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PENNSYLVANIA BAR EXAMINATION

Essay Questions and Examiners’ Analyses and Performance Test

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Table of Contents

Index .................................................................................................................................................. ii

Question No. 1: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines .......... 1
Question No. 2: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines .......... 8
Question No. 3: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines .......... 16
Question No. 4: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines .......... 23
Question No. 5: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines .......... 32
Question No. 6: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines .......... 40
Performance Test and Grading Guidelines ...................................................................................... 46
Index

**Question No. 1**

1. Decedents' Estates: Slayer's Act
2. Decedents' Estates: multi-party accounts
3. Federal Income Tax: home office deduction
4. Professional Responsibility: candor

**Question No. 2**

1. Civil Procedure/Torts: motion for judgment on pleadings/negligence of child
2. Evidence: competency of minor witness
3. Torts: strict liability - abnormally dangerous activity
4. Torts: loss of consortium

**Question No. 3**

1. Criminal Law: theft by deception, receiving stolen property
2. Evidence: hearsay, admission of party
3. Family Law: grandparents-partial physical custody

**Question No. 4**

1. Constitutional Law: procedural due process
2. Civil Procedure: class action
3. Employment Discrimination: Title VII - facially discriminatory policy
4. Employment Discrimination: Title VII - BFOQ
Question No. 5

1. Contracts: anticipatory repudiation
2. Contracts: third party beneficiary
3. Property: tenants by entireties
4. Property: transfer of title by delivery of deed

Question No. 6

1. Corporations: preemptive rights
2. U.C.C., Art. II - Sales: statute of frauds, specially manufactured goods exception
3. Corporations: promoter liability
4. Conflict of Laws: Pennsylvania approach
Question No. 1

Roger was a middle-aged accountant living in E County, Pennsylvania. He worked from his modest but comfortable home, in an office which he had used exclusively for his work for several years. He had been single for many years after a divorce. In early 2012, he began dating Buffy, a considerably younger woman; and within a few months, Buffy moved into Roger’s home, and they began to consider marriage. In the fall of 2012, Buffy began to be more insistent that Roger marry her and threatened to leave. To placate Buffy, Roger went to an online legal site and wrote a new deed to his home, designating Buffy as “joint tenant with right of survivorship,” and implied he would marry her soon. He recorded the deed promptly. He also added her name as joint owner on a savings account in which he had accumulated $30,000, simply telling her, “you will get that money if I die.”

Buffy was pleased with her shared ownership of the home and in December of 2012 persuaded Roger to add a futon, television, chest of drawers, and small refrigerator to the office room to accommodate visits of her mother and other family members. Beginning in January 2013, Buffy's relatives would visit and stay overnight in the office several times a month. Roger continued to work in the room, though he often had to go elsewhere in the house to work when the visitors were using it; and he stopped having clients come to the house because of the visits.

In September 2013, Buffy withdrew $10,000 from the joint savings account without telling Roger and put it all in a new account in her own name. A few weeks later, Buffy had become very irritated with Roger’s continued delay in marrying her, and during a heated shouting match, which included Roger confronting Buffy about the savings withdrawal, she struck Roger with a powerful punch to his chest that resulted in him becoming unconscious. Roger was rushed to a hospital but died from the trauma caused by the blow the same day. He had not made a will and had only one adult son, Dennis, as an heir.
After an autopsy revealed that the severe force of Buffy’s blow to Roger caused his death, she was charged with homicide. She hired Larry, an experienced lawyer who practiced in E County. He questioned Buffy thoroughly regarding her relationship with Roger, as well as the remarkable strength of the punch that caused Roger’s death, as she was much smaller than Roger. She said she was desperate to marry Roger and “just went crazy.”

Two days before Buffy’s trial, Larry was in a local restaurant and was talking with Betty, a friend of his from D City, in an adjacent county, who had seen TV news reports of the upcoming trial. She told Larry that, “your client looks like a girl I had seen in karate class a few years ago in D City, who punched bricks like a pile driver.” Larry asked Buffy if she had any karate training. She appeared somewhat nervous but firmly said “no.”

Buffy insisted on testifying at her trial. At trial, she claimed she had loved Roger, was hurt by his accusations, and just lost control when she punched him. The prosecutor, who wanted a Murder conviction, asked Buffy how she could hit so hard without training in self-defense, but she denied under oath that she had received such training. No witness was presented by the prosecution to rebut her testimony. She was convicted of voluntary manslaughter and did not appeal the conviction.

1. If Roger's estate files a civil action seeking to bar Buffy from asserting any interest in the jointly held property, what effect, if any, would Buffy’s conviction for voluntary manslaughter for Roger’s death have on the ownership of Roger’s home and the remaining joint funds?

2. If Dennis, as Administrator of Roger’s estate, files an action in conversion to recover the $10,000 Buffy removed from the joint account, what would Buffy need to establish to justify her removal of the funds, and what would be the likelihood of her success?

3. As a cash-basis taxpayer, what deduction, if any, could Roger's estate claim on his final federal income tax return for 2013 for the use of his home for his business?

4. Did Larry comply with the Rules of Professional Conduct regarding Buffy’s testimony at her criminal trial in which she denied any training in self-defense?
1. **Buffy’s survivorship interest in the home and account would be barred by the Pennsylvania Slayer’s Act in a civil proceeding because her conviction established that she engaged in the willful killing of Roger.**

   The Pennsylvania Probate, Estates and Fiduciaries (PEF) Code incorporates The Slayers’ Act, at 20 Pa. C.S.A. 8801 et seq. A “Slayer” is defined in the Act as “any person who participates, either as a principal or as an accessory before the fact, in the willful and unlawful killing of any other person.” The general prohibition of the Act is set forth at Section 8802 which states:

   No slayer shall in any way acquire any property or receive any benefit as the result of the death of the decedent, but such property shall pass as provided in the sections following.

   Section 8806 of the Act, which applies to joint tenants and joint owners, specifically prevents a slayer from succeeding to one-half of property owned jointly with the decedent, which would immediately pass to the estate of the decedent, with the other half also passing to the decedent’s estate when the slayer dies, “unless the slayer obtains a separation or severance of the property or a decree granting partition.” The Slayer's Act prevents a person from benefitting from his misdeed but does not extinguish any property right enjoyed by the slayer at the time of his misdeed. *In Re Trust Estate of Jamison*, 431 Pa. Super. 486, 636 A.2d 1190 (1994).

   Buffy was convicted of voluntary manslaughter, which Pennsylvania codifies as a felony of the first degree at 18 Pa.C.S.A 2503, which provides:

   A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by: (1) the individual killed…

   Case law further defines this crime as one which involves “a specific intent to kill, but, by reason of passion and provocation contains no legal malice,” *Commonwealth v. Pitts*, 486 Pa. 212, 404 A.2d 1305(1979). The Superior Court in the case *In Re Estate of Bartolovich*, 420 Pa. Super. 419, 616 A.2d 1043 (1992), *appeal denied*, 534 Pa. 634, 626 A.2d 1154, cited *Pitts* and additional authority in holding that voluntary manslaughter is a willful killing under the Slayer's Act and that a conviction of voluntary manslaughter conclusively bars the right to share in the decedent's estate as provided under the Slayer’s Act. As a result Buffy would retain only a life interest in one-half of both the home and the $20,000 remaining in the joint account, unless she could obtain severance or partition, with the other half passing immediately to Roger’s estate.

   In the civil action by the estate of the deceased joint owner seeking to bar Buffy from asserting any interest in the joint property, Buffy, as the convicted slayer, would be deprived of the interest in the property and money which she would have obtained by means of the willful killing. See *In Re Trust Estate of Jamison, supra.*
2. **Buffy would need to establish that in setting up the joint account, Roger intended to make a gift to her but will not likely be able to do so.**

The $10,000 that Buffy withdrew shortly before Roger's death is governed by the Multi-Party Accounts statutes within the PEF Code at 20 Pa. C.S.A. Section 6303, which states, at section (a):

A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sum on deposit, unless there is clear and convincing evidence of a different intent.

The assumption that a person who deposits funds into a multi-party account intends no present change in beneficial ownership may be disproved by proof that a gift was intended. *JT. ST. GOVT. COMM. COMMENT – 1976.* The facts state that Roger had deposited all $30,000 in the account he made joint with Buffy at the same time as he added her name to the home. As a result, in order to justify the removal of the funds, Buffy would need to establish that in setting up the joint account, Roger intended to make a gift to her.

The Superior Court, in *Lanning v. West*, 803 A.2d 753 (Pa. Super. 2002), affirmed a judgment against a joint account owner who had taken a substantial portion of joint funds during the life of the owner/depositor, who objected when it was discovered and demanded an accounting and return of the assets by bringing an action in tort for conversion against the joint owner. The court in *Lanning*, citing *In Re Estate of Pappas*, 428 Pa. 540, 239 A.2d 298 (1968) held that legal justification to take funds in a joint account on the basis that the funds were an inter vivos gift requires the putative donee to establish, by clear and convincing evidence, a *prima facie* case of an *inter vivos* gift.

The requirements for a gift are intent, delivery, and acceptance. *In Re Sipe's Estate*, 492 Pa. 125, 422 A.2d 826 (1980). The Supreme Court in *Lessner v. Runinson*, 527 Pa. 393, 592 A.2d 678 (1991) restated the requirements for making a valid gift through a joint tenancy bank account as set forth in *Hosfield Estate*, 414 Pa. 602, 202 A.2d 69, 71 (1964) and stated: “the mere fact that money is deposited in the account of the owner and another or the owner or another does not, standing alone, prove a gift *inter vivos*.” One who asserts such a claim must present sufficient evidence of “an intention to make an immediate gift and such actual or constructive delivery to the donee (a) as to divest the donor of all dominion or control of the funds or (b) if a joint tenancy is created, as to invest in the donee so much dominion and control of the subject matter of the gift as is consonant with a joint ownership or interest therein.” *Lessner, supra.*, 592 A.2d at 681, citing *Hosfield, supra.*, 202 A.2d at 71.

No evidence is stated or implied in the narrative to support any claim that the account or any portion of it was intended to be an immediate gift to Buffy. Roger did not tell her the money was hers to use and actually stated that she would get the money “if he died.” Buffy did not take the money with Roger’s permission, or to spend for his benefit or the joint interests of both of them for maintenance of the home, and Roger confronted Buffy about her taking the money from the account. Additionally, there is no evidence that Roger gave her a passbook or any other instrument which would constitute delivery of a present donative transfer. Buffy could not
sustain her burden of establishing a gift under the facts set forth, and the action for conversion filed by Dennis would likely be successful.

3. **The business use of Roger's home office ceased being exclusive in 2013, so a home office deduction would not be valid on Roger's final 2013 federal income tax return.**

The Internal Revenue Code (IRC) provides for a Home Office Deduction at 26 U.S.C.A. 280A (c), as an exception to the general disallowance of a business deduction of expenses of the taxpayer’s residence in subsection (a).

The definition and extent of such deduction is set forth in sub-subsection (c) (1), which permits an allowable business deduction “to the extent such item is allocable to a portion of the dwelling unit which is exclusively used on a regular basis - -

A. as the principal place of business for any trade or business of the taxpayer,  
B. as a place of business which is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his trade or business…”

The facts in the narrative confirm that Roger’s “place of business” was the office in his home. The U.S. Tax Court in *Hintze v. Commissioner of Internal Revenue*, 2001 WL 283018, T.C. Memo 2001-70, found that “exclusive use” of a portion of the taxpayer’s dwelling in a trade or business is established “if and only if the portion in question is not at any time during the taxable year used for nonbusiness purposes,” citing *Hefti v. Commissioner*, T.C. Memo 1993-128.

Roger used the room entirely for his accounting business through calendar year 2012, and was entitled to allocate a portion of his general house expenses as business expenses for federal income tax purposes, as well as a portion of the home value attributable to the home office for a deduction for depreciation through the 2012 year. The 2013 year would not qualify for the business use deduction. The narrative clearly states that from the start of calendar year 2013 the office room became a combined business and personal space, with Buffy’s relatives visiting and sleeping in the room on a regular basis. In 2013, Roger did not exclusively use the room in his home for his accounting business because the room was also used for nonbusiness purposes. Roger’s final federal tax return for 2013 should not include the home office deduction, as the exclusive use for his business ended at the close of the 2012 calendar year.

4. **Larry complied with the Rules of Professional Conduct even though he did not take any action in the criminal court regarding the possibility that Buffy lied under oath about having karate training, as he could not be certain then of its falsity.**

The Pennsylvania Rules of Professional Conduct have several requirements which deal with a lawyer’s simultaneous duties to a client as well as to other parties, including the Court. Most pertinent to the narrative is Rule 3.3 Candor Toward the Tribunal, which at section (a) (3), states:
(a) A lawyer shall not knowingly:

* * *

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence before a tribunal or in an ancillary proceeding conducted pursuant to a tribunal’s adjudicative authority, such as a deposition, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

The criminal trial of Buffy for homicide certainly involves a “tribunal.” Her testimony under cross-examination by Prosecutor regarding her ability to strike a blow to Roger more powerful than her size was certainly “material evidence” as to the degree of homicide for which she could be convicted. Her answer may have been false if Larry’s friend was correct about her having been a proficient karate student. However, the language of the rule prevents a lawyer from offering evidence that he knows to be false. Larry did not offer any evidence concerning Buffy's lack of training in self-defense, as her testimony on this point was elicited through questioning by the prosecutor. More pertinently, Larry did not know that Buffy's testimony on the matter of training in self-defense was false. The rule permits a lawyer to refuse to offer evidence “reasonably believed to be false” in a civil case but does not permit a lawyer to refuse to permit a criminal defendant to testify at the trial in a criminal matter based on the attorney's reasonable belief that the testimony will be false. The information provided by Betty on the eve of trial was uncertain; and Buffy denied karate training, so Larry did not know that Buffy's testimony was false. Had Larry later learned that her testimony was false, he would have had the obligation to take remedial action.

Since there is nothing in the facts to establish that Larry ever came to know of the falsity of Buffy's testimony, there was no obligation on his part to take any reasonable remedial measures.
Question No. 1: Grading Guidelines

1. **Slayer’s Act**

Comments: Candidates should recognize the applicability of the Pennsylvania Slayer’s Act to joint ownership, and that a criminal conviction of voluntary manslaughter will establish a willful killing that will deprive Buffy of her survivorship, without additional evidence.

