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PENNSYLVANIA BAR EXAMINATION

Essay Questions and Examiners’ Analyses
and
Performance Test

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Question No. 1

Angela was a licensed Pennsylvania lawyer living in E County, Pennsylvania, who had a general practice as a sole practitioner. She had been divorced for many years and had two adult children, Charles and Melissa. In 2007, she established a $25,000 savings account with a bank, designating the ownership as “Angela in trust for Charles.” A second account, also in the amount of $25,000, was created at the same time, owned by “Angela and Melissa as joint tenants.” Both accounts were funded entirely with Angela’s money.

Several months after creating these accounts, Angela was diagnosed with a terminal illness, and she began to wind down her law practice. In early 2008, she met with a new client who had a personal injury claim, but after doing some minimal initial work she felt too ill to continue to handle the case. She located Barry, a licensed Pennsylvania attorney, and offered to refer the case to him in exchange for his agreement to give her 25% of any fee recovered. They put this agreement in writing, and Barry met with the client and told him that Angela would have “some share” of the potential fee, to which the client had no objection. Barry and the client executed a fee agreement providing for a 1/3 contingent fee. This fee was customary in the area for a personal injury case and was the same amount that Angela had proposed to the client. The case was litigated extensively by Barry through 2008 and 2009.

In mid-2008, Angela prepared her own Last Will and Testament, which she properly executed with witnesses. The will stated that all of her “lawful debts, funeral expenses, and estate administration expenses should be paid as soon as practical after her death.” The entire estate was left to Charles and Melissa equally, but there was a specific reference to the bank accounts, stating that “the bank accounts I established for Charles and Melissa may be used in equal proportions for estate expenses and debts to the extent needed.”
Angela’s illness progressed and she required a great deal of medical treatment and nursing care prior to her death in December 2009. At her death, the remaining value of her probate estate, not including the two bank accounts, was $100,000, which included a $1,000 check from a client, which Angela had received in October 2009 for work done early in the year, but had not cashed. Her estate administration, funeral, and other final medical and personal debts were $115,000. The personal injury lawsuit referred by Angela was unsuccessful and no legal fee was generated. At the time of Angela’s death, the bank accounts had each grown modestly in value with accrued interest. Her will was accepted to probate.

1. May the executor of Angela’s estate use part of the account held by “Angela and Melissa as joint tenants” toward the estate’s $15,000 deficit as provided in Angela’s will?

2. May the executor of Angela’s estate use part of the account held by “Angela in trust for Charles” toward the estate’s $15,000 deficit as provided in Angela’s will?

For purposes of the next two questions only, assume that the personal injury case which Angela referred to Barry was successful and ultimately settled several days before Angela died. The settlement generated a total legal fee of $120,000, but the defendant’s payment did not take place until early January of 2010. Barry then submitted a check for $30,000 payable to Angela to the executor of Angela’s estate. Angela was a cash-basis, calendar year taxpayer.

3. Did the fee-sharing arrangement violate any of the Pennsylvania Rules of Professional Conduct?

4. What are the federal income tax requirements, if any, to report the $30,000 referral fee generated by the settlement of the personal injury case and the $1,000 check received by Angela?
Question No. 1: Examiner’s Analysis

1. The executor can not use any part of the account held by Angela and Melissa as joint tenants toward the estate’s deficit because the entire balance of the joint account with Melissa belongs to her upon Angela’s death.

The account held jointly with Melissa is a “joint account” defined by the Probate, Estates and Fiduciaries (PEF) Code, Chapter 63, Multiple Party Accounts, at 20 Pa. C.S.A. 6301 as “an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship.” While all of the money continued to belong to Angela during her life, as provided by PEF Code section 6303; Section 6304 (a) provides that “any sum remaining on deposit at the death of a party to a joint account belongs to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent at the time the account is created.” (emphasis added) The commentary to this section states as follows:

“The effect of (a) of this section, when read with the definition of “joint account” in Section 6301 (4) is to make an account, payable to one or more of two or more parties, a survivorship arrangement unless ‘clear and convincing evidence of a different contention (sic)’ is offered.”

Several appellate decisions have upheld this statute and the underlying principle that funds in a joint account belong to the survivor rather than the estate. In the case In Re Estate of Geniviva, 450 Pa. Super. 54, 675 A.2d 306 (1996), appeal denied, 546 Pa. 666, 685 A.2d 545 (1996), an executor was surcharged for the value of a jointly-held bank account which he had taken from the survivor and placed in the estate account for payment of decedent’s debts. The Superior Court cited Section 6304(a) in upholding the Orphan’s Court order that the funds were required to be repaid to the surviving joint owner.

Subsection 6304(d) of the PEF Code states that: “A right of survivorship arising from the express terms of an account or under this section cannot be changed by will.” The Superior Court in the case In Re Estate of Piet, 949 A.2d 886 (Superior Ct. 2008) noted that this section indicates that a will made subsequent to the creation of a joint account was ineffective to negate the survivorship right established by subsection (a) “because, presumably, if a decedent places assets in a joint account and then executes a will she did so recognizing she had already diminished her estate by creating the joint account.” 949 A.2d at 892 (emphasis added).

Had Angela made some other written or verbal declaration that established that at the time the account was created there was an intent not to create a survivorship interest or an intent to make the joint account subject to estate debts, this could have been considered as some evidence of “a different intent” relating back to the time the account was created. In Re Estate of Heske, 436 Pa.Super. 63, 647 A.2d 243 (1994). A proponent of such a conclusion would have to meet the heightened burden of presenting “clear and convincing evidence” as the statute requires. No such evidence exists here.
Here, Angela’s will written subsequent to the creation of the joint account with Melissa is ineffective to deprive Melissa of her right of survivorship under the statute, and the funds in the joint account cannot be applied to the estate debts without Melissa’s consent.

2. The account in trust for Charles is a “tentative trust” or “Totten Trust,” and was subject to revocation during Angela’s life. The funds in the account are available to be used for the estate expenses because of the need for the funds as set forth in Angela’s will.

The account which Angela established “in trust for” her son Charles is a recognized form of will substitute known as a “tentative trust” or “Totten Trust,” as first established in New York state in the case of In Re Totten, 179 N.Y. 112, 71 N.E. 748 (1904) most pertinently described by the court as a revocable or “tentative” trust. The court in the case of In Re Scallon’s Estate, 313 Pa. 424, 169 A. 106 (1937) adopted the New York rule quoting from Totten as follows:

“A deposit by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as the delivery of the passbook or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor.” In Re Totten, 179 N.Y. at 125.

The PEF Code at Section 6301 includes such specific accounts within its definition of “trust account.”

The facts establish that Angela used her own funds for this $25,000 account, and she designated it as being held by herself in trust for Charles, thereby creating a Totten Trust which would become the sole property of Charles at her death, if she chose not to revoke the trust designation or utilize the funds.

Angela neither used any of the funds in this account, nor did she complete an inter-vivos gift to Charles in any way. However, the will she executed after establishing this tentative trust account explicitly subjected it to partial or total revocation “if needed” for her estate expenses. Such a direction by will is one of the methods by which a Totten Trust can be revoked. Scallon’s Estate, supra. The Supreme Court opinion in the case of In Re Rodgers’ Estate, 374 Pa. 246, 97 A.2d 789 (1953) dealt with an account created by the decedent in trust for her sister, which the decedent revoked orally to her attorney when making a will. The court also found that the will itself was sufficient to effect a revocation based on the inadequacy of the estate assets to satisfy the testamentary gifts, funeral and administration expenses, taxes and other charges. The court noted that the distribution scheme of the will would not have been possible to accomplish without revoking the trust, which “comprised the bulk of her estate,” and that, “after payment of her own debts and funeral and administration expenses, her other assets would be pitifully inadequate” to accomplish her intended purpose.
The PEF Code at 20 Pa. C.S.A. 6304 (b) regarding Trust Accounts, provides that at the
death of the trustee or survivor of multiple trustees, “any sum remaining on deposit belongs to
the person or persons named as beneficiaries...unless there is clear and convincing evidence of a
contrary intent.”

Here, the explicit language of the will is clear as to Angela’s intent that the accounts be
utilized “to the extent needed” to pay estate expenses and debts. So long as Angela made no
further changes to her will to the time of her death, nor made any other writings or declarations
of a different intention regarding the bank account in trust for Charles, there would be no basis to
deny that the will expresses her intention to utilize those funds for any debts of her estate not
satisfied with other probate assets. The estate is insolvent in the amount of $15,000 without the
joint accounts. Such a clear provision in the will authorizes the use of the funds from the Totten
Trust that was established for Charles to pay the expenses of the estate. *In Re Rodgers Estate,*
supra. Even in the absence of such a statement by Angela in her will, the insolvency of the
estate will normally allow the estate’s use of the necessary amount of the funds.

Therefore, the necessary $15,000 to meet the estate’s outstanding obligations may be
taken from the money in the trust account.

3. The referral fee arrangement was proper, regardless of the minimal work done by
Angela, as the fee sharing was made known to the client, and the fee was not illegal
or clearly excessive.

Angela and Barry entered into a written agreement for the division of fees with respect to
the referral of a personal injury case, which was to be pursued on a contingent fee with the client.
Rule of Professional Conduct (RPC) 1.5 (c) requires contingent fee agreements to be in writing,
and 1.5(e) governs the division of legal fees between lawyers in different firms, stating:

“A lawyer shall not divide a fee for legal services with another lawyer who is not in the
same firm unless:
(1) the client is advised of and does not object to the participation of all the lawyers
involved, and
(2) the total fee of the lawyers is not illegal or clearly excessive for all legal services they
rendered the client.”

Here, the facts indicate that the client was aware that the case had been referred by
Angela to the other attorney outside of her firm, and the client did not object as evidenced by his
signing a fee agreement and working with the new lawyer. The client was also told that Angela
would receive “some part” of the legal fee, if any fee was payable, and did not object. The
Comment to RPC 1.5(e) states that a fee division “facilitates association of more than one lawyer
in a matter in which neither alone could serve the client as well, and most often is used when the
fee is contingent and the division is between a referring lawyer and a trial specialist....It does not
require disclosure to the client of the share that each lawyer is to receive.”

Angela became entitled to her 25% share of the potential legal fee when she referred the
case by a proper agreement with another lawyer outside her firm. The contingent fee agreement
with the client was in writing as required by the rules and the facts indicate that the 1/3 contingent fee was customary in the area for a personal injury case. It was a proper arrangement under the rules to divide a fair and reasonable contingent fee with 25% potentially payable to Angela. The fact that Angela did a minimal amount of work does not alter the result because unlike the Model Rules of Professional Conduct, RPC 1.5 (e) does not require that the division of a fee between lawyers be proportional to their respective share of the services, or that the lawyers have joint responsibility for the representation.

4. The $30,000 earned by Angela at the time of the settlement before her death, but not paid until the next tax year should be declared by the estate of Angela in 2010 as Income in Respect of a Decedent. The $1,000 check must be declared on Angela’s final personal return for calendar year 2009.

While Angela became entitled to 25% of any contingent fee received when she referred the case in 2008 for purposes of the RPC, and although the fee accrued late in 2009 when the case settled just before her death, the actual payment was not made until January of 2010, after her death. As a cash-basis taxpayer, her final federal income tax return for 2009 would not include this income. Poorbaugh v. U.S, 423 F.2d 157 (3rd Cir. 1970).

IRC Section 691, Recipients of Income In Respect of a Decedent, addresses inclusion in gross income of such payments. The $30,000 payment was made by Barry to Angela’s executor in January of 2010, which is shortly after Angela’s death and very early in the administration of her estate. For federal income tax purposes, the entire $30,000 is income to which Angela had become entitled during her life, but which could not be included in her final personal income tax return for 2009 because she was a cash-basis, calendar-year taxpayer. It is income in Respect of a Decedent, and is reportable in 2010 by her estate.

The $1,000 client fee check was received by Angela in October 2009 while she was still alive, but not cashed or deposited before her death, and ultimately deposited by the executor in the estate account in February 2010. Regardless of the fact that it became an estate asset, Angela’s status as a cash-basis, calendar year taxpayer caused the check to become part of her 2009 income, because she had received it and could have cashed or deposited the funds for her own use at that time. A taxpayer is not permitted to avoid or defer the taxability of such a payment so tendered by check by delaying the realization of the check, whether or not such was her intent.

The facts tell us that Angela was a cash-basis, calendar year taxpayer, as are most individuals who have not chosen another permissible method of accounting or reporting period.

Check payments implicate the concepts of cash equivalency and economic benefit. A check is a negotiable instrument and is equivalent to cash when tendered. Decisions rendered regarding checks received by the taxpayer at the very end of the year but not cashed or deposited until the next year have generally required the taxpayer to include the income in the year received. Lavery v. Commissioner, 158 F.2d 859 (7th Cir. 1946). This result is required even if the check was received on December 31 after banking hours, as the check constituted property with a fair market value at that moment. Kahler v. Commissioner, 18 T.C. 31 (1952).
Angela received her $1,000 check in October of 2009, and, regardless of her health condition, could have cashed or deposited it at that time. Unless her income for that calendar year fell below the threshold for the requirement to file a return, her final federal income tax return for that year must be filed by the executor, and must include that amount in her income.
Question No. 1: Grading Guidelines

1. **Joint Accounts, survivorship - non-alteration by will**

   Comments: Candidates should recognize that a joint account established with one party's funds belongs to the surviving joint owner, even if the establishing owner's subsequent will directs the use of such funds for estate expenses.

   5 points

2. **“In trust for” savings accounts (Totten trusts), distinguished from joint accounts - availability of such funds for estate obligations**

   Comments: Candidates should recognize the nature of an “in trust for” savings account, and its significant distinction from a joint account which makes its funds available for debts of the estate of the testator particularly when the will so directs.

   5 points

3. **Referral Fee agreements, RPC, validity and requirements**

   Comments: Candidates should recognize that referral fee agreements are regulated by the Rules of Professional Conduct; the requirements of client knowledge thereof, the immateriality of work distribution to the fee share, and the necessity that the fee not be illegal or clearly excessive.

   5 points

4. **Federal Income Tax, Calendar year, cash basis, Income in Respect of Decedent**

   Comments: Candidates should recognize the requirement of cash-basis taxpayers to report income when actually received, including checks left uncashed before the end of the tax year, as well as the requirement of a decedent’s estate to report income which was received after the taxpayers’ death but earned before death.

   5 points
Question No. 2

Tom committed a robbery at an A City, Pennsylvania, convenience store which was not solved by the police. One evening while Tom and his wife Sue were at home alone, Tom told Sue that he committed the robbery. Sue was concerned not only about Tom’s criminal behavior but whether she would have any financial liability for Tom’s actions. Sue felt that the marriage was over, and she insisted that Tom move out of the marital residence. Tom complied with the request. Sue met with a family law attorney to discuss a divorce action and to review whether Tom would have a claim to the following assets as marital property in an equitable division claim:

a. Her A City, Pennsylvania house which she purchased shortly before marriage. At the time of her marriage to Tom, the home had a value of $200,000. On the date of separation the property was valued at $280,000. Title to the real estate was always solely in Sue’s name.

b. Her Florida vacation home, purchased prior to her marriage which was valued at $300,000 on the date of marriage but worth $240,000 on the date of separation due to the poor Florida economy. Title to the real estate was always solely in Sue’s name.

c. A vacation home in Maine which was purchased during the marriage, six months before separation, using funds Sue had just inherited from her Uncle Joe. Title to the real estate was held solely in her name. The value of the Maine property did not change in the six-month period between purchase and separation.

