NEW YORK STATE BAR EXAMINATION
FEBRUARY 2000 QUESTIONS AND ANSWERS

Question-One
Right Mix (RM) is a general partnership which owns and operates several concrete mixing plants in New York. RM is organized under the laws of state X, with its principal place of business in New York. The partners of RM are Concrete Products, Inc. (CP), a corporation organized under the laws of state X, with its principal place of business in state X, and Bev, an investor, who resides in state Y. Abe, who resides in New York, is president and sole shareholder of CP.

In 1992, RM decided to construct a new concrete mixing plant in Albany, New York. Abe, on behalf of RM, began negotiations with Dave, the owner of a nearby stone quarry in Saratoga County, to purchase crushed stone for the new plant. Dave told Abe that, because of the quantities of stone RM required, a large investment would be needed to purchase a new stone crusher, trucks and other necessary equipment. Abe told Dave, "We will give you a long-term contract and you will easily be able to recover your investment." Abe then presented Dave with a proposed written agreement which provided:

For a period of fifteen years beginning January 1, 1993, RM will buy and Dave will sell 100,000 tons of crushed stone in each year of the term of this agreement, FOB RM's plant. The price per ton will be $10 in 1993, with an increase of one percent (1%) in each successive year.

Other terms of the proposed written agreement specified the size and quality of stone required, and also provided:

RM may terminate this agreement for any reason on sixty (60) days written notice to Dave.

When Dave expressed concern about the termination provision, Abe said, "Don't worry, we are here for the long haul. That's some language our lawyer insists on, just in case." RM and Dave then executed the agreement. Thereafter, Dave invested over $500,000 in a stone crusher, trucks and other equipment.

During the years 1993 through 1998, Dave delivered crushed stone to RM's plant and was paid the price specified. In none of those years, however, did Dave meet the 100,000 ton requirement, averaging only 70,000 tons per year.

In 1999, RM entered into an agreement to sell its concrete business for a very substantial profit. The buyer informed RM that it would be closing the Albany plant and on November 1, 1999, RM sent Dave a written notice terminating their agreement effective January 1, 2000. Dave has no other available market for his crushed stone.

Dave, a resident of Saratoga County, duly commenced an action in Supreme Court, Saratoga County, against RM, alleging breach of the agreement and that he was fraudulently induced into entering into the agreement. The complaint seeks damages of $1,000,000.

You represent RM, and your client wants to know:

1. Did RM have the right to terminate its agreement with Dave?

2. Does Dave have a valid claim against RM for fraudulent inducement?

3. Does RM have a valid claim against Dave for Dave's failure to deliver the required quantities of stone?

4. Can RM remove the pending action to U.S. District Court?

Answer to Question One

1. Right Mix (RM) had the right to terminate its agreement with Dave. The issue is whether RM and Dave entered into a valid and enforceable agreement that included a termination clause.

Since the agreement involves the sale of stone, a good, it is governed by the UCC. It should be noted that the partners of a partnership (which may include a non-human entity such as a corporation) are considered agents of the partnership. Thus in New York, the partners, as agents, may bind the partnership and the partnership may be liable for the acts of its agents.

In addition, a director or officer of a corporation may bind a corporation where the officer acts with actual or apparent authority.

Here, RM is composed of Concrete Products, Inc. (CP) and Bev as its partners. Under New York partnership law, this is a valid partnership. Thus, both partners can bind the corporation. In addition, Abe as the president of CP, has authority to enter into binding agreements within the scope of CP's business. Thus, Abe may validly enter an agreement binding RM concerning concrete.

An agreement under the UCC is valid and enforceable if it contains sufficient particularity as to price and quantity and if over $500, it must be in writing. These requirements are satisfied here.

Under the UCC, contracts must be mutual and supported by consideration. Here, Dave and Abe entered a valid written contract for a term of 15 years with a specific quantity and price. The contract also included a termination clause allowing only one side the right to terminate. New York has allowed contracts with one-sided termination clauses where they represent a bargained-for exchange. Here, although Dave expressed some uncertainty, he executed the agreement with RM.

Accordingly, the termination clause is valid and RM had the right to terminate the contract in good faith and in compliance with the written notification provision, which was due here. Notably, the parol evidence rule bars admission of statements made prior to, or contemporaneous with, a written agreement. Dave's statements would not be considered in construing the validity of the contract.

2. Dave does not have a claim against RM for fraudulent inducement. The issue is whether RM (through its agent Abe) fraudulently induced Dave to enter into the contract.

Fraudulent Inducement

In New York, the elements of fraudulent inducement are: 1) material misrepresentation made by a party and known to be false; 2) with the intent to cause inducement/reliance; and 3) actual inducement causing another party to enter an agreement. Since this action goes to fraudulent execution, the statements, although parole evidence are admissible.

Here, RM, through its agent Abe, reassured Dave that the termination clause was "some language" his lawyer insisted upon and that they were there "for the long haul". At the time the statements were made, there is no indication that Abe or RM intended to breach the contract or terminate prior to the 15 year term. In addition, RM honored the contract for seven years and terminated in the eighth after giving proper notice. The purpose of termination was a good faith decision based on the sale of RM's concrete business and closure of its Albany plant.

Accordingly, Dave cannot prove the elements of fraudulent inducement and his claim will likely fail. Notably, Dave may recover in quantum meruit for a portion of his $500,000 investment which RM should have known of because the agreement to stay in for 15 years caused Dave's substantive reliance and investment.

3. RM does not have a valid claim against Dave for Dave's failure to deliver the required quantities of stone. The issue is whether a party who accepts an amount not in compliance with an agreement waives the right to reject or revoke.

As noted above, RM and Dave entered into a valid and enforceable contract governed by the terms of the writing. Although the agreement specifies that Dave

would deliver 100,000 tons per year for the 15 year term of the contract, during 1993-1998 Dave delivered an average of 70,000 tons.

Waiver

At no point did RM object to the quantity, or refuse to accept the amount, or demand an additional amount. Rather RM accepted Dave's performance. Accordingly, RM waived any opportunity to object to the amount by accepting the lesser quantity and establishing a pattern of performance.

It should be noted that this agreement may be construed as an installment contract whereby each year's installment constituted a separate agreement. Under such contracts, the UCC provides that the perfect tender rule does not apply and a buyer may only revoke if the delivery is substantially impaired. Here, the impairment, if any, was minor and RM waived objecting. Therefore, RM has no claim for the failure to deliver the required amount.

4. RM can remove the action to the U.S. District Court. The issue is whether a proper basis for federal jurisdiction exists.

Federal courts are courts of limited jurisdiction and may only entertain actions based on 1) federal question; or 2) diversity jurisdiction. This limitation also applies to actions removed to federal court because a federal court only has jurisdiction on removal if the action could have properly been brought in the court.

Here, there is no federal question. In order to satisfy the requirements for diversity a claim must 1) involve completely diverse partners (from different states) and 2) the amount in controversy must exceed $75,000. For diversity jurisdiction, a partnership is deemed to be a domiciliary of the state of its partners. A corporation is deemed to be a domiciliary of its principal place of business or place of incorporation.

Here, RM partners are Bev (domiciliary of state Y) and CP (incorporated and principle place of business in state X). Dave is a domiciliary of New York. Accordingly, complete diversity exists and the $1 million satisfies the amount in controversy.

It should be noted that removal is not possible when a defendant resides in the state where removal is sought from. This does not apply here.

Answer to Question One
1. Right Mix's (RM) right to terminate agreement with Dave.

RM did have the right to terminate its agreement with Dave. The issue is whether the termination provision of the contact is enforceable.

A contract, and the terms therein, is enforceable if there is a valid offer and acceptance, and it has been supported by consideration, defined as bargained-for legal detriment or benefit. A contract is void if it is unconscionable, meaning that it is oppressive or unfair in its terms or is the product of unfair surprise.

RM's contract with Dave is enforceable in its entirety. There was a valid offer because Abe, acting as RM's agent, made a clear written proposal in 1992. There was a valid acceptance because Dave signed the agreement. Although a counteroffer will kill an offer, bargaining and questioning does not constitute a counteroffer. Dave did not kill the offer by expressing concern about the termination provision because he was merely bargaining and questioning Abe about the offer.

