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PENNSYLVANIA BAR EXAMINATION

Essay Questions and Examiners’ Analyses and Performance Test

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Question No. 1

Kim is a single woman aged 55 and lives in E County, Pennsylvania with her only child, Stacey, who is 27 years of age. Kim owns 1,000 shares of stock in Orange Corp. (stock), which she purchased in 1997 for $10 per share. She also owns her home, which does not have a mortgage. In April of 2018, Kim decided to open a restaurant with her boyfriend, Jimmy. They agreed that Kim would own and manage the restaurant, and Jimmy would serve as chef. They rented a building and purchased $50,000 of restaurant equipment using Kim’s Big Bank credit card. Kim decided to get her affairs in order, and she prepared and properly executed a will that provided for the entirety of her estate to pass to Stacey and named Stacey as executor. Kim also purchased a life insurance policy with a death benefit of $250,000, naming Jimmy as the primary beneficiary of 100% of the death benefit and Stacey as the contingent beneficiary.

Once opened, the restaurant struggled financially. On July 19, 2018, Jimmy overheard Kim telling Stacey, “We’re losing a ton of money because Jimmy is a terrible chef – I am going to have to fire him.” The next morning, when Kim arrived at the restaurant before opening, Jimmy physically attacked and killed her. He then destroyed all the restaurant’s equipment. Jimmy was arrested and promptly convicted of first-degree murder.

Stacey probated Kim’s will and was appointed as executor. She correctly valued the stock at $100,000 as it was trading on the New York Stock Exchange at an average of $100 per share on the date of death. Stacey had Kim’s home appraised at $300,000 as of the same date. The restaurant was appraised as having a value of zero dollars. Stacey discarded the ruined restaurant equipment and terminated the lease without penalty effective August 1, 2018. Shortly after being appointed executor, Stacey received a request from Big Bank for payment of the $50,000 balance on Kim’s Big Bank credit card. Kim had no other assets or liabilities.
Stacey scheduled a consultation with Chuck, an attorney, to discuss the estate. At the meeting, Stacey provided Chuck with detailed financial information for the estate, and they discussed the credit card debt, which Stacey did not want to pay for emotional reasons because it reminded her of the restaurant and Jimmy. Chuck suggested that he could represent the estate moving forward if Stacey would sign an engagement letter, but she declined and continued with the estate administration on her own. Following the meeting, Stacey transferred the stock and the house into the name of the estate, but did not make any payments to Big Bank.

In January 2019, Big Bank’s president called Chuck and asked him about filing to collect the credit card debt from Kim’s estate. The president stated he wanted to be cautious because he did not know if there were any estate assets, and did not want to waste time and legal fees. Chuck said, “I can’t take the case, but I can tell you that Kim’s estate has plenty of assets.” Two weeks later, on behalf of Big Bank, a different attorney filed a procedurally proper claim against the estate for collection of the credit card debt.

1. If Stacey files a civil action challenging Jimmy’s right to receive the death benefit of the life insurance policy, who will receive the insurance proceeds under the Pennsylvania Probate, Estates and Fiduciaries (PEF) Code?

2. Under the PEF Code, is Kim’s estate obligated to pay the Big Bank debt?

3. Assume for this question only that Stacey properly received all the stock and the house from Kim’s estate in October 2018 and that she is a cash basis, calendar year taxpayer. In filing her 2018 personal federal income taxes:
   a. Should Stacey report the receipt of Kim’s house and stock as income?
   b. Assume for this sub-question only, that on November 27, 2018, Stacey sold the stock for $110 per share, or $110,000. What, if any, is the effect of the sale of the stock on Stacey’s 2018 federal income tax filing?

4. Did Chuck violate the Pennsylvania Rules of Professional Conduct governing duties to prospective clients in his discussion with the president of Big Bank?
1. Jimmy’s conviction for first-degree murder in connection with Kim’s death will bar him from receiving the life insurance proceeds under the Pennsylvania Slayer’s Act, and Stacey will receive the proceeds as contingent beneficiary.

The Pennsylvania Probate, Estates and Fiduciaries (PEF) Code provides that the slayer of a decedent cannot inherit or otherwise take any property as a result of the decedent’s death. 20 Pa. C.S.A. § 8801 et seq. The PEF Code provides as follows:

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.

20 Pa.C.S.A. § 8802. A “slayer” is defined 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.” 20 Pa.C.S.A. § 8801. The “decedent” is “any person whose life is so taken.” Id. “Property” means “any real and personal property and any right or interest therein.” Id.

As set forth above, the killing must be “willful.” The Pennsylvania Supreme Court has stated that “the intent of the legislature and the language of the Slayer’s Act are, we believe, clear -- a person convicted of murder is not entitled to receive any property of the person he (or she) willfully or unlawfully killed.” Kravitz Estate, 418 Pa. 319, 327, 211 A.2d 443, 447 (1965). “Willfulness within the meaning of the Slayer's Act is equivalent to the intent element of voluntary manslaughter.” In re Estate of Bartolovich, 420 Pa. Super. 419, 422, 616 A.2d 1043, 1044 (1992). First-degree murder is defined as a criminal homicide when it is committed by an intentional killing. 18 Pa.C.S.A. §2502(a). “Intentional killing” is a killing “by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing.” 18 Pa.C.S.A. §2502(d). The Slayer’s Act specifically authorizes the admission into the record of the slayer’s conviction of his having participated in the willful and unlawful killing of the decedent. 20 Pa.C.S.A. § 8814.

Here, Jimmy killed Kim. He was convicted of first-degree murder, which is admissible to establish that he killed Kim. Murder establishes the “willfulness” element of the Slayer’s Act. Consequently, Jimmy is a “slayer” under Pennsylvania law and he cannot acquire any of Kim’s property as a result of her death.

The Slayer’s Act expressly addresses a slayer’s claim for the benefits of a life insurance policy on the decedent’s life as follows:

Policies on life of decedent. — Insurance proceeds payable to the slayer as the beneficiary or assignee of any policy or certificate of insurance on the life of the decedent, or as the survivor of a joint life policy, shall be paid to the estate of the decedent, unless the policy or certificate designates some person not claiming through the slayer as alternative beneficiary to him.
20 Pa.C.S.A. § 8811(a).

Applying the above law to the facts here, Jimmy is barred from receiving the life insurance proceeds due to his status as the slayer. Additionally, since Kim designated Stacey as contingent beneficiary of the life insurance proceeds, Stacey will receive the death benefit of $250,000.

2. Kim’s estate is obligated to pay the Big Bank credit card debt from the estate’s assets.

The personal representative of an estate is responsible for payment of the debts of the decedent from the assets of the estate. See 20 Pa.C.S.A. § 3392. The Pennsylvania Supreme Court has summarized the general rule as follows:

To the extent of the assets that come into his possession, the personal representative of a decedent is responsible on all contracts incurred by decedent in his lifetime.

In re Stormer’s Estate, 385 Pa. 382, 384, 123 A.2d 627, 629 (1956). Stated differently:

Executors or administrators are liable on the contracts of their decedent to the extent of the assets in their hands, whether or not the contract expressly runs to them and whether the relevant breach occurs in decedent's lifetime or after his death.


Kim’s obligation to pay the Big Bank credit card debt survived her death. Thus, Stacey, as executor, is responsible to pay the debt from the assets of the estate. The fact pattern provides that the estate assets included the house, worth $300,000 and Orange Corp. stock worth $110,000. The amount of the loan was $50,000, and there were no other liabilities. Therefore, there are sufficient assets in the estate to pay the loan, and the loan must be paid.

3(a). No. The distributions of property from the estate to Stacey should not be included as income on Stacey’s federal income tax return.

“[G]ross income means all income from whatever source derived. . . .” However, section 61 also states that there are exceptions to subsection (a). 26 U.S.C.S. § 61(b). One of those exceptions is contained in section 102, which provides in relevant part that “[g]ross income does not include the value of property acquired by gift, bequest, devise, or inheritance.” 26 U.S.C.S. § 102(a). “Property received as a gift, or received under a will or under statutes of descent and distribution, is not includible in gross income, although the income from such property is includible in gross income. 26 C.F.R. § 1.102-1.
Stacey acquired the house and stock by virtue of the bequest to her in Kim’s will. These assets were received as an inheritance, therefore, they should not be included in Stacey’s gross income, and the distribution is not subject to income tax.

3(b). The tax consequences to Stacey are that she will report a capital gain of $10,000 from the sale of Orange Corp. stock because the tax basis was stepped up to the fair market value on the date of Kim’s death.

Gross income includes “[g]ains derived from dealings in property.” 26 U.S.C.S. § 61(a)(3). “The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis. . . .” 26 U.S.C.S. § 1001(a). The basis of property is the cost of the property. See 26 U.S.C.S. §§ 1011; 1012(a); 1016.

Where property is inherited from a deceased person, the basis is “stepped up” to the fair market value as of the date of the decedent’s death:

[T]he basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent shall, if not sold, exchanged, or otherwise disposed of before the decedent's death by such person, be . . . the fair market value of the property at the date of the decedent's death. . . .

26 U.S.C.S. § 1014(a)(1).1 The Internal Revenue Code (I.R.C.) defines numerous situations in which transferred property is considered to be property acquired from a decedent, including: Property acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent. 26 U.S.C.S. § 1014(b)(1). For publicly traded securities, the mean sales price on the date of death establishes the fair market value. See 26 C.F.R. § 20.2031-2(b)(1).

Gains from a disposition of property will be treated as ordinary income unless the property sold is a capital asset. Capital assets are defined to include all property held by a taxpayer that does not fall within certain exceptions, such exceptions include stock in trade, certain intellectual property interests, etc., none of which are applicable here. 26 U.S.C.S. § 1221. Gains resulting from the sale of capital assets are subject to a preferential tax rate that is lower than the rate for ordinary income. 26 U.S.C.S. § 1.2

Orange Corp. stock is a capital asset because it does not fall into any of the exceptions stated in I.R.C. 1221. Stacey acquired the Orange Corp. stock by bequest under Kim’s will, as a result of Kim’s death. Therefore, the Orange Corp. stock qualifies as property acquired from a decedent, and the basis of the stock in Stacey’s hands will be the fair market value as of the date of Kim’s death.

As provided in the facts, Orange Corp. stock was trading on a public exchange at $100 per share on the date of death, which establishes the fair market value of the stock. Therefore,

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1 The fact pattern does not provide any information concerning an alternative valuation date and so no discussion of § 1014(a)(2) is included here.
2 The gain would be characterized as a long term capital gain subject to preferential rates because Kim’s holding period is tacked on to Stacey’s. See 26 U.S.C.S. § 1223(9).
Stacey has a basis of $100,000 in the stock based on the fair market value of $100 per share ($100 per share multiplied by 1,000 shares equals $100,000). When Stacey later sold the stock for $110 per share, she had an amount realized of $110,000 (based on the sale of 1,000 shares at a $110 per share sale price; $110 x 1,000 = $110,000). Because the amount realized exceeds her basis, Stacey has a gain of $10,000.

4. **Chuck violated the Pennsylvania Rule of Professional Conduct governing duties to prospective clients when he disclosed information that could be harmful to the estate.**

The Pennsylvania Rules of Professional Conduct limit an attorney’s permissible actions relative to a prospective client, even where the client never engages the attorney’s services. Rule 1.18, Duties to Prospective Clients, defines a prospective client as “a person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter.” Pa. RPC 1.18(a). As to whether a consultation occurs, the comments elaborate as follows:

> A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer’s advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer’s obligations, and a person provides information in response. . . . In contrast, a consultation does not occur if a person provides information to a lawyer, such as in an unsolicited e-mail or other communication, in response to advertising that merely describes the lawyer’s education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer without any reasonable expectation that a client-lawyer relationship will be established, and is thus not a “prospective client.”

Pa. RPC 1.18, cmt. 2.

Here, it is likely that Stacey, in her capacity as executor of Kim’s estate, would be deemed a prospective client of Chuck. Their discussion happened at an in-person meeting at Chuck’s law office. They discussed estate administration issues and Chuck offered to represent Stacey in her capacity as executor. This is not a case of Stacey sending an unsolicited communication in response to an advertisement. Chuck and Stacey engaged in a substantive dialog about a potential representation, and Chuck suggested that Stacey retain him as her attorney for the estate.

The rule further provides that:
Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal information which may be significantly harmful to that person except as Rule 1.9 would permit with respect to information of a former client.

Pa. RPC 1.18(b). Rule 1.9 provides that a lawyer who has formerly represented a client in a matter cannot reveal information relating to the representation except as otherwise permitted or required.\(^3\)

Since Stacey, as executor of the estate, is likely a prospective client vis-a-vis Chuck, Chuck is barred from disclosing information he learned from Stacey which may be significantly harmful to the estate. Here, the president of Big Bank suggests a concern about the economic benefit of pursuing collection activities against Kim’s estate. This statement implies that Big Bank might not aggressively pursue legal action against the estate, or, alternatively, might be amenable to a settlement favorable to Kim’s estate. Therefore, Chuck’s disclosure of the financial status of the estate, which he learned during his consultation with Stacey, is likely to be significantly harmful in that it will inform Big Bank’s strategy for collecting the debt.

Chuck had a duty to Stacey as his prospective client to keep significantly harmful information confidential. Because he revealed potentially harmful information to an adverse party, Chuck likely violated Pennsylvania Rule 1.18.

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\(^3\) Rule 1.6 prohibits disclosure of confidential information of a client except with informed consent, to prevent reasonably certain death or bodily harm, and other fact-specific situations which are inapplicable here.
Question No. 1: Grading Guidelines

1. **Slayer’s Act.**

   Comments: Applicants should recognize that the Slayer’s Act bars a participant in a willful killing from acquiring property as a result of the decedent’s death and that life insurance beneficiary designations in favor of a slayer would be invalidated.

   5 points.

2. **Executor’s responsibility to pay debts of decedent.**

   Comments: Applicants should conclude that a personal representative is responsible to pay the debts of the decedent from the assets of the decedent’s estate.

   4 points.

3. **Taxation of inherited property; basis of property acquired by inheritance and gift.**

   Comments: Applicants should discuss the rules that property acquired by inheritance is not subject to federal income tax, that the basis of inherited property is stepped up to the date of death value, and when Stacey sold the stock she had a taxable event.

   6 points.

4. **Duties to prospective clients.**

   Comments: Applicants should identify and apply the rule against revealing information that may be significantly harmful to a prospective client.

   5 points.
Question No. 2

Big Contracting, LLC (“Big”) is a Pennsylvania limited liability company (“LLC”) that has been operating only in Pennsylvania for about three years. Big has three members, Al, Ben, and Carl; is a member managed LLC; and has never had an operating agreement.

To date, Big has engaged in general construction activities. Big’s members have discussed whether they should open a retail location and begin selling Big’s used construction equipment and tools as those items become dated or worn. Big’s members have agreed to proceed with the retail store. They have also agreed that they will not give any express warranties with respect to the used items being sold. The members have heard that, since Big would be a merchant engaged in the selling of used equipment and tools, warranties other than express warranties could attach to items being sold, and they want to know (i) what warranties might arise, (ii) under what circumstances, and (iii) if there would be a way to avoid having these warranties arise with respect to the goods being sold. They also want to know if they, as members of an LLC, might have personal liability if a piece of equipment or tool fails in breach of one of these warranties.

Al is much older than Ben and Carl and would like to retire from the business and move to a warmer climate. He has had discussions with Ben and Carl about retiring from the business and selling his membership interest in Big. Ben and Carl are not averse to Al’s retiring and have discussed two options with Al. First, Al could sell and assign his membership interest in Big to Big, allowing Big to redeem his interest, for $200,000, in which case he would receive a note from Big in the amount of $200,000 payable over five years with interest. Alternatively, Al could sell and assign his membership interest in Big to Ben and Carl, thus transferring his interest to them, with each of them providing Al their personal note in the amount of $100,000,
again payable over five years with interest. Either way Al would receive $200,000 for his membership interest.

The members have discussed the two options with Big’s accountant. Their accountant has advised that, if the first option were selected, Big would still be able to pay its debts as they came due in the ordinary course; however, adding the $200,000 note to Big’s balance sheet would result in Big’s total liabilities exceeding its total assets by more than $100,000. This determination was made applying generally accepted accounting practices for LLCs. Ben would like to proceed with the first option because it would not result in a $100,000 liability being added to his personal financial statement. Carl wants to be sure that the option selected is permitted under applicable law.

1. Under the Pennsylvania Uniform Commercial Code (the “Code”), other than an implied warranty against infringement and any express warranty given by Big, what warranties could arise in connection with the sale of the used items of equipment and tools and under what circumstances?

2. Is there a way under the Code that Big could prevent these warranties from attaching to the sale of the used equipment and, if so, how?

3. Assume for this question that (i) none of the members had engaged in any fraud, intentional misrepresentation or other act with respect to an item being sold that would support a direct claim by the buyer against the member; and (ii) all warranties that might arise, other than express warranties, are applicable. If an item sold by Big fails in breach of one of the warranties that attach to the sale of the item, under the Pennsylvania Uniform Limited Liability Company Act of 2016, would the members of Big have personal liability for the breach?