After meeting with her attorney, a no-fault divorce complaint was filed and properly served on Tom who became upset as he felt Sue was attempting to abandon him in his time of need. Tom also became aware that Sue had told the police that he had committed the robbery. Tom telephoned Sue to discuss the pending divorce, and in the course of conversation, he told
Sue that he was aware that she had talked to the police and calmly told her that if he went to jail because of the robbery, upon his release he would burn down their house with her in it.

Sue immediately called the local police and told them about Tom’s telephone conversation with her. Sue further stated that she would gladly testify in court against Tom with respect to all charges. The A City, Pennsylvania police arrested Tom and separately charged him with robbery and terroristic threats.

After his release on bond Tom purchased some marijuana for personal consumption so that he could forget his problems and relax. When he was returning home to smoke the marijuana, two A City police officers approached him and asked him to stop since they were curious as to why a lone person was out walking at 10:00 p.m. Tom began to run as the police approached him, and the police ran after him. As he was running, Tom took the marijuana baggie out of his coat pocket and threw it into the gutter. The police subsequently apprehended Tom, found the marijuana and charged him with possession of the marijuana.

1. Assuming that there is no change in value of any of the properties since the date of separation, what advice should the attorney give Sue regarding whether the following property was marital property subject to equitable division?
   a. The A City House;
   b. The Florida real estate;
   c. The Maine vacation house

2. At the preliminary hearing on the robbery charge, Tom’s attorney objects to Sue’s testimony regarding the robbery based upon a marital privilege. How should the Court rule?

3. Was there sufficient evidence to support the filing of the terroristic threats charge against Tom?

4. Tom’s attorney filed an omnibus pre-trial motion requesting the suppression of the marijuana as evidence, based upon a violation of Tom’s right to be free from unreasonable search and seizure under the United States and Pennsylvania constitutions. How should the Court rule?
Question No. 2: Examiner’s Analysis

1. Sue’s attorney should advise her that the increase in value of the A City house less the decrease in value of the Florida real estate would be considered marital property subject to equitable property division in the divorce action. The Maine vacation home would not be considered marital property.

Generally marital property means all property acquired by either party during the course of their marriage, together with the increase in value of certain non-marital property. 23 Pa.C.S.A. §3501. In order to properly analyze the availability of the three parcels of real estate for equitable property division the attorney would also need to advise Sue as to her ability to set off the decrease in value of non-marital property against any increase in value of her non-marital property. 23 Pa.C.S.A. §3501 (a) provides that:

(a) General rule. -- As used in this chapter, “marital property” means all property acquired by either party during the marriage and the increase in value of any non-marital property acquired pursuant to paragraphs (1) and (3) as measured and determined under subsection (a.1). However, marital property does not include:

(1) Property acquired prior to marriage or property acquired in exchange for property acquired prior to the marriage.
* * *

(3) Property acquired by gift, except between spouses, bequest, devise, or descent or property acquired in exchange for such property.

(a.1) Measuring and determining the increase in value of non-marital property. -- The increase in value of any non-marital property acquired pursuant to subsection (a) (1) and (3) shall be measured from the date of marriage or later acquisition date to either the date of final separation or the date as close to the hearing on equitable distribution as possible, whichever date results in a lesser increase. Any decrease in value of the non-marital property of a party shall be offset against any increase in value of the non-marital property of that party. However, a decrease in value of the non-marital property of a party shall not be offset against any increase in value of the non-marital property of the other party or against any other marital property subject to equitable division.

(b) Presumption.--All real or personal property acquired by either party during the marriage is presumed to be marital property regardless of whether title is held individually or by the parties in some form of co-ownership such as joint tenancy, tenancy in common or tenancy by the entirety. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (a).

(a) The A City house. The A City House was purchased by Sue prior to the parties’ marriage and thus would be a non-marital asset and in and of itself not subject to equitable property division. Only an increase in value during the timeframe set forth in subsection (a.1) above would be marital property. The facts indicate that the real estate was valued at $200,000
on the date of marriage. On the date of separation the fair market value had increased to
$280,000 or an $80,000 increase over the $200,000 value at the time of marriage. Therefore,
since there was no change in value since the date of separation, the attorney would advise Sue
that the $80,000 increase in value of the A City real estate would be marital property.

(b) The Florida vacation home. The facts indicate that this was non-marital and thus the
value of the home of $300,000 as of the date of marriage would not be included in the equitable
property division analysis. Unfortunately, due to the poor Florida economy, this property's value
decreased by $60,000. The loss which occurred during marriage would be available to set off
against the gain on the A City property, pursuant to 23 Pa.C.S.A. §3501(a.1).

(c) The Maine real estate. Sue received an inheritance from her Uncle Joe which she
immediately used to purchase the Maine vacation property. The vacation property was titled in
her name alone. Marital property does not include inherited property or property acquired in
exchange for inherited property. 23 Pa. C.S.A. §3501(a)(3). There was no change in the value
of the Maine property from the time it was purchased until the parties separated. Therefore, the
attorney should advise Sue that the vacation property will not be deemed marital property subject
to equitable division.

Therefore, the attorney will advise Sue that the increase in value of the Pennsylvania real
estate minus the decrease in value of the Florida real estate will be considered by the Court to be
marital property in an equitable division proceeding. Tom could receive a portion of the
$20,000, which is the difference between the increase in value of the A City property and the
decrease in value of the Florida property. The Maine vacation property would remain the sole
property of Sue without any claim by Tom.

2. **Objection by Tom’s attorney to Sue’s testimony regarding the robbery charge
should be upheld based upon the confidential marital communication between Sue
and Tom.**

There are two separate marital privileges applicable in a criminal proceeding in
Pennsylvania. The first privilege permits a spouse, in a criminal case to refuse to testify against
her spouse in certain criminal matters including a robbery. 42 Pa. C.S.A. §5913. The testimony
privilege belongs to the testifying spouse. Here Sue has already indicated a willingness to testify
and thus this spousal testimony privilege would not preclude her testimony.

Pennsylvania also recognizes a privilege against disclosure of confidential marital
communications that would protect the disclosure of Tom’s statement to Sue. See
attorney objects to Sue’s testimony the Court, even at a preliminary hearing, would sustain the
objection.

The purpose of this privilege is to protect intimate communications between spouses by
assuring that the statements would not be forcibly disclosed in court. The statement by Tom
made privately to Sue did not fall within any exception to the rule. The law requires that there be
an actual communication, that there be a valid marriage at the time of the communication, that
the communication be made in confidence and that the privilege was not waived. All four requirements to assert this privilege exist.

Since this is actually a verbal communication it falls within the privilege and Sue would not be able to testify at the preliminary hearing.

3. There was sufficient evidence to support the filing of the terroristic threats charge against Tom.

Tom made a statement to Sue that if he ended up in jail because of the robbery, he would burn down the house with her inside the house when he was released from jail. It appears that this statement by Tom was meant to terrorize Sue.

Pennsylvania law defines terroristic threats as follows:

18 Pa.C.S.A. 2706. Terroristic threats

(a) Offense defined.--A person commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to:

(1) commit any crime of violence with intent to terrorize another;

(2) cause evacuation of a building, place of assembly or facility of public transportation; or

(3) otherwise cause serious public inconvenience, or cause terror or serious public inconvenience with reckless disregard of the risk of causing such terror or inconvenience.

***

(c) Definition.--As used in this section, the term “communicates” means, conveys in person or by written or electronic means, including telephone, electronic mail, Internet, facsimile, telex and similar transmissions.

In Commonwealth v. Speller, 311 Pa. Super. 569, 458 A.2d 198 (1983), the Court stated that “the offense does not require that the accused intend to carry out the threat; it does require an intent to terrorize. The harm sought to be prevented is the psychological distress which follows from an invasion of another’s sense of personal security.” Here Tom’s statement was calculated to invade Sue’s sense of personal security since he specifically told her that he would commit a crime of violence, arson and possibly homicide, if he went to jail as a result of the robbery. Obviously Sue was concerned by this statement as she immediately called the police. A threat to kill a person is sufficient to establish the intent to terrorize that person. Commonwealth v. Kelley, 444 Pa. Super. 377, 664 A.2d 123 (1995).

The statement by Tom was more than something said in a heated argument or a spur of the moment threat; the statement was calculated to threaten Sue to induce her not to testify about
the robbery. See Commonwealth v. Tizer, 454 Pa. Super. 1, 684 A.2d 597 (1996). Tom called Sue to discuss the pending divorce. The facts do not indicate that the parties engaged in a heated argument but rather that in the course of the telephone conversation Tom made a threat meant to terrorize Sue.

Further, the fact that the statement by Tom appears to be conditional in the sense that he would only burn the house down or harm Sue if he went to jail is not relevant to a determination as to whether this charge should be filed. The crime relates to Tom’s intent to terrorize and not to whether he would actually carry out the offense. Neither the ability to carry out the threat nor a belief by the persons threatened that it will be carried out is an essential element of the crime. Id. Whether Tom would ever actually burn down the house is immaterial since the crime was complete when he made the threat to commit a crime of violence with the intent to terrorize Sue so that she would not testify against him.

There was sufficient evidence for the police to file a charge of terroristic threats against Tom.

4. The marijuana that Tom abandoned when he fled the police would not be suppressed as evidence under the Fourth Amendment to the United States Constitution, but would be suppressed under Article 1, Section 8 of the Pennsylvania Constitution.

The suppression motion challenging the admissibility of the marijuana as evidence against Tom would be successful under Article 1, Section 8 of the Pennsylvania Constitution but not under the Fourth Amendment to the United States Constitution. Both the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution protect a person’s right to be free from unreasonable searches and seizures. However, a challenge under the Pennsylvania Constitution must be evaluated independently from the United States Constitution and the Pennsylvania Constitution can afford greater protection to individuals than is given under the federal constitution. Commonwealth v. Edmunds, 526 Pa. 374, 586 A.2d 887 (1991).

Tom was lawfully walking on a street at 10:00 p.m. The police were curious about why he was out walking alone at 10 p.m. and decided to ask Tom some questions. There is no evidence that Tom was doing anything illegal or that he was involved in any suspicious activities. The police have a right to approach people to ask questions without cause. The Fourth Amendment to the United States Constitution protects against an unreasonable seizure of the person. Under the Fourth Amendment neither a police pursuit nor a command to stop is a seizure absent a submission to the show of authority. California v. Hodari D, 499 U.S. 621, 111 S.Ct. 1547 (1991). Here, as the police approached him, Tom ran and then voluntarily abandoned the marijuana by throwing it into the gutter. Since there was no seizure of Tom under the Fourth Amendment to the United States Constitution prior to his discarding the marijuana, the evidence was lawfully found by the police and would not be suppressed under the United States Constitution.
A different result would be reached under the Pennsylvania Constitution. The Pennsylvania Supreme Court has ruled that under the Pennsylvania Constitution the police pursuit of a person constitutes a seizure and would require suppression of items that the person discarded absent probable cause for the seizure or a reasonable suspicion to stop and frisk. Commonwealth v. Matos, 543 Pa. 449, 672 A.2d 769 (1996). No physical seizure of the person would be required to trigger the privacy rights guaranteed under the Pennsylvania Constitution. Under the Pennsylvania Constitution, the discarding of the marijuana under such circumstances would be construed to be a coerced abandonment of the marijuana and therefore subject to suppression.

But for the police chasing Tom, the marijuana would not have been abandoned. In our situation the police had no lawful right to pursue Tom. Due to the unlawful nature of the pursuit, even though there was no physical seizure of Tom prior to his discarding the marijuana, the Pennsylvania Constitution would require suppression of the marijuana as Tom’s abandonment of the marijuana would be viewed to have been coerced.

In Matos, supra the Pennsylvania Supreme Court held that a defendant such as Tom would have a right of privacy that would be violated by the police action of chasing him. The facts of Matos, are similar to this situation in that the defendant fled a playground when the police approached him. The police chased Matos who discarded during the chase a plastic bag which contained twelve vials of cocaine. The Pennsylvania Supreme Court rejected the Hodari D holding that a seizure does not result from a police chase as being incompatible with Article 1, Section 8 of the Pennsylvania Constitution’s privacy rights guarantee.

Since the chase was a seizure under the Pennsylvania Constitution the seizure/chase is constitutional only if based upon reasonable suspicion. The only factor that the police can point to in an attempt to justify the admissibility of the evidence is Tom’s flight. The Pennsylvania Supreme Court held in the case of In the Interest of D. M., 566 Pa. 445, 781 A.2d 1161 (2001) that flight coupled with other factors such as the defendant being in a high crime area or the receipt of an anonymous call with information describing a defendant may be enough to provide reasonable suspicion and defeat the claim of coerced abandonment. However, from the facts given in this case the police had no suspicion that crime was afoot and thus no justification under the Pennsylvania Constitution to violate Tom’s privacy right by pursuing him.
Question No. 2: Grading Guidelines

1. **Equitable division of marital property**

   Comments: The candidate should recognize that the increase in value of the A City property is marital property. The candidate should also discuss the setoff of the decrease in value of the Florida property against the increase in value of the Pennsylvania property and reach the proper conclusion that $20,000 of marital property exists for equitable division. Also, the concept of inherited property as an exclusion to marital property should be discussed and applied to the facts.

   5 points

2. **Confidential marital communication**

   Comments: The candidate should recognize that two possible marital testimonial privileges are applicable, and apply these privileges to the facts. First, Sue has the privilege as Tom’s spouse to refuse to testify against him. Secondly, Tom’s objection to Sue’s testimony will be sustained since it is a protected marital communication.

   5 points

3. **Terroristic threats**

   Comments: The candidate should identify the elements of terroristic threats, apply these elements to the facts and recognize that even though no physical injury occurred, Tom’s intent was to terrorize Sue and thus the criminal charge of terroristic threats would be appropriate.

   4 points

4. **Admissibility of marijuana**

   Comments: The candidate should discuss the distinction between the protections afforded by the Pennsylvania Constitution and the United States Constitution relating to the facts. It must be recognized that under the Pennsylvania Constitution no physical seizure of the person is required for Article I, Section 8 to apply. The abandonment of the marijuana would be coerced under the Pennsylvania Constitution but not under the United States Constitution.

   6 points
Question No. 3

Sally was the owner and occupier of a two story home located in rural C-County, Pennsylvania, which she had received as a gift from her uncle. Sally was never able to use the well water, except for showering, because it became contaminated with harmful chemicals shortly before she received title.

Sally was experiencing severe financial difficulties and met with her neighbor, Charlie, who was a real estate agent. She told Charlie that she needed to sell her property immediately, but that the well was contaminated and that she did not drink the water the entire time she owned the property. Charlie suggested that Sally utilize the services of his brother, Alvin, who was a local well driller to check the present status of the water. Sally agreed and Alvin performed the test which confirmed that the well water was contaminated and was unfit for human consumption. Alvin told Sally that anyone who drank the water would become violently ill.

Sally subsequently met with Charlie and Alvin to discuss the results of the testing in detail. She reiterated that she was desperate to sell her property that was worth $225,000 if the well water was drinkable. She offered to pay Charlie a higher commission on the sale than was customary, and pay Alvin $10,000 if they would help her conceal the water quality problem. They all agreed on a plan to sell the property by concealing the problem with the well water even though they knew the property would be worth significantly less without good drinking water.

