Loan

Lender gave Borrower notice of its intention to conduct a public sale of the printing press. Borrower was also given notice that Borrower could redeem the press at any time prior to the sale by paying Lender \$5,000,000. Lender placed an advertisement in the newspaper section where sheriff's advertisements are placed stating the details of the sale including the date, time and location of the sale. No other bidders were at the sale, so Lender was the highest bidder bidding \$2,500,000 for the printing press. There was an outstanding balance on the loan of \$2,500,000 after application of the sale proceeds to the loan. Lender sold the printing press to another company two weeks later for \$3,500,000. Lender brought suit against Borrower for the deficiency on the loan.

Borrower is going to argue that sufficient notice was not provided for the public sale of the printing press so Lender is not entitled to collect on the deficiency. Public sale notice requirements require that the notice include the date, time, and place of the sale be published and provided directly to the debtor. Lender is going to argue that the sale of the printing press was commercially reasonable. The law states that the sale will be prima facie commercially reasonable if it conformed with reasonable commercial practices of printing press dealers. Borrower is going to argue that since Lender sold the printing press two weeks after the sale to another person for more than the deficiency, Lender is not entitled to the deficiency judgment. The rule requires that if the deficiency is greater than the fair market value of the equipment, then the lender is entitled to the deficiency judgment.

Lender is going to argue that the fair market value was \$2,500,000 which was paid by Lender at the public sale, not the sale price paid after the public sale. If a public sale is conducted according to appropriate standards, then a lender is entitled to a deficiency judgment based on the fair market value of the equipment regardless if the goods are later sold for a higher value. Borrower is going to argue that the fair market value of the printing press is \$3,500,000, not the \$2,500,000 paid by Lender at the public sale.

In this particular case, Lender is going to prevail regarding the legitimacy of the public sale. Pursuant to the UCC, Lender followed the appropriate steps to sell the printing press. Lender, however, may not be able to collect on the deficiency judgment. If the court finds that Lender purchased the press for itself at below market value, then Lender will not be entitled to the deficiency judgment. Since the later sale occurred just two weeks later, the court may find that the \$3,500,000 is the appropriate fair market value for the printing press and that Lender is not entitled to a deficiency judgment.

ANSWER TO QUESTION #2

(A) Able has priority. This is a priority dispute between two perfected creditors. Able was perfected because all elements of perfection were satisfied as of April 1 and continued to be so on April 15: valid security agreement (Feb. 1), value given by creditor (April 1), debtor having rights in the collateral (before Feb. 1), and act of perfection (filing of financing statement on Feb. 1). Baker was perfected as of March 1 and continued to be so on April 15: valid security agreement (March 1), value given by creditor (March 1), debtor having rights in the collateral (before Feb. 1), and act of perfection (filing of financing statement on March 1). As between two perfected creditors, priority is given to the first creditor to either file or perfect. Since Able was the first creditor to do one of these two things (Able filed on February 1), Able has priority. (It is irrelevant that Baker perfected first.)

(B) No, Baker would have had priority as of March 15. As of March 15, Able was not perfected because Able had not given value; the loan was not made until April 1. Thus, the priority conflict is between a perfected (Baker) and an unperfected (Able) creditor. In this type of battle, the perfected creditor (Baker) would prevail.

ANSWER TO QUESTION #3

A.

1. Both Friendly and Prime have temporary automatic perfection in the proceeds of the collateral (the printing press).

Friendly's security interest in the press was perfected on April 1. When Daily Journal purchased the press on April 5, Daily was a buyer in ordinary course (BIOC) and therefore it took free of all security interests created by Gutenberg even though the security interests were perfected and even if the BIOC knew of the security interests. Therefore, Friendly's security interest is not good as against Daily.

However, the security interest in the proceeds of the collateral covered by the original financing statement perfects automatically as between Friendly and Gutenberg despite disposition of the original collateral. To be valid as against third parties (such as Prime), however, there must also be perfection as to the proceeds. The proceeds of the sale to Daily Journal are noncash proceeds in the form of chattel paper (a conditional sales contract) or an account.

Friendly's security interest in the noncash proceeds will remain perfected if (a) a filed financing statement covers the original collateral and (b) the proceeds are a type of collateral in which a security interest may be perfected by filing in the same office where the financing statement has been filed. If Friendly filed its financing statement in the office of the Secretary of State (where financing statements for inventory are filed), then Friendly's security interest in the proceeds remains perfected because a security interest in proceeds in the form of chattel paper or accounts is perfected by filing in the same place.

Prime's security interest in the press attached on July 7 when Gutenberg regained possession of the collateral. At that time, Friendly's security interest had priority over Prime's security interest because Friendly's interest reattached to the press and related back to the perfection of the original collateral on April 1. When Gutenberg resold the press to Weakly Star on July 7, the security interests of both Friendly and Prime in the press were cut off because Weakly Star was a buyer in the ordinary course of business. The security interests of Friendly and Prime in the noncash proceeds (the promissory notes) were temporarily automatically perfected. However, a security interest in instruments (notes) cannot be perfected by filing in the same office where a filed financing statement covers the original collateral (rather, a security interest in instruments may be perfected only by possession), and therefore Friendly's and Prime's security interests in the proceeds will lapse within 10 days after receipt by Gutenberg unless a separate security interest in the proceeds is perfected within that time.

2. To retain priority over Prime, Friendly must perfect its security interest in the promissory notes (the noncash proceeds) by July 17 (i.e., within 10 days after Gutenberg's receipt of the proceeds) by taking possession.

ANSWER TO QUESTION #4

A. A "purchase money security interest" arises when a security interest is:

(1) taken or retained by the seller of the collateral to secure all or part of its price; or

(2) taken by a person who, by making advances or incurring an obligation, gives value to enable the debtor to acquire rights in or the use of the collateral if such value is in fact so used.

B.

1. A promissory note is a negotiable instrument that can normally be perfected only by possession. The security interest in the note may also be perfected without the necessity of the creditor taking possession for a period of 21 days from the time the security interest attaches to the extent that it arises for new value given under a written security agreement. A security interest in the note properly perfected by possession will remain perfected for a period of 21 days even if the secured party delivers the instrument to the debtor as long as the purpose of relinquishing possession is the ultimate sale or exchange or of presentation, collection, renewal or registration of transfer.

A security interest in corporate stock represented by a certificate is usually perfected by possession.

2. Security interests in accounts and general intangibles must be perfected by filing.

3. Security interests in consumer goods are perfected (1) by possession, (2) by filing in the county where the debtor is located, or (3) in the case of a purchase money security interest, automatically.

4. Security interests in equipment are perfected (1) by possession or (2) by filing with the Secretary of State.

C. Aaron has priority. In 'the case of a secured party versus another secured party where both security interests are perfected, the first in time is the first in right. First in time is determined by either the time of perfection or time of filing, whichever is earlier. Here, Aaron's security interest was perfected by possession on February 28, 1983. Barnfield did not perfect his security interest by filing until March 5, 1983. Therefore, Aaron's security interest has priority even though he filed after Barnfield, because Aaron's interest was perfected first.

D. Crickett prevails over Aphid because Crickett qualifies as a buyer in the ordinary course of business. A buyer in the ordinary course of business will take free of a security interest created by his seller (Beetle). Crickett meets the following requirements of a buyer in the ordinary course of business:

(1) Crickett purchased the refrigerator in good faith. Good faith is defined as honesty in fact in the conduct or transaction concerned.

(2) Crickett purchased without knowledge that the sale to him was in violation of a security interest. It is irrelevant whether Crickett knew that Aphid had taken a security interest in the refrigerator.

(3) Crickett purchased equipment. Farm products are subject to different rules.

(4) Crickett's purchase was ordinary, i.e., Crickett purchased from a person in the business of selling goods of the kind.

(5) Crickett paid new value for the refrigerator.

(6) The sale to Crickett was not a bulk transfer.

ANSWER TO QUESTION #5

A. The stallion used by Benny for stud services is a “good” and further is “inventory” according to recent case law. A security interest in inventory is perfected by possession, control or by filing. The proper location for filing an inventory is in the office of the Secretary of State. Here, First City Bank (Bank) filed in the county where Benny lived and the collateral was kept and therefore filing was improper. Lionel filed properly with the Secretary of State. Therefore, Bank’s security interest is unperfected, and Lionel’s security interest is perfected.

B. Priority of lien. The general rule of priority between secured creditors is “first in time, first in right.” In determining the priority of lien as between the competing security interests in the stallion, three sub-rules must be taken into account:

(1) Perfected SI v. perfected SI. First in time is first in right, with the critical time being either the time of perfection or filing, whichever is earlier.

(2) Perfected SI v. unperfected SI. Perfected SI takes over unperfected.

(3) Unperfected SI v. unperfected SI. First in time, first in right, with the critical time being the time of attachment.

C. No. Even though Lionel’s security interest is perfected and Bank’s security interest is not perfected because improperly filed, a filing made in good faith in an improper place is effective against anyone who has knowledge of the contents of the filing statement. Lionel had actual knowledge of Bank’s security interest, and therefore Bank has priority over Lionel. Note that many courts in other states hold that mere knowledge of the prior security interest is insufficient.

D. Benny had the right to redeem the collateral (the stallion) by tendering to Bank the amount of the obligation (\$6,000) plus interest and any costs caused by Benny’s default. Here, Benny tendered the \$6,000 balance due on the loan but did not tender the \$250 cost of repossession paid by Bank to Repo, Inc. Therefore, Benny had no right to redeem the stallion and Bank had no obligation to permit redemption where Benny did not tender \$6,250, plus any interest due.

E. Yes. A secured party has a right to peaceful repossession of the collateral. Under the facts of this case, Repo, Inc.’s repossession of the stallion by entering the unlocked gate and removing the animal from the yard arguably was not a breach of the peace.

F. No. Bank is not entitled to a deficiency judgment against Benny because Bank failed to give Benny notice of the private sale. A secured party's failure to follow the proper statutory procedure for sale of collateral operates as a defense to a deficiency action.

G. Benny is entitled to judgment against Bank if the court finds Bank's sale of the stallion was improper. Benny may be entitled to the following damages:

(1) Value of stallion. Benny may be able to recover damages for part of the value of the stallion if he can prove the sale was not commercially reasonable. Here, there was a substantial difference between the sale price of the stallion (\$4,500) and its fair market value (\$22,000). Benny could argue that this, combined with the rapidity with which the sale was conducted (5 days after repossession—perhaps insufficient time to adequately publicize the sale), rendered the sale commercially unreasonable, entitling him to damages for the difference between the sale price and the fair market value of the stallion. (Benny could also argue for damages based on wrongful repossession; however, as discussed above, the repossession appears to have been peaceful and without malice.)

(2) Attorney's fees. If Benny can prove the unreasonableness of the sale (and his entitlement to damages for part of the value of the stallion), he should also be able to recover attorney's fees.

ANSWER TO QUESTION #6

A. Yes. Easy's security interest is a purchase money security interest, and a PMSI prevails over other security interests in the collateral (even previously perfected security interests) if the PMSI perfects within 20 days after the debtor receives possession of the collateral.

B.

1. Bank has priority. A security interest in accounts receivable cannot be perfected by possession, only by filing. Neither Bank nor Friendly filed a financing statement, and therefore neither has a perfected security interest in the accounts. When both secured parties have unperfected security interests, the first to attach has priority. Bank's security interest attached first because Bank executed a security agreement with Elite, Bank gave value (advanced funds), and Elite had rights in the collateral, all on June 1, 1985. Friendly's security interest did not attach until June 15, 1985. Therefore, Bank prevails in a priority dispute.

2. The trustee in bankruptcy would be a lien creditor of Elite, and as such would prevail over all unperfected secured parties. Thus, if as of the date the petition in bankruptcy is filed, neither Bank nor Friendly have filed, the trustee will take priority over both security interests.

C. Bank has priority to the full extent of the collateral for both advances. A future advance clause in a security agreement permits a secured party to advance loans to the debtor which are secured by the same collateral by which the original loan was secured. The secured party has priority in the collateral over all other secured parties provided the initial secured party perfected first, even if the advance was made subsequent to another secured party's perfection. Here, Bank perfected by filing on June 2; Fancy perfected by filing on June 3. Therefore, Bank has prior rights in the collateral even though the additional loan was not advanced until June 4, because the perfection of that security interest relates back to the time of filing on June 2.

D.

1. Cash proceeds. When Debtor sold the inventory item and received identifiable cash proceeds, automatic permanent perfection occurred. That is, Bank's security interest in the collateral continued in the cash proceeds and Bank need not take any further action to protect its interest as long as the cash proceeds remain identifiable.

2. Promissory note. Bank's security interest in the promissory note (noncash proceeds) becomes unperfected ten days after Donald receives the note unless Bank reperfects before the ten-day period elapses. Because a promissory note is classified as an instrument, perfection may only be accomplished by possession (except for specialized cases not relevant to this question). Bank must take possession of the note within ten days to continue perfection.

3. Assignment of accounts. The assignment consists of identifiable proceeds (collections) received by Debtor, and therefore Bank's security interest is automatically perfected because (1) the financing statement covering the original security interest in nonfarming equipment was filed with the Secretary of State and (2) a security interest in accounts is perfected by filing in the same place.

4. Farming equipment. The equipment is noncash proceeds, and the security interest in the proceeds remains perfected as long as a filed financing statement covers the original collateral and the proceeds are of a type of collateral in which a security interest can be perfected by filing in the same office where the financing statement was filed. Because the financing statement covering the nonfarming equipment was properly filed and filing requirements are the same for both nonfarming and farming equipment in Florida, Bank's security interest will remain perfected.

E. On August 15, 1988, Lenny has priority over Amiable and Bank. Amiable, in turn, has priority over Bank, which has an unperfected security interest. Bank's security interest was perfected first, on June 1, 1982. However, a filed financing statement is effective for only 5 years, and therefore Bank's statement and security interest lapsed on June 1, 1987. Bank's continuation statement was ineffective because it was not filed within six months prior to the expiration date of the financing statement.

Therefore, Bank's security interest became unperfected on June 1, 1987 and was not perfected again by the continuation statement filed on July 5, 1987. Lenny's perfected security interest then gained priority over Bank's security interest. Similarly, Amiable had priority over Bank's unperfected security interest when Amiable filed on August 1, 1988.

ANSWER TO QUESTION #7

A. Issues raised by the fact situation include whether:

- (1) Lender's filing with the county clerk perfected Lender's security interest;
- (2) the provision for self-help breach of the peace in Lender's security agreement is enforceable;
- (3) Friendly's security interest is perfected;
- (4) Friendly's notifying Lender of Friendly's security interest had any legal effect (was notice oral or written);
- (5) Lender's repossession was lawful;
- (6) Lender's oral notice to Debra was sufficient;
- (7) Lender should have given Friendly notice of the sale;
- (8) the disposition of the collateral was commercially reasonable;
- (9) the sale can be set aside as to Best;
- (10) Lender can sue for a deficiency; and
- (11) Friendly has a cause of action against Lender.

B. Debra Debtor and Friendly will probably recover damages against Lawford Lender because the sale was not commercially reasonable. It is less likely they will be able to set aside the sale as to Best.

Lender's security interest is not perfected. A security interest in equipment is perfected by possession, control or by filing, but here Debtor is in possession of the collateral and Lender improperly filed the security agreement with the county clerk rather than the Secretary of State. Filing in good faith in an improper place is only effective against persons with knowledge of the contents of the financing statement.

A self-help provision in a security agreement is not in itself illegal, provided it calls for peaceful repossession, which is constitutionally permissible. Lender's provision providing for breaking and entering is not peaceful; however, Lender's action in entering an unlocked door and removing part of the printing machine was peaceful. Therefore, Debtor cannot recover for self-help breach of peace.

In order to sell the machine, Lender was required to give notice to Debtor, and, because the goods were nonconsumer goods, was also required to give notice to secured parties who had supplied a written notice of their claim and secured parties who had filed financing statements. Here, Lender had previously received notice (presumably written) of Friendly's security interest in the collateral on March 5, 1984. Therefore, Lender was required to give Friendly notice within a reasonable time before the public sale. The sale itself was not commercially reasonable because while it may have been conducted in the usual manner in the recognized market and conformed to reasonable commercial practices among dealers in printing machines, the collateral sold at a price substantially lower than market price. The printing machine sold for \$10,000 while similar equipment on the market sold for \$20,000. A court could find the substantial difference between sale price and market price indicates the sale was improper and find Lender liable for damages to Debtor and Friendly.

It is less likely the court will set aside the sale to Best because generally a buyer takes free of all the rights and interests of the debtor even where the secured party (here, Lender) fails to comply with the sale requirements. If Best had no knowledge of defects in the sale and was not in collusion with Lender, the sale will not be set aside.

Lender could attempt to recover a deficiency against Debtor, but Lender's failure to properly conduct the sale would provide Debtor with a defense to any such judgment.

ANSWER TO QUESTION #8

A. The power saw is a "good," subclassified as "equipment" because it was bought for use primarily in David's (the debtor's) business.

B. Power Tools, Inc. acquired a purchase money security interest because the interest was taken or retained by the seller (Power) of the collateral to secure its (the power saw's) price.

C. The security interest of Power Tools, Inc. was perfected by proper filing of the financing statement with the Secretary of State on February 15. Bank's security interest was not perfected on January 15 because it was improperly filed in the county clerk's office rather than with the Secretary of State; however, if the filing was made in good faith even though in an improper place, it is effective against anyone with knowledge of the contents of the financing statement. Friendly's security interest was perfected by filing on February 10; however, Friendly had knowledge of Bank's prior security interest even though improperly filed, and therefore Bank's security interest has priority over Friendly.

D. Lendy and the trustee in bankruptcy are “lien creditors.

E. Priority will have to be determined by the court because the priority of liens in this situation is circular: Power prevails over Bank because Bank’s security interest was not perfected even though the financing statement was filed before Power’s financing statement. Bank has priority over Friendly because Friendly had knowledge of the contents of Bank’s improperly filed financing statement when Friendly filed. Friendly, in turn, has priority over Power because Friendly filed 5 days before Power. Thus, none of the three secured parties has priority over any other because of the circularity of the liens; therefore, a court must determine a resolution. (See F. below for discussion of Lendy and Trustee.)

F. Bank should be given first priority up to the amount of Friendly’s claim. The purchase money security interest of Power Tools, Inc. was perfected as of February 15. If Power had filed within 20 days of David Debtor’s possession of the collateral, the perfection would have related back to the date (here, January 2) Debtor received possession of the power saw, and Power would have prevailed over creditors who obtained liens within the intervening 20 days. Power prevails over Bank because Bank did not file in the proper place, and therefore its filing on January 15 was not effective against Power. However, Bank has priority over Friendly which filed on February 10 because Friendly had knowledge of the contents of the Bank’s financing statement, and so Bank’s misfiled statement is effective against Friendly. Friendly, however, prevails over Power because Friendly perfected on February 10 and Power did not perfect until February 15. Lendy Creditor’s lien attached on February 20 when the sheriff levied execution. Therefore, Lendy has priority over Bank because of Bank’s improper filing.

The trustee in bankruptcy acquired a lien on the property of David Debtor on July 1. The trustee in bankruptcy may avoid preferential transfers of security interests by the debtor within 90 days of the filing of the petition in bankruptcy; however, no such transfer occurred between April 1 and July 1. In any case, the trustee has priority over Bank because of Bank’s improper filing.

ANSWER TO QUESTION #9

A. The road grader is a “good,” subclassified as “inventory” because Denny Debtor, a retail dealer of road machinery, purchased the grader as merchandise, to be placed in stock.

The washing machine is a “good,” subclassified as a “consumer good” because the machine was intended to be used for household purposes at Debtor’s home.

B. Lionel Lender’s security interest is both enforceable and perfected. Article 9 provides for automatic perfection of purchase money security interests in consumer goods. Here, Lender’s security interest in the washing machine is a purchase money security interest because Lender made a \$500 loan to enable Denny to purchase the washing machine and the value was in fact so used.

As a purchase money security interest in consumer goods (a washing machine for household use), Lender's security interest was perfected automatically as soon as the interest attached (that is, as soon as the parties executed a security agreement, Lender gave value, and Debtor acquired rights in the collateral), which occurred on November 1, 1986.

C. Lender will prevail over Conrad for the amounts owing on the road grader and the washing machine loan but not for the \$100 future advance on the washing machine loan. It is given in the facts that Lender was perfected on November 10, 1986 with respect to the road grader and Lender was perfected on November 1, 1986 with respect to the washing machine (see (B), above). Lender's priority with respect to the \$100 future advance will begin from December 20, 1986, the date the advance was made. (Future advance has priority of first advance only if security interest is perfected by filing or possession; here, Lender perfected his interest in the washing machine automatically).

A security interest normally continues notwithstanding the sale, exchange or other disposition of the collateral. Thus, Conrad can prevail only if he satisfies the requirements of one of the statutory exceptions. Conrad cannot qualify as a buyer in the ordinary course of business because he did not provide new value (he took the grader and washing machine in satisfaction of an antecedent debt). Likewise, Conrad cannot qualify for the special consumer goods exception because neither the grader nor the washing machine are consumer goods in his hands. (There may be additional reasons why Conrad does not qualify for these exceptions.) Conrad should be able to prevail over the \$100 future advance because priority only dates from the date the advance was made which was after Conrad took possession of the washing machine. Conrad gave value, received delivery of the washing machine before the security interest was perfected (December 20, 1986 when Lionel gave value), and had no knowledge of Lionel's security interest in the washing machine.

ANSWER TO QUESTION #10

A.

- (1) furniture is goods, specifically consumer goods.
- (2) inventory is goods, specifically inventory.
- (3) the note is an instrument.
- (4) the indebtedness is an account.

B. The three elements of attachment are: (1) a valid security agreement; (2) the creditor giving value; and (3) the debtor having rights in the collateral. The owner of collateral is treated as a debtor, thus Grandmother is a debtor.

Furniture—First Bank, Family Furniture

Inventory—First Bank, Dandy Dress Company

Note—First Bank

Able's Indebtedness—First Bank

C. First Bank does not have a perfected security interest in the furniture. The furniture is consumer goods and thus First Bank's nonpurchase money security interest must be perfected by possession, control or by filing a financing statement in the County Clerk's office in the county where Detra resides.

Family Furniture has a perfected security interest in the furniture. A purchase money security interest in consumer goods is automatically perfected.

First Bank has a perfected security interest in the inventory because it filed with the Secretary of State's office.

Dandy Dress Company has a perfected security interest in the inventory because it filed with the Secretary of State's office.

First Bank does not have a perfected security interest in Grandmother's note because the only method to perfect a security interest in instruments is by possession (except for special situations not relevant in this problem).

First Bank has a perfected security interest in Able's indebtedness because it filed with the Secretary of State's office.

D. First Bank is not perfected with respect to the furniture and thus Family Furniture's perfected interest will have priority. Detra cannot qualify for purchaser protection from Family because she received the furniture as a gift from her father (she did not pay value).

Under the facts as given, First Bank will have priority over Dandy Dress Company. Although it is possible for a purchase money security interest in inventory to have priority over a prior perfected security interest in the same inventory, the PMSI creditor needs to provide a statutory notice to other creditors prior to the debtor receiving possession of the inventory. There is no evidence in the problem that Dandy gave the required notice.

First Bank will have priority over Grandmother for the note. Although First Bank is unperfected, it is not competing with another creditor; instead, it is competing with the owner of the collateral, in effect, the debtor. Because First Bank's security interest attached, it will prevail over Grandmother.

First Bank will also have priority over the indebtedness owed by Able Jones because First Bank's interest properly attached.

PRACTICE ESSAY EXAM #1

QUESTION #1

An Ocean Municipal Ordinance on vending provides in relevant part:

(a) All licensed vendors shall be appropriately attired. The wearing of thong bikini bathing suits that expose the buttocks to public view is absolutely prohibited.