4. Could the members proceed by having Big acquire Al’s membership interest without violating the Pennsylvania Uniform Limited Liability Company Act of 2016?
1. The warranty of title and the implied warranties of merchantability and fitness for particular purpose could potentially arise under the Pennsylvania Uniform Commercial Code (the “Code”) from Big’s sale of used equipment and tools.

Article II of the Code generally applies to transactions involving the sale of goods. 13 Pa. C.S.A. § 2102. “Goods” are defined as “all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Division 8) and things in action. . . .” 13 Pa. C.S.A. § 2105(a). Thus, the used equipment and tools that Big proposes to sell are “goods” under the Code. The facts also indicate that Big would be acting as a merchant when selling the goods. Although Big’s status as a merchant is given in the facts, its status as a merchant is supported by the definition of merchant in the Code. Under the Code a merchant is:

A person who: (1) deals in goods of the kind; or (2) otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

13 Pa. C.S.A. § 2104. Big would be dealing in goods such as equipment and tools and would be selling these items as such. Accordingly, Big would be a merchant in connection with these sales.

With respect to warranties, other than the implied warranty of infringement and express warranties that might arise in connection with the sale of equipment and tools, the Code gives rise to three potential warranties. First, the Code affords a buyer a warranty of title. Section 2312 of the Code provides, inter alia, “Subject to subsection (b) [which addresses exclusion or modification of warranty] there is in a contract for sale a warranty by the seller that: (1) the title conveyed shall be good, and its transfer rightful; and (2) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.” 13 Pa. C.S.A. § 2312(a). Although some commentators refer to this as an implied warranty, this warranty is not designated an “implied” warranty by the Code. 13 Pa. C.S.A. § 2312, cmt. 6. Nonetheless, this warranty arises without the need of it being expressly made by the seller. Unless excluded by Big, every sale by Big of a used piece of equipment or tool would include a warranty that the buyer would receive the good free of adverse claims or liens so that the buyer would not be exposed to a lawsuit to protect his right to ownership of the good.

Second, the Code provides for an implied warranty of merchantability in sales by merchant. The Code provides, “Unless excluded or modified (section 2316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .” 13 Pa. C.S.A. § 2314(a). Subsection (b) of section 2314 of the Code sets forth the standard to be met for goods to be merchantable. It provides:
Goods to be merchantable must be at least such as:

(1) pass without objection in the trade under the contract description;
(2) in the case of fungible goods, are of fair average quality within the description;
(3) are fit for the ordinary purposes for which such goods are used;
(4) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved;
(5) are adequately contained, packaged, and labeled as the agreement may require; and
(6) conform to the promises or affirmations of fact made on the container or label if any.

13 Pa. C.S.A. § 2314(b). It is clear under this section of the Code that the implied warranty of merchantability would arise in connection with all sales by Big of used equipment and tools unless properly disclaimed by Big. Generally, the goods would need to be fit for the ordinary purposes appropriate to such goods.

Finally, the sale of the used goods by Big could give rise to an implied warranty for fitness for a particular purpose. Section 2315 of the Code provides, “Where the seller at the time of contracting has reason to know: (1) any particular purpose for which the goods are required; and (2) that the buyer is relying on the skill or judgment of the seller to select or furnish suitable goods; there is unless excluded or modified under section 2316 (relating to exclusion or modification of warranties) an implied warranty that the goods shall be fit for such purpose.” 13 Pa. C.S.A. § 2315. This implied warranty could arise if Big learns of a buyer’s particular need, knows the buyer is relying on Big’s skill and judgment to make a recommendation of a particular good, and Big makes a recommendation of a good to the buyer that is relied upon by the buyer in purchasing the good. See, James J. White and Robert S. Summers, Uniform Commercial Code, § 9-10 (4th Ed. 1995).

2. The warranty of title and the implied warranties of merchantability and fitness for particular purpose may all be excluded or disclaimed if properly done under the Code.

With respect to the warranty of title, the Code provides, “A warranty under subsection (a) [which provides for a warranty of title] will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.” 13 Pa. C.S.A. §2312(b). It is clear from this language that the seller can, if desired, include specific language in any sales agreement with a buyer advising the buyer that the seller does not have record title to the good being sold and is only selling the good with such right or title as the seller may have. Big could avail itself of the protections afforded by this subsection. It should also be noted that since the warranty of title is not designated as an implied warranty it would not be excluded by disclaimer language provided for in section 2316(c) dealing with disclaimer of implied warranties generally. 13 Pa. C.S.A. § 2312, cmt. 6.
With respect to the implied warranty of merchantability and fitness for particular purpose the Code addresses the manner in which these warranties may be disclaimed. See, 13 Pa. C.S.A. § 2316. Section 2316 provides, inter alia:

(b) **Implied warranties of merchantability and fitness.**—Subject to subsection (c), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that “There are no warranties which extend beyond the description on the face hereof.”

(c) **Implied warranties in general.**—Notwithstanding subsection (b): (1) Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like “as is,” “with all faults” or other language which in common understanding calls the attention of the buyer to the exclusion of warranties and makes plain that there is no implied warranty.

Big could disclaim both the warranties of merchantability and fitness for a particular purpose by complying with (b) or (c) above and including appropriate language in the sales agreement it prepares and uses in connection with the sale of the used equipment or tools. Big probably would be best served by including conspicuous language in their sales agreement indicating that the used equipment or tool(s) are being sold “as is and with all faults.” This would make it clear to the buyer that the buyer takes the entire risk as to the quality of the goods being sold. See 13 Pa. C.S.A. § 2316, cmt. 7.

3. **The members would not have personal liability to the buyer of goods if an applicable warranty is breached.**

Limited liability companies in Pennsylvania are governed by the Pennsylvania Uniform Limited Liability Company Act of 2016 (the “Act”). 15 Pa. C.S.A. § 8811 et seq. The Act governs the internal affairs of a limited liability company (“LLC”) and the “liability of a member as member and of a manager as manager for the debts, obligations or other liabilities of a[n] [LLC].” 15 Pa. C.S.A. § 8814(a). An LLC “is an entity distinct from its member or members.” 15 Pa. C.S.A. § 8818(a). “The ‘separate entity’ characteristic is fundamental to a limited liability company and is inextricably connected to both the liability shield, 15 Pa.C.S. § 8834, and the inability of creditors of a member or transferee to reach the assets of the limited liability company absent a ‘reverse pierce’ or a claim of fraudulent transfer.” 15 Pa. C.S.A. § 8818, comm. cmt. on subsection (a) (2016). The Act clearly provides:

A debt, obligation or other liability of a limited liability company is solely the debt, obligation or other liability of the company. A member or manager is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation or other liability of the company solely by reason of being or acting as a member or manager. This subsection applies regardless of:
(1) whether the company has a single member or multiple members; and

(2) the dissolution, winding up or termination of the company.

15 Pa. C.S.A. § 8834(a). The above language makes it clear that in nearly all circumstances a member, including a member in a member managed LLC, is not liable for the debts, obligations or other liabilities of the LLC solely by reason of being a member. Thus, the members should not be personally liable on any claims asserted against the LLC in connection with the breach of an implied warranty relating to equipment or tools sold by the LLC.

4. **The members could not proceed with the redemption of Al’s membership interest by Big without violating the Act.**

The Act defines a distribution as:

A direct or indirect transfer of money or other property or incurrence of indebtedness by a limited liability company to a person on account of a transferable interest or in the person's capacity as a member. The term:

(1) includes:

(i) a redemption or other purchase by a limited liability company of a transferable interest; and

(ii) a transfer to a member in return for the member's relinquishment of any right to participate as a member in the management or conduct of the company's activities and affairs or to have access to records or other information concerning the company's activities and affairs; and

(2) does not include:

(i) amounts constituting reasonable compensation for present or past service or payments made in the ordinary course of business under a bona fide retirement plan or other bona fide benefits program;

(ii) the making of, or payment or performance on, a guaranty or similar arrangement by a company for the benefit of any or all of its members;

(iii) a direct or indirect allocation or transfer effected under Chapter 3 (relating to entity transactions) with the approval of the members; or

(iv) a direct or indirect transfer of:
(A) a governance or transferable interest; or

(B) options, rights or warrants to acquire a governance or transferable interest.

15 Pa. C.S.A. § 8812(a). Under this section the redemption of Al’s membership interest and the debt incurred by Big in connection therewith; i.e., the promissory note for $200,000 would be a distribution to Al.

The Act further provides, *inter alia*:

A limited liability company may not make a distribution, including a distribution under section 8877 (relating to disposition of assets in winding up), if after the distribution:

(1) the company would not be able to pay its debts as they become due in the ordinary course of the company's activities and affairs; or

(2) the company's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the company were to be dissolved and wound up at the time of the distribution, to satisfy the preferential rights upon dissolution and winding up of members and transferees whose preferential rights are superior to the rights of persons receiving the distribution.


The facts indicate that the accountant for Big has advised Big that if the contemplated redemption occurs Big’s total liabilities will exceed its total assets by $100,000. Assuming that the accountant has made this determination in accordance with the rules set forth in section 8845 of the Act, the issuance of the note in connection with the redemption would violate the prohibition set forth in section 8845(a)(2) of the Act. Thus, to be in conformity with the requirements of the Act, Big should not proceed with the redemption and instead Ben and Carl should purchase Al’s membership interest in Big.
Question No. 2: Grading Guidelines

1. Sales – Warranties That Arise Other Than Express Warranty and Warranty Against Infringement

Comments: The candidates should identify and briefly discuss the warranty of title, warranty of merchantability and warranty of fitness for particular purpose.

9 points

2. Sales – Disclaimer of Warranties of Title, Merchantability and Fitness

Comments: The candidates should discuss the manner in which these warranties may be disclaimed.

3 points

3. Business Organizations – Liability of Member for Obligations of LLC

Comments: The candidates should discuss the fact that an LLC is a separate entity distinct from its members and that, generally, members are not liable for the debts and obligations of the LLC.

3 points

4. Business Organizations – Limitations on Distributions by an LLC

Comments: The candidates should recognize that the proposed redemption would be a distribution and discuss the limitations on distributions by an LLC as applicable under the facts.

5 points
Mark and Donna were married in the summer of 2001 and have two daughters, Kelley (age 5) and Alyssa (age 8). They are the owners of a two-story residential home located at 215 Pickering Street in C City, Pennsylvania, where their family has permanently resided for many years. The property is located at the end of a cul-de-sac and surrounded on both sides by friendly neighbors. One of those neighbors has a daughter, Kristen (age 9). Kristen excels both in school and in sports and is quite mature for her age.

On December 23, 2018, Mark, Donna and their children were away visiting family and were scheduled to return home on December 24 in the afternoon. At 11:05 p.m. on December 23, Kristen, who could not sleep due to the impending arrival of Santa Claus, was looking out her bedroom window at the stars. She observed a man, whom she recognized as Thad, a resident of an adjoining street, open the side window of Mark and Donna’s house and enter the home. Moments later, Thad came back through the window and ran away with a computer that he had taken from the home. Kristen immediately told her parents, who called the police to report the incident. Upon the police officers’ arrival, Kristen related what she observed and provided the police with a detailed description of the computer and Thad, including the clothing he was wearing. Kristen also told the police where Thad lived.

The police immediately drove to Thad’s residence and saw him walking towards his garage with a computer under his arm. Thad was wearing the clothing described by Kristen, and the computer he was carrying fit Kristen’s description. When the police approached Thad, without being questioned, he immediately said, “I’m sorry. I needed money for my habit.” Later investigation confirmed that Thad did not have permission to be in the home or to take the
computer. It was also determined that the window that Thad entered had been inadvertently left unlatched by Mark before he left for the family visit.

1. Other than criminal trespass and receiving stolen property, and assuming the statement made by Thad would be admissible against him, with what crimes should Thad be charged with respect to the incident at Mark and Donna’s home?

Mark and Donna were both loving parents who always put the needs of their children first. Mark worked long hours, Monday through Friday each week from 5 a.m. to 4 p.m. and Donna stayed at home full time to care for the children. Unfortunately, in January of 2019, after several years of interpersonal turmoil between the two, the couple decided to divorce. Mark moved to an apartment several blocks away from their home.

In early February 2019, Mark went to Attorney Able to discuss his custody options. Mark explained that, despite their marital difficulties, he and Donna agreed that the children would stay with Donna each week from Sunday at 5 p.m. to Friday at 4 p.m. and that they would alternate custody of the children each weekend from Friday at 4 p.m. to Sunday at 5 p.m. Mark also indicated that they both agreed that they should continue to be jointly involved in making decisions involving their children’s schooling, medical care, and other important issues. Mark asked Attorney Able to prepare a custody agreement that incorporates the above provisions.

2. What types of custody would Mark and Donna receive in Mark’s proposed custody agreement being prepared by Attorney Able, and what is the general standard that applies in making custody determinations?

Thad proceeds to trial on the criminal charges and his counsel challenges Kristen’s testimony on the grounds that Kristen is too young to be a reliable witness.

3. How should the defense challenge to Kristen’s testimony be addressed by the court and what factors should be considered in determining whether Kristen should be permitted to testify?
Question No. 3: Examiner’s Analysis

1. Aside from charges for criminal trespass and receiving stolen property, Thad should be charged with the crimes of burglary and theft in relation to the incident at Mark and Donna’s home.

“A person commits the offense of burglary if, with the intent to commit a crime therein, the person[] enters a building or occupied structure, or separately secured or occupied portion thereof that is adapted for overnight accommodations in which at the time of the offense no person is present.” 18 Pa. C.S.A. § 3502 (a)(2). “It is a defense to prosecution for burglary if . . . [t]he building or structure was abandoned[,] [t]he premises are open to the public[, or t]he actor is licensed or privileged to enter.” 18 Pa. C.S.A. § 3502 (b). An “occupied structure” includes “[a]ny structure . . . adapted for overnight accommodation of persons . . . whether or not a person is actually present.” See 18 Pa. C.S.A. §3501. Once one has entered a private residence by criminal means, it can be inferred that the person intended a criminal purpose based upon the totality of the circumstances surrounding the incident. Commonwealth v. Alston, 651 A.2d 1092, 1094 (Pa. 1994).

As applied here, the facts indicate that Thad went to Mark and Donna’s home at 11:05 p.m. on December 23, 2018, and entered the home by opening the unlatched window. A short time later Thad exited the home with a computer under his arm. The facts indicate that this was the permanent residence of Mark and Donna. As such, this would be considered an “occupied structure” as it was used for overnight accommodation regardless of whether or not the family was present at the time. The facts further indicate that Mark and Donna did not authorize Thad to be in the home; there is no indication from the facts that their property was abandoned or that it was open to the public at the time of Thad’s entry. In looking at the totality of the circumstances, including the fact that Thad entered the home without permission at 11:05 p.m. by opening a window, there is a strong inference that he intended to commit a crime when he did so. More importantly, Thad emerged with a computer and admitted to the police that he took the computer because he needed money for his habit. This bolsters the argument that he entered the property with the intent to commit the crime of theft therein.

Based upon the above, Thad should be charged with the crime of burglary.

“A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with the intent to deprive him thereof.” 18 Pa. C.S.A. § 3921(a). To be guilty of theft by unlawful taking, “the actor’s intention or conscious object must be to take unlawfully the property of another for the purpose of depriving the other of his or her property.” Commonwealth v. Dombrauskas, 418 A.2d 493, 496-497 (Pa. Super. 1980). As applied here, Thad took the computer, i.e. movable property, from Mark and Donna’s home during the late night hours of December 23. Additionally, Mark and Donna did not authorize the removal of the computer. Based upon Thad’s statement to the police that he took the computer to get money for his habit, it is clear that he intended to deprive Mark and Donna of their property.
Based upon the above, there is a strong argument that Thad should also be charged with the crime of theft.

2. Under the proposed custody agreement, Mark would receive partial physical custody and shared legal custody and Donna would receive primary physical custody and shared legal custody. The general standard to be applied in making custody determinations is the best interest of the child.

Primary physical custody, partial physical custody, and shared legal custody may be awarded by the court if determined to be in the best interest of the child. See 23 Pa. C.S.A. § 5323 (a). In 23 Pa. C.S.A. § 5322(a) Pennsylvania defines the various types of child custody. Physical custody is defined as “[t]he actual physical possession and control of a child.” Id. Partial physical custody is defined as “[t]he right to assume physical custody of the child for less than a majority of the time.” Id. Primary physical custody is defined as “[t]he right to assume physical custody of the child for the majority of the time.” Id. Legal custody is “[t]he right to make major decisions on behalf of the child, including, but not limited to, medical, religious and educational decisions.” Id. Shared legal custody is defined as “[t]he right of more than one individual to legal custody of the child.” Id. “It is clear that in matters of custody and visitation, the ultimate consideration of the court is a determination of what is in the best interest of the child. Such a determination, made on a case-by-case basis, must be premised upon consideration of ‘all factors which legitimately have an effect upon the child’s physical, intellectual, moral and spiritual well-being.’” Alfred v. Braxton, 659 A.2d 1040, 1042 (Pa. Super. 1995) citing Lee v. Fontine, 406 Pa. Super. 487, 488, 594 A.2d 724, 725 (1991), citing Zummo v. Zummo, 394 Pa. Super. 30, 574 A.2d 1130 (1990); see also 23 Pa. C.S.A. § 5328.