The agreement was supported by consideration because RM was obligated to buy, and Dave was obligated to sell, the specified quantity of crushed stone. Although illusory promises are unenforceable because they are not supported by consideration, RM's promise to buy was not illusory because the agreement stated the amount RM would buy (100,000 tons per year) and the price at which RM would buy it ($10/ton in 1993, with 1% increase each successive year).

Separate consideration was not required for the termination provision. As long as a contract is supported by consideration, all the terms therein are enforceable. The contract also is enforceable because it satisfies the Statute of Frauds. When a contract is for the sale of goods over $500, the contract must be in writing, must contain a quantity term, and must be signed by the party against whom it is enforced. This contract satisfied the Statue of Frauds because it is in writing, it specifies 10,000 tons as quantity per year and it is signed by Dave.

The termination provision is not unconscionable because it is not oppressive to Dave or the product of unfair surprise, Dave was able to discuss the term with Abe and agreed to it after Abe's assurances. Although Dave had to invest in new, expensive equipment, the termination provision is not oppressive because it gives Dave ample written notice of termination.

It should be noted that Abe had authority to enter the contract on RM's behalf. Partners may enter contracts on behalf of a partnership. Abe, as sole shareholder (and owner) of CP, may act on CP's behalf. CP, as a general partner, may also enter contracts on RM's behalf.

2. Dave's claim for fraudulent inducement.

Dave does not have a valid claim for fraudulent inducement but he may have a valid claim for damages under a promissory estoppel theory. The issue is what a plaintiff must demonstrate to satisfy the elements of a claim for fraudulent inducement.

To prove fraudulent inducement, a plaintiff must show: 1) that defendant made an affirmative representation; 2) that Dave knew to be false; 3) in order to induce plaintiff to act; 4) plaintiff did act in reasonable reliance on Dave's representation and 5) plaintiff suffered damages as a result. Here, Dave satisfies element five because he has purchased expensive equipment and has no market for the stone. He satisfies element four because he reasonably relied on Abe's statements that he would "easily be able to recover" his investment and that "we are here for the long haul". Dave satisfied element three because Abe made the above quoted statements to induce Dave to sign the proposed written agreement.

However, Dave is probably not able to prove elements one or two. Although Abe did make an affirmative representation that "we (RM) are here for the long haul", it is unlikely that he knew that statement to be false, because he made that statement in 1992, and RM did not agree to sell its business until 1999. Moreover, RM did not decide to terminate the agreement with Dave, the buyer did. Therefore, it is unlikely that Dave will be able to show that Abe purposefully made a false statement in order to convince Dave to sign the contract.

However, Dave may pursue a promissory estoppel theory. To recover, Dave would have to show that: 1) Abe made a promise; 2) Abe reasonably foresaw that Dave would rely on it; 3) Dave did rely on it, and 4) Abe reneged on his promise. Here, Abe did promise Dave and could reasonably foresee reliance because he knew of the necessary expenditures when he made his promises. Dave did rely on the promises and now Abe (RM) has reneged.

3. RM's claim for failure to deliver. RM does not have a valid claim for Dave's failure to deliver the required quantities of stone. The issues are 1) whether Dave breached the contact and 2) whether RM waived any objection it might have had.

Generally, a sale of goods contract requires perfect tender. However, the perfect tender rule does not apply to installment contracts. In an installment contract, the seller is obligated to substantially comply with the contract requirements with each installment being judged separately. If a buyer receives a non-conforming installment, it may accept the goods or reject the goods and sue for the breach.

RM and Dave had an installment contract because performance and payment were specified on an annual bases, therefore each year should be seen as one installment. Although it is close, Dave substantially complied with the installment by sending 70,000 tons instead of the contractual 100, 000 tons. Therefore, Dave did not breach the contract because he substantially complied with the installment terms.

Furthermore, RM waived any objection. When a contract contains express conditions, they must be strictly complied with. However, the person whom the conditions benefit may waive that protection. To the extent the 100,000 tons is a performance condition (i.e., a condition for RM's obligation to pay), it is a condition coupled with a covenant because it is in Dave's control whether the condition will be satisfied. However, by not objecting in each of 1993-1998, RM has waived any objection it would have had to Dave's failure to satisfy the condition.

4. Removal

RM can remove to District Court. The issue is under what circumstances a case filed in state court may be removed.

A case may be removed if it could originally have been filed in federal court. Further, if there is diversity jurisdiction, a defendant cannot remove if the case was filed in a state where Dave is a citizen.

Here, the case can be removed because it could have been filed in District Court originally under diversity jurisdiction. The amount in controversy is adequate because Dave is seeking $100,000 which is above $75,000. Furthermore, there is complete diversity.

Dave is a citizen of New York because he is domiciled there. RM - a general partnership has the citizenship of its general partners. Its partners are CP and Bev. Bev's citizenship is with state Y because she is domiciled there. CP's citizenship, a corporation, is the citizenship of the state where it is incorporated and where it has its principal place of business. CP is a citizen of state X because it is incorporated and has its principal place of business in state X.

Thus there is complete diversity because Dave (New York State) is suing RM (its general partners from state X and state Y) for $100,000. The fact that RM has its principal place of business in New York is of no consequence. RM may remove.

Question-Two

Bert was sitting in a car with Pratt when Jack approached the car, pointed a gun at Bert and fired, mistakenly killing Pratt. Jack attempted to fire again at Bert, but his gun jammed and would not fire. Jack jumped into his car, put the gun into the glove compartment, and sped off.

Within minutes, a police radio broadcast reported the shooting and described an older model dark sedan which had been seen speeding from the scene. Minutes later, while driving nearby, Officer Dent saw Jack's car, which generally met the broadcast description. When Dent put on his siren and motioned Jack to stop, Jack immediately complied. Dent ordered Jack out of the car and searched him for weapons. Dent's partner, Officer Cobb, then searched Jack's car and found the loaded gun in the glove compartment. Jack was immediately arrested for criminal possession of a weapon. Forensic tests later confirmed that Jack's gun was the weapon used to kill Pratt.

Jack was indicted for second degree murder for causing the death of Pratt and for the attempted second degree murder of Bert. Jack's attorney moved to suppress the gun, claiming that the police acted unlawfully in both stopping and searching Jack's car. At the suppression hearing, Dent testified that he stopped Jack because he believed, based on the broadcast, that it was Jack's car that had been seen leaving the scene of the shooting. Dent and Cobb both testified that they were concerned for their safety when they stopped Jack, suspecting that he was armed and had been involved in the shooting. They also acknowledged that Jack was out of the car at the time it was searched and that the gun was found in the glove compartment. The court (1) denied each branch of the motion.

At the trial, Jack testified that on the day of the shooting he arrived home and found his elderly father, Ted, bruised and bleeding. Ted told him that Bert had beaten and robbed him. Jack stated that he grabbed a loaded pistol and left the house looking for Bert, planning to kill him. Jack further stated that he was extremely disturbed by the attack on his father, and acted in rage in seeking out Bert. Jack stated that he had no intention of killing Pratt, whom he did not know, and that the only thing he remembered was his gun jamming.

At the conclusion of the proof, Jack's attorney requested that the court dismiss the charge of the murder of Pratt, on the ground that there was no proof that Jack intended to kill Pratt. The court (2) denied the motion.

Jack's attorney also moved to dismiss the charge of the attempted murder of Bert on the ground that Jack could not have killed Bert due to the malfunctioning of his gun. The court (3) granted the motion.

On due notice to the prosecution, Jack's attorney asked the court to charge the jury that, if they found that Jack acted under the influence of extreme emotional disturbance, he could not be convicted of second degree murder, but could only be found guilty of the lesser included offense of first degree manslaughter. The court instructed the jury as requested by Jack. The court further instructed the jury that the prosecution had the burden of proving beyond a reasonable doubt that Jack did not act out of extreme emotional disturbance at the time of the shooting.