(b) Violation of this ordinance is a misdemeanor that may be punished by a fine not exceeding five hundred dollars (\$500) and/or a definite term of imprisonment not exceeding sixty (60) days.

Debbie Defendant is a licensed vendor who sells hot dogs from a roadside stand in Ocean, Florida. To boost sales, Debbie wears a thong bikini bathing suit while she works.

Debbie is also known to law enforcement as one of Florida's leading dealers in illegal narcotics.

One day Officer Linda approaches Debbie, identifies herself and requests permission to search the hot dog stand. Debbie refused. Officer then notices a small cylindrical bulge in the front of Debbie's bathing suit and orders her to assume the position. During the pat down, Officer detects what feels like a hand rolled cigarette in the front of Debbie's bikini. Instead of seizing the object, however, Officer discontinues the pat down, and states: "You're under arrest for violating the City Ordinance against thong bikini bathing suits." Officer then reaches into Debbie's bikini bottom and pulls out a marijuana cigarette.

Officer issues Debbie a citation for misdemeanor possession of marijuana and misdemeanor violation of the bikini ordinance and walks away.

You are the law clerk for the circuit court judge assigned to hear the case. The judge asks you to prepare a Memorandum of Law on the following:

(1) Whether the marijuana cigarette seized by the police is admissible in evidence;

(2) Whether the Ocean Municipal Ordinance violates any provision of the Florida Constitution.

QUESTION #2

Mother conveyed Property to Son with the understanding that she could live on the property with Son until she died so long as she paid the annual real estate tax. Son's recorded deed did not reflect that understanding.

Son decided to sell Property. Son showed Property to Buyer who learned that Son lived with Mother (who was away). Buyer liked Property.

Buyer offered in writing to pay son immediately five percent of the purchase price and to complete payment in two weeks in return for title to Property. The writing provided that Son's sole remedy for Buyer's breach would be retention of the earnest money payment. The writing did not mention Buyer's remedies.

Son signed the writing and cashed Buyer's earnest money check. To expedite matters, Son also signed a deed conveying Property to Buyer on the condition that Buyer not record the deed until Son received complete payment from Buyer. Buyer did not sign the writing, nor did anyone (other than Buyer) witness Son's signing of the writing and deed.

Mother does not want Son to sell Property. Discuss the interests of Mother and Son in Property. Is the sales contract enforceable? What are Mother's remedies? What are Buyer's remedies.

QUESTION #3

Sam, a Florida resident, dies, survived by his wife and two adult children, twins, Cathy and Clay.

Wife executed a valid antenuptial agreement waiving all claims to Sam's estate.

Sam's validly executed will devised his estate to Tom in trust for the twins, Cathy and Clay. The trust provides that the trustee pay to the twins all income and as much of the principal as the trustee in his sole discretion, deems necessary for the health, welfare, and education of the twins until they reach 35 years of age at which time the trust terminates and the remaining assets, if any, be distributed to the twins in equal shares. The testamentary trust contained a spendthrift clause. Tom was also named personal representative under the will.

Sam's estate consisted of his homestead valued at \$100,000 and \$10,000 cash. City Hospital filed a valid claim against the estate for unpaid medical bills stemming from Sam's last illness in the amount of \$25,000.

Tom liquidated the assets of the estate and distributed the proceeds to the trust. After taking possession as trustee, he invested all the proceeds in a local construction company. The investment was very successful and Tom supported the twins from the trust while they obtained their college educations, paid \$20,000 for a life saving liver transplant for Clay after Clay was in an automobile accident while still in college, and made down payments on the twins' homes after they graduated.

The twins are now 31 years old and both own successful businesses. In celebration of Cathy's real estate business closing \$2,000,000 in sales in one year, Tom purchased an automobile for her with \$20,000 of the trust assets. Cathy assigned her interest in the trust to the local zoo as a charitable donation. Cathy, Clay and the zoo would like to terminate the trust. The remaining principal balance of the trust is \$34,000.

Discuss all issues concerning liquidating the estate. Discuss the funding of the trust, addressing the issue of the wife's claim and those of the hospital, as well as general provisions of the trust.

Assuming the trust was funded, discuss the administration and possible termination of the trust.

PRACTICE EXAM #1 ANSWERS

ANSWER TO QUESTION #1

I. Whether the Marijuana Cigarette Seized by the Police is Admissible in Evidence.

The Florida Constitution is analogous to the Fourth Amendment to the Federal Constitution and protects against unreasonable searches and seizure. Further, the Florida constitution has codified the exclusionary rule providing that evidence seized in violation of the law shall not be admissible. This right to be free from unreasonable search and seizure as well as the scope of the exclusionary rule are to be construed in conformity with the decisions of the United States Supreme Court interpreting the Fourth Amendment. Therefore, here, if the search of Debbie was unreasonable, the marijuana will not be admissible.

Stop and frisk law provides that when an officer encounters a person in circumstances which indicate that they have committed or are about to commit a crime, the officer may detain them for the purpose of ascertaining their identity and circumstances surrounding their presence. The detention must be no longer than reasonably necessary to achieve such purposes. If there is probable cause to believe that the person is armed, the officer may search them to the extent necessary to disclose the presence of a weapon. If a weapon is found or any evidence of criminality, it may be seized. To justify the stop, the officer must be able to state the specific and articulable facts which together with rational inferences therefrom, reasonably justify the stop. Upon making an arrest, an officer may search the arrestee and the area of his/her immediate presence for the purpose of preventing his/her escape, protecting the officer, and preventing the destruction of evidence.

In this case, the first search of Debbie would have had to have been based on an articulable reason. Officer Linda did not announce the arrest until after she found the bulge. Therefore, if she had no reason to do the first search other than knowledge that Debbie may have been a drug dealer, and she had no belief that Debbie was armed, the search was illegal and the evidence inadmissible. If, on the other hand, the frisk was based on the violation of the ordinance and a belief that there was evidence of the crime or that Debbie was armed, any evidence found would be admissible. The facts here do not support such a finding, since there is no evidence that could possibly be found that would support the charge of wearing a thong bikini and there is no evidence that Officer Linda believed that Debbie was armed.

An arrest without a warrant is appropriate for misdemeanors committed in the presence of the officer. Therefore, upon making an arrest, Officer Linda would be permitted to search Debbie as well as the surrounding area for the purposes of protecting against the destruction of evidence, protecting the officer and preventing escape. Again, there are no facts to indicate that Officer Linda believed that Debbie was armed, and there is no type of evidence that could be found to support the charge of wearing a thong bikini.

Also, the facts provide that after issuing the citation, Debbie was released.

Therefore, since the discovery of evidence was the result of an illegal search, it will not be admissible.

II. Whether the Ocean Municipal Ordinance Violates any Provision of the Florida Constitution.

Municipalities have governmental, corporate and proprietary powers to conduct government, perform municipal functions and render municipal services. A municipality has a legislative body which may exercise any power for municipal purposes except as provided by general law. Therefore, a municipality can enact local ordinances. A statute or regulation which is inconsistent with the Federal or State Constitution will be void. However, an ordinance is presumed constitutional and will be interpreted to render it constitutional.

The legislature has broad discretion in determining public interest. When analyzing the constitutionality of the ordinance, then, concepts of vagueness and overbreadth must be considered.

The overbreadth doctrine provides that the government may not achieve any governmental purpose by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. A vagueness challenge is somewhat different. A statute may not forbid or require the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. It is possible for a statute to not be vague and still be overbroad. The vagueness doctrine does not permit a litigant to raise the constitutional rights of others as is permitted when the challenge is overbreadth. If the litigant, Debbie in this case, is clearly one to whom the statute applies, then she cannot argue that someone whose conduct is on the fringes of applicability might not clearly understand that the statute is applicable to them.

An argument of overbreadth is not likely to be successful in this case. The ordinance is drafted in very specific language. It follows the one subject rule. Further, Debbie is clearly in violation since she is a licensed vendor and she is wearing a thong bikini bathing suit. She cannot argue vagueness for the reasons just stated. Therefore, Debbie can find some other Federal Constitutional basis to challenge the ordinance, she will be unsuccessful.

III. Conclusion.

Debbie will be successful in excluding the marijuana cigarette from evidence, but she will fail in her challenge to the ordinance.

ANSWER TO QUESTION #2

I. Mother's Interest in the Property.

A deed is a legal instrument necessary to a valid transfer of real property. It need not be recorded to be effective in passing title. However, a bona fide purchaser can defeat a grantee's title if the grantee does not record. A deed requires the signature of the grantor, the name of the grantee, words of conveyance and a description of the property. It need not be signed by the grantee. A deed, to be effective, must be delivered. A physical transfer of the deed to the grantee most likely indicates an intent to create an immediate interest in the grantee. The grantor may rebut the presumption by submitting evidence that no delivery was intended. However, the parole evidence rule will prevent the grantor from asserting that there were preconditions to the effectiveness of a deed which is unconditional on its face. Therefore, the deed from Mother to Son will be presumed to have been delivered. If she can show that she paid the taxes and that she lived on the Property, that evidence can be admissible. As for the deed to Buyer, there is no evidence to rebut the presumption that delivery was meant to effectuate a transfer.

In this case, Mother may seek to have a constructive trust placed on the property. A constructive trust will arise where property is acquired as a result of fraud. This remedy is available only where the fraud actually induced the transfer of the property. Further, the constructive trust will be imposed on property which is obtained in violation of a fiduciary obligation, however, a family relationship does not of itself give rise to a fiduciary obligation. Therefore, if Mother can show that she executed the deed based on the agreement with Son that she could live on Property so long as she paid taxes and that he never intended to honor the agreement, the property would be held in trust for her benefit.

II. Is the Purchase and Sale Agreement Enforceable?

To be enforceable, a purchase and sale agreement must be a valid contract. In general a purchase agreement to convey land is enforceable only if evidenced in writing. However, the statute of frauds only prevents the court from ordering specific performance, it does not void the agreement. Therefore, even without an enforceable written contract, a purchaser who accepted a conveyance may be forced to pay for the land. A purchase and sale agreement requires the signature of the party to be charged, In this case Son signed the agreement so he would be liable on it.

If a writing is not satisfactory, the doctrine of part performance may take the writing out of the statute of frauds. If there is sufficient evidence that there was an agreement, the court will order the conveyance. However, the conduct of the parties must be such that it unequivocally proves the agreement. Payment of the purchase price would be sufficient. Therefore, in this case, even if the written agreement were to fail, the Buyer paid the earnest money and Son cashed the check. The court could construe that as evidence of the agreement and compel the completion of the agreement.

III. Remedies.

If Son breaches the agreement, Buyer will be entitled to his expectancy damages as well as the return of the deposit. If a purchaser breaches a purchase and sale agreement, usually, the agreement would provide that the seller be allowed to keep the deposit. However, in this case the agreement was silent on that issue and Buyer never signed the agreement.

Generally in a contract to sell land, specific performance is available to either the purchaser or seller. However, in this case, Property might be held in a constructive trust for the benefit of Mother who would not want to have the court order specific performance. If, however, the court were to order the sale to Buyer, the proceeds would then be held in a constructive trust for the benefit of Mother.

ANSWER TO QUESTION #3

I. Administration of the Estate.

Florida recognizes a pour over trust wherein the trust is created by the terms of the will. Therefore, a petition for administration must be filed in order to commence administration of the estate. Since there is a trust, the estate cannot be through a family administration.

Until admitted to probate, a will is ineffective to prove title to or right to possession of the property of a testator. A will has only potential effect until it is proved and an order of probate is entered. The claims against the estate are made upon the receipt of notice of administration by the creditors. At that time Hospital must make its claim. Further, a spouse can relinquish her rights in all homestead, exempt property and family allowance by executing a valid antenuptial agreement. Therefore, in this case, Wife has no claim against the estate.

Homestead property and exempt property are subject to claims against the estate. Therefore it will have to be determined if in this case the property in the trust has been protected from the claims of creditors. Property may be homestead property even absent a spouse or minor children if such property is devised to the heirs of the decedent. In such cases, it is not subject to administration. The personal representative would have to petition the court for a determination as to whether by leaving the homestead to the trust for the benefit of his heirs would be sufficient to keep it from administration. The same determination would have to be made as to the \$10,000. It is possible that the claim by the hospital would have to be satisfied out of that money and it would not, therefore, be available to fund the trust.

II. The Trust.

Five elements are required for the present creation of a private express trust: (1) capacity of the settlor; (2) intent to create a trust; (3) specific trust property; (4) identifiable beneficiaries; and (5) proper trust purpose. In this case there is no issue as to capacity or intent, The trust property is present although it is unclear exactly how much is available after the claims of the creditor. Since the wife has no claims, the beneficiaries of the trust are Cathy and Clay. Further, the trustee will be Tom. According to its terms, Cathy and Clay are entitled to income as well as principal until they turn age 35, at which time they split the remaining assets. Although Tom as the trustee has broad discretion in making distributions from income and principal, there is an implied fiduciary duty to represent the best interest of all beneficiaries. The decisions of the trustee to invade principal will not be disturbed unless plainly wrong. Here, however, Tom has given Cathy a car. Although Clay has not complained, Tom must not favor one beneficiary over the other. Further, the trust clearly indicated that the income was to be used for the health, welfare and education of the beneficiaries. If Tom has violated the terms of the trust, he can be held liable for any damages that results.

Although as a general rule a beneficiary can freely assign her interest, in this case, the trust has a spendthrift provision which would act to prevent Cathy from assigning her interest to the local zoo. Therefore, that assignment is not effective and the zoo is not a beneficiary. The zoo cannot therefore, attempt to compel termination of the trust.

III. Termination of the Trust.

After a settlor dies, the courts are reluctant to terminate an active trust where that would interfere with the settlor's intent. Where, as here, the settlor has fixed the period for termination of a trust and its purposes have not yet been accomplished, such as holding the corpus until the beneficiary reaches a certain age, the trust cannot be terminated even though all of the beneficiaries approve of the termination. Further, if the trust has a spendthrift provision, courts are likely to find that the settlor's purpose of protecting the beneficiary continues and cannot be terminated by consent. Also, even though a trustee and beneficiary acting together can effect a termination without a court order, where there is a spendthrift provision this is impossible because the beneficiary has no ability to assign her interest to the trustee thereby creating a merger that would terminate the trust. Therefore, under the terms of this trust, there can be no termination prior to the time set forth by Sam.

The trust in this case will continue to exist and Tom's fiduciary obligation will continue even though the corpus is only \$34,000.

PRACTICE ESSAY EXAM #2

QUESTION #1

Harry and Zelda were an elderly, unmarried couple. Zelda owned a shopping center. Because of her love and affection for Harry, Zelda executed a deed in 1990 that conveyed the shopping center from "Zelda, an unmarried woman, to Zelda and Harry, an unmarried man, as joint tenants with a right of survivorship, on the condition that Harry cannot convey his interest in the shopping center without Zelda's written consent."

After this conveyance was duly recorded, a quarrel occurred. Zelda and Harry separated. In retaliation, and without Zelda's knowledge, Harry executed a deed conveying his right, title, and interest in the shopping center to his Uncle Frank. Although the deed recites \$10 in consideration, no consideration was actually given. Shortly after the conveyance, Harry died unexpectedly.

The northwest corner of the shopping center was subject to an easement in favor of Sunshine Utilities, a privately owned power company. Sunshine's easement was recorded in 1958. One building in the shopping center encroached the easement, which was not depicted on the survey that Zelda received when she bought the property in 1979. Zelda then built a concrete block wall on the property's boundaries and developed the shopping center. In 1978, Sunshine had ceased the transmission of electricity through the power lines. In 1979, Sunshine removed the lines and poles and ceased the regular maintenance and use of the easement. In 1991, Sunshine demanded removal of the encroaching building.

Zelda has filed both a quiet title action to nullify Uncle Frank's putative interest and, in the alternative, a partition action to sever her interest from Uncle Frank's. Sunshine has sued Zelda and Uncle Frank to require abatement of the alleged infringement.

Uncle Frank has requested your advice: (1) as to his ownership of the property, (2) as to the necessity to move the allegedly encroaching building, (3) as to whether partition is available and, if so, who pays the costs and attorney's fees, and (4) as to his rights against the surveyor who overlooked the easement. Will Uncle Frank win against Zelda? Will Uncle Frank win against Sunshine?

QUESTION #2

Jane lived alone in a house she owned on one-half acre of contiguous land ("Blackacre") within the city limits of Tallahassee in Leon County, Florida. Driver obtained a judgment against Jane for damages arising out of an auto accident. Driver recorded a certified copy of the judgment in the official records of Leon County.

Six months later, Jane married Husband, after which she purchased in her name a motel ("Motel") located in Leon County outside the city limits of Tallahassee. The Motel consisted of one building and a parking lot situated on five contiguous acres of land. The building contained 18 guest rooms, an office, and a three-room apartment. Upon Jane's acquisition of the Motel, she and Husband established residence there in the apartment. Jane and Husband lived in the Motel and operated the Motel business for profit until Jane's death one year later.

Shortly before her death, Jane borrowed money from Bank to buy a collection of rare books. To secure the loan, Jane executed and delivered to Bank a mortgage on the Motel. Jane did not tell Husband about the loan or the mortgage.

Blackacre was unoccupied from the time Jane bought the Motel until her death. During that period Jane listed Blackacre for sale with a real estate broker, but no buyer was found.

Jane's only survivors are Husband and Jane's 25-year-old daughter ("Daughter") from a prior marriage. Jane's properly executed will provides that Husband and Daughter shall each take undivided one-half interests in Blackacre and the Motel, each property to be held by Husband and Daughter as tenants in common.

Driver and Bank assert claims on Blackacre and on the Motel at Jane's death. The Personal Representative seeks your advice on settling the estate.

Discuss the following issues and suggest how the Personal Representative should proceed and what will be the likely outcome:

- (1) Who will take title to Blackacre?
- (2) Is Blackacre subject to the claim from Driver?
- (3) Is Blackacre subject to the claim from Bank?
- (4) Who will take title to the Motel?
- (5) Is Motel subject to the claim from Driver?
- (6) Is Motel subject to the claim from Bank?

QUESTION #3

Arjay is a Miami company that represents Japanese companies seeking to do business in Argentina. In January 1989, Arjay learned that Argentina was contemplating a missile defense system within the next two years. Arjay immediately faxed Jadco, a Japanese defense contractor. Arjay's fax stated: "Given Arjay's contacts in Argentina, Arjay can assist Jadco in securing the missile defense contract. Arjay expects 5% of the contract price as its commission, if Jadco secures the contract." In response, Jadco telephoned Arjay saying, "Jadco is interested in obtaining the contract and will appreciate Arjay's assistance."

During 1989 and 1990, Arjay met with Argentina officials, attempting to convince them to award Jadco the contract. Arjay offered to one official a "reward" of 2.5% of the contract price, should Jadco be awarded the contract.

On January 1, 1991, Argentina announced that Jadco had been awarded the contract for \$100 million. Upon hearing the announcement, Arjay sent Jadco a fax requesting payment of \$5 million (5%). Jadco denies liability to Arjay.

Discuss Arjay's claims against Jadco and Jadco's defenses under Florida law. Discuss the availability of punitive damages against Jadco under Florida law.

PRACTICE TEST #2 ANSWERS

ANSWER TO QUESTION #1

I. Frank's Ownership of the Property.

Frank's title to the property depends on whether the clause in Zelda's conveyance to Harry that restricted his right to convey the property was valid. The conveyance from Zelda to Harry and Zelda was duly recorded, and created a valid joint tenancy with rights of survivorship. A joint tenant has the right to convey his/her undivided interest in the property. So, notwithstanding Zelda's restriction, as a joint tenant, Harry had the right to alienate his share of the property without Zelda's written consent. Zelda's best argument in response is that the restriction made the original conveyance invalid. This argument fails since there was an explicit intent to create the joint tenancy as evidenced by the words of the grant, and the grant provided for a unity of interest between Zelda and Harry, thereby satisfying the legal requirements for a joint tenancy.

Zelda might also argue that Harry's conveyance to Frank was invalid because no consideration was actually given. This argument fails as there is no requirement that a deed be accompanied by consideration. It is sufficient that Harry conveyed only his own interest in the land to Frank and apparently recorded the deed prior to Harry's death. The court will probably find that Harry's conveyance of his share of the property to Frank was valid.

II. The Necessity to Move the Allegedly Encroaching Building.

The first question is whether Sunshine's easement was valid. Because the easement was recorded, it will bind successors in title to the servient estate (in this case, Zelda). The fact that she had no actual notice because of the defective survey is not a valid defense (see below).

The second issue is whether the easement is destroyed by non-use. Unless the original grant limited the duration of the easement, it is indefinite in length. Here, there is no indication of such a limitation. More difficult however, is whether the non-use by Sunshine of the power lines in 1978 and their subsequent removal in 1979 constitutes an abandonment. The law provides that mere non-use is not enough to destroy the easement, but that there must be an affirmative act which is a manifestation of an intent to abandon. It appears that the removal of the power lines and poles, combined with the cessation of regular maintenance for a period of 12 years is such an act. If the court accepts this argument, Sunshine's demand to remove the encroaching building would be denied. Conversely, even if the court does not accept the removal of the power lines to be an affirmative act of abandonment, it is still unlikely that the building would have to be removed. Rather, the court would likely seek some modification that would not displace an entire shopping center (for example, an easement under the ground for electrical transmission, or a new overhead line) as an equitable remedy.

III. Whether Partition is Available.

Zelda's alternative request for a partition from Frank's interest is a valid action in equity. Involuntary partition may be accomplished by the court between joint tenants. When Harry conveyed his interest to Frank, he created a tenancy in common which may be partitioned. Where property cannot be physically divided, the court may order a forced sale and a division of the proceeds among the cotenants. In this case, it appears that with one shopping center building, it would be difficult to physically divide the property, so a partition sale appears likely. If there is such a sale, the court would apportion the proceeds, but each party would generally be responsible for their own attorneys' fees and costs.

IV. Frank's Rights Against the Surveyor.

Frank probably does not have an action against the surveyor, because there was no privity between them. The surveyor's error in 1979 does not make the surveyor liable to all future owners of the property, but only to the recipient of the survey, Zelda. When Harry conveyed his right, title and interest to Frank, there was an express covenant of title, with an implied covenant against encumbrances. This is a present covenant, and therefore the better action for Frank would be against Harry's estate since a grantee has a cause of action only against his immediate grantor for a breach of a present covenant.

In summary, in Frank v. Zelda, Frank will win as to his ownership of the property, but will have to accept a partition of the property, most likely by forced sale. In Frank v. Sunshine, he utility will not prevail in its action to remove the encroaching building.

ANSWER TO QUESTION #2

I. Title to Blackacre.

Determination of title to Blackacre depends on its status as homestead property under the Florida Constitution. If the property was Jane's homestead, the law requires that it can only be devised to her spouse because there are no minor children (Daughter is 25 years old). If it is not homestead property, then it may be devised as Jane wished, to Husband and Daughter as tenants in common.

As a threshold matter, the property meets the description under Art. 10, §4 regarding size and location. The second test is whether Jane abandoned the homestead. Florida common law has held that daily residence is not essential to retaining a homestead, nor that a temporary absence with intent to return will constitute abandonment. Here, however, Jane moved out of Blackacre when she purchased Motel, and placed Blackacre for sale with a broker, where it remained unoccupied until her death. There is no indication that she planned to return to the home. These facts suggest abandonment of the homestead, and a court would probably find that it was not her homestead, and that the title to Blackacre should rest with Husband and Daughter as tenants in common.

II. Driver's Claim to Blackacre.

Driver has perfected a judgment against Jane and properly filed it with the County. Driver's claim to Blackacre depends on the property's status under the homestead analysis above. If the court finds Blackacre to be homestead property, Driver has no claim, because homestead property cannot be levied by a judgment creditor as part of the estate settlement. If, however, the court finds the homestead abandoned, then Driver may make a claim against Blackacre as part of Jane's estate. In this circumstance, Driver would be entitled to the judgment amount paid out of the estate. Should the estate not have enough cash to satisfy the judgment, Blackacre could be subject to a forced sale. Since Blackacre does not appear to be homestead property, it will probably be subject to Driver's claim.