Charlie listed the property for sale for $225,000 and within three weeks Mark, a first time home buyer with no experience in real estate transactions, met with Charlie and Sally at the property. Mark specifically asked about the water quality of the well as there was no public water supply within twenty miles, and he wanted to make sure he could drink the water. Sally told Mark the water was recently tested and assured Mark the water was fine for drinking. Being satisfied that the water test results were favorable and that Sally said it was fit for drinking, Mark agreed to purchase the property subject to receiving the test results. A day later Charlie
presented a written sales agreement to Mark, which Charlie prepared, which included the following provision: "The well water serving the property is fit for human consumption as confirmed by the water quality report attached as Exhibit A." Exhibit A was a report by Alvin which concluded that the water was fit for human consumption. The Agreement was signed by Sally and Mark and the property was conveyed to Mark two weeks later.

A few weeks after the conveyance Mark went to his doctor with complaints of severe stomach cramps that would not go away. Subsequent medical testing and independent well water testing revealed that his symptoms were caused by the water supply from the well and that the problem with the well water could not be corrected. The property was only worth $55,000 without access to good drinking water. Mark had to pay approximately $15,000 in medical bills for his illness caused by the contaminated water.

A few weeks after the sale, Sally went to her friend's church picnic. She saw her friend's Pastor (Ken) and approached him. She was feeling guilty about what she had done and was concerned that she would be liable. After some small talk she told Pastor Ken specifically what she had done with her property sale and asked him if he knew a good lawyer.

1. Mark files a civil suit against Sally for her actions regarding the transaction with him that led to his drinking the water, alleging a cause of action for battery.
   a. What is the likelihood of success on the battery cause of action?
   b. Other than battery and possible claims for civil conspiracy and intentional infliction of emotional distress, what other common law tort cause(s) of action should Mark bring in his lawsuit against Sally for her actions regarding the transaction, and with what likelihood of success?

2. What procedural step could Sally’s attorney take in an action filed by Mark against Sally to try to also hold Charlie and Alvin legally responsible for any claims asserted by Mark?

3. Mark’s attorney discovers that Sally had a conversation with Pastor Ken at the picnic about the sale, and at trial he calls Pastor Ken to testify about the contents of the conversation. Sally objects on the ground that the conversation with the Pastor Ken was privileged. How would the Court likely rule on the objection?
Question No. 3: Examiner's Analysis

1(a). Mark would likely succeed on his cause of action for battery against Sally.

Battery requires intent to cause harmful or offensive contact and resultant harmful contact. Field v. Philadelphia Electric Company, 388 Pa. Super 400, 565 A.2d 1170 (1989), citing Restatement (Second) of Torts Section 13. In Field an electric company exposed an individual to radiation by operating a reactor knowing that the claimant would be exposed to dangerous levels of radiation and by deliberately venting radioactive steam onto the claimant knowing his location. The Court found that the intentional act of venting steam where the steam produced the contact is sufficient to state an actionable battery. In reaching its conclusion the Court referenced Restatement (Second) of Torts Section 18, comment C, which in part provides: "It is not necessary that the contact with the other's person be directly caused by some act of the actor. All that is necessary is that the actor intend to cause the other, directly or indirectly, to come in contact with a foreign substance in a manner which the other will reasonably regard as offensive." The Field Court also concluded that it was immaterial that the electric company did not intend to harm the claimant. They noted that if there is intentional contact, the consequences substantially certain to follow from such contact are within the scope of the tort.

In Barber v. Pittsburgh Corning Corp., 365 Pa. Super 247, 529 A.2d 491 (1987), reversed on other grounds, 521 Pa. 29, 555 A.2d 766 (1989), the Superior Court found that a cause of action for battery existed where the Plaintiffs alleged that the Defendants deliberately exposed the Plaintiffs to asbestos above safe levels knowing that the exposure would cause serious bodily injury and death. The Barber Court noted in its Opinion that intent in the context of tort litigation is defined to include the desire to bring about the likely consequences of an intentional act or a belief that the consequences are substantially certain to result from it. Where an actor knows that the consequences are substantially certain to result from his act and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. Id. citing Restatement (Second) of Torts, §8A. Thus, intent extends both to the desired consequences and to the consequences substantially certain to follow from the act.

As applied here, it is clear that Sally knew from the time that she acquired the property that the well water was unfit for human consumption. This was later confirmed by the water quality test performed by Alvin. Despite this knowledge, and the fact that she knew from Alvin's report that anyone who drank the water would become violently ill, she proceeded to sell the property to Mark. Sally knew that Mark would be drinking the water as it was the only water source servicing the property. She knew that he intended to drink the water based upon her conversation with him and that if he drank the water she knew he would likely become violently ill. Sally's intent to cause harmful contact to Mark is established by her knowledge that Mark's drinking the contaminated water and becoming sick was substantially certain to result from her sale of the property to him. Despite this knowledge she proceeded with the transfer of the property to Mark who proceeded to drink the water and become sick. As a result of Sally's actions Mark will be able to recover for the damages sustained as a result of drinking the contaminated water.

In summary, it appears that a valid cause of action for battery has been established against Sally, and Mark should be successful in asserting this claim.
1.(b) Mark should bring a cause of action for fraud against Sally and will likely be successful. Mark could also potentially bring a cause of action for negligence which would also likely be successful on these facts.

Mark would have a cause of action against Sally for fraud. “Fraud consists of anything calculated to deceive whether by single act or combination, or by suppression of truth, or suggestion of what is false, whether it be by direct falsehood or by innuendo, by speech or by silence, word of mouth, or look, or gesture.” Woodward v. Dietrich, 378 Pa. Super. 111, 548 A.2d 301, 307 (1988). In order to state a cause of action for fraud, the Plaintiff is required to establish: (1) a misrepresentation; (2) a fraudulent utterance thereof; (3) an intention by the maker that the recipient will thereby be induced to act; (4) justifiable reliance by the recipient upon the misrepresentation; (5) damage to the recipient as the proximate result. The victim of a fraud is entitled to all pecuniary losses which result as a consequence of his reliance on the truth of the representations. Delahanty v. First Pennsylvania Bank, 318 Pa. Super. 90, 108, 464 A.2d 1243, 1252 (1983).

The rules for determining whether reliance upon a fraudulent misrepresentation was justifiable were set forth by the court in Silverman v. Bell Savings & Loan Association, 367 Pa. Super. 464, 533 A.2d 110 (1987) as follows:

It is a fundamental principal of the law of fraud, regardless of the form of relief sought, that in order to secure redress, the representee must have relied upon the statement or representation as an inducement to his action or injurious change of position. The recipient of a fraudulent misrepresentation can recover against its maker if, but only if, (a) he relies on the misrepresentation in acting or refraining from action, and (b) his reliance is justifiable.

* * *

Although the recipient of a fraudulent misrepresentation is not barred from recovery because he could have discovered its falsity if he had shown his distrust of the makers' honesty by investigating its truth, he is nonetheless required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation. (internal citations omitted)

As applied here, it is clear that Sally misrepresented to Mark in the agreement of sale the quality of the water. Sally had known throughout the period of time that she lived in the home that the water was not drinkable and this fact was later confirmed when Alvin performed the water tests which showed that the well water was not fit for human consumption. Despite this knowledge she signed the Agreement of Sale wherein she represented to Mark that the well water was fit for human consumption when she knew that this was not true and that the report that was attached to the Agreement was not accurate. This information was fraudulently uttered to Mark through her execution of the Agreement of Sale. Sally also orally represented that the water was fit for human consumption. It was clearly her intention that Mark rely upon these representations so that the sale would go through. In fact, Mark did rely upon the misrepresentations and there is no evidence that Mark had reason to believe that either Sally's representations or the attached report were not truthful. It would likely be deemed to be reasonable for Mark as a first time home buyer to rely on these representations by Sally which were confirmed by a separate water quality report. There is no evidence in the facts which would have lead Mark to believe that an independent test of the water was necessary. As a result
of the misrepresentations Mark would be entitled to pursue damages against Sally for any decreased property value resulting from the sale and the monetary damages he sustained from his illness resulting from drinking the water. Since Mark should be able to prove each of the elements for a fraud cause of action against Sally he should be successful on this claim.

Mark could also potentially bring a cause of action in negligence. The four elements necessary to establish a cause of action in negligence are: a duty or obligation recognized by law; breach of that duty by the defendant; causal connection between the defendant’s breach of that duty and the resulting injury; and actual loss or damage suffered by the complainant. Orner v. Mallick, 515 Pa. 132, 527 A.2d 521, 523 (1987). “One duty imposed by law is to use due diligence to avoid causing harm which an individual has no legal right to inflict upon another. This duty is breached by any legally harmful act or omission which might have been foreseen and avoided.” Maize v. Atlantic Refining Company, 352 Pa. 51, 41 A.2d 850 (1945). An actor is liable for negligence where the actor made a misrepresentation of fact that caused bodily harm to another as a result of an act done by the other in reliance on the truth of the representation, where the actor should realize that the misrepresentation is likely to induce action by the other which involves an unreasonable risk of bodily harm to the other and the actor knows that the statement is false. See Robb v. Gylock Corp. 384 Pa. 209, 120 A.2d 174 (1956), Restatement Torts, Section 310.

As applied here, Sally knew that there was a problem with the well water on her property and never drank the water. She knew that Mark was going to drink the water because he specifically asked about the quality of the water and there were no other public water sources in the area. Sally had a duty to inform Mark of the problems which she breached by concealing the problems from him. As a result of this breach Mark proceeded to drink the contaminated water and was caused to be made sick by it. He suffered damages for medical bills and a decrease in the value of his property for which he will likely be able to recover. In sum, Mark can probably make out a cause of action in negligence on these facts.

2. Sally’s attorney could join Charlie and Alvin as additional defendants via praecipe for a writ or a complaint and allege that they are liable to or with Sally on any causes of action brought by Mark.

Pa.R.C.P.No. 2252 (a) (4) provides in pertinent part that any party may join as an additional defendant any person not a party to the action who may be liable to or with the joining party on any cause of action arising out of the transaction or occurrence or series of transactions or occurrences upon which the underlying cause of action against the joining party is based. The additional defendants may be joined via praecipe for a writ or the filing of a complaint. See Pa. R. C. P. No. 2252 (b). A complaint must be filed in the manner and form required of the initial pleadings of the Plaintiff in the action, and shall set forth the facts relied upon to establish the liability of the joined party and the relief demanded. Pa. R.C.P. No. 2252(b)(2).

As applied here, Sally’s attorney wishes to take steps to hold Charlie and Alvin legally responsible for the claims which have been asserted by Mark. Without having to file a separate action, Sally can simply join Charlie and Alvin as additional defendants in the action brought by Mark’s attorney. The action can be commenced via praecipe for writ or complaint but when the complaint is ultimately filed Sally’s counsel will have to set forth the facts in the complaint upon which she relies to establish the liability of Charlie and Alvin and set forth the relief which she will be demanding. By proceeding in this procedural fashion Sally will be able to make Charlie
and Alvin parties to Mark’s suit and attempt to hold them partially responsible for the actions collectively taken by Sally, Charlie and Alvin. This effort would likely be successful as Charlie and Alvin both took an active part in concealing the true quality of the water when they both knew that it was contaminated and unfit for human consumption, and as a result they should be held liable with Sally on Mark’s causes of action.

3. The Court would likely overrule the objection to testimony of the conversation between Sally and Pastor Ken as it will likely not be deemed to be protected by the clergy/communicant privilege.

Rule 501 of the Pennsylvania Rules of Evidence provides for the continued recognition of privileges as provided by law. The clergy/communicant privilege is codified at 42 Pa.C.S.A. Section 5943 and provides as follows:

No clergyman, priest, rabbi or minister of the gospel of any regularly established church or religious organization, except clergymen or ministers, who are self-ordained or who are members of religious organizations in which members other than the leader thereof are deemed clergymen or ministers, who while in the course of his duties has acquired information from any person secretly and in confidence shall be compelled, or allowed without consent of such person, to disclose that information in any legal proceeding, trial or investigation before any government unit.

In a clergy/communicant relationship, the communicant holds the privilege to prevent the disclosure of confidential communications made pursuant to that relationship. Pennsylvania Courts have interpreted the clergy/communicant privilege as applying only to confidential communications between a communicant and a member of the clergy in his/ her role as confessor or spiritual counselor. Commonwealth v. Stewart, 547 Pa. 277, 690 A.2d 195 (1997). The mere fact that a communication is made to a member of the clergy is not sufficient alone to invoke the privilege. Confidential communications to a member of the clergy, even for counseling or solace, do not fall within the protections of the privilege unless motivated by spiritual or penitential considerations. Id.

As applied here, Sally is the one who is looking to assert the clergy/communicant privilege which she has the right to do. The question becomes does the privilege apply on the facts presented.

The facts make clear that Sally approached Pastor Ken who is the Pastor of her friend’s church. There is no indication that she was seeking Pastor Ken out as a “confessor or spiritual counselor” when she struck up the conversation at the picnic. Although she told Pastor Ken what she had done, she never asked for any type or forgiveness or spiritual counseling and her only request was whether Pastor Ken knew a good lawyer. In fact, there is no indication that this information was even being shared with Pastor Ken in confidence. Further, although Pastor Ken would be a member of the clergy covered by the privilege he was not Sally’s spiritual advisor or counselor.

Since the conversation between Sally and Pastor Ken does not appear to fall within the protections of the clergy/communicant privilege, the Court will overrule the objection and permit Pastor Ken to testify about the substance of the conversation.
Question No. 3: Grading Guidelines

1. **Torts: fraud, battery, negligence**

   Comments: The candidate is expected to discuss the elements of battery, apply the elements to the applicable facts, and conclude that Mark would likely have a viable cause of action against Sally for battery. The applicant is expected to identify fraud as a cause of action which can be brought against Sally, discuss and apply the elements of this tort to the applicable facts, and conclude that Mark would likely have a viable cause of action against Sally for fraud. Credit can be obtained for identifying negligence as a possible cause of action against Sally, and applying the elements of negligence to the facts.

   12 Points

2. **Civil Procedure -- Joinder of an Additional Defendant**

   Comments: The candidate is expected to recognize that Charlie and Alvin could be joined as Additional Defendants via Praecipe for a Writ or Complaint in order to attempt to hold them liable for the damages sustained by Mark.

   3 Points

3. **Evidence -- Clergy/Communicant Privilege**

   Comments: The candidate is expected to identify and discuss the clergy/communicant privilege and conclude that Sally will not likely be successful in asserting the privilege and Pastor Ken will probably be required to disclose the substance of the conversation with Sally.

   5 Points
Question No. 4

State S has been home to numerous factories that manufacture and sell furniture. The factories have employed many State S residents and produced tax revenues for State S. Many of the local factories have closed or downsized recently as a result of cheaper foreign competition. The State S legislature passed, and the governor signed, a bill known as Act 111. Act 111 requires that state agencies in State S, purchasing furniture using public funds, purchase the furniture only from manufacturers in State S. The law is to be administered and enforced by the Secretary of Consumer Affairs.

Annabelle’s Armoires is a large business that manufactures and sells wooden office furniture. It is located in C City, Pennsylvania, and employs over 100 individuals. A significant portion of Annabelle’s business has always come from state government agencies in State S. Upon passage of Act 111, Annabelle’s was advised that its bids to furnish new state offices in State S were rejected because it was not located in State S. Suit was brought on behalf of Annabelle’s against the appropriate defendants in federal court in State S, alleging that Act 111 violates its rights under the Commerce Clause of the federal Constitution, and seeking declaratory and injunctive relief.