6 points

2. **Multi-party Accounts**

Comments: Candidates should recognize that funds in joint accounts belong to the parties in proportion to the contributions of the parties during the life of both owners, and withdrawals by a noncontributory owner may be rescinded in the absence of evidence of a gift.

6 points

3. **Home Office Deduction**

Comments: Candidates should recognize the available deduction for a home office used exclusively for business use, and disallowance for combined personal and business use.

4 points

4. **Duty of Candor**

Comments: Candidates should recognize the lawyer’s responsibility of candor regarding suspected or confirmed false testimony in criminal proceedings before a tribunal.

4 points
Question No. 2

M Art Society (MAS), a Pennsylvania corporation, owns a building located in a largely residential area of M County, Pennsylvania, where it holds ceramics classes and sells supplies for making ceramics including canisters of the gases used to heat its kilns. In early 2014, MAS offered a special 6 week ceramics class for grade school children. The parents of Tom, age 6, and Jerry, age 8, enrolled them in the children's ceramics class by paying the applicable fee.

MAS used extremely unstable and highly explosive gases in its kilns used to fire the ceramics in order to attain the temperatures required for ceramic pottery making. During the first class, the children were thoroughly instructed by qualified instructors on all proper safety measures. The children were reminded at the beginning of all sessions of the basic safety rules, including the reminder that they should never touch or open the kiln door without adult supervision due to a chance of fire and explosion. Proper adult supervision was always available in the classroom during each Saturday morning session to supervise the children.

During a snack break in the fifth class, Tom and Jerry snuck from the cafeteria back into the classroom to check on the progress of their ceramic bowls that were in the kiln. Billy, who was 7 years of age, followed Tom and Jerry as far as the doorway to the classroom. Billy watched Tom and Jerry open the door of the kiln. Tom and Jerry had to open the kiln door together due to the complex latches and weight of the door. When the kiln door was opened the intense heat and fumes that came from the kiln caused Tom and Jerry to quickly flee the room. Since the kiln door was left open, the escaping heat and gases caused an explosion and fire which damaged the MAS building. Billy reported what he saw to the fire department.

MAS used a mixture of extremely volatile gases to fire its kiln even though there were less volatile gases available which are used in heating most kilns. The heat from the classroom
fire and explosion caused the highly volatile gases that were stored in canisters against the exterior of the MAS building wall to explode. The canisters were secured in a locked chain link fence and consisted of a few canisters needed by MAS in making ceramics as well as a large inventory of canisters for sale. Tony, who was walking by the MAS building at the time of the fire and explosions, was seriously injured by airborne debris from the exploding gas canisters.

Tony was hospitalized for three months and upon his release was homebound for three more months. Tony’s wife Sue immediately took an unpaid leave of absence from her employment to take care of Tony and to care for their household while Tony was recovering.

MAS filed a negligence lawsuit against Tom and Jerry for the property damage since it was known that both boys had a large trust fund that could be reached by creditors. After the appointment of a guardian ad litem for the boys, Tom and Jerry’s attorney filed an Answer denying liability and New Matter averring that Tom was age 6 and Jerry was age 8. The New Matter raised a defense that the boys’ ages precluded liability for negligence along with the defense of comparative negligence by MAS. A Reply to New Matter was filed by MAS admitting the boys’ ages but denying that their ages or comparative negligence on the part of MAS constituted a viable defense.

1. Tom and Jerry’s attorney timely filed a Motion for Judgment on the Pleadings requesting dismissal of the lawsuit based upon the boys’ ages. How will the Court rule?

2. Assume for purposes of this question that the negligence case goes to trial and that MAS plans to call Billy, as a MAS witness for liability purposes. In light of Billy’s age, what factors should MAS’s attorney be prepared to address with the court to determine whether Billy can testify?

3. What, if any, cause(s) of action other than negligence should Tony’s attorney file against MAS?

4. Does Sue have a claim for damages that she could bring as part of Tony’s lawsuit, even though she was not physically injured?
1. **The Motion for Judgment on the Pleadings should be successful in obtaining a dismissal of the negligence case against Tom, but not against Jerry.**

Tom and Jerry’s attorney filed a Motion for Judgment on the pleadings pursuant to Pa.R.C.P. No. 1034 which provides as follows:

(a) After the relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for judgment on the pleadings.

(b) The court shall enter such judgment or order as shall be proper on the pleadings.

The pleadings in this case are complete. MAS filed a Complaint to which the attorney for Tom and Jerry filed an Answer and New Matter. The New Matter averred the boys’ ages and raised as a defense that liability for negligence was precluded by the boys’ ages, along with the defense of comparative negligence on the part of MAS. A Reply to New Matter was filed by the Plaintiff admitting the boys’ ages but denying that the defenses raised were valid. No other pleadings are provided for by the Pennsylvania Rules of Civil Procedure.

The Motion for Judgment on the Pleadings is to be granted only when there are no disputed facts and the party filing the Motion, as a matter of law, is entitled to judgment. *Kelaco v. Davis and McKeans General Partnership*, 743 A.2d 525, 528 (Pa. Super. 1999); *Miller v. Nelson*, 768 A.2d 858 (Pa. Super. 2001). In deciding whether to grant the Motion, a court is limited to the pleadings and relevant documents that are attached to the pleadings as exhibits. *Citicorp North America v. Thornton*, 707 A.2d 536, 538 (Pa. Super. 1998). A court is required to accept as true all the well pled facts of the non-moving party (MAS), but only those facts specifically admitted by the non-movant may be considered against him. *Ridge v. State Employees Retirement Board of the Commonwealth of Pennsylvania*, 690 A.2d 1312 (Pa. Cmwlth. 1997). The Motion for Judgment on the Pleadings is a proper procedural Motion to file at this point since all the permitted pleadings have been filed. In the New Matter Tom and Jerry’s attorney set forth the ages of the boys and sought dismissal, based upon the age of Tom and Jerry. The boys’ ages are not in dispute as they were admitted by MAS in the Reply to New Matter.


> Both an adult and a minor are under an obligation to exercise reasonable care; however, the “reasonable care” required of a minor is measured by a different yardstick it is that measure of care which other minors of a like age, experience, capacity and development would ordinarily exercise under similar circumstances. In applying that yardstick, we place minors in three categories based upon their ages: minors under the age of seven years are conclusively presumed incapable
of negligence; minors over the age of fourteen years are presumptively capable of
negligence, the burden being placed on such minors to prove their incapacity;
minors between the ages of seven and fourteen years are presumed incapable of
negligence but such presumption is rebuttable and grows weaker with each year
until the fourteenth year is reached.

Tom is six years of age and since he is under seven years of age it is conclusively
presumed that he is incapable of negligence. The facts establish that Tom’s age was not in
dispute, and the civil Complaint for negligence should be dismissed against Tom.

However, Jerry is eight years of age. A Motion for Judgment on the Pleadings would not
be successful in his case since he is not entitled to dismissal of the Complaint filed against him.
A finder of fact would need to weigh various factors including Jerry’s experience, capacity and
his development. The closer Jerry would be to fourteen years of age would be evidence that he
could be found responsible for negligence. Even though he is only eight years of age the court
could not grant judgment on the pleadings because the individual facts pertaining to him and the
circumstances in his action would need to be examined.

2. The attorney for MAS should be prepared to address whether Billy will be
competent to testify in light of the fact that he is seven years of age.

There is no indication in the facts regarding Billy’s maturity or lack thereof. The facts
state that Billy is seven years of age and that he observed Tom and Jerry opening the kiln.
Because he witnessed the opening of the kiln by Tom and Jerry, he is a liability witness for
MAS. The general rule in Pennsylvania is that every witness is presumed to be competent.
Pa.R.E. 601(a). Immaturity, however, may be used to find that a witness is incompetent to
testify. In order to determine incompetency it must be shown that Billy is or at the time of the
explosion and fire, was incapable of perceiving the facts accurately, he was unable to express
himself so that he could be understood or that he has an impaired memory or does not
sufficiently understand the duty to tell the truth. Pa.R.E. 601(b)(1)-(4).

A child witness must be examined for competency using the following test:

(1) There must be a capacity to communicate, including both an ability to
understand questions and to frame and express intelligent answers;

(2) The mental capacity to observe the occurrence itself and the capacity of
remembering what it is he is called to testify about; and

(3) A consciousness of duty to speak the truth.


A child witness must have the ability to perceive accurately, both at the time of the
competency hearing and at any other relevant time which would include the events he is relating.
If Billy’s competency to testify is questioned based upon his age, counsel for MAS should be prepared to establish that Billy is capable of understanding the questions he is to be asked concerning the fire and explosion at the MAS building and what if any involvement, Tom and Jerry had in that incident. The answers to questions must be expressed in an intelligible manner. Billy must be able to express with clarity what he saw including the actions of Tom and Jerry relative to the fire and explosion. It must also be demonstrated that Billy had the mental capacity to observe the occurrence and to remember what he observed. Perhaps counsel could use the statement Billy made to the fire department regarding the incident to support his ability to observe and relate the incident. Billy would also need to be able to express and understand the difference between telling the truth and a lie. To establish this point a child witness may be asked questions to demonstrate an understanding of the consequences of lying. Just because Billy is seven years of age does not per se make him incompetent to testify. The court would go through a series of questions either on its own or have counsel question the child regarding the issues set forth above pertaining to Billy’s competency.

3. **In addition to negligence, the Complaint against MAS should include a cause of action alleging strict liability.**

As a general rule, strict liability involves policy judgments that one who engages in certain activities will be financially responsible to those injured by such activities. *Commonwealth of Pennsylvania Department of Public Welfare for use of Molek v. Hickey*, 136 Pa. Cmwlth. 223, 226, 582 A.2d 734, 735 (1990). The court must determine as a matter of law whether an activity is abnormally dangerous so that strict liability will be imposed. *Albig v. Municipal Authority of Westmoreland County*, 348 Pa. Super. 505, 502 A.2d 658 (1985). In *Diffenderfer v. Staner*, 722 A.2d 1103 (Pa. Super. 1999), the Superior Court analyzed whether an activity would be classified as abnormally dangerous and, in doing so applied the Restatement 2nd of Torts, Sections 519 and 520 (1977), which provides as follows:

**§ 519. General Principle.**

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous

**§ 520. Abnormally Dangerous Activities.**

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;
(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

The hobby of ceramics is a routine arts and crafts activity safely engaged in by many people and by itself likely would not be considered to be an abnormally dangerous activity. However, MAS stores large quantities of extremely volatile gases outside its building for use in making ceramics and for sale to others. The analysis must focus on whether the storage of the highly volatile gases in a largely residential area is an abnormally dangerous activity using the above referenced factors. The storage of the extremely volatile gases in a residential area creates a high degree of risk of harm to the person, land or chattels of another due to the extremely unstable and highly explosive nature of the gases being stored. The storage of a large quantity of the highly volatile gases outside of the building in a chain link fence enclosure, makes it likely that the harm caused by the explosion of the gases would be great. If the damage could be contained to the building itself, there might not be as high of a likelihood of great harm to those outside the building.

An explosion is the type of danger one could reasonably expect from the storage of highly volatile gases. The storage of these gases in a residential area is a highly dangerous activity that is likely to result in property damage or injury to third parties. The risk of explosion possibly could have been reduced by the use of alternative storage arrangements but due to the volatile nature of the gases, the risk of explosion could not have been eliminated. The storage of the highly volatile gases for use in kilns does not appear to be usual since less volatile gases are available and generally used for kilns. The storage of the volatile gases is not appropriate for a residential area, and does not appear to have a value to the community that outweighs the dangerous attributes of storing volatile gas in a largely residential area. The activity of MAS arguably satisfies the factors set forth in the Restatement 2nd of Torts Section 520 and the allegation of strict liability should be included in the Complaint.

4. Sue would have a claim for damages as a plaintiff in Tony's lawsuit if she made a claim for loss of consortium.

The loss of consortium claim is grounded upon the loss of a spouse’s services and companionship after an injury. Here, during the recovery period, Tony was unable to perform normal and usual household tasks. Sue lost the services and society of Tony for a significant period of time while he was bedridden and recuperating. Sue had to perform many tasks around the house that normally she would have received help from Tony in performing. A loss of services and society of a spouse after injury are compensable to the other spouse. Jackson v.

Here, Sue suffered a loss of society, companionship, services, and affection of her husband due to the injury to Tony. The loss of consortium claim is derivative of the injured spouse’s claim and arises from the bodily injury sustained by Tony. Sue is entitled to damages for loss of consortium if Tony is successful on his claim. Barchfield v. Nunley, 395 Pa. Super. 517, 577 A.2d 910 (1990). Sue should become a co-Plaintiff with Tony in the Complaint against MAS and allege a cause of action for loss of consortium.
Question No. 2: Grading Guidelines

1. Motion for Judgment on the Pleadings – Tom and Jerry’s Ages

Comments: The candidate should discuss the elements of a Motion for Judgment on the Pleadings and apply the law regarding the necessary age to establish civil culpability for negligence to the facts. A proper conclusion regarding Tom and Jerry’s request for dismissal should be reached.

6 points

2. Competency to testify due to age

Comments: The candidate should discuss the factors MAS’s attorney should be expected to address in order to support Billy’s competency to testify in the lawsuit.

5 points

3. Strict Liability

Comments: The candidate should identify strict liability as a cause of action to be included in the Complaint and discuss the elements of strict liability relating to the facts.

5 points

4. Loss of Consortium

Comments: The candidate should identify loss of consortium as a cause of action available to Sue, and discuss the elements necessary to establish a cause of action for loss of consortium filed to recover Sue’s damages.

4 points
Bob and Jane are the parents of Ian who was born on December 1, 2010. Three weeks after Ian’s birth, Jane died in a car accident. Since Jane’s death, Ian, with Bob’s verbal consent, was primarily raised by Jane’s parents who live in C County, Pennsylvania. Jane’s parents have provided for all of Ian’s needs including daily care giving, buying him food and clothing, and taking him to all medical appointments. Ian, by all accounts, was very happy under the care of his grandparents. Bob, who lives nearby in C County, generally only spent time with Ian for a few hours on Saturday afternoons. When Bob came to pick up Ian on Saturday, May 3, 2014, Bob, without citing any reasons, told Jane’s parents that he would not be returning Ian and that they could not see him any further. Jane’s parents have not seen Ian since that time.