III. Bank's Claim to Blackacre.

The Bank does not have a direct claim to Blackacre since the mortgaged property was Motel. If, as discussed below, the Motel was Jane's homestead, Bank will not be able to levy against Motel. If Bank's mortgage cannot be satisfied, it may make a claim on that part of Jane's estate which is not exempt under the homestead protection. This would include Blackacre.

IV. Title to the Motel.

The analysis here mirrors the discussion in Section (1) above. The Motel is located on five contiguous acres outside the Tallahassee municipality, and thus qualifies as a homestead. Unlike property held within city limits, there is no requirement that only the property used as the actual residence be protected. This means that all of the improvements on the Motel land (the guest rooms and office) are considered part of the homestead, not just the three-room apartment. While Florida presumes that property owned by a married couple is held as tenants by the entirety, and thus is not homestead property, in this case Motel was purchased and owned by Jane as an individual. Husband's occupancy will not be relevant to the determination, however, Jane occupied Motel for one year as her residence. This should be determinative for the court to find that the property qualifies as Jane's homestead.

As homestead property, Jane could only devise Motel to Husband. Because Daughter is not a minor child, she has no right to the property. The devise to Daughter fails as adeemed by extinction, and the property should be held by Husband in fee simple.

V. Driver's Claim to Motel.

Driver has no claim to Motel, since it is Jane's homestead. As discussed above, a judgment creditor cannot levy against the homestead for debts of the owner as long as there is a spouse or minor child entitled to homestead protection. Husband appears to be entitled to that protection, and Driver will not be able to make a claim against Motel.

VI. Bank's Claim to Motel.

If a property owner is married, the spouse must join in any conveyance of homestead property. Assuming that Motel was homestead property, Jane was not able to place a mortgage on the property without Husband's consent. She did, however, mortgage the Motel after her marriage to Husband, and acted without his knowledge or consent. Under these circumstances, Bank still has a right to payment of the loan, but cannot force a sale of Motel. The homestead exemption will protect Husband from Bank's claim. As discussed above, Bank may have other recourse beyond Motel to satisfy the loan. Neither can Bank claim satisfaction of the loan outside the homestead rules, since the mortgage was for the purchase of rare books, and was not a purchase money mortgage (an exception to the rule) on the Motel itself.

ANSWER TO QUESTION #3

I. Arjay's Claims Against Jadco.

To prevail in this action, Arjay will have to prove that a valid contract existed with Jadco, and that the contract was breached by Jadco's refusal to pay the 5% commission.

The Offer.

Under contract law an offer is defined as a communication that gives the recipient of the communication the power to conclude a contract by accepting. Arjay will claim that the fax to Jadco was an offer, because it communicated Arjay's willingness to help Jadco secure the missile contract in exchange for a 5% commission.

The Acceptance.

An acceptance is an exercise of the power to conclude a contract given to an offeree by the offeror. Arjay will claim that Jadco's phone call met that criteria. By saying that Jadco "will appreciate Arjay's assistance" it would be a reasonable construction to assume that Jadco was in fact agreeing to the offer communicated by Arjay.

Consideration.

The promise to pay Arjay may be enforceable on three separate grounds. First, Arjay can argue that the promise was supported by consideration. Consideration requires legal detriment and bargained for exchange. For legal detriment to constitute good consideration, it must be bargained for in exchange for the promise. In this case, a bilateral contract was formed when Arjay offered to assist Jadco to secure the missile contract in exchange for Jadco's promise to pay a commission.

If, as discussed below, Jadco denies that there was bargained for consideration, a second alternative ground to enforce the promise is that there was reliance by Arjay on Jadco's promise. Because of Jadco's phone call indicating that it would appreciate Arjay's assistance, Arjay spent two years attempting to secure the missile contract for Jadco by meeting with Argentina officials.

The third alternative ground to enforce the promise for Arjay is that promissory estoppel should apply because Jadco was unjustly enriched. Florida recognizes the doctrine of promissory estoppel in situations where a promisor makes a promise which he reasonably expects to induce action of a substantial character on the part of the promisee and which does induce such action. Jadco's request for Arjay's assistance would reasonably be expected to induce Arjay to act on Jadco's behalf, which it did for over two years. During that time, Arjay actively attempted to secure the contract for Jadco, and Jadco apparently never tried to stop Arjay or in any way clarify their relationship. If the court finds that Arjay's performance was not bargained for, it may agree that it would be unjust to treat their efforts as a gift to Jadco, and in justice, Jadco ought to compensate Arjay for that benefit of helping secure the Argentinian contract. This quasi-contractual recovery may limit the damages received by Arjay, but is probably the best theory of recovery, given the vagueness of Jadco's response and the defenses likely to be advanced by Jadco .

Breach of contract. Arjay will claim that a valid contract existed, and that when the missile contract was awarded to Jadco for \$100 million, a \$5 million commission was owed. Jadco's refusal to pay Arjay is a breach, and Arjay will argue to recover the full \$5 million as damages for full performance on their part. Punitive damages are discussed in Section (3) below.

II. Jadco's Defenses.

Jadco's initial defense is that there was no contract because no offer was made. Arjay's fax could be reasonably understood not as an offer but a statement of intent, or perhaps even an invitation to deal. The language of the fax suggests that Arjay intended to act regardless of Jadco's response. Under these circumstances, Arjay's demand for a commission if Jadco secures the contract unilaterally placed Jadco in the position of owing a commission without having requested Arjay's involvement. Since the fax did not give Jadco the power to conclude the contract by agreeing, Jadco can assert that no valid offer was ever made.

Jadco can also claim that even if the court found the fax to be a valid offer, the telephone statement of appreciation for Arjay's assistance does not operate as an acceptance. First, because the language is unclear: to appreciate assistance does not necessarily indicate a promise. Second, because the offer was made in writing (by fax), it is customary that an acceptance be in writing as well. Here there is only a telephonic conversation, in which none of the details of the contract are discussed or even referred to. This suggests that Jadco did not understand the original fax to be an offer, nor did Jadco expect its phone call to serve as an acceptance.

Jadco can also raise a defense under the Statute of Frauds. A contract which cannot be performed in one year or less must have a writing signed by the party to be charged. In this case, the missile contract was not to be awarded for two years, and in fact was awarded two years after the fax from Arjay. Because it was impossible for Arjay to complete the contract in less than one year and there is no signed writing by Jadco, the contract should fail under the Statute of Frauds.

The final defense available to Jadco is that no contract existed because of the offer by Arjay to the Argentinian official of a "reward" of 2.5% of the contract price. Facially, this appears to be a bribe to an official of another government, and such an act is illegal. Under the contractual doctrine of impossibility, an illegal act by one of the parties to the contract renders the contract itself illegal and unenforceable. Even though Arjay performed under the contract and might otherwise be entitled to recovery under a quasi-contractual theory (see above), the law will not enforce a transaction which is illegal.

III. Availability of Punitive Damages Against Jadco.

Under Florida's punitive damages statute, in any civil action based on misconduct in commercial transactions that involves willful, wanton, or gross misconduct, the judgment for the total amount of punitive damages awarded to a claimant cannot exceed three times the amount of compensatory damages awarded by the trier of fact. In this case, the misconduct if any, by Jadco does not seem to rise to the level required by the statute for punitive damages.

The mere existence of a contract dispute does not automatically rise to the level of commercial misconduct; instead there must be some egregious act committed by the defendant. Because Jadco can make a legitimate argument that no contract ever existed (see above), it would be unlikely that the court would find Jadco's conduct to be extreme enough to justify the award of punitive damages. Should the court rule in Arjay's favor in the contract dispute, there are other types of remedies available under Florida law that are better suited to a dispute of this type.

PRACTICE ESSAY EXAM #3

QUESTION #1

Janet Jeweler, a resident of Small Town, Florida, went to the Small Town Bank to rent a safe deposit box. Janet explained to the bank's vice president, Victor Veep, that she needed to store her business and personal jewels in a safe deposit box because she had just broken off her engagement to her former business partner, Frank, and could no longer store her jewels in his safe. She also told Veep that she had a sale pending for most of the jewels to Mr. Buyer.

The "Safe Deposit Agreement" prepared by the bank provided that "No person other than the renter shall have access to the box" and that "The bank shall not be liable for loss or damage to the contents of the box resulting from any cause whatsoever." Janet objected to the provision relieving the bank from liability. However, Veep told her "That's the only way we will accept your jewels, but don't worry, Janet, we will take good care of them." Since there were no other banks within one hundred miles of Small Town, Janet signed the agreement and paid Veep the \$20 rental fee. Veep signed the agreement on the bank's behalf and then deposited the jewels worth approximately \$100,000 in the safe deposit box.

Janet felt uneasy about the deposit because Frank, who was one of Veep's drinking buddies, had told her that Veep had received numerous reprimands for coming to work intoxicated and for mishandling customer assets. As she had feared, later that day during their regular three-martini lunch, Veep told Frank that Janet's jewels were in one of the bank's safe deposit boxes.

After lunch, they went to the bank. Veep instructed Ms. Teller, the supervisor of the safe deposit box department, to give them access to Janet's box. Ms. Teller gave Veep the master key. Frank removed all the jewels from Janet's box. He kept Janet's engagement ring, gave Veep a small diamond as a "reward" for his help, and sold the remainder of the jewels to Mr. Buyer.

Janet comes to you for advice. Discuss the relationship between Janet and the Bank, potential causes of action, the damages recoverable, and any available defenses. Do not discuss possible criminal charges.

QUESTION #2

Husband and Wife, both in their mid-fifties, have been married fifteen years and have one thirteen-year-old child. Husband moves out of the house when he discovers that Wife is having an affair with Husband's best friend. After the separation, Husband begins dating another woman.

Husband owns a car dealership and holds all the stock in this closely held corporation. The dealership was purchased during the marriage with money the couple saved. Husband's stockholdings are valued at \$200,000. Since the couple's separation, Husband's net income from the business has declined by 25%, although he currently earns \$100,000 per year. Wife is a housewife who worked as a waitress the first two years of the marriage.

The couple's marital home is held as a tenancy by the entirety, although Husband's father provided the \$50,000 down payment. At the time of the purchase, the home was worth \$200,000. Currently the home is valued at \$300,000, with a mortgage of \$90,000 remaining.

During the marriage, the couple spent their vacations at a mountain cabin, which Husband owned prior to the marriage and which is held in his name. The cabin was worth \$100,000 when the couple married. During the marriage, Husband personally performed renovations on the cabin, including refinishing kitchen cabinets, hanging drapes and installing carpeting. No other renovations were made during the marriage, and the cabin is currently worth \$150,000.

An additional significant asset to be considered is a diamond ring valued at \$20,000, given to Wife by Husband for their fifth anniversary.

Wife would like to make a clean break from Husband, so she does not want to be awarded periodic alimony or child support. Wife does want exclusive possession and title to the marital home, sole ownership of the ring and one-half of all other assets. Husband claims full ownership of the business and the mountain cabin and states he has more than a one-half interest in the marital home.

Husband and Wife agree that it would be best if Wife had primary custody of the child, although the child has indicated a desire to live with the father. Husband insists upon a provision that if the Wife is awarded custody, the judge must order Wife to foster in the child a loving feeling toward Husband. Wife objects to such a provision.

Husband asks you to handle his divorce and to advise him of his legal rights. How would you advise Husband? Discuss the procedures for dissolution of the marriage, the likely distribution of the claims to property, alimony/child support issues and child custody issues.

QUESTION #3

Your client, Harry, was living in Tampa one year ago when he defaulted on a personal loan. The lender, Liz, filed suit and received a personal judgment against Harry in the amount of \$20,000. While the suit on the loan was pending, Harry and his wife Wanda visited Sarasota. Harry liked the area so well that he purchased a house.

Harry was happy in Sarasota, and soon moved all of his personal possessions to the new house and registered to vote in Sarasota County. Wanda wanted to wander around the state, however, and traveled continuously.

Concerned for her safety in hotels, Harry also purchased a cottage in Key West and a condominium in Orlando within a month of the Sarasota acquisition. All of the property was purchased with Harry's funds and title was placed solely in his name. Liz learned of the real estate purchases and recorded a certified copy of her judgment against Harry in all the counties where Harry now owned property.

While Wanda roamed, Harry met Gilda and began an extensive visit at her home in Georgia. A month ago, Wanda went to Wisconsin and Harry decided to sell the Sarasota house. Wanda said she wouldn't travel to Florida in the foreseeable future. She sent Harry a properly executed power of attorney, naming Harry as her attorney in fact, for the specific and limited purpose of executing any necessary papers in the sale of the Sarasota house.

Your paralegal prepared the documents needed to convey title from Harry to the buyer while you were on vacation. You arrive at your office just in time to conduct the closing. Liz appears at your office to collect her \$20,000 from the proceeds. Harry leaves your office in a rage and refuses to sign the documents to close the transaction.

Analyze the legal issues and discuss the actions you would take and the advice you would give Harry regarding the situation.

PRACTICE TEST #3 ANSWERS

ANSWER TO QUESTION #1

I. Relationship between Janet and the Bank.

Contractual.

Janet and the Bank engaged in a contractual relationship. In exchange for a rental fee (the consideration), the Bank agreed to restrict access to the box to anyone other than the renter. The Bank holds a bailment for Janet regarding the jewelry. The Bank is responsible for the actions of Veep under the doctrine of respondeat superior, since Veep is an employee and is acting within the scope of his employment when he contracted with Janet.

B. Agency.

There is also an agency relationship between the Bank and Janet. While the Bank holds her property subject to the obligation to protect it for her benefit, it does not hold legal title and thus the Bank has the responsibilities of an agent, but not a trustee, for Janet. Because a bailment is a purely contractual arrangement, legal title did not pass from Janet to the Bank, and the Bank does not have trustee powers in this relationship.

II. Potential Causes of Action.

Breach of Contract/Breach of Warranty.

The contract provided that no one except the renter shall have access to the box. Frank was not the renter and should not have received a key. The Bank may be sued for violating the contractual agreement.

Torts.

Janet may pursue several tort theories against the Bank.

1. Vicarious Liability. First, Janet may attempt to hold the Bank vicariously liable for the torts of its employees under a respondeat superior theory. Veep has committed the intentional tort of trespass. Ms. Teller may have been negligent in allowing Veep access to Janet's box in the circumstances.

2. Negligent Hiring /Retention. Second, the Bank may be held directly liable for its own negligence in hiring and retaining an incompetent agent. The Bank negligently entrusted the safekeeping of the box to Veep, who had previously been reprimanded for mishandling customer assets. The Bank was aware of Veep's intoxication while working and failed to exercise its duty of care to its client, Janet, in protecting her valuables.

Also, even though the Bank was not a trustee, it still had a duty to Janet to keep her affairs private and safeguard her property. Veep's discussion with Frank and opening of the box violated the duty to hold the property to her benefit and not discuss her affairs with others.

III. Damages Recoverable.

Constructive Trust.

A constructive trust can be imposed on Frank and Mr. Buyer because the property in their possession was obtained in violation of a confidential relationship between Janet and the bank. Under this device, Janet will be entitled to a return of her property from Buyer and Frank. This recovery is also possible because Veep received a diamond from Frank and thus was engaged in self-dealing.

Damages for Breach of Contract.

Damages for breach of contract will also be available to Janet. Because the Bank breached its agreement, Janet may recover any lost profit from her pending sale to Buyer and the cost of the box rental.

Damages for Tort Theories.

Under the tort theory, Janet will be entitled to compensatory and punitive damages. The conduct of Veep and the Bank evidenced a willful and wanton disregard for her privacy and she will be able to sue for three times the amount of compensatory damages.

IV. Available Defenses.

The Bank can argue that it made no express warranty of safety and, indeed, the contract had a clause which released the Bank from any liability whatsoever. Such a clause in Florida has been upheld as valid; however, to be enforceable, the contract must be clear and unequivocal on the limitation of liability in question. While this clause arguably is clear regarding liability, the Bank may ultimately not prevail with this defense since an attempt by contract to exempt one from liability for an intentional tort is generally void. Thus, the question becomes whether Veep's actions can be classified as an intentional tort, rather than mere negligence. In addition, Janet can argue that the contract that she signed was a contract of adhesion. The Bank was the only bank for miles and miles, and Janet had no real bargaining power. She had no choice.

The Bank's best defense to Janet's vicarious liability claim is that the torts of its agents were not committed within the scope of their employment. Generally, intentional torts are not within the scope of an agent's employment, except for unusual cases where such conduct is expected of an agent. This would not be the case here. Veep committed the intentional torts of trespass and invasion of privacy not in furtherance of the Bank's business, but on the basis of a personal agenda.

Therefore, the Bank is probably not vicariously liable for the intentional torts of Veep. The Bank would only be vicariously liable for the negligence of Ms. Teller, if any.

Regardless of whether the torts of the agents were committed within the scope of their agency, though, the Bank can be held liable for its own negligence in hiring, retaining, or failing to supervise incompetent agents. This is a particularly strong argument here, where Veep has a history of coming to work intoxicated and mishandling customer assets. However, if the Bank can be held liable only for its own negligence, the contractual provision precluding liability may be enforceable.

The Bank could also argue that the jewels were the property of Frank since he and Janet were partners. Regardless of the true ownership, the Bank committed itself to a bailment contract with Janet, not on behalf of the partnership, but individually with Janet, and was therefore responsible to her for safekeeping. Frank's title, if any, to the property was not an issue for the Bank to unilaterally resolve, and this defense will probably not succeed.

ANSWER TO QUESTION #2

I. Procedures for Dissolution.

To dissolve a marriage in Florida, the parties must file a petition for dissolution. Florida is a "no-fault" divorce state. However, because Husband and Wife have a minor child, they cannot file a petition for simplified dissolution. Compulsory financial disclosure of both parties is required. Separation and support agreements can be made, but must be approved by the court. When the court is satisfied or has resolved the property division, spousal and child support, and child custody issues, a final decree will be issued. Alimony, child support and custody decisions may be modified after the decree is entered, but property settlements cannot be changed without consent of the parties.

II. Distribution of Property.

Florida's equitable distribution statutes will guide the property distribution in this case. Distribution must be equitable, although not necessarily equal, between the parties, and is based on eight statutory factors including the length of the marriage, the contributions made by each party, the economic circumstances of the parties, and any factors necessary to do equity and justice between the parties. Here it appears that Husband has an ongoing business and the ability to continue to earn income while Wife does not. The parties were married 15 years and have a child who lives at home, and by agreement will be in Wife's custody.

The home will likely be held marital property since it was held as a tenancy by the entirety and was paid for, at least in part, with marital assets. The fact that Husband's father provided the downpayment will not convert the house into Husband's sole property. The court will most likely hold that this downpayment was a gift to the couple. At most, the court will give Husband a "special equity" in the property, if it finds that the downpayment was meant to be a gift to Husband alone.

Husband's claim of full ownership of the business will probably not be accepted by the court. Because the business was purchased during the marriage with money saved by the couple, it is marital property and will be considered by the court as part of the overall property distribution. Depending on the alimony award (see below), Husband may retain a greater percentage of the business, but he is unlikely to retain full ownership.

The mountain cabin was owned by Husband before the marriage and is therefore not subject to equitable distribution. While there is a presumption that real property is a marital asset, in this case Husband holds title in his name only and has independently performed the renovations. Even though the couple spent their vacations there, it appears that Wife did not contribute either funds or personal services to the property and, therefore, its appreciation in value is also likely to be viewed as nonmarital property.

The diamond ring, which was a gift from Husband, was under prior law considered to be the property of the recipient spouse. Under present law, it is simply treated as a marital asset subject to distribution. The court may distribute the ring as it sees fit to achieve equity (not equality) between the parties.

Under these circumstances, I would advise Husband to attempt a negotiated property settlement with Wife to allow each party the property they most desire, rather than risking a court-ordered distribution of property.

III. Alimony.

Wife has not asked for periodic alimony, but the court in its discretion may award her rehabilitative or lump sum alimony, or use of the family house as a form of lump sum alimony. Rehabilitative alimony is awarded to provide temporary assistance in adjusting to a new life and to obtain new skills, education or other rehabilitation. Wife has not worked outside the home for 13 years and is probably in need of training if she wishes to be self-supporting in the future. Rehabilitative alimony is usually awarded in marriages of shorter duration, and where the parties are younger than their mid-fifties. The court is not likely to order this type of alimony under the circumstances presented in this matter.

Lump sum alimony is a definite amount and must be reasonably related to the estate of the person on whom it is imposed. Husband's income has declined by 25% since the separation, but he has current earnings of \$100,000 plus an ongoing business worth \$200,000. It appears that he could pay a lump sum amount to Wife. Since the parties do not wish to have periodic alimony, the court is likely to consider lump sum alimony as part of a special equity finding, and because of the child's custody remaining with Wife, may order the exclusive possession of the marital home to Wife as a form of lump sum alimony. If this occurs, however, it does not transfer title in the house to Wife, since the property was owned as an estate by the entireties. Because there is still a \$90,000 mortgage on the house, some form of alimony will be necessary.

IV. Child Support.

Under Florida cases, an agreement between the parties for child support may be adopted by the court if it provides for proper care and maintenance of the child. Here, Wife has not asked for child support, but it does not appear that she has other resources with which to meet the child's needs. A spouse may not waive child support for a minor child without court approval. If the court finds Wife does not have sufficient means to support the child, then under Florida statutes, it may order Husband to pay child support based on the guideline amounts. Husband earns \$100,000 per year and Wife does not work outside the home. The statutory guidelines apply to parents with a combined net income of \$100,800 per year. In determining the actual payment, the court has discretion to modify the amount upon a written finding that the guideline amount would be improper. The court must consider the needs of the child and the financial status and ability of the payor spouse to supply those needs. Nothing in the facts suggest that a deviation from the guidelines would be necessary.

V. Child Custody Issues.

The public policy of Florida regarding child custody is to assure that the child has frequent contact with both parents, and that both parents share the rights and responsibilities of childbearing. The controlling determination of custody is the welfare of the child. In this case, both Husband and Wife agree that the child should live with Wife. Provided that the court finds no compelling reason against that decision, it will probably stand. The fact that the child, who is 13 years old, wishes to live with Husband, is a relevant, though not controlling factor in determining custody, and the court may consider that preference in making its determination.

The dispute over whether Wife must foster in the child a loving feeling toward Husband should be resolved in the broader context of shared parental responsibility for the child's welfare. If Wife's objection would cause her not to allow Husband to have frequent and continuing contact with the child, the court must consider that fact in its custody determination. Absent Wife taking such a position, there is little chance that the Court will order Wife to foster affection for Husband in the child, but would require both parents to cooperate in order to assure the child's well being and best interests.

ANSWER TO QUESTION #3

I. Legal Issues.

A. Validity of Liz's Judgments Against Harry.

Under Florida statutes, a valid judgment becomes a lien on real estate when a certified copy is recorded in the official records of the county where the property is located. The lien is effective for 7 years from the date of recording and may be extended for an additional 7 years by re-recording. Here, Liz appears to have followed the proper procedures to enforce a valid lien against Harry's property in Sarasota.

B. Harry's Right to a Homestead Exemption on the Sarasota Property.

Under the Florida Constitution, Art. VII, §6, a Homestead exemption from taxation is provided to every person who has legal or equitable title to the real estate where their permanent residence exists. Only one homestead exemption is allowed, and the real estate title may be held as tenancy by the entirety, joint tenants, tenants in common or by condominium. The Constitutional Homestead exemption is the basis for a statutory Homestead exemption for estate purposes. It is this statutory provision which is at issue in this situation.

Florida law provides that the homestead right exempts a family's real property from forced sale for the debts of the owner. For purposes of this rule, however, property that is owned by spouses as tenants by the entirety is not homestead property. Further, the statute provides that the owner may sell the property during his life, but only if joined in the deed or mortgage by the spouse.