1. Does Act 111 violate the Commerce Clause of the United States Constitution?

Prior to the passage of Act 111 and the loss of business, Annabelle’s employed a sales force of 6, including Juan, who was of Mexican descent, had worked for Annabelle’s for 5 years, and received generally good performance evaluations. His sales volume was the third best of the sales staff, so he was shocked when he received notice that he would be terminated, effective immediately, for failure to follow management directives. Juan was not provided any additional information. The other members of the sales staff, none of whom was of Mexican descent, were
retained. After following required administrative procedures, Juan brought suit against Annabelle’s in the appropriate federal court in Pennsylvania, alleging that his rights under Title VII were violated when he was discriminated against because of his national origin.

At trial, Juan presented evidence of his work history, his sales volume, his performance reviews, and his termination. In support of Juan’s termination, Annabelle’s sales manager testified that he had directed Juan to schedule visits to prospective customers in his territory on a particular day, and Juan did not do so. Juan testified that he was scheduled to go to his child’s school for a conference with the teacher on the evening of the day he was directed to visit prospective customers, and that a visit to the customers would not have allowed him to arrive home in time for the conference. Juan testified that he scheduled the customer visits the next day and so notified the sales manager. Other sales employees, who were not terminated, testified that they had made similar scheduling changes because of personal commitments and no disciplinary action was taken.

2. What are the respective burdens for each party with respect to Juan’s Title VII claim, and, based on the facts provided, was there sufficient evidence for a fact finder to conclude that each party met its respective burdens with respect to Juan’s claim?

After the passage of Act 111, Annabelle’s business declined significantly, and several members of its sales staff were terminated as a result. At the time of their hiring, sales staff were required to sign an employment contract that contained a non-compete clause that provided: “If employee leaves Annabelle’s employ, for any reason, employee covenants that he/she will not accept employment with any furniture manufacturer located within 250 miles of Annabelle’s for a period of 7 years.

3. What is the likely outcome of an action by Annabelle’s to enforce the non-compete clause?
Question No. 4: Examiner’s Analysis

1. Act 111 does not violate the Commerce Clause because State S, in making furniture purchases, is acting as a market participant.

The Commerce Clause of the United States Constitution, Art. I, §8, Cl. 3, grants to the federal government the right to regulate commerce among the States. Powers not delegated to the federal government are reserved to the States or to the people. The “negative” aspect of the Commerce Clause is the implied limitation on states’ power to interfere with or impose burdens on interstate commerce unless the interference is demonstrably justified by a valid factor unrelated to economic protectionism. *Wyoming v. Oklahoma*, 502 U.S. 437, 112 S.Ct. 789 (1992).

In the case of *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 71 S.Ct. 295 (1951), the Supreme Court held that a state may not burden interstate commerce, even if the goal of the State’s regulation is the betterment of the health and safety of its citizens if reasonable nondiscriminatory alternatives to conserve legitimate local interests are available. In that case, an ordinance was enacted by the City of Madison making it illegal to sell any milk as pasteurized unless it had been processed and bottled at an approved plant within 5 miles of the city. In its Opinion, the Court invalidated the ordinance and found that there were non-discriminatory alternatives that would accomplish the City’s goals of furthering the health and safety of the local community.

Here, it is undisputed that Act 111 discriminates against out-of-state furniture businesses, and that Act 111 was passed to benefit the citizens and businesses of State S. However, Act 111 only applies to publicly-funded purchases of furniture by state government entities in State S for use in public buildings. As a result, the appropriate analysis would consider State S and its officials as “market participants.” In the case of *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 96 S.Ct. 2488 (1976), the Court considered a Maryland program in which the state offered a financial reward for conversion of Maryland-titled junk cars converted to scrap, and imposed a more stringent documentation requirement for out-of-state processors of junk cars to receive the reward. The more stringent documentation requirement made it easier for suppliers in possession of junk cars to sell to in-state processors. The Court concluded that Maryland was acting as a “market participant,” rather than as a “market regulator,” and stated: “Nothing in the purpose animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.” *Id* at 810.

Accordingly, it is likely that the court will dismiss Annabelle’s Commerce Clause challenge to Act 111 because under Act 111 State S is acting as a market participant.

2. Juan will bear the initial and ultimate burden of proof of his Title VII claim. He may proceed under the burden shifting framework or the mixed-motive theory of liability.

Title VII provides: “It shall be an unlawful employment practice for an employer- (1)
to fail or refuse to hire or to discharge any individual ..., because of such individual’s race, color, religion, sex, or national origin..." 42 U.S.C. 2000e-1 et. seq. (emphasis added).

Under Title VII, in analyzing disparate treatment claims, courts have recognized actions based on "pretext" and "mixed motive." In order to establish a prima facie case under the "pretext" method, Juan must offer evidence that: (1) he belongs to a protected class; (2) he was qualified for the position in question; (3) he suffered an adverse employment action; (4) circumstances exist that support an inference of discrimination. See McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089 (1981).

"National origin" has been interpreted to mean the country from which an individual or his ancestors came. Espinoza v. Farah Manufacturing Co., Inc., 414 U.S. 86, 94 S.Ct. 334 (1973). It is undisputed that Juan, who was of Mexican descent, is a member of a protected class, and that he was qualified for his position by virtue of the fact that he had performed it for several years with satisfactory performance reviews. His termination will qualify as adverse employment action. Additionally, none of the other sales employees was terminated. Juan will likely be found to have established a prima facie case of discrimination.

Once Juan has established a prima facie case, the burden shifts to Annabelle’s to articulate a legitimate non-discriminatory reason for the action taken against him. Texas Department of Community Affairs v. Burdine, supra. Annabelle’s Sales Manager testified that Juan was terminated for failure to follow a directive that he visit prospective customers in his sales territory on a date specified. "This burden is one of production, not persuasion." Reeves v. Sanderson Plumbing, Inc., 530 U.S. 133,142, 120 S.Ct. 2097 (2000). "[I]t [the burden] can involve no credibility assessment." Id at 142, citing St. Mary’s Honor Center, et. al. v. Hicks, 509 U.S. 502, 510, 113 S.Ct. 2742 (1993). This testimony would likely be sufficient evidence of a legitimate non-discriminatory reason for Juan’s termination to meet defendant’s burden.

Since Juan retains the ultimate burden of persuasion, he must then establish that the reason proffered by Annabelle’s was not the true reason for its decision, but, rather, was pretextual, and that the true reason was based upon unlawful criteria. Burdine, supra, at 254, St. Mary’s Honor Center, et. al., v. Hicks, 509 U.S. 502, 113 S.Ct. 2742 (1993). "Provided that the proffered reason is one that might motivate a reasonable employer, an employee must meet the reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." Chapman v. Al Transp., 229 F.3d 1012, 1030 (11th Cir. 2000). However, "...a plaintiff’s prima facie case, combined with sufficient evidence to find that the employer’s asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." Sanderson, supra at 148.

Juan’s testimony that he scheduled the customer visits for the next day because of an evening school conference, and his former colleagues’ testimony that similar actions by other sales agents were not punished, if found credible, would be sufficient to allow but not necessarily require a fact finder to conclude that the offered reason was a pretext for discrimination.
In a "mixed motive" action, a plaintiff must prove by direct or circumstantial evidence that an illegitimate factor had a "motivating" role in the employment decision. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775 (1989), *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148 (2003). If the plaintiff succeeds, the employer may avoid liability by proving that it would have made the same decision even in the absence of the impermissible factor. *Price Waterhouse, supra*. Since Juan has no direct evidence, such as a derogatory statement by his supervisor, the court would look at circumstantial evidence of discrimination. Courts have considered "evidence, whether or not rigorously statistical, that similarly situated employees outside the protected class received systematically better treatment" as a type of circumstantial evidence of intentional discrimination. See *Sun v. Board of Trustees*, 473 F.3d 799, 812 (7th Cir. 2007). Since we know that other employees were not disciplined, let alone terminated, for conduct similar to Juan's, there may be sufficient evidence of discriminatory animus for Juan to prevail under a mixed-motive analysis. Annabelle's could avoid liability by proving that it would have made the same decision even in the absence of the impermissible factor.

3. **It is likely that the non-compete clause will be found to be unenforceable as the terminated sales staff did not leave voluntarily, and the terms of the covenant are overly broad.**

The standard for enforcement of a restrictive covenant in Pennsylvania is that it must: (1) relate to...a contract for employment, (2) be supported by adequate consideration, and (3) the application of the covenant must be reasonably limited in both time and territory. *Insulation Corp. of America v. Brobston*, 446 Pa. Super. 520, 667 A.2d 729 (1995), *Piercing Pagoda, Inc. v. Hoffner*, 465 Pa. 500, 351 A.2d 207 (1976). Here, it is clear that the first two elements have been met. The restrictive covenant was set forth in the employment contract which was entered into at the time the sales employees were hired; hence, the non-compete provisions were part of their employment agreement and supported by consideration. See *Maintenance Specialties, Inc. v. Gottus*, 455 Pa. 327, 314 A.2d 279 (1974). The determination of the third element relating to the reasonableness of time and territory involves a weighing of the employer's need for protection (the employer's protectable interest) against the hardship of the restriction to be imposed on the employee. *Brobston, supra*. The third element is problematic for several reasons: the length and scope of the prohibition, the fact that the sales job likely involves no unique technical information or skill, and the fact that the sales employees were terminated for lack of business at Annabelle's.

In *Brobston*, the court held that the fact that an employee was terminated for failing to promote his employer's interests rather than having quit voluntarily was a circumstance to be considered in evaluating the reasonableness of a restrictive covenant. Significant among the factors identified by the court was the [apparent] fact that the employer determined that the employee's worth to the corporation was presumably insignificant, stating:

The employer who fires an employee for failing to perform in a manner that promotes the employer's business interests deems the employee worthless. Once such a determination is made by the employer, the need to protect itself from the former employee is diminished by the fact that the employee's worth to the corporation is presumably insignificant. Under such circumstances, we
conclude that it is unreasonable as a matter of law to permit the employer to retain unfettered control over that which it has effectively discarded as worthless to its legitimate business interests. *Id at 532.*

In its Opinion reversing the injunction against the employee’s ability to compete, the Court stated: “This conclusion would remain the same even if it were determined that [the employee] was legitimately terminated for economic reasons…” *Id.* Here, it appears that the sales employees were terminated for economic reasons, lack of business, which was caused by Act 111. Accordingly, under the above analytic framework, since Annabelle’s viewed the employees’ value to the corporation as insignificant, it is unlikely that the covenant will be held to be enforceable.

Additionally, while such things as customer lists for Annabelle’s remaining viable customers might be viewed as proprietary and worthy of protection, the court might view the length of time and scope of the covenant as excessive and unreasonable, in light of the hardship that might be expected from its enforcement. Annabelle’s has suffered a loss of customers, which necessitated termination of some of its sales staff. Given the lack of sufficient business to support its sales staff, it would appear to be unreasonable to require sales employees to refrain from competition for a period of seven years in an area within 250 miles.
Question No. 4: Grading Guidelines

1. Dormant Commerce Clause

Comments: Candidates should discuss the Commerce Clause to the United States Constitution, its “negative” aspect, and the “market participant” exception, and apply the law to the facts, reaching the correct conclusion that State S is a “market participant”, and, therefore, Act 111 would not be found to violate the Commerce Clause.

6 points

2. Title VII- prima facie case; burdens of production and proof.

Comments: Candidates should discuss the elements of a prima facie case of national origin discrimination; they should recognize that the plaintiff bears the initial and ultimate burden of persuasion, which may be met with circumstantial evidence. Candidates should recognize that under a “pretext” claim, once the prima facie case has been established, the burden of production of a legitimate non-discriminatory reason is shifted to the employer, following which Juan is required to establish pretext and that illegal discrimination was the real reason for defendant’s negative employment action. Credit can be obtained for discussing the burdens in a “mixed motive” claim, recognizing that once the plaintiff proves that an illegitimate factor had a motivating role in the decision, the employer can avoid liability by proving it would have made the same decision even in the absence of the impermissible factor. The candidates should apply these principles to the facts and reach a well-reasoned conclusion.

8 points

3. Contracts- Pa law- Non-Compete Covenants

Comments: Candidates should discuss the general requirements for non-compete clauses in employment contracts, and analyze the facts to reach a well-reasoned conclusion.

6 points
Question No. 5

Jack and Katie, a married couple, purchased a parcel of land located in Smallville, Pennsylvania, upon which was erected a small residential dwelling known as Blackacre. The deed conveying the property stated that Jack and Katie were granted title to Blackacre as "husband and wife." Shortly after moving into Blackacre, Katie gave birth to octuplets.

Because Blackacre now was much too small for their suddenly large family, Jack and Katie entered into a valid, written agreement with Bob, a local contractor, to build an addition to their home. To defray part of the cost of the addition, Jack and Katie sold Whiteacre, their hunting cabin also located in Pennsylvania, to Sarah. The deed from Jack and Katie to Sarah contained the following: "The Grantors hereby do remise, release, and forever quitclaim, unto the Grantee, her heirs and assigns, all right, title, and interest, both in law and equity, in or to the lands released."

Bob finished his work on the addition and sent Jack and Katie a final bill for $6,000, the remaining amount due under their agreement. Jack and Katie, however, refused to pay the bill stating that Bob had failed to paint the interior of the new addition and to install marble tiles in the new bathrooms. Bob replied that interior painting and installation of marble tile were not part of their agreement. For more than a month, Bob argued with Jack and Katie about the payment of his bill. Finally, Jack and Katie offered to give Bob two tickets, each having a face value of $1,000, to the Super Bowl, which was being played in Pennsylvania for the first time, instead of paying the amount that Bob claimed was owed to him. Bob decided to accept the offer of the Super Bowl tickets rather than continuing to argue with Jack and Katie about his bill. The parties then signed a memorandum in which Bob agreed to accept the Super Bowl tickets in full satisfaction of his claim against Jack and Katie.
Ted, a caterer in Big Valley, Pennsylvania, the site of the Super Bowl, advertised the following: “Coming to the Super Bowl? Let us cater your Stadium tailgate party! Stadium parking passes for the game also available! Bob, who lived 200 miles from Big Valley, saw the ad and entered into a valid contract with Ted for a parking pass and a lavish party in the Stadium parking lot. When making the contract, Bob told Ted, “But for the Super Bowl, I never would go to Big Valley or pay your outrageous prices.” Ted replied that his prices were due to the large number of fans like Bob who were coming from out-of-town solely to attend the game.

When Bob arrived at Jack and Katie’s house to pick up the Super Bowl tickets at the time agreed upon in the memorandum, Jack and Katie refused to turn them over saying that they had made a bad deal and that they could “scalp” the tickets for a large amount of money.

Sarah subsequently discovered from a search of public records that Jack and Katie never had received valid title to Whiteacre.

1. Based solely on the language of the deed that she received, does Sarah have a legal remedy against Jack and Katie?

2. Bob filed suit against Jack and Katie for breach of contract seeking damages in the amount of $6,000. Jack and Katie contend that if they are liable to Bob, the damages cannot exceed the face value of the Super Bowl tickets that Bob had agreed to accept. Will Jack and Katie’s defense be successful?

3. Assume for purposes of this question, that Bob’s suit against Jack and Katie was resolved amicably and that Bob now has the Super Bowl tickets. Just before Bob was to leave for Big Valley to attend the game, the players suddenly and unexpectedly went on strike to protest the owners’ unilateral implementation of a new drug testing policy. Due to this completely unforeseen event, the Super Bowl was cancelled. Ted filed suit against Bob after Bob refused to pay for the costs of the tailgate party and the stadium parking pass. What defense should Bob raise to this suit?