(a) Were the numbered rulings correct?

(b) Were the court's instructions to the jury correct?

Answer to Question Two
A. 1. Denial of motion to suppress the gun

The court improperly denied Jack's motion to suppress the gun. The issues are whether the stopping of the car and the search of the car violated Jack's 4th Amendment rights against unreasonable searches and seizures.

In New York, the police have a "sliding scale of police authority" to detain people while investigating a crime. Here, the police stopped Jack's car, they could briefly detain Jack in this way if they had a "reasonable and articulable suspicion" that Jack had committed, was committing, or is about to commit a crime. The reports of a car like Jack's speeding away from the crime scene gave the police such a reasonable suspicion. Further, once stopped, the police had a right to search Jack's "wingspan", or the areas into which Jack could reach to grab a weapon, if they had reason to believe he was armed. This would generally include most areas of the passenger compartment, but not the trunk. Again, based on the radio reports, the police had reason to believe Jack may be armed. Out of a concern for their safety, the police had the right to order Jack out of the car to conduct a "protective frisk" for weapons (again, with the reasonable belief he was armed), and if based on the patdown of his outer clothing they felt something they reasonably believed to be a weapon, they could reach in and remove it. However, once Jack was out of the car, the police could not open up closed containers in the passenger compartment to search for weapons, and they were therefore not entitled to open Jack's glove compartment to search for the gun. This search went beyond the scope of the polices' authority in conducting this type of search and violated Jack's 4th Amendment rights. The gun should be suppressed.

2. Denial of motion to dismiss murder charge against Pratt

The issue here is whether Jack's intent to kill Bert could be "transferred" to Pratt. The court properly denied Jack's motion to dismiss this charge. The doctrine of transferred intent provides that if one intends to kill one person, and mistakenly kills another instead, the intent to kill the first person is transferred to the act towards the actual victim. Here, Jack is charged with second degree murder of Pratt (intentional murder - the elements are that, with the intent to cause the death of another person, the defendant causes the death of that person). If the jury finds that Jack did intend to kill Bert, that intent will be transferred to his act killing Pratt, and Jack can be convicted of the intentional murder of Pratt.

3. Dismissal of attempted murder charge

The court improperly dismissed the attempted murder charge. A person is guilty of attempt when, with intent to commit a crime, he takes a "substantial step" toward committing that crime - a step "beyond mere preparation". (The crime of attempted murder merges with the completed crime, so if Jack had killed Bert, he could not be convicted of murder and attempted murder.) Here, Jack took a substantial step toward killing Bert - he aimed a loaded gun at Bert and pulled the trigger. The fact that Jack was unable to complete the crime due to a factual impossibility - the gun jamming - does not absolve him of responsibility to the crime of attempted murder. Further, Jack could only raise the affirmative defense of abandonment if he 1) renounced and 2) avoided the completion of the crime. Here, he technically avoided committing the crime because his gun did not work, but he clearly did not renounce. This affirmative defense would not be available to Jack. This motion should have been denied.

B. Jury instructions

The court's instructions to the jury were correct in part and incorrect in part. The issues are whether Jack was entitled to a charge of the lesser included crime of manslaughter and whether "extreme emotional disturbance" is a defense or an affirmative defense.

The lesser included crime of first degree manslaughter in this case involves a killing "in the heat of passion" or "under extreme emotional disturbance". This exists when the defendant kills due to 1) circumstances that would provoke a reasonable person, 2) the defendant was in fact provoked, 3) there was little time between the provocation and the killing such that a reasonable person would not be able to cool off, and 4) defendant in fact did not cool off. The facts indicate that Bert had beaten up Jack's elderly father; we do not know how much time had elapsed since the provocation when Jack found Bert. However, the issues as to whether the provocation was reasonable, whether Jack was in fact provoked as he claims, etc. are questions of fact for the jury. The jury may consider these issues in deciding whether to convict Jack of second degree murder or first degree manslaughter (or neither). This part of the charge was proper.

However, the instruction as to burden of proof was incorrect. Extreme emotional disturbance is an affirmative defense. Therefore, unlike a defense (i.e., justification) required to be proved by the prosecution beyond a reasonable doubt, the defense must prove by a fair preponderance of the evidence that Jack was suffering from extreme emotional disturbance at the time of the killing. Therefore, this part of the charge was improper.

Question-Three
Wanda, a wealthy heiress, began dating Harry in 1983. Wanda wanted a big family and spoke frequently about it to Harry. Harry repeatedly told Wanda that he was also looking forward to having several children. In 1984, Harry asked Wanda to marry him. In accepting his proposal, Wanda told Harry that she wanted a prenuptial agreement.

Attorneys for Harry and Wanda negotiated a prenuptial agreement. Each party made full and fair financial disclosure. The agreement provided, among other things, that any real property purchased during their marriage, regardless of the manner in which title was held, would become the sole property of Wanda in the event of a divorce or an annulment. On February 10, 1985, Wanda duly signed and acknowledged the agreement. Two days later Harry signed the agreement, but the acknowledgment of Harry's signature did not occur until July 1985. Harry and Wanda were married in June 1985.

In 1986, Harry and Wanda purchased Blackacre, a summer cabin in a remote part of upstate New York, as tenants by the entirety. Wanda planned to substantially renovate the property for use after she and Harry had children but, in fact, they never used or visited the property.

Tom, a resident of Warren County, believed that Blackacre was part of the residuary estate that he had inherited from his father. Starting in 1987, each July 1st, Tom took his family to the cabin for two months. Tom and his wife did not use the property during the rest of the year, but each fall, Tom had the property posted with signs stating "No Trespassing", to discourage sportsmen from hunting on the land.

In 1995, Tom conveyed his interest in Blackacre to his sister, Theresa, by quitclaim deed. The deed was duly recorded, and Theresa began using Blackacre for one month every year during the summer. She did not come to the property at any other time, but in the fall of 1996, she had the windows on the cabin changed, and in the spring of 1997, she hired a contractor who erected a fence and gate on one of the boundaries of the property.

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In the years after their marriage, Wanda and Harry failed to have children. On several occasions, Wanda sought the assistance of fertility counselors, and she was assured that she was capable of bearing children. In September 1998, Wanda discovered a medical report revealing that Harry had a vasectomy in 1982, which prevented him from fathering children. Wanda confronted Harry with the report, and Harry admitted that it was true and that he never really intended to have children. Wanda continued to cohabit with Harry for another month, at which point she consulted an attorney.

In October 1998, Wanda duly commenced an action against Harry. The complaint recited the foregoing facts and sought an annulment and the division of their marital property pursuant to their written agreement. Harry duly moved to dismiss Wanda's complaint on the ground that it failed to state a cause of action. The court (1) denied the motion. Harry interposed an answer which admitted the foregoing pertinent facts, but asserted the affirmative defense of their cohabitation after September 1998. Harry's answer also challenged the validity of their written agreement on the ground that his signature was not acknowledged until after the wedding.

Wanda moved for summary judgment on her cause of action for an annulment. The court (2) granted Wanda's motion. The court also (3) held that their written agreement was valid despite the fact that Harry's signature was not acknowledged until after the wedding, and then awarded Blackacre to Wanda.

In November 1998, Theresa learned that Wanda claimed to be the owner of Blackacre. Shortly thereafter, Theresa duly commenced an action against Wanda to quiet title to Blackacre and to have Theresa declared the title owner. After issue was joined, Wanda moved for summary judgment on the ground that the facts set forth above are insufficient, as a matter of law, to vest title in Theresa. The court (4) granted Wanda's motion for summary judgment.

Were the numbered rulings correct?

Answer to Question Three
1. The court was correct to deny Harry's motion.

An action for annulment can be made in few instances. Infancy of a spouse or incompetency of a spouse are grounds. Infancy can only be brought forth by the infant spouse, and incompetency is only available if the competent spouse was not aware of the other spouse's incompetency before or at any time during the marriage.