In this case, it appears that Harry purchased the Sarasota property with the intent to make it his permanent residence, as evidenced by his placing all his personal possessions in the new house and his decision to register to vote in Sarasota County. The fact that Harry bought other real estate and traveled to Georgia with Gilda does not invalidate his homestead right to the Sarasota property. While he may not claim more than one homestead, he appears to have done all that is necessary to make the Sarasota property his permanent residence.

The fact that the property qualifies as a homestead does not by itself resolve the issue with Liz's judgment. Even though she is a judgment creditor, she has not attempted to force the sale of the property, which would be prohibited. If Harry chooses not to sell the property to Buyer, Liz cannot force the sale to collect her judgment. But if Harry does complete the sale without violating Wanda's rights to the homestead (see below), Liz's judgment lien is valid and she will be able to collect her \$20,000.

C. Wanda's Rights to the Sarasota Property.

Title to the Sarasota property is solely in Harry's name, but he may not alienate the property without Wanda's consent. It is not necessary for Wanda to claim the Sarasota property as her permanent residence to take advantage of the homestead. As a spouse, she has an interest in the property through the descent statutes and that right cannot be alienated by Harry without her consent. Wanda has given Harry a properly executed power of attorney which provides Harry with the power to execute "any necessary papers in the sale of the Sarasota house." Thus, it appears that she has freely joined Harry in his decision to sell the property, and he may do so.

D. Ethical Issues Regarding Legal Representation.

Because Wanda is giving up her homestead right in the Sarasota home, I would be concerned that she have independent, competent legal advice before she executed a power of attorney to Harry. Because I represent Harry, and their interests may not be identical in this matter, I would advise Wanda to obtain separate counsel.

The preparation of the papers to convey title by my paralegal is probably acceptable, provided that the paralegal was acting under my direction and guidance. The preparation of real estate closing documents by a nonattorney, if properly supervised, does not constitute unauthorized practice of law. The fact that I arrived just in time to conduct the closing, however, suggests that I may not have provided proper supervision and did not act in my client's best interest. A proper title search on my part would have revealed the existence of Liz's judgment lien on the property and could have avoided the present difficulty.

E. Buyer's Right to Complete the Purchase and Sale of the Sarasota Home.

The buyer for the Sarasota home presumably has a properly executed purchase and sale agreement, and could sue Harry for breach of contract and seek specific performance, if he refuses to complete the sale.

II. My Advice to Harry.

Liz has a valid judgment lien which she will execute whenever Harry sells the property in Florida, but she cannot force him to sell the Sarasota property to pay her judgment. Likewise, Wanda can block the sale of the Sarasota property as an improper alienation of her homestead rights. If Harry wishes not to sell the property, only the buyers have the ability to force the sale, but even they cannot do so without Wanda's consent. I would advise Harry to talk with Wanda, and not to sell the property at this time. It may be possible to satisfy the buyers with some small amount for liquidated damages. The cottage in Key West and the condominium in Orlando may not be worth as much money as the home in Sarasota, and may at some point be sold to satisfy the judgment lien, but Harry should keep the Sarasota house and his rights to the homestead exemption therein.

JULY 2001 ESSAY QUESTIONS AND ANSWERS

QUESTION NUMBER 1

When Husband and Wife divorced in Florida two years ago, they resided a mile apart. The final judgment awarded shared parental responsibility for Child (their son, age 10). Child's primary physical residence was with Wife, and Husband had access to Child on alternating weekends, one weekday evening, alternating holidays, and five weeks in the summer. There was no restriction in the judgment concerning Wife's relocation with Child to another state. The judgment contained no specific reservation of jurisdiction.

One year ago, Wife moved to Georgia with Child and enrolled him in school. Husband continued to see Child approximately one weekend per month in Georgia, but was not able otherwise to visit with Child during that time because of the distance. Wife remained in Georgia until three months ago, then moved with Child to Maine.

Husband continued to live in Florida where he filed last month for modification of the primary residence of Child, alleging as grounds that Wife's relocation of Child interfered with his right of access.

Wife contested Florida's jurisdiction and filed modification actions in Maine and Georgia to simultaneously change Husband's visitation schedule.

You are the clerk for the Florida judge before whom Husband's modification petition is pending. Judge asks you which state has jurisdiction of this matter. Judge also asks you how a Florida court should rule on Husband's modification petition. Prepare a memorandum of law addressing fully Judge's questions including the reasoning for your answers.

QUESTION NUMBER 2

Mr. and Mrs. Elder moved to a condominium in Florida four years ago; title to the condominium is in Mr. Elder's name only. From May through November, they live in the condominium; from December through April, they rent the property to tourists and live in a home that they jointly own in North Carolina.

This past January (while they were in North Carolina), Mrs. Elder fell and had a serious head injury. During his wife's extensive hospitalization, Mr. Elder became depressed. Al, the Elder's adult son, suggested that his father come to Florida for a visit. When Mr. Elder arrived in Florida, Al, without authority and over Mr. Elder's objection, moved him into a county-owned and operated nursing home. Mr. Elder tried to leave the nursing home on several occasions, but the staff prevented his departure. He has been placed in a wing of the facility that is kept locked.

With hospital and nursing home bills piling up and the condominium vacant since April, Mr. Elder signed the deed to the Florida condominium over to Al, and the property was sold by Al to Mr. Buyer in October of this year. The proceeds of the sale were placed in an escrow account for Mr. Elder, but the hospital and the nursing home have filed actions seeking reimbursement from the escrow account for the amounts owed.

Mrs. Elder, fully recovered, was released from the hospital in November. From her home in North Carolina, she contacts you. She opposes the sale of the condominium and she doesn't believe that her husband ever really needed to be in a nursing home. Mrs. Elder asks you to tell her what she can do about the condominium sale and what she can do about the confinement of Mr. Elder.

Prepare a memorandum that analyzes the Florida Constitutional implications of the sale of the condominium and Mr. Elder's confinement in the nursing home. Also discuss any action for compensatory or actual damages that might be available under Florida law against the nursing home, and possible defenses available to the nursing home. Do not discuss punitive damages.

QUESTION NUMBER 3

Teen is 18 years old and lives with his parents in Lakeland, Florida. While Father was away, Teen took Father's truck to visit a friend who lived about 40 miles away in Orlando. Father normally allowed Teen to use his truck, but was unaware that Teen had taken it this specific time.

On the way to Orlando, Teen stopped to get a six-pack of beer at Beverage Store, where Clerk was working. Clerk did not ask Teen for any identification and sold him the beer. After drinking six beers, Teen fell asleep at the wheel and drifted over the center line, colliding with Driver's car. Driver was properly within her lane at the time of the collision. Driver was not wearing her seat belt and, although it was dark out, did not have her headlights on. Driver suffered permanent injuries.

You are an associate in a two-lawyer general practice law firm. Driver wishes to retain your firm. Neither you nor your partner has ever handled a personal injury case but you have both discussed a desire to expand the firm's practice into that area of law.

Partner has asked you to prepare a memorandum of law setting forth the claims Driver may have and the possible defenses. Partner would also like for you to address the standard for punitive damages in Florida. Lastly, Partner is considering whether to refer this case to a personal injury law firm to handle if that firm will equally split its contingent fee with your firm. Your memo should address whether such a referral is necessary and whether the proposed fee arrangement would be permissible.

ANSWER TO QUESTION 1

Question One: Jurisdiction

Despite the fact that the original judgment did not expressly reserve jurisdiction, Florida is still the appropriate forum. Under the Uniform Child Custody Jurisdiction Act (UCCJA), which Florida has adopted, the court which originally awarded custody will retain jurisdiction over the matter. This is to avoid snatching by one parent and fleeing to another forum to contest an order that the parent does not approve of. Also, the Maine court must give full faith and credit to the Florida judgment.

Florida has continuing jurisdiction in this case because Father (Husband) remained here. This is all that is necessary for the original court to remain the appropriate jurisdiction. Although Mother (Wife) would argue that Maine is now the appropriate forum, because Child resides in Maine, this is an incorrect assertion under the UCCJA. The only way for jurisdiction to change would be if all parties no longer resided in Florida, there was an emergency in another state and jurisdiction was necessary to protect Child from harm, or the Florida courts decided that another state could more appropriately exercise jurisdiction (for convenience of parties, witnesses, etc.). Unless Florida expressly declines jurisdiction, which there is no reason to do, Maine cannot accept jurisdiction because all states have adopted the UCCJA in one form or another and would be bound by the rules set forth above.

Additionally, although the facts do not make this issue clear, it is possible that Mother (Wife) fled the state with Child in order to deprive Father (Husband) of his visitation rights. If this is the case, and Father (Husband) is able to successfully assert this, no forum to which Mother (Wife) flees may entertain jurisdiction under the UCCJA or the uniform Kidnapping Protection Act. However, it does not appear as if Father (Husband) would be successful on this claim because he continued to exercise visitation in Georgia without complaint. Nonetheless, Florida remains the appropriate forum.

Question two: Husband's Modification Petition

The primary question in determining an initial grant of custody (in Florida, known as primary physical residence) or in modifying custody is: What is in the best interests of the child? Once the initial custody award has been made, courts will modify the judgment only upon a showing of substantial change in circumstances. This is a very high burden for Husband to meet. He would need to show an actual detriment to Child such that not changing his primary physical residence would cause him harm. Courts are generally reluctant to find this harm. Indeed, Florida courts have found that abuse to the custodial parent or drug use by the custodial parent are insufficient grounds for changing primary physical residence. Husband would basically need to allege either mental or physical abuse to child. Because Child is 10 and capable of testifying, the court should be able to readily determine whether such grounds exist.

Because the original award did not restrict Wife's ability to relocate, Husband would not even have grounds to argue that she is flaunting the ruling of trial court by infringing Husband's grant of visitation. Although courts want to foster the healthy relationship between non-custodial parents and their children, custodial parents are allowed to relocate for basically any good reason. A showing by wife that she moved to obtain a better education (for herself or child), a better job, or to be closer to family will generally be sufficient. If Husband wanted to enjoin Wife from moving with Child, he should have filed an emergency injunction action before she left Florida. In fact, Husband's acquiescence in Wife's move to Georgia (by continuing to exercise visitation there and not filing an action) might be seen as a waiver.

However, despite the fact that Husband should be unsuccessful in his petition to modify custody, the court should divide visitation and transportation costs between Husband and Wife. Husband should not have to bear the expense of travel for himself or Child for visitation alone. If the parties do not have sufficient financial means to pay for transportation, so that Husband would be completely deprived of all visitation with Child, this might be a ground for enjoining Wife's move, but probably would still be insufficient to change custody. Moreover, since Florida no longer has personal jurisdiction over Wife (she left the state a year ago), an injunction would come too late.

In conclusion, the Florida court still appropriately exercises jurisdiction over this case under the UCCJA. However, Husband's petition for modifying primary physical residence should be denied absent a showing of abuse to Child. Nonetheless, this court should order Wife to continue sharing parental responsibility with Husband and to split travel expenses necessary for him to exercise visitation. The court could, in its discretion, modify visitation time to be more consistent with the actual time Husband can visit Child given the distances between them.

ANSWER TO QUESTION 2

This is a real estate, constitutional law, and torts question raising issues concerning the homestead rights in one's property under the Florida Constitution, the right to due process before being committed, and false imprisonment and the vicarious liability of governments for their employees' acts.

Homestead

Under the Florida Constitution, residents of Florida may claim their primary residence as their homestead, making the residence exempt from being taken to satisfy claims of creditors, among other rights. There is no filing requirement to declare a residence as homestead property, except insofar as a filing is required with the local tax assessor to claim the homestead exemption for a reduction in valuation of the home for taxing purposes. Otherwise, the owners were living in the home with the intent that it be their primary residence, gives rise to the Homestead exemption. The homestead statutes extend to ½ acre of such property inside a municipality, and up to 160 acres outside a municipality. Condominiums can be someone's homestead.

Here, the Elder's lived in the condo for 7 months each year. This is over ½ of the year, so they may argue that the condo was their homestead, if they affirmatively plead that the condo in Florida, and not the North Carolina home was their primary residence. The fact that they rented the property to others while in North Carolina does not nullify the homestead status, so long as the Elder's intended to return to the condo and claim it as their primary residence. Further, the fact that they intended to return to the Florida condo, and would have but for Mrs. Elder's injury and the sale of the condo is strong evidence that they had not abandoned the condo as their homestead. A homestead is abandoned only when the owners manifest an intent, expressly or impliedly, that they don't intend the property to be their homestead anymore.

Real property is presumed to be held by the entirety (the married couple) in Florida so long as the parties are married at the time the title is conveyed to one or both of the parties. The presumption arises even if only one of the party's names appears as grantee on the deed. Further, any interest in homestead property that is being conveyed requires the joinder of both spouses in the conveyance.

Therefore, in this case, Mrs. Elder owned an interest in the condo homestead even though her name did not appear on the deed, because they were married when they moved into the condominium. Thus, Mrs. Elder was required to sign any deed, conveying the property to Al, so as to signify that she consented to the conveyance and release of her rights in the homestead. She did not sign the deed, therefore, her interest was never released, and she may sue to eject the new owner and to otherwise quiet title to the condo. Mr. Elder may also argue that his signature on the deed was obtained under duress, because he is being confined against his will, but here is no need to make this argument, as Mrs. Elder's claim is strong enough.

Nursing Home Violations

For a violation of a citizen's constitutional rights to occur, there must first be an action taken by the state or one of its counties, municipalities or other divisions. Secondly, this action taken (or not taken) must be in violation of the citizen's rights as granted in the Florida or U.S. Constitutions.

Citizens are entitled to notice of a proceeding against them, and an evidentiary hearing before they are confined against their will by the state, whether the confinement is punitive or for the citizen's own safety. Here, Mr. Elder has been confined against his will and without his consent by the county government in its nursing home. While the county may attempt to argue that Mr. Elder has consented to the confinement in their defense, it is clear that this son committed him to the nursing home without his consent as manifested in his various attempts to leave. There is further evidence that he is a danger to himself or others which could give rise to a justification for the confinement. Indeed, no hearing has ever been held to hear any such evidence or even to determine if such evidence exists. The nursing home has violated Mr. Elder's constitutional rights to due process of law before depriving him of his liberty. It has failed to hold an evidentiary proceeding before confining him against his will.

As a side note, Mr. Elder may also make a claim against the county for false imprisonment: the intentional confining of a person without their consent. A county government in Florida is vicariously liable for the torts of its employees unless the alleged tort was caused in the planning functions of government. Here, there is evidence that the county's employees are intentionally confining Mr. Elder without his consent as evidenced by their closing and locking of the doors each time he attempted to leave. While sovereign immunity applies to planning or discretionary functions of government employees, these actions of locking the doors are operational in nature, because it is the employee's duty to safeguard the patients in the home. However, Mr. Elder's damages will be capped at \$100,000.00 for the violation. If he succeeds in a judgment for more, he will have to get a bill passed in the Florida Legislature, authorizing the higher payment.

Remedies

As stated above, the sale of the condominium may be set aside and the new owner summarily ejected. The new owner will be entitled to his money back plus damages that he may bring in a cause of action against Al for breach of any warranties in the deed from Al to him. The new buyer may also have a claim against his title company and a claim for malpractice against his attorney (if he had one) who conducted the hearing.

Mr. Elder may file a Writ of Habeas Corpus against the director of the nursing home, requesting a hearing and immediate release. He may also file, if his confinement is determined to be wrongful and against his consent, a false imprisonment action against the county. The county may raise sovereign immunity as a defense. However, this would likely only succeed in capping their damages liability and not in nullifying it. He is also entitled to receive any money back that he paid for the nursing home care. However, the nursing home would likely succeed on a claim in a certain quantum meruit against Mr. Elder if it could show that it conferred a benefit on him (shelter, food, etc.) with the expectation of being paid, and Mr. Elder did receive the benefit. However, if the confinement was wrongful, they may only recover the actual value of the care, and no profit.

The nursing home may attempt to obtain a judgment for their overdue bill and levy on the escrow account being held for Mr. Elder. However, the account consists of proceeds from the sale of the homestead which Mr. and Mrs. Elder likely intend to apply to the purchase of a new homestead, or repurchase of the old one. As such, the homestead exemption applies to the proceeds as well, and is therefore out of the nursing home's power to levy.

ANSWER TO QUESTION 3

This is torts question that raises issues of negligence, dangerous instrumentalities, "tavern keeper" liability, vicarious liability, punitive damages, professional duty of competency for attorneys, and contingency fees in personal injury cases. I will address the torts first with respect to each potential defendant and then address the ethical issues.

Driver v. Teen: Driver can assert a claim of negligence against Teen. In order to recover for negligence, Driver must show that Teen owed Driver a duty of care, that Teen breached that duty, and that the breach was the proximate and actual cause of Driver's damages.

Driver should have not problem satisfying these elements. Teen owed Driver a duty to drive carefully and sober. Teen breached that duty by driving under the influence of alcohol. This breach directly caused an automobile accident, which caused Driver's permanent injuries.

Driver might also be able to establish negligence automatically by proving negligence per se. Negligence per se automatically establishes negligence if Driver can show that Teen violated a statute, that Driver is a member of the class that the statute is designed to protect, and that the harm that occurred is of the type that the statute is designed to prevent. In this case, Driver can show that Teen violated a statute outlawing driving while intoxicated, which is designed to protect other drivers on the road, such as Driver, from accidents caused by intoxicated drivers such as Teen. Thus, Driver should be able to establish negligence per se against Teen.

Teen can attempt to limit his liability by showing that Driver was comparatively negligent. Florida follows pure comparative negligence rather than contributory negligence, which means that the victim will be able to recover regardless of how negligent victim was (unless victim was legally intoxicated and greater than 50% at fault). In comparative negligence, a jury will assign percentages of fault to both Driver and Teen. Driver will only recover from Teen the percentage of Driver's damages that corresponds to Teen's percentage of fault.

Here, Driver was also negligent in failing to wear a seat belt (which is not negligence per se in Florida) and in failing to use headlights in the dark (which might be negligence per se if there is a statute requiring the use of headlights in darkness). Thus, Driver's recovery will be limited by whatever percentage of fault Driver's negligence is considered to be.

Punitive Damages Considerations: Driver will also be able to recover punitive damages against Teen. In Florida, punitive damages are available if a defendant's actions were "willful and wanton." Drinking six beers would most likely satisfy this standard. Punitive damages are normally limited to three times the amount of actual damages of \$500,000, whichever is greater. However, if the defendant was legally intoxicated, there is no limit to the amount of punitive damages. Thus, since Teen was most likely legally intoxicated, there will be no cap on the punitive damages available to Driver.

Driver v. Father: Driver will also have a cause of action against Father based on the doctrine of dangerous instrumentalities or negligent entrustment. Father can be held liable for torts caused by the use of dangerous instrumentality such as a truck or by negligently entrusting the truck to another. Thus, even though Father was not operating the truck he can be held liable for its use either strictly (dangerous instrumentality) or negligently (elements of negligence listed supra) and directly and proximately led to the accident causing Driver's injuries.

Driver v. Beverage Store: Driver could also assert a negligence claim against Clerk. While tavern keepers or liquor store clerks are normally not liable for the intoxicated acts of their patrons, they can be held liable if they knowingly serve alcohol to someone with an alcohol problem or to a minor. While Clerk might defend by asserting that he did not know that Teen was a minor, this defense would probably not be successful because Clerk's failure to ask for identification breached a duty that he owed as a vendor of alcohol to only sell to those 21 and older. Thus, this is negligence (element given supra) and directly and proximately led to the accident causing Driver's injuries.

Driver v. Beverage Store: It is not necessary to refer this case to a personal injury law firm if it is possible for our firm to become sufficiently competent to handle this case. Attorneys have an ethical duty to only accept cases that they are competent to handle. The fact that we have never handled a personal injury case before would indicate incompetence. We can cure this incompetence either by properly educating ourselves in personal injury law or by associating ourselves with attorneys who are competent to handle the case.

Should we choose to refer this case to another firm and split a fee, we must abide by certain rules. Since this is a personal injury case, we must give Driver a Statement of Client Rights.

In addition, the contingency fee must be written and disclose the percentage for the fee and when the percentage is calculated. To split the fee, normally contingent fees must be split according to the work done. This could be altered, however, by a written agreement with the client in which both attorneys agreed to be jointly responsible to be equally available for consultation, and the agreement must disclose the basis for fee splitting.

For personal injury cases, however, the lawyer with primary responsibility must get at least 75% of the fee, which would invalidate our equal sharing arrangement, unless we get a court approval for our arrangement.

Conclusion: Driver can recover against Teen based on negligence against Father either in strict liability (dangerous instrumentalities) or negligence (negligent entrustment), against Clerk for negligence, and against Beverage Store in vicarious liability.

We must either cure our incompetence to handle this case or refer it to another competent firm. Since it is a personal injury matter, equal fee sharing will probably not be permitted as the lawyer with primary responsibility must get at least 75% of the fee.

FEB 2002 ESSAY QUESTIONS AND ANSWERS

QUESTION NUMBER 1

Gardner, knowing how much Homeowner hates to mow his lawn, submitted to Homeowner a signed written offer to mow Homeowner's lawn every Friday for the next eight Fridays for \$40.00 per mowing payable in cash on each Saturday following the Friday on which Gardner mows Homeowner's lawn.

The contract provided: "This contract may not be orally modified."

Homeowner marked through the \$40.00 per mowing provision and changed it to \$35.00 per mowing. Homeowner also marked through the provision for payment on each Saturday and substituted a provision that Homeowner would pay Gardener on each fourth Saturday.

Homeowner signed the contract, initialed each change and gave it to Gardener.

Gardener initialed each of the changes and returned the contract to Homeowner. The next day Gardener told Homeowner that he would like to change the contract price to \$40.00 per mowing.

Homeowner said, "OK, \$40.00 per mowing, but you have to trim."

Gardener responded, "OK, \$40.00 per mowing and trimming."

Thereafter, Gardener mowed and trimmed Homeowner's lawn on the next three consecutive Fridays. On the Fourth Friday, Orlando was hit by a hurricane and Gardener did not mow and trim Homeowner's lawn until Saturday. Homeowner waved "hello" to Gardener while Gardener mowed and trimmed Homeowner's lawn on Saturday. When Gardener finished, Gardener asked Homeowner for \$160.00 for mowing and trimming Homeowner's lawn four times.

Homeowner replied, "I will not pay you anything because you breached the contract; the fourth mowing and trimming was supposed to have been done yesterday."

Gardener comes to you for advice about suing Homeowner for the \$160.00. How would you advise Gardener about: potential causes of action against Homeowner, Homeowner's potential defenses and Gardener's answer to them, and the likely outcome.

QUESTION NUMBER 2

The Campus Drug Store is owned and operated by State University, which is part of the State of Florida's university system. One day, Worker, an employee of the Campus Drug Store, observed Suspect, a young woman with red hair, take a tablet of a prescribed drug for pain from behind the counter and swallow the pill. After surveying Suspect's movements through the store, Worker saw Suspect stop at the magazine counter.

Ten minutes later, Customer, also a young woman with red hair, entered the Campus Store and proceeded to look at music albums displayed on the opposite side of the magazine counter.

Meanwhile, Worker went to the office of his manager. Worker told Manager about his observation of Suspect. In an effort to apprehend Suspect, Manager accompanied Worker to a location in the store where Worker could identify Suspect. The two employees concealed themselves behind an aisle within viewing range of the magazine rack. Worker then peered around the corner, witnessed Suspect at the magazine rack, and advised Manager that Suspect was the red-haired woman standing by the magazine rack. He did not mention that there were two red-haired women standing opposite each other at the magazine rack. When Manager looked around the corner, he observed only Customer standing at the music display, which abutted the magazine rack. Unbeknownst to Manager, Suspect had disappeared from the magazine area after Worker had seen her.