As applied here, both Mark and Donna are seeking “physical custody” of the children as they are requesting actual possession of the children for specific periods of time. Since Donna will have the children for a majority of the time, i.e. from Sunday at 5 p.m. until Friday at 4 p.m. every week and every other weekend, she will have primary physical custody. Since Mark will only have the children every other weekend from Friday at 4 p.m. to Sunday at 5 p.m. he will clearly have the children for less than a majority of the time. Thus, Mark’s custody is classified as partial physical custody.

With regard to legal custody, it is clear that both the parties intend to be involved in the decision making regarding schooling, medical care, and other important decisions concerning the children. The right to make these types of decisions is classified as legal custody as set forth above. Because both Mark and Donna are agreeing to jointly take part in making these decisions, they would each have shared legal custody of the children.

As stated above, the general standard to be applied in determining custody of the children will be the best interest of the child.
3. The court should make a legal determination to ensure that Kristen has the requisite mental capacity to perceive the events about which she is being called to testify, to understand and communicate about the issues and to recall information and the ability to tell the truth.

Pa. R.E. 601 sets forth the following general rule regarding competency:

(a) **General Rule.** Every person is competent to be a witness except as otherwise provided by statute or in these rules.

(b) **Disqualification for Specific Defects.** A person is incompetent to testify if the court finds that because of a mental condition or immaturity the person:

1. is, or was, at any relevant time, incapable of perceiving accurately;
2. is unable to express himself or herself so as to be understood either directly or through an interpreter;
3. has an impaired memory; or
4. does not sufficiently understand the duty to tell the truth.

In *Commonwealth v. Hutchinson*, 25 A.3d 277, 289-90 (Pa. 2011) (internal quotations omitted) the Pennsylvania Supreme Court set forth the standard for evaluating the competency of juvenile witnesses as follows:

Although competency of a witness is generally presumed, Pennsylvania law requires that a child witness be examined for competency. See *Commonwealth v. Delbridge*, 578 Pa. 641, 855 A.2d 27, 39 (2003) (citing *Rosche v. McCoy*, 397 Pa. 615, 156 A.2d 307, 310 (1959) and Pa. R.E. 601). As we have recently reiterated, this Court historically has required that witnesses under the age of fourteen be subject to judicial inquiry into their testimonial capacity. *Commonwealth v. Ali*, [608 Pa. 71,] 10 A.3d 282, 300 n.11 (2010). A competency hearing of a minor witness is directed to the mental capacity of that witness to perceive the nature of the events about which he or she is called to testify, to understand questions about that subject matter, to communicate about the subject at issue, to recall information, to distinguish fact from fantasy, and to tell the truth. *Delbridge*, *supra* at 45. In Pennsylvania, competency is a threshold legal issue, to be decided by the trial court. *Commonwealth v. Dowling*, 584 Pa. 396, 883 A.2d 570, 576 (2005).

“When the competency of a minor witness is challenged, either the trial court or the district attorney ordinarily asks the minor witness several questions to extract the minor's capacity for understanding the difference between right and wrong and his or her duty to speak truthfully about the matter at hand.” *Commonwealth v. Shearer*, 882 A.2d 462, 469 (Pa. 2005). The trial court will then evaluate the minor’s answers to those questions and make a determination regarding the minor’s competence to testify. *Id.* at 469-70.

As applied here, Kristen is nine years of age. The facts indicate that she excels both in school and at sports and is quite mature for her age. The facts further indicate that Kristen gave detailed descriptions of Thad and the stolen computer and informed the police where Thad lived. Here, the trial court, as a threshold legal issue, should determine whether she is competent to testify. The court or the district attorney should specifically inquire into Kristen’s mental
capacity to perceive the events that she observed on December 23, to understand the questions posed about those events, her ability to communicate and recall information about those events, to distinguish fact from fantasy and to appreciate the importance of telling the truth. If the trial court finds that Kristen cannot meet these standards to establish competency then it should find that she is not competent to testify. However, if the trial court is satisfied through this inquiry that Kristen is competent, then she would be permitted to testify.
Question No. 3: Grading Guidelines

1. **Criminal Law**

   The candidate should recognize that Thad should be charged with the crimes of burglary and theft relative to the incident at Mark and Donna’s home and the candidate should set forth the applicable elements of these offenses and apply the relevant facts.

   10 Points

2. **Custody**

   The candidate should identify the types of custody Mark and Donna would receive under the agreement, apply the relevant facts, and recite the standard used in determining child custody.

   5 Points

3. **Evidence**

   The candidate should recognize that the trial court should inquire into Kristen competency as a witness and discuss the relevant factors in reaching this determination.

   5 Points
Question No. 4

When identity and location are known, State A’s Adoption Act (the “Act”) requires notification to biological parents of hearings to terminate parental rights. Further, if a biological mother’s identity or location is unknown, Section 123 of the Act (“Section 123”) provides that State A shall make reasonable efforts to identify and locate the biological mother and to provide personal notification of the hearing. If State A is unable to locate the biological mother, notice of the hearing shall be published in the County where the hearing will take place.

There is no similar provision in Section 123 or the Act relating to notification to biological fathers whose identity or location is unknown.

Two years ago, Angie became pregnant by Tom, whom she met on a business trip. Angie and Tom live in the same county in State A but in different cities. Angie did not notify Tom of the pregnancy and listed the father as “unknown” on the birth certificate. Angie placed the baby for adoption through an agency run by State A and did not identify the father to the agency. Angie received notice of the hearing to terminate parental rights, but Tom did not. After the hearing terminating all rights, Angie contacted Tom and told him about the baby.

Tom properly filed a lawsuit in federal court challenging the constitutionality of Section 123, arguing that it violates Equal Protection because it treats biological fathers differently than biological mothers. There is no legislative or other history explaining why Section 123 requires efforts to locate only biological mothers. In response to Tom’s litigation, State A asserts the following state interests in favor of upholding Section 123: (1) saving costs associated with locating unidentified fathers and (2) protecting the bond between biological mother and child.

For ten years, Angie worked as a staff accountant at a branch office of Dundmiff Co. (“DM”), a company with more than 400 employees. Angie’s direct supervisor is branch manager Mitch Scott, who has full authority over her employment. Angie’s unmarried
colleague, Sue, was pregnant at the same time as Angie. Almost daily throughout their pregnancies, Scott made jokes about “loose” women “getting knocked up”; made comments about how large their breasts were getting; and gave advice on how not to get “too fat.” When Sue married her baby’s father during the pregnancy, Scott said to Angie, “Well, I can still get in line for you after you lose the baby weight.” Angie often left in tears, produced less work, and complained to friends about Scott. DM has an anti-harassment policy that directs employees to report harassment to DM’s human resources department. Angie and Sue hoped the comments would end, so neither ever contacted human resources or filed a formal complaint.

Scott demoted Angie to a bookkeeper position immediately after she returned from maternity leave, noting her decrease in productivity during her pregnancy. The demotion included a pay cut and more menial job duties. Scott then said, “Don’t worry, I’m sure you will do anything to get your old job back. But, be more careful this time – I’m not ready to be a daddy.” Angie immediately quit.

1. Assume all procedural and jurisdictional requirements are satisfied with Tom’s Equal Protection challenge to Section 123. How will the court analyze Tom’s challenge and what is Tom’s likelihood of success?

2. Angie exhausted her administrative remedies and then timely filed suit against DM in the appropriate federal court alleging that DM is liable under Title VII for Scott’s conduct that resulted in a hostile work environment (the “Title VII Lawsuit”).

   (a) What must Angie prove at trial in order to establish the existence of a hostile work environment, and what facts support her claim?

   (b) What substantive affirmative defense might DM raise to Angie’s hostile work environment claim and with what likelihood of success?

3. After months of discovery in the Title VII Lawsuit and after exhausting administrative remedies, Sue filed a timely motion to intervene under FRCP 24, also pursuing a Title VII hostile work environment claim against DM for Scott’s conduct. Assume that Sue satisfied all of the notice and pleading requirements of Rule 24. Use the facts above and the facts of this question to analyze the factors a court would consider when receiving a motion to intervene.
Question No. 4: Examiner’s Analysis

1. The court will analyze Tom’s challenge by applying intermediate scrutiny to Section 123’s gender-based classification, and Tom is likely to succeed on his Equal Protection challenge.

Pursuant to the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” When the state creates a classification that includes benefits or burdens to one class, but not others, then equal protection is implicated. See Caban v. Mohammad, 441 U.S. 380 (1979). The Supreme Court has applied different levels of scrutiny to determine whether state legislation violates the Equal Protection Clause. Clark v. Jeter, 486 U.S. 456, 461 (1988). Where a statute classifies based on race or national origin or affects a “fundamental right,” courts must apply the highest level of scrutiny, or strict scrutiny, to the challenged legislation. Id. (citing Loving v. Virginia, 388 U.S. 1, 11 (1967); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 672 (1966)). The lowest level of scrutiny under the Equal Protection Clause requires only that “a statutory classification . . . be rationally related to a legitimate governmental purpose.” Id. (citations omitted). Finally, “[b]etween [the] extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.” Id. (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24, and n. 9 (1982); Mills v. Habluetzel, 456 U.S. 91, 99 (1982); Craig v. Boren, 429 U.S. 190, 197 (1976); Mathews v. Lucas, 427 U.S. 495, 505-06 (1976)).

The provisions in Section 123 provide certain notification procedures for unidentified biological mothers in termination hearings, but does not provide the same procedures for biological fathers. Thus, it is a sex or gender-based classification, and the court will apply the standard of intermediate scrutiny to Tom’s Equal Protection challenge.¹

Intermediate scrutiny requires that the classification “be substantially related to an important governmental objective.” Id. The Supreme Court summarized the heavy burden of satisfying intermediate scrutiny as follows: “[f]ocusing on the differential treatment for denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is ‘exceedingly persuasive.’ The burden of justification is demanding and rests entirely on the state.” U.S. v. Virginia, 518 U.S. 515, 532-33 (1996) (citation omitted). It was noted in Virginia that four decades of court precedent “reveal[s] a strong presumption that gender classifications are invalid.” Id. at 532 (quoting J.E.B. v. Alabama ex rel. T.B., Univ. for Women, 511 U.S. 127, 152 (1994)).

¹ The facts specifically state that Tom’s case is based on his allegation that Section 123 “violates Equal Protection because it treats biological fathers differently than biological mothers,” thereby raising the issue of a gender-based classification under Equal Protection. If, instead, Tom had asserted that he had been denied the fundamental right to parent, the court would apply strict scrutiny. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925). However, much of the analysis, and certainly the outcome, would be the same whether the court applies intermediate or strict scrutiny given that strict scrutiny is the most exacting standard. Moreover, modern jurisprudence involving the fundamental right to parent involve Due Process, not Equal Protection challenges. See generally, Santosky v. Kramer, 455 U.S. 745 (1982); Lassiter v. Dep’t of Social Svcs., 452 U.S. 18 (1982). Here, the facts and call of the question are explicitly limited to the issue of Equal Protection.
Looking to the interests proffered by State A with respect to Section 123, it is virtually certain that the provision will not survive Tom’s Equal Protection challenge. As a threshold matter, it is important that the proffered justification for a gender classification “must be genuine and not hypothesized or invented post hoc in response to litigation.” Virginia, 518 U.S. at 533 (citations omitted). Here, there is no legislative history or other information setting forth the original justification for Section 123. Rather, State A did not advance either of its justifications, concerns about cost savings and the mother-child bond, until after Tom commenced litigation.

Further, even if the justifications asserted by State A are “genuine” and were not developed “in response to litigation,” they would still likely fail constitutional muster. In Caban v. Mohammad, 441 U.S. 380, 382-84 (1979), the male plaintiff’s biological children were adopted by their stepfather without the plaintiff’s consent, which was permissible under New York law. Id. at 382-84. However, the law would not have allowed his children to be adopted without their biological mother’s consent. Id. at 386. Thus, the statute treated unwed mothers and unwed fathers differently for the purposes of consenting to the adoption of their children, which the Supreme Court held violated the Equal Protection Clause. Id. at 386-87.²

In Caban, the state’s interest in providing for the wellbeing of illegitimate children was insufficient to survive an Equal Protection challenge. Id. at 391-93. This is a far more substantial interest than the first interest asserted here – saving administrative costs. Thus, it is likely a court would hold that this interest is insufficient to justify gender-based classifications. See also, Reed v. Reed, 404 U.S. 71, 76 (1971) (holding that “reducing the workload on probate courts by eliminating one class of contests” by favoring males over females for estate administrators is an insufficient government objective “to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment.”).

The second interest advanced by State A for Section 123 applying only to biological mothers is the interest in protecting the bond between biological mother and child. Arguably, this is an important governmental interest. However, State A’s reliance on this interest to support the gender distinctions contained in Section 123 is insufficient for State A to prevail on Tom’s Equal Protection challenge.

First, inherent in Section 123 and State A’s argument is an unspoken presumption that the bond between biological mother and child is stronger or more important than that of a biological father and child. This is almost identical to the argument advanced by the state as a justification of the gender-based differences for adoption consent laws in Caban. 441 U.S. at 388 (noting that the state argued that “a natural mother, absent special circumstances, bears a closer relationship with her child . . . than a father does”). In response, the Supreme Court held, “[w]e reject . . . the claim that the broad, gender-based distinction [of the challenged consent law] is required by any universal difference between maternal and paternal relations at every phase of a child’s

² Section 123 here and the adoption consent law in Caban are distinguishable from gender-based citizenship rules that were challenged in Nguyen v. INS, 533 U.S. 53 (2001). In Nguyen, the Supreme Court upheld different rules for granting citizenship to children born abroad out-of-wedlock based on “whether the one parent with American citizenship is the mother or father.” Id. at 58-59. There, actual biological differences in the role men and women have in childbirth played a dominant role in the Court’s decision. Id. at 62. Here, State A has not cited any real biological difference, but rather on some antiquated notion of the superiority of the mother-child bond over the father-child bond for purposes of terminating parental rights.
development.” *Id.* at 389. The Supreme Court has clearly held that gender-based classifications “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.” *Virginia*, 518 U.S. at 533. The presumption that a mother’s bond is stronger than a father’s bond, and is, therefore entitled to higher protections before parental rights are terminated clearly relies upon an “overbroad generalization” about differences between men and women.

Second, Tom’s challenge is not to Section 123’s requirement to make reasonable efforts to identify and locate unknown biological mothers. Rather, his challenge is to the fact that Section 123 omits the same protections for biological fathers. The exclusion of efforts to identify and notify biological fathers is not “substantially related” to the interest of protecting the mother-child bond. Thus, State A’s proffered reason of protecting the mother-child bond fails to provide an “exceedingly persuasive” justification for why biological mothers and biological fathers are treated differently under Section 123. For the foregoing reasons, it is unlikely that State A will be able to meet its burden to show that the gender-based classification in Section 123 is substantially related to important government interest, and Tom is likely to succeed in challenging the constitutionality of the statute.

2.a. To establish the existence of a hostile work environment, Angie must prove that Scott’s conduct was so severe or pervasive that it resulted in an objectively and subjectively hostile work environment at DM. The frequency and nature of Scott’s comments as well as their impact on Angie’s productivity at work support such a finding.

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating “against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1). Title VII’s prohibition on employment discrimination “is not limited to ‘economic’ or ‘tangible’ discrimination. The phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’” in employment.” *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). Thus, “a plaintiff may establish a violation of Title VII by proving that discrimination [or sexual harassment] has created a hostile or abusive work environment.” *Id.* at 66.

There is a Title VII violation “[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (citation and internal quotations omitted). Thus, in order for sexual harassment to be actionable under Title VII, it must be “severe or pervasive.” *Pa. State Police v. Suders*, 542 U.S. 129, 133 (2004). Thus, to determine if harassment gives rise to a hostile work environment, courts must look to all of the circumstances, including: “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Id.* (quoting *Harris*, 510 U.S. at 23).
The facts set forth above support a finding that Scott’s conduct was sufficiently severe or pervasive to create a hostile work environment. His comments and jokes occurred with great frequency – daily for many months during Angie’s pregnancy. The comments were certainly of a nature that could be considered “humiliating” – Scott inferred that Angie was sexually promiscuous and he commented on changes to her physical appearance, including the size of her breasts. These comments and jokes interfered with Angie’s work performance, in that she experienced a decrease in job performance. Finally, when Scott demoted Angie, he suggested that she could work her way back up in the company through sexual favors.