Fraud is a viable ground for annulment. It requires a spouse to knowingly induce the other person into marriage and had the person been made aware of the spouse's fraudulent misrepresentations, she would not have gotten married. There is no grounds for fraud if a spouse simply changes his mind after the marriage. He must have knowingly put forth representations with no intention of their truthfulness.

Here, Wanda clearly has grounds for annulment based on fraud by Harry. She detrimentally relied on Harry's representations of wanting to have children and married him. She eventually learned of his inability and Harry admitted that he never intended to have children. It is clear that Harry fraudulently purported his desires for children in hopes that Wanda would marry him. This is grounds for annulment of the marriage. Wanda has a cause of action.

2. The court was not correct in granting Wanda's motion.

When a spouse discovers the other spouse's fraud, that is the spouse learns she was fraudulently induced into marriage by relying on the other spouse's misrepresentation, she must immediately retreat from the marriage. Continued cohabitation upon discovery of the fraud is a defense to an annulment. It can be viewed as a condonation of the spouse's fraud and the court will not allow the annulment action to proceed.

Here, Harry is correct in asserting the defense of cohabitation for the one month after discovery of his fraud. The court should not have granted summary judgment and Wanda's action for annulment cannot be sustained because of her cohabitation with Harry.

3. The court was not correct.

Prenuptial agreements are valid contractual agreements that are executed prior to the actual marriage. They can dispose of marital property and make any provisions as long as both marital parties agree, execute and acknowledge the agreement. An agreement executed after the marriage is no longer considered prenuptial and cannot be held valid.

Here, Wanda acknowledged the prenuptial prior to the marriage, but Harry did not acknowledge it until after marriage began. While prenuptial agreements do not require both parties to acknowledge the agreement simultaneously, it is required that the agreement be acknowledged prior to the marriage. Harry and Wanda did not both acknowledge prior to the marriage. Therefore, the agreement is invalid and the marital property will be distributed according to the New York laws of equitable distribution.

4. The court was not correct in granting Wanda's motion.

Adverse possession of another owner's property requires that the adverse possessor be in hostile, open and notorious possession of the property for the statutory period of ten years.

Evidence of adverse possession include express representations by the possessor that the property is his; uninterrupted and continuous possession for the statutory time period; possessor can make improvements on land or keep others off the property because it is his.

Adverse possession also requires that the true owner fail to remove the adverse possessor during the statutory time period. Here, Tom believed in 1987 that the property was his. Tom continuously inhabited the summer cabin each year until 1995. He warded off trespassers and conveyed the land to his sister. This is evidence of adverse possession. Also, during no time did Harry or Wanda use or visit the cabin.

Tom's conveyance did not interrupt the adverse possession because his sister automatically continued the possession. Conveyance or assignment of adverse possession is allowed as long as the adverse possession continued without interruption.

Theresa also acted in conformity with adverse possessor. She used the cabin each summer. She made improvements and erected a fence for the boundaries. Theresa clearly satisfied adverse possession requirements and title vested in 1997, ten years from when her brother began.

Wanda has no valid defenses against Theresa's acquisition of title. She did not visit the property or ever attempt to eject Tom or Theresa. She cannot use the defense that the adverse possession was not continuous. Since it was a summer cabin, Tom and then Theresa's continuous use of the cabin for each summer for ten years will qualify as continuous and uninterrupted.

The court was wrong to grant Wanda's motion for summary judgment. There is clearly evidence of adverse possession and as such there are litigious and material issues to be tried in court.

Answer to Question-Three

1. The first ruling is correct. The issue is whether Harry's alleged misrepresentations constitute a valid ground for annulment of the marriage. To get an annulment, a party (spouse) must establish a valid ground. One such ground is lack of mental capacity, under which a party may seek an annulment if the other spouse made misrepresentations prior to their marriage which go to an essential and vital part of the marriage. Sex and procreation constitute essential and vital parts of the marriage. Since Harry repeatedly told Wanda that he was also looking forward to having several children, when he in fact had had a vasectomy previously, he has made a misrepresentation about an essential element of the marriage. A motion to dismiss for failure to state a cause of action directs that taking all of the plaintiff's allegations as true, she fails to state any grounds upon which relief can be granted. In this instance, Wanda's complaint does state lack of mental capacity, a ground which entitles one to an annulment. Therefore, the court was correct to dismiss Harry's motion. The first ruling is correct.

2. The second ruling was incorrect. The issue is whether Wanda's cohabitation with Harry after learning of the misrepresentation constitutes a waiver. When the ground for annulment makes the marriage voidable versus outright void, a party may be deemed to have waived that ground if she continues to cohabitate after discovering the facts which underlie the ground. In this instance, Wanda's claim of lack of mental capacity renders the marriage voidable (versus, for example, incest or bigamy). Therefore, because she continued to cohabitate with Harry after learning of his misrepresentations about his ability to procreate, her behavior constituted a waiver. A motion for summary judgment argues that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Since Harry has raised a valid defense of waiver by cohabitation, the court erred in granting Wanda's motion. Since Harry was actually entitled to judgment in his favor, the court should have searched the record and decided instead for Harry, the non-movant. Therefore, the second ruling is incorrect.

3. The third ruling is correct. The issue is whether a prenuptial agreement must be acknowledged, and if so, at what time. Courts will uphold premarital or prenuptial agreements if they are freely made, signed and in writing, and do not set a time for divorce or so deprive one spouse of support that they may be in danger of becoming a public charge. If these agreements are made before the marriage, than becoming married serves as a condition to its enforcement. The agreements may be made at any time during the marriage as well. In this instance, the fact that Harry's signature was not acknowledged until after the wedding is irrelevant and the agreement is valid as is. Therefore, the third ruling is correct.

4. The fourth ruling was incorrect. The issue is whether Theresa has satisfied the elements of adverse possession. One may acquire property of another by continuous, open, hostile and actual use of the property for ten years. In terms of actual use, the key is that the adverse possessor make use of the land in a way that would put it's owner on notice that it was being possessed. In this instance, Theresa satisfies all of the elements. First, she has met the ten year statutory requirement. While Tom originally adversely possessed the property, adverse possessors may tack their time if the parties have a non-hostile nexus, meaning they conveyed the property rather than ousted the other. Here, Tom conveyed his interest beginning in July 1987 to his sister Theresa. By tacking their time in possession totaling over ten years, Theresa satisfies this element. Further, Tom and Theresa have held it continuously throughout this time without interruption and without Wanda's permission. As to the actual use element, while Tom and Theresa only actually used the land for one to two months out of the year, their measures such as the "no trespassing" signs and erecting a fence would have put Wanda on notice of their

possession. By satisfying all of the elements for adverse possession, Theresa should receive title to Blackacre under law. Therefore, Wanda's motion for summary judgment should have been denied or decided in Theresa's favor. The fourth ruling is therefore incorrect.

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Questions & Sample Answers

Question Four

In May 1999, Pearl, age 10, a student at Coe public school, joined her class on a bus trip to a flower fair at a local park. Two teachers and four aides went along to supervise the students, but the students were allowed to walk through the park on their own and to participate in various pre-planned activities.

Upon arriving at the park, Pearl's teacher told Pearl and her class that they were all to meet at the park entrance at 2 p.m. to return to school together. Shortly before noon, Pearl's teacher gave Pearl and one of her friends permission to go across the street from the park to have lunch at a nearby fast-food restaurant. At 2:00 p.m., in preparing for their return to school, Pearl's teacher discovered that Pearl was missing. After an unsuccessful search for Pearl in the park and surrounding area, the class boarded the bus and returned to the school without Pearl.

When Pearl realized that she had missed the bus, she started to walk back to school alone. Just outside the park, Pearl was assaulted by Lou, a derelict, and she sustained serious injuries. Peter, a police officer, witnessed the assault, ran to the aid of Pearl, and then arrested Lou.

In September 1999, following timely and proper service of a notice of claim, an action was duly commenced on Pearl's behalf against the Coe School District and Lou to recover damages for Pearl's injuries. After the complaint set forth the foregoing facts, it alleged that the School District failed in its duty to supervise Pearl during a school activity, and that Lou assaulted Pearl, causing her injuries.