At that point Manager took over the surveillance. He kept watch over Customer (instead of Suspect) while Customer browsed through the store. When Customer attempted to leave the store, Manager stopped her, accused her of shoplifting and demanded that she accompany him to his Office. Customer did so and Manager called the police, who came and arrested Customer after Manager signed a sworn complaint. In the complaint, Manager wrote that Customer had stolen and consumed a controlled substance. The arresting officer issued Customer a notice to appear in court at a later date on charges of retail theft and possession of a controlled substance. The officer then release Customer from custody.

Prior to the court date, the State Attorney, while obtaining a witness statement from Worker, showed Worker a picture of Customer. Worker informed the State Attorney that Customer was not the woman Worker saw shoplifting. The State Attorney decided not to prosecute the charges against customer.

Customer has come to you and asked for your advice concerning a potential suit against Manager and State University. Prepare a memorandum of law discussing Customer's potential causes of action under Florida law, and of the defenses Supervisor and State University may assert.

QUESTION NUMBER 3

Testator (T) and Wife (W), who are husband and wife and Florida residents, were involved in a fatal accident. T was killed instantly and W died one hour later. At the time of the accident, T had an interest in the following described properties as indicated:

| <u>Property</u> | <u>Titled</u> |
|--|-------------------------|
| Family residence | T & W, Husband and Wife |
| Rental property | T & Friend |
| \$100,000.00 bank account at City Bank | T in Trust for Fred |
| \$500,000.00 brokerage account at Bull Brokerage | T |

T's validly executed will left his entire estate to W provided she survived him. If W failed to survive T, the will left everything including "my account at City Bank" to a testamentary trust. The stated purpose of the trust was to provide for T's children and grandchildren taken into consideration the standard of living to which the children were accustomed at the time of T's death. The will named T's brother, Bob and sister, Sissy, as cotrustees. The will contained the following provisions:

The trustees should distribute so much of the trust principal or income that the trustees deem necessary or desirable in their absolute and uncontrolled discretion to provide for the health, education and welfare of my natural children and others as the trustees in their discretion may deem appropriate during the term of the children's natural lives and upon the death of my last surviving child, the remaining assets, if any, shall be distributed in equal shares to my grandchildren. No part of the interest of any beneficiary of this trust shall be subject in any event to sale, alienation, hypothecation, pledge, transfer or subject to any debt of said beneficiary or process in aid of execution of said judgment.

The will further provided 'if any person dies with me in a common disaster and such person is required to survive me in order to take property under this will, then such property shall vest as if such person predeceased me.'

T is survived by three adult children:

1. Fred, T's son from his first marriage who was adopted by his ex-wife's second husband;
2. Alice, his adopted child with W; and,
3. Ned, his child with W.

Sissy declines to act as trustee due to health problems.

There is a properly recorded judgment against Ned for failure to repay a bank loan.

Bob retains you to give him legal advice as to the trust. Advise Bob as to each of the following issues including the reasons for your advice:

1. Is the trust valid?

2. Assuming the trust is valid, will any of the assets fund the testamentary trust? Discuss each asset.
3. Assuming the trust is valid and funded, who will be the trustee or trustees?
4. Assuming the trust is valid and funded, who will be the beneficiary or beneficiaries?
5. Can bank reach or garnish any interest that Ned may have in the trust?

ANSWER TO QUESTION 1

First, we must examine whether there was a valid contract, and if so, what the terms thereof were. The facts stipulate that Gardener (“G”) made a signed written offer to Homeowner (“H”). However, the proposed terms of the contract, as set forth in the offer, were modified by H. This modification constituted a counteroffer. Both H and G assented to the terms of this counteroffer by initialing the changes of \$35.00 instead of \$40.00 and payment every fourth Saturday instead of every (each) Saturday. Thus, G accepted H’s offer and there was a meeting of the minds as to these terms. The contract recited valuable consideration: the work of G mutually balanced by H’s promise to pay. Thus, there was a valid, binding contract based on an offer, acceptance, and consideration.

The terms of the foregoing contract were as follows: H would pay \$140.00 (\$35 x 4) to G every fourth Saturday, in consideration of G’s mowing the lawn every Friday.

The contract, by its express terms, prohibited any oral modification of its terms. Thus, an issue arises regarding the purported oral modification carried out by G and H the next day. They purported to agree on a modification from \$35 to \$40, along with a new duty to be accomplished by G. G would argue that the increase of price was not really a modification, but rather a collateral contract supported by new consideration: G’s promise to perform an additional duty which he was not formerly obligated to perform. If G were to prevail, then the final terms of the contract were: G to mow every Friday AND trim every Friday, and H to pay \$160.00 (\$40 x 4) every fourth Saturday.

On the other hand, H would argue that the oral modification was invalid as contrary to the terms of the written contract. H might argue this position in order to attempt paying \$140.00 per month rather than \$160. However, it does not appear that H is attempting to advance this argument, and in any event, it appears that G would prevail on this point because the modification was supported by additional consideration.

Assuming that the contract price really was enforceable as \$160.00 every four weeks, we must address the alleged breach that occurred on the fourth Friday when the city was hit by a hurricane. (The facts state that “Orlando” was hit, and I am assuming that this scenario took place in Orlando.)

G would argue that H was the one who was at fault, rather than G, regarding the nonpayment. This is so because G's late performance probably was excused by impossibility or commercial impracticability on Friday due to the danger of mowing and trimming during a hurricane, and the impracticality of mowing wet grass during the rainstorms that commonly accompany a hurricane. G is likely to prevail on this argument. Therefore, G's late performance should be excused and further, the alleged breach probably was not material. Unless H had notified G of some special circumstances that would justify finding consequential damages the under Hadley v. Baxendale standard, I would advise G that any breach, if there was any, probably was not a material breach.

Further, G can assert waiver by H of the late performance. The facts stipulate that H waved "hello" to G while G was performing his duties on Saturday, one day late. This action by H probably constitutes waiver.

Also, G may be able to assert an equitable claim of laches, since the H failed to protest G's late performance at a time when G could have stopped working.

Accordingly, G could assert a right to obtain payment from H if H breached the contract by refusing to keep his promise of making payment. If G's late performance was excused or waived, G should obtain full payment of the \$160.00.

HOMEOWNER'S DEFENSES

H may claim that the contract was materially breached by G (which probably will not succeed). H will also argue that he had no intention of waiving G's timely performance by simply waving "hello." Further, as stated above, H could even argue that the contract price was supposed to be \$140.00 per four weeks rather than \$160.00.

GARDENER'S ANSWERS

G could assert that the contract was divisible, and that later performance of one day's work should not constitute a breach of any other portion of the contract (namely, the first three week's performance). G will thus argue that, at worst, he should be paid \$120.00 ($\40×3 weeks) for the weeks in which he did perform on time. However, the contract probably is not divisible because the payment was to be made in 4-week blocks.

Still, G can rely on the earlier arguments that the alleged breach was excused, waived, or immaterial, and thus H should owe the entire contract price for that 4-week block. Most likely, G would prevail in this assertion.

EQUITABLE ASPECTS

If for some reason the contract were to be found invalid, G should be able to assert a claim in quasi-contract and recover the fair value of the work which he actually performed, in quantum meruit.

ANSWER TO QUESTION 2

This question raises torts issues as well as the doctrine of sovereign immunity and vicarious liability. Customer may consider several claims against Manager and State University, including false imprisonment, defamation and malicious prosecution.

First, I will discuss some general issues of sovereign immunity. The State of Florida, including its subdivisions including the State University System, has waived its constitutional and inherent sovereign immunity in certain respects. It has waived it for operational activities (as opposed to planning level activities) for which its agents and employees owe individuals a duty of care. This fact pattern clearly demonstrates an operational level activity—the ownership and management of the campus drug store.

The activities in question were not high-level planning activities but proprietary and operational activities. Besides, common law governmental immunity usually doesn't even apply to proprietary as opposed to governmental functions. Must get claim bill from leg. to exceed cap. There is a cap on the State's liability of \$100,000 per person, no punitives against state and \$200,000 per incident. The fact pattern given is likely to be considered one incident anyway. I think Florida's sovereign immunity has been waived for intentional torts with the scope of business that are the subject of vicarious liability.

This question also raises vicarious liability issues. Will the state be liable for potential intentional torts of the store manager? While employers are not usually vicariously liable for the intentional torts of their employees, there is an exception for intentional torts that are committed on behalf of the employer to carry out the employer's business. There is a good argument that the removal and restraint of potential shoplifter if tortuous falls well within this exception and the State as an employer could be held vicariously liable for the Manager's potentially tortuous behavior. Although we are not given enough facts, Customer may also consider a direct action against the State for negligent hiring. If the state conducted a reasonable background investigation of Manager that revealed no relevant offenses or info., there is a rebuttable presumption that the employer (the State) was not negligent. No presumption runs in the converse.

The first tort Customer may assert against Manager and the State is false imprisonment. False imprisonment requires an intentional confinement of a person in a bounded area. There is no requirement of damages (non-related damages are recoverable) and the required intent is the intent to confine. Here, manager stopped Customer and demanded that she accompany him to his office. While it would be a stronger prima facie case if done by a security guard, the elements are probably satisfied here. There is little evidence that Customer willingly consented to the confinement and she was bound within a bounded area.

Manager and the State could rebut with the shopkeeper's privilege. Shopkeepers are privileged to stop and investigate suspected shoplifters if there is a reasonable basis for their suspicions. The confinement and inquiry also must be reasonable in scope and manner. The question here is whether manager had a reasonable basis of his suspicions. Manager will argue that it was reasonable to rely upon the claims of the employee. He will also claim that no first hand knowledge is required of the person who actually restrains the suspected shoplifter. Customer probably has the better argument that Manager should have done more to make sure Customer was the right person. Manager simply could have asked employee after stopping Customer initially (although any confinement no matter how short can give rise to a false imprisonment claim). This is a tough issue that would have to be resolved at trial. Manager also could argue the defense of consent, but there is little factual support in the fact pattern. In conclusion, Customer has a good case for false imprisonment.

Second, Customer could try to assert a claim for common law defamation. This requires a defamatory statement of or concerning the plaintiff as well as publication and damages. It is unclear in Fla. whether falsity and fault cure also a part of prima facie case for common law defamation, but the best guess is no. Here, we have a defamatory statement ("stolen & consumed a controlled substance"). We also have the of or concerning plaintiff element and an intentional publication to a third party (the police officer). The statement tends to adversely affect Customer's reputation for honesty and sobriety. Customer therefore has a solid prima facie case. This is libel (written) & damages are presumed.

Manager and State may argue an absolute or qualified privilege. The absolute privilege for judicial proceedings is however, inapplicable before actual charges are filed. The best defense is a qualified privilege. A qualified privilege is available in several socially useful circumstances. One includes making out a complaint to police officer. The privilege is available if defendant acted in good faith, was interested in the transaction, the statement was limited to the State's interest and the Manager offered the statement in a proper manner. There is no showing of bad faith here and the other elements appear to be met. Manager and State will bear the burden of proof. Customer could only violate this qualified privilege by showing of express malice by a preponderance of the evidence. Express malice requires that the primary purpose of the statement to be to harm or injure the plaintiff. Where there is an argument that Manager was reckless, this is not sufficient in Fla. (as opposed to the NY Times v. Sullivan actual malice standard used in many states). Customer could probably make out a prima facie case of defamation but Manager & State also could assert a qualified privilege.

There is also a weak argument for malicious prosecution. Malicious prosecution requires initiation of criminal charges, termination in plaintiff's favor, no probable cause, bad faith and damages. Here we have criminal charges levied via a notice to appear, a termination in Customer's favor and damages (presumably time, attys fees, etc). The problem is there is no showing of bad faith on the part of Manager. While there is also an argument there was no probable cause, the lack of bad faith will be fatal to Customer's claim.

As mentioned above, Customer may be able to assert a claim for negligent hiring against the State. The problem with this claim would be the requirement of actual damages. There is little evidence in the facts that Customer suffered actual damages b/c of the confinement, defamatory statement or prosecution.

In conclusion, Customer's best claim is false imprisonment. Her possible claims for negligence, defamation and malicious prosecution are unlikely to prevail. (Customer should be able to recover nominal damages (or actual if shown) from Manager and vicariously from the State.

ANSWER TO QUESTION 3

1) Trust Validity:

The validity of the trust, and its applicability at all, depend on whether W is deemed to have survived and takes all under the will or not. T's will expressly requires W's survival of him to take under the will. However T's will also contains a clause addressing simultaneous death in which case, the beneficiary under the will is deemed to predecease T. The facts state that W survived T by one hour. Florida does not follow the Uniform Probate Code requirement that a person survive by 120 hours. Therefore, under Florida law, W survived. However, T's will states that if he and a beneficiary died in a "common disaster" the beneficiary shall be deemed to have predeceased. No mention is made in this clause of a situation where we are unable to determine which party died first. In addition, W is the only beneficiary named in the will with a survivorship requirement. Therefore, on these facts, it appears that even though W actually survived, because she and T died in a "common disaster", she will be deemed to have predeceased T and his estate goes to the trust. The facts state that the will was validly executed and therefore, the estate will pour-over into this trust. The trust was created in the will and is considered a testamentary trust, trustees are names, certain an identifiable property will make the corpus of the trust and the trust is for a valid legal purpose. One possible question would be T's identification of trust beneficiaries. For a private trust, the beneficiaries must be identifiable. In this case, T's will states that the trust is for the health, education and welfare of his natural children "and others." The Court would have to decide whether this "and others" makes the trust invalid due to uncertainty of beneficiaries.

2) Trust Assets:

The facts state that T had an interest in four assets. I will discuss each separately. First the family residence titled in the name of both T and W as husband and wife. In Florida, property conveyed to both husband and wife is held as tenancy by the entirety whether the parties are designated as husband and wife in the deed or not. One aspect of tenancy by the entirety is that it includes a right of survivorship. Therefore, W takes this property under the right of survivorship and it will pass through her estate. Second, the rental property is held in the name of T and Friend. In order to be a joint tenancy, it would have to state as much in addition to a right of survivorship. Because this information was not included, it is assumed that T and Friend held this property as tenants in common. Therefore, T's undivided one-half interest passes to his estate and could then go to the trust.

Third, the \$100,000 bank account at City Bank held "in trust for Fred" is commonly referred to as a Totten Trust. T retained ownership of the account and was able to withdraw funds until his death. The Totten trust will only go to the named beneficiary, Fred, if it still existed at T's death and was not specifically devised to someone else. In this case, T's will specifically mentioned his account at City Bank and directed that those funds become a part of the trust. As a result, Fred does not have a claim to the \$100,000 and it should go to the trust. Finally, the \$500,000 brokerage account in T's name only should be available to fund the trust.

3) Trustees:

T's will named Bob and Sissy as co-trustees. The facts state that Sissy declined to act as trustee due to health problems. T's brother, Bob, should be able to act as trustee, provided he is at least 18 years of age and has not been convicted of a felony. The facts do not indicate that T named co-trustees for a particular reason or that Sissy was to provide particular services that cannot be provided by Bob alone. Therefore, the Court should allow Bob to serve as sole trustee as long as he posts the required bond.

4) Beneficiaries:

Assuming the "and others" problem mentioned earlier is corrected, the beneficiaries of the trust should be Alice and Ned, T's children, and the remainder on their death to T's grandchildren. Fred would not take as a beneficiary because he was adopted by his stepfather after T's divorce to his first wife, thereby terminating his inheritance rights to T or T's family. As an adopted child, Alice takes as if she were a natural child of T and W. The Rule against perpetuities may raise an issue if the interests of T's grandchildren don't vest within a life in being plus 21 years. However, in Florida the trust will survive if the interests vest under the common law RAP, stated above, or if the interests actually vest within 90 years, which changed December 31, 2001 to 360 years. Therefore, RAP shouldn't be a problem under either statute. The facts do not state the year.

5) Ned's Interest:

The terms of the trust created by T include a spendthrift provision, which prevents Ned from assigning his interest in the trust and also prevents Ned's creditors from attaching the trust corpus. However, as distributions are made to Ned, those distributions can be attached. In addition, this is a discretionary trust for the "health, education and welfare" of the beneficiaries. Therefore, Ned has no power to compel the trustee to make any distributions to him. As a result, Ned's creditors cannot compel distributions. The judgment against Ned is for a bank loan. Had this debt been for child support or alimony, the Court might allow the creditor to reach Ned's interest in the trust only on a showing that all other possible alternatives have been exhausted and this is a last resort.

JULY 2002 ESSAY QUESTIONS AND ANSWERS

QUESTION NUMBER 1

Dentist entered into a written agreement with Contractor wherein Contractor agreed to construct an office building for Dentist. The agreement was signed by both parties. Dentist intends to operate his dental practice in part of the building and rent the remaining space to professional tenants. The agreed-upon price was \$700,000 to be paid in full upon Dentist's acceptance of the building. After 45 days and partial completion of the structure so that the building was framed in and the roof completed, Contractor asked Dentist for an advance of \$100,00 to pay subcontractors and materialmen. Dentist agreed and made the requested payment to Contractor. The following day Dentist inspected the building and discovered cracks in the foundation. When he brings this matter to Contractor's attention, Contractor insisted that the cracks were merely "superficial" and that the building was sound. Dentist hired an engineer to inspect the building and the engineer stated that the foundation must be replaced. This will require that the structure no in place be torn down and rebuilt. Informed of this, Contractor refused to cooperate and halted work on the project.

Dentist entered into an oral agreement to purchase a unique sculpture from Artist that Dentist wanted to display in his waiting room in the new building. The agreed-upon price was \$400. Dentist gave Artist \$5 to hold the sculpture for him at the price for 30 days. At the time of the agreement, Artist, who is not in the business of selling art objects, felt the price was fair. However, one week later Artist saw a similar sculpture appraised at \$15,000 on television. Artist called Dentist that night and raised his price to \$15,000. The next day, Dentist went to Artist's house with a check for \$395, but Artist refused to accept it.

Dentist retains you to represent him against Contractor and Artist. During your conference, Dentist also tells you that he recently attended a reunion for his dental school and a former classmate told him of an apparently foolproof scheme to defraud certain insurance companies. Dentist has heard that many doctors and dentists are engaged in this type of activity and profit from engaging in this scheme might be \$100,000 per year or more. Dentist requests your help in investing these funds in a way that will prevent detection by law enforcement authorities.

Prepare a written memorandum to your file discussing what remedies are available Dentist against Contractor and Artist and the likelihood that Dentist will prevail. Also, discuss in your file memo how you will respond to Dentist's request for help regarding the investment of funds.

QUESTION NUMBER 2

Mother and her eight-year-old Son go to see Doctor at their local public hospital ("Public Memorial") which is owned and operated by the City of Crossroads.

Doctor diagnoses both Mother and Son with a life-threatening condition, which, if left untreated, will cause them to die within three months. If treated, however, the condition can be completely reversed, restoring both Mother and Son to perfect health. The treatment involves a series of injections made from animal hormones. Mother, a strict vegetarian and animal rights activist, refused to consume any products made from animals. Therefore, she refused the medical treatment for herself and for Son. Son's father is unreachable for the next six months.

Under state law, Doctor must report to the State Attorney's Office a refusal of medically necessary care by patient or the guardian of a patient so the State Attorney can determine whether the State's interest in protecting its citizens is implicated. Following Doctor's report, the State Attorney's Office advised Mother and Doctor that the State would seek judicial intervention to compel the medically necessary treatment for Mother and Son.

Mother told her story on a local television newscast. Mother sought to hold an afternoon rally at the park at Public Memorial to raise public awareness. Public Memorial owns the park. Public Memorial's president refused to grant permission for the rally because he does not permit rallies related to health care issues and because afternoon rallies are too disruptive to Public Memorial's operations. Mother wishes to seek a court order to permit the rally.

You have been retained to represent Mother. Prepare a legal memorandum analyzing the issues raised by Mother's disputes pertaining to treatment for Mother and Son and to the holding of the rally. Also include your advice as to her chances of prevailing on the issues.

QUESTION NUMBER 3

Smith owned 300 acres of property improved as an orange grove in South Florida. Smith decided to sell the orange grove and retire. Brown approached Smith and offered to purchase the orange grove for \$500,00 cash. Smith readily accepted, and Brown and Smith sealed the transaction with a handshake.

Three days after the handshake, Brown delivered \$500,000 cash to Smith. Smith accepted the \$500,000 and gave Brown a handwritten receipt that stated: "Received from Brown \$500,000 cash for my orange grove, Smith."

Immediately thereafter, Brown took possession and installed an expensive new irrigation system and pump, built a small residence in the middle of the grove and commenced operations.

Percy, a long time friend of Smith, had been living in a cabin in a corner of the orange grove for 28 years prior to the transaction between Brown and Smith. Although Smith didn't know Percy resided there during the first two years of Percy's tenure, Smith never forced Percy off the land.

The first time it was operated, Brown's new irrigation system sprayed water on Percy's cabin, damaging the roof. Percy sued Brown for trespass and damages, alleging that Percy owned the cabin and one-third acre of land immediately around the cabin. Brown countersued Percy for ejectment, alleging that he

(Brown) owned the grove and claiming that he (Brown) was unaware that someone lived in the Cabin.

Meanwhile, Smith, upon learning of Percy's troubles, sued Brown for ejectment on the theory that Smith was still the owner of the grove.

You are Brown's attorney. Write a memorandum updating your client and advising Brown regarding the ownership of the grove property, the improvements thereon, and the liability of any party of damages.

Be sure to discuss the following ongoing litigation including any legal defense(s) available to the parties and the likely outcomes of these actions.

- I. Smith's suit for ejectment against Brown.
- II. A. Percy's suit for trespass and damages against Brown.
A. Brown's countersuit for ejectment against Percy.

ANSWER QUESTION 1

This question involves two contracts and whether or not they were breached. It also involves an issue of professional conduct.

Dentist vs. Contractor: Dentist and Contractor entered into a valid contract for the construction of a building. Dentist's consideration was for \$700,000 to be paid to the contractor upon completion of the building, while contractor's consideration was to construct an office building. This is a valid bargained for exchange.

After a partial completion of the building, contractor requested \$100,000 of the \$700,000 payment. Under the common law which governs this contract because it is a contract for services (and could be considered a contract involving land), a modification of a contract need be supported by additional consideration. Here, no additional consideration was given by the Dentist so it really wasn't a valid modification, but payment of the \$100,000 has already been tendered by Dentist so it may not even be an issue unless Dentist seeks to recover the \$100,000.

When told of the cracks and the need to replace the foundation, Contractor has refused to replace/continue working. This can be considered an anticipatory breach, but is more likely a material breach of contract because contractor refuses to perform his contractual duty. First of all, contractor contracted to build a building for Dentist. In this contract, even though maybe not specifically mentioned, there is probably an implied agreement that contractor build a building up to and following all codes, requirements and standards.

The fact that an engineer inspected the building is evidence that the building was not up to standards. Most likely, Dentist entered into a contract with contractor expecting to receive a building that was quality and habitable. By not building a sound foundation, Contractor has likely breached the contract. He was, however, given a chance to cure that breach at his own expense, but he has refused to continue working. So contractor has willfully breached the contract. Dentist can sue Contractor and try to obtain expectation damages, the position Dentist would be in if Contractor had performed the contract. Dentist will now have to find another contractor to build the building, and the original

Contractor should be liable to Dentist for any cost over \$700,000 that the Dentist will have to pay to get the building constructed. If time was of the essence in the contract, Contractor may be liable for damages caused by the delay in construction, like Dentist's lost profits or lost rent. Because contractor breached but has spent money on the foundation, he will not likely recover any money spent towards the first foundation because Dentist is not unjustly enriched by the foundation needing to be replaced. Dentist may be able to recover the \$100,000 from contractor because Dentist was expecting to be paying for a quality foundation. Since the foundation cannot be used, contractor should not be able to keep the \$100,000. The \$100,000 can be tacked on the damages owed by contractor to Dentist.

Contractor can be required to pay any incidental or consequential damages of his breach and incurred by Dentist in finding replacement.

