NEW YORK STATE BAR EXAMINATION
FEBRUARY 2004 QUESTIONS AND ANSWERS

Question-One
You are a law clerk for an Appellate Division Justice. There is a pending appeal from an order granting summary judgment in favor of the defendant dismissing the complaint in the action. The decision below contained the following accurate recitation of the facts:

The defendant, No Comparison, Inc. ("Comparison"), was incorporated under the laws of the State of New York as a catering business on July 31, 2001. Prior to the incorporation, on

June 1, 2001, Edward Early, a co-owner of the business, entered into a verbal agreement for payroll services with plaintiff, Best Office Services, Ltd. ("Best"), which was memorialized in a letter from an officer of Best dated June 15, 2001 referencing the agreement between her company and Comparison. On June 20, 2001, Early submitted to Best a credit application in which he referenced "our agreement" and set forth the assets of Comparison. The application stated that "No Comparison, Inc." was the business name of the entity, that he was its president, and that Sharon Jones was its chief financial officer.

Pursuant to the agreement, Best was to provide services for the period July 1, 2001 to June 30, 2002. Consistent with the agreement, Best submitted monthly invoices through February 1, 2002, covering, as was customary, the immediately preceding month. Out of the seven invoices submitted by Best, only the first applied to the period prior to Comparison's incorporation.

Comparison promptly paid the first three invoices.

The payments were made in the form of checks signed by Sharon Jones, which contained the reference "for payroll services." Thereafter, Comparison made no further payments. The president of Best, without consulting the board of directors of Best, authorized Best's counsel to commence this

Action to recover damages for Comparison's breach of contract. The certificate of incorporation and by-laws of Best are silent on the question of who has authority to commence a legal action on the part of the corporation. In its answer, Comparison raised as affirmative defenses that (1) the action was not duly authorized by the board of directors of Best, (2) the agreement between the parties was unenforceable because it was entered into before the existence of the corporation, and (3) the agreement violated the statute of frauds.

Following the joinder of issue, Comparison moved for summary judgment dismissing the complaint based on the affirmative defenses. The court granted the motion, holding that although board authorization was not required for Best to bring the action, the agreement itself was not enforceable for the reasons set forth in the other affirmative defenses asserted by Comparison.

Best has duly filed and perfected its appeal. The Appellate Division Justice has asked you to prepare a memorandum analyzing the merits of the three (3) affirmative defenses.

ANSWER TO QUESTION 1
1) First Affirmative Defense: Action Not Authorized by Board

The issue is whether there was a triable issue of fact whether the President of Best was authorized to commence an action for breach of contract, where the certificate of incorporation and bylaws was silent as to this matter.

In evaluating a motion for summary judgment, a court must look at all available factual evidence as submitted by the parties and each required element of the cause of action or affirmative

defense. If it determines that there is no triable issue of fact with respect to any element, it will enter summary judgment for a party.

An officer has authority to manage the daily business of the corporation. Board approval is required for actions considered not to be required in the ordinary course of the management of the corporation. An unauthorized officer action, however, may be ratified by later board approval.

In this case, the President of Best authorized Best' s counsel to enter the action to recover damages for the breach of contract. It is unknown from the facts whether it was in the ordinary course of business for Best to commence breaches of contracts actions. Best provides payroll services and thus it is in the ordinary course of Best' s business to enter into contracts to provide payroll services. Because it is in the power of management to authorize entry into these types of contracts as part of the daily management of the corporation, it is also considered that commencing actions for breach of contract is also within the President' s powers as an officer of the corporation.

Even if it were not impliedly authorized to commence breaches of contracts actions, there may be a triable issue of fact that the Board did not ratify the action, by knowing of it and accepting its benefits. Thus, the denial of summary judgment on the first affirmative defense was proper.

2) Second Affirmative Defense: Pre-Incorporation Contract Unenforceable

The issue is whether there is a triable issue of fact whether Comparison is bound by the contract entered into by one of its promoters prior to incorporation.

A corporation is not liable on pre-incorporation contracts entered to by a promoter unless the corporation ratifies the contract post-incorporation. A corporation may ratify the contract, either expressly or impliedly. Implied ratification occurs when the corporation; 1) knows or has reasons to know of the material terms of the contract,

and 2) accepts the benefit of the contract. The promoter remains personally liable on the contract unless there is a novation.