The School District's answer denied the essential allegations of the complaint and included, as an affirmative defense, that Pearl was culpable under comparative negligence rules because she failed to appear at the designated place and time for the departure of her class. Lou, who had no assets, did not answer the complaint or appear in the action.

Thereafter, the School District moved to dismiss Pearl's complaint on the ground that it failed to state a cause of action because (a) the School District owed no duty to Pearl on these facts, and (b) the assault by Lou constituted an intervening cause which precluded liability against the School District. Pearl cross-moved to dismiss the School District's affirmative defense on the ground that, as a 10 year old, she was incapable of negligence.

The court (1) denied the School District's motion to dismiss the complaint, made on the ground that the School District had no duty to Pearl, (2) denied the School District's motion to dismiss the complaint, made on the ground that Lou's assault constituted an intervening cause of Pearl's injuries, and (3) granted Pearl's cross-motion to dismiss the School District's affirmative defense. On its own motion, based on the papers already submitted in support of the motion and cross-motion, the court granted summary judgment to Pearl and scheduled a jury hearing to determine the extent of Pearl's damages and the apportionment of liability between the defendants.

The jury fixed Pearl's damages at $110,000, $10,000 of which represented medical expenses, and $100,000 of which represented pain and suffering. The jury apportioned liability 40% to the School District and 60% to Lou. The court thereupon entered judgment accordingly.

A. Were the numbered rulings (1), (2) and (3) correct?

B. Was the court correct in granting summary judgment on its own motion?

C. How much of the judgment can Pearl recover from the School District if the courts rulings are sustained on appeal?

Answer to Question Four
A. 1. Motion to dismiss based on no duty.

The Court correctly denied the School District's motion to dismiss on the ground that it owed no duty to Pearl because the School District owes a duty to its students.

In a negligence action, the first element to establish is whether the defendant owes a duty to the plaintiff. The question is whether the plaintiff is a foreseeable plaintiff and, if so, what is the standard of care owed?

The teachers supervising the students owe a duty of care towards the students; to supervise them like an "ordinary prudent person" would under similar circumstances. The main purpose for the presence of the teachers and aides is to supervise the children while they are at the park. Therefore, the teachers and aides owe a duty to the children while the children are under their supervision.

Is the school district liable for the torts of the teachers? A principal is vicariously liable for the negligence of its agents while the agent is performing for the principal within the scope of the relationship.

Here, the teachers are on duty and performing their jobs as employees of the School District so the School District is vicariously liable. A breach of duty on the part of the teacher is vicariously attributed to the School District.

In this case, the teachers clearly breached the duty to supervise Pearl in that they gave Pearl permission to leave the park and they failed to get her back on the bus, abandoning her and compelling her to make her way home alone.

This duty and breach of duty on the part of the supervising teachers is attributable to the teachers' employers, the School District. The School District clearly owes a duty to the children entrusted in their care.

2. Was Lou's assault a superseding cause? The issue is whether the conduct by Lou was a foreseeable result of the negligence of the teachers.

To establish causation, the conduct must be the factual cause ("but for" cause) as well as the legal or proximate cause of the plaintiff's injury. The teacher's failure to adequately supervise Pearl and failure to bring Pearl home from the park was the factual cause because "but for" this conduct, Lou would not have attacked her.

The teacher's conduct is also the proximate cause. The teacher has the duty to supervise the children to make sure no harm comes to them. Letting the children out of the park was exposing them to harm of this type, along with harm of many different types. Leaving Pearl behind, knowing she would have to get home by herself, was also conduct that could foreseeably lead to Pearl being attacked by a stranger. This is the very harm that the teacher's negligent conduct could foreseeably produce.

The tortious intentional acts of a third party are generally superseding causes that will serve to cut off liability. However, where the defendant's conduct increases the likelihood that the third party's intentional tort will occur, the third parties conduct is foreseeable and not a superseding cause.

3. The court was incorrect in granting Pearl's cross motion to dismiss on the ground that she is incapable of negligence due to her age.

The issue is whether a 10 year old is capable of negligence. A child is capable of negligence and will be held to a standard of conduct of children of like age, intelligence and experience. Because a child is capable of negligence, a child is capable of contributory negligence.

Here, Pearl's conduct may be considered contributorily negligent but that is an issue to be decided by the jury. The court was incorrect in granting the motion to dismiss this affirmative defense because the School District had a right to have Pearl's conduct considered by the jury. As New York is a comparative fault state, Pearl's contributory negligence may be considered and, if the trier of facts finds her to be partially at fault, her award would be reduced proportionally.

B. Issue: May the Court grant an order for summary judgment on it's own motion?

Either (or both) of the parties may make a motion for summary judgment and the court can grant relief if it finds no issue of material fact. Furthermore, the court may, upon "searching the record", grant the motion for the non-moving party. Alternatively, a motion for a failure to state a cause of action may be heard as a motion for summary judgment. Here the court erred in ordering a summary judgment for a party on its own motion.

Assuming the court properly ordered the summary judgment motion, the court would be correct in going forward with a trial on the issue of damages alone. A court can grant a motion for summary judgment as to liability and go forward with a trial regarding just damages.

C. Issue: Is the School District's liability for Pearl's non-economic losses reduced under CPLR 13?

CPLR 13 serves to limit a joint tortfeasors liability for non-economic damages depending on their percentage of fault.

Unless an exclusion applies, a joint tortfeasor in a personal injury action who is found to be 50% or less at fault, may not be required to pay the plaintiff more than their proportional share of the plaintiffs non-economic damages. Exclusions include tortfeasors who release toxic substances, intentional or reckless tortfeasors, and owners/operators of motor vehicles.

Here, since the School District is less than 50% at fault (because they have been found to be 40% at fault) and because they do not fall under an exclusion, they will not be required to pay more than 40% of Pearl's $100,000 worth of pain and suffering ($40,000). Since they may have to pay 100% of her economic damages which is the $10,000 in medical expenses, they will have to pay a total of $50,000.

In absence of this CPLR provision, the School District may have been liable to Pearl for the entire sum under joint and several liability of joint tortfeasors. If they wish, since they paid more than their share of economic damages, they may seek contribution from Lou for $6,000, which represents his portion of those damages.

Answer to Question Four
A. 1. The court correctly denied the school district's (the "school") motion to dismiss because the school owed a duty to Pearl. The issue is whether a school can be held liable for negligent supervision of its minor students.

A cause of action for negligence exists when there is a duty, a breach, causation (actual and proximate) and injury. Here, the school, through its two teachers and four aides, owed a duty to its students to exercise reasonable care in the student's supervision. A duty to reasonably supervise exists on any school property and this duty is exemplified when the school takes its students off school grounds.

Here, the teacher breached her duty to reasonably supervise Pearl when she

allowed Pearl and her friend (both 10 years old) to go across the street from the park for lunch. The school also breached its duty when it allowed the school bus to leave the park without Pearl on board. Therefore, the school owed a duty to Pearl and breached this duty when it failed to reasonably supervise her.

The school is vicariously liable for the teachers negligent act because there is an employer-employee situation and the teacher was acting within the scope of her employment. An employer may be held vicariously liable for the negligence of its employees if the employee acts within the scope of its employment. Here, supervising Pearl during the field trip was the teacher's duty. The field trip was organized by the school and was an official school activity. Therefore, the teacher was acting within the scope of her employment when she breached her duty to Pearl and the school may be held liable for her negligence.

Note that the fact that the teacher told Pearl to be back at the park by 2:00 does not absolve liability. The negligence occurred when the teacher allowed a 10 year old to cross the street to go to a fast food restaurant. In any event, this instruction does not release the school from or satisfy its duty to Pearl.

2. The court was correct in dismissing the school's motion to dismiss because it was foreseeable that Pearl could be injured as a result of its negligence.

The issue is whether Lou's criminal act was an intervening unforeseeable cause of Pearl's injury such that it releases the school from all liability.