4. Due to the pressure of caring for their octuplets, Jack and Katie subsequently divorced. (a) What was the nature of the ownership of Blackacre prior to the divorce? (b) Apart from equitable distribution claims, what ownership rights do Jack and Katie have to Blackacre and how should the proceeds from a potential sale of the property be divided following their divorce?
Question No. 5: Examiner’s Analysis

1. Sarah does not have a legal remedy against Jack and Katie because the deed to Whiteacre was a quitclaim deed which contains no warranties of title or quiet enjoyment.

Jack and Katie’s deed to Sarah contained the words “release and quitclaim.” Whenever such words are contained in a deed, they are construed as creating a quitclaim deed. 21 P.S. § 7 (2001).

Unlike a general or special warranty deed, a quitclaim deed contains no warranties of any kind. It merely transfers or releases whatever title or interest that the grantor may have in the property, whatever that may be, if any, at the time of the execution of the deed. 1 LADNER, PENNSYLVANIA REAL ESTATE LAW, § 16.03 (5th ed. 2006). “The distinguishing characteristic of a quitclaim deed is that it is a conveyance of the interest or title of the grantor in and to the property described, rather than of the property itself.” Greek Catholic Congregation of Borough of Olyphant v. Plummer, 338 Pa. 373, 377, 12 A.2d 435, 437 (1940). Thus, a quitclaim deed is used when a party wishes to sell or otherwise convey an interest in property that he thinks that he may have, but does not wish to warrant any title. Id.

Since a quitclaim deed is one that purports to convey nothing more than the interest or estate that the grantor possesses at the time, the grantee receiving such a deed proceeds at his peril regarding title to the property. If it later turns out that the grantor had no legal interest or title to the property, the grantee of a quitclaim deed has no cause of action against the grantor for breach of warranties of title or quiet enjoyment. Greek Catholic Congregation of Borough of Olyphant v. Plummer, 347 Pa. 351, 352, 32 A.2d 299, 300 (1943).

Because a quitclaim deed contains no warranties of any kind and only conveys whatever interest the grantor has in the property, Sarah has no legal protection as to her title to Whiteacre and cannot pursue a remedy against Jack and Katie.

2. Jack and Katie’s defense will not be successful because the obligation to pay Bob’s bill was not discharged by the accord between the parties due to the failure to turn over the Super Bowl tickets.

Jack and Katie’s defense that Bob’s damages are limited because of his agreement to accept the Super Bowl tickets could be based upon the existence of an accord. The Restatement (Second) of Contracts defines an accord as “a contract under which an obligee promises to accept a stated performance in satisfaction of the obligor’s existing duty.” RESTATEMENT (SECOND) OF CONTRACTS, § 281 (1). Because an accord is a contract, the elements necessary to establish the existence of an accord are the same as those required to show the existence of a contract. Brunswick Corp. v. Levin, 442 Pa. 488, 491, 276 A.2d 532, 534 (1971). There must be an unequivocal offer of payment or performance in satisfaction of the underlying claim, an acceptance and consideration. PNC Bank, Nat. Ass’n v. Balsamo, 430 Pa. Super. 360, 634 A.2d 645 (1993), appeal denied, 538 Pa. 659, 648 A.2d 790 (1994). Consideration to support an accord exists when the parties have a legitimately disputed claim and the creditor

The facts here clearly demonstrate the existence of an accord between the parties. There was a legitimate dispute about Bob’s bill for the work on the addition to Blackacre and Bob accepted Jack and Katie’s offer of the Super Bowl tickets to satisfy his bill.

The existence of an accord, however, does not operate as a substituted contract\(^1\) that extinguishes an obligor’s existing duty by substituting the promise of another duty in its place. Nowicki Construction Co., Inc. v. Panar Corp., N.V., supra. Instead, an accord suspends the obligee’s right to enforce the original duty and provides the obligor with a chance to render a substituted performance of a new promise in satisfaction of the original duty. RESTATEMENT (SECOND) OF CONTRACTS, § 281, comment b. Only actual payment or performance of the promise in the accord can discharge the original duty. Lazzarotti v. Juliano, 322 Pa. Super. 129, 138, 469 A.2d 216, 221 (1983). Here, there are no facts that would indicate that the parties intended Jack and Katie’s promise to give the Super Bowl tickets to Bob to discharge the debt in the absence of performance of that promise. Thus, there was no substituted contract, and Jack and Katie’s original duty to pay Bob for the work on Blackacre was not discharged because they failed to provide the substituted performance required by the accord.

When an accord is breached by the obligor’s failure to perform, the law gives the obligee the choice of enforcing the original duty in the underlying agreement or the duty in the accord. RESTATEMENT (SECOND) OF CONTRACTS, § 281, comment b; Zager v. Gubernick, 205 Pa. Super. 168, 170-74, 208 A.2d 45, 49 (1965). Because Jack and Katie breached the accord by failing to turn over the Super Bowl tickets, Bob’s claim for damages is not limited to the value of the tickets. He is free to seek higher damages by enforcing his original $6,000 claim against Jack and Katie. Therefore, Jack and Katie’s defense will not be successful.

### 3. Bob should raise the doctrine of frustration of purpose in defending Ted’s suit.

Bob should raise frustration of purpose as a defense to Ted’s suit for non-payment of the costs of the Super Bowl tailgate party and the parking pass. The doctrine of supervening frustration or frustration of purpose, which is set forth in Section 265 of the Restatement (Second) of Contracts, states:

Where, after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

RESTATEMENT (SECOND) OF CONTRACTS, § 265.

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\(^1\) In a substituted contract, a new promise is accepted in satisfaction of a previously existing claim; in an accord and satisfaction, the performance of the new promise is accepted as a satisfaction. A party asserting the existence of a substituted contract has the burden of proving that the parties intended to discharge the earlier contract. \textit{Id.}

The doctrine of frustration of purpose is specifically applicable to a situation where some change in circumstance has so destroyed the value of a party’s performance as to frustrate the other party’s purpose in making the contract. To establish a frustration of purpose defense, four conditions must be met. They are: (1) the purpose that is frustrated must have been the principal purpose of that party in making the contract and the other party was aware of that purpose; (2) the frustration must be substantial; (3) the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made; and (4) the frustration must occur without the fault of the party claiming frustration. RESTATEMENT (SECOND) OF CONTRACTS, § 265, comments a and b; see also, John E. Murray, Jr., MURRAY ON CONTRACTS, § 114 (B), at 754 (4th ed. 2001).

In this case, Bob’s principal purpose in entering into the contract with Ted was to have a tailgate party on the day of the Super Bowl in the parking lot of the Stadium where the Super Bowl was being played. Bob had tickets to the game. Bob told Ted that, but for the Super Bowl, he would never go to Big Valley or have agreed to pay what he regarded as “outrageous prices” for Ted’s services. Ted also understood that Bob’s principal purpose in making the contract was based upon the playing of the game. Ted specifically advertised his services to fans like Bob who were coming to Big Valley to attend the game. Further, Ted admitted that his prices were due to the large number of fans like Bob who were coming to town solely to attend the Super Bowl. Thus, both parties not only were aware that the playing of the game was a basic assumption on which the contract was made, but that it also was Bob’s principal purpose in making the agreement for the tailgate party and the parking pass at the Stadium.

The Restatement provides that a party’s frustration of purpose is considered “substantial” when it is “so severe that it is not fairly to be regarded as within the risks ... assumed under the contract.” RESTATEMENT (SECOND) OF CONTRACTS, § 265, comment a. Here, there is no indication that the parties gave any thought to a possibility that the game would not be played or intended Bob to bear the risk of loss for that possibility. The cancellation of the Super Bowl caused a substantial frustration of purpose because the contract to provide a Super Bowl tailgate party and a parking pass for the game at the Stadium was dependent for performance on the Super Bowl being played. Moreover, the supervening event that caused the frustration of purpose, the players’ strike, was completely unforeseen. The foreseeability of the supervening event is a factor that must be considered in determining whether the risk of loss should be assumed by the party seeking to be excused from the contract. MURRAY ON CONTRACTS, *supra*, at p. 755. Based upon the absence of any allocation of risk and the unforeseen nature of the supervening event, Bob’s frustration of purpose would be considered “substantial.”

Finally, the supervening event that caused the frustration of purpose did not happen through any fault on the part of Bob. The facts state that the supervening event that caused the frustration of purpose was the players’ strike to protest the owners’ unilateral implementation of a new drug testing policy.
Once a party has demonstrated a frustration of purpose, that party’s obligation to render performance is discharged. RESTATEMENT (SECOND) OF CONTRACTS, § 265. “At that point, it is up to the parties to waive the difficulties or seek to terminate the agreement.” Ellwood City Forge Corp. v. Fort Worth Heat Treating Co., Inc., 431 Pa. Super. 240, 249, 636 A.2d 219, 223 (1994). Because Bob can demonstrate the elements necessary for asserting the defense of frustration of purpose, he has a strong argument that his duty to pay Ted for the costs of the tailgate party and the parking pass for the Super Bowl was discharged.

4. Jack and Katie received title to Blackacre as tenants by the entirety. Upon their divorce, the tenancy by the entireties was severed and each would own an undivided one-half interest in Blackacre as tenants in common. After the sale of the property, Jack and Katie will be entitled to one-half of the net proceeds.

Tenancy by the entireties is a form of joint ownership of property that exists only between a husband and a wife. Maxwell v. Saylor, 359 Pa. 94, 58 A.2d 355 (1948). Under Pennsylvania law, the conveyance of real estate to two grantees who are husband and wife is presumed to create a tenancy by the entireties unless the deed shows a different intent. Holmes Estate, 414 Pa. 403, 200 A.2d 745 (1964). The deed to Blackacre stated that title to the property was conveyed to Jack and Katie as “husband and wife.” Based upon this language, Jack and Katie initially owned Blackacre as tenants by the entireties.

A tenancy by the entireties is predicated upon legal unity of husband and wife as one person or unit. Beihl v. Martin, 236 Pa. 519, 84 A. 953 (1912). The legal unity of person existing in a tenancy by the entireties, however, is destroyed by the divorce of the parties. Section 3507 of the Pennsylvania Divorce Code provides in part:

(a) General rule. – Whenever married persons holding property as tenants by the entireties are divorced, they shall, except as otherwise provided by an order made under this chapter, thereafter hold the property as tenants in common of equal one-half shares in value, and either of them may bring an action against the other to have the property sold and the proceeds divided between them.

(b) Division of Proceeds. – Except as otherwise provided in subsection (c), the proceeds of a sale under this section, after the payment of the expenses of sale, shall be divided equally between the parties.


Thus, under Pennsylvania law, a divorce severs the tenancy by the entireties and the resulting joint interest of the parties in the property becomes a tenancy in common.

A tenancy in common is an estate in which there is unity of possession but separate and distinct titles. In Re Estate of Quick, 588 Pa. 485, 490, 905 A.2d 471, 474 (2006). A right of survivorship does not exist in a tenancy in common. 1 LADNER, PENNSYLVANIA REAL ESTATE LAW, § 8.03 (5th ed. 2006). After the divorce, each co-tenant owns an undivided one-

In sum, Jack and Katie initially owned Blackacre as tenants by the entireties. The divorce severed the tenancy by the entireties and created a tenancy in common between Jack and Katie. As tenants in common, Jack and Katie each own an undivided one-half interest in the property and each is entitled to receive one-half of the proceeds less expenses if the property is sold following the divorce.
Question No. 5: Grading Guidelines

1. **Quitclaim Deed**

   Comments: Candidates should recognize that the language stated in the facts creates a quitclaim deed. Candidates should discuss the features of a quitclaim deed and reach the conclusion that the grantee of a quitclaim deed has no cause of action against the grantor for breach of warranties of title or quiet enjoyment if it later turns out that the grantor had no legal interest or title to the property.

   5 Points

2. **Accord and Satisfaction**

   Comments: Candidates should recognize the basis for the asserted defense as an attempted accord and satisfaction. Candidates should note that the elements necessary to establish the existence of an accord are the same as those required to show the existence of a contract. Candidates should recognize that the original obligation is not discharged if the accord is not satisfied by performance. Candidates should conclude that the defense of accord and satisfaction will not be successful because the accord was not satisfied by performance and that a claim based upon the original obligation can be asserted.

   5 Points

3. **Frustration of Purpose**

   Comments: Candidates should recognize the applicability of the defense of supervening frustration or frustration of purpose. Candidates should discuss the elements necessary to assert a defense of frustration of purpose and apply these elements to the stated facts in the course of reaching a well-reasoned conclusion.

   5 Points

4. **Severance of a Tenancy by the Entireties by Divorce**

   Comments: Candidates should recognize that a tenancy by the entireties is a form of joint ownership of property that exists only between a husband and a wife and discuss Pennsylvania law’s presumption that a conveyance to a husband and wife creates a tenancy by the entireties. Candidates should recognize that a divorce severs the tenancy by the entireties and results in the joint interest of the parties in the property becoming a tenancy in common with each co-tenant owning an undivided one-half interest in the property and being entitled to one-half of the proceeds of the sale.

   5 Points
Question No. 6

Tim, a lifelong resident of State Y, died two (2) months ago. Tim's will, that was duly probated in State Y, contained a devise of Greenacre, a 300-acre parcel of mountaintop land located in Pennsylvania, to his nephew, Nick, who lives in Pennsylvania near Greenacre. The residue of Tim's estate was left to his son, Sam. When Sam, the executor of Tim's estate, presented the will for probate, the provision providing for the devise of Greenacre to Nick had the word "void" written across it with Sam's signature in the margin. Sam told the Orphan's Court clerk he was directed by his father to revoke this provision.

Under State Y law, if Sam had in fact been directed by Tim, his actions would be considered sufficient to revoke the devise, thereby making Greenacre a part of the residuary estate. Under Pennsylvania law, however, Sam's attempted revocation would be invalid because Tim's alleged direction to Sam was not proven by the oaths or affirmations of two competent witnesses. Sam has opened an ancillary estate in the appropriate Pennsylvania Orphan's Court to deal with Greenacre. Sam has notified Nick of the ancillary administration, has advised Nick of the revocation, and has indicated that if Nick tries to challenge the revocation, Sam will testify that he was directed by his father to revoke the devise. Nick has filed appropriate documents with the Pennsylvania Orphan's Court seeking ownership of Greenacre.

Nick serves on the board of directors of Wind, Inc. ("Wind"), a wind energy company located in Pennsylvania. Nick is aware that Wind is looking for land to lease in the area of Greenacre for the location of commercial windmills. Wind's board consists of nine members. Discussions are to be held at the next monthly board meeting about the leasing of land in the area of Greenacre. If Nick is successful in the Orphan's Court, Nick would like to lease Greenacre to Wind, but has a number of concerns. He questions whether he, as a board member, can lease the
land to Wind. He has also learned that his presence at the next board meeting is needed to
establish a quorum.

One month ago, Wind’s purchasing agent visited Kurt’s Computers ("Kurt’s") looking
for a mobile computer system to be used by Wind to run software it had purchased for
monitoring of its windmills. Kurt’s offers computer-consulting services and also assembles and
sells its own brand of computers. Wind’s agent explained its need for a computer to run its
monitoring software to Kurt, who was the owner of Kurt’s, and Kurt agreed to assemble an
appropriate computer for Wind. Wind’s agent signed a purchase order that properly and validly
disclaimed all implied warranties arising under the Uniform Commercial Code and paid Kurt in
full. When Wind’s agent went to Kurt’s to pick up the computer, he said to Kurt, “Are you sure
that this computer will allow us to run the monitoring software that we discussed when the
computer was ordered?” Kurt responded, “Without question!” After using the computer for
about a week, Wind determined that it was totally incapable of running the monitoring software.