Bob is the owner of Quality Used Cars (“Quality”) in C County, Pennsylvania. On May 15, 2014, Kristen came to Quality to purchase a vehicle. After discussing the vehicle’s history with Bob, and being assured by Bob that it was in great shape and had never been in an accident, Kristen purchased the vehicle for $8,500 which was the price at which Bob listed the vehicle. Bob’s employee, Lester, overheard the entire conversation between Bob and Kristen and knew from Bob’s statements to him that Bob was aware that the vehicle had been in an accident which cracked the engine block and that Bob also knew that the vehicle was only worth $3,500.

The day after the sale of the vehicle to Kristen, Bob brought a new snowblower to Quality’s sales office. The snowblower still had the tag on it from the retailer, Snow Removers R Us. Bob told Lester that his buddy stole the snowblower three days earlier and gave it to him to use at the Quality business location.

On May 18, 2014, Lester contacted Detective Shiner at the C County District Attorney’s Office to report what transpired with the vehicle sale to Kristen and the recent arrival of the
stolen snowblower. After hanging up the phone with Lester, Detective Shiner contacted Snow Removers R Us and their manager confirmed that a snowblower had been stolen several days earlier, and the manager provided the Detective with the serial number of the stolen snowblower.

Detective Shiner went to Quality on May 19 and entered the sales office of Quality which was open to the public. The Detective saw the snowblower sitting in the office. The snowblower still had the Snow Removers R Us sales tag on it, which clearly displayed the same serial number of the stolen snowblower provided by the manager of Snow Removers R Us, and fit the description given by Lester. In response to questions by Detective Shiner, Bob denied engaging in any criminal conduct regarding the sale of the vehicle to Kristen or his possession of the snowblower. A subsequent investigation by Detective Shiner revealed that Bob had been given a copy of a vehicle inspection report in March of 2014 which disclosed that the vehicle sold to Kristen had a cracked engine block and that the vehicle was only worth $3,500.

1. Based on the above facts, what specific charges should the Detective bring against Bob under the Pennsylvania Crimes Code?

2. Assume the charge relative to the sale of the vehicle to Kristen proceeds to trial and Kristen attempts to testify to the representations made by Bob to Kristen. If Bob's counsel objects to Kristen’s testimony on the grounds of hearsay, how should the Prosecutor respond, and how should the Court rule?

Jane’s parents met today with Attorney Able, and they told him that all they want is an overnight stay with Ian every Wednesday and every other weekend from Friday at 5 p.m. to Sunday at 5 p.m. and don’t object to Bob making all of the major decisions concerning Ian.

3.(a) What type of custody rights are Jane’s parents seeking, and do they have standing to assert those rights under Pennsylvania law?

3.(b) Assume for this question only that Jane's parents have standing and that a custody action is filed on their behalf to obtain the custody rights they are seeking. What standard should the Court apply, and what factors support Jane’s parents securing custody rights?
Question No. 3: Examiner’s Analysis

1. The Detective should bring a charge against Bob for theft by deception with regard to the sale of the vehicle to Kristen and receiving stolen property with regard to his possession of the snowblower.

   A person is guilty of theft if he intentionally obtains or withholds property of another by deception. A person deceives if he intentionally creates or reinforces a false impression, including false impressions as to value. 18 Pa. C.S.A. Section 3922 (a)(1). The Commonwealth must also establish reliance upon the false impression by the victim. Commonwealth v. Imes, 623 A.2d 859 (Pa. Super. 1993). Evidence that a car dealer told a purchaser that a used car was in good condition, was not damaged, and had never been in a wreck; and that the car dealer was told by the service manager of a dealership that serviced the car prior to its sale that car had suffered major front-end collision damage, was sufficient to establish the element of deception by the car dealer, in the trial of car dealer for theft by deception. Commonwealth v. Pappas, 845 A.2d 829 (Pa. Super. 2004), appeal denied, 862 A.2d 1254 (Pa. 2004).

   As applied here, it is clear that Bob made a representation to Kristen that the vehicle had never been in an accident and that it was in good condition. In fact, the evidence establishes that Bob knew that the vehicle had been in an accident and sustained a crack to the engine block which reduced the value of the vehicle to $3,500. Despite this knowledge, Bob told Kristen that the vehicle had never been in an accident and sold the vehicle to Kristen for $8,500 which was far more than he knew the vehicle was worth. Kristen appears to have relied upon this representation and ended up paying $5,000 more for the vehicle based upon the deception created by Bob. Accordingly, there is a strong argument that Bob should be charged with the crime of theft by deception.

   A person is guilty of theft if he intentionally receives or retains movable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received or retained with intent to restore it to the owner. 18 Pa. C.S.A. Section 3925(a), Commonwealth v. Newton, 994 A.2d 1127 (Pa. Super. 2010).

   As applied here, Bob told Lester that his buddy had stolen the snowblower from Snow Removers R Us. Bob told Lester that the snowblower was given to him to be used around the business. Bob was in possession of the stolen snowblower at the time that he discussed it with Lester and also at the time that Detective Shiner came to question Bob. Detective Shiner confirmed that the snowblower at the Quality business location was in fact stolen. There is no question that Bob knew that the snowblower was stolen because he acknowledged to Lester that his buddy told him that it was stolen. These facts likely support the charge of receiving stolen property.

2. The Prosecutor should argue that the statement is not hearsay since it is not being offered for the truth of the matter asserted. In the alternative, if the Court found that the statement was hearsay, the prosecutor should argue that the statement
should be admitted under the party-admission exception to the hearsay rule. In either case the statement should be admitted.

Pennsylvania Rule of Evidence 801 (c) defines hearsay as a statement that the declarant does not make while testifying at the current trial or hearing and which a party offers in evidence to prove the truth of the matter asserted in the statement. A declarant is defined as the person who made the statement. Pa. R.E. 801 (b). A statement includes a person’s oral assertion. Pa. R.E. 801 (a). Statements offered against an opposing party which were made by the opposing party in their individual capacity are not excluded by the hearsay rule even though the declarant is available as a witness. Pa. R.E. 803(25)(A). In Commonwealth v. Edwards, 903 A.2d 1139 (Pa. 2006), the Court held that the testimony of the Defendant’s friend that the Defendant had told her he had robbed the victim on the Friday evening before the murders was admissible as an admission of a party-opponent under Rule 803(25). "Voluntary extrajudicial statements made by a defendant may be used against a defendant even though they contain no admission of guilt. These extrajudicial statements, which differ from confessions in that they do not acknowledge all essential elements of a crime, are generally considered to qualify for introduction into evidence under the admission exception to the hearsay rule." Commonwealth v. Ogrod, 839 A.2d 294 (Pa. 2003).

As applied here, Bob's counsel is attempting to prevent the Commonwealth from entering Bob's representation to Kristen that the vehicle was in great shape and had never been in an accident on the basis that this is hearsay. Initially, it should be argued that Kristen’s testimony regarding Bob’s representation to her is not hearsay because it is not being offered for the truth of the matter asserted. Kristen’s testimony that Bob told her the vehicle was in great shape and had never been in an accident is not being offered for the purpose of showing the truth of the statement. Rather, the statement is being offered to show what was said to Kristen by Bob. Accordingly, the Court should overrule the objection on the basis that the statement is not hearsay.

Alternatively, if the Court found that Kristen’s statement was hearsay it would likely fall under the exception for admissions by a party opponent as it was a statement made by Bob in his individual capacity. It does not matter under the exception that Bob is available to testify. If Bob’s statement was considered hearsay it would likely be admitted under this exception.

3.(a) Jane’s parents are looking to secure partial physical custody rights, and they likely have standing to pursue those rights under Pennsylvania law.

Jane’s parents are seeking to spend time with Ian for an overnight stay every Wednesday each week and every other weekend from Friday at 5 p.m. to Sunday at 5 p.m. Since they are seeking actual physical possession and control of Ian, this would be referred to as physical custody. See 23 Pa. C.S.A. Section 5322 (a). Because they are seeking the right to assume physical custody of Ian for less than a majority of the time, namely a total of four overnights every two weeks, this would be referred to under the law as partial physical custody. See 23 Pa. C.S.A. Section 5322 (a).
Jane’s parents, as the grandparents of Ian, would have standing to pursue partial physical custody rights under 23 Pa. C.S.A. Section 5325. Under this statute, a grandparent may file an action for partial physical custody under a number of situations including “when the child has, for a period of at least 12 consecutive months, resided with the grandparent or great-grandparent, excluding brief temporary absences of the child from the home, and is removed from the home by the parents," provided an action is filed within 6 months after the removal of the child from the home. 23 Pa. C.S.A. Section 5325 (3). As applied here, it is clear from the facts that Ian resided with his grandparents for a period of time in excess of 12 consecutive months excluding the brief temporary absences on Saturdays when Bob would spend time with him. The facts are also clear that Bob has now removed Ian from his grandparents home and has indicated that he is not going to return Ian. Under these circumstances, Jane’s parents would likely have a right to file an action for partial physical custody provided that they do so within 6 months of Ian having been removed from their home by his father.

Jane’s parents can also argue that they have standing for partial physical custody under 23 Pa. C.S.A. Section 5325 (1) which permits a grandparent or parent of a deceased parent to file an action for partial physical custody. Under this provision a parent of the deceased parent may file an action for partial physical custody. Since Jane is deceased, her parents would have standing to file an action for partial physical custody under this section as well.

Jane’s parents might also argue that they have standing under 23 Pa. C.S.A. Section 5324(2) based on the argument that they stood in loco parentis to Ian. Standing based on in loco parentis will be found in a custody action where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture and affection, assuming in the child’s eye a stature like that of a parent. S.A. v. C.G.R., 856 A.2d 1248 (2004) As applied here, Jane’s parents have established a strong bond with Ian and have essentially acted as his parents for most of his life. Accordingly, they could argue that they have standing to pursue custody on this ground as well.

3.(b) The Court would apply the best interest of the child standard in reaching its determination, and a number of factors support awarding partial physical custody to Jane’s parents.

In making its determination as to whether or not Jane’s parents should be awarded partial physical custody, the Court is required to determine what is in the best interest of the child by considering all relevant factors, giving weighted consideration to those factors which affect the safety of the child, including a list of factors enumerated in 23 Pa. C.S.A. Section 5328 (a). Some of the factors which stand out in this instance include the fact that the grandparents performed parental duties on behalf of Ian for most of his life. 23 Pa. C.S.A. Section 5328 (a)(3). Ian’s grandparents have also provided for his daily care and it should be argued that this relationship should be maintained in order for there to be stability in his life. 23 Pa. C.S.A. Section 5328 (a)(4). It is clear that the grandparents have maintained a loving, stable and consistent relationship with Ian and supported his emotional needs. 23 Pa. C.S.A. Section 5328 (a)(9). The grandparents have also demonstrated that they will attend to Ian’s daily physical, emotional and developmental needs. 23 Pa. C.S.A. Section 5328 (a)(10). Since the grandparents and Bob live in C County and their residences are close in proximity, there is no reason why the
partial custody could not be granted on this basis. 23 Pa. C.S.A. Section 5328 (a)(11). It is clear that the grandparents have the availability to care for Ian as they have been doing so for nearly three and one-half years. 23 Pa. C.S.A. Section 5328 (a)(12). Jane’s parents can argue any other factor deemed relevant to support their argument that an award of partial custody in their favor is in the best interest of Ian. 23 Pa. C.S.A. Section 5328 (a)(16).

If Jane’s parents pursue partial physical custody under 23 Pa. C.S.A. Section 5325(3), the Court is also required to consider whether the award of custody which they seek would interfere with any parent/child relationship and consider what is in the best interest of the child. 23 Pa. C.S.A. Section 5328 (c)(2). If Jane’s parents seek partial physical custody under 23 Pa. C.S.A. Section 5325(1) the Court shall consider the amount of personal contact between Ian and his grandparents prior to the filing of the action, whether the award interferes with any parent/child relationship and whether the award is in the best interest of the child. 23 Pa. C.S.A. Section 5328(c)(1). Under either section, Jane’s parents should argue that the period of partial custody which they are requesting is reasonable under the circumstances and would not interfere with Ian’s relationship with his father. Ian has spent the majority of his life with his grandparents and has been directly under their care. This is a well-established relationship and there is no reason why they should not be permitted to continue to spend time with Ian as he has been thriving under their supervision. Jane’s parents should also argue the factors enumerated above in support of their position that it would be in Ian’s best interest to be awarded the partial physical custody which they seek. If Jane’s parents initiate the action under 23 Pa. C.S.A. Section 5325(1) they will also point out the significant amount of personal contact between Ian and themselves. In particular, they will argue that Ian spent approximately three and one half years almost exclusively under their care before Ian’s father removed him from their home.
Question No. 3: Grading Guidelines

1. **Theft by Deception/Receiving stolen property**

   Comments: The candidate is expected recognize that the charges of theft by deception and receiving stolen property should be brought by the Detective, and the applicable facts should be discussed with regard to the elements of each of those charges.

   8 Points

2. **Hearsay - Admission of party opponent**

   Comments: The candidate should recognize that the statement would likely not be considered hearsay as it is not being offered for the truth of the matter asserted. In the alternative, if the Court found the statement was hearsay it would likely be admitted under the admission by a party opponent exception to the hearsay rule.

   4 Points

3. (a-b) **Custody**

   Comments: The candidate is expected to recognize that Jane’s parents are seeking partial physical custody rights and that they likely have standing to do so under Pennsylvania law. In addition, the candidate should recognize that the best interest of the child standard will be used by the Court in reaching its determination and the relevant factors should be argued relative to this standard.

   8 Points
Paul has been employed by C City for ten years as an accountant, an at-will position. During that time, he received outstanding performance evaluations and several promotions. C City is governed by a City Council. At a recent Council meeting, the Council President announced that C City had adopted a strict ‘no-drugs’ policy for its employees, in response to several widely-publicized arrests for drug possession in the city and that any C City employee involved with drugs or drug users would be terminated.

A drug sweep at a local party shortly after the drug policy announcement resulted in several arrests for marijuana possession and an article in the C City Sentinel, the local newspaper. Photos were published of the partygoers, one of whom looked very much like Paul. Although Paul was not in attendance, he received calls from some friends who saw the newspaper photos and thought that they recognized him.

Following publication of the article, the C City Manager called Paul into her office and terminated his employment, effective immediately, for “associating with drug users and for suspected drug use,” based on the newspaper article and photos. At the next public meeting of C City Council, the C City Manager touted the success of the new anti-drug policy, and announced that Paul had been terminated as a result of the new policy for associating with drug users. Paul’s requests for an opportunity to address the matter and establish his innocence of any drug activity or association with drug users, were denied. Paul has been unable to find work as an accountant, and his family has been severely harmed financially by his termination.