To succeed in a negligence case, the plaintiff must demonstrate duty, breach, causation and injury. Duty and breach were discussed in the previous question. A person's breach must be both the actual and proximate cause of the plaintiff's injury. Actual cause is the "but for" cause (i.e., but for defendant's negligence, plaintiff would not have been injured). The proximate cause is the legal cause. This means that the injury must have been foreseeable to the defendant as a result of his breach. Any act that occurs after the defendant's breach that contributes to the harm is an intervening cause. If the intervening cause was unforeseeable to the defendant and resulted in an unforeseeable injury to the plaintiff, it is considered a superseding cause. A superseding cause will absolve the defendant's liability to the plaintiff. Frequently intervening criminal acts are

considered superseding causes. But criminal acts are not superseding if the defendant should have anticipated them or if the defendant's conduct makes the criminal act more likely to occur.

Here, there is no doubt that the school's negligence was the actual cause of Pearl's injury. But for the teacher's permission to leave the park and but for the bus leaving without Pearl, the injury would not have occurred.

The school's negligence may also be considered the proximate cause. It was foreseeable to the school that leaving the park without Pearl might result in her injury. Leaving a 10 year old alone at a park is an act that has foreseeable negative consequences. While it is true that Pearl's assault by Lou was the direct cause of her injury, this type of injury would not have been unforeseeable to the school. Because the school's act of leaving the park without Pearl made this criminal act more likely to occur, the assault is not a superseding cause that will release the school of liability.

3. The court was incorrect in granting Pearl's cross-motion to dismiss the school's affirmative defense because a child can be capable of negligence.

The issue is whether a child can be capable of negligent conduct such that it may be used as an affirmative defense in a negligence action.

Children are capable of negligence but are held to a different standard than adults. Children are held to the standard of behaving as a child of like age, experience and intelligence. If a child is engaged in an adult activity (driving) he may be held to a higher adult standard with respect to that activity.

Here, Pearl is not engaged in an adult activity. Therefore, she will be held to a standard of a reasonably prudent 10 year old of like experience and intelligence. If other 10 year olds would have arrived back at the park by 2:00, Pearl may be held negligent for failing to meet this standard. Therefore, her claim that as a 10 year old she is incapable of negligence is not grounds to dismiss the school's affirmative defense.

Note that even if Pearl is found to have deviated from this standard, she can still recover under the pure comparative negligence approach (adopted by New York). So all that the school's affirmative defense is capable of is reducing its own liability.

B. No, the court was not correct in granting summary judgment on its own motion because the parties were not given an opportunity to submit affidavits.

A court may grant, on its own motion, summary judgment when there is no genuine issue of material fact. In deciding this motion, the court may consider everything before it, documents from discovery, all pleadings and affidavits from the parties.

If a court decides to grant summary judgment on its own motion, it must give the parties notice and allow them to submit affidavits on the facts. Here, the court filed to do that. Had the court notified the parties and undergone the proper procedure, it could have properly granted summary judgment.

C. Pearl can recover $50,000 from the school in damages. The issue is how much a joint tortfeasor is required to contribute upon a finding of liability.

Joint tortfeasors may be held jointly and severally liable when held liable to the plaintiff. This means that the plaintiff may recover the full amount from either one of the defendants (but may not receive double recovery). The defendant who paid more than his share may then file for contribution from the other defendant.

There is, however, a special rule regarding non-economic damages. When a joint tortfeasor is found to be less than 50% liable, he cannot be required to contribute more than his equitable share for non-economic damages. This exception does not apply to intentional tortious acts, environmental hazardous waste defendants and operators (and owners) of automobiles.

Here, the school was found to be 40% at fault. Despite this, the school may be required to pay the entire $10,000 for medical expenses under joint and several liability. It may recover contribution from Lou in its own suit for contribution. But because the school was less than 50% liable and was not engaged in a special activity, it can only be required to contribute 40% of non-economic damages. Thus, the school must pay $44,000 to Pearl.

February 2000 NY Bar Exam

Questions & Sample Answers

Question-Five
Dan owned Blackacre, real property located in Westchester County, which was encumbered by a mortgage held by Bee Bank. The mortgage set forth in pertinent part that Dan's payments were to be made directly to Bee Bank, and that if Dan missed three consecutive monthly payments, Bee Bank could commence foreclosure proceedings thirty days after Bee Bank served Dan with a default notice.

Dan became ill and failed to make his payments in January, February, and March, 1999. On April 1, Bee Bank instructed its management company, Ag Co, to serve the thirty day default notice, and Ag Co served the notice in its own name, "as agent for Bee Bank." Dan failed to make any payments in response to the default notice, and, after thirty days, Bee Bank commenced a foreclosure action. Art, Dan's attorney, immediately moved to dismiss Bee Bank's action on the ground that the default notice from Ag Co was ineffective. The court (a) denied Art's motion.

In early June, Dan was hospitalized. Dan duly executed a power of attorney naming Art as his attorney in fact. Dan instructed Art to draft a will in which Dan bequeathed Blackacre to his brother, Ed, and named Ed as executor. Dan's will also bequeathed $5,000 to Nurse Nancy, because she had been very kind to him in the hospital. Art took the will to Dan's hospital bed to be signed, and because Dan was extremely weak, Dan asked Ed to assist him in executing the will. With Ed holding his arm, Dan signed his name in front of Art and Nurse Nancy, declared the instrument to be his will, and had Art and Nurse Nancy sign their names as witnesses. Art promptly filed the will with the Surrogate's Court of Westchester County.

In July, Bee Bank moved for summary judgment in the foreclosure action, but before the motion was heard by the court, Dan died. In August, at Bee Bank's request, Art signed a stipulation in which Bee Bank agreed to adjourn the motion until January 2000, on the condition that if Dan's will had not been probated by then, Art would consent to the entry of judgment against Dan.

Ed did not offer Dan's will for probate. In January, Bee Bank's motion and the stipulation were submitted to the court, and the court (b) denied Bee Bank's motion.

(1) Were the rulings (a) and (b) correct?

(2) Was Dan's will properly executed?

(3) Is Ed or Nancy disqualified as a beneficiary under the will?

(4) What must Bee Bank do to proceed with its foreclosure action?

Answer to Question Five

1. A. The court properly denied Art's motion. The issue is whether a party to an action may properly serve default notice pursuant to an acceleration clause.

A clause accelerating payment will generally be upheld providing it was not unconscionable at the time the agreement was entered into by the parties. Unconscionability must exist at the time the agreement was entered into by the parties, and cannot result at a later time. In determining whether unconscionability exists, the bargaining power of the parties must be considered. The superior bargaining power of one of the parties may render the agreement void. Here, there does not seem to be unconscionability at the time the contract was entered into, nor is the acceleration clause invalid because Bee Bank was required to give Dan 30 days notice before commencing foreclosure proceedings. In addition, New York provides for redemption by the mortgagor until the time of the foreclosure sale (but not after the sale).

Ag Co., as Bee Bank's agent, acting pursuant to actual authority, served notice on Dan. There does not appear to be any misrepresentation on the part of Ag Co. or Bee Bank. Ag Co. disclosed its principal, and provided Dan with effective notice.

However, Ag Co. would not be permitted to serve Dan with process because as Bee Bank's agent, it is a party to the suit. Process may be effectively served by persons over 18 years old who are not a party to the suit. (Personal service is preferred.)

B. The court properly denied Bee Bank's motion. The issue is whether Art had authority to act on behalf of Dan (his estate) after his death.

An agency is an express or implied agreement to act on behalf of another. An agency is revoked upon the death of one of the parties automatically, unless the agency is coupled with an interest. Here, Art was Dan's attorney and had actual authority to act on Dan's behalf during Dan's lifetime. However, the agency relationship between them terminated at Dan's death. Art does not have the authority to consent to the entry of judgment against Dan.

2. Dan's will was properly executed. The issue is whether Dan's will was executed with the required formalities.

Formalities that are required during a will's execution include that there must be two disinterested witnesses, who must sign as witnesses within 30 days of one another. The settlor must notify them that this is his will. The witnesses must see the testator's signature. The testator may have another sign at his direction and in his presence if he is incapable.