Dentist vs. Artist: Dentist entered into a valid agreement with Artist. Artist was to build a sculpture for Dentist in exchange for \$400. This constitutes a bargained-for-exchange. In addition, Dentist paid \$5 to keep the offer open for 30 days. An option contract is valid under the common law if consideration is given for the option. Here, \$5 is valid consideration. This

contract is for the sale of goods under \$500, so it does not need to be in writing to satisfy the statute of frauds. But if it is the sale of goods under the UCC, the option by artist may only be valid if in writing and signed by the Artist, because then it would be a firm offer. Firm offers are valid under the UCC without additional consideration if signed by the merchant. Here, Artist can be considered a merchant if he regularly sells (but facts tell us he doesn't sell his projects) his sculpture on a regular basis. Even if he is a merchant, the fact that he didn't sign his "firm offer" may be cured by the fact that he was given consideration in exchange. It also may be a contract for services since the artist will sculpt a sculpture. Also, since it is under \$500, the common law will likely govern.

Because it is a valid option contract, Artist has to leave offer open for 30 days. The next question is whether Artist can refuse to sell the sculpture for less than \$15,000. They both agreed to \$400 and they both understood what they were bargaining for, a sculpture by Artist. If artist was mistaken as to the value of his sculpture, it is a unilateral mistake. A unilateral mistake will not serve to rescind or discharge the contract unless the other party knew or should have known of the party's mistake. Nothing in the facts indicate that Dentist should have known or knew about the mistake in value by Artist. Furthermore, a mistake in value does not necessarily qualify as a mistake able to rescind or discharge the contract anyway.

If there was a mistake as to what the contracted item actually was, like a real Van Gogh versus a fake Van Gogh, then maybe the contract would be discharged, but here, Artist just wants what he thinks his sculptures worth. That is too bad because he has offered it for \$400 and if the option contract is valid, he will have to sell it for \$400. If Dentist wants to specifically enforce this contract he probably can. Specific enforcement is available if damages at law are not adequate and if the goods are unique. Here the facts specifically tell us that the sculpture is unique. So if the court construes this contract as a sale for goods, it can be specifically enforced. But if it is a services contract, courts generally won't order a party to specifically perform services. Since Dentist can't

likely find a comparable sculpture in the same price range, he will likely be able to buy this one for \$400. And probably not at \$395, since the \$5 was given in consideration for the option, the full \$400 should go towards the sculpture.

In regard to what I should advise Dentist to do about the insurance fraud, I am prohibited by the rules of professional conduct from advising my client to commit a crime I can advise him, and should advise him that he should not do such a thing because it is against the law. I should advise him of all of the legal consequences so as to persuade him against it, such as a criminal conviction, jail or prison time, possible revocation of his dental license, and the moral consequences. I must tell him that I in no way can be involved in such a scheme and that I maybe obligated to tell the authorities if he plans to commit a future crime.

However, I probably can't reveal such confidential information protected by the attorney-client privilege unless he intends to commit a crime that involves the risk of substantial bodily harm or injury or even death. However, this information given to me by my client may not be protected. If he insists on this criminal action, I should tell him that I must withdraw from being his counsel unless he changes his mind. I don't have to represent someone that I feel is repugnant or objectionable or that insists on committing a crime.

Back to Contractor contract: Since the contract provided for Dentists acceptance of the building, this may provide a stronger basis for his refusal to accept the substandard, cracked foundation.

ANSWER TO QUESTION 2

Mother's case raises constitutional issues under both the Florida and Federal Constitution.

Right to Refuse Medical Treatment

Right to Refuse One's Own Medical Treatment. Mother's attempt to refuse life-saving medical treatment as to herself raises issues related to constitutional privacy rights under the Federal and Florida Constitution. While the Federal Privacy Rights cases have been derived from substantive due process and notions of liberty in the 14th Amendment, Florida's Constitution provides an explicit right of privacy which could conceivably provide greater constitutional protection. The Supreme Court has held that a person has a fundamental right to refuse medical treatment under the 14th Amendment [Cruzan]. This state action that interferes with that right is subject to strict scrutiny and the state must demonstrate a compelling state interest and the absence of less restrictive means. The state may argue it has a compelling interest in protecting the life of adult citizens, but the Cruzan court disagreed.

Once a rational adult is properly informed of the risks of medical treatment, she may refuse that treatment and the state may not force it upon her. Any attempt by the state to compel mother to undergo medical treatment would likely be unsuccessful.

Right to Refuse Medical Treatment For One's Child – Mother's attempt to prevent medically necessary treatment for her son is a different story altogether and will likely be unsuccessful. While a parent does have a constitutional right

to make fundamental parenting decisions, the courts have held that this interest yields to the state's compelling interest in protecting the well-being of children. The state will likely successfully argue that it is the paramount duty of the state to protect children. The significant possibility of death without the life saving treatment is sufficient to overcome the parent's political ideologies regarding animal-based hormones. The state may also be able to assert, via third-party standing, the rights of both the child to obtain medically necessary life saving treatment and the rights of the absent father to possibly participate in the decision if he can be located. By acting unilaterally, Mother may be depriving the Father of his right to participate if the treatment will sustain son's life until he returns. Thus, Mother will likely be unable to prevent the state from obtaining an injunction compelling her to permit son to undergo the treatment.

Free Speech, Public Forums

Public Memorial's refusal to allow Mother to hold a rally at a public park raises First Amendment issues of her rights to speech and assembly. The hospital's refusal, because it is City owned, constitutes sufficient state action to trigger Mother's constitutional protections.

Critical to determining the validity of the hospital's refusal in this case is the issue of whether it amounts to a content-based regulation or a neutral time, place and manner regulation. Content-based regulations of speech are subject to strict scrutiny and will not be upheld unless the state demonstrates a compelling state interest and that the regulation is narrowly tailored to achieve that interest. The hospital president's statement that it does not permit rallies related to health care issues" is clearly content based.

Particularly due to the political nature of Mother's speech, prior restraints which prevent speech from happening virtually per se invalid. If the court accepts that the true purpose for refusing her rally is based on its content, the refusal is unconditional and the court may enter an injunction permitting the rally.

The hospital may also argue that rather than being content-based, the regulation is a neutral time, place and manner regulation. Generally, the state can regulate the time, place and manner of speech, as long as it is content-neutral. When discretion is based solely on an individual, significant concerns are raised and the exercise of discretion will be clearly scrutinized. If the park constitutes a public forum, the type of place where political speech has been freely allowed, less restrictions are allowed. A public park is usually a public forum. The hospital president's statement that afternoon rallies are too disruptive to the hospital's operation maybe legitimate if the hospital can show that a rally of its sort would interfere with patient care. In the context of the other content-based statement, the Court will likely find that the hospital's prior restraint of Mother's speech violates her first amendment rights.

Mother should probably seek to assert her rights by obtaining a Preliminary Injunction or a temporary restraining order in federal or state court. Based on the exigencies of the circumstances she should probably prevail.

ANSWER TO QUESTION 3

I. Smith's suit for ejectment of Brown.

Brown will prevail in the ejectment suit by Smith against Brown. The facts state that an offer was made to purchase the grove, was accepted, and that there was adequate consideration to support a contract (exchange of the grove for \$500,000).

ORAL CONTRACT/STATUTE OF FRAUDS:

A contract for the sale of an interest in land falls within the statute of frauds must be in writing, must adequately describe the property conveyed, include a price, and be signed by the grantor (Smith). Smith will argue that the oral contract violates the statute of frauds and that he should prevail based on this defense.

However, Smith provided Brown with a written receipt identifying both parties, the purchase price, and the land, and Smith's signature. The Statute of Frauds does not necessarily require the entire contract be written. Rather, any writing memorializing the above terms will suffice. Smith will argue the Description of Land is inadequate. "My Orange Grove" may be a sufficient description if Smith only owns one such orange grove. "My orange grove" may not be a sufficient description of the property if Smith owns more than one orange grove. Courts generally require that the land description be adequate enough to indicate with reasonable accuracy the land involved in the conveyance.

Even if Brown cannot prevail based on the receipt, Brown has a very good argument under the doctrine of part performance. The doctrine of part performance provides that an oral contract for the sale of land will be enforced if two of three things occur: payment of all or part of the purchase price, possession, substantial improvements are erected by the purchaser. Here Brown meets all three requirements. Brown paid the full purchase price, took possession, and made substantial improvements by installing an irrigation system and a residence. Therefore, Brown will prevail in the ejectment suit by Smith against Brown. Brown owns the land and improvements thereon.

II A. Percy's suit for trespass against Brown:

Percy is suing Brown for trespass and damages for the water spraying on Percy's cabin and roof. Of course, the preliminary issue of Percy's ownership interest in the land must be addressed first. Percy must own the land or at least have a protectable interest in order to prevail in a suit for trespass against Brown. Brown, after all, will not be liable for trespass if he, in fact, owns the land.

Assuming Percy owns the land and the cabin: Trespass is an intentional tort. The intent required is he intent to enter upon the land of another. Malice, spite, or even knowledge that the land belongs to another is not required. Only the intent to cause the conduct which causes the entry upon the land is required. Water spraying onto another's land is a trespass.

Moreover, the mere trespass itself is sufficient for liability. Percy need not prove actual economic damages and would be entitled to nominal damages. Percy would of course also be entitled to damages actually caused to his roof

by the irrigation system. Moreover, if the trespass was continuing in nature, money damages may be inadequate and multiple suits would have to be brought against Brown. In such cases, a court would likely grant an injunction to stop a continuing trespass.

However, for the reasons stated below, I do not believe Percy will prevail. Percy must have an interest in the land in order to sue Brown for trespass. Brown cannot be a trespasser on his own land. I do not believe Percy has met the requirements for adverse possession.

II B. Brown's countersuit for ejectment against Percy:

Percy will allege that he (Percy) is the rightful owner of the cabin and the land through his adverse possession against Smith.

A party may gain adverse possession by occupying land continuously for the statutory period, adversely against the true owner's title, notoriously and openly acting as if he were the true owner, and exclusively. A party may not gain title to land through adverse possession if he possesses the land with the permission of the true owner.

Percy occupied the land for a period of 28 years. The common law period for adverse possession is 20 years. In Florida, the statutory period is 7 years. Percy meets this requirement.

However, Percy occupied the land for a period of 28 years – 26 of those years, Smith knew Percy was there. Smith, and also Brown as his successor in land, can argue that Percy was there with Smith's implied permission. Although Percy will argue that he never explicitly received permission, Smith knew Percy was there and never forced him to leave. Therefore, Percy does not meet this requirement of adverse possession.

Furthermore, Florida requires that an adverse possessor acting without color of title, pay the taxes on the portion of the land claimed. Florida also requires that the claimant enclose the portion of the land claimed. The facts do not state whether Percy took these required steps for adverse possession. Percy might have a better case if he was acting under color of title but would still need to know if he made improvements, enclosed the land, or used it for other purposes.

Based on the above facts I do not believe Percy has met the requirements for adverse possession.

Therefore, Brown will prevail and will be able to eject Percy.

FEB 2003 ESSAY QUESTIONS AND ANSWERS

QUESTION NUMBER 1 (February 2003 Bar Examination)

Dave and First Wife were married in Leon County, Florida in 1975. They had two children, Son and Daughter. Dave and First Wife became estranged and their marriage was dissolved in 1990. Dave moved to Polk County, Florida. First Wife, Son and Daughter continued to reside in Leon County.

In 1992 Dave bought a farm in Polk County, three miles outside the city limits of Lakeland. The farm consisted of several structures located on 140 acres of contiguous land. In 1994 Dave married Second Wife. Dave and Second Wife lived and worked on the farm.

Second Wife was involved in an automobile accident. The other person involved in the accident, Driver, filed suit against Second Wife, who was uninsured. Driver obtained a judgment against Second Wife and recorded the judgment in 1998.

Dave defaulted on an unsecured loan he had taken from Bank to buy a new tractor. Dave also failed to pay wages owed to his farmhand, Worker. Worker's duties included general repairs and maintenance of the farm's structures and the cultivation of the land. Bank and Worker each obtained judgments against Dave and recorded the judgments in 2000.

Dave died in 2002. He was survived by First Wife, Son (age 20), Daughter (age 15) and Second Wife. Dave's properly executed will left all of his property, including the farm, to Second Wife. One month after Dave's death, Second Wife moved off the farm and went to live permanently with her sister in Lakeland.

Your law firm has been retained by Second Wife following Dave's death. Prepare a memorandum discussing the rights and interests that First Wife, Second Wife, Son, Daughter, Driver, Bank and Worker have in the farm.

QUESTION NUMBER 2 (February 2003 Bar Examination)

Seller, the owner of an office building, contracted with Broker to list Seller's property for sale. The language of the brokerage agreement provided "that Broker shall be entitled to a commission of five percent at time of closing on the sale of Seller's property."

Over a weekend, while Seller was out of town, Broker showed the property to Buyer and several other interested persons. Buyer insisted that Broker quickly prepare an agreement. After obtaining approval from Seller over the phone, Broker wrote the following:

Seller, for the sum of \$500,000, agrees to sell to Buyer the office building and related property owned by Seller in Anytown, Florida. Buyer agrees to pay a deposit of \$20,000, to be placed in escrow by Broker. In the event of a default by Buyer, Seller can either keep the deposit or sue for actual damages, at Seller's discretion.

Signed,
Buyer

The day after this document was signed by Buyer, plumbing within the building broke, flooding several of the offices and causing \$25,000 in total uninsured damages. Seller made emergency plumbing repairs totaling \$2,000. Seller then demanded reimbursement for the repairs from Buyer. Buyer not only refused, but also placed a stop payment order on the \$20,000 deposit check. Buyer claimed he was under no obligation to purchase the property. Broker, however, sought her five percent commission from Seller.

Seller is now seeking your services. Seller agrees to pay your fee in cash if you can get Buyer to purchase the property. If Buyer does not purchase the property, Seller will pay your fee by giving you a lease of office space in the office building equal to the value of your fee.

Draft a legal memorandum to your file addressing the following issues: the validity of the alleged agreement signed by Buyer; Seller's potential remedies against Buyer; and, Seller's potential liability to Broker. Also discuss the ethics of the proposed fee arrangement between Seller and you.

QUESTION NUMBER 3

In 1992, Martha, a widow, executed a document which created the "Martha's Life Insurance Proceeds Trust." It provided that the proceeds of any life insurance policies in effect at the time of Martha's death would be placed in the trust. The named co-trustees were Thomas, Martha's oldest child, and Smallville National Bank. The beneficiaries were Thomas, Ben and Susan, Martha's only three children. Martha died a widow and left no will.

The trust document provided that the income from the trust is to be paid to Thomas, Ben and Susan in equal shares for ten years. The trust is to be treated as a spendthrift trust as to Ben only and not as to Thomas or Susan. At the end of ten years, the trust shall terminate and the proceeds paid in equal shares to Thomas, Ben and Susan. The document contained no provision regarding compensation for the trustees.

The Smallville National Bank was placed in receivership and liquidated in 2001.

Martha died in 2002 with \$3,000,000 in life insurance in effect. The named beneficiary was "Martha's Life Insurance Proceeds Trust." Thomas undertook to serve as trustee. After two months, Thomas received a demand letter from Assign, Inc. which stated that Susan had assigned her rights to income from the trust to Assign for the remainder of the trust's term in exchange for a lump sum settlement.

Thomas, in his capacity as trustee, was also sued by Investors, Inc. According to the suit, Ben owes Investors \$500,000 as a result of unsuccessful stock trades.

Thomas comes to you seeking legal advice as to his mother's trust, the demand letter from Assign and the lawsuit by Investors. Thomas is also concerned about how much these matters will cost him personally in legal fees. Thomas is further concerned about the amount of time he will personally need to devote to his duties as trustee and the options available to him at this time.

Draft a memo addressing the following: the legal issues arising from the creation and provisions of the trust, the demand letter and the lawsuit; and, the concerns expressed by Thomas. Your memo should include your advice to Thomas.

ANSWER TO QUESTION 1

This question deals with the concept of Florida homestead. There are several homestead issues presented in the facts and I will discuss each of them in turn in order to determine the relative rights & interests of each of the parties.

First the farm located in Polk County is clearly qualified homestead property. Dave, a natural person bought the property and lived on it as his principal residence. This satisfies the "natural person" and "principal residence" requirements. Additionally, the homestead protection extends to cover up to 160 acres of property located outside a municipality (up to ½ acre of property located inside a municipality). The facts show that Dave bought 140 acres of land, three miles outside of the city limits. Based on the Florida law discussed above, this entire 140 acres qualifies as Florida homestead.

Next, when Dave married the second wife, the second wife was then entitled to the homestead protection as well. Dave & his second wife married in 1994. Therefore, the property was established as the second wife's homestead at that time. The second wife did not get into the auto accident until later. In fact, it was not until 1998 that the other driver got & recorded a judgment against the second wife. This judgment may not be levied against the property (farm) because the homestead protection was already established. However, although the driver could not go after the 2nd wife's interest in the farm in 1998, as I will discuss later, he can go after it later on in 2002.

As previously stated, the second wife and Dave lived on the farm. This means that the homestead protection prevents their creditors from levying on the property. There are, however, certain exceptions to this homestead protection. The three exceptions are 1) mortgages 2) mechanic liens, and 3) taxes/assessments made on the property. The loan Dave took out from the bank to buy the tractor would not qualify for any of these exceptions. Therefore, the bank is precluded from going after the farm to satisfy the unpaid loan. The homestead protection works to protect the farm from the bank.

A different situation may arise w/the farmhand as stated above; one of the exceptions to homestead protection is mechanics' liens. In these situations, creditors may enforce their creditor's judgments on the property. The facts show that the worker made general repairs & maintenance of the farm's structures and the cultivation of the land. Mechanic's liens generally include debt arising from the services of others for the improvement and work done on a particular piece of property.

Here, under these facts, the Worker probably can get a valid mechanics' lien based on the improvements made to the property by himself. If he can, then he may enforce his judgment against the property and the homestead protection would not foreclose his right to do this.

Finally, the last situation deals with the rights and interests, if any, that the first wife, second wife, son and daughter might have in the farm. The first wife can be dispensed with quickly and easily. Dave & the first wife divorced before the farm was even purchased by Dave. Therefore, she never had an interest in the farm and nothing in the fact or law would give her an interest now.

To determine the interest the second wife has, along w/the son & daughter, there are some general rules to apply. Dave died in 2002. The facts demonstrate that Dave devised all property, including the farm, to his second wife. However, Florida law makes clear that this attempted devise is void. Under the Florida Statutes, a person may not devise a homestead if he is survived by spouse or minor child. Here, Dave was survived by a minor child since his daughter was only 15 at the time. Therefore, the attempted devise of the farm is void.

Since the devise of the farm is void, we go to the Florida Statutes to determine who gets what interest in the property. Florida Statutes say that when a homestead is not subject to devise, or is devised improperly, the surviving spouse gets a life estate in the property and any lineal descendants get a vested remainder in the property. Therefore, based on the facts in the case, the second wife, would have a life estate in the farm. Additionally, the son and daughter would each get a vested remainder in the property since they were Dave's lineal descendants. This would be the parties' respective interests at the time of Dave's death.

However, the facts go on and show that the second wife moved off the farm and went to live permanently with her sister one month after Dave died. This constitutes an abandonment of the homestead. As such, she (the 2nd wife) is no longer entitled to the homestead protection on her interest in the property. The judgment that was recorded against her in 1998, may now be levied on her property interest in the farm. However, remember that the 2nd wife has only a life estate in the farm. Therefore, this life estate is all that can be attached by the creditor driver.

As an aside, there is no indication that Dave deeded the house as joint tenants or tenancy by entirety to his 2nd wife, but if he did it would be her's outright. Subject to the driver's claim when she left.

ANSWER TO QUESTION 2

Seller would most likely succeed against Buyer because a valid and enforceable contract for the sale of land arose between the parties. It may be a question as to who was the actual offeror or offeree. But as can be gleaned from the facts Seller contracted Broker to make offers to identified parties. By Broker Seller manifested an intent to contract and undertake a commitment or promise.

Being the offeror, Seller made the offer to sell his office building and related property in Anytown. There are no facts, which would indicate that the offer was revoked or terminated in any other way. However, Buyer could argue that the writing was indefinite. Under common law the sale of land had to be definite as to the terms. That is, the land must be defined clearly and also the price and the parties. Here, Buyer would argue that "related property" was a vague term and as such the offer fails. Seller would argue that as between the parties "related property" was not vague and had a definite meaning. Seller could possibly introduce evidence that he had limited property in Anytown and as such "related property" was definite. Seller would argue that Buyer knew what related property meant and therefore the offeror would not fail.

Acceptance by Buyer would be shown by tendering the \$20,000 check. Here consideration was also satisfied. Seller promised to sell his land and Buyer promised to pay \$500,000. There the requirements for bargained for legal detriments are satisfied.

Seller could also argue that a substitute for consideration was given. Substitute consideration will be found to make a contract enforceable. Here, Seller would argue that he relied to his detriment when he paid for the plumbing repairs. That is in relying on Buyer's promise to buy; Seller undertook the detriment of fixing the plumbing so as to give marketable title to Buyer. As such Buyer should be estopped.

Buyer would have no defense to formation. Here the agreement meets the requirements of the Statute of Frauds. It is in writing, identifies the parties, the consideration, the subject matter and is signed by Buyer. Since Seller is trying to enforce the agreement and not the other way around, it need not be signed by Seller. Only the person being charged Buyer.

Having signed the contract, Seller became the equitable owner in the proceeds for the property while Buyer became the equitable owner of the property. Seller could argue for equitable conversion. Under the doctrine of equitable conversion, as mentioned above each party becomes the equitable owner of the other parties' interest. The Court would then order that the sale go through. Seller would have to argue that money damages were not adequate to remedy his damages & that specific performance was necessary to compensate him. Normally, a land sale is unique and Specific Performance is appropriate, but here Buyer would argue specific performance is not required because Seller acknowledges money damages are adequate by the existence of the liquidated damages clause.

Seller would argue that the liquidated damage clause would be insufficient of a remedy because the plumbing damages cost over \$20,000 as noted in the liquidated damages clause. Plus Seller would argue that by signing the contract the risk was on the Buyer for the damages due to plumbing. Buyer would argue that Seller had a duty to disclose the plumbing defects but Seller would counter that the plumbing was hidden and undiscovered at the time they entered the contract, therefore Seller breached no duty.

Seller would argue that the duty to perform was breached when Buyer refused to close and when he stopped payment on the check. Therefore, Seller's damages would be the contract price minus the full market value at the time of Buyer breach plus any consequential damages.

Buyer would seek to avoid this by saying the liquidated damages clause doesn't call for this and also that the agreement fails for being illusory because Seller gets to elect to remedies at his discretion. Seller would argue that the agreement is not illusory because consideration was satisfied as above and also that these damages fall within the "actual damages" as called for in the liquidated damages clause.

Therefore, given the existence of the Liquidated Damages clause, Specific Performance would not be appropriate. So the Seller would probably get actual damages since had the sale gone through, Buyer would have to pay for the repairs to the plumbing & not Seller. Actual damages for Seller would be contract price, cost of repair and consequential damages.

Seller would not have to pay Broker because the agreement with Broker is a condition precedent. Under condition precedent, a party is not obligated to perform until a condition is met. Therefore, the condition of "closing on the sale of property" was not met so Seller is not obligated to give Broker five percent.

Under Florida's laws for Professional Conduct, a lawyer may accept payment in the form of cash or property. Additionally, payment may be received based on contingency. A Statement of Client's right must be given and the method of calculating payment should be expressed. That is that fees should be notified beforehand if they are to be taken from the judgment or before the judgment.

If this could be deduced in the agreement between me and the lawyer then our agreement is valid and ethical.

ANSWER TO QUESTION 3

A valid trust exists when the Settlor transfers, (delivers), property to a trustee for the benefit of the beneficiaries and the Settlor so had the intent to create a trust.

