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Question No. 1

Roger was a wealthy, elderly, single man with no children. He lived in E County, Pennsylvania, in a home he had purchased for $250,000 in 2001. He also owned several cars, fine furnishings, and had a substantial amount of cash. For the past few years, he had employed Harold as a butler, cook, and housekeeper. After the first year of working, Harold became dissatisfied with his wages and threatened to leave. Roger gave him a small raise, but also promised he would leave Harold at least $50,000 in his will in exchange for Harold’s promise to continue working. At Harold’s request, Roger wrote, signed, and dated a note saying, “I agree to leave Harold at least $50,000 in my will in return for his promise to continue working for me until my death.” Harold made a photocopy of the note which he gave to Roger.

In early 2012, Roger was diagnosed with a serious heart ailment which motivated him to have a will drawn by Angela, his attorney, who was licensed to practice in Pennsylvania. He instructed Angela to leave his home to his niece, Cheryl, who was the only relative close to him, and to leave everything else to the E County Foundation, a local charity. He forgot to tell Angela to include the $50,000 bequest to Harold, though he had previously put his copy of the note in his safety deposit box at his bank, to which only he had access. The will was drafted in accordance with Roger’s instructions, and was properly signed, dated, and witnessed.

Later in the year Roger’s condition worsened, and he had to move into a long-term care facility. Harold continued to live in and maintain the house at Roger’s request. In November 2012, as his medical and care bills mounted Roger signed a contract to sell his home. He found a buyer, Jack, who had a poor credit rating and needed at least another year to get a bank loan at an affordable rate. On November 15, 2012, Roger and Jack signed an agreement for the sale of Roger’s home for $600,000, to be payable by a note to Roger for the full purchase price which
was to be secured by a mortgage in the house. The closing was held on December 15, 2012, with both the mortgage and note being signed by Jack. The note required monthly payments for one year, and a “balloon payment” of the entire unpaid balance one year from the date of the sale. Roger died two days after the closing. Harold had continued to work for Roger until his death by helping with moving items out of the house and other duties before and after the closing.

Sam was an attorney licensed in Pennsylvania. A friend of Cheryl’s, who also knew Sam, had told Sam about Roger giving Cheryl his home by his will and that Roger sold that home before he died. Sam mailed Cheryl a copy of his legal advertising brochure which accurately noted his experience with probate and real estate matters, with a cover letter offering to advise her regarding the home which Roger’s will had devised to her which had been sold to Jack. After a few weeks with no response, Sam obtained Cheryl’s cell phone number from their mutual friend and called Cheryl to ask her whether she needed legal advice about Roger’s home having been sold after Roger had willed it to her.

1. Harold presented to Angela the note Roger had written about the $50,000 bequest Harold had expected to be in Roger’s will, and made a claim against the estate for the $50,000 that was promised him. Under Pennsylvania’s Probate, Estates and Fiduciaries Code, what basis, if any, should Harold assert in support of his claim against the estate, and with what likelihood of success?

2. What, if anything, does Cheryl take from the estate?

3. If Roger was a cash basis taxpayer and Jack had paid the entire $600,000 sales price to Roger at the December 2012 closing, what would be the 2012 federal income tax consequences, if any, on Roger’s final return?

4. Did either Sam’s direct mail solicitation or phone call to Cheryl violate any provision of the Pennsylvania Rules of Professional Conduct?
Question No. 1: Examiner’s Analysis

1. **Harold should assert that a contract exists supporting his claim against the estate, and he will be able to collect the promised $50,000 as a “contract concerning succession” because there is a writing supporting the contract, which meets the requirements of 20 Pa. C.S.A. 2701(a)(3).**

   Despite the fact that Roger neglected to provide a bequest of at least $50,000 to him, Harold will be able to make a claim against the estate as a Contract Concerning Succession, as provided by the Pennsylvania Probate, Estates and Fiduciaries (PEF) Code at 20 Pa. C.S.A. 2701, which states:

   (a) Establishment of Contract - - A contract to die intestate or to make or not to revoke a will or testamentary provision or an obligation dischargeable only at or after death can be established in support of a claim against the estate of a decedent only by:

   (1) provisions of a will of the decedent stating material provisions of the contract;

   (2) an express reference in a will of the decedent to a contract and extrinsic evidence proving the terms of the contract; or

   (3) a writing signed by the decedent evidencing the contract.

   There was no provision in Roger’s will, nor any express reference in the will to Harold, nor any contract or the material terms thereof, so the claim would not be valid under subsections 1 or 2. The note clearly states that Harold promised to work for Roger until Roger’s death in exchange for Roger’s promise to make the bequest, which evidences a bargained-for exchange supported by consideration which establishes a “contract.” The note therefore appears to qualify under subsection 3 as a “writing signed by the decedent evidencing the contract.” Harold worked for Roger until his death and should be successful in his claim for $50,000 against Roger’s estate.

2. **Cheryl will receive the proceeds of the sale of Roger’s home under the statutory exception to ademption at 20 Pa. C.S.A. 2514 (18).**

   At common law, when a testator sells or otherwise disposes of property specifically devised in his or her will, the testamentary gift is considered to be extinguished, or “adeemed,” even though the proceeds from the sale can be traced to other assets in the estate unless the will had stated that such proceeds are to be included in the bequest. See Harshaw v. Harshaw, 184 Pa. 401, 39 A. 89 (1898); In Re Frost’s Estate, 354 Pa. 223, 47 A.2d 219 (1946).

   Though Roger’s will did not specify that Cheryl would take the “proceeds” of the sale of his home, the PEF Code has altered the common law rule by statute at 20 Pa. C.S.A. 2514 (18) “Nonademption- balance”, to include such “proceeds” with respect to property specifically devised or bequeathed. In the absence of a contrary intent appearing in the will, the person devised such property “has the right to any of that property which the testator still owned at his death and (i) any balance of the purchase price or balance of property to be received in exchange,
together with any security interest owing from a purchaser to the testator at his death by reason of a sale or exchange of the property by the testator.” *Id.*

Roger died two days after the closing on the property and before any payments would have been made on the note. The payments owed on the note which were owed at Roger’s death constituted the balance of the purchase price due at Roger’s death and the mortgage which Jack signed to purchase the property from Roger is a security interest owing from a purchaser to the testator. The statute prevents Jack’s payments from falling into the residuary of Roger’s estate, which would belong to the E County Foundation but for this statutory provision. The proceeds of the home sale belong to Cheryl, and she will also have a security interest in the home.

3. **Roger would have had a gain of $350,000 on the sale of his home, but only $100,000 would be included in gross income on his final return because of the exemption provided by IRC section 121 for the sale of a principal residence.**

The Internal Revenue Code (IRC) at Section 61(a)(3) includes in gross income any gain on the sale or transfer of property. The amount of gain on a sale of property “shall be the excess of the amount realized therefrom over the adjusted basis provided in IRC section 1011 for determining gain.” 26 U.S.C.A 1001(a). The facts state that Roger purchased his home in 2001 for $250,000, and the sales price to Jack in 2012 was $600,000. Roger’s basis is generally defined by IRC Section 1012 as “the cost of such property,” and the facts provide no information to include any adjustments to the basis enumerated in IRC Section 1016. Roger therefore would have realized a gain of $350,000 in 2012 had Jack paid the full purchase price at that time.

The facts indicate that the home was Roger’s principal residence since its purchase, and Roger would then be entitled to exempt the first $250,000 of his gain under IRC Section 121 because the home had been used as his principal residence for two years. This would result in Roger having a gain of $100,000 from this sale, which would be included in gross income on his final return.

4. **Sam’s direct mailing to Cheryl was most likely not in violation of the Rules of Professional Conduct. His direct telephone call was a violation.**

The propriety of lawyer solicitation of potential clients is addressed in Pennsylvania by Section 7 of the Rules of Professional Conduct, “Information about Legal Services”, primarily RPC 7.1- Communications Concerning a Lawyer’s Services, RPC 7.2 Advertising, and RPC 7.3- Direct Contact with Prospective Clients. Rule 7.1 generally defines the scope and limitations of the content of such communications and prohibits “false and misleading communication.”

The particularities of Sam’s contact with Cheryl are most specifically dealt with by RPC 7.3, which states:

(a) A lawyer shall not solicit in-person or by intermediary professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain, unless the person contacted is a lawyer, or has a
family, close personal, or prior professional relationship with the lawyer. The term “solicit” includes contact in-person, by telephone or by real-time electronic communication, but, subject to the requirements of Rule 7.1 and Rule 7.3(b), does not include written communications, which may include targeted, direct mail advertisements.

(b) A lawyer may contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment unless:

1. the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer;
2. the person has made known to the lawyer a desire not to receive communications from the lawyer; or
3. the communication involves coercion, duress or harassment.

Sam’s mailed brochure and cover letter clearly constitute a “targeted, direct mail advertisement.” The Explanatory Comments to RPC 7.3 distinguish the “potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of prospective clients” from “Advertising and written communications which may be mailed, or autodialed, which make it possible for a prospective client to be informed about the need for legal services,” noting that “the contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and prospective client can be disputed and may not be subject to third-party scrutiny.”

The direct mail which Sam sent to Cheryl would be permitted under RPC 7.3, so long as its contents comply with the general requirements of RPC 7.1 as not being “false or misleading” as well as the restrictions on direct mail solicitation in subsection (b) of RPC 7.3, which the facts do not indicate as applicable. Sam accurately stated the nature of his experience, and there is no indication in the facts that Cheryl was physically, mentally or emotionally vulnerable, nor was there any coercion in the manner or content of the mailing or any indication that Cheryl expressed a desire not to receive any communications from Sam. Further, RPC 7.4 (a) explicitly states that “a lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.”

Sam’s direct call to Cheryl’s cell phone is more problematic. Sam is not related to Cheryl, nor is there any indication of any prior professional or close personal relationship, and his attempt to contact her is certainly motivated by his pecuniary interest. His unsolicited telephone call clearly violates Rule 7.3 even though he obtained Cheryl’s phone number from a mutual friend.
Question No. 1: Grading Guidelines

1. Contract to Make a Will

Candidates should recognize the existence of a contract to provide a bequest which was evidenced by Roger’s written note and that the bequest should be charged to the estate despite the omission of the bequest from the decedent’s will.

4 points

2. Ademption

Candidates should recognize the nature of ademption, the common law result regarding proceeds of a sale of property that had been devised or bequeathed, and the Pennsylvania statutory inclusion of proceeds still due at testator’s death if no contrary intent is expressed in the will.

4 points

3. Capital gain on sale of residence; exclusion amount

Candidates should recognize the taxability of a gain on the sale of property, discuss the calculation of gain, and the home exclusion and its limit.

6 points

4. Professional Responsibility: Direct contact with prospective client

Candidates should recognize the boundaries for lawyer contact with prospective clients, and the distinction between proper direct mail and an unsolicited phone call.

6 points
Question No. 2

In July 2012, Ted, who was 20 years of age, attended his company (CO) picnic which was held at CO’s private park located in A County, Pennsylvania. CO provided unlimited free beer for all picnic guests. CO served the beer to the guests but made no attempt to prevent serving the beer to those individuals who were not of legal drinking age, which is age 21. Over 25% of CO’s employees and guests who attended the picnic were under the age of 21. Pennsylvania has statutes that make it a criminal offense for those under the age of 21 to consume beer or other beverages containing alcohol and for a person to furnish beer or other alcoholic beverages to a person under 21 years of age.

Ted was served beer at CO’s picnic and consumed so much beer at the picnic that he became visibly intoxicated. While Ted was driving home from the picnic, he was involved in a serious one vehicle accident which was caused by his car leaving the lane of travel due to his intoxication from the consumption of beer. Ted survived the accident, but he sustained serious, permanent bodily injuries from the crash. Beth, a registered nurse licensed by the state, who worked as a pediatric nurse at a local hospital, stopped at the accident scene and rendered emergency care to Ted. Beth reasonably believed that her assistance to Ted was necessary to treat his injuries until the paramedics arrived at the scene.

Ted filed a Workers Compensation claim against CO which was denied based on the finding that the injury did not occur in the course of Ted’s employment. Ted then consulted Attorney Wiley to bring any possible civil lawsuit against any party who may have been liable for his injuries. Attorney Wiley investigated the accident and discovered that Beth’s treatment of Ted was negligent and he further was able to secure competent medical proof to show Beth’s treatment made Ted’s injuries worse.
CO had a very poor health care insurance plan for its employees, and Ted had very limited first party (medical) vehicle insurance. Many of Ted’s medical bills were unpaid. CO voluntarily paid $25,000 of Ted’s unpaid medical bills as a goodwill gesture to assist its employee. CO’s board of directors enacted a new policy, two days after the accident, that banned alcoholic beverages from all company functions.

1. What cause of action should Attorney Wiley bring in a civil lawsuit against CO for Ted’s injuries?

2. Other than a possible defense based on Beth’s actions, what affirmative defense(s), if any, should CO raise in the lawsuit Ted files against it, and, if successful, what effect would the defense(s) have on Ted’s ability to recover?

3. At the trial of this matter against CO:

   (a) Is the payment of medical expenses by CO admissible to establish CO’s liability?

   (b) Can the new policy passed by CO’s board of directors, banning alcoholic beverages at company functions, be used against CO to establish liability?

4. What legal advice should Attorney Wiley give Ted regarding the filing of a personal injury claim against Beth for the negligent treatment of Ted’s injuries at the accident scene?
Question No. 2: Examiner’s Analysis

1. Attorney Wiley should file a cause of action for negligence in a civil lawsuit filed against CO.

   Attorney Wiley should file a cause of action alleging negligence in the civil lawsuit filed against CO. A cause of action for negligence has four basic elements:

   (1) duty on defendant to conform to certain standards of conduct toward a plaintiff;
   (2) defendant’s breach of that duty;
   (3) causal connection between defendant’s conduct and plaintiff’s injury; and
   (4) loss or damage suffered by plaintiff.