In addition to a showing that harassment was “severe or pervasive,” a hostile work environment plaintiff must establish that the work environment was both subjectively and objectively hostile. The subjective component requires that the Plaintiff actually be offended by the conduct at issue. *Harris*, 510 U.S. at 21-22 (“[I]f the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.”). However, it is not necessary that the harassment result in “concrete psychological harm,” or be “psychologically injurious” to the plaintiff, only that “the environment . . . is perceived, as hostile or abusive . . .” *Id.* at 22. Establishing the existence of a hostile work environment also requires that the plaintiff prove the environment is objectively hostile. *Harris*, 510 U.S. at 21 (“Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview.”).

Here, there are facts to support a finding of both a subjectively and objectively hostile work environment. With regard to Angie’s individual response to Scott’s conduct, she regularly left work in tears; complained to friends and family about Scott; noticed a decrease in her productivity; and ultimately quit her job in response to his comment that she could get her old job back, presumably by succumbing to sexual demands.

With regard to whether a reasonable person in Angie’s circumstances would find that Scott’s conduct created a hostile work environment, it is again important to look to the frequency, nature, and impact of the conduct. *Harris*, 510 U.S. at 23. Again, Scott’s jokes and comments occurred almost daily over many months, included humiliating comments about Angie’s body and Scott’s perception that she is promiscuous, and intimated that she should engage in sexual relations with him. Finally, these comments clearly impacted Angie’s work performance and ultimately drove her to quit.

In sum, there are numerous facts that will support Angie’s claim that Scott’s conduct was sufficiently severe or pervasive to create a subjectively and objectively hostile work environment at DM.

2.b. **DM may argue that it took reasonable steps to prevent and remedy harassment and that Angie unreasonably failed to take advantage of DM’s harassment policy. However, because the harassment culminated in a tangible employment action, this affirmative defense is unavailable to DM.**

Employer defendants in hostile environment claims involving supervisor harassment do have an affirmative defense available. *See, generally, Faragher v. City of Boca Raton*, 524 U.S.
775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998). Specifically, an employer may avoid liability for supervisor harassment where the employer can show: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at 765.

However, if a supervisor’s harassment results in a “tangible employment action” against the employee, then there is strict liability for the employer, and the affirmative defense is not available to the employer. Jones v. Se. Pa. Transp. Auth., 796 F.3d 323, 328 (3d Cir. 2015) (quoting Pa. State Police v. Suders, 542 U.S. 129, 143 (2004)). Such tangible employment actions may include “hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” Ellerth, 524 U.S. at 761.

Here, DM might argue that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior by having a human resources department and complaint procedure in place, and that Angie unreasonably failed to take advantage of any preventative or corrective opportunities in that she never contacted human resources to file a harassment complaint against Scott. However, this affirmative defense is likely to fail under the circumstances because Scott’s harassment appears to have resulted in a tangible employment action – specifically, in his demotion of Angie from staff accountant to bookkeeper.

Angie might also argue that she was constructively discharged from her position as a result of the harassment. A “constructive discharge” occurs where “the abusive working environment became so intolerable that [a plaintiff’s] resignation qualified as a fitting response.” Suders, 542 U.S. at 134. In Suders, the Supreme Court held that the Faragher/Ellerth affirmative defense is not available to an employer “if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion . . . .” Id.

Here, DM is likely to be unsuccessful in avoiding Title VII liability for Scott’s harassment of Angie because this harassment culminated in a demotion and, possibly also because she was constructively discharged in response to this demotion.

3. Sue should argue that the court should grant her motion for permissive intervention because her claim shares common questions of law and fact with Angie’s case. Angie should argue that the intervention will unduly delay the adjudication of her rights in her action.

Federal Rule of Civil Procedure 24 outlines the grounds upon which a party may intervene in a pending action:

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or
(2) claims an interest relating to the property or transaction that is
the subject of the action, and is so situated that disposing of the
action may as a practical matter impair or impede the movant's
ability to protect its interest, unless existing parties adequately
represent that interest.

(b) Permissive Intervention.

(1) In General. On timely motion, the court may permit anyone to
intervene who:

(A) is given a conditional right to intervene by a federal
statute; or

(B) has a claim or defense that shares with the main action
a common question of law or fact.

* * *

(3) Delay or Prejudice. In exercising its discretion, the court must
consider whether the intervention will unduly delay or prejudice
the adjudication of the original parties’ rights.

F.R.C.P. 24

There is nothing in the facts indicating that there is any federal statute giving Sue the
unconditional right to intervene for purposes of Rule 24(a)(1) or the unconditional right to
intervene for purposes of Rule 24(b)(1)(A). Thus, neither intervention of right under Rule 24(a)
or permissive intervention under Rule 24(b)(1)(A) is supported by federal statute.

Furthermore, Sue has not identified any specific “property or transaction that is the
subject of [Angie’s] action” to which she claims an interest. However, even if Sue successfully
argues that the harassing workplace environment at DM is a “transaction” in which she claims an
interest, there would be no reason for the court to conclude that Sue is “so situated that
disposing of [Angie’s] action may as a practical matter impair or impede [Sue’s] ability to
protect [her] interest, unless existing parties adequately represent that interest.” F.R.C.P.
24(a)(2). Simply stated, if Sue does not intervene in Angie’s action, there is no reason to believe
she would not be able to bring a separate lawsuit. Thus, Rule 24(a)(2) is inapplicable and Sue
does not satisfy either of the requirements for intervention of right.

Accordingly, Sue should seek permissive intervention under Rule 24(b)(1)(B) in Angie’s
Title VII case, arguing that her own hostile work environment claim shares common questions of
law or fact with Angie’s claim. See e.g., Premier Foods of Bruton, Inc. v. City of Orlando, et.
al., 192 F.R.D. 310 (M.D. Fla., 2000). A party seeking to intervene under the permissive

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3 See 7C Wright & Miller, Federal Practice and Procedure §1908.1 and n. 31 (discussing and citing employment
discrimination cases “in which it has been held that the applicant has the kind of interest [in a transaction] that [Rule
24(a)(2)] requires. . .”).
intervention provision must show: (1) that its application to intervene is timely, and (2) that its claim or defense and the main action have a question of law or fact in common. See Cox Cable Comms. v. United States, 992 F.2d 1178, 1180, n.2 (11th Cir. 1993). The court has broad discretion in determining whether Sue’s claims are sufficiently similar to Angie’s to warrant intervention. See e.g., Alexander v. Fulton County, Ga., 207 F. 3d 1303, 1323 (11th Cir., 2000).

The facts state that Sue filed a timely motion to intervene, so that factor is satisfied. Sue has a compelling argument in this regard. Sue was pregnant during the same time period that Angie was pregnant, and both Angie and Sue were unmarried at the time they became pregnant. Therefore, Scott’s comments about “loose” women getting “knocked up” could certainly be found to be intended to apply to both women. Scott also made similar comments about both Sue and Angie’s bodies. Thus, there are certainly facts that Sue’s claim would have in common with Angie’s claim. There are also common questions of law shared by the claims of Angie and Sue, such as whether Scott’s comments are actionable and the applicability of any affirmative defense raised by DM, since neither Sue nor Angie utilized DM’s complaint procedures.

Despite common questions of law and fact, a court would also need to look at whether allowing Sue to intervene might unduly delay or prejudice the adjudication of Angie’s case. While there are common questions of law and fact between Angie and Sue’s claims, there are also differences. After Sue married the father of her child, Scott continued to harass Angie, arguably even more severely when he said he would “get in line for” Angie after her baby was born. Scott also demoted Angie after she delivered the baby and made another reference that could only be interpreted as an invitation to advance professionally by acquiescing to Scott’s sexual demands. It might be argued that trying Sue and Angie’s cases together could prejudice Angie if the severity of her allegations were overlooked. Additionally, allowing intervention might also cause delay – possibly undue delay – in getting Angie’s case to trial. Discovery has already been underway for months. While there is likely to be overlap with some discovery, the impact of the harassment on Sue as well as damages issues would be the subject of additional discovery.

In conclusion, there is no basis for Sue to intervene in the Title VII Lawsuit as a matter of right under FRCP 24(a). However, there are factors that weigh both in favor and against permissive intervention under FRCP 24(b).
Question No. 4: Grading Guidelines

1. Constitutional Law

Applicants should demonstrate knowledge of the level of scrutiny applicable to an Equal Protection challenge to a gender classification and apply a set of facts to the standard to reach a well-reasoned conclusion.

   6 points

2(a). Employment Law

Applicants should demonstrate knowledge of the standard courts apply to hostile work environment claims under Title VII and apply a set of facts to this standard to reach a well-reasoned conclusion.

2(b). Employment Law

Applicants should demonstrate knowledge of the Ellerth/Faragher affirmative defense and apply a set of facts to reach a well-reasoned conclusion.

   10 points

3. Civil Procedure

Applicants should demonstrate knowledge of the requirements to intervene in an action under FRCP 24 and apply a set of facts to these requirements, identifying facts that weigh both in favor of and against permissive intervention.

   4 points.
Adam owned two penthouse condominium units in a luxury high-rise building in Big City, Pennsylvania, known respectively as Unit A and Unit B. Tired of Pennsylvania winters, Adam executed and recorded two valid deeds on January 2, 2017, before moving to Florida. In the first deed, Adam “granted and conveyed Unit A to my sister Zoe; but if my brother Sam retires from his overseas post with the U.S. Foreign Service and returns to Big City, then to Sam.” In the second deed, Adam “granted and conveyed Unit B to my children, Barb, Charlie, and Dave as joint tenants with right of survivorship, not as tenants in common.”

Barb, who previously had lived and studied in Paris, always dreamed of owning an upscale French restaurant. After receiving an unsecured loan from Big Bank (Bank), Barb leased space in a high-rent Big City building and spent a hefty sum of money remodeling and equipping the space for her new restaurant that she called “Chez B.” Barb then entered into a valid, written contract with Anthony, an internationally known chef, food critic, and author, to serve as head chef at Chez B for a term of three years starting on June 1, 2018.

Two weeks prior to his start date, Anthony called Barb from Paris and said, “I’m sorry, Barb, but I’m not going to be your head chef. The Eating and Travel Channel (EAT) has offered me a job hosting a television series headquartered in Paris focusing on the exploration of international cuisine. I’ve accepted EAT’s offer. Good luck with your restaurant!” Furious at Anthony’s last-minute action, Barb immediately hired a new head chef at a salary more than the salary that she had contracted to pay Anthony.

Chez B opened on July 1, 2018. On September 1, 2018, Chez B suffered smoke and water damage from a fire in an adjacent business and was forced to close for repairs. After the fire, Barb’s accountant thoroughly reviewed Chez B’s financial records and estimated that the
average daily fixed costs of the restaurant (expenses that cannot be avoided regardless of the level of production or sales) were $2,000 per day. In the absence of reliable data about Chez B’s profits since it was only in operation for two months, the accountant conducted extensive research about profits earned by other upscale restaurants in Big City when they initially opened and determined that their profits were approximately $2,000 per day. After Barb provided this information to Disaster Services (Disaster), Barb entered into a written contract with Disaster for smoke and water-damage remediation services. The contract between Barb and Disaster provided the following: “If the remediation work is not completed in time to reopen the restaurant on January 1, 2019, then Disaster will pay a penalty of $4,000 per day for each day that Chez B remains closed.” Due to Disaster’s failure to finish its work on time, Chez B did not reopen until January 21, 2019, 20 days later.

1. What respective interests or estates were created by Adam’s deed to Unit A?

2. Barb sued Disaster for $80,000 ($2,000/day fixed costs plus $2,000/day profit = $4,000/day x 20 days) because the remediation work was not completed by January 1, 2019. Disaster’s defense was that Barb’s actual losses were later shown to be less than $4,000 per day. If Disaster is found liable, is an award of $80,000 in damages proper?

3(a). Even though Anthony’s time for performance was not yet due, Barb immediately sued Anthony for breach of contract based upon Anthony’s refusal to perform as the head chef at Chez B. What theory in contract law should Barb use as the basis for asserting that a breach of contract has occurred?

3(b). For purposes of this question only, assume that Anthony called Barb shortly after she had hired a new head chef and said, “I had a change of heart. I cancelled my contract with EAT and I can start work as head chef at Chez B on June 1, 2018, as previously scheduled.” What effect, if any, does Anthony’s willingness to now perform the contract have on Barb’s suit against Anthony?

4. For purposes of this question only, assume that Barb was forced to close Chez B two months after it had reopened. When Barb was unable to pay back her loan, Bank obtained a judgment against Barb. Barb’s interest in Unit B subsequently was involuntarily sold at a sheriff sale to Ed to satisfy the judgment. What is the state of title to Unit B following the sheriff sale?
1. Adam’s deed for Unit A created a fee simple subject to an executory limitation in Zoe and a shifting executory interest in Sam.

“A fee simple absolute is the largest estate known to the common law[.] [I]t denotes the maximum of legal ownership, the greatest possible aggregate of rights, privileges, powers and immunities which a person may have in land. It is of potentially indefinite duration.” RALPH E. BOYER ET AL., THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY, at 82 (West Publishing Co. 4th ed. 1991). A fee simple absolute “is inheritable by either lineal or collateral heirs, generation after generation, but is freely transferable, either inter vivos or by will, free of any claim of the transferor’s heirs . . . .” ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY, § 2.2 (West Publishing Co. 1984).

At common law, the only way that a fee simple estate could be created was using the words of limitation “and his heirs” or “and their heirs.” Failure to use these specific words of limitation resulted in an individual grantee only receiving a life estate. JAN Z. KRAŚNOWIECKI, KRASNOWIECKI ON REAL PROPERTY LAW AND PRACTICE, § 1-3, § 4-1 (PBI Press 2nd ed.). Most states have abolished the common law requirement that the phrase “and his heirs” must be used to create a fee simple estate. BOYER, supra at § 6.1. In Pennsylvania, the use of the words “grant and convey,” or either one of [these] words,” are sufficient to pass fee simple title. See, 21 P.S. § 2. In this case, the word of purchase in Adam’s deed designate Zoe as the grantee. Although Adam’s deed does not contain the common law words of limitation, the use of the words “granted and conveyed” means that Zoe received a fee simple interest in the property. See, Stonybrook Condo. Ass’n v. Jocelyn Props., Inc., 862 A.2d 721, 724 (Pa. Cmwlth. 2004), appeal denied 879 A.2d 784 (Pa. 2005).

Zoe’s estate in Unit A, however, can be ended by the occurrence of a stated event - Sam’s retirement from his overseas post with the U.S. Foreign Service and return to Big City. Because her estate can be divested by the occurrence of this event, Zoe’s estate in Unit A is not a fee simple absolute, but a defeasible fee simple. CUNNINGHAM, supra at 2.3; RESTATEMENT OF THE LAW OF PROPERTY, § 16, cmt. b (1936) (“Any cutting short of an interest is designated . . . as a ‘divesting’ thereof.”).

“A ‘future’ interest in land is a non-possessory interest that will, or may, become a possessory estate at some future time.” CUNNINGHAM, supra at 3.1. A future interest can be created in favor of a grantor or a transferee. A future interest created in favor of a transferee is either a remainder or an executory interest. BOYER, supra at § 7.1.

A remainder is a future interest in favor of someone other than a grantor which is capable of becoming possessory upon the natural expiration of a prior estate of lesser duration created at the same time and in the same instrument. Id., § 7.5. An executory interest or limitation also is a future interest. Id., at 7.6. Unlike a remainder, an executory interest only becomes possessory upon the occurrence or non-occurrence of an event that divests or defeats the interest of another. Gohn’s Estate, 324 Pa. 177, 180, 188 A. 144, 146 (1936). In this case, Sam’s interest is an
executory interest, and not a remainder, because his interest in Unit A comes into being not upon the natural expiration of Zoe’s estate, but only if the event stated in the conveyance occurs - if Sam retires from his overseas post with the U.S. Foreign Service and returns to Big City.

An executory interest is classified as either “shifting” or “springing” depending on whether it divests an interest from a transferee or the grantor. BOYER, supra at § 7.6. Here, Sam’s interest in Unit A is a shifting executory interest or limitation because the occurrence of the stated condition shifts the interest in Unit A from the original transferee, Zoe, to another transferee, Sam. See id.

In short, Adam’s deed to Unit A created a defeasible fee simple known as a fee simple subject to an executory limitation in Zoe and a corresponding future interest known as a shifting executory interest in fee simple in Sam.¹

2. Eighty thousand dollars is the proper measure of damages because the contract between Barb and Disaster contains a valid liquidated damages clause.

Contracting parties may include in their agreement a clause specifying in advance the amount of damages that a party shall receive in the event of a breach. Such a clause is known by the term of art phrase as “liquidated damages.” Pantuso Motors, Inc. v. Corestates Bank, N.A., 568 Pa. 601, 608, 798 A.2d 1277, 1282 (2002).