In this case, there is a triable issue of fact whether Comparison ratified the contract and so should be held liable on it. Early, a promoter, entered into an agreement on

June 1, 2001, prior to incorporation. The contract specified that Best was to provided payroll services from July 1, 2001 to June 30, 2002. Comparison paid for the first three months of services, including one month of services provided to the pre-incorporated entity. Payment by Comparison was made after incorporation for the first three months of payroll services by payment by Sharon Jones, the CFO of Comparison. Because Comparison accepted performance of the payroll services, it accepted the benefit of the contract. Further, because Early knew of the contract, and Sharon Jones knew of the existence of an agreement and had reason to inquire as to the length of the contract, because she paid the checks to Best, Comparison can be said to have known or have reason to know of the material terms of the contract – payroll services for a period of a year. Thus, there is at least a triable issue of fact that Comparison ratified the contract and so should be held liable on the contract.

3) Third Affirmative Defense: Statute of Frauds

The issue is whether there is a triable issue of fact whether the agreement violated the Statute of Frauds.

The first issue is whether the contract falls within the Statute of Frauds. The Statute of Frauds requires that contracts that cannot be completed within one year of the agreement must be in writing and signed by the party to be charged to be enforceable. The writing must contain all material terms of the contract. In a contract for services, the contract must be completed within one year of the agreement, not within one year from the start of performance.

In this case, Comparison and Best entered into an oral agreement on June 1, 2001, specifying that the performance of the payroll services from July 1, 2001 to

June 30, 2002. Although performance of the contract would last under a year, the agreement falls within the Statute of Frauds because there is more than one year before the end date of performance from the time of agreement. The oral agreement thus is not enforceable, as it does not satisfy the Statute of Frauds.

The second issue is whether either the June 15 letter from Best, the June 20 credit application, or the checks satisfy the Statute of Frauds. The writing must contain all material terms of the agreement and be signed by the party to be charged.

In this case, the letter from Best was not signed by Early, acting on behalf of the party to be charged. The credit application, although it references the oral agreement, does not contain the material provisions of the contract. Finally, the checks, though signed on behalf of the Comparison, do not contain the material terms. Thus, none of these writings satisfy the Statute of Frauds.

The third issue is whether there was waiver of the Statute of Frauds. The requirements of the Statute of Frauds may be waived if there is part performance that has been accepted by the party to be charged.

In this case, Comparison accepted the first seven months of performance by Best and paid for the first three months of performance. Because Best has partially performed and this has been accepted by Comparison, there is waiver of the requirement of the Statute of Frauds.

Thus, summary judgment against Best was improper as there was a triable issue of fact that the requirements under the Statute of Frauds were waived by acceptance of part performance.

ANSWER TO QUESTION 1
1) The action was not duly authorized by the Board of Directors at Best.

The issue presented here is whether or not an action can be commenced when authorized by an officer of a corporation and not authorized by the Board of Directors. As a general rule, the Board of Directors is responsible for the management of the corporation. The Board must meet and decide, by appropriate voting procedure, actions to be undertaken in the best interest of the corporation. Officers also owe the corporation duties of care and loyalty (virtually identical to those owed by the directors). Absent provisions in the certificate of incorporation or by-laws, the directors decide whether or not to commence actions.

Here, the president of Best (an officer) acted without consulting the Board of Directors. This was improper as the Board alone can authorize a lawsuit on behalf of Best (apart from a shareholder derivate suit, not applicable here). Board authorization was necessary for Best to bring about the action.

2) Agreement was unenforceable because it was entered into before the existence of the corporation.

The issue presented is whether an agreement entered into prior to the corporation's existence is enforceable against the corporation.

Under the BCL, when a promoter (one who enters into agreements, makes purchases and attempts to otherwise provide a corporation with capital before its creation) enters into contractual agreements with others he is personally liable on the agreements until the corporation is formed or accepts the benefits of the agreements as if it were in existence.