   **Schmoyer v. Mexico Forge, Inc.,** 437 Pa. Super. 159, 649 A.2d 705 (1994). A violation of a legislative enactment may constitute negligence per se. **D’Ambrosio v. City of Philadelphia,** 354 Pa. 403, 47 A.2d 256 (1946). Negligence per se establishes both the duty and required breach of duty where an individual violates a statute designed to prevent a public harm. **Braxton v. Commonwealth Department of Transportation,** 160 Pa. Cmwlth. 32, 634 A.2d 1150 (1993), appeal denied, 539 Pa. 682, 652 A.2d 1326 (1994). The court would determine the duty and whether to accept or adopt the statute in question as setting the standard of care. Thus, negligence per se, if found by the court, establishes the first two requirements to hold a party negligent.

   To establish liability the plaintiff still must prove that violation of the statute was a substantial factor in causing the plaintiff’s injuries. **Gravlin v. Fredavid Builders and Developers,** 450 Pa. Super. 655, 677 A.2d 1235 (1966), appeal denied, 546 Pa. 694, 687 A.2d 378 (1996). Additionally, there must be a direct connection between the harm meant to be prevented by the statute and the injury complained of. **Id.**

   In **Congini v. Portersville Valve Company,** 504 Pa. 157, 470 A.2d 515 (1983) the Pennsylvania Supreme Court held:

   [O]ur legislature has made a legislative judgment that persons under twenty-one years of age are incompetent to handle alcohol. Under Section 6308 of the Crimes Code, 18 Pa. C.S. §6308, a person “less than 21 years of age” commits a summary offense if he “attempts to purchase, purchases, consumes, possesses or transports any alcohol, liquor or malt or brewed beverages.” Furthermore, under Section 306 of the Crimes Code, 18 Pa.C.S.A. §306, an adult who furnishes liquor to a minor would be liable as an accomplice to the same extent as the offending minor.

   Further the Court in **Congini, supra,** relied upon Section 286 of the Restatement of Torts Second which provides as follows:
Section 286 of the Restatement of Torts Second provides:

§286. When Standard of Conduct Defined by Legislation or Regulation Will Be Adopted.

The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part:

(a) to protect a class of persons which includes the one whose interest is invaded, and
(b) to protect the particular interest which is invaded, and
(c) to protect that interest against the kind of harm which has resulted, and
(d) to protect that interest against the particular hazard from which the harm results.

We have previously relied upon this Section and accepted it as an accurate statement of the law.

Citations omitted

It is apparent that the Pennsylvania Legislature in enacting §6308 of the Crimes Code intended to protect those under 21 years of age as well as society at large from the effects of serving alcohol to minors. *Id.* 470 A.2d at 518. A social host is negligent per se in serving alcohol to a person less than 21 years of age, and the person serving the alcohol to the minor will be liable for injuries proximately caused by the minor’s intoxication. *Id.* at 518; *Orner v. Mallick*, 515 Pa. 132, 527 A.2d 521 (1987).

CO breached the standard of conduct of a reasonable person in furnishing alcohol to a minor. CO can be held liable if Ted became intoxicated as a result of its actions and the intoxication was the proximate cause of Ted’s injuries. Proximate cause is established where the wrongful conduct is a substantial factor in bringing about the plaintiff’s harm. *Majors v. Broadhead Hotel*, 416 Pa. 265, 205 A.2d 873 (1965). The facts state that Ted was visibly intoxicated when he left the picnic and that the car he was driving left the lane of travel due to his intoxication from the consumption of alcohol. The service of alcohol leading to Ted’s intoxication was a substantial factor in causing Ted’s accident which resulted in Ted’s injuries and damages. Additionally, the injuries Ted suffered as a result of his intoxication were the very type of harm meant to be protected by the statute. Ted would be able to establish a cause of action for negligence against CO.

2. **CO should raise the defense of contributory negligence to Ted’s lawsuit, and if successful the defense would reduce or bar Ted’s recovery.**

42 Pa.C.S.A. § 7102 entitled Comparative Negligence provides in pertinent part as follows:

(a) General Rule. – In all actions brought to recover damages for negligence resulting in death or injury to a person or property, the fact that the plaintiff may
have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

Under the legal defense of contributory negligence, Ted’s recovery will be reduced by the percentage of his negligence, unless he is found to have been more than 50% causally negligent, in which case he is barred from any recovery. Contributory negligence is neglect of the duty imposed upon a person to exercise reasonable care for his or her own protection and safety which is a legally contributing cause of an injury. See *Trayer v. King*, 241 Pa. Super. 86, 359 A.2d 800 (1976). The contributory negligence of a plaintiff, like the negligence of a defendant, is lack of due care under the circumstances. *Argo v. Goldstein*, 438 Pa. 468, 265 A.2d 783 (1970). In *Congini*, supra, at page 518, the court noted that an 18 year old is presumptively capable of negligence and that by knowingly consuming alcohol is guilty of a summary offense; and held that a social host may assert a minor’s contributory negligence in consuming alcohol as a defense. The voluntary consumption of alcohol by Ted, as a minor, in violation of Pennsylvania law and to the extent of becoming intoxicated was a substantial factor in causing his injuries and would likely be found to be contributory negligence and could either diminish or bar Ted’s recovery from CO.

3.(a) **CO’s payment of medical expenses will not be admissible at trial to establish CO’s liability.**

Since Ted’s medical insurance coverage and his automobile insurance were insufficient to pay all of his medical expenses, his employer, CO, voluntarily paid $25,000 toward his medical bills. Attorney Wiley now seeks to use this voluntary payment of medical expenses as an admission of liability by CO.

Pa.R.E. 409 is applicable and states as follows:

**Rule 409. Payment of medical and similar expenses**

Evidence of furnishing or offering or promising to pay medical, hospital or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Thus, based on this prohibition, the voluntary payment by CO of Ted’s medical expenses is clearly inadmissible at trial to establish liability.

3.(b) **The new CO policy of banning alcohol beverages at company events will not be admissible to establish liability against CO.**

Shortly after Ted’s accident, the board of directors of CO changed its policy and banned alcohol beverages from all company functions. Since a number of CO’s employees are under the age of 21 and CO presumably wants to eliminate or minimize its liability, this is a sound policy.
The law would encourage such policies that would tend to protect not only the employees but the public in general.

CO’s action subsequent to the accident in barring alcohol from company events implicates Pa. R.E. 407. This rule states as follows:

Rule 407. Subsequent remedial measures

When, after an injury or harm allegedly caused by an event, measures are taken which, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove that the party who took the measures was negligent or engaged in culpable conduct, or produced, sold, designed or manufactured a product with a defect or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for impeachment, or to prove other matters, if controverted, such as ownership, control or feasibility of precautionary measures.

The value to society as a general social policy of encouraging people to take steps to limit the availability of alcohol and further to prohibit the supply of alcohol to minors would be encouraged by the prohibition found in Rule 407. The purpose of the rule is to encourage remediation after an accident without concern that evidence of subsequent remedial measures will be admissible to establish liability for a prior act. See Duchess v. Langston, Corp, 564 Pa. 529, 769 A.2d 1131 (2001). Based upon Pa.R.E. 407 the subsequent policy change by the board of directors would not be admissible to establish liability since it would be construed to be a subsequent remedial measure. Moreover, the change in policy would not fall into any of the exceptions set forth in Rule 407. It is clear that the new policy was enacted to prevent harm in the future or to at least to minimize the occurrence of harm. Although it could be successfully argued that if the company had such a policy in place at the time of the injury, it is substantially less likely that Ted would have had the accident while operating his vehicle, the change in policy will not be admissible to establish liability.

4. **Beth was a licensed pediatric nurse and thus under the Good Samaritan statute would be exempt from liability.**

Beth is a registered nurse, licensed in the state, who stopped and rendered assistance to Ted. Pennsylvania grants certain individuals including registered nurses, licensed by any state, immunity from civil damages resulting from his or her rendering emergency care in good faith at the scene of an emergency unless the acts or omissions were intentionally designed to harm the recipient or were grossly negligent. 42 Pa.C.S. 8331(a). The civil immunity under Pennsylvania’s Good Samaritan Statute would insulate Beth from liability if a civil action was filed by Ted for negligence.

Here, Beth meets the criteria of a protected party in that she is a licensed, registered nurse who acted in good faith based upon her belief that the immediate care rendered to Ted was necessary. The fact that Beth is a pediatric nurse is of no consequence since the statute does not require that the registered nurse practice in any particular field. The statute simply requires that
the nurse be a registered nurse, who is licensed by a state. Also, the investigation conducted by Attorney Wiley would support simple negligence on the part of Beth and not intentional conduct or gross negligence. There is nothing in the facts to support a conclusion that Beth was grossly negligent or acted with the intent to harm Ted.

Attorney Wiley should advise Ted that he does not have a cause of action against Beth for her negligent treatment of his injuries at the accident scene because the Good Samaritan Statute grants her immunity from this civil claim.
Question No. 2: Grading Guidelines

1. Negligence/negligence per se

Comments: The candidate is expected to discuss the elements required to prove a negligence cause of action and also the concept of negligence per se, and apply these elements to the facts.

8 points

2. Contributory negligence

Comments: The candidate should discuss contributory negligence as the appropriate defense to the negligence cause of action and also discuss that a successful defense would reduce or bar Ted’s recovery.

5 points

3. Medical expense payment/subsequent remedial measures

Comments: The candidate should discuss the issue relating to payment of medical expenses and determine that such payment would not be admissible to establish CO’s liability and further that the new company policy on barring alcohol beverages at company events is a subsequent remedial measure and therefore not admissible to prove liability.

3 points

4. Good Samaritan Statute

Comments: The candidate should discuss the applicability of the Good Samaritan Statute to the facts and conclude that Beth would be exempt from liability.

4 points
Question No. 3

In June of 1983, two days after they graduated from Swan Song High School at the age of 18, Sandy and Rob were married in C County, Pennsylvania, where they continue to live today. Immediately after the wedding, Sandy began her pursuit of a business profession which required four years of college and four years of graduate school. While Sandy was in school, Rob managed the home and cared for the couple’s two children, who were born in 1984 and 1985. In 2010, after the children had grown up and moved out of the house, Rob, who had no education beyond high school, became a plumber’s helper at an annual salary of $30,000 a year which he continues to earn to this date. Sandy is earning about $600,000 a year as a successful business executive. Rob has recently learned that he is expected to receive a $5,000,000 inheritance from his elderly mother, who, due to extensive medical problems, is not expected to live more than two years. Throughout their marriage the couple lived in an expensive home, drove top of the line vehicles and vacationed frequently.

In December of 2012, Rob found out that Sandy had been cheating on him for several months, and he decided to file a divorce action in C County, Pennsylvania, which included a claim for alimony. Shortly after being served with the divorce complaint in January 2013, Sandy learned that she had cancer, and the doctor told her that she had about three years to live and would only be able to work for about two more years. Sandy told her friends, Bradley and Lance, about the divorce filing and the cancer prognosis. Several days later, and unbeknownst to Sandy, Bradley and Lance decided to teach a lesson to Rob for filing a divorce action against their good friend. Knowing that Rob was an avid runner, they decided that Bradley would break Rob’s kneecap so he couldn’t run again. Lance agreed to help with the attack by getting the baseball bat to be used in the attack and driving Bradley to commit the attack upon Rob.
Early one morning in February of 2013, Lance drove Bradley to a local running trail which they knew Rob used every morning. While Lance waited in the car, Bradley exited with the baseball bat provided by Lance and proceeded to locate Rob on the trail. Soon after Bradley left the car Lance came to his senses and decided that this was not a good idea. He made the decision that he had to stop this plan immediately. He ran to attempt to stop Bradley before he committed the planned attack. By the time Lance caught up to him, Bradley had already located Rob and had broken his right kneecap with the bat. As a result of the attack, Rob underwent extensive surgery, and doctors pronounced that he would never be able to run again and that he would have a permanent limp.

Two days after the attack, Rob provided a written statement to the police which described in detail the physical characteristics of his attacker and the bat used in the attack.

1. Given the standard of living established during the marriage, and setting aside any potential tax ramifications, what other factors should be argued by Rob in support of his claim for alimony and what other factors should be argued by Sandy against the claim for alimony?

2. (a) Would a charge of aggravated assault against Bradley be supported by the facts?

   (b) Would a charge of criminal conspiracy to commit aggravated assault be supported against Lance under the above facts taking into account his attempt to stop the attack?

Assume that the charge of aggravated assault against Bradley proceeds to trial and that the prosecutor calls Rob as a witness to testify. During Rob’s testimony, the prosecutor asks Rob to specifically describe the person who attacked him and the bat which was used by the attacker. Rob responds that he cannot recall the specific description of either the assailant or the bat.

3. Without addressing the possible applicability of the recorded recollection exception to the hearsay rule, what procedure, if any, should the prosecutor use to try to get the specific description of the assailant and the bat into evidence through Rob’s testimony?
Question No. 3: Examiner’s Analysis

1. In support of his claim for alimony, Rob should argue a number of factors including the relative earnings and earning capacities of the parties, the length of the marriage, his substantial contribution toward his wife’s education and increased earning potential, the incomes of the parties, the relative education of the parties, his contribution as homemaker and his wife’s marital misconduct. On the other hand, his wife should argue that her physical condition and her husband’s substantial expected inheritance should limit the amount and duration of alimony.