1. Assume that the Pennsylvania Orphan’s Court is the proper forum to resolve the
revocation issue. In deciding who should receive Greenacre, which state’s law
should the Pennsylvania Orphan’s Court apply and with what result?

2. Assume for this question only that Nick is successful in the Pennsylvania
Orphan’s Court and that Greenacre is owned by Nick. Under Pennsylvania
corporate law:

   a. Under what circumstances may Wind, while Nick is a member of its board,
validly accept a lease offer presented by Nick for Wind to lease Greenacre?

   b. In accepting such an offer, to what standard of care will the board of directors
be expected to adhere?

   c. To what extent, if any, can Nick be part of and participate in the next board
meeting where such an offer will be considered?

3. Under the Uniform Commercial Code, what claim should be asserted by Wind
against Kurt’s because of the failure of the computer to handle the monitoring
software and with what likelihood of success?
Question No. 6: Examiner's Analysis

1. The Pennsylvania court should apply the law of Pennsylvania in determining the validity of the revocation, which will result in the purported revocation being invalid, and title to the property passing to Nick under the will.

The facts present a conflict of laws issue regarding the disposition of real property located in Pennsylvania under a will of a State Y testator. The will was probated in State Y. Under State Y law, Sam's writing "void" on the provision making the devise to Nick would be recognized as a valid revocation, if it had been done at the direction of Tim. Under Pennsylvania law, the attempted revocation was invalid.

Generally, the question of whether an act constitutes a revocation of a provision of the will concerning the disposition of land covered by the will is determined by the law of the state in which the land is located and not the law of the state of the testator's domicile at the time of his death. The Pennsylvania Supreme Court has stated:

[I]t is a principle of private, international law, fortified by a great mass of authority, that all questions relating to the transfer of title to land wherever arising will be governed by the laws of the place where the land is situated. *Citations omitted.* This principle is applicable to questions relating to the effect of language in wills of testators not domiciled in the dominant situs . . .

*In re: Dublin's Estate*, 375 Pa. 599, 603, 101 A.2d 731, 733 (1954). “The situs state of realty is generally entitled to the severest deference . . . . That the laws of the situs state should govern the devise of real property is a sound principle, articulated in both Restatements of Conflicts of Laws, and in the consistent statements of this Court.” *In re: Estate of Janney*, 498 Pa. 398, 401, 446 A.2d 1265, 1266 (1982). The situs of the land rule is widely recognized when title to land is involved.

The court should take into account the situs rule set forth above. The court might also consider which state has the most substantial relationship to the dispute. The court could conclude that Pennsylvania has the most substantial relationship given the fact that the land lies within its borders and clearly, Pennsylvania has the greatest interest in regulating the transfer of title to land within its boundaries. Predictability and certainty in matters of title transference are paramount in all states. On the other hand, the court might conclude that State Y has the primary interest in determining whether the will was revoked so as not to defeat the expectations of the testator. However, here the attempted revocation was not done by the testator and the only evidence to support the revocation is the testimony of Sam who stands to gain if the provision is deemed to have been revoked.

Given the strong preference for the situs rule, the Pennsylvania court would most likely apply Pennsylvania law, which will have the effect of invalidating the putative revocation by Sam and validating the devise to Nick under the will. If, however, the court views the matter as one involving a devise by a State Y resident the court might conclude that State Y has the greater interest and apply State Y law.
2a. The Pennsylvania Business Corporation Law (the “BCL”) provides that an offer from a director of a corporation is not per se invalid because of its source but can be accepted by the corporation if it is basically fair to the corporation.

Section 1728 of the BCL provides, generally, “[a] contract or transaction between a business corporation and one or more of its directors . . . shall not be void or voidable solely for that reason, or solely because the director or officer is present at or participates in the meeting of the board of directors that authorizes the contract or transaction or solely because his or their votes are counted for that purpose” provided that certain procedures or conditions are met. 15 Pa. C.S.A. §1728(a). Such an agreement may be valid if:

(1) the material facts as to the relationship or interest and as to the contract or transaction are disclosed or are known to the board of directors and the board authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors even though the disinterested directors are less than a quorum;

(2) the material facts as to his relationship or interest and as to the contract or transaction are disclosed or are known to the shareholders entitled to vote thereon and the contract or transaction is specifically approved in good faith by vote of those shareholders; or

(3) the contract or transaction is fair as to the corporation as of the time it is authorized, approved or ratified by the board of directors or shareholders.

15 Pa. C.S.A. §1728(a); see also, Sell and Clark, Pennsylvania Business Corporations §1728.4.

If one of these statutory conditions has been met the transaction will not be invalidated solely because the transaction is one with an interested director. “The ultimate test in such situations, therefore, would seem to be one of the basic fairness of the transaction.” Id. at §1728.4.

There is little case law interpreting the language of Section 1728(a) and the disjunctive nature of the statutory provisions. If challenged it is possible that fairness might be determined to be paramount. The comments of Lamb and Shiba in their treatise on Pennsylvania corporate law provide:

The statutory requirements of disinterested director approval or shareholder approval or fairness, linked by the disjunctive, might be interpreted to mandate an evaluation of fairness only if disinterested director approval or shareholder approval is lacking. This interpretation is countered, however, by the language providing that a contract or transaction satisfying one or more of three requirements is not void or voidable solely because of the director’s or officer’s interest. The few opinions construing this type of statute agree that use of the word “solely” leaves open the possibility that an interested transaction may be

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avoided notwithstanding its approval by disinterested directors or officers. Constrained in this manner, the statute's only certain effect is to remove the presumption of automatic voidness or voidability; it should not be presumed to provide a safe harbor for interested transactions.

_Lamb and Shiba, Pennsylvania Corporation Law & Practice, §4.4[f]2 (1993)._ 

Wind may accept the lease offer presented by Nick if Nick discloses his ownership interest and a majority of disinterested board members approve the lease. In making the decision, the disinterested board members should recognize their fiduciary duty to the corporation and they should review the lease to be certain that it is fair to the corporation.

2b. **In considering the lease offer, the board members would be held to the standard of a reasonably prudent board member under similar circumstances.**

Section 1712 of the BCL provides that a board member must “serve, in good faith, in a manner he reasonably believes to be in the best interests of the corporation and with such care, including reasonable inquiry, skill and diligence as a person of ordinary prudence would use under similar circumstances.” _15 Pa. C.S.A. §1712(a)._ This duty of care applicable to directors sets the standard expected generally in board decision making. Each director reviewing the lease offer would be required to exercise the degree of care of a reasonably prudent director under similar circumstances. _See generally, Sell and Clark, Pennsylvania Business Corporations, §§1728.2 and 1728.3._

2c. **Nick may participate at the board meeting and his presence may be counted toward a quorum.**

A contemplated transaction is not void or voidable solely because of Nick’s attendance or participation in the meeting at which it is being considered. _15 Pa. C.S.A. §1728(a)._ Additionally, an interested director may be counted in determining the presence of a quorum at a board meeting where the contemplated transaction with the interested director is being discussed and voted upon. _15 Pa. C.S.A. §1728(b); see also, Sell and Clark, Pennsylvania Business Corporations §1728.5._ Thus, Nick’s participation would not _per se_ invalidate the transaction so long as a majority of the disinterested directors in attendance vote in favor of the lease. Of course, Nick should always be counseled not to vote on the transaction.

It should be noted, however, that the general provisions of Section 1728 are applicable except to the extent that they are otherwise restricted in the bylaws of the corporation. _15 Pa. C.S.A. §1728(c)._ 

3. **Wind should assert a breach of express warranty claim against Kurt’s based upon the statement made by Kurt when Wind picked up the computer.**

Section 2313 of the Pennsylvania Uniform Commercial Code (the “Code”) provides, “[e]xpress warranties by the seller are created as follows: (1) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the
bargain creates an express warranty that the goods shall conform to the affirmation or promise.” 13 Pa. C.S.A. 2313(a)(1). Section 2313 further provides “It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the opinion of the seller or commendation of the goods does not create a warranty.” 13 Pa. C.S.A. 2313(b).

In analyzing whether an express warranty arises one must determine if the seller’s words constitute an express warranty and if they became part of the basis of the bargain. Words constituting mere puffery will not suffice. If the statement by the seller is clear and explicit it is more likely that an affirmation has been made. In the instant case, the seller was clear and unequivocal that the computer being sold will run Wind’s software. It is, therefore, likely that the statement is an affirmation that will support an express warranty claim.

The next question is whether the statement was a part of the basis of the bargain. The statement came after the purchase order was signed at the time of delivery. It is a statement made in response to a question seeking confirmation of Wind’s prior understanding that the computer would be able to run the software it had purchased for monitoring its windmills. Comment 7 to Section 2313 states, “The precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language or samples or models are fairly to be regarded as part of the contract. If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order (Section 2209).” A finding that a statement was part of the basis of the bargain does not require strict proof of reliance. The buyer will assert that the statement was relevant in the buyer’s decision making process and induced the buyer to purchase the good. See generally, White and Summers, Uniform Commercial Code, §9-5, 4th Ed. (1988).

Here, the later affirmation will support an express warranty claim given the guidance provided by Comment 7 above. Section 2209 essentially provides that a modification does not require consideration to be binding. As a post-contract statement, proof of the statement would not be barred by the parole evidence rule set forth in Section 2202 of the Code as it only prohibits proof of prior or contemporaneous statements. Also, the express warranty would not be disclaimed by the waiver of implied warranties contained in the sales contract. Accordingly, Wind should prevail on a claim of breach of express warranty.
Question No. 6: Grading Guidelines

1. The law of the state where the real property is located generally will determine the validity of the revocation.

Comments: The candidates should recognize that this is a conflict of laws issue. They should recognize that it involves a devise of real property and discuss how conflict of laws rules are applicable.

5 points

2. Deal with an interested director.

Comments: The candidates should discuss the circumstances under which a corporation may enter into a transaction with one of its directors, the standard of care required of directors and the effect of the interested director's presence at the meeting for quorum and voting purposes.

10 points

3. Express warranty

Comments: The candidates should recognize the possibility of an express warranty, and discuss whether the circumstances in which the statement was made will support a claim of express warranty.

5 points
Supreme Court of Pennsylvania
Pennsylvania Board of Law Examiners

Pennsylvania Bar Examination
February 23 and 24, 2010

PERFORMANCE TEST
February 23, 2010

Use GRAY covered book for your answer to the Performance Test.
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FILE
Date: February 23, 2010
To: Applicant
From: Steven Sauer
Re: Bridge Access Problem

Our clients, Mr. and Mrs. Benjamin F. Bridge, have recently purchased a plot of land known as Lot 3, Creek Estates, in Madison, Pennsylvania, at a judicial tax sale. When they attempted to gain access to their new property from Maple Street by going through Lot 2 which is located between Maple Street and the Bridge’s property, they found that there was an electrically operated iron gate across the front of the driveway on Lot 2. All attempts to persuade Mr. and Mrs. Eastwood, the owners of Lot 2, to allow them access have been unsuccessful. The Bridges provided me with a letter they recently received from the Eastwoods concerning their request to access the Eastwood’s property and with a copy of the subdivision plan (attached) which shows the location of the properties in question.

The Bridges have asked our firm whether they should file suit to require the Eastwoods to allow them access through Lot 2. In my initial meeting with the Bridges based on some preliminary research, I identified the theories of easement by necessity and easement by implication as possible bases on which to bring suit. The Bridges requested an opinion whether either of these theories would support filing suit against the Eastwoods. Please prepare a reasoned opinion letter of counsel for my signature addressed to the Bridges discussing the likelihood of success of each of the theories that I identified.

You should follow our firm’s format and guidelines for preparing opinion letters of counsel, which are set forth in a memorandum in the File. The File and Library which are provided contain the only facts and legal principles you should consider and rely upon in completing this assignment. In the attached File, you will find a memorandum of facts from our investigator, as well as certain documents he has obtained.
Subdivision Plan of Creek Estates
for
Randill Creek Development Corp.
Dated: March 5, 1985
By: James Madison (seal)
James Madison, P.E.
Approved: Madison City Council
By: R.K.O.W
Chairperson
By: M.G. Meyer
Member
By: 
Member
Recorded: Madison County Recorder of Deeds
Map Book: 777 Page: 855

Land Now or Formerly of Jones
Lot 3

Land Now or Formerly of Smith

Lot 2

Lot 1

Maple Street
Suite & Sauer, P.C.

Date: January 4, 1995
To: All Associates
Re: Guidelines and Format for Preparation of Opinion Letters of Counsel

All associates should use the following guidelines when preparing opinion letters for clients of Suite & Sauer.

1. The opinion letter should be in formal letter format, dated and addressed to the client(s), but should not contain a letterhead or inside address which your assistant will add. The letter should have a short subject line.

2. Use an appropriate salutation and closing to begin and end the letter. Do not sign your name.

3. At the beginning of the opinion letter, clearly identify and restate the question(s) raised. “You have asked for an opinion regarding . . .” is an example of an appropriate way to begin the body of the letter and introduce the client’s question(s).

4. Briefly state your conclusion(s) to the question(s) raised by the client. Words such as “probably”, “possibly” and “not likely” may be used to qualify your conclusion if the outcome is less than certain.

5. Following your conclusion(s) to the question(s) raised, provide an analysis of the issues raised by the question(s), showing how the relevant authorities as applied to the facts lead to your conclusions. Cite the legal authorities relied upon using a short form of citation (Blue Book format is not required). If there are facts and/or legal principles relevant to any point or element in your analysis which could be argued to support a different conclusion, identify and discuss those principles/facts.

6. If more than one question has been raised, state your conclusion and analysis for each question independently. State the conclusion and analysis for the first question before you address the next question. You should separate the discussions by short, underlined headings of no more than three to six words that relate to the issue being addressed.

7. If you are asked to provide a recommendation regarding the possible settlement of a claim, your recommendation should be based on an assessment of the client’s likelihood of success in asserting or defending the claim, the potential damages that could be awarded, the potential for future liability if the claim succeeds, and the client’s interests in settling the claim. If settlement is recommended, the terms of the recommended settlement should be set forth.

8. The opinion letter should be straightforward, logical, and in language that a layperson can understand.

9. Any specific instructions provided by a managing partner in a particular case should be incorporated in your opinion letter.
January 10, 2010

Mr. and Mrs. Benjamin Bridge
Lot 3, Creek Estates
Madison, Pennsylvania 19999

Dear Mr. and Mrs. Bridge:

This letter is in response to your repeated requests to use our property to access your property from Maple Street. As we have consistently advised you, we have no intention of permitting this use.

When we purchased Lot 2 in 1987, we were aware that Rancid Creek Development Corp. was using our property to access Maple Street. We did not object at that time because we had not yet built our house on Lot 2 and were not using the property. However, we never intended this use to become permanent. The company’s use of our property had ceased by the time we began construction of our home, so this did not become an issue.

We are environmentally conscious and wish to keep Lot 3 undeveloped and in its natural state, considering it to be a bird and wildlife sanctuary. We have installed the electronic gate on our property in order to keep unwanted individuals from using our property to access Lot 3. We do not intend to give you permission to use our property to obtain access to Lot 3, and any attempt to do so will be considered to be a trespass for which we will take appropriate legal action.

Sincerely,

Charles Eastwood
Date: February 22, 2010
To: Steven Sauer
From: Michael Hammer, Investigator
Re: Bridge Access Problem

You have asked me to investigate the history of Lot 3 of Creek Estates. Here is what I discovered.