1. What claim(s) based on the United States Constitution should Paul assert as a result of his termination, and with what likelihood of success?

Paul’s wife, Nina, age 30, had recently gone back to work at Store as a receptionist/typist. Store employs over 5,000 employees at several facilities at which it manufactures and sells
industrial and farm equipment, and chemicals used in farming and in manufacturing. Store was opening a new facility at which it would employ over 1,000 workers. Nina saw an internal job posting for positions as a storeroom clerk at the new facility and applied for one of the positions because the salary was 25% higher for the position than her current salary.

A recently-published scientific study found that long-term exposure to some of the chemicals sold at Store may pose a risk to male and female fertility. As a result of the study, Store implemented a policy that banned women of childbearing age from being hired for or being placed in any job that involved contact with the chemicals, unless they produced a certificate of infertility from a physician. Solely as a result of the policy, Nina and 125 other female applicants who applied for various positions at Store's new facility were rejected for the positions they sought. After satisfying required administrative procedures, Nina filed a suit against Store in the appropriate federal district court, claiming sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, and seeking injunctive relief for herself and on behalf of women of childbearing age, who were or will be denied employment by Store based on its policy.

2. What prerequisites must be established by Nina to obtain class certification, and what is the likelihood of success in obtaining class certification?

3. On what basis should Nina seek to establish her claim of sex discrimination, and based on the facts, what is her likelihood of success?

4. What defense could be raised by Store to support its policy against Nina's claim of discrimination, and based on the facts, what is the likelihood of success?
1. Paul should assert that his right to procedural due process under the Due Process Clause of the Fourteenth Amendment was violated, and he will likely be successful.

Paul should raise a claim based on the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. Procedural due process is applicable to government decisions or actions which deprive an individual of liberty or property interests. Mathews v. Eldridge, 424 U.S. 319 (1976). The governmental action requirement has been met here since the action against Paul was taken by C City. As an at-will employee, Paul likely had no property interest in his employment protectable under the Due Process Clause of the Fourteenth Amendment. However, the Due Process Clause also protects the liberty interests of an employee. The Supreme Court has recognized a protectable interest in reputation, and has held: “…where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.” Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

The government action in question must involve a publication to others that is substantially and materially false. See Codd v Velger, 429 U.S. 624, 627 (1977). In the context of government employment, the information that is published must adversely affect the reputation of the employee, and must be taken in connection with some adverse employment action affecting the employee. Paul v. Davis, 424 U.S. 693 (1976). "In the public employment context, the 'stigma-plus' test has been applied to mean that when an employer 'creates and disseminates a false and defamatory impression about the employee in connection with his termination,' it deprives the employee of a protected liberty interest." Hill v. Borough of Kutztown, 455 F.3d 225, 236 (3d Cir. 2006), citing Codd, supra.

The fact that Paul is only an at-will employee and lacked a protected interest in his employment would not likely defeat his liberty interest claim. Several federal courts of appeals have uniformly resolved this issue in favor of recognizing liberty-based claims to procedural due process by at-will employees who have been defamed and discharged by state actors. See Hill v. Borough of Kutztown, 455 F.3d 225 (3d. Cir. 2006); Doe v. Department of Justice, 753 F.2d 1092 (D.C. Cir. 1985); Dennis v. S & S Rural High School Dist., 577 F.2d 338 (5th Cir. 1978); Collaizzi v. Walker, 542 F.2d 969 (7th Cir. 1976).

Once it is determined that there is a protected interest, it must be determined what process is due. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541 (1985) "Due process is flexible and calls for such procedural protections as the particular situation demands. Mathews, supra, 424 U.S. at 334. Generally, there must be "some kind of hearing" or pretermination opportunity to respond. Loudermill, supra. 470 U.S. at 542. In Mathews, supra, 424 U.S. at 335, the Supreme Court held that “identification of the specific dictates of due process generally requires the consideration of three distinct factors.” Those factors are:
First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.*

Here, Paul’s employment was terminated because he was mistakenly assumed to be a person in a newspaper photo of attendees at a party where drug use took place. The announcement at a public meeting of C City Council that Paul was terminated for associating with drug users was a publication, and Paul’s good name and reputation were damaged. The C City Manager made public information about Paul that was not true, as the facts state that Paul was not in attendance at the party referenced in the article and photos. The statement was made in connection with the termination of Paul's employment, satisfying another prong of the liberty interest claim. Paul was deprived of a liberty interest without any opportunity to be heard concerning the allegations that resulted in his termination. Paul was terminated from his employment and his good name and reputation were damaged without any pretermination or postdeprivation opportunity to address the matter. Applying the factors set forth in *Mathews*, it will likely be found that Paul was denied due process. An opportunity for Paul to be heard would have afforded him a chance to correct this mistake and clear his name. Accordingly, Paul will likely be successful in his Procedural Due Process claim for violation of his liberty interest, because he should have been afforded an opportunity to be heard and to correct his misidentification and clear his name.

2. **In order to bring suit on behalf of similarly situated females, who were denied employment by Store based on its policy, Nina would have to satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure, and it is likely that certification of the class would be granted.**

Rule 23 of the Federal Rules of Civil Procedure, provides:

**(a) Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class;
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
(4) the representative parties will fairly and adequately protect the interests of the class.

**(b) Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:
inconsistent or varying adjudications with respect to individual
class members that would establish incompatible standards of
conduct for the party opposing the class; or
adjudications with respect to individual class members that, as a
practical matter, would be dispositive of the interests of the other
members not parties to the individual adjudications or would
substantially impair or impede their ability to protect their
interests;

(2) the party opposing the class has acted or refused to act on grounds that
apply generally to the class, so that final injunctive relief or corresponding
declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to the class
members predominate over any questions affecting only individual
members . . . .

* * *

A plaintiff seeking class certification must establish that the proposed class meets all four
of the requirements outlined in Rule 23(a) and qualifies under at least one of the three sections of
Rule 23(b). In Re: Whirlpool Corp. Front-Loading Washer Products Liability Litigation, 722
F.3d 838 (6th Cir. 2013); In Re: Mercedes-Benz Tele Aid Contract Litigation, 257 F.R.D. 46, 54-
57 (D.N.J. 2009). The criteria set forth in Rule 23(a) are generally referred to as numerosity,
commonality, typicality and adequacy of representation. Id. at 54.

Here, there are at least 125 women who are potential members of the proposed class in
Nina’s suit challenging Store’s policy. All of the women were denied a position at Store's new
location as a result of Store’s hiring policy that banned women of childbearing age from any job
that involved contact with certain chemicals unless they produced a certificate of infertility from
a physician. There is no strict numerical test for the numerosity requirement in Rule 23(a)(1),
but “substantial” numbers are sufficient to satisfy this requirement. In Re: Whirlpool Corp., 722
F.3d at 852; Daffin v. Ford Motor Co., 458 F.3d 549, 552 (6th Cir. 2006). A class of 125 would
likely be substantial enough to meet the requirements of Rule 23(a).

The commonality requirement will be satisfied if the named plaintiffs share at least one
question of fact or law with the claims of the prospective class members. Baby Neal for and by
Kanter v. Casey, 43 F.3d 48 (3d Cir. 1994). The factual and legal issues in the case for all of the
prospective class members are identical to those faced by Nina and relate to whether Store’s
policy that women of childbearing age who are not infertile may not hold positions that involve
contact with chemicals that have been implicated in the loss of fertility constitutes sex
discrimination in violation of Title VII of the Civil Rights Act of 1964. The typicality
requirement is intended to assess whether the action can be efficiently maintained as a class and
whether the plaintiff’s incentives align with those of absent class members. Id. at 57. Nina's
claims are typical of the claims of the class and her incentives appear to align with the interests
of the prospective class members. Finally, Nina must be an adequate representative of the other
class members. The requirement of adequate representation requires that plaintiff's attorney be
qualified to conduct the litigation and that the plaintiff not have interests antagonistic to those of the class. *In Re: Mercedes-Benz*, 257 F.R.D. at 70. Absent evidence in the facts to indicate that Nina would not protect the interests of the other class members or that her attorney is not qualified to conduct the litigation, this prong would be met.

Once the requirements of Section (a) are determined to have been met, the court must examine whether Section (b) is satisfied. Section (b)(2) would apply to the action brought by Nina. Based on the facts presented, all of the women were denied employment at Store because of its hiring policy. Injunctive relief is appropriate for the class as a whole because Store has acted on grounds that apply generally to the class by precluding certain employment to women of childbearing age based on its policy. It appears that Nina would be able to meet the prerequisites for certification of a class action under Rule 23.

3. **Nina should seek to establish her claim of sex discrimination on the basis of disparate treatment by showing that Store's policy was facially discriminatory, and she will likely be successful.**

Store’s policy applies only to women of childbearing age, notwithstanding that the scientific study related to the impact of certain chemicals on male and female fertility, not just women’s fertility. Since the policy applies only to women, it is facially discriminatory in violation of Title VII, which provides:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual…, because of such individual’s …sex…”


Disparate treatment occurs when an employer treats some people less favorably than others because of their race, color, religion, sex, or national origin, and requires proof of a discriminatory motive or intent. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335, n. 15 (1977). Intentional discrimination may be established through direct or circumstantial evidence. *Armstrong v. Flowers Hospital*, 33 F.3d 1308 (11th Cir. 1994).

A policy that explicitly discriminates against women on the basis of their sex is facially discriminatory and forbidden under Title VII. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, et al., v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) In *Johnson Controls*, a battery manufacturer enacted a policy that precluded all women who were "capable of bearing children," who had not produced a letter documenting their infertility, from jobs involving high levels of lead exposure despite evidence that lead exposure also had a debilitating effect on the male reproductive system. The Supreme Court in *Johnson Controls* held that the fetal protection policy explicitly discriminated against women on the basis of their sex and created a facial classification based on gender. The court also found that the policy violated Title VII, as amended by the Pregnancy Discrimination Act, 42 U.S.C.A. §2000e(k), because the basis for exclusion was the potential for
pregnancy, which is regarded under Title VII in the same light as explicit sex discrimination. *Id.* at 199.\(^1\) The policy constituted sex discrimination under a disparate treatment theory because the policy created an intentional, facial classification based on sex/potential for pregnancy.

As in the current scenario, when a facially discriminatory policy exists, the discrimination is in effect admitted by the employer, and the plaintiff need not otherwise establish the presence of a discriminatory intent. *Healey v. Southwood Psychiatric Hospital*, 78 F.3d 128 (3d Cir. 1996); *Gerdom v. Continental Airlines*, 692 F.2d 602 (C.A. Cal. 1982). The policy in question here is facially discriminatory because it requires female employees but not male employees to produce proof of infertility in order to not be excluded from certain positions even though the chemicals involved imposed a risk to both male and female fertility. See *Johnson Controls*, 499 U.S. at 198. The policy at issue here is nearly identical to the policy found to be facially discriminatory in *Johnson Controls*, and, therefore, is presumptively in violation of Title VII. Based on the facts, Nina should be able to establish that Store discriminated against her on the basis of sex/potential for pregnancy, based on its facially discriminatory policy.

4. **Store could raise the bona fide occupational qualification defense, however the defense would not be successful because sex and fertility are not related to performance of the job requirements of a storeroom clerk.**

Once plaintiff has established that the policy at issue was facially discriminatory, the burden is on the employer to establish a valid defense. A facially discriminatory policy, such as the one here, is permissible under Title VII only if justified as a bona fide occupational qualification (BFOQ). *Johnson Controls*, 499 U.S. at 200. A BFOQ is a qualification that is reasonably necessary to the normal operation of an employer’s business.” 42 U.S.C.A. §2000e-2(e)(1). Additionally, under the Pregnancy Discrimination Act, 42 U.S.C.A. §2000e(k), unless pregnant employees differ from others in their ability or inability to work they must be treated the same as other employees for all employment-related purposes. *Id.* at 201.

The BFOQ defense has been interpreted narrowly. See, *Dothard v. Rawlinson*, 433 U.S. 321, 332-337 (1977). Sex discrimination is permissible only where it is “reasonably necessary” to the “normal operation” of the “particular” business. *Johnson Controls*, 499 U.S. at 201. To constitute a BFOQ, the qualification at issue must concern job-related skills and aptitudes and affect an employee's ability to do the job. *Id.* at 201. The court in *Johnson Controls* rejected a BFOQ defense to a claim similar to that at issue here and held:

... the language of both the BFOQ provision and the PDA which amended it, as well as the legislative history and the case law, prohibit an employer from discriminating against a woman because of her capacity to become pregnant unless her reproductive potential prevents her from performing the duties of her

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1 The Pregnancy Discrimination Act, 42 U.S.C.A. §2000e, states: "... (k) The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy..."
An employer must direct its concerns about a woman's ability to perform her job safely and efficiently to those aspects of the woman's job-related activities that fall within the "essence" of the particular business.

Id. at 206.

Since there is no evidence that the plaintiffs would have been unable to perform the responsibilities of the positions they sought because of their sex or potential pregnancy, Store’s BFOQ defense will not be successful.
Question No. 4: Grading Guidelines

1. Constitutional Law

Comments: Applicants should demonstrate an understanding of the requirements of the Fourteenth Amendment’s Procedural Due Process Clause and apply the requirements to the facts to reach a well-reasoned conclusion.

5 points

2. Civil Procedure

Comments: Applicants should demonstrate an understanding of the requirements of Rule 23 of the Federal Rules of Civil Procedure, and apply the requirements of the rule to the facts to reach a well-reasoned conclusion.

6 points

3. Labor and Employment

Comments: Title VII - Applicants should demonstrate an understanding of the principles of Title VII of the Civil Rights Act of 1964 with respect to a disparate treatment claim on the basis of a facially discriminatory policy, and apply the principles to the facts to reach a well-reasoned conclusion.

5 points

4. Labor and Employment

Comments: Title VII- Applicants should demonstrate an understanding of the requirements of the defense of a bona fide occupational qualification to sex discrimination claims under Title VII of the Civil Rights Act of 1964, and apply the requirements to the facts to reach a well-reasoned conclusion.

4 points
Peter, who hosted a radio talk show, and Alicia, who did off-screen narration known as “voiceovers” for television commercials, lived at Blackacre located in Smallville, Pennsylvania. Although they were married when they purchased Blackacre, the deed to the property listed Peter and Alicia simply as the grantees, and not as husband and wife.