Where a divorce decree has been entered, the court may allow alimony, as it deems reasonable, to either party if it finds that alimony is necessary. 23 Pa. C.S.A. Section 3701 (a). Alimony is based upon reasonable needs in accordance with the lifestyle and standard of living established by the parties during the marriage, as well as the payor’s ability to pay. Perlberger v. Perlberger, 426 Pa. Super. 245, 626 A.2d 1186 (1993), appeal denied, 536 Pa. 628, 637 A.2d 289 (1993). In determining whether alimony is necessary and in determining the nature, amount, duration and manner of payment of alimony, the court shall consider all relevant factors, including, but not limited to, the relative earnings and earning capacities of the parties; the ages and physical conditions of the parties; the sources of income of the parties; the expectancies and inheritances of the parties; the duration of the marriage; the contribution by one party to the education, training or increased earning power of the other party; the relative education of the parties and the time necessary to acquire sufficient education or training to enable the party seeking alimony to find appropriate employment; the contribution of a spouse as a homemaker; and the marital misconduct of either of the parties during the marriage. 23 Pa.C.S.A Section 3701 (b). 1

As applied here, Rob should argue that the factor of relative earnings and earning capacities of the parties weighs heavily in his favor. In particular, he is only making $30,000 per year, while his wife is making $600,000 per year. He should also argue that this is a marriage of long duration, now thirty years, and that he made substantial contributions to the wife by caring for the children while she pursued her education and set herself up for an increased earning power which she presently enjoys. Rob should also argue that, due to the sacrifices which he has made, he still only has a high school education, making it difficult for him to find employment, while his wife has four years of college and a graduate degree which contributes to her ability to make substantially more money. Rob also made substantial contributions as a homemaker by managing the home and caring for their children. Finally, Rob will also argue that Sandy’s marital misconduct should be a factor which weighs against her when the court weighs the factors to determine an alimony award.

Sandy, on the other hand, should argue that her current physical condition should play a significant factor in limiting the duration of alimony. Namely, she has been diagnosed with cancer and has a life expectancy of only three years, and she has been told that she can only work two more years. She would also argue that her husband is expected to receive a substantial

1 This list is not exhaustive of the factors set forth in 23 Pa. C.S.A. Section 3701(b).
inheritance in the amount of $5,000,000 from his mother and this would substantially reduce his need for alimony going forward.

2(a). **A charge of aggravated assault against Bradley would likely be supported by the facts presented.**

A person is guilty of aggravated assault if he attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly, or recklessly under circumstances manifesting an extreme indifference to the value of human life. 18 Pa.C.S.A. Section 2702 (a)(1). A person is also guilty of aggravated assault if he attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon. 18 Pa. C.S.A. Section 2702(a)(4). The term “serious bodily injury” is defined by statute as bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ. 18 Pa.C.S.A. Section 2301. Bodily injury is defined as impairment of physical condition or substantial pain. Id. A deadly weapon includes any device or instrumentality which, in the manner in which it is used, is calculated or likely to produce serious bodily injury. Id. A person acts intentionally with respect to a material element of an offense when, if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result. See 18 Pa. C.S.A. Section 302 (b)(1)(i).

As applied here, with respect to subsection (a)(1), Bradley clearly intended to inflict serious bodily injury upon Rob from the outset of his plan. Namely, he decided to teach Rob a lesson and devised a plan, along with Lance, to break Rob’s kneecap by using a baseball bat. It was clearly his conscious object to cause serious injury to Rob by hitting him in the knee with a baseball bat. He proceeded to intercept Rob while he was running and in fact did break his kneecap with the baseball bat which resulted in surgical repair. The doctors have now indicated that Rob will never be able to run again and that he will walk with a permanent limp for the rest of his life. This prognosis will likely meet the definition of serious bodily injury, namely that Rob now has a permanent impairment in the use of his knee. The facts also support a violation of subsection (a)(4) as Bradley used the bat to inflict bodily injury upon Rob. The bat would be classified as a deadly weapon as the manner in which it was used was likely to produce serious bodily injury and Bradley intentionally caused Rob “bodily injury” as he has sustained an impairment of his physical condition. Based upon these facts, there is a strong argument that a charge of aggravated assault against Bradley is supported by the facts under either of the sections enumerated above.

2(b). **A charge of criminal conspiracy to commit aggravated assault would likely be supported on the facts presented despite Lance’s attempt to stop the attack against Rob.**

A person is guilty of conspiracy with another person to commit a crime if with the intent of promoting or facilitating its commission he agrees with such other person that they or one or more of them will engage in conduct which constitutes such crime or agrees to aid such other person in the planning or commission of such crime. 18 Pa.C.S.A. Section 903 (a)(1) and (2). No person may be convicted of conspiracy to commit a crime unless an overt act in pursuant of
such conspiracy is alleged and proved to have been done by him or by a person with whom he
conspired. 18 Pa.C.S.A. Section 903 (e). “A conspiracy conviction requires proof of: (1) an
intent to commit or aid in an unlawful act; (2) an agreement with a co-conspirator; and (3) an
overt act in furtherance of the conspiracy. Because it is difficult to prove an explicit or formal
agreement to commit an unlawful act, such an act may be proved inferentially by circumstantial
evidence, for example, the relations, conduct or circumstances of the parties or overt acts on the
part of the co-conspirators.” Commonwealth v. Poland, 26 A.3d 518 (Pa. Super 2011), appeal

As applied here, Lance took part in a plan with Bradley from the outset to teach Rob a
lesson by breaking his kneecap. He agreed with Bradley that Bradley would break Rob’s
kneecap, which is an unlawful act, and Lance agreed with Bradley to secure the baseball bat and
drive him to the scene of the attack. In fact, Lance did procure the bat for Bradley and drove him
to the local running trail so that Bradley could complete the attack upon Rob. When Lance
provided Bradley with the baseball bat and drove him to the scene of the attack he committed
overt acts in furtherance of the conspiracy to commit aggravated assault upon Rob. It is clear that
Lance acted intentionally as he engaged in the conduct enumerated above with the objective of
causing Rob’s injuries.

Lance will likely try to claim that he renounced the conspiracy and that he should
therefore not be responsible for the conspiracy. “It is a defense that the actor, after conspiring to
commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a
complete and voluntary renunciation of his criminal intent.” 18 Pa. C.S.A. Section 903(f). Even
though Lance made an attempt to stop the attack by running from his car towards Bradley, the
facts make clear that by the time he found Bradley the attack had already been completed. Lance
did not thwart the success of the conspiracy and he will not be able to escape responsibility for
the crime of conspiracy.

In conclusion, a charge of criminal conspiracy to commit aggravated assault would likely
be supported against Lance.

3. The prosecution should attempt to refresh Rob’s recollection by showing Rob his
written statement taken two days after the attack in order to get the description of
the assailant and bat into evidence through Rob’s testimony.

Pa. R.E. 612 permits a writing or other item to be used to refresh the memory of a
witness. In particular, Pa. R.E. 612 (a) provides that a witness may use a writing to refresh
memory for the purpose of testifying. A witness whose memory is exhausted may use any
writing or other aid to refresh or revive his or her present recollection of past events, but
testimony must be from present memory and not from the writing itself. Dean Witter Reynolds,

“The proper procedure for a party to refresh his own witness’s recollection is to show the
writing or other evidence to his witness and after the witness’s recollection is refreshed, to
proceed with direct examination and have the witness testify from present recollection.”
In this instance, Rob is unable to recall the description of the assailant or the bat, so the prosecutor should attempt to refresh Rob’s recollection by showing him a copy of his prior statement. Rob should be permitted to review the statement that he previously provided to the police and if the review refreshes his recollection as to his descriptions, Rob would be permitted to testify as to the specific descriptions of both the assailant and the baseball bat. This procedure is permissible provided that Rob is testifying from his own memory as opposed to just reading from his prior statement.
Question No. 3: Grading Guidelines

1. **Alimony**

   Comments: There are a number of factors that Rob should argue in support of his claim for alimony including the relative earnings and earning capacities of the parties, the length of the marriage, his substantial contributions towards his wife’s education and increased earning potential, the relative education of the parties, his contribution as homemaker and his wife’s marital misconduct. His wife on the other hand should argue that her physical condition and her husband’s substantial expected inheritance should limit the amount and duration of alimony.

   8 Points

2a. **Aggravated Assault**

   Comments: A charge of aggravated assault would likely be supported against Bradley as he intentionally caused serious bodily injury to Rob and he also used a deadly weapon in order to inflict bodily injury upon Rob.

   4 Points

2b. **Conspiracy**

   Comments: A charge of criminal conspiracy to commit aggravated assault would likely be supported on the facts presented as Lance and Bradley intended to commit the unlawful act of aggravated assault, reached an agreement to do so and took a number of overt acts in furtherance of that conspiracy. An attempt by Lance to argue that he effectively renounced the conspiracy will likely not be supported by the facts presented.

   4 Points

3. **Refreshed Recollection**

   Comments: Since Rob is unable to recall the descriptions, the prosecution should show Rob his written statement taken two days after the attack to attempt to refresh his recollection in order to get the description of the assailant and bat into evidence through Rob’s testimony.

   4 Points
Question No. 4

C City was settled in the 1600’s by 100 families. A survey of the real estate title records in 2010 showed that 80% of the privately-owned land in C City was held by 20 families, all descendants of the original settlers, and there were significantly fewer real estate transactions per year in C City than in any other city in S State. In 2010, the S State legislature, after extensive research, found that the concentration of land ownership in C City limited the real estate marketplace, unduly inflated land prices when land became available for sale, reduced real estate tax revenue, and inhibited business and economic growth because of the lack of available real estate. In comparison, neighboring communities showed vibrant commercial development.

Much of the C City land was leased to long-term tenants, many of whom expressed interest in ownership. After lengthy hearings, the legislature passed the S State Land Reform Act of 2010 (“Act”). The purpose of Act was to alleviate the problems created by the concentrated land ownership in C City by creating a mechanism for identifying and condemning appropriate tracts of land and then transferring ownership to current lessees under certain conditions. A process was developed which included an appropriate mechanism to establish fair value for condemned property. The C City Redevelopment Authority (“Authority”) was created to administer Act, which became effective on January 1, 2011.

The Pilgrim Family (“Pilgrims”) owned substantial land in C City. Five of Pilgrims’ tenants, who qualified under the Act, filed applications asking Authority to condemn 20 acres of land owned by Pilgrims. Authority held a public hearing on the proposed condemnation, made the finding that the acquisition of 20 acres of Pilgrims’ lands would effectuate the public purposes of Act, and began the process of condemnation. Pilgrims filed suit in the appropriate federal district court, alleging that Authority’s action constituted an unlawful taking in violation
of the public use requirement of the Takings Clause of the Fifth Amendment to the federal constitution and sought preliminary and permanent injunctive relief against the action.

1. Assume that the issue is ripe for resolution and that the court has jurisdiction to decide the matter. Based on the facts, how would the court analyze and decide the merits of the constitutional issue?

2. Identify each of the factors that would be considered in determining whether preliminary injunctive relief should be granted, and discuss each factor under the facts presented, incorporating, if applicable, your response to question #1 by reference without restating it in its entirety.

   Hotel is a 250-room hotel and conference center, housed in a rambling, old building in C City. Donna has worked for Hotel for 10 years and was promoted during that time to manager of housekeeping services, where she supervises a staff of 20 people. The written job description for her position specifically includes daily tasks of walking to at least 10% of the occupied hotel rooms, lifting mattresses to check cleanliness, and looking under beds and furniture for evidence of vacuuming; and, if there is a shortage of housekeepers, filling in for absent workers.

   Donna injured her knee at home, and she was on medical leave until May 2011, recovering from knee surgery. On May 15, Donna’s physician cleared her to return to work with permanent limitations, including a prohibition on lifting objects over 10 pounds, no bending, squatting or stooping, and very limited walking. Donna came back to work, presented the doctor’s note, and requested that another employee be assigned to perform the job functions which she was unable to perform because of the limitations imposed by her doctor. Hotel refused her request and terminated Donna’s employment for her inability to perform the functions required by the position. After satisfying administrative prerequisites for filing suit, Donna filed suit in the appropriate Federal District Court, alleging disability discrimination in violation of the Americans with Disabilities Act.

3. Under the facts, will Donna be successful in her claim of discrimination?
Question No. 4: Examiner’s Analysis

1. The Constitutional issue will be analyzed by the Court under the Fifth Amendment Takings Clause, and the taking by Authority under the Act will likely be considered for public use, based on the determination of the state legislature.

The Fifth Amendment of the United States Constitution, applicable to the States through the Fourteenth Amendment, provides, in pertinent part: “private property [shall not] be taken for public use, without just compensation.” Act will effect a taking of Pilgrims’ property for redistribution to lessees, and an appropriate mechanism exists for establishing fair value for the condemned property. Authority’s action under the Act is being challenged by Pilgrims as a violation of the public use requirement of the Takings Clause. The issue is whether the taking by Authority under the Act will be for “public use,” given that it will effect the transfer of land from one private person through a public entity to another private person.

The Supreme Court has held that “one person’s property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.” Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55, 80, 57 S.Ct. 364 (1937). “[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.” Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 241, 104 S.Ct. 2321 (1984). The State’s police power will determine whether the taking may constitute a “public use.” Id. at 240. In the case of Old Dominion Land Co. v. United States, 269 U.S. 55, 66, 46 S.Ct. 39 (1925), Justice Holmes, writing for the Court, stated that deference to the legislature’s “public use” determination is required “until it is shown to involve an impossibility.”

In Hawaii, supra, the Supreme Court held that the Constitutional requirement is satisfied if the legislature “rationally could have believed that the [Act] would promote its objective.” Id. at 242. The Court upheld the determination by the Hawaii legislature that the public interest would be served by reducing the land oligopoly that had existed for centuries and had “created artificial deterrents to the normal functioning of the State’s residential land market….” Id. at 241-242. The Court further found that “regulating oligopoly and the evils associated with it is a classic exercise of a State’s police powers.” Id. at 242.

The Court has also upheld the exercise of eminent domain for purposes of economic development by the City of New London, CT, as a valid exercise of its police power under the Fifth Amendment. Kelo, et. al., v. City of New London, et. al., 545 U.S. 469, 125 S. Ct. 2655 (2005). The Court recognized that the Fifth Amendment does not impose a literal requirement that condemned property be put into use for the general public and applied the long-accepted broader interpretation of “public use” as “public purpose”. Id. at 480 (citations omitted). The court gave deference to the legislative determination that the area was sufficiently distressed to justify a program of economic rejuvenation and found that, because the plan served a public purpose of economic development, the taking satisfied the public use requirement of the Fifth Amendment notwithstanding the fact that the pursuit of a public purpose benefitted individual private parties. Id. at 484, 485.
Here, the State S legislature has determined that it would be in the public interest to allow redistribution of land in C City under certain specific circumstances to expand the real estate market and promote business and economic growth. Since there is a reasonable public purpose for the action taken by Authority under the Act, it is likely that the court will defer to the legislative judgment and uphold Authority’s taking of Pilgrim’s property under the Act.