Empty trusts are not valid, as property must be delivered to the trustee to be held in trust. If a trust is empty, the court could declare an invalid trust or no trust being created. However, a trust, which has no other property but an expectation of future income from insurance proceeds, will not be held as an invalid trust.

This is an exemption to the general rule that a trust must have res or there can be no trust with an expectation to future income. Therefore, Martha's trust does not fail for lack of property.

The Executed document created while Martha was alive created a testamentary trust as it would be created on the death of Martha. If so, it should be executed like a will with 2 attesting witnesses. Assuming this the case and not on intravenous trust w/a pour-over clause which also needs to be executed like a will, the pour-over clause, which are valid. The trust is valid.

As to the trustees, a trust does not fail for want of trustees. Further, a sole trustee cannot be the sole beneficiary. The fact that the Bank was liquidated leaving Thomas as the sole trustee does not invalidate the trust because he is not the sole beneficiary. However, since he is not a bank, he may be needed to be bonded unless the trust agreement says otherwise. Possibly all the beneficiaries would want him to be bonded.

As to the beneficiaries, a trust must have ascertainable beneficiaries. In the present case, Thomas, Ben and Susan are ascertainable beneficiaries; therefore, the trust does not fail for lack of ascertainable beneficiaries.

It appears that the trust document creates a fixed term trust. The trust has to exist for 10 years before the rest of the trust can be distributed to the 3 beneficiaries thereby terminating the trust. Therefore, the trust has a fixed period for termination.

Spendthrift clauses are valid in Florida. Therefore, it will not be voided as against the law or public policy. It is okay that the spendthrift is only against Ben. This is not an invalid restraint against public policy.

Therefore, the trust is valid. The fact that it does not have a compensation clause for trustees does not preclude a trustee from receiving reasonable compensation for services and expenses arising out of the scope of the business of handling the trust.

Demand Letter

Susan does not have a spendthrift clause against her interest; therefore, she can freely assign her income to whomever she wants. The interest is a property interest and freely alienable. However, the Assign group has no claim to the rest of the trust since Susan does not have a current interest in the res of the trust but an expectancy interest as to a future share in it split among the three beneficiaries. Since Thomas received the letter from Assign, he should pay Assign Susan's income.

Lawsuit

Investor's Incorporate have no claim to the trust property. The res of the trust belongs to the trust and not Ben. Since spendthrift clauses are valid in Florida, Thomas need not worry about Investor's Inc., they cannot enforce Ben's liability for \$500,000. in bad investments against the trust. Ben's income is restrained from being assigned. This is not an undue restraint on alienability since spendthrift clauses have been held valid. Ben has no current interest in the res of the trust either. It is an expectancy interest, a remainder to be distributed to him in equal shares among the 3 beneficiaries.

However, once Thomas gives Ben his income and he (Ben) is in possession of it, Investors may try and can go after it. This is of no concern to the trust since it does not affect the business of the trust even though it affects a beneficiary.

Thomas' Concerns

As a trust agreement controls and no revocation was expressly given power to the Settlor or anyone else for that matter. The trust is irrevocable. A trustee and the beneficiaries can all agree to terminate the trust if the Settlor's intent is no longer being served, or if the res is less than \$50,000, the trustee can terminate the trust.

However, the trust was fixed for 10 years making the trust irrevocable during this period as intended by the Settlor. Furthermore, the spendthrift clause indicates a specific purpose that has not been fulfilled; therefore, the trust is still going on for a purpose as intended by the Settlor, Martha. The trust cannot be terminated which is clear from Martha's intent.

Even though the trust document is void of any clause of compensation, Thomas is able to receive reasonable compensation for his performance as trustee and can receive expenses including legal fees since these arise out of the business of dealing with the trust and the fact Thomas' legal fees have nothing to do with him violating his fiduciary duties.

Thomas can delegate some of his duties to an agent who after a reasonable investigation is qualified to handle those duties He could have become liable for any violations the agent causes however.

Besides being able to be reasonably compensated out of the trusts of his expenses and legal fees incurred from dealings of the trust and for his management of the trust, Thomas can seek leave from being a trustee by the Court and a court can appoint a Trustee in his place since trusts are not void for want of trustees.

Thomas should make sure if he is going to resign as trustee he does so in a way he will not violate his fiduciary duties to the trust.

JULY 2003 ESSAY QUESTIONS AND ANSWERS

QUESTION 1

Two years ago, Wanda (a nurse) and Howard (a paramedic) met at the hospital where they both work, the only hospital in their community. Wanda was a single parent with a two-year-old son named Sam. Howard and Wanda were married last year.

Prior to their marriage, Wanda and Howard owned separate homes. Before the wedding ceremony, Wanda sold her home and kept the proceeds of the sale in a separate bank account. Wanda and Sam moved into Howard's home. After they moved in, she and Howard remodeled the kitchen, the bathroom and put in new landscaping. The remodeling efforts increased the value of the home by \$15,000.

Immediately after the marriage, Howard (with Wanda's consent) filed a petition to adopt Sam. Sam's birth certificate identified Mark as the father. When Sam was a baby, Mark denied paternity and left Florida and his whereabouts were unknown to Wanda. In fact, Howard and Wanda hired a private investigator to locate Mark without success. The judge granted the adoption. Once the adoption was complete, Wanda quit her job to become a housewife at Howard's insistence.

Howard recently decided that he no longer wanted to be married. Howard told Wanda to leave, but that he wanted custody of his adopted son, Sam. Wanda, however, took Sam and moved in with her mother. Wanda applied for a position with the hospital where she worked prior to her marriage to Howard, but all the positions were taken. The hospital's human resource manager has promised to let her know if a position becomes available. In the meantime, Wanda is taking classes at the local college to receive a degree in Health Education.

Howard has filed a petition for divorce. Howard seeks half of the proceeds from the sale of Wanda's home. Howard requests that he be allowed to keep his home worth approximately \$100,000. Howard also requests that he be allowed to keep the following property: the proceeds of a joint savings account totaling \$10,000 and some stocks he acquired prior to the marriage. Howard also seeks sole custody of Sam.

Shortly after the filing of Howard's divorce petition, Mark returned. He has informed Wanda that he never should have left and should have never denied that he was Sam's father. With Wanda's consent, a paternity test is performed that establishes that Sam is indeed Mark's son. Mark argues that the adoption was not valid and he intends to assert his paternity rights.

Wanda seeks your legal advice. Prepare a memorandum of law discussing the following issues:

- (1) How will the property be distributed?
- (2) Whether Wanda has a claim for alimony?
- (3) Whether the adoption of Sam by Howard is valid?
- (4) Who should be granted custody of Sam?
- (5) Whether Wanda has a claim for child support from Howard or Mark or both?

QUESTION 2

Ten years ago, Homeowner purchased some land beside a river and built a house. Homeowner purchased the land from Boater who had owned the land for the previous 15 years. During those 15 years, Boater never developed the land but, instead, used the land on a regular basis for hunting and fishing. City recently built a bridge across the river, adjacent to Homeowner's property.

Prior to the construction of the bridge by City, the only way off of Homeowner's property was by a small road that cuts through Neighbor's property and leads to a major highway. Homeowner regularly used this road during the past 10 years to gain access to Homeowner's property. Prior to Homeowner, Boater had used the same road for 15 years.

Recently, Neighbor and Homeowner have gotten into a dispute unrelated to the use of the road. Neighbor has known about Homeowner's past use of the road. Neighbor, however, became so upset by the dispute that Neighbor constructed a fence blocking Homeowner's use of the road. Although the bridge has now provided Homeowner a new way to exit Homeowner's property, Homeowner must drive an extra 20 miles to travel to City as compared to the much shorter route if Homeowner uses the road through Neighbor's property.

The new bridge also blocks Homeowner's view of the river. The value of Homeowner's home was reduced from \$300,000 to \$200,000 because of the bridge.

Homeowner comes to your law firm for advice. Prepare an opinion letter for Partner to Homeowner discussing fully the following: Homeowner's potential legal claims against Neighbor and City; potential defenses by Neighbor and City to such claims; and, the likely outcome of legal actions by Homeowner against Neighbor and City.

Partner would also like to make an oral agreement with Homeowner to take the case on a contingency fee with Partner receiving 50 percent of any recovery. Advise Partner if such a fee agreement is proper.

QUESTION 3

Activist, a prominent women's rights activist, is a resident of Metropolitan City, Florida. She was the mother of eighteen-year-old Barry. Barry lived at home with Activist, while attending Metropolitan Community College. On Barry's 15th birthday, Activist took out an insurance policy on Barry in the amount of \$1,000,000. Activist named herself as the insurance policy's beneficiary. Two weeks after his 18th birthday, Barry died mysteriously of a heart attack.

Reporter, a reporter for the Daily Star (Metropolitan's daily newspaper), discovered the existence of the insurance policy on Barry's life. Also, Reporter gained access to the coroner's unofficial, preliminary report which stated that Barry may have died as a result of poisoning, possibly administered through Barry's food over a period of several months. Reporter spoke with Officer Ripken, an officer with the Metropolitan City Police Department. Officer Ripken did not participate in the investigation of Barry's death. Officer Ripken told Reporter the following: "I would not be surprised if Activist were to become a suspect in Barry's death and to be charged with murder by tomorrow." Reporter did not verify this information. Reporter did not speak with either the coroner or Activist. The next day, The Daily Star ran the following story on page one of its local section:

PROMINENT MOM SUSPECTED IN SON'S DEATH

Barry, the son of Activist, died yesterday of a mysterious heart attack. Activist is a prominent women's rights activist and resident of Metropolitan City. Foul play is suspected in Barry's death and Activist is a suspect. A reliable source confirmed that Activist will be charged with Barry's murder in the very near future.

Angered by the Daily Star's allegations, Activist wrote the Daily Star a scathing letter and requested a retraction. Activist was neither charged with nor arrested for Barry's death. After an autopsy, the coroner's official report stated that Barry's heart attack was caused by a rare heart condition. The Daily Star printed a retraction after release of the official autopsy report.

Activist would like to file suit against the Daily Star. She comes to you for legal representation. Discuss the cause(s) of action available to Activist along with anticipated defense(s) by the Daily Star. Discuss the likely outcome of such litigation.

ANSWER TO QUESTION 1

The first issue is how should the marital property be distributed upon dissolution of Wanda's and Howard's marriage. Under Florida law, marital property is distributed under the doctrine of equitable distribution. Equitable distribution requires that property is divided 50/50 unless justice requires otherwise. In Florida, marital property includes: (1) assets accrued during the marriage; (2) interspousal gifts; (3) pension plans, etc. In determining the distribution of property the court considers the following factors:

- the background of the parties
- letting the spouse go to school
- longevity of the marriage
- saving the marital home for the kids
- the health of the parents
- interruption of careers

Here, marital property includes (1) the increased value of Howard's home and (2) the joint savings account. It is unlikely that the proceeds from Wanda's home will be considered marital property because she sold the home prior to the marriage and kept the proceeds in a separate bank account.

Additionally, so long as Howard kept the stock he acquired prior to the marriage separate from the marital assets, they too are not marital property.

Finally, since Howard owned his home prior to the marriage a court could find that it is not marital property. However, since the family did reside in the home during the marriage, a court could find the home marital property. Consequently, Wanda and Howard should each receive $\frac{1}{2}$ of the joint checking account and $\frac{1}{2}$ the increase of the home. Howard will also assert and receive a "special equity" award in the home since he owned it prior to the marriage.

The second issue is whether Wanda has a claim for alimony. Under Florida law, a spouse may receive alimony based on their need and the other spouse's ability to pay. Florida recognizes four types of alimony: (1) periodic permanent; (2) lump sum; (3) rehabilitative and (4) temporary. In determining whether to award alimony and the amount to be awarded, the following factors are considered:

- the spouse's contribution to the marriage;
- time needed to acquire training and education to reenter the workforce
- the age, emotional and physical conditions
- financial resources, and
- duration of the marriage.

Here, Wanda worked as a nurse prior to the marriage and quit her job to become a housewife. Consequently, a court is likely to grant her periodic alimony as well as rehabilitative. The facts do not provide much information about the wealth of Howard, but the amount will be determined based upon his ability to pay. Howard will likely argue that Wanda should not be granted rehabilitative alimony because she already has a career as a nurse. Wanda will counter that no positions are available in the nursing field so she would like to go to college.

If Howard has the means, a court will likely award Wanda rehabilitative alimony to receive her degree in Health Education. Finally, since Wanda is a single parent and living with her mother the court will likely award her temporary alimony until the divorce is final.

The third issue is whether the adoption of Sam by Howard is valid. Under Florida law, a natural person who is a Florida resident and capable of care giving may adopt child. However, homo-sexuals may not adopt in Florida. Furthermore, consent of the parents is required unless the parent abandoned the child.

Here, when Sam was a baby, Mark denied paternity and left Florida. His whereabouts were unknown to Wanda and private investigators were unable to locate him. Consequently, Wanda gave her consent and the court permitted Howard to adopt Sam. Since Mark abandoned Sam, his consent was not required for the adoption of Sam by Howard. Therefore, the adoption was valid and Mark has no paternity rights to assert.

The fourth issue is who should be granted custody of Sam. Under Florida law, the best interest of the child standard is applied in determining custody. The court also considers factors such as:

- the best interest of child
- the child's preference
- the health of the parties
- institution such as schools and churches
- pecuniary welfare
- other siblings and
- one's ability to comply with the court's visitation order.

Here, Wanda was Sam's single parent before the marriage and stayed home with him during the marriage. While the facts do not indicate Sam's age; the older he is, the more weight the court will give his preference. Under the circumstances, Wanda will likely be awarded custody and serve as the "primary residential parent." However, Florida recognizes "shared parental responsibility" which means Howard and Wanda both will make all the major decisions regarding Sam's life. Howard will also be awarded visitation.

The final issue is who will be required to provide Wanda support for Sam. Since the court will likely find that the adoption of Sam by Howard was valid, Howard will be required to provide the support because all of Sam's ties with Mark were cut off by the adoption.

Under Florida law, each parent is equally responsible for the care of their child. However, the court must follow statutory guidelines in determining the amount of support Howard will be required to pay. If the judge deviates from the guidelines by 5% or more, justification must be provided in writing.

Here, Howard will be required to provide support to Sam until he reaches the age of 18 or until 19 if he is still in high school working towards a degree. Furthermore, if Sam has a physical or mental illness that requires him to depend on his parents, support may be required beyond the age of 18.

ANSWER TO QUESTION 2

First off, I would like to address the professional conduct issues involved in your suggestion to take H's case on a contingent basis and by oral agreement. I would suggest that according to the Model Rules of Professional Responsibility and their adoption in Florida, any retainer agreement between our firm and our client, H, should be in writing and signed by both the client and the attorneys who will be working on the case. This is the best way to inform our client about what we expect from him (cooperation and payment) and what he can expect from us (estimate of hours to be billed, court time, withdrawal terms, etc.). Although taking the case on contingent basis is not an issue here, as it is with criminal or domestic matters, the percentage to be taken is far too high. Generally, the amount charged on a contingent basis is 33 1/3% which can increase with the amount recovered. The written agreement should state when the fees and costs will be calculated – either before or after computing the percentage – and the client should be made aware. If we can make these alterations, we should be able to handle H's case without being subject to sanctions by the Florida Supreme Court, and without opening ourselves up to malpractice liability.

Regarding the case itself, it appears that H has issues with N concerning an easement and with the City concerning eminent domain or inverse condemnation. We will analyze the issue with N first.

Homeowner (H) v. Neighbor (N)

An easement can be expressly or impliedly acquired. It may be given in a deed, obtained by necessity of use, or acquired through adverse possession (also called a prescriptive easement). Here, there is no indication that the easement was written into a deed, or that N and H own their property from a common prior owner, so it is likely that it will not be considered express. On the other hand, the easement was a necessity in that prior to the bridge being constructed, it was the only way off H's property. N would argue that H could still take a boat across to leave the property but the court will have to determine whether or not that is reasonable. A landlocked property is always granted an easement off the land by necessity – but the owner of the servient estate (the one being burdened) usually will be able to choose a reasonable location for the path across his property. The dominant estate (the one obtaining the benefit of the easement), here, H, may not claim the use due to its convenience when a viable option is available. Here, N would argue that the 20-mile deviation is not so excessive that he need retain the location of the easement on his property. H would argue that he didn't abandon the easement, and that N has not yet reasonably relied on such abandonment to justify revoking the passage and erecting a fence to block H's egress.

Also, the characteristic of the usage of the easement has not changed – i.e. there are not plans to expand or widen the road, thus bringing in higher traffic – so H can argue that there has been no additional burden on H. N might contend that the City's erection of a bridge across the river, adjacent to H's property, would increase recreational or tourist traffic and eventually the higher population from homeowners moving into the area.

H would answer that no such uses have become apparent, and that the problem is not yet ripe. Because H has not shown signs of abandonment, he will argue that the continuation of the easement is a necessity; N would argue that the easement may now be terminated since there is an alternative means of ingress/egress from H's property and as such, it is no longer "necessary."

Should these arguments fail, H will likely claim that the parcel used is a prescriptive easement. The period for adverse possession of an easement in Florida is 20 years, while it is 7 for other property. Because H purchased property from B who had used it for 15 years before H's ten-year period of possession, the prior owner's usage may be tacked on to H's time period to make 25 years of total prescriptive use – thus satisfying the requirements for adverse possession. For a prescriptive easement, the elements include adverse, notorious, continuous, hostile, open, and exclusive possession. Although N knew about the past use of the road, he did nothing about it. H would argue that he did it in the open and that N's knowledge would not affect the character of the easement. However, if N gave H permission to use the easement, adverse possession would be defeated as it would no longer be hostile. The use is adverse in that H knew he was using N's property and not his own, he did it in the open and not in secret, he held it exclusively for 25 continuous years through the tacked on usage of the prior owner, and he held it despite N's ownership or lack of consent (hostile).

Therefore, the easement will likely remain open as one acquired by adverse possession, so H would probably prevail under these facts.

H will probably succeed against N.

Homeowner (H) v. City (C)

The second issue is whether H may be compensated for his perceived loss to the value of his property at the action of the government, through its City. The municipality retains a sovereign immunity similar to the state in that its discretionary functions are protected (deciding whether or not to erect a bridge for the public good) while its ministerial or operational activities generally are not (failure to replace rotten planks on the bridge, exposing citizens to harm). In Florida, sovereign immunity has been waived to the extent of \$100,000 per person and \$200,000 per incident. If the municipality has taken out liability insurance, it will be responsible up to the amount of coverage (an amount up to which the City has been said to have waived its immunity). This may come into play here if H suffers damages from the construction of the bridge, but the more prevalent issue appears to be the concept of a "taking."

In general, there is no right to light, air, or aesthetics of your property. Therefore, being deprived of these things does not constitute a cause of action, which can be compensated. Here, H's claim on these grounds would fail.

When the government institutes a regulation that has the effect of a total deprivation of the value of a citizen's property, then the citizen has a claim to the reasonable fair market value of his property which is seen as having been "taken" and necessitating compensation under due process and the Constitution, both Florida and Federal (5th Amendment right to life, liberty, and property applied to the states through the 14th Amendment and requiring fair notice and a hearing prior to the deprivation of these privileges).

In the present case, construction of the bridge did not result in a total deprivation of H's use, and so would not be a "taking" under principles of eminent domain. The fact that the property abuts the bridge and that there is a loss of property value of \$100,000 (or 1/3 property value) due to aesthetic loss is not enough to require compensation by the government. At some point down the line, considering changed circumstances, H may have a claim for inverse condemnation in that the government-created structure has effectively deprived him of his property value (as is the case when a noisy airport is constructed next to a residence). Should this be the case, the homeowner would likely be able to recover the amount of the damage to his property. Based on the present facts, it does not seem to rise to the level of a nuisance and so H would not be able to recover for his blocked view of the river.

Should the court decide that as a riparian homeowner, H should be entitled to a view of the river as part of the intrinsic value of his riverfront property, then the court may award such compensation as it deems reasonable. If the entire purpose or intended use of the property is denied, the court may award its fair market value as compensation.

At present, H will probably fail against C.

ANSWER TO QUESTION 3

This is a Florida torts essay. It involves a discussion of defamation and privacy and the defenses to such an action, including the immunities awarded to the press to print issues of public concern.

DEFAMATION:

In Florida, in order to prove a defamation action, the Plaintiff must be able to plead and prove the following. A statement was made, by the defendant, about the plaintiff, that it was false, misleading, or detrimental to plaintiff's reputation, and that it was published to one or more person(s). In addition, libel per se will exist, and therefore give Plaintiff an easier time in proving damages in her action if the defendant has made a defamatory publication regarding such areas as: plaintiff's work, her criminal background, plaintiff's morals or her reputation for unchastity.

Plaintiff will want to prove the following: 1. A statement was published about her. Here a statement was published as given in the facts by the Star, her name appears in the publication. 2. The statement does in fact appear to have been printed by the Star. 3. By reference to the story appearing on page one of the local section it appears that the statement was published to more than one person. Additionally, Activist (the plaintiff) will have to show that it was a false statement and not merely an opinion and that she suffered some form of damages, although she may not have to prove actual damages if she is a private plaintiff, she may still need to prove some sort of damage to her reputation, although this should not be too difficult based upon the words that were published about her.

Plaintiff may be able to prove libel per se, because the statement was made concerning her criminal background as the statement tells the reader that a reliable source confirmed that Activist will be charged with the murder.

Public v. Private Plaintiffs:

In Florida, Activist in proving her case will try to prove that she is a private plaintiff. The difference between public and private plaintiffs is that a defendant will be liable to a private plaintiff for negligence, while a public plaintiff in order to prove damages must prove actual malice.

Here, Plaintiff will argue that she clearly is a private plaintiff. She will argue that she is a regular woman who is mourning the loss of her son and who has a normal place in society. She will argue that a public plaintiff is someone who has achieved pervasive fame or notoriety and that persons such as actors and actresses, politicians and sports players are public plaintiffs and not her.

The Star however, will argue that she is a public plaintiff. The facts indicate that she is a prominent women's activist and the paper will use this fact to show that she is required to prove actual malice. Additionally, the paper will argue that she may not be able to prove actual malice because the paper published a retraction and this may be a presumption that there is no malice that is in the newspaper's favor.

If the Star is unsuccessful in proving that she is a purely public plaintiff, they may try to argue that she is a public plaintiff for certain purposes, that she has thrust herself into the limelight on certain issues. Here the paper will argue that as a women's activist she is at least a public plaintiff for certain purposes and that this is one of those situations. However, Activist will argue that this suit does not revolve around her public involvement, namely as a women's Activist, but instead revolves solely around her personal life and her criminal record.

Negligence in Reporting:

A private plaintiff, if she can prove defamation in the form of libel by the printing of the article and the damage to her reputation will want to show that because she is a private plaintiff the newspaper is liable to her for their negligent actions. Here, the facts show that the reporter, discovered the insurance policy on the late Barry's life, and then gained access to the unofficial coroner's report and subsequently spoke to an officer that was not on the case, the reporter did not verify this information. These facts should be helpful to the plaintiff for proving her claim that she is a private plaintiff that only has to prove negligence to recover from the newspaper. It is a reporter's responsibility to check his facts while making his investigation into an article he is writing. It is also the responsibility of the newspaper to make sure that its employees are acting in accordance with the law. Because reporter did not check his facts, and therefore was negligent in his reporting, plaintiff may be able to recover her damages. Therefore, Activist should be able to prove that Reporter and Star had a duty to Activist and to the rest of the community to publish information that is not false or misleading, that they breached the duty when they did not check the facts, that this failure to check the facts was both the cause in fact and proximate or legal cause, as if the statement had not been published, Activist's reputation would not be damaged and that it is foreseeable that when a newspaper allows false information to be published that there will be damages and that in fact there are damages.