Here, Dan signed with Ed's help, which is proper. Dan told Art and Nancy that this was his will. There is a problem with the two disinterested witnesses requirement, however, the will was properly executed and may be admitted into probate.

3. Ed is not disqualified as a beneficiary under Dan's will. Nancy will be disqualified under Dan's will. The issue is whether an interested witness may qualify as a beneficiary under the will.

A beneficiary under will that is present when the will is executed will properly take under the will provided there are two disinterested witnesses. Ed is a beneficiary under Dan's will. He will be permitted to take under the will because Art and Nancy were the witnesses. Art is a proper

witness. Attorneys may serve as witnesses. Nancy, however, will not take under Dan's will. Nancy is an interested witness. Dan bequeathed $5,000 to Nancy in his will. Therefore, she is disqualified as a beneficiary. Furthermore, she may not even sue Art, Dan's attorney, for his malpractice which resulted in her being disqualified because an attorney owes a duty of care only to his client. Art owed a duty of care only to Dan, not Nancy.

4. In order to proceed with a foreclosure action, Bee Bank must notify Dan's estate. The issue is who is entitled to notification now that the original mortgagor is dead.

A Bank can still foreclose on a mortgage even though it may not hold the devisee personally liable on the mortgage. Therefore, if Ed does not pay Blackacre's mortgage, Bee Bank may not hold him personally liable, but may foreclose on Blackacre, thereby depriving Ed of his interest in Blackacre.

After providing notice, Bee Bank must file the appropriate papers in court and properly advertise the foreclosure sale. Bee Bank may not go after Ed for a deficiency judgment if the proceeds from the sale are insufficient.

Answer to Question Five

1. A. The court was correct in denying the motion that service of the default notice was ineffective.

The issue is whether a default notice can be served by an agent of one of the parties.

In a mortgage situation where a default event is defined and foreclosure is not until mortgagor is served with notice, the notice can be validly served by the mortgagee themselves or their agent. This process is not part of the foreclosure proceeding (judicial) itself and as such service can be by a party (or their agent).

In this case, the default event had occurred and Bee Bank was entitled to serve notice. Ag Co. were authorized to serve the notice and, while it was in Ag Co.'s name, it was clear on the face of the notice that Ag Co. were acting in the capacity of agents. The purpose of notice is to give the other party opportunity to act. Here, Dan had knowledge of his arrears and the notice was consistent with that. He would thereby be estopped from denying he had received valid notice of impending foreclosure proceedings.

B. The court was correct in denying Bee Bank's motion for summary judgment.

The issue is whether the stipulation was valid, and further whether Art had the authority to consent to the entry of judgment.

Under New York law, a power of attorney, in the absence of any provision to the contrary, is extinguished on death. In this case, Art did not have the requisite authority to execute the stipulation for adjournment with condition that Art consented to summary judgment against Dan because Dan was deceased at the time Art signed the stipulation. (In addition, any power over land needs to be expressly in writing to satisfy the statute of frauds.)

The court was therefore correct in not granting the summary judgment because this deprived a necessary party (Dan's estate and beneficiaries who held an interest in the property, namely Ed) from defending the action.

2. Dan's will was properly executed.

The issue is whether a will is invalidated by either an assisted signature or by an interested attesting witness.

Under the EPTL, a will will be validly executed if it is signed at the bottom by the testator in the presence of two witnesses who are aware they are witnessing a will and sign within 30 days of each other. Any form of signature or mark by the testator will be accepted by the court (they have accepted an X before) as long as it is in his own hand. If the testator has another sign on his/her behalf, then there must be an additional witness (i.e., testator, proxy signatory and two attesting witnesses). A will in New York will not be invalidated when one of the attesting witness is an interested witness (ie., a beneficiary under the will). This may invalidate the gift but does not invalidate the will.

In this case, Dan signed the will in his own hand (support by Ed is not a signature on his behalf and is no need for an extra witness) and published that it was a will - "declared it to be a will", and it was signed by two witnesses who signed proximately (i.e., within 30 days) of each other. While Nancy was an interested witness, under New York law this does not invalidate the will.

3. Nancy is disqualified as a beneficiary but Ed is not.

Issue is whether an interested witness loses their benefit under the will and whether assisting a signature invalidates a gift under a duly executed will.

In this case because Nancy is an interested witness - since she stood to collect $5,000 as a beneficiary (makes her interested) she will be disqualified as a beneficiary under the will. Ed is not disqualified as to his position as executor - this is never a sufficient interest under a will to make him interested (an executor is a position that is not of beneficial interest). This gift of Blackacre will not be disqualified as the will was validly executed and he was not one of the witnesses. If he had been one of the witnesses he would've been a supernumerary witness and still received the bequest, unless the court determines he signed on Dan's behalf and then the will would be invalid anyway.

4. Bee Bank must serve default notice on executor.

The issue is how a mortgagee can foreclose on a deceased estate before or while the estate is being probated.

The mortgagee must commence proceedings with the administrator of the estate, that is file default notice and file proceedings again in court against the estate for foreclosure.

Note: Any beneficiary will take with the mortgage and retains the right to redeem before foreclosure (even though not personally liable on the mortgage).

Question-Six
Ann, Bill, Cal and Dawn decided to go into the restaurant business together at Lake George, New York and, in January 1990, caused the incorporation of Eat Well Inc., a New York corporation. The certificate of incorporation authorized the issuance of 1000 shares of $100 par value stock. Ann, Bill, Cal and Dawn each paid for and received 150 shares, with 400 shares remaining unissued.

The four shareholders then entered into a written agreement requiring unanimous approval by all four directors for any action taken by the board of directors. There was no such provision in either the certificate of incorporation or the by-laws of the corporation.

At the first meeting of shareholders, Ann, Bill, Cal and Dawn were elected directors. At the first directors meeting that followed, Ann was elected president, Bill vice president, Cal secretary and Dawn treasurer. Later in 1990, the Eat Well restaurant was opened and proved to be both popular and profitable.

Gourmet Corp. operated Gourmet, another quality restaurant, near Eat Well. At a meeting of the Eat Well Inc. board of directors in 1998, Bill stated that the shares of Gourmet Corp. were for sale at an attractive price and on terms Eat Well Inc. could easily afford. Bill urged that Eat Well Inc. purchase the shares, but the three other directors rejected the proposal. Bill then stated that he would buy the shares on his own.

Bill proceeded to purchase all the shares of Gourmet Corp. and took over management of its restaurant. As the result of an aggressive promotional campaign, Gourmet's business increased dramatically, with a significant number of Eat Well's regular customers going to Gourmet instead. This resulted in Eat Well Inc. losing $75,000 in 1999. Bill recently sold his shares of Gourmet Corp. for a profit of $200,000.

On January 10, 2000, on due notice, Ann called a meeting of the Eat Well Inc. board of directors for January 24. The notice recited that one of the purposes of the meeting was to consider a proposal by Ann for the sale of 400 unissued shares of Eat Well Inc. at their par value of $100 each, with each shareholder to have the option of purchasing 100 shares, and any shares not purchased under that option to be offered to other shareholders, pro rata, at $100.

Bill told Cal he would not be able to attend the meeting. After Ann called the meeting to order, Cal asked that the meeting be adjourned for one week so that Bill could attend and vote on the proposal. Ann and Dawn refused Cal's request. The resolution reciting Ann's proposal was then voted upon, with Ann and Dawn voting in favor, and Cal voting against. Ann then declared the resolution duly adopted by a majority of directors present.

The fair value of the shares of stock is $1,000 a share. Eat Well Inc. is not in need of the $40,000 in additional capital which would be produced from the sale of its unissued shares. Although he could afford to do so, Cal is simply unwilling to invest any more funds in Eat Well Inc.

1. Will Eat Well Inc. succeed in an action against Bill to recover:

(a) The profit of $200,000 Bill realized from the sale of Gourmet Corp. shares?

(b) The loss of $75,000 sustained by Eat Well Inc. from Gourmet Corp. competition?