2. **In addition to Plaintiff’s likelihood of success on the merits, the court would consider whether Plaintiff will suffer irreparable injury, the harm to other interested parties, and whether the public interest will be served by issuance of a preliminary injunction.**

Rule 65 of the Federal Rules of Civil Procedure provides for the granting of a preliminary injunction after a hearing. Preliminary injunctive relief is extraordinary equitable relief within the court’s discretion.

The requisite considerations for preliminary injunctive relief are: (1) a movant’s likelihood of success on the merits; (2) whether the movant will suffer irreparable injury without a preliminary injunction; (3) whether issuance of a preliminary injunction would not cause substantial harm to other interested parties; and (4) the absence of harm to the public interest. *Winkelman v. New York Stock Exchange*, 445 F.2d 786 (3d Cir. 1971). The third element has also been described as “the extent to which defendant will suffer irreparable harm if the preliminary injunction is issued.” *Pappan Enterprises, Inc. v. Hardees Food Systems*, 143 F.3d 800, 803 (3d Cir. 1998). The Supreme Court has referred to this element as whether “the balance of equities tips in [plaintiff’s] favor,...” *Winter, et. al., v. Natural Resources Defense Council*, 555 U.S. 7, 20, 129 S.Ct. 365, 374 (2008).

Because it has been determined in the first issue that Authority’s taking under the Act is likely to be found to be for a public purpose and to be upheld as a constitutional taking under the Fifth Amendment, there is little likelihood of movant’s success on the merits of the claim.

Second, it is unlikely that Pilgrims will suffer irreparable injury if a preliminary injunction is denied. Should movant ultimately prevail on the merits of the claim, title to the land could be returned to Pilgrims and the [former] tenants be returned to their status as lessees. If Pilgrims’ risk is only financial, this fact would weigh against preliminary injunctive relief. However, if there were a risk that [former] tenants may make permanent changes to the land, this might be seen as irreparable injury. In reviewing a motion for preliminary injunctive relief, if a court finds that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673 (1976). If, however, movant fails to show the likelihood of success on the merits of the constitutional claim, no such finding is required. *Michigan Rehabilitation Clinic, Inc., P.C. v. City of Detroit*, 310 F.Supp. 2d 867, 871 (E.D. Mich. 2004).

Third, the issuance of the requested preliminary injunction will not likely cause substantial harm to others since it will maintain the status quo pending the final decision of the
court. The parties seeking to obtain Pilgrims’ land could continue to use the land as lessees until a final determination is made.

Finally, the stated reason for redistributing privately-held land under the Act to expand the land ownership population is for the public purpose of fostering economic and business growth, so it is likely that a court would view granting of preliminary injunctive relief as harmful to the public interest.

A court would apply the four factors required for injunctive relief in making a determination as to whether the request of Pilgrims for preliminary injunctive relief would be granted.

3. Donna will likely not be successful in her claim of discrimination under the Americans with Disabilities Act because she will not be able to establish that she could perform the essential functions of her position with reasonable accommodation.

The Americans with Disabilities Act, as amended, (ADA) prohibits “discrimination [by a covered entity] against a qualified individual on the basis of disability in regard to …hiring, advancement, or discharge of employees …and other terms, conditions, and privileges of employment.” 42 U.S.C.A. §12112(a). Such discrimination is defined to include “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity….” 42 U.S.C.A. §12112 (b)(5)(A).

Donna will seek to establish that the denial of her requested accommodation, and her subsequent termination, constituted unlawful discrimination in violation of the ADA. In order to establish a *prima facie* case under the ADA, Donna will need to establish: (1) that her employer is subject to the ADA; (2) that she was disabled within the meaning of the ADA; (3) that she was otherwise qualified to perform the essential functions of her job with or without reasonable accommodation; and (4) that she suffered adverse employment action because of her disability. *Giordano v. City of New York*, 274 F.3d 740, 747 (2d Cir. 2001). Thus, she will need to establish that she is a “qualified individual with a disability”, that her employer is a “covered entity”, and that she was discriminated against on the basis of her disability.

A “covered entity” includes an employer, defined as “a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year…” 42 U.S.C.A. §12111 (2); (5). It would appear that Hotel is an “employer” for purposes of the ADA.

Next, Donna must show that she is a “qualified individual with a disability” within the meaning of the ADA. A disability is defined as: “(A) A physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or ( C ) being regarded as having such an impairment…” 42 U.S.C.A. §12102(1). A “physical impairment” is defined in the ADA regulations as: “(1) any physiological disorder
or condition . . . or anatomical loss affecting one or more body systems such as … musculoskeletal.” 29 C.F.R. §1630.2(h).

“Major life activities” is defined to include but not be limited to: “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, …and working.” *Id.* at 12102(2) (emphasis added). “Substantially limits” has been defined broadly as a limitation in the ability of an individual to perform major life activities, as compared to most people in the general population. 29 C.F.R. §1630.2(j).

Although all knee injuries do not necessarily qualify as disabilities for purposes of the ADA, a knee injury that substantially limits a major life activity can constitute a disability. *See Moreno v. Grand Victoria Casino*, 94 F.Supp. 2d 883 (N.D. Ill. 2000). Since Donna can document an injury to her knee, subsequent surgery, and her physician’s statement that she is permanently limited in various aspects of her physical mobility, such as walking, lifting and bending, that most people can readily be expected to be able to do, she should be able to establish that she is disabled within the meaning of the ADA.

Finally, Donna must show that she is a qualified individual within the meaning of the ADA. A “qualified individual” is defined as “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C.A. §12111 (8).

Thus, the main issue appears to be whether Donna could perform the essential functions of her job, with or without reasonable accommodation. An “essential function” is one which is a fundamental job duty of a position. *Kvorjak v. Maine*, 259 F.3d 48, 55 (1st Cir. 2001), 29 C.F.R. §1630.2(n)(1). “Evidence of whether a particular function is essential includes, but is not limited to: (i) The employer’s judgment as to which functions are essential; (ii) Written job descriptions prepared before advertising or interviewing applicants for the job; (iii) The amount of time spent on the job performing the function; (iv) The consequences of not requiring the incumbent to perform the function; … .” 29 C.F.R. §1630.2(n)(3); *Desmond v. Yale-New Haven Hospital, Inc.*, 738 F.Supp.2d 331 (D. Conn. 2010); *Turner v. Hershey Chocolate USA*, 440 F.3d 604 (3d Cir. 2006).

In this case, Donna is unable to do more than limited walking and lifting, and she is prohibited from bending, squatting, or stooping, all of which she would be required to do in performing the daily functions that are part of the written job description and, apparently, considered essential functions of the position by her employer. It does not appear that she can challenge her inability to perform the essential job functions without accommodation. Her physician has stated that the limitations are permanent. Since the job of housekeeping supervisor requires that she check the work of the housekeeping staff and, if necessary, fill in for absent staff, it appears that the work she cannot perform because of her limitations is essential to the position, and that she is unable to perform these functions of her job on a permanent basis. Accordingly, the inquiry moves to whether she could perform the essential functions of her job with reasonable accommodations. In the case of *Desmond v. Yale-New Haven Hospital*, *supra* at 347-348, a former physician assistant admitted that she could no longer perform certain of her job duties, and requested that other members of the medical team perform those functions. The
court, in granting summary judgment to her former employer, found that the requested accommodation was not “reasonable” because it would have eliminated certain essential functions of her job, and elimination of essential functions is not acceptable “job restructuring.”

Here, the requested accommodation was to remove those job elements that Donna could no longer perform and assign them to another employee. “Job restructuring” is included as a possible “reasonable accommodation” under the ADA, 42 U.S.C.A. §12111(9)(B); and such restructuring may include reallocating or redistributing nonessential, marginal job functions. 29 C.F.R. pt. 1630, App. §1630.2(o) (emphasis added), or “altering when/how an essential function is performed.” Id. However, restructuring does not require such reallocation, and “…a reasonable accommodation can never involve the elimination of an essential function of a job.” Shannon v. New York City Transit Authority, 332 F.3d 95, 100 (2d Cir. 2003); see also, Wells v. BAE Sys. Norfolk Ship Repair, 483 F.Supp. 2d 497 (E.D. Va. 2007).

Accordingly, it appears that Donna will be unsuccessful in establishing a claim of discrimination in violation of the ADA because the activities she is unable to perform because of her limitations are “essential functions” of the position, and, her request to have these activities transferred to another employee does not constitute a reasonable accommodation. Since Donna is unable to perform essential functions of her job with or without reasonable accommodations, she will not be successful in her claim of discrimination under the ADA.
Question No. 4: Grading Guidelines

1. **Constitutional Law**

Comments: Applicants should demonstrate an understanding of the Fifth Amendment to the United States Constitution’s “Takings Clause”, and should apply the law to the facts to reach a well-reasoned conclusion.

6 points

2. **Civil Procedure**

Comments: Applicants should demonstrate knowledge of the requirements for preliminary injunctive relief, and apply the law to the facts in discussing the factors that would be considered by the court.

4 points

3. **Americans with Disabilities Act**

Comments: Applicants should demonstrate an understanding of the requirements for making a claim under the Americans with Disabilities Act, and should apply the law to the facts to reach a well-reasoned conclusion.

10 points
Question No. 5

Joe, a retired executive chef, owned two Pennsylvania properties: a mansion in Big City known as Blackacre and a cottage in Rural County known as Whiteacre. Tired of paying high property taxes and rising maintenance costs, Joe decided to move to an apartment and to give Blackacre to his two sisters, Ann and Betty. Using a form that he found at “Be Your Own Attorney.com,” Joe conveyed Blackacre to Ann and Betty by a deed which stated: “Said Grantor does hereby grant, bargain, alien and enfeoff Blackacre unto the said Grantees, their heirs and assigns, as joint tenants and as in common, with right of survivorship to the survivor of them.”

Joe’s grandson, Bob, was a student at Le Cordon Bleu Culinary School (School) in Big City. The final requirement for Bob to graduate from the School as a pastry chef was to bake a five layer cake. Bob considered this task too trivial for his considerable culinary talents, and instead of working on the cake, he spent all of his time with his new girlfriend, Cindy, a 17 year old who lived independently from her parents. Joe, who made many prior cash gifts to Bob while he was attending the School, very much wanted Bob to follow in his footsteps as a chef. Joe told Bob: “If you bake a cake to fulfill your requirement to graduate from the School, I will pay you $20,000.”

Cindy solely supported herself by working as a barista at a Big City coffee house located far away from her apartment. Cindy told Bob that she was in danger of losing her job at the coffee house and ultimately her apartment because Big City Transit Authority had announced that it would be eliminating the bus route that Cindy used to get to the coffee house due to state budget cuts. Bob asked Joe to help Cindy, and Joe agreed to sell a car to Cindy for $3,000. The written agreement dated January 15, 2012, provided that Cindy would pay $100 to Joe upon signing the agreement and $100 each month until the balance was paid.
Joe later discovered that his entire savings had been wiped out when his investment advisor was arrested and charged with running an elaborate “Ponzi” scheme. As a result, Joe fell seriously delinquent in the payment of the mortgage and property taxes for Whiteacre. Joe orally offered to sell Whiteacre to Dan in return for Dan’s promise to pay off the delinquencies and to make all future mortgage payments. Dan orally agreed to Joe’s terms, paid the delinquencies and immediately moved to Whiteacre where he continuously and exclusively has resided. Besides paying the mortgage and taxes, Dan made a number of substantial permanent improvements to Whiteacre that greatly enhanced the property’s appearance and value.

On February 1, 2012, Cindy turned 18 years of age. Six months later, Cindy stopped making payments and returned the car to Joe saying that she could no longer afford the high cost of gasoline, parking fees and insurance.

1. Shortly after Joe’s conveyance of Blackacre, Ann died. Ann’s will, among other things, specifically devised her interest in Blackacre to the Society for the Protection of Homeless Cats. What is the state of title to Blackacre following Ann’s death?

2. Bob baked the cake, graduated from the School and obtained a high-paying position as a pastry chef at an elite Big City restaurant. When Bob requested payment of the $20,000, Joe refused, stating, “I was wiped out by my crooked investment advisor. Besides, your cake is not worth $20,000 to me. Baking that cake was for your own good. Look at the job that it got you!” Without utilizing promissory estoppel, discuss whether an enforceable contract was created between Bob and Joe?

3. Joe sued Cindy for breach of contract for the remaining monies owed by Cindy on the agreement for the sale of the car. What defense should Cindy raise to the breach of contract suit, and what arguments should Joe make in opposition to this defense?

4. A Marcellus Shale drilling company offered Joe a substantial sum of money to purchase Whiteacre. Desperate for cash, Joe entered into a written agreement to sell Whiteacre to the drilling company. After learning of this agreement, Dan called Joe and demanded that Joe provide him with a deed to Whiteacre. When Joe refused, Dan sued Joe for specific performance. Can Dan enforce the oral agreement with Joe for the sale of Whiteacre?
1. **The language in Joe’s deed will be construed as creating a joint tenancy with right of survivorship between Ann and Betty, not a tenancy in common. Betty, as the survivor, is the sole owner of Blackacre following Ann’s death.**

Concurrent estates are estates owned by two or more persons at the same time. R. Boyer, H. Hovenkamp and S. Kurtz, *The Law of Property: An Introductory Survey*, Chapter 5, Section III, at p.100 (4th ed.). The two forms of concurrent ownership of property between persons who are not married are joint tenancy and tenancy in common.


In contrast, a tenancy in common is a concurrent estate with only the unity of possession. *In Re Sale of Property of Dalessio*, 657 A.2d 1386, 1387 n.1 (Pa. Cmwlth. 1995). Unlike a joint tenancy, where joint tenants own an undivided part of the whole, each tenant in common owns the whole of the undivided interest. Because a right of survivorship is not associated with a tenancy in common, each tenant can dispose of his interest or any portion thereof by deed or by will and the tenant’s interest can pass to his heirs if the tenant dies intestate. 1 Ladner Pennsylvania Real Estate Law, § 8.03 (5th ed. R. M. Friedman 2006).