Lot 3 was once a part of a larger tract owned by the Rancid Creek Development Corp. In 1985, Rancid Creek Development Corp. subdivided the property into three lots known as Creek Estates. A copy of the subdivision plan has previously been provided to you by the Bridges.

After the subdivision plan was approved, Rancid Creek Development Corp. began to sell the lots. It sold Lot 1 to a Mr. and Mrs. Streep and Lot 2 to a Mr. and Mrs. Eastwood. The deed did not reserve or refer to any easement for access to Lot 3. Reasonable consideration was paid in purchasing each lot. Rancid Creek Development Corp. was unable to sell Lot 3.

Lot 3 is bordered on its north by Rancid Creek. Rancid Creek is a navigable stream with a channel that is regularly maintained by the Army Corps of Engineers. A number of lots abutting Rancid Creek have docks for boats as large as thirty feet in length. There is a public marina with access to Oak Street located approximately one mile downstream from Lot 3.

When the real estate market began to collapse in 2006, Rancid Creek Development Corp. stopped paying the taxes levied against Lot 3, and it was recently sold at tax sale to Mr. and Mrs. Bridge. The deed resulting from the tax sale did not refer to any access easement.

I talked to the president of Rancid Creek Development Corp. who provided the information contained in the attached affidavit. I also talked to Mr. and Mrs. Smith who own the adjoining property located east of Lots 2 and 3 and who provided the information found in the attached affidavit.

Finally, I spoke to the City Director of Public Safety who expressed concern regarding the difficulty in providing police and fire services to Lot 3 if it were occupied. The Postmaster at the Madison Post Office raised a question about the practicality of mail delivery to Lot 3, although he did state that the Bridges could rent a box at the Post Office as many residents do, install a mail box on a post in the right-of-way of Maple Street, or rent a mail box at the marina.
AFFIDAVIT OF RONALD RANCID

COMMONWEALTH OF PENNSYLVANIA:
COUNTY OF MADISON:

Ronald Rancid makes the following statements under penalty of perjury:

1. I am and have been since November 1983 president of Rancid Creek Development Corp.

2. For several years before Lot 2 was sold to the Eastwoods in 1987, Rancid Creek Development Corp. utilized Lot 3 to store construction equipment and supplies, gaining access over the area where the Eastwoods’ driveway is now located. Equipment and supplies were moved on and off Lot 3 at frequent intervals, at least on a weekly and sometimes on a daily basis. In the several years following the sale of Lot 2 to the Eastwoods, Rancid Creek Development Corp. continued to move its equipment over Lot 2, although as time passed, the equipment was moved on a less frequent basis. As the years went by and Rancid Creek Development Corp. undertook projects further and further from Madison City, this use became less frequent and eventually stopped.

3. The foregoing is true and correct based on my personal knowledge.

Ronald Rancid
AFFIDAVIT OF JOHN AND JANE SMITH

COMMONWEALTH OF PENNSYLVANIA:
COUNTY OF MADISON:

John and Jane Smith make the following statements under penalty of perjury:

1. We have owned the land immediately to the East of the Creek Estates development since 1981.

2. Beginning in December, 1983, we witnessed the flow of Rancid Creek Development Corp.’s construction equipment across what is now Lot 2 for several years prior to the Eastwood’s purchase of Lot 2.

3. Rancid Creek Development Corp. moved equipment to and from Maple Street to its construction yard by the bank of the creek on a frequent basis, at least weekly, and often on a daily basis.

4. As a result of this traffic, a definite dirt trail, approximately twenty feet wide came into existence by the time Lot 2 was purchased by the Eastwoods in July, 1987. The trail was never graded or paved. This trail was clearly visible from Maple Street and from our property. Several years after the Eastwoods purchased Lot 2, Rancid Creek Development Corp. stopped moving its equipment across Lot 2 and the vegetation returned to the area.

5. Sometime thereafter, the Eastwoods built a house on Lot 2, fenced in the lot, and installed a driveway at the bottom right corner of the lot, approximately where the bed of the trail had previously been located, with an electrically operated iron gate at its intersection with Maple Street.

The foregoing is true and correct based on personal knowledge.

John Smith

Jane Smith
Supreme Court of Pennsylvania

Sam BUCCIARELLI, et al., Appellants

v.

Al DElISA, Appellee

OPINION OF THE COURT

This is an appeal from an order of the Superior Court reversing an order of the Court of Common Pleas of Susquehanna County permanently enjoining appellee Al DeLisa from interfering with appellants Bucciarelli et al. in their use of an access road ("the cottage road") which traverses DeLisa's property.

The facts underlying this dispute are that in 1986 Maxine Keene conveyed a twenty-acre parcel of land on Lake Shawnee in Susquehanna County to her son, Raymond Keene. Mrs. Keene retained ownership of other land on the lake which she subdivided into four lots. These lots contained cottages which the Keene family had for some years rented out. In 1987, with the assistance of her son Raymond, Mrs. Keene submitted a subdivision plan to the county planning commission. This plan indicated that access to the four lots comprising the subdivision would be by an existing road which traversed the twenty acre tract which Mrs. Keene had conveyed to Raymond the year before. Upon approval of the subdivision plan, Mrs. Keene sold the four lots to appellant purchasers or their predecessors in title.

In 1988, Raymond Keene conveyed his twenty acre parcel to Al DeLisa. For some ten years before he purchased this parcel of land, DeLisa lived across the lake from and within sight of the Keene subdivision of four lots, and in order to get to his house, he drove over an access road which intersected the cottage road. Neither Mrs. Keene's deed to Raymond nor Raymond's deed to DeLisa indicated that an easement was reserved.

Subsequently, DeLisa blocked the cottage road, which had been used by the appellants for access to their lakeside lots and this action followed.

The trial court held that DeLisa had constructive notice of the easement by way of the recorded subdivision plan. The trial court also found that DeLisa had actual notice of the right-of-way. The trial court based its decision on the theory that the recorded subdivision plan created an easement by implication, but it noted that an easement by implication appears to have been created by severance of title as well.

The Superior Court rejected the notion that the subdivision plan placed DeLisa on constructive notice of the easement. The Superior Court also held that the trial court had not made any findings which would support an easement by implication at severance of title when the land was conveyed from mother to son in 1986, and the court found insufficient evidence to support either the traditional or Restatement tests for easement by implication at severance of title. Further, the Superior Court found insufficient evidence concerning the use of the easement prior to the mother's conveyance of the parcel to her son, and insufficient evidence to permit an analysis of the factors concerning the creation of easements by implication.

We granted limited allocatur to address two questions: whether an easement by implication was created at the time of severance of title; and whether DeLisa had actual notice of the existence of a right-of-way over the property when he purchased
the property. * * *

Although the Superior Court is correct that the Chancellor did not find facts specifically in support of the conclusion that an easement by implication at severance of title was created, the Chancellor did make findings as to what DeLisa knew about the Cottage Road before he purchased the property:

This court concluded that the defendant had actual notice of the existence of the right-of-way. Photographic evidence presented at trial clearly demonstrated that the road in question is visible from the defendant's house. He has lived there for a number of years and must have seen vehicular traffic going to and from the cottages served by the road. His denials of such observations were not credible, as photographs demonstrated that the road is not merely some path through the woods. Rather, it is an unpaved private driveway through both woods and open fields, leading to four lake-side cottages, quite common in this rural area. Further, the photographs showed that the roadway has remained in the same condition since the 1970's. Accordingly, the court resolved the issues of credibility against the defendant.

Slip Op. at 3.

The importance of this finding is that it is one of several factors to consider in determining whether an implied easement was created:

The effect of the prior use as a circumstance in implying, upon a severance of possession by conveyance, an easement results from an inference as to the intention of the parties. To draw such an inference the prior use must have been known to the parties at the time of the conveyance, or, at least, have been within the possibility of their knowledge at that time. Each party to a conveyance is bound not merely to what he intended, but also to what he might reasonably have foreseen the other party to the conveyance expected. Parties to a conveyance may, therefore, be assumed to intend the continuance of uses known to them which are in considerable degree necessary to the continued usefulness of the land. Also they will be assumed to know and to contemplate the continuance of reasonably necessary uses which have so altered the premises as to make them apparent upon reasonably prudent investigation...

Restatement of Property, § 476, Comment j. (FN1)

The record supports the finding that DeLisa knew of the existence of the cottage road before he purchased the land. Further, examination of the record supports the chancellor's conclusion that this case involves an easement by implication at severance of title.


It has long been held in this Commonwealth that although the language of a granting clause does not contain an express reservation of an easement in favor of the grantor, such an interest may be reserved by implication, and this is so notwithstanding that the easement is not essential for the beneficial use of the property. The circumstances which will give rise to an impliedly reserved easement have been concisely put by Chief Justice Horace Stern speaking for the Court in Tosh

"[W]here an owner of land subjects part of it to an open, visible, permanent and continuous servitude or easement in favor of another part and then aliens either, the purchaser takes subject to the burden or the benefit as the case may be, and this irrespective of whether or not the easement constituted a necessary right of way." Tosh v. Witts, supra, 381 Pa. at 258, 113 A.2d at 228.

(Citations omitted.) The Boehm court further stated:

Easements by implied reservation ... are based on the theory that continuous use of a permanent right-of-way gives rise to the implication that the parties intended that such use would continue, notwithstanding the absence of necessity for the use.

467 Pa. at 314 n. 4, 356 A.2d at 767 n. 4.

Beginning with Boehm's requirement of the parties' intent, it is clear in this case that the mother and son intended the easement to continue. Not only did Raymond Keene assist his mother in creating a subdivision plan which included access to the four lots by way of the cottage road, R.R. 125a-126a, but he allowed the owners of the lots to utilize the road while he owned the twenty acre parcel across which the road ran because he believed there was an easement for the cottage road. RR 123a. Moreover, Raymond Keene testified that he told DeLisa during negotiations for DeLisa to purchase the property that the cottage road was a right-of-way for access to the four lots on the lake. R.R. 130a. It is clear from the record that the grantor, Mrs. Keene, and the grantee, her son Raymond, agreed that the road leading to the four lots on the lake would remain an access road even after the land was conveyed to Raymond.

Next, we turn to the requirements that an easement by implication at severance of title must be open, visible, permanent and continuous. Photographic evidence depicting the cottage road reveals that it is a one lane dirt road approximately twenty feet wide which has been in existence for at least twenty years, R.R. 151a, and which intersects an access road used daily by DeLisa to get to his home on the other side of the lake. Furthermore, photographic evidence depicting a view of the four lots and the cottage road from DeLisa's side of the lake reveals that the cottage road is highly visible from the side of the lake on which DeLisa's house is located. In fact, one witness, a neighbor whose house is located 200 feet from DeLisa's, testified that he could see the cottage road from his property and that there are no obstructions on DeLisa's land which would prevent him from seeing the road also. R.R. 154a. Thus, it is apparent that the requirements that the easement be open, visible and permanent have been met.

As to the requirement that the use be continuous, one witness testified that he had seen automobiles using the cottage road from 1985 through 1993 or 1994, R.R. 156a, and another witness stated that he used the road since 1976. R.R. 151a. DeLisa himself indicated that he had seen cars utilize the road over the last ten years to get to the cabins on the lake. R.R. 166a.

Powell on Real Property suggests:

The requirement that the quasi-easement must have been "permanent" or "continuous" simply means that the use involved shall not have been occasional, accidental or temporary. This means the use
shall have been of such a character as to enable the claimant to rely reasonably upon the continuance of such use.... It is submitted that ... any well-defined route should be held to satisfy the "permanent" or "continuous" prerequisite for implication.

4 Powell on Real Property § 34.08[2][c] (1996). We agree with this analysis of the continuousness requirement. The road here is well defined and permanent and the evidence is sufficient to support a finding of continuousness.

The requirements stated above have as their purpose the creation of a test to determine whether an easement was intended at severance and whether the person against whom the easement is asserted had notice, actual or constructive, that such an easement existed. In this case, the trial court found that DeLisa had actual notice and the record supports this finding. Additionally, the evidence supports a finding that the grantor, Mrs. Keene, intended to create an easement at severance of the title and that the grantee, her son, was aware of this intent and, after the conveyance, acted in accord with the existence of the easement.

Thus, since the evidence supports a finding of intention to create the easement and a finding that DeLisa purchased the land knowing of the existence of the easement, an easement by implication at severance was created and is binding against DeLisa.

Order of the Superior Court is reversed.

(FN1.) This court has never specifically adopted Restatement of Property § 476 and we decline to do so now, for § 476 is merely a list of frequently encountered considerations as to whether an easement by
Superior Court of Pennsylvania

Clyde A. PHILLIPPI and Roger L. Phillippi, Appellants,

v.

Charles D. KNOTTER and Virginia Knotter, Appellees

Appellants appeal from a final decree entered on May 12, 1999, in the Court of Common Pleas of Somerset County that denied appellants' post-trial motions and appellees' post-trial motion. Appellants sued for injunctive relief requesting the grant of an easement over the land of appellees. Appellees counterclaimed by denying the existence of an easement and claiming that appellants had been trespassing on their land. On October 23, 1998, the trial court denied appellants' request for permanent injunctive relief in the form of an easement across appellees' land. The trial court additionally found for appellees on their count of trespass against appellants and granted appellees a permanent injunction enjoining appellants from entering or otherwise interfering with the use of appellees' land. The appeal followed. Upon review, we affirm the final decree of the trial court.

***

An easement may be created 1) expressly; 2) by prescription; 3) by necessity; or 4) by implication. (citation omitted). Herein, appellants ask the following:

1. Does an easement by necessity exist in favor of the Appellants over land of the Appellees to provide access for the Appellants to their property when the Appellants' property and the Appellees' property were at one time one property which was divided by Appellees' predecessor in title and thereby landlocked the Appellant's property?

***

3. Does an easement exist by implication in favor of the Appellants over the property of the Appellees?

***

The parties to the present case are the owners of two distinct parcels of land that at one time were a single parcel owned by O'Brien Coal Company. On August 19, 1910, O'Brien Coal Company conveyed in fee simple a section of this property one hundred feet in width to the Connellsville and State Line Railroad Company ("Railroad"). This conveyance to the Railroad bisected O'Brien Coal Company's remaining property into an eastern section and western section. However, access to both the eastern and western sections of the property was available via a public road.

On August 25, 1917, O'Brien Coal Company conveyed to E.J. O'Brien, who was the president of the coal company at the time, approximately 45 acres of O'Brien Coal Company's remaining land. This 45-acre tract consisted of approximately 40 acres of land immediately east of the Railroad's property and 5 acres of land immediately west of the Railroad's property. O'Brien Coal Company owned the remaining land to the south of this 45-acre parcel. A public road provided access to the western section of E.J. O'Brien's parcel. The record does not demonstrate how E.J. O'Brien accessed the section of his parcel that laid east of the Railroad's right-of-way. The deed that conveyed this parcel to E.J. O'Brien contains very specific language concerning the description of the property conveyed as well as descriptions of coal mining and timber rights. However, this
deed does not contain language creating an easement from the eastern section of E.J. O'Brien's parcel over the remaining land of O'Brien Coal Company to the public road.

E.J. O'Brien's parcel of land was taken by the Commissioners of Somerset County during the Great Depression due to E.J. O'Brien's failure to pay taxes. Eventually, appellants became the owners of the 45-acre tract once owned by E.J. O'Brien. The remaining land owned by O'Brien Coal Company that was situated to the south of E.J. O'Brien's parcel was also taken by the Commissioners of Somerset County during the Great Depression due to O'Brien Coal Company's failure to pay taxes. Eventually, appellees became the owners of this parcel of land once owned by O'Brien Coal Company.