Alicia worked out of her own recording studio at Blackacre. Big Cable Network (Cable) contracted with Alicia to do voiceovers for ads promoting Cable’s programs. In their contract, Cable promised to pay Alicia a flat fee and to “bear any costs directly incurred by Alicia in producing the ads.” Alicia rented a special piece of sound equipment for the voiceovers for Cable’s ads from Eli at a cost of $2,500. Alicia told Eli that Cable would directly pay him for the cost of renting the sound equipment.

Alicia solely owned Greenacre, a cottage in Rural, Pennsylvania. Knowing that Will, her close friend, loved the outdoors, Alicia invited Will to use Greenacre for a weekend. While Will was at Greenacre, Alicia sent Will a text message stating, “Open up the box on the dining room table.” Will opened the box and found a signed deed conveying Greenacre to him. Attached to the deed was a note signed by Alicia saying, “Enjoy!” Will texted back to Alicia, “This is a wonderful surprise. Thank you!” When he left Greenacre at the end of the weekend, Will took the deed with him, but never recorded it.

While in Smallville to review Alicia’s promotional ads, Cable’s owner heard Peter’s radio talk show and asked him to come to Cable’s headquarters in Los Angeles for an audition. Without telling Alicia or WBAR Radio in Smallville, which recently had signed Peter to a new three year contract to continue his daily radio talk show, Peter went to Cable’s headquarters. Several days later, Cable posted an announcement on its website that Peter had signed a contract
to host a nationally broadcast talk show in Los Angeles for Cable. The announcement included a video in which Peter stated, “While I hate to leave WBAR and my loyal fans in Smallville, Cable’s offer to host a show in LA is simply one that I couldn’t refuse!” After learning that Peter was taking the position with Cable, WBAR immediately hired another talk show host to replace Peter. Furious that Peter decided to leave Smallville without discussing the move with her, Alicia separated from Peter and moved out of Blackacre. To obtain money to rent another location for her recording studio, she signed a quitclaim deed conveying her interest in Blackacre to Diane.

Returning to Smallville and discovering that Alicia had left, Peter had second thoughts about taking the job with Cable. After some discussions, Cable and Peter jointly announced that Peter would not be taking the job with Cable and that Peter would remain at WBAR in Smallville.

1. WBAR refused to put Peter back on the air, and Peter sued WBAR for breach of contract. Will Peter’s suit be successful?

2. Cable refused to pay Alicia for her voiceover work or to pay for the costs that she incurred in producing the ads. What legal theory can Eli use to sue Cable to collect the money owed for renting the equipment to Alicia?

3. Assume for purpose of this question only that WBAR obtained a judgment against Peter on a counterclaim for breach of contract. To recover on this judgment, WBAR wants to force a sale of Blackacre. Will WBAR succeed in forcing a sale of Blackacre?

4. Learning about her separation from Peter, Will handed the deed to Greenacre back to Alicia saying, “You’re going to need this now more than me.” Several weeks later, Will unexpectedly died. Will left his entire estate to the National Audubon Society. Who has legal title to Greenacre?
1. Peter’s breach of contract action against WBAR will be unsuccessful because Peter’s conduct constituted an anticipatory repudiation of their contract.

Section 250 of the Restatement (Second) of Contracts defines an anticipatory repudiation as either a statement by a party to the other that he will not or cannot perform without a breach or a voluntary affirmative act that renders a party unable or apparently unable to perform without a breach. RESTATEMENT (SECOND) OF CONTRACTS, § 250 (1981). A party’s voluntary and affirmative action will be considered such a repudiation if “it make[s] it actually or apparently impossible for him to perform.” Id., comment c.


The facts state that Peter traveled to Los Angeles and signed a contract with Cable to host a nationally broadcast talk show based in Los Angeles. Peter’s action of taking another job across the country would constitute a voluntary affirmative act that would make it, at the least, apparently impossible for Peter to perform his duties in Smallville under his contract with WBAR. See, RESTATEMENT (SECOND) OF CONTRACTS, supra, illustration 7. Additionally, Peter appeared in a video on Cable’s website in which he stated that he was leaving WBAR and Smallville to take Cable’s offer of a job in Los Angeles. Peter’s signing of the contract with Cable coupled with his conduct in appearing in the video would likely be viewed as an absolute and unequivocal refusal to perform his contract with WBAR. Applying either the Restatement standard or Pennsylvania’s stricter standard, Peter’s actions would constitute an anticipatory repudiation of his contract with WBAR.

An obligor who repudiates a contract prior to his performance can nullify or retract his repudiation and reinstate the contractual rights and duties of the parties. The nullification or retraction, however, must come to the knowledge of the injured party before he materially changed his position in reliance on the repudiation or indicates to the other party that he considers the repudiation to be final. Id. § 256. In this case, WBAR materially changed its position following Peter’s statement that he was leaving WBAR to take an offer of the position with Cable by hiring another talk show host. Even though Peter announced that he was not going to take the position with Cable and that he intended to remain in Smallville at WBAR, his attempted nullification of his repudiation of the contract was too late.

The rationale for the rule of anticipatory repudiation is the prevention of economic waste. 2401 Pennsylvania Ave. Corp., supra. “An obligee/plaintiff should not be required to perform a useless act as a condition of his right to recover for a breach when the obligor has demonstrated an absolute and unequivocal refusal to perform.” Id. at 174, 489 A.2d at 737. Consequently, the injured party’s duty to perform under the contract is discharged when there has been an

Because Peter’s actions constituted an anticipatory repudiation that was not timely nullified, WBAR’s duties to Peter under their contract were discharged. Therefore, Peter’s breach of contract action against WBAR will not be successful.

2. **Eli should seek to recover against Cable under the theory that he is a third party beneficiary of the contract between Cable and Alicia.**

Since he is not a party to the contract, Eli would have to assert that he is a third party beneficiary of the contract between Cable and Alicia in order to pursue a claim against Cable. In *Guy v. Liederbach*, 501 Pa. 47, 459 A.2d 744, 751 (1983), the Pennsylvania Supreme Court adopted Section 302 of the Restatement (Second) of Contracts for determining third party beneficiary claims. Under the Restatement (Second), a third party can claim rights under a contract, even if not explicitly stated, if it is consonant with the intention of the contracting parties. Section 302 states:

**Intended and Incidental Beneficiaries**

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.


As explained by the Court in *Liederbach*, the Restatement (Second) established a two part test for determining whether one is an intended third party beneficiary. The first part is a standing requirement which leaves discretion with the court to determine whether recognition of third party beneficiary status would be appropriate to effectuate the intent of the parties. The second part defines the two types of claimants who can be intended beneficiaries. If a third party satisfies both parts of the test, a claim may be asserted under the contract. *Guy v. Liederbach*, 501 Pa. at 61, 459 A.2d at 751.

In *Scarpitti v. Weborg*, 530 Pa. 366, 609 A.2d 147 (1992), the Supreme Court revisited its decision in *Liederbach* and reaffirmed that the principles stated in Section 302 of the Restatement (Second) were part of the law of Pennsylvania. The Court in *Scarpitti* summarized the law governing third party beneficiaries in Pennsylvania after *Liederbach* in this way:
A party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself ...unless, the circumstances are so compelling that the recognition of the beneficiary’s right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

Scarpitti v. Weborg, 530 Pa. at 372-73, 609 A.2d at 150-51. (emphasis by the Court) (citations omitted).

In this case, the agreement between Cable and Alicia does not contain any affirmative expression of intent to make Eli a third party beneficiary of their agreement. Consequently, Eli would have to satisfy the two part test for intended third party beneficiary status set forth in Section 302 of the Restatement (Second) of Contracts to recover against Cable.

Here, the underlying contract between Cable, the promisor, and Alicia, the promisee, required Cable to pay a flat fee to Alicia for her voiceover work and to “bear any costs directly incurred by Alicia in producing the ads.” By including this language in their agreement, the intention of the parties arguably was to make Cable financially responsible for those costs directly incurred as part of Alicia’s production of Cable’s ads. Therefore, Eli can contend that recognition of his right as a third party to receive payment for renting the special sound equipment to Alicia under these circumstances is sufficiently compelling and would effectuate the intention of the parties. Additionally, the performance of the promise would satisfy the obligation of the promisee (Alicia) to pay money to the beneficiary (Eli). Thus, Eli can argue that he is a “creditor beneficiary” under subsection 1 (a) of Section 302 of the Restatement (Second). See, RESTATEMENT (SECOND) OF CONTRACTS, supra, Comment b.

3. By virtue of their marital status, Peter and Alicia own Blackacre as tenants by the entireties. Because Alicia’s unilateral conveyance of her interest to Diane was ineffective in severing the tenancy by the entireties, WBAR cannot recover its judgment against Peter by forcing a sale of Blackacre.

The deed conveying Blackacre did not state that Peter and Alicia were married. The failure of the deed to note this fact, however, is legally inconsequential. 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. Holmes Estate, 414 Pa. 403, 200 A.2d 745 (1964). It is the actual married status of the grantees and not necessarily the words stated or omitted in the instrument that determines their right to take as tenants by the entireties. 1 LADNER PENNSYLVANIA REAL ESTATE LAW, § 8.04(b) (6th ed. R. Friedman 2013).

To overcome the presumption that a conveyance to grantees who are married creates a tenancy by the entireties, there must be clear and convincing evidence of a contrary intent. Brenner v. Sukenik, 410 Pa. 324, 189 A.2d 246 (1963). In this case, there are no facts that would indicate an intention to create a different estate in Blackacre between Peter and Alicia.
Therefore, the presumption would control and Peter and Alicia would own Blackacre as tenants by the entireties.

A tenancy by the entireties is predicated upon legal unity of husband and wife. *Beihl v. Martin*, 236 Pa. 519, 84 A. 953 (1912). From the inception of the estate, “each spouse is seized of the whole or the entirety and not a share, moiety, or divisible part.” *Gasner v. Pierce*, 286 Pa. 529, 531, 134 A. 494, 495 (1926). When either spouse dies, the entity continues even though it is now composed of only one natural person instead of the two who had composed it while both were alive. 1 LADNER, *supra*, §8.04(a).

Because a tenancy by the entireties is grounded in the conception of the estate as a single indivisible unit, neither spouse can terminate or sever the tenancy by his or her own conveyance as a joint tenant can do. *Gasner v. Pierce, supra*. For the same reason, an estate held as tenants by the entireties cannot be attached or sold by a creditor of one of the tenants as long as both tenants are alive and remain married. *Beihl v. Martin, supra*.

Although Alicia separated from Peter, they are still married. Consequently, Alicia cannot unilaterally terminate or sever the tenancy by the entireties in Blackacre and her attempt to do so by conveying her interest in Blackacre to Diane would be legally ineffective.

As a general matter, a judgment operates as a lien upon all real property of a debtor in the jurisdiction in which the judgment is entered of record. *In Re Upset Sale, Tax Claim Bureau of Berks County*, 505 Pa. 327, 479 A.2d 940 (1984). A judgment obtained by a creditor against an individual spouse owning property as a tenant by the entireties, however, only serves as a lien upon that spouse’s expectant interest in obtaining the entireties property by survivorship or divorce. *Beihl v. Martin, supra*.

As long as Peter and Alicia are both alive and married to one another, they own Blackacre as tenants by the entireties. Despite Alicia’s efforts to unilaterally terminate and sever the tenancy by the entireties, Blackacre still remains as a tenancy by the entireties and WBAR cannot collect on its judgment against Peter by forcing a sale of property held as a tenancy by the entireties.

4. **The National Audubon Society has legal title to Greenacre because Alicia’s words and actions constituted delivery of the deed and transferred ownership to Will. Will’s return of the deed to Alicia, the original grantor, did not legally re-transfer title.**

A deed is not legally effective until it has been delivered. *Herr v. Bard*, 355 Pa. 578, 580–82, 50 A.2d 280, 281 (1947). Whether there has been a delivery of a deed is a question of fact to be determined from the evidence by the trier of fact. *Mower v. Mower*, 367 Pa. 325, 327, 80 A.2d 856, 858 (1951).

No particular form or ceremony is necessary to make a valid delivery. *City Stores Co. v. City of Philadelphia*, 376 Pa. 482, 486, 103 A.2d 664, 666-67 (1954). Delivery instead depends
upon the intention of the grantor as shown by his words and actions and by the circumstances surrounding the transaction. *Loutzenhiser v. Doddo*, 436 Pa. 512, 516, 260 A.2d 745, 747 (1970).

To effect a delivery, it is not necessary for a grantor actually or manually to give the deed directly to the grantee. *Chambley v. Rumbaugh*, 333 Pa. 319, 322, 5 A.2d 171, 173 (1939). A delivery of a deed will be found to have constructively occurred where the grantor’s words and actions or the circumstances surrounding the transaction evidences an intent to divest himself of all dominion and control over the property and invest the grantee therewith. *Fiore v. Fiore*, 405 Pa. 303, 306, 174 A.2d 858, 859 (1961). In order to complete the delivery of a deed, whether such delivery is actual or constructive, an acceptance by the grantee is necessary. *Fiore v. Fiore*, supra, §16.17. No express acceptance is required and acceptance is presumed if the conveyance is beneficial to the grantee. R. BOYER, H. HOVENKAMP and S. KURTZ, *THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY*, § 16.4 at p. 559 (4th ed. 1991); see also *Blight v. Schenck*, 10 Pa. 285, 291 (1849).

Finally, the failure to record the deed does not affect delivery. The recording of the deed is not essential to its validity or the transition of title. Title to real estate may be passed by delivery of a deed without recording. *In Re Petrack Estate*, 486 Pa. 237, 240, 405 A.2d 879, 880 (1979), citing *Malamad v. Sedelsky*, 367 Pa. 353, 358, 80 A.2d 853, 856 (1951).

The facts here state that Alicia not only instructed Will on where he could find the deed but also attached a note to the deed which said “Enjoy.” Although Alicia did not manually hand the deed to Will, a court probably would conclude that Alicia’s words and actions strongly evidenced an intent to give up dominion and control over Greenacre and thus constituted an effective delivery of the deed. Additionally, Will’s actions of sending a text message thanking Alicia for the “wonderful surprise” and taking the deed with him at the end of his weekend at Greenacre constitute an express acceptance. Since a valid delivery and acceptance occurred, Will obtained legal title to Greenacre, notwithstanding his failure to record the deed.