A liquidated damages clause is a valid contractual provision if two requirements are met. First, the computation of actual damages for contractual breach is speculative or otherwise difficult to estimate or ascertain in advance or to prove after a breach occurs. Second, the amount agreed to as damages is a reasonable forecast or approximation of the expected loss. Brinich v. Jencka, 757 A.2d 388, 401-02 (Pa. Super. 2000) (citation and quotation omitted), appeal denied, 565 Pa. 634, 771 A.2d 1276 (2001); see also, RESTATEMENT (SECOND) OF CONTRACTS, § 356(1) (1981). To be valid, a liquidated damages clause must “comport with the general and overarching principle of contract remedies—compensation for damages sustained.” Holt’s Cigar Co. v. 222 Liberty Assoc’s., 404 Pa. Super. 578, 587, 591 A.2d 743, 747 (1991) (citation omitted). “Where a stipulated damages clause is intended as a form of punishment with the purpose . . . to secure compliance [with the terms of the contract] . . . the provision must fail as an unenforceable penalty.” Id.

[W]hether [a] stipulat[ed sum] is a penalty or a valid liquidated damages provision is to be determined by the intention of the parties, drawn from the words of the whole contract, examined in the light of its subject-matter and its surroundings; and in this examination we must consider the relation which the sum stipulated bears to the extent of the injury which may be caused by the several breaches provided against, the ease or difficulty of measuring a breach in damages, and such other matters as are legally or

¹ Executory interests are not vested and therefore are subject to the Rule Against Perpetuities. In Re Pruner’s Estate, 400 Pa. 629, 162 A.2d 626 (1960). Pennsylvania, however, prospectively abolished the rule for all interests created after December 31, 2006. See, 20 Pa.C.S.A. § 6107.1 (a) (2). Because Adam created the interests in Unit A in his January 2, 2017, deed, an analysis of whether Sam’s shifting executory interest violates the rule is unnecessary.
necessarily inherent in the transaction.


“[P]arties who agree to include a liquidated damages clause in their contract, and do so properly, cannot later claim entitlement to actual damages; rather in keeping with the law of contracts, the parties must be bound by their bargain. This is true whether the complaint avers that the amount of liquidated damages is insufficient to fully compensate or is excessive in light of the actual damages caused.”


The facts in this case state that Chez B was only in operation for two months before it had to close due to the adjoining fire. Because of the absence of reliable data about Chez B’s profits, the computation of actual damages for contractual breach would have been speculative or otherwise difficult to estimate or ascertain in advance. Further, the facts that the agreed upon damage amount of $4,000 per day was based upon the calculations made by Barb’s accountant of the restaurant’s average daily fixed costs of operation as well as extensive research about profits earned by other upscale restaurants in Big City when they initially opened. Thus, the stipulated damages were not a made-up amount intended to punish Disaster for not completing the remediation on time. Rather, it appears to be a thoughtful attempt to reasonably forecast the expected loss that Barb would suffer if Disaster breached the contract. *See, e.g.*, *Holt’s Cigar*, 404 Pa. Super. at 589-91; 591 A.2d at 748-49 ($500 per diem is not a reasonable estimate of damages from delayed repairs). Lastly, although Barb’s actual damages were stated to be less than $4,000 per day, there are no stated facts to support a conclusion that the difference between Barb’s actual loss and the stipulated damage amount was so grossly disproportionate as to give a windfall to Barb.

While the contract here called the clause at issue a penalty, the name given to this provision by the parties is not controlling. “Whether the parties have denominated the sum specified in any given case a penalty or liquidated damages is of little moment in determining its real character. The name by which [a penalty or liquidated damages clause] is called is but of slight weight, the controlling elements being the intent of the parties and the special circumstances of the case.” *Commonwealth v. Musser Forests, Inc.*, 394 Pa. 205, 211-12, 146 A.2d 714, 717 (1958) (citations omitted).

In short, the facts support the conclusion that the contractual provision requiring Disaster to pay $4,000 per day for each day that the Chez B was not open on January 1, 2019, due to Disaster’s failure to timely complete the remediation work is a valid liquidated damages clause. Therefore, the court more than likely will enforce their bargain, and Barb will be entitled to receive the specified liquidated damages resulting from Disaster’s breach of the contract.

3 (a). Barb should assert that Anthony’s refusal to perform as the head chef at Chez B 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, cmt. a (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., cmt c.


The facts here state that Anthony called Barb from Paris two weeks prior to his start date and told her that he was not going to perform as the head chef at Chez B because he had accepted another job hosting a television series headquartered in Paris for EAT. Regardless of whether either the Restatement standard or Pennsylvania’s stricter standard is applied, Anthony’s actions and statement to Barb that he was not going to become the head chef at Chez B because of his new overseas job with EAT would constitute an anticipatory repudiation of his contract with Barb. See, RESTATEMENT (SECOND) OF CONTRACTS, § 250, Illus. 7.

3 (b). Barb’s suit claiming an anticipatory repudiation of the contract would not be affected because Anthony’s attempted retraction of his breach occurred after Barb materially changed her position in reliance upon the anticipatory breach.

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 changes his position in reliance on the repudiation or indicates to the other party that he considers the repudiation to be final. RESTATEMENT (SECOND) OF CONTRACTS, § 256. In this case, the facts state that following Anthony’s breach by his statement that he had accepted EAT’s offer to host a television series based in Paris in lieu of fulfilling his contract to be the head chef for Chez B, Barb immediately hired a new head chef at a salary more than the salary that she had contracted to pay Anthony. Barb thus materially changed her position in reliance upon Anthony’s repudiation of their contract. Even though Anthony informed her that he could start work as head chef at Chez B on June 1, 2018, as previously scheduled, 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. “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.” 2401 Pennsylvania Ave. Corp., 507 Pa. 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 anticipatory repudiation. Weinglass v. Gibson, 304 Pa. 203, 155 A. 439 (1931); see also RESTATEMENT (SECOND) OF CONTRACTS, § 253 (2).
Because Anthony’s actions and statement constituted an anticipatory repudiation that was not timely nullified, Barb’s duties to Anthony under their contract were discharged. Therefore, Barb’s breach of contract action against Anthony for anticipatory repudiation of the contract would be unaffected by Anthony’s attempted retraction.

4. The sheriff sale caused an involuntary severance of Barb’s undivided interest in Unit B as a joint tenant with right of survivorship with Charlie and Dave. Because of the severance, Ed owns a one-third interest in Unit B as a tenant in common while Charlie and Dave own the remaining undivided two-thirds as tenants in common with Ed and between themselves as joint tenants with right of survivorship.

The essence of a joint tenancy with right of survivorship is the so-called four “unities” of time, title, interest and possession. 

In re Estate of Quick, 588 Pa. 485, 490, 905 A.2d 471, 474 (Pa. 2006) (citation omitted). A joint tenancy with right of survivorship may be severed by the act of either of the parties that destroys one of the four required unities. Gen. Credit Co. v. Cleck, 415 Pa. Super. 318, 345, 609 A.2d 553, 556 (1992). The action of one of the parties, which may be voluntary or involuntary, “must be of sufficient manifestation that the actor is unable to retreat from the position of creating a severance of the joint tenancy.” Allison v. Powell, 333 Pa. Super. 48, 51, 481 A.2d 1215, 1217 (1984) (internal quotations and citation omitted).

“It has long been the law in Pennsylvania that a sale upon execution of a judgment against one joint tenant’s interest effects an involuntary severance of the joint tenancy.” In Re Estate of Larendon, 439 Pa. 535, 541, 266 A.2d 763, 766-67 (1970) (citations omitted). Upon severance, the incident of survivorship between the joint tenant whose actions caused the severance and the other co-tenants is terminated. The resulting interest of the tenant who caused the severance or whoever acquires his interest becomes as a tenant in common in relation to the other tenants. American Oil Co. v. Falconer, 136 Pa. Super. 598, 605, 8 A.2d 418, 421-22 (1939).

The facts state that Adam granted and conveyed Unit B to Barb, Charlie, and Dave as joint tenants with right of survivorship. When Bank had the sheriff levy upon and eventually sell Barb’s interest in Unit B to partially satisfy its judgment against Barb, an involuntary severance of the joint tenancy occurred because the unities of title, time, and interest previously existing between Barb, Charlie, and Dave had been shattered by the forced sale. Because of the involuntary severance caused by the execution sale initiated by the Bank, Ed acquired a one-third interest in Unit B as a tenant in common.

The execution sale of Barb’s interest in Unit B, however, does not affect the four unities as to the remaining two-thirds interest held by Charlie and Dave in the property. As to that remaining two-thirds interest, Charlie and Dave would remain as joint tenants with right of survivorship. If either Charlie or Dave would die, the survivor of those two would own the undivided two-thirds interest in Unit B. Thus, the ownership interest of Charlie and Dave in Unit B must be viewed from two different perspectives. In relation to Ed, Charlie and Dave together own a two-thirds interest in Unit B as a tenant in common. As between themselves, their undivided two-thirds interest is held as joint tenants with right of survivorship. RALPH E.
In summary, the severance of the joint tenancy with right of survivorship caused by the involuntary sale of Barb’s interest to Ed resulted in Ed owning a one-third interest in Unit B as a tenant in common. Charlie and Dave would own the remaining undivided two-thirds interest as a tenant in common in relation to Ed and as joint tenants with right of survivorship between themselves.
Question No. 5 - Grading Guidelines

1. Estates in Land and Future Interests

Comments: Candidates should analyze the language of the stated conveyance and apply the appropriate common law and statutory rules to determine the respective present and future interests in Unit A.

5 Points

2. Liquidated Damages

Comments: Candidates should recognize that the law allows parties to a contract to specify in advance the amount of damages that a party shall receive in the event that a breach occurs. Candidates should discuss the necessary elements for a “liquidated damages” clause and analyze the stated facts in determining whether the damages clause is valid.

5 Points

3. Anticipatory Repudiation

Comments: Candidates should recognize that the stated facts present the issue of anticipatory repudiation of a contract. Candidates should demonstrate an understanding of the principle by providing a definition or statement of the principle and apply that definition to the facts and should reach the conclusion that anticipatory repudiation is the basis for asserting that a breach of contract has occurred. 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.

5 Points

4. Involuntary Severance of a Joint Tenancy with Right of Survivorship

Comments: Candidates should recognize that an involuntary sale upon execution of a judgment against the interest of a joint tenant with right of survivorship (JTWROS) causes a severance of the JTWROS and that the resulting interest of the tenant who acquires his interest becomes as a tenant in common in relation to the other tenants. Candidates also should recognize that where there are more than two joint tenants with right of survivorship, the other tenants will continue to hold the remaining interest between themselves as JTWROS. Candidates should apply these principles to the stated facts and reach the correct result regarding the state of title.

5 Points
Paige, age 10, was on her way to the second day of school on her school bus in Rural County, Pennsylvania. Paige’s bus stop was the first on the route. Temporarily the only passenger, Paige was looking out of the bus window. The bus’s route included a shortcut over Half-Mile Road, a short secluded road that had not been on the route in previous years. As the bus passed the only house situated along Half-Mile Road, Paige saw a man sitting on the front porch. He stood up and aimed a rifle at her as the bus drove past.

Paige froze in fear and was unable to move or speak for several minutes, then began to shake and cry uncontrollably. She was still so upset when the bus arrived at her school that her parents were called to pick her up.

At home, Paige remained anxious and upset all evening and suffered repeated nightmares that night. The next morning she became hysterical at the bus stop and had to return home.

Both Paige’s school and her parents reported the incident to the local police. Darby, who had pointed the rifle and was the owner of the house, was aware Half-Mile Road was a public roadway; but he told the police he believed there was no legitimate reason for anyone else to drive there because no one else lived along that road. He was very annoyed by the noise of the school bus. Darby stated that, although he did not intend to shoot anyone, he pointed the rifle at Paige in the hope that, if the bus driver and passenger believed he was about to shoot, they would be alarmed enough to cause the school district to change back to the former bus route and stop using Half-Mile Road as a shortcut.

Darby was charged with several criminal offenses. He accepted a plea agreement under which he pleaded guilty to a summary offense, disorderly conduct, in exchange for dismissal of
the more serious charges. The disorderly conduct charge was based on allegedly threatening behavior with intent to cause annoyance or alarm.

Over the next several months, Paige suffered extreme fear of riding the bus. Her parents drove her to school, avoiding Half-Mile Road. Paige’s nightmares continued. Her personality changed drastically. Normally a friendly, confident child, Paige became quiet and guarded. Her appetite and schoolwork suffered. She had frequent headaches, stomach aches, and panic attacks and required antianxiety medication. Her parents took her to a psychologist, who counseled her for anxiety and depression. At the psychologist’s suggestion, Paige’s parents continued driving her to school for the rest of the school year. Eventually, after about a year, Paige’s nightmares and panic attacks gradually subsided and her normal personality returned.

Paige’s parents timely filed a civil action against Darby in the Rural County Court of Common Pleas. They asserted claims of their own and on Paige’s behalf, arising from Darby’s intentional misconduct.

1. Excluding any claim for infliction of emotional distress, what intentional tort can best be asserted on Paige’s behalf, and with what likely outcome?

2. Assume, for this question only, that the tort claim is successful. What category or categories of compensatory damages may be recovered (a) on Paige’s behalf and (b) on her parents’ claim?

3. Assume, for this question only, that under the facts above, the complaint includes allegations relating to the criminal charges against Darby that were dismissed pursuant to his subsequent plea agreement. If Darby moves to strike those averments as scandalous and impertinent under the Pennsylvania Rules of Civil Procedure, how should he raise the issue and how would the court analyze that issue?

4. Assume, for this question only, that the case proceeds to trial and Paige’s counsel seeks to introduce evidence of Darby’s guilty plea to a summary offense in relation to the incident at issue. If Darby objects to the admission of the evidence as prejudicial, under the Pennsylvania Rules of Evidence how should the court rule?
Question No. 6: Examiner’s Analysis

1. Paige’s parents should assert a claim on her behalf against Darby for the tort of assault.¹

   A civil assault occurs when the defendant intentionally causes an imminent apprehension of a harmful or offensive bodily contact. *Sides v. Cleland*, 648 A.2d 793, 796 (Pa. Super. 1994) (citing *Restatement (Second) of Torts* § 21).

   (1) An actor is subject to liability to another for assault if

      (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and

      (b) the other is thereby put in such imminent apprehension.

   *Restatement (Second) of Torts* § 21 (Am. Law Inst. 1965). See also *Cucinotti v. Ortmann*, 159 A.2d 216, 217 (Pa. 1960) (tort of assault consists of an act that is intended to, and does, place another person in reasonable apprehension of an imminent battery). “Intent” is defined as the desire to cause the consequences of one’s act, or the knowledge that the consequences were substantially certain to result from one’s act. *United Servs. Auto. Ass’n v. Elitzky*, 517 A.2d 982, 986 (Pa. Super. 1986) (citing *Nationwide Mut. Ins. Co. v. Hassinger*, 473 A.2d 171, 175 (Pa. Super. 1984) (citing *Restatement (Second) of Torts* § 8A)).

   Regarding brandishing of weapons, Pennsylvania courts have found an actionable assault occurs where a defendant displays and produces a weapon in such a manner as to amount to “an offer to commit a battery.” *Cucinotti*, 159 A.2d at 219. For example, in *Sides*, the defendants approached the plaintiff wielding chainsaws. That conduct was actionable in a tort claim for assault. *Sides*, 648 A.2d at 796. In fact, the court found itself “at a loss to understand how a fact finder could arrive at any other conclusion” than that an assault had occurred. *Id.* at 797. Accord *Bechtel v. Combs*, 70 Pa. Super. 503, 506 (1918) (citing “old-time illustration” of one who places his hand on his sword during an argument; this would constitute assault but for the accompanying declaration, “If it was not assize time I would not take such language from you,” which effectively disclaimed intent to use the sword). These decisions illustrate what is also common experience, that brandishing a deadly weapon is an obvious threat of battery.

   In this case, Darby aimed a deadly weapon, a rifle, at a child in a passing school bus. The facts indicate he did so expressly for the purpose of scaring Paige by putting her in fear of being shot. Her reaction demonstrates that she was indeed subjected to extreme fear. Under the facts as given, Paige has a viable tort claim of assault against Darby.

2. Paige may recover compensatory damages for her own pain and suffering, and her parents may recover out-of-pocket damages.

¹ The torts of negligent and intentional infliction of emotional distress were eliminated in the call of the question.
(a) In general, the purpose of awarding tort damages is to place the injured party in the same position she occupied before the tort. Amadio v. Levin, 501 A.2d 1085, 1102 n.1 (Pa. 1985) (Nix, C.J. dissenting) (compensatory damages are awarded “to put the plaintiff in the same position, so far as money can do it, as he or she would have been” if the tort had not been committed) (citing Sedgwick on Damages (9th ed.) at 25). For a personal injury tort, this means the plaintiff may recover any out-of-pocket expenses, including costs of counseling, as well as damages for pain and suffering, including mental suffering. See Spack v. Apostolidis, 510 A.2d 352, 355 (Pa. Super. 1986) (citing Moore v. McComsey, 459 A.2d 841, 843-44 (Pa. Super. 1983)).