Appellants' parcel of land remains bisected into an eastern and western section by the strip of land owned by the Railroad. A public road runs through the western section of appellants' parcel of land. Appellants claim that the eastern section of their parcel is landlocked. As a result of this allegation concerning the eastern portion of their property, appellants allege that either an easement by necessity or an easement by implication exists from the southern part of the eastern section of appellants' parcel through appellees' parcel to the public road. This alleged easement connects the eastern section of appellant's parcel to the public road that runs through the western section of appellants' parcel. Although appellants describe the alleged easement as an "access road", this description does not comport with the facts of record that depict this strip of land as an incline of a former tramway that was once used for mining and sporadic timber activities. Usage of this incline occurred only with the consent of appellees' predecessor in title and appellees.

After appellants became the owners of their current parcel, they asked appellees to fill in a ditch that obstructed the alleged easement and for permission to use the alleged easement in order to obtain firewood. Appellees filled in the ditch and allowed appellants to use the alleged easement. Subsequently, appellees revoked their permission when traffic upon the alleged easement increased and purportedly damaged this particular tract of land. In turn, a dispute between the parties concerning the alleged easement ensued and culminated into the present lawsuit.

First, we address appellant's claim that an easement by necessity exists over the property of appellees. Claiming the existence of an easement by necessity contemplates a situation in which a parcel of land is landlocked. (FN 1) "It is a well-settled principle of law that, in the event property is conveyed and is so situated that access to it from the highway cannot be had except by passing over the remaining land of the grantor, then the grantee is entitled to a way of necessity over the lands of his grantor." (citations omitted). The three fundamental requirements for an easement by necessity to arise are the following:

1) The titles to the alleged dominant and servient properties must have been held by one person.

2) This unity of title must have been severed by a conveyance of one of the tracts.

3) The easement must be necessary in order for the owner of the dominant tenement to use his land, with the necessity existing both at the time of the severance of title and at the time of the exercise of the easement.

(citation omitted)
An easement by necessity is always of strict necessity. (citation omitted). An easement by necessity never exists as a mere matter of convenience. (citation omitted). As stated previously, "an easement by necessity is extinguished when the necessity from which it resulted ceases to exist." (citation omitted).

Herein, the evidence of record establishes that: (1) there was unity of title between the property of appellants and appellees; and (2) the unity of title was subsequently severed in 1917 when O'Brien Coal Company conveyed the property now owned by appellants to E.J. O'Brien. However, appellants failed to demonstrate the existence of necessity at the time of the original severance and presently.

The fact that O'Brien Coal Company conveyed only one parcel of land to E.J. O'Brien is the principal factor that guides our present analysis in determining the existence of an easement by necessity. From the time of the original severance to the present, the western portion of the land currently owned by appellants has been accessible from a public road. Therefore, the situation caused by the original severance was not that of strict necessity in which property was conveyed in such a way that access to it from a public road could not be had except by passing over the remaining land of the grantor. We believe the term "strict necessity" in this context requires that property be without any access to a public road. Allowing an individual to use the doctrine of easement by necessity to ensure that each portion of his or her singular property has access to a public road would be far too expansive for this intrusive doctrine. Consequently, we find that the trial court's conclusion that an easement by necessity does not exist is correct.

Next, we address appellants' argument that an easement by implication exists in favor of appellants over appellees' property. "An easement by implication can be found to exist where the intent of the parties is demonstrated by the terms of the grant, the property's surroundings and any other res gestae of the transaction." (citation omitted). Two different tests have been utilized in this Commonwealth to determine whether an easement has been created by implication: the traditional test and the Restatement of Property test. (citation omitted) The Pennsylvania Supreme Court defined the traditional test as follows:

It has long been held in this Commonwealth that although the language of a granting clause does not contain an express reservation of an easement in favor of the grantor, such an interest may be reserved by implication, and this is notwithstanding that the easement is not essential for the beneficial use of the property.... The circumstances which will give rise to an impliedly reserved easement have been concisely put by Chief Justice Horace Stern speaking for the Court in Tosh v. Witts [381 Pa. 255, 113 A.2d 226 (1955)]:

"[W]here an owner of land subjects part of it to an open, visible, permanent and continuous servitude or easement in favor of another part and then aliens either, the purchaser takes subject to the burden or the benefit as the case may be, and this irrespective of whether or not the easement constituted a necessary right of way." [Tosh, 113 A.2d at 228] (citations omitted).

Bucciarelli v. DeLisa, 547 Pa. 431, 437-438, 691 A.2d 446, 448-449 (1997) (citations omitted). Our Supreme Court further stated:

Easements by implied reservation ... are based on the theory that continuous use of a
permanent right-of-way gives rise to the implication that the parties intended that such use would continue, notwithstanding the absence of necessity for the use.

Id., 691 A.2d at 449 (citation omitted).

The Restatement of Property test "emphasizes a balancing approach, designed to ascertain the actual or implied intention of the parties." (citation omitted). "No single factor under the Restatement approach is dispositive." (citation omitted). Section 476 of the Restatement of Property designates the following factors as important in determining whether an easement by implication exists:

(a) whether the claimant is the conveyor or the conveyee,

(b) the terms of the conveyance,

(c) the consideration given for it,

(d) whether the claim is made against a simultaneous conveyance,

(e) the extent of necessity of the easement to the claimant,

(f) whether reciprocal benefits result to the conveyor and the conveyee,

(g) the manner on which the land was used prior to its conveyance, and

(h) the extent to which the manner of prior use was or might have been known to the parties.

(citation omitted). In addition, this court has noted that "[t]he extent to which an easement is necessary under the circumstances is a factor heavily weighed in determining whether an easement should be implied." (citation omitted).

An easement by implication could have arisen only at the time at which ownership of the two parcels in question first became separated. (citation omitted). Thus, the primary focus under either of the two tests is on the time of the original severance of the property which was originally owned by O'Brien Coal Company. Herein, a review of the facts under either the traditional or Restatement test demonstrates that appellants are not entitled to an easement by implication even with the relaxed burden of proof demanded when dealing with a right of ancient origin too remote to be capable of direct proof.

Under the traditional test, appellants failed to demonstrate the existence of an easement by implication. The traditional test requires appellants to prove that at the time of the original severance, there was an open, visible, continuous and permanent use of the alleged easement. . . . Regarding the question of use, we agree with the trial court's conclusion that there was not enough evidence to show open, visible, continuous and permanent use of the alleged easement at the time O'Brien Coal Company conveyed the parcel to E.J. O'Brien. Although there was testimony that appellees allowed previous owners of appellants' parcel to use the alleged easement for various mining and timber activities, this usage was temporary and ceased after the activities were completed.

Under the more flexible balancing approach of the Restatement of Property, appellants also failed to show that an easement by implication arose as a result of the conveyance from O'Brien Coal Company to E.J. O'Brien. Applying the factors set forth by the Restatement of Property, we note the following: (1)
appellants are neither the conveyors nor conveyees; (2) the conveyance did not grant E.J. O'Brien an easement over the property of O'Brien Coal Company; (3) the consideration recited in the conveyance is "the sum of one dollar and other valuable consideration"; (4) the present claim is not made against a simultaneous conveyance. In addition, we note that there is not enough evidence to suggest the existence of necessity for the easement at the time of the original conveyance and whether reciprocal benefits resulted to O'Brien Coal Company and E.J. O'Brien. Furthermore, other than coal mining and timbering, it was not possible to determine the manner in which the land was used prior to the conveyance from O'Brien Coal Company to E.J. O'Brien. In balancing the aforesaid factors, we find that the trial court correctly determined that no easement by implication arose as a result of the conveyance from O'Brien Coal Company to E.J. O'Brien.

Since we find that neither an easement by necessity nor an easement by implication exists over appellees' parcel for the benefit of appellants, appellants' argument concerning the issuance of an injunction to prevent appellees from interfering with appellants' use of the alleged easement is moot. Therefore, we decline to address the merits of this argument.

For the foregoing reasons, we affirm the final decree of the trial court.

Final decree affirmed.

(FN1.) Black's Law Dictionary (7th edition 1999), at 883, defines "landlocked" as "[s]urrounded by land, often with the suggestion that there is little or no way to get in or out without crossing the land of another."
Statutes

33 U.S.C.A. Section 558c

The Secretary of the Army is authorized and empowered, under such terms and conditions as are deemed advisable by him, to grant easements for rights-of-way for public roads and streets on and across lands acquired by the United States for river and harbor and flood control improvements including, whenever necessary, the privilege of occupying so much of said lands as may be necessary for the piers, abutments, and other portions of a bridge structure.

43 U.S.C.A. Section 931

All navigable rivers . . . shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both.

43 U.S.C.A. Section 951

Rights of way for ditches, canals, or reservoirs heretofore or hereafter approved . . . may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation or drainage.
Question No. PT: Examiner’s Analysis

The applicant is assigned, as an associate in the firm of Suite and Sauer, to draft a reasoned opinion letter for Attorney Sauer’s signature discussing whether causes of action exist based on the notion that an access easement exists in favor of the Bridges of Madison City over the land owned by the Eastwoods. Specifically, the applicant is asked to opine whether the causes of action based on the theories of easement by necessity and easement by implication would be successful.

In this exercise, the applicant must derive the facts from a variety of sources, including an investigator’s memorandum, and documents such as a subdivision plan, affidavits and letters. The applicant has also been given a memorandum explaining how to structure the letter for attorney Sauer.

Format

2 Points

Paying attention to instructions is an important part of the skill of a lawyer. The applicant is expected to utilize a specific format suited to the task, and to organize it in accordance with the instructions.

Cause of Action 1: Easement by necessity

7 Points

The applicant is expected to recognize that an easement by necessity could be a viable cause of action. The specific question is whether the cause of action may be maintained successfully notwithstanding the fact that Lot 3 is accessible by boat on Rancid Creek.

An easement by necessity contemplates a situation in which a parcel of land is landlocked. It applies to situations where property is so situated that access to it from the highway cannot by had except by passing over the land of another which was once part of a common parcel. *Phillippi v. Knotter*

The elements of the cause of action for an easement by necessity are: (1) the two relevant parcels were once under common ownership, (2) the common owner sold one of the parcels, and (3) an easement is necessary in order for the owner of the dominant tenement to use his land, both at the time of severance of title and at the time of the exercise of the easement. *Phillippi*

The relevant facts can be ascertained from the investigator’s memorandum, the attached affidavits, and the Eastwoods’ letter, as well as by examining the recorded subdivision plan. Lots 2 and 3 were both owned by Rancid Creek Development Corp., and Lot 2 was sold to the Eastwoods.

Lot 3 cannot be accessed from Maple Street without going over Lot 2 which is now owned by the Eastwoods.

Rancid Creek is a navigable stream, which makes it a public highway, 43 U.S.C.A. §931.
Access to Lot 3 is available by taking a boat on Rancid Creek to a marina which has access to Oak Street, but this access is obviously more inconvenient than access by vehicle across Lot 2.

Easements by necessity are always a matter of strict necessity, not convenience. *Phillippi*

Support for the necessity of the easement might be found in the fact that the City Director of Public Safety expressed concern regarding the difficulty in providing police and fire services to Lot 3 if it were occupied. However, there is nothing in the File to indicate that it would be impossible to provide such services.

The applicant should conclude that this cause of action would not likely be successful, notwithstanding the concerns of the Director of Public Safety about the difficulty in providing police and fire services.

**Cause of Action 2: Easement by implication**

The applicant should recognize that it is possible to allege that an easement by implication exists even though the easement is not essential for the beneficial use of the property, and the granting clause does not contain an express reservation of an easement in favor of the grantor. *Bucciarelli v. DeLisa.*

An easement by implication can arise only at the time at which ownership of the two parcels in question first became separated. *Phillippi*

Where an owner of land subjects part of it to an open, visible, permanent and continuous servitude or easement in favor of another part and then aliens either, the purchaser takes subject to the burden or the benefit as the case may be. *Phillippi.*

The above referenced requirements are intended to create a test to determine whether an easement was intended at severance and whether the person against whom the easement is asserted had notice that an easement existed. *Bucciarelli*

Continuous use of a permanent right-of-way gives rise to the implication that the parties intended that such use would continue notwithstanding the absence of necessity for the use. *Bucciarelli*

Pursuant to *Bucciarelli v. DeLisa* and *Phillippi v. Knotter*, there are two recognized means of establishing an easement by implication: the traditional common law test, and the Restatement test, which has not been adopted by the Supreme Court as the law of Pennsylvania.

The traditional test requires the person seeking the easement to prove that at the time of the original severance, there was an open, visible, continuous, and permanent use of the alleged easement. *Phillippi*

The elements that must be shown under the traditional test are that the use of Lot 2 for access to Lot 3 at the time of the original conveyance must have constituted an:

- open,
• visible,
• permanent and
• continuous servitude.

The relevant facts are that at the time of the conveyance to the Eastwoods in 1987, the servitude was open and visible, because there was a twenty foot wide trail, which was visible from both the road and the neighbors’ property.

The requirement that the quasi-easement must have been permanent or continuous means that the use involved shall not have been occasional, accidental or temporary. Any well-defined route should be held to satisfy the permanent or continuous prerequisite for implication. *Bucciarelli.*

The use was continuous and permanent in that at the time of severance the trail was used on a regular and frequent basis. The evidence suggests that the use was continuous and permanent because Rancid Creek Development Corp. had been using the trail on a weekly or daily basis for several years to access Lot 3.

There is an implication that an easement was intended by the parties at the time of severance based on the permanent and continuous use of the trail. This implication is further supported by the fact that the Eastwoods were aware of this use when they purchased Lot 2 and allowed the use to continue for several years.

Although there is a self-serving statement in the Eastwood’s 2010 letter to the Bridges that they never considered the use to be permanent, the evidence of continuous and permanent use both prior to and after severance should be sufficient to support the existence of an easement.

The Restatement test has not been adopted by the Pennsylvania Supreme Court, however, the factors listed therein are useful to courts in analyzing claims of implied easements. *Bucciarelli.* Under the Restatement test, eight factors must be balanced to ascertain the intent of the parties. *Phillippi*

The extent of the necessity of the easement to the claimant is a factor heavily weighed in determining whether an easement should be implied. *Phillippi.* Although strict necessity, as discussed above, does not exist, the concerns of the Director of Public Safety do exhibit some need for access to Maple Street.

There are several other factors that tend to support an easement by implication under the Restatement test.

(1) The manner in which the land was used prior to its conveyance. *Phillippi.* Prior to the conveyance of Lot 2 to the Eastwoods, Lot 3 was used to store construction equipment and supplies and Lot 2 was used to access Lot 3.
(2) The extent to which the manner of prior use was or might have been known to the parties. *Phillippi*. The Eastwoods had been aware of the above referenced use when they purchased Lot 2.

(3) The consideration given for the purchase of Lot 2. *Phillippi*. Reasonable consideration was paid for the lot.

On the other hand, there are several factors which could negate the implication of an easement. For example, the Bridges are neither the conveyor nor the conveyee, and there was no mention of the easement in any deed of conveyance. However, other than the Eastwoods' self-serving letter written years after the fact, there is no evidence to support the proposition that an easement was not intended at the time of severance.

Parties to a conveyance may be assumed to intend the continuance of uses known to them which are in considerable degree necessary to the continued usefulness of the land. *Bucarelli*

The applicant should advise the clients that a cause of action for easement by implication is likely to succeed.