Here, the agreement is enforceable against the corporation because the corporation came into existence on July 31, 2001, accepted the benefits of Early's agreement with Best, and acted as a corporation. Early acted as a promoter would. Although normally he would be personally liable on the agreement alone, Comparison also became liable on the agreement when it came into existence and continues to accept the benefits of Best's service. It is significant that Comparison (through Chief Financial Officer, Sharon Jones) in fact paid for the first three invoices, signing the checks referencing that they were for payroll services. This shows that Comparison should be bound by the agreement because after the corporation came into existence, it paid two more invoices, acting as a corporation, under the agreement between Early and Best. The argument that the agreement is not enforceable against Comparison is without merit.

3) Agreement violated the Statute of Frauds

The issue is whether or not the agreement between Early and Best for payroll services violated the Statute of Frauds.

A service contract that is not capable of being performed, from the date of the agreement, falls within the Statute of Frauds. Such an agreement must satisfy the Statute of Frauds through either a writing that is signed by the party asserting Statute of Frauds as a defense and contains all the material terms of the agreement, or through some other non-writing satisfaction such as complete performance of the service contract.

Here, the agreement is within the Statute of Frauds because it is impossible to complete within one year from the date the agreement was entered into (here,

June 1, 2001) since it was for services provided until June 30, 2002 (more than one year after the agreement was entered into). The agreement fails to satisfy the Statute of Frauds through Best's performance because under these facts, it does not appear that Best performed completely since it only submitted seven invoices for seven months of services provided (up to February 2002). Partial performance of a service contract does not satisfy the Statute of Frauds.

In addition, it is highly unlikely that either of the two writings between Early and Best will satisfy Statute of Frauds. The letter from Best, which memorialized the agreement, was not signed by a representative of Comparison, the party who is asserting Statute of Frauds as a defense. As for the credit application submitted by Early, under these facts, it is not clear if it is signed or not. Even if signed by Early on behalf of Comparison, under these facts that writing seems to merely reference "our agreement" and not include all the material terms of the agreement. Under thee facts, the agreement is unenforceable because of the Statute of Frauds.

Question-Two
In September 2003, Udall, an undercover police officer, noticed that Drew often drove his car into an area known to be frequented by several cocaine dealers. On several occasions Udall

approached Drew's car and offered to purchase cocaine from Drew. Drew continuously refused Udall's offers until October 21, 2003, when Udall again approached Drew's car and offered to purchase a packet of cocaine. Drew asked how much Udall would pay, and Udall replied, "One hundred bucks". Drew agreed to the sale. Udall gave Drew $100, whereupon Drew handed Udall a packet of cocaine weighing 600 milligrams.

Drew was immediately placed under arrest by Udall, removed from the car and handcuffed. Udall then frisked Drew and felt the outline of what he believed to be two bullets in Drew's left rear pocket. Udall reached into the pocket and removed two .38 caliber bullets. At that point, Udall inspected the interior of the car where he saw nothing incriminating. However, upon discovering that the glove compartment was locked, Udall took the keys from the ignition, unlocked the glove compartment and found a loaded .38 caliber handgun.

Shortly thereafter, Drew was indicted for the crimes of criminal possession of a weapon, criminal sale of a controlled substance, and criminal possession of a controlled substance in the 5th degree. Under Penal Law §220.06(5) a person is guilty of criminal possession of a controlled substance in the 5th degree: "when he knowingly and unlawfully possesses.....cocaine and said cocaine weighs five hundred milligrams or more."

In a pre-trial motion, Drew moved to suppress the handgun on the ground that the search of the locked glove compartment violated his rights against unreasonable search and seizure. The Court (1) denied Drew's motion to suppress the handgun.

At Drew's trial, Udall testified to the foregoing facts involving the undercover operation and Drew's arrest. At the close of the prosecution's case, Drew moved to dismiss the indictment on the ground that the prosecution failed to establish that Drew knew the weight of the packet of cocaine which he allegedly possessed. The Court (2) denied Drew's motion.

Drew then testified and denied that he sold any drugs to Udall or that he had any drugs in his possession at the time of his arrest. He further testified that Udall had approached him on ten different occasions in a harassing manner asking to buy drugs, and he had consistently refused. He further denied that Udall gave him any money or that he gave drugs to Udall.