Once an executed deed has been delivered, title passes to the grantee. *Malamad v. Sedelsky*, supra. Consequently, title cannot be revested in the grantor by merely handing back the deed to the grantor, by destroying it, or marking it cancelled, or agreeing that the original deed was void. *Tate v. Clement*, 176 Pa. 550, 35 A. 214 (1896); see also, R. BOYER, H. HOVENKAMP and S. KURTZ, supra, § 16.4 at p. 574. If Will wanted to transfer title back to Alicia, he could only do so by executing a new deed to Greenacre. Because title to Greenacre could not be transferred by handing a deed back to Alicia, title to the property remained in Will at the time of his death. Therefore, the Audubon Society has legal title to Greenacre.
Question No. 5: Grading Guidelines

1. **Anticipatory Repudiation**

Comments: Candidates should recognize the applicability of the principle of anticipatory repudiation of contract. Candidates should provide some basic definition or statement of the principle and apply that definition to the stated facts. Candidates also should set forth the circumstances under which a party can nullify or retract his repudiation and determine from the stated facts whether the repudiation was nullified. Finally, candidates should recognize that an anticipatory repudiation discharges the injured party’s obligations under the contract.

5 Points

2. **Third Party Beneficiary**

Comments: The candidates should recognize that under certain circumstances a contract can be enforced by a person who is not a party to the agreement. The candidates should discuss the elements necessary for third party beneficiary status and apply these elements to the stated facts.

4 Points

3. **Tenancy by the Entireties**

Comments: Candidates should discuss Pennsylvania law’s presumption that a conveyance to a husband and wife creates a tenancy by the entireties even when the words of the instrument fail to state the existence of the marriage. Candidates should recognize that neither spouse can terminate or sever an estate held by the entireties by his or her own conveyance as a joint tenant can do. Candidates also should recognize that an estate held by the entireties cannot be attached or sold by a creditor of one of the tenants as long as both tenants are alive and remain married. Candidates should apply these principles to the stated facts and reach the conclusion that WBAR cannot force a sale of the property held by Peter and Alicia as tenants by the entireties.

5 Points

4. **Delivery of a Deed**

Comments: Candidates should recognize the necessity of delivery of the deed to transfer title to real property. Candidates should discuss the principles of law governing the delivery of a deed and apply these principles to the stated facts in the course of reaching a well-reasoned conclusion.

6 Points
Question No. 6

Pam is the owner of a spa located in Pennsylvania. Pam provides manicures, pedicures, and massages to her patrons. Pam has created a body cream that she sells at her spa.

Pam has provided a small quantity of her body cream to Dr. Derm, a local Pennsylvania dermatologist and friend of Pam’s. Dr. Derm has sold Pam’s body cream to several of his patients, including Mary, a resident of nearby State X.

Pam would like to produce her body cream in greater quantities and market it on a broader basis but lacks the capital necessary to proceed. A few months ago, Pam discussed her plans with Dr. Derm who expressed an interest in providing her with the start-up money that she needed to proceed. Pam has proposed that she form a Pennsylvania corporation, Newco, Inc. (“Newco”), with a single class of common stock. She has offered Dr. Derm a 30% equity interest in Newco for his initial investment. Dr. Derm has agreed, provided that Pam set up the corporation in a way to allow him, if desired, to maintain a 30% common stock interest in the event that Newco desires to issue common stock to new investors in the future.

In reliance on Dr. Derm’s promise to invest, two months ago Pam contacted Molds, Inc. (“MI”), a Pennsylvania corporation. MI designs and produces custom plastic molded products. Pam told MI that she was a representative of Newco. Pam indicated that Newco thought that packaging its body cream in a hand shaped plastic container would help sales. MI indicated that although it had never produced a hand shaped container it could do so. MI also indicated it would not have a market for the containers elsewhere. MI asked Pam if she was sure that Newco wanted the containers and Pam confirmed Newco’s need. Pam then, on behalf of Newco, ordered 2,000 hand containers at a price of $5.00 each, and MI accepted the oral order. Last
month, MI created the mold needed to produce the containers and as of yesterday had manufactured one-half of the containers ordered by Newco.

Last week, Dr. Derm was served with a civil complaint filed by his patient, Mary, seeking monetary damages. The complaint alleges the body cream Dr. Derm sold her (Pam’s cream) burnt her skin leaving permanent scars. Mary’s complaint was filed in the appropriate federal district court of Pennsylvania. The complaint asserts claims of negligence, breach of implied warranty and products liability, which were permitted claims under Pennsylvania law. Mary’s counsel had advised her not to file the suit in State X because her cause of action would be limited to a products liability claim under State X’s statutory products liability law which subsumes all breach of warranty and common law claims, including negligence. Dr. Derm immediately called Pam and advised her of the lawsuit and suggested that she suspend sales of the body cream.

1. If Newco is formed, other than setting up Newco as a statutory close corporation, what step, if any, could be taken for Newco to provide Dr. Derm the protection that he desires?

2. If today Pam advises MI that the hand shaped containers are no longer needed, can MI enforce the oral contract?

3. Assume for purposes of this question only, that the oral contract with MI is found to be enforceable and that Newco has not yet been formed. Does Pam have any personal liability to MI under the contract?

4. If Dr. Derm files a motion to dismiss Mary's complaint, arguing that State X law should apply to Mary’s case, and in response Mary argues that Pennsylvania law should apply, how should the court analyze the choice of law issue?
Question No. 6: Examiner’s Analysis

1. If the parties proceed and Newco is formed, Pam could provide for preemptive rights for shareholders in the articles of incorporation of Newco.

   The Pennsylvania Business Corporation Law of 1988 (the “BCL”) provides, “Except as otherwise provided in the articles, a business corporation may issue shares, option rights or securities having conversion or option rights, or obligations without first offering them to shareholders of any class or classes.” 15 Pa. C.S.A. §1530(a). This section essentially provides that no preemptive rights exist except to the extent provided for in the articles of incorporation.

   A preemptive right is “a prior right over other persons to subscribe for a purchase of stock subsequently issued in proportion to one’s holdings of the original stock. The underlying basis of the right is the preservation of a shareholder's relative and proportionate voting strength and control in the corporation.” Sell and Clark, Pennsylvania Business Corporations, §1530.3.

   To properly protect Dr. Derm the articles should provide that shareholders would have preemptive rights with respect to the issuance of both currently authorized and newly authorized shares.

2. The oral contract should be enforceable under the Pennsylvania Uniform Commercial Code (the “Code”) as one involving specially manufactured goods.

   Section 2102 of the Code indicates that the Code applies to transactions in goods. 13 Pa. C.S.A. §2102. The agreement for the containers to be manufactured by MI for sale to Newco is a transaction in goods under the Code. Section 2201 of the Code generally requires a contract for the sale of goods for a price of $500 or more to be in writing and signed by the party to be charged to be enforceable. 13 Pa. C.S.A. §2201(a). Here, we have a completely oral contract which ostensibly would be unenforceable under this statute of frauds provision. The Code does, however, provide an exception to the writing requirement where goods have been specially manufactured and are not suitable for resale by the seller in the ordinary course of its business. 13 Pa. C.S.A. §2201(c)(1).

   For the specially manufactured goods exception to the statute of frauds to apply five elements must be established by the party seeking enforcement of the contract. The elements are:

   1. The goods must have been specially manufactured for the buyer.

   2. The goods, once manufactured, must be goods not suitable for sale to other persons in the seller’s ordinary course of business.

   3. The seller must have made a substantial start in the manufacture of the goods.

   4. The seller’s beginning of manufacture occurred under circumstances that reasonably indicate the goods are for the buyer.
5. The actions of the seller occurred before the seller received any notice of repudiation.


MI should have no problem establishing each of the foregoing elements, thus taking the contract out of the statute of frauds. The containers were specially manufactured for the buyer, are not suitable for resale by MI, and one-half of the containers were made before Pam told MI that the containers were no longer needed. The specially manufactured goods exception should apply and the contract will be enforceable.

3. Pam would have personal liability as a promoter.

A “promoter” is a person who purports to act on behalf of a proposed corporation that has not yet been incorporated. Generally, a promoter is someone who takes an active part in creating and organizing the corporation. An officer who executes or enters into a pre-incorporation contract has the legal status of a promoter. Fletcher Cyc. Corp. §189 (Perm. Ed. 1999).

In the absence of an express or implied agreement to the contrary, a promoter is liable on a pre-incorporation contract even though the contract purports to be on behalf of the corporation to be formed. Id. at §215. “Even though they purport to act on behalf of the proposed corporation and not for themselves, promoters may be held personally liable on contracts made by them prior to the actual formation of the corporation. In the absence of a novation or an agreement by the other party to a release of liability, the promoter will remain liable after the corporation is formed.” John W. McLamb and Wendy C. Shiba, Pennsylvania Corporate Law & Practice, §2.2 (1993).

Here, Pam was clearly acting as a promoter. She negotiated the contract with MI and purported to enter into a contract on behalf of a corporation (Newco) that had not yet been formed. There is no indication that MI agreed to look only to Newco to enforce its rights under the contract or to release Pam if and when Newco was formed. MI should be successful in asserting a claim directly against Pam if it so desires. See, RKO-Stanly Warner Theaters, Inc. v. Graziano et al., 467 Pa. 220, 355 A.2d 830 (1976).

4. The court should apply Pennsylvania’s choice of law rules, as the forum state, to determine which state’s law should apply.

A federal court must apply the forum’s choice of law rules in resolving a choice of law issue. Klaxon Co. v. Stentor Electric Mfg. Co., Inc., 313 U.S.487 (1941). Therefore, the district court should look to Pennsylvania’s choice of law rules to analyze the choice of law issue.

In 1964, the Pennsylvania Supreme Court abandoned the strict lex loci delicti rule in favor of a more flexible rule which permits analysis of the polices and interests underlying the particular issue before the court. Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964). Under the old rule the place where an injury occurred, in this case State X where the
body lotion apparently was applied, would control the state law that the court would apply. The current choice of law approach rejects the rigid place of injury approach in favor of a more flexible approach that considers each state’s policies and interests.

Pennsylvania law takes a three step approach. The court in *Kallman v. Aronchick*, 2013 WL 5964444 (2013), recently described the process as follows:

First, the court must determine whether a real conflict exists, that is, whether these states would actually treat the relevant issues any differently. If there is no substantive difference between the laws of the competing states, no real conflict exists and the forum law applies. Where a real conflict exists, the court moves to the second step and examines the governmental polices underlying each law in order to classify the conflict as true, false or an unprovided for situation. A false conflict occurs where only one state’s interests would be impaired, and the law of the interested state applies. Where on the other hand, each jurisdiction has a governmental policy or interest that would be impaired by the application of the other state’s law, a true conflict exists. Where there is a true conflict, the court turns to the third step to “determine which state has the ‘greater interest in the application of its law.’” This determination demands that a court weigh the contacts each jurisdiction has with the dispute on a qualitative scale according to the extent they implicate the policies and interests underlying the particular dispute before the court. (Citations omitted)

In the instant case a real conflict does exist. Pennsylvania courts would allow claims of negligence, breach of implied warranty and products liability while State X would only allow, and would limit the cause of action to, a statutory products liability claim. It also appears that a true conflict exists. Each state seeks to compensate people injured by defective products within the state and to regulate the conduct of manufacturers and distributors of products within the state. Since the respective interests of each state would be impaired by application of the other state’s law a true conflict arises. The third inquiry, i.e., which state has the greater interest in the application of its law is less clear. In making this inquiry, a court must look to various factors including the place where the injury occurred, the place where the conduct causing the injury occurred, the domicile, residence and place of business of the parties and the place where the relationship between the parties is centered. *See, Knipe v. SmithKline Beecham*, 583 F.Supp.2d 602 (E.D. Pa. 2008). In the instant case, the defendant has his business in Pennsylvania and presumably saw the plaintiff at his business in Pennsylvania. It also appears that he sold her the body cream at his office. The plaintiff is a resident of State X and apparently used the body cream in State X where the injury was precipitated. The court will have to weigh these factors and conclude which state has the greater interest in having its law applied.
Question No. 6: Grading Guidelines

1. **Preemptive rights**

   Comments: The candidates should discuss preemptive rights as a solution and indicate the step required to establish such rights.

   3 points

2. **Specially manufactured goods exception to statute of frauds**

   Comments: The candidates should recognize that the statute of frauds applies to this oral agreement and should discuss the applicability of the specially manufactured goods exception.

   6 points

3. **Promoter liability**

   Comments: The candidates should recognize that Pam was acting as a promoter and, as such, has liability on the contract.

   4 points

4. **Conflict of laws analysis**

   Comments: The candidates should discuss the analysis that the court would undertake under Pennsylvania law to resolve the choice of law issue.

   7 points
Supreme Court of Pennsylvania
Pennsylvania Board of Law Examiners

Pennsylvania Bar Examination
July 29 and 30, 2014

PERFORMANCE TEST
July 29, 2014

Use GRAY covered book for your answer to the Performance Test.

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# TABLE OF CONTENTS

**File**

Memorandum to applicant assigning task.................................................................1  
Letter from Brian Mull to Shirley Sauer........................................................................2  
Memorandum re: format of opinion letters...................................................................4  

**Library**

**Rules**

Rules of Professional Conduct  
Rule 5.4. Professional Independence of a Lawyer..........................................................5  

**Statutes**

Business Corporation Law  
15 Pa. C.S.A. § 1715. Exercise of powers generally ......................................................5  
15 Pa. C.S.A. § 1728. Interested directors or officers; quorum........................................5  

Uniform Condominium Act  
68 Pa. C.S.A. § 3108. Supplemental general principles of law........................................6  
68 Pa. C.S.A. § 3301. Organization of unit owners’ association.........................................6  
68 Pa. C.S.A. § 3303. Executive board members and officers............................................6  

**Cases**

Office of Disciplinary Counsel v. Jackson, et al. (Supreme Court of Pennsylvania)..............7  
Lyman, et al. v. Boonin, et al. (Supreme Court of Pennsylvania).......................................11
FILE
TO: Applicant
FROM: Shirley Sauer
DATE: July 29, 2014
SUBJECT: Brian Mull

Our File No. 1700

Our client, Brian Mull, was recently elected to the Executive Board of the Hickstown Condominium Association. The Hickstown Condominium is a development of 100 townhouse units located in Hickstown, Madison County, Pennsylvania. Mr. Mull owns three of these units, two of which are vacant and one of which is his home.