Additional Defenses:

Star will argue that in fact the article with the information was not fact, but was merely opinion and therefore is not actionable. Star will argue that a reasonable person reading the article would not regard the statement as a statement of fact. However, Activist will argue that in fact, this does appear by the words as a statement of fact based on the information contained in the report and based upon the fact that it was published by the newspaper whom the public may view as printing the facts and not the opinions.

The Daily Star will also argue that they have a Florida constitutionally protected right to print information that is for the public knowledge and that this right is protected both by the Federal Constitution under the First Amendment and by the Florida Constitution as well.

Daily Star should also argue that they have immunity when they publish public information that the public has a right to know about. However it should be noted that this is not an absolute immunity. Instead it is a qualified immunity that still requires the paper to use it's right to publish only information that is for the public good, and not to purposefully publish false information.

Media Defendant:

There are additional requirements when a Plaintiff desires to sue a media defendant. Five days before a prospective plaintiff wishes to file an action against a media defendant, the Plaintiff is required to send a letter with notice to the media advising them that she is about to file a lawsuit. The media defendant is then permitted 10 days to file a retraction letter. This retraction letter does not allow the media to escape all liability for damages, but instead may show a lack of malice on the part of the media defendant. Media defendant may have an additional defense in this case, if they are able to prove that they were not given proper notice of the intent to commence a lawsuit, however, they did print the retraction so this may show that they were aware of her informing them of her intent to file.

Damages:

In a defamation case, a private plaintiff is not required to show actual damages. She can show damages by way of the damage to her reputation. Additionally, if Activist is successful in proving libel per se, she does not need to prove damages at all, as the court will rule that the damage, in this case to her reputation due to the imputation on her that she is a criminal is sufficient proven by the facts.

However, Activist will still want to argue that she should be entitled to punitive damages. It should be noted that in Florida, punitive damages are a little harder to prove. In Florida a Plaintiff must please and prove damages by showing that the defendant acted wanton and willfully towards her. Punitive damages are available in Florida if proven, for up to 3 times the compensatory damages or \$500,000, whichever is greater.

Daily Star will argue that it is not liable to Activist for the willful violations of any (as is mentioned above the retraction may help the newspaper to prove that they are not liable for malice damages/punitive damages) of its employees. Here, Star will have to argue that it did not condone, approve of, encourage, the actions of Reporter. Activist will argue, and this may be difficult for the Star to prove as the editors or upper level employees of the Star have a duty to make sure that it's reporters check their sources and that the Star should be responsible for the actions of its employees when such matters are printed.

The Star may make an argument if Activist is successful for indemnity from Reporter for any amount that Star has to pay because of Reporter's actions.

PRIVACY:

In Florida, the tort of Privacy is recognized. This tort is actually comprised of 4 separate and distinct causes of action. They are 1. commercial appropriation of the plaintiff's likeness for commercial advantage, 2. public display of private facts, 3. false light and 4. intrusion on the plaintiff's seclusion.

This tort is recognized in Florida, and every Floridian has a constitutionally protected right to be free from government intrusion and to be left alone. In this case, it appears that Plaintiff might have a case for false light. Here, as is mentioned above, information was presented about her, to the public and she will argue that this information put her in a false light and that it damaged her reputation. The same defenses are available to the defendant in a privacy action as are available in a defamation action, and here, Activist must establish that her reputation was injured due to the publication of this information to more than just one person. Here, Activist should be able to show publication, the facts indicate that the newspaper, the Daily Star is the city newspaper, therefore it should not be difficult to prove that the false information was received by several people. In addition, proving the falsity of the information should not be too difficult as she has never been charged with the crime and the coroner's report shows that her son suffered from a rare heart condition.

Although the newspaper will still argue that they have a privilege to publish information to the public and that based on this privilege they are immune from suit. They will have to prove that they are immune from suits for liability in cases such as this where Activist may be able to prove that the information was serious, incorrect, and will be debilitating to her reputation and livelihood.

Activist will want to show the same type of damages as explained above in her case here.

There is probably not a cause of action for commercial appropriation as this tort usually requires that the plaintiff show that the defendant is using her name or likeness for a commercial advantage. This is usually proven by way of the use of a celebrity's likeness in an advertisement or commercial promotion.

Additionally, public display of private facts may not be as successful a cause of action as false light or as detailed facts were not published about plaintiff's life, but instead newspaper will argue that it was publishing information that should be made available to the public about a public crime that may have been committed or about a public person who may be involved in such an action. Activist may have an argument for intrusion on her seclusion, although it appears that false light might be a better place for her claim, as it might be a clearer liability to prove as a closer connection to a defamation claim.

The outcome of this case is likely to be that Activist will recover under both a defamation and a privacy cause of action as a private plaintiff, and that she should be able to recover compensatory, but probably not punitive damages.

FEB 2004 ESSAY QUESTIONS AND ANSWERS

QUESTION 1

On October 1, Buyer saw a specialized van with a FOR SALE sign that included a telephone number and a price of "\$25,000 cash." That night, Buyer called Seller. Buyer explained that he would have to borrow the money but could get it next week. Seller provided his address to Buyer and told Buyer, "If you want the van, mail me a check for \$5000. Pay the balance by November 1." Later that day, Buyer mailed Seller a \$5000 check.

The next night, at Buyer's 18th birthday party, Buyer discussed the deal with Investor. After buying the van, Buyer planned to start a document courier service, and he had spent \$1200 on business cards, flyers and a cellular phone. Buyer projected a profit of \$50,000 in the first year. Investor was impressed with Buyer's plans and agreed to loan Buyer \$20,000 to buy the van.

On October 25, Buyer called Seller to pick up the van. Seller refused and said someone had offered him \$35,000 for the van. Seller had not cashed Buyer's check yet. Seller offered to deposit the check and give him the van if Buyer would pay Seller \$20,000 now plus \$400 a month for 25 months. Buyer laughed and said, "Yeah, right." But without a van, Buyer will not be able to start his courier service.

Investor wants to hire you to be Buyer's attorney. Investor will fund the litigation and pay you at your hourly rate. Investor wants you to recover punitive damages and attorney's fees. Investor does not want you to settle the case. Investor gives you a \$500 retainer and asks for monthly updates.

Prepare a memorandum of law addressing fully the following matters:

1. Buyer's potential claims against Seller and Seller's potential defenses.
2. Your proposed agreement with Investor including any ethical considerations.

QUESTION 2

While Jogger, a young and successful physical therapist, was running, she saw Dottie, Owner's Dalmatian dog, standing on the public sidewalk in front of Jogger. Dottie had jumped the four foot fence that completely enclosed Owner's yard. Jogger did not want to deviate from her route, and as she passed Dottie, she was attacked and bitten by the dog, causing lacerations requiring stitches.

Immediately after the attack, Owner drove up to his residence. Owner exclaimed truthfully: "Dottie and I have lived here for five years and Dottie has never jumped that fence nor bitten anyone!"

Owner drove Jogger to Hospital's emergency room. On the way to Hospital, Owner was involved in an accident caused by the negligence of both Owner and a horseback rider (Rider). Jogger, who was not wearing her seat belt, was thrown about in Owner's car, and as a result, suffered serious but non-life-threatening head injuries.

Jogger was transported by ambulance to Hospital's emergency room, where she was treated by Doctor, an employee of Hospital, Inc. Doctor was intoxicated when he treated Jogger, and as a result of Doctor's intoxication, he negligently treated Jogger. Doctor's treatment caused the deterioration of Jogger's condition and her death, intestate, two weeks later. Hospital had no reason to know of Doctor's intoxication when he treated Jogger, nor any unfitness of Doctor to practice medicine.

Jogger experienced severe pain and suffering from her automobile accident injuries in the two weeks preceding her death. Jogger was survived by her current husband (Husband), with whom she had one six-year-old child (Child).

Husband is the personal representative (PR) of Jogger's estate and retains your law firm to pursue survival and/or wrongful death actions against Owner and Hospital. Neither Rider nor Doctor can be located.

Florida's survival statute, section 46.021, provides:
"No cause of action dies with the person. All causes of action survive and may be commenced, prosecuted and defended in the name of the person prescribed by law."

Florida's Wrongful Death Act, section 768.19, provides:
"When the death of a person is caused by the wrongful act, negligence...of any person...the person...(who) would have been liable in damages shall be liable for damages as specified in this act."

Section 768.20 provides:
"The (wrongful death) action shall be brought by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate (the) damages specified in this act (which are) caused by the injury resulting in death."

Corporations are "persons" for the purposes of the Wrongful Death Act.

Senior partner for your firm asks you to draft a legal memorandum addressing each of the following five issues:

1. What is the basic difference between the claims asserted and the damages recoverable in a survival action and a wrongful death action?
2. Against which Defendant(s) should a survival action be filed, and against which should a wrongful death action be filed?
3. With respect to Dottie's attack on Jogger, what is the best claim PR can assert against Owner? Why is this the best claim and what defense(s) can Owner assert against PR?
4. What defenses may Owner assert against PR with respect to the automobile accident?
5. What is the best claim PR can assert against Hospital? What defenses may Hospital assert against the claim, and what is the likelihood of success of those defenses?

QUESTION 3

Senior Partner asks you, Junior Associate, to draft a trust for Settlor, a Florida resident, pursuant to Settlor's wishes. Settlor comes to the appointment with you and tells you he is terminally ill, and he wants to make the trust while he is still alive. According to Settlor, he is taking morphine pills for the pain, and he takes another two pills while in the office. He wishes to leave all his property in a trust for his twin children, who are 25 years old, and Senior Partner. The division will be a third (1/3) to Senior Partner, a third (1/3) to one child and a third (1/3) to the other child. He is afraid that his twin children are not mature enough to handle the money and does not want them to have access to the money until they are 50 years old. Senior Partner would also receive her share in 25 years. All the property would be divided at that time. Settlor is worried that one child will lose her money to her husband in a divorce scheduled for next year and the other child will lose the money while he works through a "gambling addiction." Settlor is afraid that the children will try to break the trust.

The Settlor also wants to leave nothing to his wife in the trust. He would like you to be trustee and to invest the money in the trust. He asks you to invest the money in the oil drilling company that Senior Partner owns. He tells you that his investment counselor told him that the investment in the oil drilling company was extremely risky. Draft a memo advising Senior Partner whether any problems exist in implementing any of Settlor's wishes.

ANSWER TO QUESTION 1

In order to form a valid contract there must be an offer, acceptance, and consideration.

Offer – An invitation to enter into a K. The FOR SALE sign would not be considered an offer, it would be an invitation to make an offer. When Buyer called Seller that is the offer.

Acceptance – Manifestation of intention to enter into a K. Since Buyer was not ready and able to enter into the K, Seller will argue that he did not accept. Buyer will argue that he did accept b/c he said he would have the money next week. Since the language is unclear it is uncertain if there was a valid acceptance.

Option K – In order to form an option K there needs to be consideration under Common Law principles and Under the UCC there needs to be a writing by the Seller stating K will be kept open for a certain time period, but doesn't require consideration. In this case Buyer accepted when he mailed the \$5000 under the MAIL BOX RULE b/c that was the way Seller wanted acceptance. Furthermore, a valid OPTION K was created which made the offer irrevocable until November 1.

Consideration – Bargained for exchange, Detrimental Reliance or Benefit to Promisor. In this case the \$5000 was sufficient consideration to keep option open.

Minor Under 18 – A minor under 18 can contract and doesn't make the contract VOID just b/c he/she was under 18. It only makes the K VOIDABLE by the minor not the other person. Seller will argue the K is void, however, that's not the case. If Buyer still wants to go through with the K he can – it's enforceable.

Statute of Frauds – requires a K not able to be performed with 1 yr. to be in writing or a K for the sale of Goods over \$5000. Since the car was valued at 25,000 Seller will argue that the K is unenforceable b/c it wasn't in writing. Buyer will counter by saying he sent Seller a check for \$5000 which was in writing and signed. The SOF requires the (1) name of parties to be charged, (2) signature of parties, (3) subject matter, (4) terms, and the (5) price. SOF can be overcome by part payment and possession or improvements. In this case there was only part payment. Therefore there might be a problem with enforcing under SOF.

Detrimental Reliance – A court will enforce a K if a party made an offer which he knew Buyer would rely on and buyer did in fact rely to his detriment. In this case Seller knew Buyer relied on his offer.

Option – Since there was valid consideration paid and Seller stated Buyer had until Nov. 1 the K was irrevocable. Regardless of whether or not Seller cashed the check, sending the check was valid consideration. Seller might argue b/c he did not cash it there was no acceptance. However, the court will rule that there is a valid option.

UCC – The applicable law will be the Unif. Comm. Code b/c this car is considered GOODS.

Anticipatory Repudiation – It is where someone in a valid K states they will not be performing their side of the bargain. To be a Repudiation the words must be certain. When Buyer called Seller he refused to sell the van. Buyer had the option of purchasing UNTIL Nov. 1. Seller will argue that there wasn't a valid K and that there was only preliminary negotiations. S will argue that he gave a counter offer.

Damages – If the court determines a valid K or option was in effect, Buyer can sue immediately for the return of his \$5000 check and for any consequential, actual, and special damages. However, Buyer has a duty to mitigate damages. In order to obtain Consequential Damages Seller must have known about losses that could stem from this Breach.

Specific Performance – Since this is a specialized van Buyer will contend he wants the court to force Seller to sell b/c this van is unique. SP is available for unique property.

If Buyer doesn't want SP he can sue for actual damages, which would be the difference in price b/t this van and a comparable one. He can also obtain special damages which would be costs stemming from breach like time and money wasted looking for a new van.

Buyer will argue he will lose \$1200 on cards, flyers, and cell phone and the \$50,000 profit. Seller will argue B is not entitled to that money b/c he can mitigate. The court will probably not give B these damages unless this van is so unique that B can't do business w/o and can't find another one. Buyer might be able to recover lost profits for his business until he finds another van.

Ethical Considerations – Attorney's fees can be paid by another party but the client must be informed that the fees are being paid by someone else.

Confidential – The Attorney must keep the case confidential b/t the buyer (client) and the Attorney. He cannot disclose anything about the case unless client consents.

The Investor can have no say in the handling of the case. Only the client can. Therefore, Investor can't tell the lawyer he doesn't want the cases settled, only the client can instruct the Lawyer whether to settle. Investor is not entitled to monthly UPDATES.

Punitive Damages – are only recoverable for intentional misconduct or Gross negligence. In FL Punitive Damages are capped at 3 times Compensatory or 500,000.

If motivated by Financial Gain then the cap is 4 times compensatory or 2 million. If an intentional tort or drugs or alcohol involved then there is no cap. Punitive will not be allowed in this contracts case.

Attorney's fees – Generally each party must pay their own fees. However, in Florida by statute Attorney's fees can be awarded in certain cases where Manufacturers or Sellers defraud or Breach K. In this case the court probably won't award fees.

ANSWER TO QUESTION 2

I. The basic differences b/t the claims is that Florida law permits the continuation of a lawsuit via the survival statute, though the party successively dies. The estate then carries forth the suit and damages recovered may include medical expenses, loss of wages (past), & loss of future earnings reduced to present value. A wrongful death action may be commenced to address a loss of life resulting from tortious conduct. Such is often dependent upon whether the deceased is single or married, a minor (25 or under), has surviving parents or children, in terms of claims and awarded damages. Damages may include loss of consortium for husband & a child, future earnings, medical expenses, funeral expenses, etc.

II. Husband, on behalf of the estate of wife, should file a wrongful death action against the hospital and the doctor (though he has not been located). Husband should also file suit under the survival statute against the Owner and the Rider (though also not located.)

III. The best claim the PR (husband) can assert against Owner with respect to Dottie's attack is one of strict liability. Florida law provides that a dog-bite is strict liability for the owner, regardless of whether dog had propensity to bite or a history of biting/viciousness. Therefore, owner's statement of shock to Jogger (i.e. "Dottie has neverst) is irrelevant. Strict Liability will be imposed

against Owner for this 1 bite and any other successive bite resulting in injury. Owner's best defenses are (1) that Jogger was negligent because she had the last clear chance to avoid the dog by deviating a bit from her route, yet she assumed the risk/was contributorily negligent as she encountered the dog willfully. (2) Owner may also attempt to argue that along this negligence, she provoked the dog to bite her by running near dog. However, through both of these defenses are adequate under Florida law, neither will be successful in all likelihood & owner will be held strictly liable.

IV. Defenses that owner may assert against the PR with respect to the car accident may include: (1) Good Samaritan. Owner may claim that he should not be liable or his damages reduced b/c he was rescuing the Jogger. (However, one may also argue that he had a duty to do so given that he created the peril by his dog.) His "good samaritan" defense will fail, however, because Florida law provides that one may be liable for ORDINARY NEGLIGENCE in carrying out the rescue, not gross negligence. From the given facts, it appears Owner committed ordinary negligence in the car accident & therefore will be held liable. He assumed a duty to care for Jogger, breached that duty with his negligence which was the proximate/actual/CIF of her injury. (2) Owner may also assert the defense of (Assumption or risk)/contributory negligence because Jogger did not wear her seatbelt & such is provided for under FL law as raising a presumption of CN. Owner may argue that Jogger's injuries were not caused by the accident itself but from the resulting impact "was thrown about in Owner's car, and AS A RESULT, suffered" injuries. This may be a viable defense for the purposes of reducing Owner's liability/damages, as Jogger would be responsible for the amount of harm which resulted from her contrib. negl. in not wearing the seatbelt.

However, unless Jogger is found to be 100% responsible, which is unlikely, Owner will still be liable & must pay damages for his negligence. (“But for his negl., she wouldn’t be injured” remains).

(3) Owner may attempt to argue that the accident was superseding/intervening, but this will likely fail because it was completely foreseeable.

V. PR should assert a wrongful death claim against the Hospital. (He may also wish to file a negligent hiring claim, but that is not the best claim.) Here the doctor was an employee of the hospital. Therefore, an issue of vicarious liability arises (or res. superior) as there is an employer/employee relationship. PR may sue hospital (and doctor, though unavailable) for the gross negligence of its employee – the doctor. A reason why owner would not likely be found liable for Jogger’s death & why a wrongful death claim would not be appropriate is because the doctor’s intoxication & resulting negligence in treating Jogger was so substantial that it may be considered a superseding/intervening cause which cuts off the liability of owner. Therefore the hospital should be held liable for the actions of its employee, the doctor. Additionally, though hospital may argue that they had no knowledge of his intoxication or any unfitness, the procedure used by the hospital in completing background checks should be examined. Here, while working for the hospital, the employee doctor assumed a duty to care for Jogger, breached that duty by his negligence via intoxication which caused & resulted in Jogger’s death. It is also worth arguing that doctor should be held to a heightened standard, which makes his intoxication even more of an aggravating circumstance to the point of S/L. In addition to the aforementioned defense of “no knowledge”, which will fail; the Hospital may argue that when the doctor treated the woman negligently while intoxicated, that such constituted an intentional tort or gross misconduct which should remove him from the scope of employment. Hospital is not likely to succeed on these merits and as a result will be found vicar. liable for damages including: loss of consortium to husband & son, med. expenses, loss of future earnings, funeral expenses, & potential punitive damages, which may not be capped at any amount given that caps on damages are excepted for those claims where intoxication by drugs or alcohol is at issue. Hospital may attempt to recover damages through an indemnification action against the doctor.

ANSWER TO QUESTION 3

To: Senior Partner:
From: Junior Associate
Re: Trust for Settlor

Under Florida law a Settlor can create a Trust by transferring the trust res (property) to the trustee w/the intention to create a trust for the benefit of ascertained beneficiaries. Here Settlor intends to create a trust for the benefit of his twin children and senior partner. Delivery of the trust res, w/the Settlor’s intent to create the trust, to a trustee, in this case Settlor wishes that I serve as trustee, would create a trust, an express intervivos trust for the benefit of settlor’s twins and senior partner.

Potential Problems

First if the trust res includes any real property Settlor must deliver a deed to trustee (me) subscribed by two witnesses, and the trust agreement must be in writing to satisfy the statute of frauds. (The statute of frauds requires that any contract conveying an interest in property be in writing signed by the person to be charged).

Furthermore, a Settlor must have the capacity to contract in order to create a trust. As indicated Settlor is currently under the influence of morphine pain pills and as such his capacity to create the trust may be questioned. If found that the Settlor lacked the requisite capacity, the trust will fail and a resulting trust for the benefit of the Settlor's estate will be created.

Regarding the age limits on Settlor's twin children and holding Senior Partner's interest for 25 years, Settlor can accomplish this by including a fixed period of time (25 years) for the trust and designating a 1/3 interest in the remaining principal each to the twins and senior partner. By setting a fixed period of time to the trust Settlor can be assured that the beneficiaries or the trustee will not be able to terminate the trust before the termination date in the trust. (Florida law allows the beneficiaries to a trust to terminate it and obtain the principal if all agree and terminating the trust will not be contrary to a material purpose of the trust. However trusts w/spendthrift clauses and fixed periods cannot be terminated in this fashion).

Regarding Settlor's fear that one child will lose her money to her husband in divorce: Creditors can generally reach a beneficiary's interest in a trust unless the trust includes a spendthrift clause. By adding a spendthrift clause any creditor will not be able to attach the beneficiary's interest unless the creditor provided necessities to the beneficiary or a former spouse seeks to collect past due alimony or child support payments after all other avenues of recovery have been exhausted. Furthermore because the trust names the child only as the beneficiary, and not the child and her husband, her interest will be considered separate property by the divorce court, not subject to the equitable distribution of marital property.

Regarding the child w/the gambling addiction see the discussion above regarding spendthrift clauses. Once again a spendthrift clause will prevent the child's gambling creditors from obtaining her interest in the trust. However, once income or principal is in the hands of the beneficiary a creditor will be able to obtain it. As long as the principal remains in the trust w/ a valid spendthrift clause, therefore, the child's gambling creditors will not be able to reach her interest.

Regarding Settlor's wife, a spouse has a right to take an elective share upon the decedent spouse's elective estate equal to 30% of the elective estate. Property included, among other things, in an elective estate includes the Settlor's interest in a Revocable Intervivos trust.

Trusts are irrevocable unless the Settlor specifically reserves the right to modify or revoke the trust. In this case Settlor has not indicated that he wishes to maintain a right to modify or revoke the trust, therefore without reserving such right the trust will be irrevocable and outside the elective estate.

Ethical Considerations

Under the Rules of Professional Conduct (RPC) an attorney may not enter into a representation where there may exist the potential for a conflict of interest. In this case a potential conflict arises in that Senior Partner is a beneficiary to the trusts. Even though senior partner is not drafting the trust documents, Junior Partner's association in the same firm as Senior Partner would be the same as if Senior Partner drafted the trust. The potential conflict of interest, however, could be waived by Settlor if after consultation he consents to the representation.

Under the RPC an attorney is prohibited from entering into a contractual relationship w/a client unless the transaction is fair to the client, the attorney believes he can still represent the client, and the client is given the opportunity to consult another attorney. Settlor asks that the trustee invest the money in the trust in Senior Partner's oil company. This constitutes a transaction b/t the attorney Senior Partner (in the same firm as Junior Partner) and Settlor. Settlor will have to be informed of his ability to seek outside counsel, Junior Partner must reasonably believe that his representation will not be affected by the transaction, and the investment transaction must be fair. If not Junior Partner and Senior Partner will have violated the RPC.

Furthermore Settlor must be informed that since the investment in the oil company is very risky of what may happen under Florida law if the investment is underproductive. Under Florida law if all of the investments in a trust taken as a whole do not produce at least 3% interest per anum the beneficiaries have a right to payment of the 3% out of the trust principal (3% is based on the fair market value of the trust principal). Sine Settlor is afraid that twins and Senior Partner will get trust principal before 25 years have passed this is a valid concern. If the oil investments continually underperform the trust corpus will be depleted. Depending on the amount of the value of the trust property if this causes the value to drop below \$50,000 the trustee can petition the courts to terminate the trust b/c of the cost of administration. This may cause the trust to terminate before the 25-year period the Settlor desires.