In rebuttal, the prosecution introduced evidence that Drew was convicted of criminal possession of cocaine the previous year.

Drew requested that the court charge the jury on entrapment with respect to the charge of criminal sale of a controlled substance. The prosecution objected, asserting that the defense was not available to Drew (a) because he denied the underlying crime, (b) because he had a prior conviction for a drug related offense, and (c) because the proof presented as to the elements of the defense was insufficient to require the charge.

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

2. Should Drew's request to charge the defense of entrapment be granted?

ANSWER TO QUESTION 2

1) Ruling One is incorrect because Udall violated Drew’ s Fourth Amendment rights, as expanded under New York law, by searching the locked glove compartment after Drew had been removed from the car and handcuffed.

Under the Fourth Amendment, a police officer who has probable cause to make an arrest can make a warrantless search incident to a lawful arrest. In this regard, he can search not only the

suspect's person, but also areas within the suspect's "wingspan". If the suspect is arrested in an automobile, the "wingspan" includes the passenger compartment. Also pursuant to a lawful arrest, a police officer can make a warrantless search of an automobile if he has reason to believe it contains contraband. In this regard, the police officer can also search any containers found in the car that might contain the contraband. The rationale for this is that one has a lesser reasonable expectation of privacy in one's automobile. Thus, under general Fourth Amendment principles, Udall's search of the locked glove compartment was valid.

However, New York affords a suspect's greater Fourth Amendment protections. If the police want to search a car after the suspect has been removed from the car, they need a warrant. In this case, Drew has been safely removed from the car and handcuffed. Thus, Udall should have obtained a warrant before searching the car. Because he did not obtain a warrant, the court should have granted Drew's motion.

In Ruling Two, the court properly denied Drew's motion because §220.06(5) of the Penal Law (the "Section") does not require that the defendant be aware that the cocaine in his possession weighs 500mg or more.

The Section has two prongs: 1) defendant knowingly and unlawfully possessed cocaine, and 2) the weight of that cocaine equals or exceeds 500mg. In the case at hand, there is no evidence that Drew was unaware that what he sold to Udall was cocaine. Drew did not raise that defense in his motion, nor did he make that assertion in his testimony. Thus the first prong of the Section is satisfied. The second prong of the Section is also satisfied because Drew did not contest that the cocaine weighed less than 500mg. Accordingly, Ruling Two is correct.

2) Drew's request regarding the jury charge should be granted because there is a factual question regarding Drew's affirmative defense regarding entrapment and Drew presented sufficient facts to warrant sending the issue to the jury.

Entrapment is an affirmative defense, which the defendant must prove by a preponderance of the evidence. To succeed with that defense, the defendant must prove that 1) the police created the "criminal environment" and 2) the defendant was not "predisposed" to commit the crime. In the case at hand, Drew testified that Udall approached him on ten different occasions in a harassing manner to buy drugs and on each of those occasions, Drew refused Udall's request. At no point did Drew unilaterally offer to sell drugs to Udall. A jury certainly could find that Udall created a criminal environment. Whether Drew has a predisposition to sell drugs is a question of fact. Conceivably, a jury could find in his favor because again, at no point did Drew unilaterally offer to sell drugs to Udall.

The fact that Drew denied the crime would not prevent him from asserting the entrapment defense because a defendant can plead in the alternative even if the alternatives are inconsistent with each other. His prior conviction likewise would not prevent him from asserting the defense. Rather it is merely a fact to be considered in determining whether he was predisposed to sell drugs. Moreover, on the facts, Drew's prior conviction was inadmissible character evidence. A prior conviction cannot be introduced to prove character in order to prove conformity with that character. Under New York law, a prior conviction can be introduced for impeachment purposes, but only if the conviction relates to the trait at issue. The trait at issue in Drew's testimony is his veracity, and the prior drug conviction does not relate to veracity.

ANSWER TO QUESTION 2

1) a. The court correctly denied Drew's motion to suppress the handgun. At issue is whether the handgun was discovered as a result of an improper search.