Mr. Mull was formerly admitted to practice law in his native country, but has allowed that status to lapse. When he moved to Hickstown, he took and passed the Pennsylvania Bar Examination and was admitted to the Pennsylvania Bar. However, his license to practice law in Pennsylvania is currently administratively suspended due to his failure to meet his CLE requirements.

Mr. Mull still owes Suite & Sauer some money for legal services rendered to him in connection with a recent business venture. Mr. Mull currently derives income from his business as an information technologist.

Mr. Mull sent us the attached letter, raising several questions regarding his duties as a member of the Executive Board. Please prepare a draft of an opinion letter addressed to Mr. Mull responding to his questions in the order in which they are raised. Because of his law background, Mr. Mull will want you to cite and explain any legal authorities upon which you rely in formulating your responses. A memorandum mandating the firm’s format for opinion letters is attached.

I have included Mr. Mull’s letter in the file and the relevant legal authorities in the attached library. In completing your assignment, you should rely only on the facts contained in the file, and the legal authorities in the library.
July 23, 2014

Shirley Sauer, Esquire
Suite & Sauer, P.C.
123 Main Street
Madison, Pennsylvania 19998

Re: Various Legal Questions
Your File No. 1700

Dear Ms. Sauer:

I live in a unit of the Hickstown Condominium (Condominium), which is a development of 100 townhouse units located in Hickstown, Madison County, Pennsylvania. The Condominium was properly created in 1982 under existing law. The Hickstown Condominium Association (Association) is organized as a business corporation. The Association's bylaws authorize the Executive Board to promulgate and amend the Rules and Regulations of the Association. The Rules and Regulations of the Association, in part, authorize the Executive Board to regulate the use of the amenities of the Condominium, which include a pool, tennis courts, fitness center, club house, and one parking spot for each unit, 75 of which are covered and 25 of which are uncovered. Our budget totals $300,000 per year, and the maintenance and operation expenses for the above referenced amenities amounts to 10% of the budget ($30,000) per year. Out of the $250 monthly assessment for each unit, 10% ($25) is allocated to the cost of maintaining the amenities.

I was recently elected to the Executive Board of my Association. There are nine other members of the Executive Board, and each of the other nine members owns only one unit in which he or she lives. I would like your legal opinion regarding the following questions that have arisen since I was elected to the Executive Board of my Association. For each opinion, I would appreciate your reasoning and the legal foundation behind each opinion.

First, I own two units in the Condominium in addition to the unit in which I live. Those units are currently vacant. There are eight other owners who have unoccupied units that they are trying to rent, and 10 owners who are currently renting their units to tenants. An owner-occupier has brought a proposal to the Executive Board to amend the Rules and Regulations of the Association to give an owner who occupies a unit a preference in obtaining a covered parking space for their unit. Under existing regulations, covered parking spaces are generally assigned to the owner of a unit that is occupied based on the length of the time of ownership of the unit, regardless of whether the owner is living in the unit or renting it to a tenant. The proposal would provide an exception to the time of ownership standard by giving a preference in assigning a covered parking spot to an owner who occupies a unit over an owner who is renting the unit to a tenant and would permit a new owner-occupier of a unit to "bump" a tenant from a covered parking spot that had previously been assigned to the owner of the rented unit based on length of
ownership. This amendment may make it difficult to lease vacant units because the owners of
the units will not be able to guarantee the assignment or continued use of a covered parking spot
to their tenants regardless of the amount of time that they have owned the unit. One of the
members of the Executive Board intends to make a motion to amend the Rules and Regulations
to reflect the above referenced proposal, and this motion will be voted on at the next meeting.
My first question is: would this be a permissible amendment for the Board to approve?

Second, the Executive Board has decided to install a computer system with software
designed to keep track of the unit owners and occupants, violations of the Rules and Regulations,
and delinquencies in fines and dues payments. I intend to make a proposal to the Board to offer
my services to the Association to design, install, and maintain this system for a fee that is at a
substantial discount from my normal fees which are in line with prevailing rates. I would,
however, make a small profit from this business. My second question is: may I participate in the
discussion and vote on a motion to accept or decline my offer to provide these services without
affecting the validity of the transaction?

As a final matter, I am in a position to refer all of the Association’s legal work, which
will be quite substantial, to Suite & Sauer in exchange for the reduction in my debt to the law
firm over time. Specifically, I propose that you hire me as an IT consultant on an as needed
basis not to exceed 10 hours per month at a salary equal to fifteen percent of the fees paid to your
firm by the Association. I believe that this will not be unfair to the Association because Suite &
Sauer’s hourly rates are in line with those charged by other firms to condominium associations,
and the quality of Suite & Sauer’s work is the highest in the city. I will disclose this arrangement
to the Board. Please advise me if you are able to agree to this arrangement.

I look forward to your prompt response.

Sincerely yours,

Brian Mull

Brian Mull
Memorandum

To: All associates
From: Susan Suite
Date: July 2, 2006
Re: Instructions for drafting opinion letters

The following instructions for drafting opinion letters must be followed by all firm attorneys:

The document should follow the format of a formal business letter. The letter should be dated and directed to the client(s), but neither our letterhead nor the client’s inside address is required, as these will be added by your assistant. The subject line should succinctly identify the subject matter(s) of the letter, and the client’s file number.

1. The letter should begin with an appropriate salutation followed by a brief statement of the purpose of the letter.

2. The letter should be divided into sections, one for each question presented, which should be separated by a short heading that reflects the issue being addressed.

3. Each section should include a statement of the question being addressed, a reasoned analysis supporting your conclusion that applies the relevant legal principles to the facts, and a conclusion. If there are facts and/or legal principles relevant to any point or element in your analysis that could be argued to support a different conclusion, identify and discuss those principles/facts.

4. You may qualify your opinion if the outcome is less than certain, but if you do, you should state why you cannot give an unqualified opinion.

5. Legal authorities that are relied upon should be cited. Short, informal citation forms are permissible (Bluebook format is not required).

6. The letter should conclude with an appropriate closing and the signature of the assigning partner.

7. The opinion letter should be straightforward, logical, and in language that a layperson can understand.
LIBRARY
Rules of Professional Conduct

Rule 5.4. Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

* * *

(3) A lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement;

* * *

Statutes

Business Corporation Law

15 Pa. C.S.A. §1715. Exercise of powers generally

(a) General rule. In discharging the duties of their respective positions, the board of directors, committees of the board and individual directors of a business corporation may, in considering the best interests of the corporation, consider to the extent they deem appropriate:

(1) The effects of any action upon any or all groups affected by such action, including shareholders, employees, suppliers, customers and creditors of the corporation, and upon communities in which offices or other establishments of the corporation are located.

(2) The short-term and long-term interests of the corporation . . .

(b) Consideration of interests and factors. The board of directors, committees of the board and individual directors shall not be required, in considering the best interests of the corporation or the effects of any action, to regard any corporate interest or the interests of any particular group affected by such action as a dominant or controlling interest or factor.

* * *

(d) Presumption. Absent breach of fiduciary duty, lack of good faith or self-dealing, any act as the board of directors, a committee of the board or an individual director shall be presumed to be in the best interests of the corporation.

15 Pa. C.S.A. § 1728. Interested directors or officers; quorum

(a) General rule. --A contract or transaction between a business corporation and one or more of its directors or officers or between a business corporation and another domestic or foreign corporation for profit or not-for-profit, partnership, joint venture, trust or other enterprise in which one or more of its directors or officers are directors or officers or have a financial or other interest, 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, 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 the shareholders.

Uniform Condominium Act

68 Pa. C.S.A. § 3108. Supplemental general principles of law

The principles of law and equity, including the law of corporations and unincorporated associations, the law of real property and the law relative to capacity to contract, principal and agent, eminent domain, estoppel, fraud, misrepresentation, duress, coercion, mistake, receivership, substantial performance or other validating or invalidating cause supplement the provisions of this subpart except to the extent inconsistent with this subpart.

68 Pa. C.S.A. § 3301. Organization of unit owners’ association

A unit owners’ association shall be organized no later than the date the first unit of the condominium is conveyed to a person other than a successor declarant. The membership of the association at all times shall consist exclusively of all the unit owners or . . . their heirs, successors or assigns. The association shall be organized as a profit or nonprofit corporation or as an unincorporated association.

68 Pa. C.S.A. § 3303. Executive board members and officers

(a) Powers and fiduciary status.—Except as provided in the . . . bylaws . . . , the executive board may act in all instances on behalf of the association. In the performance of their duties, the officers and members of the executive board shall stand in a fiduciary relation to the association and shall perform their duties, including duties as members of any committee of the board upon which they may serve, in good faith in a manner they reasonably believe to be in the best interests of the association and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances.

* * *

The executive board and its members shall have no liability for exercising these powers provided they are exercised in good faith, in the best interest of the association and with such care in the manner set forth in this section.
Supreme Court of Pennsylvania

OFFICE OF DISCIPLINARY COUNSEL, Appellant
v.
Harry C. JACKSON, Esquire, Appellee

OPINION

This matter is before us by virtue of our constitutional power to supervise the conduct of attorneys. Article 5§ 10(c). Three days of hearings were held before a Disciplinary Board Hearing Committee, which thereafter recommended that Anonymous Attorney be privately reprimanded and Harry C. Jackson, Esquire, be disbarred. The attorneys and the Office of Disciplinary Counsel (ODC) filed exceptions to the Hearing Committee Report and Recommendation. The Disciplinary Board made the same findings and recommendations as the Hearing Committee. Anonymous Attorney advised this Court that he would not initiate any further review of his case while both Jackson and the ODC sought further review by this Court. We granted the request for further review and ordered both matters briefed and argued.

* * *

Anonymous Attorney was admitted to the practice of law in 1949 and for most of his career was practicing as a sole practitioner in Lancaster County. Except for these proceedings, Anonymous Attorney has had no other disciplinary infractions.

* * *

By our order dated March 8, 1982, Jackson was suspended from the practice of law for a period of five years effective September 25, 1981. (Citation omitted) In 1986, Jackson retired as a [workmens’ compensation] referee to concentrate on preparing for reinstatement as a licensed attorney.

Prior to 1986, Anonymous Attorney was acquainted with Jackson as a workmen’s compensation referee primarily through Anonymous Attorney’s workmen’s compensation practice. In late 1985, Jackson discussed with Anonymous Attorney the possibility of Jackson working part-time, without pay, as a paralegal for Anonymous Attorney. Jackson indicated that this arrangement would help Jackson stay current with the law and assist him in obtaining reinstatement of his attorney’s license. Initially, Jackson worked two to three days a week. Anonymous Attorney testified that he advised Jackson to make
sure that he informed every client that he was working only as a paralegal and not as an attorney. At no time was Anonymous Attorney given or made aware of the contents of the Bar Association’s Guidance Opinions which each suspended attorney is given. Accordingly, Anonymous Attorney assumed a suspended attorney could do what a normal paralegal could do, which included interviewing the clients; obtaining information from clients; undertaking legal research; and preparing, under supervision, legal documents. While Jackson was working as a paralegal in Anonymous Attorney’s office between January of 1986 and March of 1987, Jackson’s name did not appear on any office signs, on Anonymous Attorney’s legal stationery or on legal business cards, and the telephones were answered only by reference to Anonymous Attorney’s name. Finally, Anonymous Attorney indicated that he did, in fact, supervise Jackson between January of 1986 and March of 1987, and oversaw all of Jackson’s actions as a paralegal.

On occasions beginning in November of 1986, Anonymous Attorney split legal fees with Jackson. Anonymous Attorney has acknowledged that this was improper. Anonymous Attorney testified that in November of 1986 he split a fee with Jackson. At the time, he did not view this payment as a fee-splitting arrangement, but rather as compensation for substantial time and services provided by Jackson. In several other instances, Jackson was paid monies although Anonymous Attorney indicated that he did not directly authorize payments. In any event, Jackson did receive fees from Anonymous Attorney.

* * *

**ANONYMOUS ATTORNEY**

ODC has alleged that Anonymous Attorney conspired with Jackson to have Anonymous Attorney act as a “front” in concealing and preventing discovery of Jackson’s practice of law while under suspension. It is alleged that Anonymous Attorney’s actions specifically violated Disciplinary Rule 3-101(A), Disciplinary Rule 3-102(A) and Disciplinary Rule 3-103(A) of the Code of Professional Responsibility. Those provisions state that:

A lawyer should not aid a non-lawyer in the unauthorized practice of law. Disciplinary Rule 3-101(A).

A lawyer or law firm shall not share legal fees with a non-lawyer ... Disciplinary Rule 3-102(A).
A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law. Disciplinary Rule 3-103(A).

After reviewing the record, we are not convinced that ODC has met its burden of establishing the alleged conspiracy. * * *

Anonymous Attorney does admit that he did on at least one occasion split a legal fee with Jackson. He also admits that on several other occasions Jackson was paid a fee without his explicit authorization. As the Board succinctly stated:

Disciplinary Rule 3-102(A) and Rule of Professional Conduct 5.4 prohibit the sharing or splitting of fees between a lawyer and a non-lawyer. There can be no question but that Jackson, as a suspended lawyer, is a “non-lawyer” within the meaning of the rules. The purpose of this legal mandate is to maintain a lawyer’s independent professional judgment, unhampered by monetary obligation to a party other than his client. In addition, the purpose is to protect the Bar against the unauthorized practice of law by persons the system does not recognize as presently licensed to practice. The only exception to the rule prohibiting sharing fees with non-lawyers is the payment by a law firm into a profit-sharing plan in which non-lawyer employees of the firm share in the profits earned by the lawyers, obviously from fees. The exception is sustainable because there is no direct link between a specific fee and a specific payment to a non-lawyer. In this case, that very evil is present.

Report and Recommendations of the Disciplinary Board of the Supreme Court of Pennsylvania, page 17.

While these instances of sharing a legal fee are clearly in violation of Disciplinary Rule 3-102(A), we are cognizant of Anonymous Attorney’s
acceptance of responsibility and his
assurances that such actions will not reoccur
in the future. It is clear that Anonymous
Attorney was motivated by compassion for
Jackson’s financial condition rather than any
evil intent. Furthermore, the fees were paid
after the period of suspension had ended, yet
before formal reinstatement occurred. We
are satisfied with Anonymous Attorney’s
assurances that there will be no future
occurrences, keeping in mind that we are not
condoning his actions. However, we agree
with the Hearing Committee and the
Disciplinary Board that in light of
Anonymous Attorney’s remorsefulness, his
cooperation and his unblemished
disciplinary record, a private reprimand is in
order. Accordingly, we accept the
recommendation of the Disciplinary Board
and order that a private reprimand be issued.
Furthermore, Anonymous Attorney is also
ordered to pay the cost of investigation and
prosecution in this matter.
Alice J. LYMAN, et al.,
Appellants/Appellees,
v.
Tobyann BOONIN, et al.,
Appellees/Appellants

OPINION

This appeal comes to us by virtue of our grant of cross petitions for allowance of appeal, following an Order of the Superior Court which affirmed in part and reversed in part the Order of the Court of Common Pleas.