In this case, Paige is a child and the facts do not suggest she would have any out-of-pocket loss of her own. The facts also state that Paige fully recovered after a year, so there is no indication she would suffer any ongoing loss after she reaches the age of majority. Therefore, Paige’s compensatory damages will be limited to damages for her own pain and suffering.

(b) When a child asserts a claim in tort, however, her injury gives rise to two separate causes of action. One belongs to the child’s parents for expenses they incur because of the child’s injury, and the other to the child herself for pain and suffering (and losses, if any, after minority). Schmidt v. Kratzer, 168 A.2d 585, 587 (Pa. 1961); Hathi v. Krewstown Park Apartments, 561 A.2d 1261, 1262 (Pa. Super. 1989). Therefore, Paige’s parents would have the right to assert a claim for the costs of her counseling and medication, any loss of work time from driving Paige to school, and perhaps gas costs for doing so. See Spack, 510 A.2d at 355.

3. Pennsylvania Rules of Civil Procedure provide discretion to strike scandalous and impertinent matters upon preliminary objections.

The Pennsylvania Rules of Civil Procedure authorize a preliminary objection to the inclusion of scandalous or impertinent matter in a prior pleading. Pa. R.C.P. No. 1028(a)(2). “Scandalous” or “impertinent” matter is an averment that is “immaterial and inappropriate to the proof of the cause of action.” Common Cause/Pa. v. Commonwealth, 710 A.2d 108, 115 (Pa. Cmwlth. 1998), aff’d, 757 A.2d 367 (Pa. 2000); see also Breslin v. Mt. View Nursing Home, Inc., 171 A.3d 818, 829 (Pa. Super. 2017) (quoting Common Cause). More specifically, an averment is “scandalous” when it “bears cruelly upon the moral character of an individual or states anything that is contrary to good manners or anything that is unbecoming to the dignity of the court to hear or that charges some person with a crime not necessary to be shown.” Michael Rosenhouse, 14 Std. Pa. Pract.2d § 80:49. An averment is “impertinent” when it is “irrelevant to the material issues made or tendered and . . . whether proven or admitted, can have no influence in leading to the result of the judicial decree.” Id.

The trial court may strike such an averment from a complaint. However, this remedy tends to be sparingly applied, and the trial court generally will not exercise its discretion to strike matter as scandalous or impertinent unless it is prejudicial to the party seeking to strike it. See, e.g., Breslin, 171 A.3d at 829 (citing Commonwealth, Dep’t of Envtl. Resources v. Hartford Accident & Indem. Co., 396 A.2d 885, 888 (Pa. Cmwlth. 1979)); Karl Oakes, 5 Std. Pa. Prac.2d § 25:63. In the absence of any demonstrated prejudice, the trial court normally will treat a


Here, Darby pleaded guilty to a summary offense, but the remaining charges were dismissed pursuant to the plea agreement. Those charges are irrelevant in the civil case. Therefore, the complaint’s averments relating to those charges accuse Darby of crimes not necessary to be shown. Accordingly, they are scandalous. As in Brandywine Agency, the averments relating to alleged criminal activity bear negatively on Darby’s character. Thus, they are prejudicial. The trial court would not commit reversible error should it decide to treat the averments as mere surplusage and ignore them; however, the court could properly exercise its discretion to strike those averments from Paige’s complaint.

4. Pennsylvania law generally precludes admission, in a civil action, of a guilty plea to a criminal summary offense in relation to the same conduct giving rise to the civil action, in that its prejudicial effect normally outweighs its probative value.

Evidence is relevant if it tends to make a material fact more or less probable than it would be without that evidence. Pa. R.E. 401. In general, all relevant evidence is admissible. Pa. R.E. 402. Under Pa. R.E. 403, however, relevant evidence that is otherwise admissible may be precluded where its probative value is outweighed by a danger of unfair prejudice.

Here, the facts state that Darby pleaded guilty to the summary offense of disorderly conduct:

§ 5503. Disorderly conduct.

(a) Offense defined. - - A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

(1) engages in fighting or threatening, or in violent or tumultuous behavior;

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2The enactment of the Rules of Evidence are not intended to supplant the common law. See Pa. R.E. 101 cmt.
(2) makes unreasonable noise;

(3) uses obscene language, or makes an obscene gesture; or

(4) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

* * *

(c) Definition. - - As used in this section the word “public” means affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, any neighborhood, or any premises which are open to the public.

18 Pa. C.S. § 5503. Thus, even though both the summary offense and the civil assault might arise from the same conduct, the elements of the criminal offense are different from those of civil assault. Accordingly, the probative value of the criminal plea is limited.

Moreover, even though both the criminal charges and the civil cases may have arisen from the same operative facts, that does not automatically mean that the probative value of the conviction would outweigh its potential prejudicial effect. Offering the jury evidence that Darby pleaded guilty to a criminal charge arising from his conduct toward Paige might improperly suggest to the jury that Darby is of bad character or is automatically liable to Paige in her civil action. That would be strongly prejudicial to Darby.

Further, a plea bargain like the one here, where serious charges are dropped in exchange for a summary guilty plea and payment of a fine, should give rise to questions of whether the guilty plea can reasonably be relied on as evidence in another proceeding. It may have been merely an expedient to save time and money in defending against the other charges. Regarding a summary offense, “expediency and convenience, rather than guilt, often control the defendant’s ‘trial technique.’” Hurtt v. Stirone, 206 A.2d 624, 627 (Pa. 1965). “In such [a] case[], it is not obvious that the defendant has taken advantage of his day in court, and it would be unreasonable and unrealistic to say he waived that right as to a matter (civil liability), which was probably not within contemplation at the time of the conviction.” Id.; see also Folino v. Young, 568 A.2d 171, 173-74 (Pa. 1990).

Overall, therefore, balancing of the probative value and the potential prejudicial effect should lead applicants to conclude the trial court will exclude evidence of the summary conviction.
Question No. 6: Grading Guidelines

1. **Torts – Assault**

   Comments: The applicant should recognize that the appropriate cause of action is the intentional tort of assault. The applicant should set forth the elements of the cause of action, apply them to the facts of the case, and conclude that the claim is likely to be successful.

   5 points

2. **Torts – Damages for Intentional Torts**

   Comments: The applicant should recognize that compensatory damages including out-of-pocket expenses and compensation for pain and suffering may be available for the intentional tort of assault. The applicant should set forth the requirements for recovering each type of damages, apply those requirements to the facts of the case, and conclude that under the facts as given, only pain and suffering damages are recoverable by or on behalf of Paige, and only out-of-pocket damages are recoverable by her parents.

   5 points

3. **Civil Procedure – Pleading; Scandalous and Impertinent Matters**

   Comments: The applicant should define “scandalous and impertinent” in the context of pleadings under the Pennsylvania Rules of Civil Procedure, apply the definition and conclude the averments at issue are scandalous and impertinent. The applicant should state that a litigant must seek to strike scandalous and impertinent averments by means of a preliminary objection. The applicant should recognize that the trial court sustaining such an objection nonetheless has discretion either to strike scandalous and impertinent averments or simply ignore them.

   4 points

4. **Evidence – Guilty Plea to Summary Offense Related to Subject Matter of Civil Case**

   Comments: As this interrogatory specifically asks for an analysis of prejudice, the applicant should discuss the relevance / probative value of the evidence, including the definition of relevance. The applicant should also explain the potential prejudicial effect. The applicant should recognize that the trial court must weigh the two, and should conclude that the court will likely exclude the evidence.

   6 points
PT

Question Number 3 on Examplify

Supreme Court of Pennsylvania
Pennsylvania Board of Law Examiners

Pennsylvania Bar Examination
February 26 and 27, 2019

PERFORMANCE TEST
February 26, 2019

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Memorandum

TO: Applicants
FROM: Fredda Jones, Managing Partner
RE: Assignment to Draft Legal Memorandum
DATE: February 26, 2019

I recently met with a new client, Jerry Idaho, who is the president and CEO of a food manufacturing company named Tater Products, Inc. (Tater). Tater is located in the town of Girdler, in Knox County, Pennsylvania, and it manufactures food items from potatoes. Many of its dishes originate from Mr. Idaho’s own secret family recipes. Tater’s best-selling dish is called Taters-n-such, which is made from potatoes, tomatoes, and beans, along with the Idaho secret family spice recipe (secret recipe). No other food manufacturer makes a product like Taters-n-such.

Recently, two Tater employees named Ben Anderson and Billy Benedict quit and began working for another food manufacturer. Aside from any other causes of action he may have, Mr. Idaho wants to know if he can enforce against them the non-compete agreement each signed. He would like to file for a preliminary injunction based on the non-compete agreements to stop them from working for a competing company in the food industry.

Your assignment is to draft a legal memorandum addressing two issues, and I will address all remaining issues. The first issue is whether the non-compete agreements are enforceable against Mr. Anderson and Mr. Benedict. The second issue is to determine whether we can successfully obtain a preliminary injunction after notice and a hearing against either Mr. Anderson or Mr. Benedict or both. Your legal memorandum should set forth the appropriate law on these issues, and integrate relevant facts to come to a conclusion concerning the questions presented.

Included in the attached File is a notarized affidavit Mr. Idaho signed when he was in today that outlines the factual basis for his desire to pursue these issues. The facts from this affidavit will form the basis for our pleadings. Also attached is a blank copy of the non-compete agreement signed by Mr. Anderson and Mr. Benedict (Mr. Idaho will send the actual signed copies over to our office later today and, for purposes of your assignment, you can deem the attached copy to be identical to the actual signed copies); and a Guideline for Preparing Internal Legal Memoranda. Included in the attached Library is caselaw and a rule of civil procedure relevant to the issues. You should only use facts contained in the File, and you should only use the attached cases and rule for your legal analysis. Do not rely upon your personal knowledge of these issues or on any legal authority not included in the Library. Instead you should base your legal analysis and conclusions only upon the documents provided in the File and the Library.
AFFIDAVIT OF JERRY IDAHO

I, Jerry Idaho, do hereby swear, attest and affirm, subject to penalty of perjury, that:

I am the founder of Tater Products, Inc. (Tater), a successful manufacturer of food products based on potato recipes, and have been its President and CEO since its inception in 1992. My company has been a great success since opening. Tater’s number one selling product is Taters-n-such, a dish made with potatoes, tomatoes, beans, and the secret Idaho family spice recipe (“secret recipe”). No other food manufacturer makes a product similar to Taters-n-such, which is so popular that it generates 65 percent of Tater’s revenue. We have tour buses full of tourists who come to Tater’s tasting room, and the most requested sample by far is Taters-n-such.

One of Tater’s first hires was Ben Anderson, who was hired in 1993 to oversee production. Mr. Anderson was a close friend and one of the few people I trusted with the secret recipe that is added to Taters-n-such. Between 1993 and February 20, 2019, Mr. Anderson was the production manager responsible for ordering the secret ingredients and personally adding the secret recipe to the final batches of Taters-n-such. No one other than Ben Anderson and I know the secret recipe.

In June 2018, it was obvious to me and to Tater’s management that we needed to hire an Assistant Production Manager. After 25 years of being the only person at the company to add the secret recipe to Taters-n-such, Ben Anderson needed a break. I mentioned to our previous lawyer, who has since retired, that I would hire a new Assistant Production Manager; but I was concerned that the new employee could take our secret recipe and leave to work for a competing company. I was specifically concerned about employees going to work for Maters-r-us (Maters), our largest and closest competitor. Our counsel recommended that I have the new employee sign a “non-compete” agreement as a condition of employment. When I discussed the matter with Mr. Anderson, I said, “Maybe it would be a good idea to have you sign one of these, too. Would you do that?” I never had a written employment agreement or non-compete agreement with Mr. Anderson and we had never discussed the topic before. Instead, at the beginning of each year since he started working for me, Mr. Anderson and I discussed how much I would pay him, what his duties would be, and what benefits he would receive. After we had a good laugh because we were such good friends and Mr. Anderson was already a 25 year employee, Mr. Anderson agreed that he should sign the agreement. He took a copy of the agreement, filled in his name, and signed it on June 24, 2018.

On July 2, 2018, I offered a job to Billy Benedict to serve as Tater’s Assistant Production Manager. As per counsel’s advice, I made Mr. Benedict’s offer of employment contingent upon him signing a non-compete agreement. Mr. Benedict stated he would sign the non-compete agreement, which he signed on July 10, 2018, his first day of employment at Tater’s, at the same time he signed his employment contract describing the duties of his position, and the wages and benefits he would receive.

Upon beginning his employment with Tater, Mr. Benedict quickly formed a close bond with his new boss, Ben Anderson. Despite his fondness for Mr. Benedict, Mr. Anderson never entrusted the secret recipe to him. However, Mr. Anderson did share other confidential and proprietary information about Tater products with Mr. Benedict. For instance, Mr. Benedict learned the temperature at which ingredients are cooked, the timing of when ingredients are added, and the lengths of time for which ingredients are cooked before being blended together. This knowledge about our processes and procedures extends across our product lines, but most significantly affects Taters-n-such.

During the course of a few months following his hiring, Mr. Benedict constantly complimented Mr. Anderson. He would tell Mr. Anderson how he was the best boss ever, how important Mr. Anderson was to the organization, and how Mr. Anderson deserved a huge raise. By January 2019, Mr. Benedict had
convinced Mr. Anderson that he was underpaid, underappreciated, and could make a lot more money if he would just leave Tater and work for another company. Mr. Benedict, as it turned out, is Mary Beth Heirloom’s cousin; she is the President of Maters. Maters is located in nearby Corbin, Knox County, Pennsylvania, 15 miles away from Tater’s operation. Maters manufactures food products using tomatoes as its primary ingredient. They are the only other food manufacturer that, generally speaking, makes dishes similar to those made by Tater. Maters has been trying unsuccessfully to copy Tater’s recipes for years, but, without the secret recipe, it has never had as much success as Taters. Through my below-referenced conversation with Mr. Anderson, I confirmed that Maters plans to obtain the secret recipe and produce a new dish called Maters-n-Taters-n-Beans, substantially the same dish as Tater’s-n-such. Maters, however, could not duplicate Taters-n-such without the secret recipe.

On February 20, 2019, Ben Anderson and Billy Benedict marched into my office and resigned effective immediately. They then departed and drove immediately to Maters, where Mary Beth Heirloom, Mr. Benedict’s cousin, hired them both on the spot, for double their salaries at Taters, and with the same titles and responsibilities. Ms. Heirloom immediately began trying to pressure Mr. Anderson to give up the secret recipe. Feeling a little guilty about leaving me, his longtime friend, and Taters, Mr. Anderson telephoned me this morning to try to gauge just how upset I would be if he gave up the secret recipe and to tell me what had occurred during the past several months. Mr. Anderson reasoned that Mr. Benedict had already guessed at 50 percent of the ingredients based solely on eating Tater products, so perhaps I might not mind if he gave away the remaining ingredients. I told Mr. Anderson I would need to think about it for a few days and immediately called my new attorney.

If Mr. Anderson is allowed to work for another food manufacturing company, including Maters, he will likely give away the secret recipe. In fact, Mr. Anderson has admitted that Maters is pressuring him to give away the secret recipe so that they can duplicate Tater’s best-selling product, Taters-n-such. If the secret recipe is revealed to Tater’s competitors, including our biggest competitor, Maters, it will have an immediate negative impact on our sales. If Mr. Benedict is allowed to work for another food manufacturing company, including Maters, he will tell them ingredients, cooking times and temperatures, and other proprietary information. Providing this proprietary information to other food manufacturers will enable them to better compete with Tater to the detriment of our business. The work being performed by Mr. Anderson and Mr. Benedict for Maters is in direct competition with Tater, and specifically violates the non-compete agreements they each signed. Based on the foregoing, I believe, swear, and affirm that Tater will suffer immediate irreparable harm if Mr. Anderson and Mr. Benedict are allowed to work for a competitor of Tater, including Maters.

DATED: February 26, 2019

Jerry Idaho
President and CEO
Tater Products, Inc.

(Notary stamp intentionally omitted)
NON-COMPETE AGREEMENT

I, (name of employee), acknowledge that all documents, recipes, trade secrets, ingredients, processes, and other information (collectively “Company Information”) about Tater Products, Inc. are special, valuable, and unique to Tater Products, Inc. As a condition of my being employed at Tater Products, Inc., I agree that I will not, during or after the term of my employment, disclose said documents and information to any person, firm, corporation, competitor, or other entity for any reason whatsoever, except as necessary for the business of Tater Products, Inc.

I further acknowledge that during the term of my employment with Tater Products, Inc., my employer will invest substantial time, effort, and money in developing and maintaining goodwill with its customers and consumers, based in large part on Company Information. This goodwill is an extremely valuable asset of my employer. Accordingly, I agree that if my employment is terminated, whether by me or by Tater Products, Inc., and regardless of the reason why my employment is terminated, I will not, directly or indirectly, individually or as a partner, agent, employee, stockholder, owner, or otherwise, for a period of one year from the termination of my employment with Tater Products, Inc., solicit or accept a job offer from another food manufacturing company within a 30 mile radius of Tater Products, Inc.’s location in Girdler, Pennsylvania.