The Fourth Amendment of the Constitution protects citizens against unreasonable searches and seizures. When a search or seizure is conducted in violation of a defendant's constitutional rights, the evidence gathered pursuant to that search normally cannot be entered into evidence against that defendant. Furthermore, a search will normally be considered unreasonable if it is not conducted pursuant to a validly executed search warrant. However, there are several exceptions to the warrant requirement, two of which are specifically relevant here: 1) a police officer may conduct a warrantless search of a person incident to a lawful arrest; and 2) an officer may conduct a search of that person's automobile. Under either exception, an officer may search even concealed spaces where he has reason to believe (i.e., through the "plain feel" of a weapon through a suspect's pocket) that a weapon or contraband may be found, and may seize any such weapon or contraband.

Here, Udall lawfully arrested Drew. Drew does not contest the lawfulness of his arrest, and in any case Udall had probable cause to arrest Drew when Drew handed him a packet of cocaine. Therefore, Udall had the power to search Drew's person for weapons and contraband. Similarly, Udall properly inspected Drew's pocket when he plainly felt objects the size and shape of bullets, and was authorized to seize the bullets he found as weapons. Although Udall saw nothing incriminating in plain view in Drew's automobile, his discovery of bullets in Drew's pocket gave him reason to believe that there was a weapon in the car, and so, under the automobile exception, Udall had the power to search the glove compartment and seize the gun found therein.

b. The court properly denied Drew's motion to dismiss the indictment. At issue is the requisite level of intent needed to be found guilty under Penal Law §220.06(5).

A finding of guilt under §220.06(5) requires that the defendant knowingly and unlawfully possesses cocaine, and that the cocaine weighs 500mg or more. When the word "knowingly" is used in a penal statute for controlled substances, it is normally construed to mean knowledge only of the possession of the substance, not of the weight. More generally, a court can look to the words of the statute to determine the scope of the word "knowingly" in the statute.

In this statute, the "knowingly" issued only in the context of the possession of the cocaine, and the weight of the cocaine is contained in a separate independent clause. The statute does not require, for example, that the defendant "knowingly and unlawfully possesses…500mg or more of cocaine". Thus, §220.06(5) does not require that Drew know the actual weight of cocaine in his bag, only that he knew he was in possession of cocaine. There is no question that Drew knew he possessed cocaine, so the indictment should not have been dismissed.

2. The court should grant Drew's request to charge the entrapment defense. At issue is when an entrapment defense is available to a criminal defendant.

Entrapment is an affirmative defense that is available to a defendant who would not have committed a crime, were it not for the efforts of police to induce the defendant into commission of that crime. The defendant must show by a preponderance of evidence that he was in fact entrapped. In determining the viability of the defense, courts look to the conduct of the defendant, including prior conduct that reflects on the credibility of his assertion that he was entrapped.

Here, Drew has offered evidence in the form of his own testimony that he was not predisposed to sell cocaine, and that Udall essentially wore him down into selling him cocaine by continuously harassing Drew and asking him to sell Udall cocaine. If the jury believes Drew, this account would be enough to constitute entrapment. Furthermore, the fact that Drew denied the underlying crime does not preclude him from raising entrapment as a defense. Although it may reflect poorly on his credibility, Drew is entitled to provide alternate defense theories at trial. Finally, Drew's prior drug conviction does not prevent him from raising the defense. First, the prior drug

conviction was for possession and not sale, and therefore does not directly contradict Drew's assertion that he was not predisposed to sell cocaine. Second, even if the prior drug conviction undermines Drew's credibility as to his entrapment defense, a jury is entitled to believe Drew's testimony in spite of his prior drug history. The prior conviction goes to the believability of Drew's entrapment defense not whether the defense should be allowed.

Question-Three

Grant owned Black Acres, a subdivision of 100 lots in Westchester County. In 1992, Mary and Fred were married and immediately bought one of the Black Acres lots. A year later, Deb, their daughter, was born.

The deeds from Grant for every lot, including Mary's and Fred's, contained a restrictive covenant setting forth that only one single family house could be built on each lot, and that the covenant would be binding on all successors in interest. Mary's and Fred's deed was duly recorded in the Westchester County clerk's office.

Mary and Fred built a single family house on their lot and lived there with Deb until April 1996, when Fred moved out. Mary and Fred then sold the house and lot to Mary's brother, Jeff. The deed conveying the property to Jeff did not contain the restrictive covenant.