The underlying action was instituted by three non-resident owners of a condominium unit in a high-rise residential complex in Philadelphia known as the Philadelphian. The Philadelphian was originally an apartment building. However, in 1979 it was converted to a condominium complex by virtue of filing a Declaration of Condominium in accordance with the Unit Property Act, Act of July 3, 1963, . . . (repealed July 2, 1980). All of the Philadelphian's unit owners are members of an unincorporated association known as the Philadelphian Owners' Association, which is governed by a seven-member council. In 1986, the council adopted a membership policy which required council members to be resident owners. The council also adopted a parking policy for the allocation of on-site parking due to the severe shortage of on-site parking. (FN1 omitted)

Concomitant with the new policy was the creation of two waiting lists: the first list was for resident owners, while the second list was for non-resident owners and their tenants. The lists created a priority scheme whereby resident owners would first be awarded parking spots and the second list would only come into operation after the parking requirements of all the resident owners had been satisfied. Because the parking shortage was so severe, there was no movement on the second list.

The Appellants/Appellees, Alice J. Lyman, Catherine A. Lyman and Cletus P. Lyman, were non-resident owners and as such were included on the second list. They commenced this action after they experienced difficulty securing a tenant for their unit. The difficulty was allegedly related to the unavailability of parking. Their complaint was brought in equity and contained three separate prayers for relief:
first, they sought to have the parking policy declared unlawful; second, they sought damages in the nature of lost rent which they attributed to the discriminatory parking policy; (FN2 omitted) and third, they asked that the requirement that council members be resident owners be declared unlawful.

* * *

Prior to our review of the issues presented in this case of first impression, we must briefly review the standards of review to be employed when reviewing actions of condominium associations.

When called upon to review actions of a condominium association which do not impact constitutional privileges, courts have generally employed one of two standards. The first standard is "the administrative agency analogy." Under this standard, courts have scrutinized condominium association actions in much the same way judicial review of administrative actions is conducted. Thus, to determine whether an action is reasonable, the court looks first to whether an association has acted within the scope of its authority as defined by the enabling statute, its own declaration and bylaws; and whether it has abused its discretion by promulgating arbitrary or capricious rules bearing no relation to the purpose of the condominium. Under this standard, if the rule is authorized and reasonable the association or council may adopt it; if not, then it cannot. (citations omitted)

The second standard is the "corporate analogy." Under this standard, the actions of members of a condominium council are evaluated in the same fashion as are those taken by boards of directors of corporations, to wit: whether there was a good faith exercise of business judgment. This test was employed in Rywalt v. Writer Corp., 34 Colo.App. 334, 526 P.2d 316 (1974), where the court determined that the business judgment rule would insulate condominium council members if the actions are: 1) within the powers of the corporation and 2) within the exercise of an honest business judgment.

In the case of Papalexio u. Tower West Condominium, 167 N.J.Super. 516, 401 A.2d 280 (1979), a New Jersey court used this business judgment test to basically restrict condominium board challenges to those situations where there can be "a demonstration of the board's lack of good faith, self-dealing, dishonesty or
incompetency." Id., 167 N.J.Super. at 528, 401 A.2d at 286. (FN 3 omitted)

Thus, under the above standard, review of association actions would only be undertaken if its actions were made in bad faith or were indicative of self-dealing or incompetency. This standard of review was ultimately adopted by New Jersey's highest court in Siller v. Hartz Mountain Associates, 93 N.J. 370, 461 A.2d 568, cert denied, 464 U.S. 961, 104 S.Ct. 395, 78 L.Ed.2d 337 (1983).

Although not dispositive because it applies only to condominiums created after July 2, 1980, (FN5) we note that our legislature in enacting the "Uniform Condominium Act," 68 Pa.C.S. § 3101 (FN6 omitted) provided some guidance in determining the standards to be applied in reviewing the actions of a condominium council. Therein the General Assembly set forth the following:

The principles of law and equity, including the law of corporations and unincorporated associations, the law of real property and the law relative to capacity to contract, principal and agent, eminent domain, estoppel, fraud, misrepresentation, duress, coercion, mistake, receivership, substantial performance or other validating or invalidating cause supplement the provisions of this subpart except to the extent inconsistent with this subpart.

68 Pa.C.S. § 3108.

Every contract or duty governed by this subpart imposes an obligation of good faith in its performance or enforcement.

68 Pa.C.S. § 3112.

In the performance of their duties, the officers and members of the executive board shall stand in a fiduciary relation to the association and shall perform their duties ... in good faith in a manner they reasonably believe to be in the best interests of the association and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances.

68 Pa.C.S. § 3303(a).
From the above described standards we announce the following rule to be applied in those situations not covered by the now enacted statute: judicial relief from the actions of condominium governing bodies will be available in those situations where the action of the governing body is unauthorized, or it is established that the action has been taken fraudulently, in bad faith, or constituted self-dealing. (FN7)

* * *

Here, authorization for the condominium council's actions is contained in the Philadelphian's code of regulations. In Article XIV of those regulations is a section entitled "Parking Garage" which provides in relevant part:

14.01 Designation of Parking Spaces
... After all Units have been sold, the Council shall have full authority to operate, manage, and use the Parking Garage for the benefit of the Unit Owners.

14.02 Operation of Parking Garage
... Unit Owners shall not acquire any easement rights to use a particular parking space; and spaces or privileges may be assigned, reassigned or revoked by the Council or Declarant in accordance with the applicable provisions of the Governing Documents and such rules and regulations as may be promulgated for the operation of the Parking Garage.

Record at 323. Thus, the Philadelphian's code of regulations clearly provided authorization for the management of the parking facilities. (FN8 omitted)

The question remains however, whether the policy as passed is permissible under the standard articulated. The answer to this question is not apparent on the face of this record. Although the resident owners could validly enact a policy favoring one group of owners over another, the plaintiffs below have argued that the policy was not only facially discriminatory but placed upon them financial obligations to support the resident owners by actively subsidizing the parking garage. The imposition of such a burden could be grounds to invalidate the policy as passed. This, however, calls for factual findings by the trial court. Thus, this case was not appropriate for the entry of summary judgment. As a consequence, a remand to the trial court is necessary for the
development of a factual record as to the existence or non-existence of self-dealing.

Accordingly, the Order of the Superior Court granting partial summary judgment is vacated and the matter is remanded to the trial court for proceedings consistent with this opinion.

* * *

(FN 1-4 omitted)

(FN5) As stated previously, the Philadelphian was established as a condominium unit in 1979 by the filing of a Declaration of Condominium pursuant to the Unit Property Act, Act of July 3, 1963, P.L. 196, 68 P.S. §§ 700.101-700.805 (repealed July 2, 1980). The Uniform Condominium Act is inapplicable in that it applies only to condominiums created within the Commonwealth after July 2, 1980.

* * *

(FN 6 omitted)

(FN7) We wish to emphasize the fact that where a governing body's action benefits its own members it is not of itself dispositive of a claim of self-dealing. To find self-dealing, there must be a demonstration of a benefit that was gained at the expense of imposing an impermissible burden on the other owners.
**Instructions**

The performance test is designed to test an applicant’s ability to perform the legal task that has been assigned using the factual information contained in the File and legal principles that are provided in the Library.

The File contains the only factual information that you should consider in performing the assigned task. The task to be completed is set forth in the first document in the File in the form of a memorandum to the applicant. The Library contains the only legal principles that you should consider to complete the assigned task. Although your general knowledge of the law may provide some background for analyzing the problem, the factual information contained in the File and the legal principles contained in the Library are the only materials that you should use in formulating your answer to the assigned task.

Your response should be written or typed in the correct answer screen or book that has been provided. Be sure to allow sufficient time for reading the materials, organizing your answer and completing the task assigned. Your answer should demonstrate an understanding of the relevant facts, recognition of the issues and the applicable principles of law and the reasoning that supports your answer. Your grade will be based on the content of your response and your ability to follow instructions in performing the assigned task.

The events depicted and the persons portrayed by the information in the File are fictitious and such information does not depict nor is it intended to depict or portray any actual person, company or occurrence. Any similarity to any person, living or dead, or any occurrence is purely coincidental.
The applicant is assigned, as an associate in the firm of Suite and Sauer, to draft an opinion letter to a client offering the firm’s opinion regarding several questions for attorney Sauer’s signature. There are three questions that must be addressed, all dealing with the client’s position as a member of his Condominium Association’s Executive Board.

In addressing this problem, the applicant must derive the relevant facts from the client’s letter and the assigning partner’s memorandum. The law that will be applicable is reproduced in the attached library. Instructions on how to organize an opinion letter have been given in a separate memorandum.

**Format**

Paying attention to instructions is an important part of the skill set of a lawyer. The applicant is expected to follow the format of an opinion letter, and to address the questions in the order given.

**Validity of Proposed Amendment (priority for owner-occupied units)**

The question raised here is whether the proposed amendment that would give owner-occupied units priority in obtaining covered parking spaces would be permissible.

The Uniform Condominium Act applies to condominiums created within the Commonwealth after July 2, 1980. *Lyman v. Boonin*

The Uniform Condominium Act is applicable to this matter because the Hickstown Condominium was created in 1982.

Under the Uniform Condominium Act, the Executive Board can act in all matters on behalf of the association except as provided in the bylaws. 68 Pa.C.S.A. 3303(a).

The bylaws of the Association authorize the Executive Board to make amendments to the Rules and Regulations of the Association, and the Rules and Regulations specifically authorize the Board to regulate the use of amenities, including parking.

The Uniform Condominium Act generally imposes a fiduciary duty on Executive Board members, requiring the board members to act in good faith and in the best interest of the association, exercising the care of a reasonably prudent person. Id. at §3303.

There is nothing in the facts to support a conclusion that the adoption of the amendment would be in bad faith, without the exercise of ordinary care, or contrary to the best interest of the Association.
An action by the board of directors or an individual director is presumed to be in the best interests of the corporation absent a breach of fiduciary duty, lack of good faith or self-dealing. 15 Pa. C.S.A. 1715(d).

When evaluating the impact of an action of a governing body of an association for purposes of possible self-dealing, the issue is not whether the board’s actions benefit its members, but whether that benefit was gained by imposing an impermissible burden on the other owners. *Lyman v. Boonin*

While the amendment will benefit the other nine members of the Board who are all owner-occupiers, the burden on owners who do not occupy units would not be impermissible given the small amount of the assessment attributable to parking spaces and the fact that each unit owner is provided a parking space which must be maintained through the assessed fees.

Given the number of amenities, the portion of the $25 monthly cost for maintaining amenities that would be allocable to the parking amenities would be relatively small.

The facts state that there are various amenities available to unit owners, including a pool, tennis courts, fitness center, club house and parking spots some of which are covered; and that the monthly cost of maintaining and operating all of the amenities is only $25 out of a monthly assessment of $250.

All units are assigned a parking spot and the cost of maintaining these parking spots, whether covered or uncovered, will be paid from the monthly assessment paid by all unit owners.

The proposed amendment does not preclude the assignment of the covered parking spots to units owned by non-occupiers who are leasing to a tenant but merely gives a preference in assigning the covered spots to owner-occupiers.

The letter should advise the client that the amendment, if proposed, would likely be permissible, as the Board is authorized to make the amendment and the adoption of the amendment would not be in violation of the Board's fiduciary duty to the Association.

**Conflict of interest (working for the board)**

7 points

The questions here are whether Mull as an interested board member, may participate in the discussion and vote on the issue of whether he may sell his services to the Association without invalidating the transaction.

The Association is organized as a business corporation.

The law of corporations supplements the provisions of the Uniform Condominium Act to the extent that it is not inconsistent with the provisions of the Uniform Condominium Act. 68 Pa. C.S.A. 3108.
The sections of the Uniform Condominium Act set forth in the Library do not directly address the question of whether a director may participate in the discussion and vote on a contract or transaction in which he or she is interested; therefore there is not any inconsistency with any applicable provisions of the Business Corporation Law that address this issue.

Section 1728 of the BCL sets forth the standards that must be met for a contract between a corporation and one of its directors not to be invalidated solely because of the involvement or participation of an interested director. The factors are:

- The material facts as to the relationship and the contract or transaction are known or disclosed to the board, and the board authorized the contract by a majority of the disinterested directors;
- The material facts are known or disclosed to the shareholders, and the matter is approved in good faith by the shareholders; or
- The contract or transaction is fair to corporation at the time it is approved. 15 Pa. C.S.A. § 1728.

In this situation, the nature of the contract and Mull's interest in it would be known to the Board, as Mull as a member of the Executive Board is making a proposal to the Board to provide services to the Association.

If the transaction is approved by the affirmative votes of a majority of the disinterested board members, the transaction will not be invalidated because of Mr. Mull's interest or his participation in the discussion and vote on the transaction.

The transaction would also likely satisfy the test of fairness because the services are being offered by Mull at a discount from his normal fees, which are in line with prevailing rates; and this fact would further support the validity of the agreement as being in the best interest of the Association, notwithstanding Mull's involvement in the discussion and vote on the agreement.

Fee splitting 3 points

The last item for discussion is Mull’s proposal that he receive a slightly disguised referral fee for sending the Association’s legal work to Suite and Sauer.

The Rules of Professional Conduct preclude a lawyer or law firm from sharing legal fees with a nonlawyer, except in certain limited situations. (R.P.C. 5.4)

Mull has been suspended from the practice of law for failure to keep his CLE current and would not be considered to be a lawyer. Office of Disciplinary Counsel v. Jackson.

The fee to be paid to Mull is directly linked to the legal fees paid by the Association and will be paid regardless of the amount of work, if any, performed by Mull.
Because Mr. Mull is a suspended lawyer, it would not be proper for Suite & Sauer to share its fee with him, even the payment may be, in part, for some work performed by Mull for the firm. Office of Disciplinary Counsel v. Jackson.