Unlike early common law when joint tenancies were favored, the presumption under current law is that a conveyance or devise to two or more persons who were not husband and wife creates a tenancy in common. Pennsylvania follows the contemporary trend of disfavoring joint tenancies with right of survivorship. *Pennsylvania Bank & Trust Co v. Thompson*, 432 Pa. 262, 247 A.2d 771 (1968). By statute, the incident of survivorship has been eliminated and an instrument creating a joint estate will be presumed to create a tenancy in common. See, Pa. Stat. Ann. tit. 68, § 110 (2004). Pennsylvania’s statute on joint tenancies, however, has been held only to be statute of construction; it does not proscribe the creation of a joint tenancy with right of survivorship. *Teacher v. Kijurina*, 365 Pa. 480, 487-88, 76 A.2d 197, 201 (1950).

In light of Pennsylvania’s statutory preference for tenancy in common, whether a particular conveyance or devise to two or more persons creates a joint tenancy with right of survivorship becomes a question of intent. *Maxwell v. Saylor*, 359 Pa. 94, 58 A.2d 355 (1948). In order to create a right of survivorship, the intent to do so must be expressed with sufficient clearness to overcome the statutory presumption that survivorship is not intended. *Isherwood v. Springs-First Nat. Bank*, 365 Pa. 225, 74 A.2d 89 (1950). Intent to create a joint tenancy with right of survivorship is to be gleaned from the language used in the instrument. *McCallum’s Estate*, 211 Pa. 205, 60 A. 903 (1905). No particular words must be used in its creation and
courts have found the intent to create a joint tenancy with right of survivorship trumps the use of imprecise or improper language in creating it. *In Re Estate of Quick, supra.*

In *Zomisky v. Zamiska,* 449 Pa. 239, 296 A.2d 722 (1972), the Pennsylvania Supreme Court held that a conveyance to a father and son as “joint tenants and as in common with the right of survivorship” created a joint tenancy with right of survivorship. In *Zomisky,* the Court declared that the use of words “joint tenants” in connection with the operative words “right of survivorship” was sufficient to remove any ambiguity and indicated the intent of the parties to have title to the property pass to the survivor upon the death of the other. Similarly, in *Teacher v. Kijurina, supra,* the Court observed that numerous other cases held that the words “survivor” or “right of survivorship” was a reasonably clear expression of intent sufficient to overcome the statutory presumption against a joint tenancy with right of survivorship.

Although the deed to Blackacre used the phrase “as in common,” a court applying Pennsylvania law would probably find the use of “joint tenants,” and “right of survivorship” and “survivor” a sufficient expression of intent to overcome not only the statutory presumption in favor of tenancy in common but also the ambiguity in Joe’s deed and therefore created a joint tenancy with right of survivorship. Because the deed created a joint tenancy with right of survivorship, Ann would not have been able to transfer her interest in Blackacre by will to the Society for the Protection of Homeless Cats. Therefore, upon Ann’s death, Betty, as the survivor, would hold title to Blackacre.

2. **Whether Bob has an enforceable contract with Joe depends upon whether Joe’s promise to pay $20,000 to Bob if Bob baked a cake to satisfy the requirement to graduate from the culinary school is supported by consideration.**

In order to form an enforceable contract under Pennsylvania law, there must be an offer, acceptance, and consideration. *Jenkins v. County of Schuylkill,* 441 Pa. Super. 642, 648, 658 A.2d 380, 383, appeal denied, 542 Pa. 647, 666 A.2d 1056 (1995). In this case, the initial two elements for an enforceable contract are clearly present. Joe made an offer to pay $20,000 to Bob, and Bob accepted the offer by baking a cake and satisfying the final requirement to graduate from culinary school. The remaining question is whether the third element – consideration – is present.


The legal value element for consideration requires that a benefit must be conferred upon the promisor or a detriment caused to or suffered by the promisee. *Hillcrest Foundation, Inc. v. McFeaters,* 332 Pa. 497, 2 A.2d 775 (1938). “A test of good consideration is whether the promisee, at the instance of the promisor, has done, forborne or undertaken to do anything real, or whether he has suffered any detriment, or whether . . . he has done something that he was not bound to do, or has promised to do some act, or has abstained from doing something.” *Presbyterian Board of Foreign Missions v. Smith,* 209 Pa. 361, 363, 58 A. 689, 690 (1904).
When used in describing consideration, the terms “benefit” and “detriment” are only used in a technical sense and have no necessary reference to material advantage to the parties. *Stelmack v. Glen Alden Coal Co., supra.* Therefore, any change in position, no matter how slight, is sufficient consideration to support a contract. *Hillcrest Foundation, Inc. v. McFeaters, supra.*

Consideration is more than a promisee suffering a legal detriment. The detriment incurred by the promisee must be the “*quid pro quo*” or the “price” of the promise. *Stelmack v. Glen Alden Coal Co., supra,* 339 Pa. at 414, 14 A.2d at 129. Put in other terms, “consideration must actually be bargained for as the exchange for the promise.” *Id.* As part of the bargaining, “the promise must induce the detriment and the detriment must induce the promise.” *Pennsy Supply v. American Ash Recycling Corp.,* 895 A.2d 595, 601 (Pa. Super. 2006). (quotation omitted).

The element of bargained-for-exchange, however, must be distinguished from a conditional gift. “If a promisor merely intends to make a gift to a promisee upon the performance of a condition, the promise is gratuitous and the satisfaction of the condition is not consideration for a contract.” *Stelmack v. Glen Alden Coal Co., supra,* 339 Pa. at 414, 14 A.2d at 129. Distinguishing between bargained for consideration and a condition of a gratuitous promise is often difficult. *Pennsy Supply v. American Ash Recycling Corp., supra.* The determination is essentially dependent upon the outward manifestations of the parties and the surrounding circumstances. Dean Murray has suggested that courts should consider such factors as the discernible benefit to the promisor, the extent of the detriment to the promisee, and the nature of the promise in deciding whether there is bargained for consideration or a conditional gift. *MURRAY ON CONTRACTS, supra,* at § 60 C.

In this case, Bob baked a cake to fulfill the requirement for graduation. Although Bob and Joe regarded the task as trivial, Bob’s action arguably constituted a change of position and resulted in the incurring of a legal detriment.

The more difficult determination is whether Bob’s legal detriment was actually the product of bargained-for-exchange. Although Bob’s actions were induced by Joe’s promise, it is less clear whether Bob’s actions induced Joe’s promise. The facts state that Joe had made many prior cash gifts to Bob while he was attending the culinary school. Given these circumstances, Joe’s promise could be viewed as gratuitous because he had no particular interest in the detriment that Bob was to incur to take advantage of the promise to pay the $20,000. On the other hand, the facts state that Joe very much wanted Bob to follow in his footsteps as a chef. Thus, it can be asserted that Bob’s baking of a cake and graduating from culinary school conferred a benefit upon Joe and actually induced him to make the promise of the $20,000.

Whether a contract is supported by consideration presents a question of law. *Pennsy Supply v. American Ash Recycling Corp., supra.* A court would have to weigh these arguments in determining whether there was consideration to make Joe’s promise binding.

3. Cindy should assert her status as a minor in defense to Joe’s breach of contract action. In opposition to this defense, Joe should argue that the car is considered a necessary and that Cindy ratified the contract by continuing to make payments and by failing to make a timely disaffirmance upon reaching majority.
In Pennsylvania, individuals who are 18 years of age or older have a right to enter into binding and legally enforceable contracts. Pa. Cons. Stat. Ann. tit. 23, § 5101 (a). As a general rule, contracts entered into by a minor are voidable by the minor, but not void. *Aetna Casualty & Surety Co. v. Duncan*, 972 F.2d 523, 526 (3d Cir. 1992). This means that a minor can render a contract a nullity and avoid liability by disaffirming the contract within a reasonable time after the minor attains majority age. *Milicic v. Basketball Marketing Co., Inc.*, 857 A.2d 689, 694 (Pa. Super. 2004). As explained by the Pennsylvania courts, the purpose of the rule rendering contracts of a minor voidable is “to protect minors from contracts which may be disadvantageous to them and to protect them ‘against their own lack of discretion and against the snares of designing persons.” *Pankas v. Bell*, 413 Pa. 494, 501-02, 198 A.2d 312, 315 (1964), quoting, *O’Leary’s Estate*, 352 Pa. 254, 256, 42 A.2d 624, 625 (1945).

There are no formal requirements that a minor must follow to disaffirm a contract. *See*, J.E. Murray, Jr., *MURRAY ON CONTRACTS* § 24 (4th ed. 2001). A minor’s return of a purchased object, as Cindy did here, is a clear manifestation of intent not to be bound by the contract. *Musser v. Schock*, 95 Pa. Super. 406 (1928).

Joe can raise several arguments in opposition to Cindy’s disaffirmance of the contract. Like other jurisdictions, Pennsylvania recognizes that a contract made by a minor for what are known as “necessaries” is enforceable. *The Frank Spangler Co. v. Haupt*, 53 Pa. Super. 545 (1913). What constitutes a necessary, however, has no hard and fast meaning, but depends upon such factors as the minor’s standard of living and particular circumstances as well as the ability and willingness of the minor’s parent or guardian, if one exists, to supply the needed services or articles. Ultimately, what constitutes a necessary for a particular minor is a question of fact to be decided based upon all of the circumstances of the case. *Rivera v. Reading Housing Authority*, 819 F. Supp. 1323, 1332 (E.D. Pa. 1993), aff’d sub nom., *Rodriguez v. Reading Housing Authority*, 8 F.3d 961 (3d Cir. 1993). Given the fact intensive nature of the question, Pennsylvania courts have reached different conclusions regarding whether a car is a necessary for purposes of a minor’s disaffirmance of a contract. *Compare, State Farm Mutual Automobile Insurance Co. v. Skivington*, 28 D. & C.4th 358 (C.P. Cumberland 1996) (car used by a minor to go back and forth to work a necessary preventing disaffirmance of insurance contract) *with Musser v. Schock*, 95 Pa. Super. 406 (1928) and *Dobson v. Rosini*, 20 D. & C.2d 537 (C.P. Northumberland 1959) (minor’s purchase of car disaffirmed). Whether a car for a person in Cindy’s particular situation constituted a necessary and therefore prevented the contract from being disaffirmed would be a question to be decided by the trier of fact in the case.

In addition, Joe can argue that Cindy ratified the contract. Joe can assert that Cindy’s continued use of the car and her payments to Joe after reaching her majority constitute positive acts manifesting an intention to regard the contract as binding. *See, Campbell v. Sears, Roebuck & Co.*, 307 Pa. 365, 161 A. 310 (1932). Joe further can claim that Cindy failed to disaffirm the contract to purchase the car within a reasonable time after she turned eighteen. What constitutes a reasonable time for disaffirming a contract is dependent upon all of the surrounding circumstances including whether the parties have performed the contract when the minor attained majority and the degree of prejudice to the adult in permitting a longer or shorter time to be considered reasonable. *MURRAY ON CONTRACTS, supra*. A thirteen month delay in
disaffirming a contract made by a minor has been held to be unreasonable, where the minor repeatedly recognized the contract after attaining majority. *Campbell v. Sears, Roebuck & Co.*, supra. The lapse of three months after reaching majority before disaffirming a contract has been held to be reasonable. *Haines v. Fitzgerald*, 108 Pa. Super. 290, 165 A. 52 (1933). Whether Cindy’s actions constitute a ratification of the contract or an untimely disaffirmance of the contract also would be questions to be decided by the trier of fact in this case.

4. **Dan can enforce the oral agreement for the sale of Whiteacre under the partial performance exception to the Statute of Frauds.**

The Statute of Frauds requires that contracts for the sale of real property must be in writing. Pa. Stat. Ann. tit. 33, § 1 (1997); *Rosen v. Rittenhouse Towers*, 334 Pa. Super. 124, 131, 482 A.2d 1113, 1116 (1984). The purpose of the statute is to prevent fraudulent claims and perjury. The Statute of Frauds is not a mere rule of evidence, but a declaration of public policy, which, absent equities sufficient to take the case out of the statute, operates as a limitation upon judicial authority to afford a remedy unless renounced or waived by a party entitled to claim its protection. *Kurland v. Stolker*, 516 Pa. 587, 533 A.2d 1370 (1987). In this case, Joe can answer Dan’s action for specific performance by asserting that the alleged agreement for the sale of Whiteacre is not in writing and is therefore unenforceable because it violates the Statute of Frauds.

Even though the Statute of Frauds generally prevents the enforcement of contracts for the sale of real property that are not in writing, an oral agreement for the sale of real property can be enforced under the partial performance doctrine. To demonstrate partial performance to take an oral agreement for the sale of real property out of the ambit of the Statute of Frauds, the buyer, after initially providing full, complete and satisfactory proof of the terms of the agreement, including the amount of consideration, must show: (1) that possession of the property was taken in pursuance of the oral contract and at or immediately after the time that the contract was made; (2) that the change of possession was notorious and has been exclusive, continuous and maintained; and (3) that there was performance or part performance by the buyer which cannot be compensated in damages and such as would make rescission of the oral contract inequitable and unjust. *Kurland*, supra, 516 Pa. at 593, 533 A.2d at 1373.

The facts state that Dan immediately moved to Whiteacre following his agreement with Joe and that he continuously and exclusively resided on the property after taking possession. Based upon these facts, Dan should be able to satisfy the initial two requirements necessary for the partial performance exception to the Statute of Frauds.