2. Will Cal succeed in an action seeking to set aside the January 24 resolution on the grounds that:

(a) The resolution was not adopted by unanimous vote of all four directors, or

(b) The issuance of additional shares violates the rights of Cal?

Answer to Question Six

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1. A. The corporation will not be able to recover the profit of $200,000 Bill realized from the sale of Gourmet Corp. The issue is whether Bill had violated his duty of loyalty to the corporation by usurping a corporate opportunity. A director of a corporation has a duty of loyalty to that corporation which requires him to act in the utmost good faith and best interest of the corporation. A director may not, for instance, usurp corporate opportunities. A corporate opportunity is any opportunity in which the business is likely to engage or venture. However, after making the opportunity available to the corporation, the director may engage in such activity when the corporation rejects the opportunity.

In the present case, Bill was entitled to buy the stock of Gourmet because he presented the opportunity to the board of Eat Well and the proposal was rejected. As a result, Bill is entitled to the benefit of his investment unless it can be shown that the increase in Gourmet's equity was due to the competition with Eat Well. In such a case, the basis of liability would be a competing venture (discussed below) and Eat Well would be permitted to disgorge Bill's profits.

B. Eat Well should be able to recover their loss sustained from Gourmet Corps. direct competition. As stated, directors owe an undivided duty of loyalty to the corporation they serve. The issue here is whether Bill breached the duty of loyalty by engaging in a competing venture with Eat Well. It is a violation for a director to engage in competition with the corporation. It is immaterial whether the board of the corporation has declined the opportunity to engage in the additional business.

As such, Bill is guilty of violating his duty of loyalty because he engaged in a competing venture. The fact that the Eat Well board rejected the proposal provides Bill with no protection in this case. Bill will be liable for losses sustained by Eat Well, and the corporation may disgorge profits from the competing venture.

2. A. Cal will not succeed in an action seeking to set aside the January 24th resolution on the grounds that the resolution was not adopted by a unanimous vote of all four directors. The issue is whether the vote of two directors was sufficient to pass the resolution. The New York BCL requires that actions be approved by a super majority of the board be included in the corporation's certificate of incorporation. In the absence of such a provision, board action may be taken when a quorum of directors is present and a majority of those voting vote in favor of the action.

In the present case, the agreement by the shareholders to require a unanimous vote for board action is ineffective because it was not included in the certificate of incorporation. A quorum of the directors entitled to vote were present at the meeting because Cal, Ann and Dawn were all present making 3/4, which is greater than the 1/2 required. In voting, Ann and Dawn, a majority of the quorum, voted in favor of the resolution 2/3, which is more than the 1/2 required to pass the resolution. As a result, the resolution was sufficiently adopted.

B. The issuance of the new stock does not violate Cal's preemptive rights. The issue is whether Cal's preemptive rights attach to the issuance of the new shares. For corporations formed prior to February 22, 1998, shareholders are assumed to have preemptive rights to maintain their proportional share in a corporation, so that they may have a right to buy shares when the corporation issues shares in exchange for cash. The preemptive right only gives the shareholder the right to buy the shares. The shareholder does not have an absolute right to maintain his proportionate share of the corporation.

Cal does have preemptive rights on the shares being offered, however, Cal was given the right to maintain his proportionate share by the fact that he had the right of first

refusal over 100 of the 400 shares of new stock. Cal is now a 25% owner and an offer to

buy 100 shares should maintain that proportion. Cal does not have an absolute right to maintain his 25% share.

The corporation is authorized to issue the unissued shares at par value. There is an issue that the fair market value of the shares is $1,000 a share and the shares are only being sold for $100. This would seem to be a misdirecting of profits. In some sense, this sale transfers wealth from existing shareholders to new shareholders. Still, the corporation only need show that the stock was issued for par value which is $100 in order to avoid liability for watered stock.

It may be a violation of a duty of loyalty or a closely held corporation's duty of good faith to fellow shareholders to force this addition of paid in capital in order to prevent a massive redistribution of wealth to new underpaying shareholders. There may not be a valid business reason for the decision because the facts state that the corporation does not need the additional paid in capital. Eat Well is a closely held corporation whose stock is not publicly traded and is held by a small group of people who also run the business.

Answer to Question Six
1. Eat Well, Inc. will not recover the profit of $200,000 but will recover the loss of $75,000.

A. Regarding the $200,000 profit, the corporation will not succeed. The issue is whether a director owes a duty of loyalty to not usurp a corporate opportunity.

Directors owe a fiduciary duty of loyalty to the corporation. The director must act in good faith with that degree of morality, conscientiousness, honesty and fairness that the law requires of fiduciaries.

Under this duty of loyalty, a director must not usurp a corporate opportunity without 1) informing the Board about the opportunity and 2) waiting for the Board to reject it. A corporate opportunity is one which the corporation has indicated an interest in or is in need of.

Here, Bill is director and vice president of Eat Well, Inc. Since its opening in 1990, Eat Well, Inc. has proved to be popular and profitable. There is no question that Eat Well has an interest in another quality restaurant that is near Eat Well.

However, at the Eat Well board of directors meeting in 1998, Bill informed the other directors that shares of Gourmet Corp. were for sale at an attractive price and on terms that Eat Well could afford. He urged the directors that Eat Well buy the shares, but three directors rejected his proposal. Bill then told the directors that he intended to buy the shares himself.

Accordingly, Bill did not breach a duty of loyalty. He informed the Board and waited for them to reject the proposal. In addition, Bill, in good faith, told the directors he would purchase shares of Gourmet, Inc.

So Bill has not breached a duty of loyalty here, the $200,000 profit he made by selling the Gourmet stocks is rightfully his. Accordingly, Eat Well will not succeed in an action to recover the $200,000.

B. Eat Well will succeed in an action to recover the loss of $75,000 by Eat Well from Gourmet Corp. competition.

The issue is whether a director breaches a duty of loyalty by competing with his corporation.

Directors owe a duty of loyalty to the corporation. The director must act in good faith and with the conscientiousness, morality, fairness and honesty that the law requires of fiduciaries.

Under the duty of loyalty, the director must not compete with the corporation. As has been stated, Bill did not breach by purchasing the shares but when he took over management of Gourmet's restaurant he began competing with Eat Well. Due to his efforts and skills of being in the restaurant business, he started an aggressive, promotional campaign and in fact, a significant number of Eat Well's regular customers began going to Gourmet instead. The resulting loss of $75,000 was due to the fact that Bill was competing with Eat Well. Accordingly, Eat Well will succeed in action against Bill to recover the loss of the $75,000 because Bill breached his duty of loyalty by competing with Eat Well, and Eat Well is able to recover that resulting loss.

2. Cal will succeed on both grounds to set aside the January 24 resolution. The issue is whether a unanimous vote was required.

A. The resolution should be set aside because the resolution was not adopted by unanimous vote.

The issue is whether the written agreement requiring that all four directors approve is valid. Under the BCL, a majority of directors is necessary to make a quorum and a majority of those present must vote to take Board action, contrary to any provisions outlined by the articles or bylaws.

Here, there is no provision in the articles or bylaws regarding the number of directors required to take Board action. However, New York allows directors in a close corporation to write agreements affecting action taken by a board of directors and such writing will be enforceable. Here, there is such a written agreement requiring a unanimous vote.

Since this written agreement will be given full effect, on January 24th, in order for the sale of the 400 unissued shares to be approved, all four directors are needed to unanimously vote. Bill was not there and Cal voted against. Ann and Dawn's voting in favor fails as a majority of directors present because it required a unanimous vote. Accordingly, the January 24th resolution should be set aside because not all the directors voted on the new issuance.

B. The January 24 resolution should be set aside because Cal's rights are violated. The issue is whether the issuance is valid.

Preemptive rights arise when there will be a new issuance of stock for cash but not within two years of incorporation. This is to help the shareholder maintain their percentage of ownership in the company. Here, they are proposing to issue the stocks at $100, when the fair market value is $1000. Carl should not be forced to bear the burden of losing capital because the shareholders pay less than fair market value. Thus, the resolution should be set aside.