In the event of a breach or threatened breach by me of the provisions in this non-compete agreement, I agree and understand that Tater Products, Inc. shall be entitled to an injunction restraining me from working for any food manufacturing company within the radius described above.

This non-compete agreement shall be an addendum to my employment contract. I understand that I will not be hired by Tater Products, Inc. unless I complete and sign this Non-Compete Agreement.

Date: ___________________ _____________________

Employee Signature
Use the following guidelines and format in the order listed for preparing all internal legal memoranda:

1. The document should be entitled “Memorandum of Law.”

2. At the top of the memorandum, include a heading similar to the heading above (e.g. – To, From, Re, and Date). In the “From” section, state only “Applicant” do not include your name.

3. Include a brief introductory paragraph laying out the purpose of the memorandum.

4. The memorandum should be divided into sections, one for each issue discussed. Each section should begin with a short heading that reflects the issue being addressed.

5. Each section should also include a statement setting forth the issue being addressed and a reasoned analysis supporting your conclusion. Identify the relevant and controlling legal principles and apply these legal principles to the facts to demonstrate the reasoning that supports your conclusion on the issue presented. If there are facts and 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 or facts.

6. Include all relevant facts needed to resolve the issues presented as well as any background facts helpful to understanding the issues.

7. State your conclusion(s) as a positive statement that responds to the question(s) raised by the issue presented.

8. Bluebook citations are not necessary; however, you must include sufficient informal citations to the appropriate legal authority and affidavits of probable cause, such that I will know to which document you are referring.
LIBRARY
(a) A court shall issue a preliminary or special injunction only after written notice and hearing unless it appears to the satisfaction of the court that immediate and irreparable injury will be sustained before notice can be given or a hearing held, in which case the court may issue a preliminary or special injunction without a hearing or without notice. In determining whether a preliminary or special injunction should be granted and whether notice or a hearing should be required, the court may act on the basis of the averments of the pleadings or petition and may consider affidavits of parties or third persons or any other proof which the court may require.

***
Appellee, George W. Kistler, Inc., commenced this action in equity seeking to enforce a restrictive covenant in a written employment contract between itself and its employee, appellant William J. O'Brien. On May 14, 1974, the Court of Common Pleas issued a Decree Nisi enjoining appellant from engaging in selling or servicing fire equipment within a 50 mile radius. Appellant's exceptions were dismissed by the court en banc and a Final Decree granting relief was entered. This appeal followed.

Appellant seeks to vacate the ruling of the court below on several grounds. One of his contentions is that the covenant restricting appellant from engaging in a competitive business was not supported by adequate consideration. We agree with this argument and therefore reverse. Accordingly, we need not address appellant's other contentions. [footnote omitted]

A review of the record reveals the following pertinent facts. Appellee, George W. Kistler, Inc., (Kistler) is a Pennsylvania corporation engaged in the sale and service of fire equipment and fire prevention services. [footnote omitted] About a year prior to May of 1970, appellant, William J. O'Brien (O'Brien) was contacted by representatives of Kistler with respect to O'Brien's possible employment with their company. No decision was made at that time and the matter was left open for further discussion. Subsequently, some time in the late Winter or early Spring of 1970, Kistler again solicited O'Brien and after various negotiations relating to wages, duties, insurance benefits and other terms of employment but not including any mention of a restrictive covenant, it was agreed that O'Brien would leave his present employer and work for Kistler. O'Brien gave his then employer two weeks notice and began to work for Kistler on May 11, 1970.

On or about that same day, O'Brien questioned one of the clerks at the business with regard to his insurance benefits. Upon doing so, he was handed various forms to complete and sign, among them a document entitled Employment Contract which contained the following clause:

'In consideration of the said OWNER granting such requested employment to the said EMPLOYEE and in further consideration of the payment of ONE ($1.00) DOLLAR lawful money of the United States, this day made by the OWNER to the EMPLOYEE, he, the EMPLOYEE, agrees with the OWNER that for a period of two (2) years after said employment is terminated for any cause whatsoever by either or both of the parties, that he will not directly or indirectly manufacture, sell, distribute, handle on his own account or by association or employment by or with any other persons whomsoever within an area of fifty (50) miles, extending from the City of Allentown, Lehigh County, Pennsylvania, any product equal in character or in any way similar to the products handled, bought, sold or serviced or to be handled, bought, sold or served [sic] by said OWNER.'

O'Brien worked at various times in the capacity of Service Manager and Branch Manager for Kistler until November 16, 1973, when he was discharged for reasons that are disputed.
Upon his departure from Kistler, O'Brien went into business for himself servicing hand portable fire extinguishers. He solicited business from concerns located in large buildings and also did service work by subcontract for distributors of hand portable fire extinguishers. This activity was to some extent in competition with the activities of his former employer.

It is axiomatic in our law that in order for a covenant in restraint of trade to be enforceable the covenant must 1) relate to (be ancillary to) a contract for the sale of the good will of a business or to a contract of employment, 2) be supported by adequate consideration, and 3) be reasonably limited in both time and territory. [citations omitted]

Appellant asserts that the covenant is unenforceable because it lacks consideration. It is his position that the negotiations prior to May 11th constituted a complete and binding oral contract for which the consideration was the employment itself. Thus he argues that the employment as consideration was not available to support the subsequent written restrictive covenant. Moreover, he contends that the entering into an agreement containing a restrictive covenant was not a factor considered in arriving at the oral agreement of employment. It was not until O'Brien had commenced work and inquired about his Blue Cross benefit forms that he was requested by a clerk to sign the 'Employment Contract' supposedly in accordance with the general practice of the firm. It is particularly significant that Kistler, who was then operating a sole proprietorship and personally participated in the final negotiations, never discussed this requirement.

Thus we must first determine at what point a final and binding employment contract was executed before determining what, if any, consideration passed for the signing of the covenant.

The Chancellor, in reviewing the evidence, rejected appellant's claim that an oral contract existed and found that the written contract was the sole agreement of employment between the parties. Based upon this premise he concluded that the employment itself was the consideration for the covenant. While the Chancellor's findings, approved by the court en banc, have the force and effect of a jury's verdict, they must also be supported by adequate evidence in order that they be affirmed on appeal. [citation omitted] Our reading of the record, and especially the testimony of appellee, Kistler, forces us to conclude that the Chancellor's finding was contrary to the evidence and that a final and binding oral contract of employment which did not contain a restrictive covenant did exist prior to the date the written contract was signed.

* * *

Under the law of this Commonwealth it has been held that even where a later formal document is contemplated, parties may bind themselves contractually prior to the execution of the written document through mutual manifestations of assent. [citations omitted] Thus evidence of mutual assent to employ and be employed which contains all the elements of a contract may be construed as a binding contract of employment through [sic] not reduced to writing. Under this test, it is clear that the testimony recited above requires a finding of the existence of an oral contract of employment at least two weeks prior to the written contract. Not only was it agreed that O'Brien would cease working for his present employer and begin working for Kistler, but all aspects of the employment relationship such as wages, duties and benefits were also agreed upon. Kistler's testimony admits mutual assent regarding the employment. Moreover, there was no evidence that the parties understood that O'Brien 'was not to become a regular employee until he signed the restrictive covenant, and was not to receive any commissions . . . or other confidential information prior to that time.' [citation omitted] Indeed the record establishes that both parties understood that O'Brien was to leave his then employment and become a regular employee of Kistler without any promise not to engage in a competitive enterprise. [footnote omitted]
Having concluded that a valid oral contract of employment, without a covenant to compete, existed prior to the written contract of employment, we cannot accept the Chancellor’s view that the employment itself constituted the consideration for the covenant. In our judgment, such consideration would clearly be past consideration.

While a restrictive covenant, in order to be valid need not appear in the initial contract, if it is agreed upon at some later time it must be supported by new consideration. [citations omitted] As stated by the Supreme Court of North Carolina:

‘. . . when the relationship of employer and employee is already established without a restrictive covenant, any agreement thereafter not to compete must be in the nature of a new contract based upon a new consideration.’ [citation omitted]

Furthermore, we have stated that continuation of the employment relationship at the time the written contract was signed was not sufficient consideration for the covenant despite the fact that the employment relationship was terminable at the will of either party. [citation omitted] [footnote omitted] Thus the covenant which is the basis of this action is not enforceable for lack of consideration and the decree of the court below must be reversed. [footnote omitted]

Decree reversed. Costs on appellee.

***
Appellant, Boyds, LP, appeals from the order entered in the Philadelphia County Court of Common Pleas, which deemed as final the order sustaining in part and overruling in part the preliminary objections of Appellees, Tung To and John Doe, Inc., d/b/a "ToBox," and the order denying Appellant's petition for a preliminary injunction. We affirm.

The relevant facts and procedural history of this case are as follows. Appellant is a high-end clothing retailer in Philadelphia, with several departments, including men and women's footwear. Appellee Tung To ("Appellee To") entered into an employment agreement ("Agreement") with Appellant on September 27, 2009, to work as a floor manager and buyer for Appellant's footwear department. The Agreement contained a covenant ("Non-Compete Covenant"), which provided:

**Nondisclosure, Confidentiality, Non-Interference and Covenant Not to Compete**

Employee acknowledges that all documents pertaining to Employer's clients, suppliers, advertisements, vendors, manufacturers, designers, clothing lines, prices, sales, profits, inventory and/or any other information related to Employer's business, as they may exist from time to time is a valuable, special and unique asset of Employer's business. Employee will not, during or after the term of his/her employment, disclose said documents and or information to any person, firm, corporation, association or other entity for any reason or purpose whatsoever, except for the business of Employer. In the event of a breach or threatened breach by Employee of the provisions of this paragraph, Employer shall be entitled to an injunction restraining Employee from disclosing in whole or in part, any and all documents pertaining to Employer's clients, suppliers, advertisements, vendors, manufacturers, designers, clothing lines, prices, sales, profits, inventory and/or any and all other information related to Employer's business or from rendering any services to any person, firm[,] corporation, association or other entity to whom such information in whole or in part, has been disclosed or is threatened to be disclosed. Nothing herein shall be construed as prohibiting Employer from pursuing any other remedies available to Employer for such breach or threatened breach, including the recovery of damages from Employee.

In consideration of the execution and delivery by Employer of this agreement, Employee covenants and agrees that:

**Covenant Not to Compete**

Employee acknowledges that during the term of his/her employment with Employer, that
Employer shall invest substantial time, efforts and money in developing goodwill with its clients and customers, business affiliates and suppliers. This goodwill is a highly valuable asset of [Appellant]. Accordingly, Employee agrees that in the event Employee's employment terminates, regardless of the reason for said termination or party instituting the termination, Employee will not, directly or indirectly, individually as a partner or as an agent, employee or stockholder of any corporation or otherwise, for a period of one year from the termination of this Agreement:

(a) Solicit or accept a job offer from another men's and or women's retail clothing company and/or any company who engages in the sale of men's and/or women's clothing that is within a (50) mile radius of any [of Appellant's] operation.

(Appellant's Complaint, filed November 4, 2013, Exhibit B; R.R. at 36a).

Appellee To ended his employment with Appellant on September 16, 2013. That same day, Appellant learned that Appellee To was planning to open his own men's footwear store in Philadelphia, and that he had taken a confidential list of Appellant's clients. Appellee To allegedly returned the client list on October 24, 2013, and opened his own store, ToBox ("Appellee ToBox"), in Philadelphia on October 31, 2013.

Appellant filed a complaint against Appellees on November 4, 2013, which alleged breach of contract, misappropriation of trade secrets and confidential information, unfair competition, and breach of duty of loyalty. Appellees filed preliminary objections to the complaint on November 25, 2013, to which Appellant responded. Thereafter, on December 9, 2013, Appellant filed a petition for preliminary injunction, inter alia, to enjoin Appellees from competing with Appellant. Appellees filed a response on December 30, 2013. That same day, the court sustained in part and overruled in part Appellees' preliminary objections. The court subsequently denied Appellant's petition for preliminary injunction on January 14, 2014.


Eventually, the parties settled all claims except Appellant's allegations of breach of the Non-Compete Covenant. Thus, on December 3, 2014, the court entered an order that deemed as final the December 30, 2013 and January 14, 2014 orders dismissing Appellant's claims of breach of the Non-Compete Covenant, and dismissed with prejudice all other claims. Appellant timely filed a notice of appeal on December 4, 2014.

Appellant raises the following issues for our review:

In its first issue, Appellant argues the facts alleged in Appellant's complaint were more than sufficient to overcome Appellees' preliminary objections to Appellant's claims for breach of the Non-Compete Covenant. Appellant asserts the Non-Compete Covenant is an enforceable restrictive covenant. Specifically, Appellant avers the Non-Compete Covenant was executed incident to Appellee To's employment with Appellant, the restrictions imposed are reasonably necessary for Appellant's protection because Appellee To was privy to confidential information relating to Appellant's customers and suppliers, and the restrictions imposed are reasonably limited in geographic scope and duration. Appellant contends Appellees violated the Non-Compete Covenant by opening a store in Philadelphia. Appellant alleges the Non-Compete Covenant is not so limited in scope as to prohibit Appellee To from only soliciting or accepting a job from an unrelated third party. Rather, Appellant asserts the plain language of the Non-Compete Covenant implicates all forms of work for a competitor of Appellant. Appellant states the Non-Compete Covenant prohibits Appellee To, "individually . . . as a stockholder," from "directly or indirectly" engaging in restricted activity, which includes Appellee To's ownership of Appellee ToBox. Appellant contends Appellee ToBox is a distinct legal entity from Appellee To, and that Appellee ToBox offered Appellee To a position as an operator, which he affirmatively accepted. Additionally, Appellant claims that, even if the Non-Compete Covenant is ambiguous, it is for the trier of fact to resolve any ambiguity. Appellant maintains it met its burden of stating a meritorious claim against Appellees for breach of the Non-Compete Covenant. Appellant concludes this Court should reverse the trial court's December 30, 2013 order sustaining in part and overruling in part Appellees' preliminary objections, and reinstate Appellant's claims for breach of the Non-Compete Covenant. We disagree.

Rule 1028 of the Pennsylvania Rules of Civil Procedure provides, in relevant part:

Rule 1028. Preliminary Objections

(a) Preliminary objections may be filed by any party to any pleading and are limited to the following grounds:

* * *

(2) failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;

(3) insufficient specificity in a pleading;

(4) legal insufficiency of a pleading (demurrer);
Pa.R.C.P. 1028(a)(2)-(4) (emphasis added).

A trial court may also sustain preliminary objections in the nature of a demurrer if it “appears from the face of the complaint that recovery upon the facts alleged is not permitted as a matter of law.” [citation omitted]

Instantly, the trial court reasoned:

When considering preliminary objections, all material facts and all inferences set forth in the complaint must be admitted as true. [citation omitted] However, the court is not bound to accept as true any averments in the pleading that are in conflict with exhibits that are attached to that pleading. [citation omitted] Moreover, restrictive covenants are not favored in Pennsylvania. [citation omitted] “The failure of an employer to include specific provisions in an employment contract will not be judicially forgiven or corrected at the expense of the employee.” [citation omitted] [Here,] [t]he subject contract provides that [Appellee To] may not “solicit or accept a job offer from another men's or woman's retail clothing company.” [Appellant] alleges that [Appellee To] opened up his own men's retail clothing store. Thus, given the plain language of the [Agreement] when compared to the allegations of the complaint, [the trial] court finds that the breach of contract, as to the violation of the [Non-Compete Covenant], to be legally insufficient as [Appellee To] did not solicit or accept a job but instead opened up his own store . . . .