The third element needed to establish the partial performance exception can be satisfied by the showing that valuable improvements were made that cannot be readily compensated in money damages. *Id.* In *Rader v. Keiper*, 285 Pa. 579, 132 A. 824 (1926), the Pennsylvania Supreme Court discussed the type of improvements that would take an oral contract for the sale of real property out of the Statute of Frauds. In *Rader*, the Court stated: “Repairing and improving a dwelling house or outbuildings are such improvements as any tenant for a term of years might make, and do not in any wise add to the permanent value of the land.” *Id.* at 586, 132 A. at 827. The facts here state that Dan made a number of substantial permanent
improvements to Whiteacre that greatly enhanced the property’s appearance and value. These improvements are similar in character and nature to those required by the Court in *Rader* to enforce an oral agreement for the sale of real estate. *Id.* Thus, Dan would likely be able to satisfy the third element of the partial performance doctrine needed to enforce the oral contract with Joe for the sale of Whiteacre.

Although Joe can invoke the Statute of Frauds as a defense to Dan’s suit because the agreement for the sale of Whiteacre was not in writing, Dan, assuming that he can satisfactorily prove the terms of the oral contract, is likely to prevail in his action for specific performance based upon the partial performance doctrine.
Question No. 5: Grading Guidelines

1. Concurrent Estates - Joint Tenancy with Right of Survivorship and Tenancy in Common

Comments: Candidates should discuss the differences between the concurrent estates of joint tenancy with right of survivorship and tenancy in common and the present statutory presumption favoring tenancy in common. Candidates should analyze the particular language of the deed set forth in the facts, reach a well-reasoned conclusion concerning whether this language overcomes the presumption favoring tenancy in common, and conclude that Betty would be the sole owner of Blackacre after Ann’s death.

6 Points

2. Consideration

Comments: Candidates should recognize that consideration is one of the three essential elements to any enforceable contract. Candidates should discuss each of the elements necessary for consideration - legal value and bargained-for exchange - and analyze whether these elements are present under the stated facts and thereby create an enforceable contract between the parties.

5 Points

3. Defense of a Breach of Contract Based Upon Minority Status

Comments: Candidates should recognize that minority status can be asserted as a defense to a contract and that contracts made by a minor are voidable, not void. Candidates also should recognize that a contract made by a minor will be enforceable when the contract is one for a necessary or when the contract has not been disaffirmed by the minor within a reasonable time after reaching majority.

4 Points

4. Statute of Frauds and the Partial Performance Exception

Comments: Candidates should recognize that the Statute of Frauds requires that contracts for the sale of real property must be in writing. Candidates also should recognize that an oral contract for the sale of property can be enforced under the partial performance doctrine. Candidates should discuss the elements needed to establish the partial performance exception and analyze the facts presented in reaching a well-reasoned conclusion concerning whether the partial performance exception is applicable.

5 Points
Question No. 6

ATV Experiences ("ATV") is a Pennsylvania general partnership that sells and services new and used all terrain vehicles. ATV also maintains an inventory of parts and supplies. Tom, Dick, and Harry are the sole general partners of ATV. Tom handles sales, Dick is the parts manager, and Harry takes care of the service side of the business.

Two months ago, the borough in which ATV’s business is located conducted pressure testing of sewer lines in the area to determine if structures in the area showed evidence that storm water was being placed into the borough’s sanitary sewer system in violation of a local ordinance. The borough determined that the building owned by ATV from which it operates was not in compliance with the ordinance. One month ago, the borough’s codes enforcement officer visited ATV and handed a notice of non-compliance to Tom. The notice required ATV to correct the deficiencies that were found within 20 days and provide the borough with proof of the same. Tom read the notice and threw it in the trash. Tom did not tell Dick or Harry about the notice. Yesterday, ATV received a notice of a fine in the amount of $2,500 from the borough for failure to comply with the notice of non-compliance.

Last week, Billy came to ATV’s sales lot to buy an all terrain vehicle as a surprise birthday present for his son, whose birthday is today. Billy identified a vehicle. Billy paid Tom, and Tom gave Billy a bill of sale for the purchased vehicle. Billy asked Tom if ATV could keep the vehicle on ATV’s lot, as an accommodation to Billy, until his son’s birthday, so as not to ruin the surprise. Tom agreed. Yesterday, the vehicle purchased by Billy was stolen from ATV’s lot.

For the past few months Harry has been working on all terrain vehicles after hours at ATV’s shop using ATV’s tools. Harry has not told Tom or Dick about his after hours activities. Harry has told customers of ATV that he can save them money if they let him work on their
vehicles after hours. Harry only accepts cash for the after hours work he is doing and has kept all of the money he has received to date, using it for his personal expenses. Yesterday, an unsatisfied after-hours customer of Harry confronted Tom about work that Harry had allegedly done wrong.

Two weeks ago, Dick telephoned Tire Company, a tire wholesaler, to order 100 tires at a price of $50 per tire for ATV’s inventory. The next day Tire Company faxed Dick a confirmation accepting the order that also indicted: “any sums outstanding for more than seven (7) days after delivery shall bear interest at a rate of 1.5% per month (18% annually).” Dick received the confirmation but never discussed a finance charge with Tire Company and did not reply to the confirmation. The tires were delivered yesterday.

1. Assuming lack of notice of non-compliance would be a defense to the fine being imposed by the borough, can Dick and Harry successfully argue, on behalf of ATV, that the fine should be waived because they were not personally given notice of the violation?

2. Under Pennsylvania partnership law, what duties, if any, to ATV has Harry violated by his actions?

3. Under the Uniform Commercial Code, who bears the risk of loss for the stolen vehicle, ATV or Billy?

4. Under the Uniform Commercial Code, will Tire Company be able to enforce the interest provision contained in its confirming memo?
Question No. 6: Examiner’s Analysis

1. ATV will not be able to defend against the fine based on the lack of notice of the non-compliance to Dick and Harry because Tom was a partner acting for the partnership when he received the notice of non-compliance, and notice to a partner acting within the scope of the partnership’s business is notice to the partnership.

The Pennsylvania Uniform Partnership Act (“UPA”) provides that the law of agency shall apply under the UPA. 15 Pa. C.S.A. §8304(b). The UPA also states that “[a] person has ‘notice’ of a fact, within the meaning of this chapter, when the person who claims the benefit of the notice: (1) states the fact to the other person; or (2) delivers through the mail, or by other means of communication, a written statement of the fact to the other person or to a proper person at his place of business or residence.” 15 Pa. C.S.A. §8303(b). When Tom received the notice of non-compliance from the borough he had notice of ATV’s non-compliance as determined by the borough when it conducted the pressure testing.

Given that Tom was on notice of the violation, the issue is whether ATV was also on notice. It is clear under the UPA that every partner is an agent of the partnership for the purpose of its business. 15 Pa. C.S.A. §8321(a). When Tom was handed the notice of non-compliance he was at ATV’s place of business acting for and on behalf of ATV. The UPA provides:

Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner operate as notice to or knowledge of the partnership except in the case of a fraud on the partnership committed by or with the consent of that partner.

15 Pa. C.S.A. §8324. Essentially, notice to a partner acting on behalf of the partnership is notice to the partnership.

Tom was acting as an agent of the partnership when he received the notice of non-compliance. He was not in collusion with the borough to have a fine imposed against ATV. He simply ignored the notice and did not tell the other partners of his receipt. Under these circumstances notice to Tom was notice to ATV and, therefore, ATV should not be able to avoid the fine on the basis of lack of notice of non-compliance to the other partners.

2. Harry has breached his fiduciary duty to ATV by competing with ATV and has breached his duty to account to ATV for the money that he has received as a result of his after hour operations.

The UPA and case law provide that each partner in a general partnership has a fiduciary duty to the partnership and the other partners. “Partners stand in a fiduciary relationship to copartners; each is under a duty to act for the benefit of all and not to gain individual advantage
at the expense or to the detriment of other partners.” *Bracht v. Connell*, 313 Pa. 397, 170 A. 297 (1933). When a partner breaches this duty and derives benefit as a result, the UPA states, “[e]very partner must account to the partnership for any benefit and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property.” 15 Pa. C.S.A. §8334. A partner cannot benefit personally from the use of partnership assets or by personally engaging in the business of the partnership without the consent of the other partners.

Harry has had a personal enterprise going to the detriment of ATV. Presumably, if his customers were not going to him they would be serviced by ATV during normal business hours. Harry is competing with ATV and taking away business that would otherwise benefit ATV and its partners. Additionally, Harry is using ATV’s shop and tools while competing with ATV. Harry has breached his fiduciary duty to ATV and the other partners. The UPA requires Harry to account to ATV for the money that he has received from the after hours operation. Any monies received by Harry would be deemed to be held in trust for the benefit of ATV and should have been turned over to ATV. By keeping the monies he received and using them for his personal expenses, Harry breached his duty to account for the benefits he improperly received.

3. **Under the Uniform Commercial Code, ATV bears the risk of loss for the all terrain vehicle until it is picked up by Billy.**

The Pennsylvania Uniform Commercial Code, Article 2, Sales (the “Code”), generally applies to transactions in goods. 13 Pa. C.S.A. §2102. “Goods” are defined as “all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Division 8) and things in action. 13 Pa. C.S.A. §2105(a). The all terrain vehicle involved in this case is a good under the Code.

ATV is also a merchant under the Code. The Code defines a merchant as “[a] person who: (1) deals in goods of the kind; or (2) otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.” 13 Pa. C.S.A. §2104. Clearly, ATV deals in the sale of all terrain vehicles.

Under the facts we have a loss of a good through no fault of either the buyer or the seller. The issue is who bears the risk of loss in such a situation. Section 2509 of the Code addresses this question. Section 2509 is broken into three categories, which apply unless there is a contrary agreement of the parties. Here, there is no evidence in the facts of an agreement between the parties as to who bears the risk of loss in this situation. The first category addresses risk of loss where the contract of sale requires or authorizes the seller to ship the goods by carrier. The second addresses situations where the goods are being held by a bailee to be delivered without being moved. Subsection (c) then provides “In any cases not within subsection (a) or (b), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise on tender of delivery.” 13 Pa. C.S.A. §2509(c). ATV is a merchant seller and thus risk of loss
stays with ATV until the buyer has taken receipt of the goods. The Code indicates that “receipt” has occurred when the buyer has taken physical possession of the good. 13 Pa. C.S.A. §2103(a).

ATV is not a seller who is to ship the all terrain vehicle with a carrier nor is it a bailee of a good to be delivered without being moved (e.g., grain being held in a warehouse). Instead, ATV is a merchant seller holding a purchased good on its lot for pick up by its buyer as an accommodation to the buyer. Under these circumstances the seller bears the risk of loss. Comment 3 to Section 2509 indicates: “[w]hether the contract involves delivery at the seller’s place of business or at the situs of the goods, a merchant seller cannot transfer risk of loss and it remains upon him until actual receipt by the buyer, even though full payment has been made and the buyer has been notified that the goods are at his disposal. . . . The underlying theory of this rule is that a merchant who is to make physical delivery at his own place continues meanwhile to control the goods and can be expected to insure his interest in them. The buyer, on the other hand, has no control of the goods and it is extremely unlikely that he will carry insurance on goods not yet in his possession.” One might argue that ATV is a bailee or that ATV is acting as agent of the buyer and that therefore the buyer is in possession via his agent, but these arguments would most likely fail. See, generally, White and Summers, Uniform Commercial Code, 4th Ed. §5-4 and Quinn’s Uniform Commercial Code Commentary and Law Digest, 2nd Ed. §2-509[A][12].

4. **Tire Company will be able to charge the finance charge that they have proposed if the seven (7) day time limit is reasonable within the industry.**

As indicated above, ATV is a merchant. Tire Company is also a merchant as a wholesaler of tires. Between merchants, a confirming memo or a definite expression of acceptance operates as an acceptance of a verbal offer, thus creating a contract even when the acceptance contains additional terms. Tire Company has accepted the order; however, the acceptance included an additional term. The question is whether the interest provision, a term added by Tire Company and never discussed by ATV and Tire Company, becomes a part of the contract.

Section 2207 of the Code (often referred to as the battle of the forms section) provides:

Additional terms in acceptance or confirmation

(a) General rule.—A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(b) Effect on contract.—The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(1) the offer expressly limits acceptance to the terms of the offer;
13 Pa. C.S.A. §2207(a) and (b). Between merchants, a written confirmation or an expression of acceptance operates as an acceptance even though it contains additional terms. Where both parties are not merchants the new terms are proposals for addition to the contract. Between merchants, the terms become part of the contract unless the offer limited acceptance to the terms of the offer, they materially alter the contract or there is an objection to the terms within a reasonable time.

The issue at hand is whether or not the new interest provision materially alters the contract. The comments to Section 2207 indicate that an additional term will materially alter a contract if it will result in surprise or hardship if made a part of the contract. Comment 5 suggests that a clause providing for interest on overdue invoices will not materially alter the contract provided the clause is within the range of trade practice. A court would have to determine if the interest rate in question and the time frame within which it would become applicable is typical in the industry. Arguments could be made by both ATV and Tire Company regarding the reasonableness and conformity to industry standards of the interest clause added by Tire Company. While a thirty (30) day time period might appear to be more reasonable, a court would need to look at trade practice among similarly situated parties in the industry to determine if a seven (7) day time period is reasonable. See, White and Summers, Uniform Commercial Code, 4th Ed. §1-3.

While not directly at issue in determining whether the added interest provision will be enforceable, it is possible that ATV could question the enforceability of the contract based on the statute of frauds. Section 2201 provides that between merchants a memorandum confirming a contract, that meets the requirements of Section 2201, can satisfy the statute of frauds if not objected to by the receiving merchant. If a challenge were made by ATV to the enforceability of the contract based on the statute of frauds, an argument can be made under the facts that the confirming memo sent by Tire Co, which accepted the order and was not objected to by ATV, satisfies the statute of frauds.
Question No. 6: Grading Guidelines

1. **Partnerships—Notice to partner notice to partnership**

Comments: The candidates should recognize that partners are agents of the partnership for purposes of partnership business and that notice to one partner is notice to the partnership.

5 points

2. **Partnerships—Fiduciary Duty of Partners**

Comments: The candidates should recognize that partners owe a fiduciary duty to the partnership and one another and that partners must account to one another for benefits personally derived.

5 points

3. **Sales—Risk of Loss**

Comments: The candidates should recognize ATV as a merchant seller and conclude that ATV retained the risk of loss while holding the good on its lot as an accommodation to the buyer.

5 points

4. **Sales—Additional Term between Merchants**

Comments: The candidates should recognize that the parties are merchants and that the confirmation contains a new term that will become a part of the contract unless it materially alters the contract.

5 points
Supreme Court of Pennsylvania
Pennsylvania Board of Law Examiners

Pennsylvania Bar Examination
February 26 and 27, 2013

PERFORMANCE TEST
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To: Applicant  
From: Sharon Suite  
Date: February 26, 2013  
Re: Thomas Tam v. Felix Feral

We have filed a shareholder derivative suit against Felix Feral in the Madison County Court of Common Pleas on behalf of Thomas Tam and Feral’s Fine Cars, Inc. Feral’s Fine Cars, Inc., is also named as a nominal defendant because of its refusal to bring suit against Feral on its own behalf after a demand to do so had been made on it by Tam. Feral’s counsel has filed preliminary objections to our complaint. The complaint and the preliminary objections, both with notices and verifications deleted to save space are attached. I do not wish to arbitrate this case.

Your assignment is to prepare a brief opposing defendant’s preliminary objections setting forth all reasonable arguments that can be made against the need to arbitrate this matter. You may assume that the facts contained in my memorandum summarizing my interview with Tam, and as averred in the complaint, are true, and that the shareholders’ arbitration agreement attached to the preliminary objections is accurate. A memorandum setting forth the firm format for drafting briefs is attached. You have also been provided with a Library, which contains the only legal authorities and principles upon which you should rely in completing this assignment.
Memorandum

To: All associates
From: Sharon Suite
Date: July 2, 2006
Re: Instructions for drafting briefs.

The following instructions for drafting briefs should be followed by all firm attorneys:

1. The document should be entitled: “Plaintiff’s [or Defendant’s] Brief in Support of [or Opposition to] ______________.” A caption is not required.

2. The first section should be entitled “Statement of Facts” and should set forth a short statement of only the facts relevant to the issue(s) being discussed.

3. The second section should be entitled “Statement of Issues.” Each issue should be numbered and be set forth in the form of a question, which is followed by a one word suggested answer. All issues that can reasonably be raised in support of the position being taken should be identified.

4. Following the Statement of Issues, there should be a section entitled “Argument” containing a discussion of the issues. For each issue to be discussed, there should be a numbered subheading stating the issue to be discussed in the form of a statement immediately followed with a reasoned discussion supporting your position on that issue. Each discussion should apply legal principles to the facts relevant to that question. Contrary authority should be distinguished.

5. There should be a final section, entitled “Conclusion” which states in a non-argumentative sentence the relief requested, followed by “Respectfully submitted”, and the name of the law firm.

6. Authorities should be cited. Short, informal citation forms are permissible. Bluebook format is not required. Do not cite authorities that you have not read.

7. All reasonable arguments in support of the position being taken should be raised.
In the Court of Common Pleas for Madison County, Pennsylvania

THOMAS TAM, on behalf of Feral’s Fine Cars, Inc.

v. No. 2013 - 0007

FELIX FERAL and FERAL’S FINE CARS, INC., nominal defendant

COMPLAINT

Plaintiff Thomas Tam comes, by his attorneys, and on behalf of Feral’s Fine Cars, Inc., complains against defendants upon a cause of action of which the following is a statement:

1. Plaintiff Thomas Tam is a resident of the County of Madison, Pennsylvania.

2. Feral’s Fine Cars, Inc. (“Cars”), is a Pennsylvania corporation with a registered address and principal place of business in Madison County, Pennsylvania.

3. Defendant Felix Feral is and at all times material hereto was a resident of Madison County, Pennsylvania, and is the sole director and president of Cars.

4. All of the events and transactions giving rise to the cause of action complained of herein occurred in Madison County, Pennsylvania.

5. All conditions precedent to the bringing of this suit, including plaintiff Tam having made a demand on Cars to bring this action against Felix Feral which Cars refused to do, have been satisfied.

6. Plaintiff has been a shareholder of Cars since February 1, 2010, having purchased 40% of the issued and outstanding shares of Cars from its treasury stock for the price of $600,000.00.

7. Beginning on February 1, 2010, and continuing until the present, defendant Feral has, in violation of his fiduciary duties as an officer and director of Cars to Cars as a corporation, its shareholders and its creditors, enriched himself by systematically bleeding Cars dry of its assets and net worth by paying rent to himself at an unreasonably high rate, and by purchasing parts and supplies from a corporation wholly owned by him at a cost double that available from other suppliers, even though he has had to cause Cars to borrow money and incur debt to do so.

8. As a result of the foregoing conduct, Cars has been transformed from a profitable corporation with a positive net worth to a corporation that is insolvent in the sense that it is deeply in debt, has a negative net worth, and can no longer pay its obligations as they come due.
WHEREFORE, plaintiff respectfully requests that this court enter an order in favor of plaintiff Cars and against defendant Feral, requiring an accounting of all sums rightfully belonging to Cars and unlawfully diverted by defendant Feral, requiring defendant Feral to repay the same to Cars, and awarding punitive damages for defendant Feral’s outrageous behavior, as well as attorney fees and costs.

Sharon Suite  
Sharon Suite, Esquire  
Attorney for plaintiff
In the Court of Common Pleas for Madison County, Pennsylvania

THOMAS TAM, on behalf of Feral’s Fine Cars, Inc.:

v. No. 2013 - 0007

FELIX FERAL and FERAL’S FINE CARS, INC., nominal defendant:

PRELIMINARY OBJECTIONS

Defendant Felix Feral comes, by his attorney, and preliminarily objects to plaintiffs’ complaint for the following reason:

1. This action should be dismissed without prejudice because Thomas Tam, Feral’s Fine Cars, Inc., and defendant Feral are parties to a Shareholders’ Arbitration Agreement dated February 1, 2010, which Agreement contains a mandatory arbitration clause that governs this dispute, a true and correct copy of which is attached hereto as Exhibit “A” and incorporated herein by reference.

Wherefore, defendant Feral respectfully requests that this court enter an order dismissing the complaint without prejudice to plaintiff filing a claim in arbitration as provided for in the Shareholders’ Arbitration Agreement.

John Silver
Attorney for defendant Felix Feral
This agreement is made this 1st day of February, 2010, among Felix Feral, Thomas Tam, and Feral’s Fine Cars, Inc. (hereafter referred to as “this corporation”), with intent to be legally bound hereby.

1. Felix Feral is the majority shareholder, sole director and president of this corporation.

2. Thomas Tam is a shareholder of this corporation, having purchased 40% of the issued and outstanding shares of this corporation on this date.

3. Feral’s Fine Cars, Inc., is a Pennsylvania corporation with a registered address and principal place of business in Madison County, Pennsylvania.

4. Should any dispute or disagreement arise between or among the shareholders of this corporation pertaining in any way to this corporation that cannot be resolved amicably, such dispute shall be submitted for resolution pursuant to the Pennsylvania Arbitration Act by a single arbitrator. The arbitrator shall be appointed by the president of this corporation and the proceedings conducted in accordance with the rules of the Madison County Automobile Dealers’ Association. The arbitrator so appointed shall be the sole judge of the facts and the law, and the decision shall be final and non-appealable, and may be entered in any appropriate court as a judgment at law or a decree in equity, as appropriate; provided, however, that the arbitrator shall have no power to award counsel fees, costs, consequential damages or punitive or exemplary damages.

IN WITNESS WHEREOF, the parties have executed this agreement on the date first mentioned above.

__________________________    ____________________________
Felix Feral                      Thomas Tam
Felix Feral, President

FERAL’S FINE CARS, INC.

By:  ____________________________
Felix Feral, President
I met with Thomas Tam on January 29, 2013, to discuss whether he has a cause of action against his uncle, Felix Feral. The following is a synopsis of my interview with him.

Tam won $1,000,000 in the Pennsylvania Lottery three years ago. After withholdings for taxes, and paying certain bills, he realized net proceeds of $600,000. Tam was advised by his uncle, Felix Feral, to purchase forty percent of the stock of Feral’s Fine Cars, Inc., an importer and seller of luxury foreign motor vehicles in Madison. Feral owns the remaining shares of Fine Cars, and is its sole director and president. Feral is also a member and officer in the Madison County Automobile Dealers’ Association. When Tam bought into the corporation, he was advised by Feral to sign a Shareholders’ Arbitration Agreement, the terms of which Feral’s attorney fully explained to Tam before Tam signed it.

Tam is 28 years old. He attended Madison High School but dropped out at age 18 at the end of his sophomore year, having first repeated 8th grade twice and having also repeated some grades in elementary school. While still in school, it was determined that Tam had a very low IQ and suffered from Attention Deficit Disorder. These conditions have not improved with age. However, while he was still in high school, Tam excelled at athletics, and lettered in football, wrestling and baseball in both his freshman and sophomore years.

After Tam’s father died when Tam was six, Tam’s mother and Tam lived with his uncle, Felix Feral, who was his mother’s brother. Feral acted as a surrogate father, attending parent-teacher conferences, and going to sporting events and school plays in which Tam was participating. When Tam’s mother passed away in 1998, Tam continued to live with Feral until July 2012.

For the last ten years, Tam was employed by Fine Cars as a helper. His duties consisted of assisting in the mechanical and body shops, running errands during the day, and sweeping up at the end of the work day. He was paid $9.00 per hour, and received modest fringe benefits. While cleaning the office, Tam discovered invoices and receipts that showed that Feral had been purchasing parts and supplies from Feral’s Automotive Supply, Inc., which is wholly owned by Feral, at twice what the items would cost elsewhere, that Fine Cars’ facility was owned by Feral, and that Fine Cars was leasing its facility from Feral at a rental that was twice per square foot of comparable properties.

Fine Cars has never paid a dividend. Tam was recently laid off. The reason given by Feral was that Fine Cars had a large negative net worth, and could no longer pay its bills as they became due because luxury automobile sales had been faltering.
LIBRARY
42 Pa. C.S.A. § 7303. Validity of agreement to arbitrate

A written agreement to subject any existing controversy to arbitration or a provision in a written agreement to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity relating to the validity, enforceability or revocation of any contract.

42 Pa. C.S.A. § 7304. Court proceedings to compel or stay arbitration

(a) Compelling arbitration.--On application to a court to compel arbitration made by a party showing an agreement described in section 7303 (relating to validity of agreement to arbitrate) and a showing that an opposing party refused to arbitrate, the court shall order the parties to proceed with arbitration. If the opposing party denies the existence of an agreement to arbitrate, the court shall proceed summarily to determine the issue so raised and shall order the parties to proceed with arbitration if it finds for the moving party. Otherwise, the application shall be denied.

(b) Stay of arbitration.--On application of a party to a court to stay an arbitration proceeding threatened or commenced the court may stay an arbitration on a showing that there is no agreement to arbitrate. When in substantial and bona fide dispute, such an issue shall be forthwith and summarily tried and determined and a stay of the arbitration proceedings shall be ordered if the court finds for the moving party. If the court finds for the opposing party, the court shall order the parties to proceed with arbitration.

(d) Stay of judicial proceedings.--An action or proceeding, allegedly involving an issue subject to arbitration, shall be stayed if a court order to proceed with arbitration has been made or an application for such an order has been made under this section. If the issue allegedly subject to arbitration is severable, the stay of the court action or proceeding may be made with respect to the severable issue only. If the application for an order to proceed with arbitration is made in such action or proceeding and is granted, the court order to proceed with arbitration shall include a stay of the action or proceeding.

(e) No examination of merits.--An application for a court order to proceed with arbitration shall not be refused, nor shall an application to stay arbitration be granted, by the court on the ground that the controversy lacks merit or bona fides or on the ground that no fault or basis for the controversy sought to be arbitrated has been shown.
Supreme Court of Pennsylvania

Harry W. FROWEN, Executor of the Estate of Blanche Frowen, Deceased, Appellant,
v.
J. Marshall BLANK

OPINION OF THE COURT

This appeal is in response to a dismissal of an action in equity seeking the rescission of an agreement for the sale of real estate. The basis of the action was an alleged fraud in seeking the execution of the agreement. The Chancellor was affirmed by the court en banc in finding that fraud had not been established nor had there been a showing that a confidential relationship existed between the parties to the agreement.

On May 22, 1968, Blanche Frowen executed an agreement to sell to J. Marshall Blank, appellee, her farm containing approximately seventy (70) acres in Unity Township, Westmoreland County, for the sum of $15,000.00, of which $500.00 was paid prior to the execution of the agreement and the remaining balance of $14,500.00 no later than one year following the death of Ms. Frowen. Interest computed at the rate of five percent per annum was to be paid quarterly on the unpaid balance. The instant action was initiated by a complaint in equity filed November 29, 1973 by Blanche Frowen as plaintiff. This action resulted in a decree by the Chancellor which was affirmed by the Court en banc, with one judge dissenting [footnote omitted], dismissing the complaint, holding that Ms. Frowen had failed to establish her burden of proof regarding the allegations of fraud.

***

This Court granted review to determine whether the record did establish prima facie the allegation of fraud or in the alternative whether it established a confidential relationship between decedent and appellee.