(Trial Court's Order, filed December 30, 2013, at 1 n. 1) (citation to record omitted). We accept the court's interpretation of the Non-Compete Covenant. An examination of this provision indicates the Non-Compete Covenant barred Appellee To from certain activities, but it did not preclude outright ownership of his own business. Therefore, the court did not abuse its discretion in sustaining in part and overruling in part Appellees' preliminary objections. [citation omitted]

In its second issue, Appellant claims Appellees' conduct has caused and will continue to cause Appellant to sustain irreparable harm because Appellees opened a business in Philadelphia that competes with Appellant, and Appellant will suffer permanent injury to its customer and supplier relationships. Appellant alleges greater injury will occur from refusing to grant a preliminary injunction than from granting it because the harm to Appellant's customer relationships is likely to be significant, whereas Appellee To's ability to earn a living will not be significantly harmed because he is free to work anywhere that does not violate the Non-Compete Covenant. Appellant contends an injunction will restore the parties to their status before the breach occurred. Appellant also asserts it is likely to prevail on the merits of the claim of breach of the Non-Compete Covenant because the parties entered into this provision of the Agreement in conjunction with Appellee To's employment with Appellant, the protections the Non-Compete Covenant offers Appellant are reasonably necessary to protect Appellant's legitimate business interests, and the Non-Compete Covenant is reasonably limited in duration and geographic scope. Appellant avers an injunction is also reasonably suited to stop Appellees' offending activity because there is no indication Appellees will refrain from violating the Non-Compete Covenant unless prohibited by court order. Appellant maintains there is no indication that entering an injunction against Appellees will harm the public interest. Appellant concludes this Court should reverse the trial court's January 14, 2014 order denying Appellant's petition for preliminary injunction. We disagree.
Our review of the court's denial of equitable relief in this case implicates the following legal principles:

[I]n general, appellate courts review a trial court order refusing or granting a preliminary injunction for an abuse of discretion. We have explained that this standard of review is to be applied within the realm of preliminary injunctions as follows:

[W]e recognize that on an appeal from the grant or denial of a preliminary injunction, we do not inquire into the merits of the controversy, but only examine the record to determine if there were any apparently reasonable grounds for the action of the court below. Only if it is plain that no grounds exist to support the [order] or that the rule of law relied upon was palpably erroneous or misapplied will we interfere with the decision of the [trial court].

[citation omitted] “This standard is highly deferential.” [citation omitted]

Pennsylvania Rule of Civil Procedure 1531 governs preliminary and special injunctions, in pertinent part, as follows:

Rule 1531. Special Relief. Injunctions

(a) A court shall issue a preliminary or special injunction only after written notice and hearing unless it appears to the satisfaction of the court that immediate and irreparable injury will be sustained before notice can be given or a hearing held, in which case the court may issue a preliminary or special injunction without a hearing or without notice. In determining whether a preliminary or special injunction should be granted and whether notice or a hearing should be required, the court may act on the basis of the averments of the pleadings or petition and may consider affidavits of parties or third persons or any other proof which the court may require.

Pa.R.C.P. 1531(a). “The purpose of a preliminary injunction is to prevent irreparable injury or gross injustice by preserving the status quo as it exists or as it previously existed before the acts complained of in the complaint.” [citation omitted] “Any preliminary injunction is an extraordinary, interim remedy that should not be issued unless the moving party's right to relief is clear and the wrong to be remedied is manifest.” Id.

A party seeking a preliminary injunction must establish: (1) the injunction is necessary to prevent immediate and irreparable harm; (2) greater injury will occur from refusing to grant the injunction than from granting it; (3) the injunction will restore the parties to the status quo as it existed before the alleged wrongful conduct; (4) the likelihood of success on the merits; (5) the injunction is reasonably designed to prevent the wrongful conduct; and (6) the injunction will not adversely affect the public interest. [citation omitted]

To satisfy the fourth element, a plaintiff must demonstrate the behavior it seeks to restrain is actionable, the wrong is manifest, and the right to relief is clear. [citation omitted] . . . “[T]he party seeking an injunction is not required to prove that he will prevail on his theory of liability, but only that there are substantial legal questions that the trial court must resolve to determine the rights of the parties.” [citation omitted]
Here, a review of the record reveals Appellant failed to establish the prerequisites for a preliminary injunction. [citation omitted] Appellant failed to provide any support for how it has suffered or will continue to suffer irreparable harm, or how its customer and supplier relationships will be more adversely affected, absent a preliminary injunction, or how Appellant's status quo has been disturbed following the opening of Appellee ToBox, or that substantial legal questions exist for the court to decide. [citation omitted] In fact, the court determined in its December 30, 2013 order that Appellees have not violated any term of the Non-Compete Covenant by opening their own business. [citation omitted] Therefore, Appellant failed to establish a sufficient basis to warrant a preliminary injunction. Furthermore, the court concluded:

[Appellant] is a large and distinguished retail business that has operated for more than seventy-five (75) years. As [Appellee] To is the sole owner of [Appellee] ToBox, a company that opened less than two months ago, [the trial] court finds that greater injury will occur from granting the injunction than from refusing it and thus [Appellant] has not satisfied its burden for injunctive relief.

(Trial Court's Opinion, filed January 14, 2014, at 4). Thus, the court had reasonable grounds to deny Appellant's petition for a preliminary injunction. [citation omitted] Accordingly, we affirm.

Order affirmed.

Judgment Entered.
The applicant is assigned to draft a legal memorandum to the assigning Managing Partner providing a legal analysis of two issues. The first issue is whether a non-compete agreement is enforceable against two former employees. The second issue asks applicants to decide whether our client can successfully obtain a preliminary injunction with notice and hearing to stop the former employees from working for a competing food manufacturing company.

**Formatting**

Following directions concerning formatting is an important skill of every lawyer. The applicant is expected to follow the directions provided concerning the format of the legal memorandum.

**Likelihood of Successfully Enforcing the Non-Compete Agreements**

In order for a covenant in restraint of trade to be enforceable the covenant must 1) relate to (be ancillary to) a contract for the sale of the good will of a business or to a contract of employment, 2) be supported by adequate consideration, and 3) be reasonably limited in both time and territory. *Kistler v. O’Brien.*

Restrictive covenants are not favored in the Commonwealth of Pennsylvania. *Boyd v. Tung To, et al.*

Even where a later formal document is contemplated, parties may bind themselves contractually prior to the execution of the written document through mutual manifestations of assent. *Kistler v. O’Brien.*

Evidence of mutual assent to employ and be employed which contains all the elements of a contract may be construed as a binding contract of employment though not reduced to writing. *Kistler v. O’Brien.*


While a restrictive covenant, in order to be valid need not appear in the initial contract, if it is agreed upon at some later time it must be supported by new consideration. *Kistler v. O’Brien.*

When the relationship of employer and employee is already established without a restrictive covenant, any agreement thereafter not to compete must be in the nature of a new contract based upon a new consideration. *Kistler v. O’Brien.*

Continuation of the employment relationship at the time the written contract was signed is not sufficient consideration for the covenant despite the fact that the employment relationship was terminable at the will of either party. *Kistler v. O’Brien.*

**Ben Anderson’s Non-Compete Agreement**

Although the terms of the non-compete agreement seem reasonably limited in both time and territory (1 year, and within 30 miles), the terms of the non-compete agreement signed by Ben Anderson are not enforceable under Pennsylvania law.
The facts indicate that Mr. Anderson had no written employment agreement with Tater; rather there was an oral agreement for employment describing Mr. Anderson’s wages, duties, and benefits. The facts further state that Mr. Idaho and Mr. Anderson never discussed the topic of a non-compete agreement before the day Mr. Anderson signed it. Idaho Affidavit.

“[E]vidence of mutual assent to employ and be employed which contains all the elements of a contract may be construed as a binding contract of employment though not reduced to writing.” Kistler v. O’Brien.

Here, there was a 25 year history of employment that evidenced all elements of a contract (e.g. – wage, duties, and benefits) that was in place before the non-compete agreement was signed by Mr. Anderson. Affidavit.

Although the non-compete agreement claims to be an addendum to Mr. Anderson’s employment agreement, Mr. Anderson was employed for 25 years without the non-compete agreement, and there are no facts to indicate that Mr. Anderson received any consideration in exchange for signing the non-compete agreement.

It also cannot be argued that Mr. Anderson received the benefit of continued employment as a result of signing the non-compete agreement, as the Pennsylvania Supreme Court held that continuation of the employment relationship at the time the written contract is signed is not sufficient consideration. Kistler v. O’Brien.

Mr. Anderson was employed by Tater for 25 years before he signed the non-compete agreement. Idaho Affidavit. The facts indicate that the topic of a non-compete agreement had never been discussed with him prior to the day he signed it. Idaho Affidavit. There is no evidence that he received any consideration provided in exchange for signing the non-compete agreement. Idaho Affidavit. Therefore, a non-compete agreement will not be enforceable against Mr. Anderson.

**Billy Benedict’s Non-Compete Agreement**

Tater will likely be able to enforce the non-compete agreement against Billy Benedict.

Mr. Benedict’s non-compete agreement relates directly to his contract for employment and, in fact, the non-compete agreement specifically states that it is an addendum to his employment contract. Non-Compete Agreement.

Mr. Idaho conditioned his offer of employment to Mr. Benedict upon Mr. Benedict signing the non-compete agreement. Idaho Affidavit.

Mr. Benedict signed his non-compete agreement on the first day of his employment, concurrently with the signing of his employment agreement. Idaho Affidavit and Non-Compete Agreement.

Although the facts do not reveal any extra consideration for signing the non-compete agreement, he would not have been employed by Tater if he did not sign the non-compete agreement. Idaho Affidavit and Non-Compete Agreement.
While evidence of mutual assent to employ and be employed that contains all the elements of a contract may be construed as a binding contract of employment although not reduced to writing, in the case of Mr. Benedict, his non-compete agreement was reduced to writing, and was a condition of his employment. *Idaho Affidavit and Non-Compete Agreement.*

Mr. Benedict’s non-compete agreement is also seemingly reasonably limited in both time and territory. The time limitation is only in place for one year, and the territory is limited to 30 miles.

Because Mr. Benedict’s non-compete agreement is directly related to his employment contract, he signed it as a condition of employment, he received consideration in the form of his job with Tater, and it was limited in time and territory, it is likely that Tater will be able to enforce the non-compete agreement against Mr. Benedict.

**Likelihood of Obtaining a Preliminary Injunction**  
**11 Points**

A court shall issue a preliminary or special injunction only after written notice and hearing unless it appears to the satisfaction of the court that immediate and irreparable injury will be sustained before notice can be given or a hearing held, in which case the court may issue a preliminary or special injunction without a hearing or without notice. In determining whether a preliminary or special injunction should be granted and whether notice or a hearing should be required, the court may act on the basis of the averments of the pleadings or petition and may consider affidavits of parties or third persons or any other proof which the court may require. *Pa. R.C.P. 1531.*

The purpose of a preliminary injunction is to prevent irreparable injury or gross injustice by preserving the status quo as it exists or as it previously existed before the acts complained of in the complaint. *Boyds v. Tung To, et al.*

Any preliminary injunction is an extraordinary, interim remedy that should not be issued unless the moving party's right to relief is clear and the wrong to be remedied is manifest. *Boyds v. Tung To, et al.*

A party seeking a preliminary injunction must establish: (1) the injunction is necessary to prevent immediate and irreparable harm; (2) greater injury will occur from refusing to grant the injunction than from granting it; (3) the injunction will restore the parties to the status quo as it existed before the alleged wrongful conduct; (4) the likelihood of success on the merits; (5) the injunction is reasonably designed to prevent the wrongful conduct; and (6) the injunction will not adversely affect the public interest. *Boyds v. Tung To, et al.*

**Injunction against Billy Benedict**

*Boyds v Tung To, et al.* requires first that a party seeking a preliminary injunction must establish that the injunction is necessary to prevent immediate and irreparable harm. Mr. Idaho’s affidavit states that Mr. Benedict was in possession of confidential and proprietary information about Tater’s processes and procedures, and that allowing him to work at a competitor would cause immediate and irreparable harm to Tater. *Idaho Affidavit.*
The confidential and proprietary information included identifying ingredients used in products; cooking times; cooking temperatures; the timing of adding ingredients, etc. Idaho Affidavit. If Mr. Benedict is allowed to work for another food manufacturing company, including Maters, he will give that company Tater’s proprietary information and enable that company to better compete with Tater, to the detriment of Tater’s business. Idaho Affidavit.

Mr. Idaho further affirmed that Tater’s best-selling product was the only one on the market, but that his biggest competitor, for whom Mr. Benedict went to work, was trying to replicate the recipe and market a competing product. Idaho Affidavit. Up until now, no other company produced such a product. Thus, allowing Mr. Benedict to assist Maters in the production of such a competing product could result in immediate and irreparable harm via the development of a product that would directly compete with Tater’s best-selling product.

Mr. Benedict may possess confidential and proprietary information, but he does not know the secret recipe for Tater’s best-selling product. Although he would not be able to provide Maters with the secret recipe, he would be able to share confidential and proprietary information gained while employed by Tater to assist Maters to better compete with Tater, to the detriment of Tater’s business. A preliminary injunction would prevent him from putting into practice while working for Maters the confidential and proprietary information he gained working at Tater, to the detriment of Tater.

The second required element that a party must prove when seeking a preliminary injunction is that greater injury will occur from refusing to grant the injunction than from granting it. Boyds v Tung To, et al.

Although it can be inferred that the harm to Tater in allowing Mr. Benedict to work for Maters is that he will give them confidential and proprietary information about Tater’s product lines, including Tater’s best-selling product, it is not clear from the known facts that a greater injury will occur from refusing to grant the injunction than from granting it. Although Mr. Idaho’s Affidavit states that Mr. Benedict possesses confidential and proprietary information, we do not know what aspect of Tater’s business that pertains to. Mr. Benedict has been able to guess 50 percent of the secret recipe, but the facts state that his knowledge came from eating the product, not from his employment at Tater.

Further, Tater is a successful company that has been in business for more than 25 years. Although Mr. Idaho claims the information Mr. Benedict possesses will enable Maters to better compete with Tater to Tater’s detriment, it is uncertain what actual harm might come from refusing to grant the preliminary injunction; however, in granting the injunction, we know for certain that Mr. Benedict would not be allowed to work at Maters where he could share his proprietary knowledge of Tater’s products; although the President of Maters is a cousin of Mr. Benedict and he may share the information without being employed by Maters. Thus, it is unclear whether greater injury will occur from refusing to grant the injunction than from granting it.

The third required element that a party must prove when seeking a preliminary injunction is that the injunction will restore the parties to the status quo as it existed before the alleged wrongful conduct. Boyds v Tung To, et al.

Prior to Mr. Benedict’s alleged wrongful conduct – e.g. – going to work for Maters – Tater was a highly successful food manufacturing business with 25 plus years of experience manufacturing food products, based in large part to its secret recipe. Granting the injunction will help prevent Mr. Benedict from using proprietary information learned while working for Tater to assist Maters in competing with Tater.
Also, prior to the alleged wrongful conduct – e.g. – going to work for Maters - Mr. Benedict had resigned from Tater, but was still subject to the non-compete agreement. Granting the preliminary injunction will restore Mr. Benedict to his pre-wrongful conduct status, and will prevent him from using proprietary information gained at Tater for the benefit of Maters.

The fourth element that must be proved by a party seeking a preliminary injunction is the likelihood of success on the merits. *Boyds v Tung To, et al.*

To satisfy the fourth element required to obtain a preliminary injunction, a plaintiff must demonstrate the behavior it seeks to restrain is actionable, the wrong is manifest, and the right to relief is clear. *Boyds v. Tung To, et al.*

The party seeking an injunction is not required to prove that he will prevail on his theory of liability, but only that there are substantial legal questions that the trial court must resolve to determine the rights of the parties. *Boyds v. Tung To, et al.*

As the analysis above indicates, it is likely that Mr. Benedict’s non-compete agreement can be enforced against him. Thus, it is likely that Tater would prevail on the merits on the question of whether the non-compete agreement is enforceable.

The fifth element that must be proved by a party seeking a preliminary injunction is that the injunction is reasonably designed to prevent the wrongful conduct. *Boyds v Tung To, et al.*

Here, it seems reasonable to conclude that an injunction preventing Mr. Benedict from working for Maters is reasonably designed to prevent him from competing with Tater by working for a competitor.

The sixth and final element that must be proved by a party seeking a preliminary injunction is that the injunction will not adversely affect the public interest.

The public interest would be served by enforcing non-compete agreements under these circumstances. This non-compete was signed as a condition of employment, the employee received consideration, and the agreement is limited in time and territory. Such an agreement would discourage company employees from seeking employment with a competing company in order to gain inside information, which they could then take to a competitor, in this case a business owned by the relative of the employee accused of violating the non-compete agreement. Thus, it appears that the granting of a preliminary injunction would not adversely affect the public interest.

As a result of the foregoing, it seems likely that a court will issue a preliminary injunction to stop Mr. Benedict from working at Maters; however, it is possible the court would not issue the preliminary injunction.
**Injunction against Ben Anderson**

To satisfy the fourth element required to obtain a preliminary injunction, a plaintiff must demonstrate the behavior it seeks to restrain is actionable, the wrong is manifest, and the right to relief is clear. *Boyds v. Tung To, et al.*

The party seeking an injunction is not required to prove that he will prevail on his theory of liability, but only that there are substantial legal questions that the trial court must resolve to determine the rights of the parties. *Boyds v. Tung To, et al.*

As stated above, it is not likely that the non-compete agreement will be enforceable against Ben Anderson. Because Mr. Idaho wishes to seek an injunction against Mr. Anderson upon the basis of the non-compete agreement, it is likely that Mr. Idaho will not be successful on the merits of his claim against Mr. Anderson.

The likelihood of success on the merits is a key requirement that a plaintiff must prove in establishing a proper basis for a preliminary injunction. *Boyds v Tung To, et al.* Thus, because Tater will likely fail in this regard, it will not be successful in its request for a preliminary injunction against Mr. Anderson.