***

After a consideration of the Chancellor’s findings and a review of the record we are satisfied that appellant did not prove fraud. The basic theory to establish the fraud allegation is that the decedent was deceived into believing that the agreement entered into on May 22, 1968 conveyed a leasehold interest to appellee and was not an outright sale. To support this view, appellant points to the age of decedent at the time of
execution (eighty-six years of age); her infirmities at the time (impaired hearing); her limited formal training (two years of elementary training); and the agreement itself. It is argued that the payment of interest on a quarterly basis, that the total consideration was $15,000 for a property worth approximately $35,000 at the time of the purported sale, that only $500 of the “purchase price” was required to be paid within her lifetime would comport to a lease agreement and not the sale of a fee interest. However, the sine qua non of actionable fraud is the showing of a deception. (citations omitted) A fraud consists of anything calculated to deceive, whether by single act or combination, or by suppression of truth, or a suggestion of what is false . . . . (citations omitted)

* * *

T[t]he Chancellor has found, based upon credible and competent evidence, that that party had been fully explained and understood the nature of the agreement at the time of its execution. We, therefore, affirm the Superior Court’s acceptance of the Chancellor’s conclusion that appellant failed to prove fraud in this record. As previously noted, appellant argues in the alternative that the record establishes the existence of a confidential relationship between decedent and appellee. If a confidential relationship has been established on this record, our earlier finding that appellant had failed to affirmatively show fraud would not preclude appellant from some relief. Rescinding a contract because of fraud calls into play one set of criteria; rescission based on the breach of a confidential relationship is another proposition.

When the relationship between the parties to an agreement is one of trust and confidence, the normal arm’s length bargaining is not assumed, and overreaching by the dominant party for his benefit permits the aggrieved party to rescind the transaction. [Citations omitted]. This is so because the presence of a confidential relationship negates the assumption that each party is acting in his own best interest. [Citations omitted]. Once a confidential relationship is shown to have existed, it then becomes the obligation of the party attempting to enforce the terms of the agreement to establish that there has not been a breach of that trust. [Citations
We agree ... that if such a relationship did exist between the decedent and the appellee, finding that the decedent understood the terms of the agreement does not necessarily preclude a finding that the relationship had been breached. Where a confidential relationship exists, the law presumes the transaction voidable, unless the party seeking to sustain the validity of the transaction affirmatively demonstrates that it was fair under all of the circumstances and beyond the reach of suspicion. The crux of the controversy presently before us is whether the record here establishes the existence of a confidential relationship ... . We have had occasion to describe a confidential relationship as follows:

Confidential relation is not confined to any specific association of the parties; it is one wherein a party is bound to act for the benefit of another, and can take no advantage to himself. It appears when the circumstances make it certain the parties do not deal on equal terms, but, on the one side there is an overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed; in both an unfair advantage is possible.

* * *

The record establishes that at the time of the execution of the agreement decedent was 86 years old and had been suffering from a loss of hearing and sight. She had no more than two or three years of formal education and little knowledge of business matters. A widow since 1935, Ms. Frowen had been living alone on her 70 acre farm when appellee and his wife purchased the farm adjoining hers in the early 1960’s. A close social relationship quickly developed between the older woman and the young couple. Decedent taught the young couple farm-related crafts, while on occasion appellee helped her with minor farm chores. Because she had never learned to drive, appellee and his wife often drove decedent to local social events, such as fairs and grange meetings, and took her to dinner to celebrate decedent and appellee’s birthdays which were only one day apart. For years decedent rented her barn to appellee for the storage of machinery.
On April 14, 1967, appellee prepared a one-page handwritten document which stated that decedent agreed to sell her farm to appellee for $15,000. This document was signed by decedent in the presence of appellee only. Appellee, approximately one year later, took this handwritten document to his attorney and instructed him to draft the agreement now in question. On May 22, 1968, appellee drove Ms. Frowen to his attorney’s office. The agreement, prepared in advance, was read to Ms. Frowen by appellee’s attorney and she signed it. There is uncontroverted testimony on the record that she did not read the agreement. At no time did decedent have assistance from her own counsel nor did she ever discuss the transaction with anyone except appellee and his representatives. The Chancellor found appellee’s attorney and the attorney’s brother, who had also acted as appellee’s attorney in the past, explained the agreement to her. However, she never consulted the attorneys concerning the fairness of the price to be obtained and the method of payment.

As stated above, under the agreement Ms. Frowen agreed to sell to appellee her seventy (70) acre farm for the sum of $15,000, of which $500 was paid prior to the execution of the agreement and the remaining balance no later than one year following the death of Ms. Frowen. Appellee was to make quarterly interest payments at the rate of five (5%) percent on the unpaid balance. Appellant retained a life interest in the house and garden and in the income of the gas lease on the premises. Appellee was to maintain the house in good repair, a promise he failed to keep. There is creditable testimony on the record that the market value of decedent’s farm clearly exceeded the sales price. Appellant’s expert witness testified that as of the date of the agreement the fair market value of the farm was $500 per acre, or $35,000. This estimate was based on sales of comparable nearby farms during 1968. Appellee also testified he had purchased his own 55 acre farm, adjoining decedent’s, in 1962, for $14,000.

The foregoing facts convince us that a confidential relationship existed between decedent and appellee at the time the agreement was executed. Appellee had gained the confidence of decedent over a number of years through their close social
relationship. He asked decedent to sell him her farm and was the only person to advise her on the sale. Decedent’s age, hearing and sight infirmities, and long friendship with appellee indicate “... dependence or trust justifiably reposed.” Appellee drafted the handwritten agreement and later had his attorney prepare the more complete one. He drove decedent to his attorney’s office where without independent advice she agreed to sell her farm. Appellee was her sole advisor or counsellor at a time when she justifiably placed her confidence in him and believed that he would act in good faith for her interest.

* * *

Having concluded that a confidential relation existed between decedent and appellee, there remains to be determined whether the transfer was “fair, conscientious and beyond the reach of suspicion.” [Citation omitted]. Transactions between persons occupying a confidential relation are prima facie voidable, and the party seeking to benefit from such a transaction has the burden of proving that the transfer was indeed fair, conscientious and beyond the reach of suspicion. Since appellee has not had an opportunity to do so, the matter must be returned to the court below for further proceedings consistent with this opinion.

Accordingly, the decree is reversed and the cause remanded to the Orphans’ Court Division, Court of Common Pleas, Westmoreland County, for further proceedings consistent with this opinion.
Supreme Court of Pennsylvania

FLIGHTWAYS CORP., Appellant,

v.

KEYSTONE HELICOPTER CORP.

OPINION OF THE COURT

The parties to this litigation are also parties to an agreement relative to the furnishing of helicopter shuttle and charter services. The contract includes an arbitration clause, which is as follows:

‘Any controversy or claim arising out of or relating to this Agreement, or the alleged breach thereof, except where other relief is more appropriate in connection with a breach of Section VIII hereof (not here applicable), shall be settled by arbitration in Philadelphia in accordance with the Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrators may be entered in any Court having jurisdiction thereof.’

Disputes having arisen, appellee invoked arbitration. Appellant thereupon brought the present suit in equity. The complaint sought a cancellation of the agreement and an award of damages on the ground of fraudulent inducement in various respects, and mutual mistakes of fact in others; it sought also an injunction against the proposed arbitration on the ground that a viable arbitration clause is an impossibility when it is contained in an agreement which is vitiated for fraud.

The Chancellor sustained preliminary objections which challenged the jurisdiction of equity in the circumstances, and directed the parties to proceed to arbitration. This appeal followed [footnote omitted]. We will affirm.

By now it has become well established that ‘(S)ettlement of disputes by arbitration are no longer deemed contrary to public policy. In fact, our statutes encourage arbitration and with our dockets crowded and in some jurisdictions congested arbitration is favored by the courts.’ [Citation omitted]. When one party to an agreement to arbitrate seeks to enjoin the other from proceeding to
arbitration, judicial inquiry is limited to the questions of whether an agreement to arbitrate was entered into and whether the dispute involved falls within the scope of the arbitration provision. [Citation omitted]. Thus a party who can establish that he did not agree to arbitrate, or that the agreement to arbitrate, limited in scope, did not embrace the disputes in issue, may be entitled to enjoin an arbitration proceeding. [Citations omitted]. Here, however, there is no question but that the appellant is a party to an agreement to arbitration of ‘(a)ny controversy or claim arising out of or relating to this Agreement, or the alleged breach thereof.’ Broader language would be difficult to contrive. It cannot be circumvented by an allegation that the contract was void ab initio because of fraud in the inducement or mutual mistake. As the Court of Appeals for the Third Circuit accurately surmised in Merritt-Chapman & Scott Corp. v. Pennsylvania Turnpike Commission, 387 F.2d 768 (3d Cir. 1967), we are satisfied with the soundness of the rule . . . ‘that a general attack on a contract for fraud is to be decided under the applicable arbitration provision as a severable part of the contract and that only where the claim of fraud in the inducement goes specifically to the arbitration provision itself should it be adjudicated by the court rather than the arbitrator’ [Citation and footnote omitted].

The Chancellor was correct in sustaining the objection to the exercise of equity jurisdiction under the facts of this case. We therefore affirm the decree; costs on appellant.
**Examiner’s Analysis and Grading Guidelines**

As an associate in the firm of Suite and Sauer, the applicant is asked to prepare a brief asserting grounds for opposing preliminary objections that defendant’s counsel had filed to a complaint that was filed on behalf of Thomas Tam. The complaint alleges that plaintiff is suing Felix Feral, the sole director and president of Feral’s Fine Cars, Inc., on behalf of Fine Cars. The complaint further alleges that Feral has abused his position as director to divert funds from the company, to the detriment of the shareholders and the corporation.

The defendant’s objection is that the dispute is subject to mandatory binding arbitration pursuant to the shareholders’ arbitration agreement, to which Tam is a party.

The applicant has been provided with a memorandum which outlines the firm’s policies for drafting briefs. The applicant is to set forth in the brief all issues that can reasonably be raised in opposition to the need to arbitrate this matter.

**Format  3 Points**

Paying attention to instructions, whether internal to the lawyer’s employer, or imposed by court rule, is an important part of the skill set of a lawyer. The instructions specify how the document should be titled, that it should contain a short statement of the relevant facts, a statement of the issues, a discussion of the issues, and a conclusion and closing.

**Facts  5 points**

The relevant facts include the following:

- Tam was diagnosed as suffering from attention deficit disorder and a low intelligence quotient, conditions that have existed for a long time;
- Tam repeated several grades in school, and dropped out of high school at the end of his sophomore year;
- Until recently, Tam has been dependent from an early age on his uncle for a place to live, and since he was 18, for his livelihood;
- Feral acted as Tam’s surrogate father during Tam’s childhood;
- Feral advised Tam to sign a shareholders’ arbitration agreement;
- A shareholders’ arbitration agreement was signed by Tam and Feral and contains a mandatory arbitration clause covering disputes between or among the shareholders;
- The complaint avers a dispute between a shareholder [Tam] on behalf of the corporation and an officer/director and between Tam and the corporation as a nominal defendant;
- The arbitration agreement allowed Feral to choose the arbitrator, provided that the arbitration would be conducted under the rules of an organization in which Feral was a member and officer, and limited the arbitrator’s ability to award damages.
Tam’s athletic ability, and his specific duties at Feral’s Fine Cars are not relevant to any issue raised in response to the Preliminary Objections in the case.

**Grounds for opposing arbitration**

**The dispute is not within the scope of the arbitration clause.**

4 Points

Under Pennsylvania law, a written agreement or a provision in a written agreement to subject or submit an existing or future dispute to arbitration is generally valid, enforceable and irrevocable. 42 Pa. C.S.A. § 7303.

One ground for resisting arbitration is that the dispute does not fall within the scope of the arbitration clause. *Flightways Corp. v. Keystone Helicopter Corp.*

Whether a dispute is arbitrable is a legal question which must be decided by the court. *Flightways Corp. v. Keystone Helicopter Corp.*

In this case, the arbitration clause in the Shareholders’ Arbitration Agreement covers disagreements between the shareholders pertaining in any way to the corporation.

Here the dispute is between a shareholder on behalf of the corporation and an officer/director of the corporation regarding the performance of his duties as an officer and director. The complaint might also be considered to be between a shareholder and the corporation as a nominal defendant for refusing to bring suit. Neither of these claims involves a dispute between shareholders and therefore the claim would not fall within the arbitration clause.

It could be argued that because Feral is also a shareholder, the dispute is arbitrable; however, this dispute falls outside of the arbitration clause because the claim is really against Feral as an officer and director rather than as a shareholder and the clause does not include disputes between a shareholder or the corporation on one hand and an officer/director on the other.

**Abuse of a confidential relationship.**

8 points

Another basis for resisting arbitration is that an agreement to arbitrate was not entered into by the parties. *Flightways Corp. v. Keystone Helicopter Corp.*

Pennsylvania law permits challenges to an agreement to arbitrate based on any “grounds as exist in law or in equity relating to the validity, enforceability or revocation of any contract.” 42 Pa. C.S.A. §7303.
One of the grounds for refusing to enforce a contract is that it was procured by an abuse of a confidential relationship. *Frowen v. Blank.*

Where the attack is specifically against the arbitration agreement itself, rather than to an entire agreement of which an arbitration provision is a part, the issue is for the court rather than the arbitrator to decide. *Flightways Corp. v. Keystone Helicopter Corp.*

Here, the attack based on a breach of a confidential relationship goes to the arbitration provision so the court can decide the issue of whether there was a breach of a confidential relationship.

The applicant should realize from the facts set forth in the memorandum summarizing the interview with Tam that the shareholders’ arbitration agreement is a product of the abuse of the confidential relationship.

A confidential relationship is one of trust and confidence in which normal arms’ length bargaining cannot be assumed. *Frowen v. Blank.*

A confidential relationship exists when circumstances make it certain that the parties do not deal on equal terms because on one side there is overmastering influence or on the other, weakness, dependence or justifiable trust. *Frowen v. Blank.*

The facts in support of a confidential relationship include Tam’s limited intellectual capacity, as demonstrated by his low IQ and his academic performance in elementary school; and his dependence upon Feral, who not only acted as his surrogate father as he was growing up, but who is his closest living “relative” with whom he lived until recently and upon whom he was dependent for employment.

Where a confidential relationship exists, the law presumes the transaction voidable unless the party seeking to sustain the validity of the transaction affirmatively demonstrates that it was fair under all of the circumstances. *Frowen v. Blank.*

The arbitration clause is unfair in that the arbitrator will be selected by Feral, it will be conducted under the rules of an organization of which Feral is a member and officer, and the relief which can be granted is limited.

These facts should amply support the argument that the court should refuse to enforce the arbitration clause on the ground of a breach of a confidential relationship.