Mary and Fred each retained counsel and entered into a duly executed separation agreement. The agreement provided in pertinent part that Mary would have custody of Deb, but that Fred would be entitled to liberal visitation. The agreement also provided that, until Deb reaches age 21, Fred would pay $1,000 per month for child support, an amount that both Mary and Fred acknowledged was correct under the Child Support Standards Act, and that the agreement would be incorporated but not merged into any judgment of divorce. In August 1997, Mary was granted a judgment of divorce.

In February 2003, Mary unexpectedly lost the job that she held for ten years and started to experience financial difficulties. Despite her best efforts, she has been unable to find a job for the last year. Mary has informed Fred that she cannot afford to care for Deb without an increase in child support payments of an additional $500 per month. Fred has refused to pay the additional $500 per month, citing the terms of the separation agreement, and has told Mary that in order to make sure that Deb's financial needs are met, he is going to seek custody of Deb. Deb has expressed a preference to live with Fred.

Jeff has decided to convert his home into a two family residence by adding a second floor and renting it out as an apartment. The local building code allows such a conversion, and Jeff's application to convert the second story to the house was approved. Jeff was about to begin construction when he received a letter from Phil, who owns a lot in Black Acres, threatening to sue to prevent Jeff from converting the house into a two family house in violation of the restrictive covenant.

Mary has consulted you for advice and wants to know:

(1) If she can get more child support from Fred;

(2) Whether Fred can get custody of Deb; and

(3) Whether Phil can successfully sue to stop Jeff from converting the house into a two family residence.

How should you advise Mary?

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ANSWER TO QUESTION 3

1. The issue is whether an incorporated separation agreement may be modified because of a change in circumstance. A child support award may be modified after the party obtains a judgment of divorce where the circumstances surrounding the care of the child change such that without the change extreme hardship will result. Moreover, the court must look to see if the modification is in the best interest of the child.

Here, Mary's situation is dire because she has been out of work for one year. However, Mary must show that there are changes in circumstances resulting from her care of Deb that warrant the increase in child support (i.e. that Deb has additional expenses from education or otherwise that are inherent in her growing up). Increasing child support to otherwise augment Mary's decrease in income could amount to providing maintenance to Mary, which essentially would be an additional provision in the separation agreement which did not exist before and which the court may not allow. However, the court must also look to the best interests of the child to ensure that she has the necessity she requires. Should the best interest of the child indicate a need for an increase in support, the court will grant it. Here, if Mary establishes that Deb's needs are increasing in cost and that her dire circumstances are unable to meet those needs, and that it is in Deb's best interest to get an increase, the court will probably allow for a modification in support.

2. The issue is whether custody of a child is dependent solely on a parent's economic status.

Custody of a child is dependent on the best interests of the child and the fitness of the parent seeking custody. Here, there is no indication that Mary is an unfit mother. This needs to be established first in a custody hearing. Moreover, while the court will look at Mary's financial circumstances as a factor in custody determinations, it is not the sole factor and certainly not the dispositive factor. Moreover, as it pertains to the best interest of the child, Deb's preference to live with her father may be considered by the court but again, it is not the only factor. The court may also look to other factors including her relationship with her parents, both of their financial circumstances, Deb's educational requirements, amongst other things. Upon considering all of these factors, the court will look to whether it is necessary to move the child. Here, there is no indication that Mary is unfit to be a parent or that Deb's best interests will be served by letting her live with her father. Thus, it is likely that Mary will retain custody of Deb.

3. The issue is whether a restrictive covenant may be enforced against a subsequent purchaser.

Generally, a restrictive covenant must be in writing, signed by the grantor and grantee, touch and concern the land, and be intended to run with the land to be enforceable against a subsequent buyer. Here, the covenant touched and concerned the land because it affected the parties rights as landowners (i.e., restricted use of their property). Moreover, the covenant was intended to run with the land because the original deed states that the covenant would be binding on successors in interest. Moreover, the original covenant was in writing and signed, thus the restrictive covenant is enforceable, generally. As to Jeff, a subsequent buyer must have notice in order for a restrictive covenant to be enforced against them. Notice may be actual (covenant contained in the deed), constructive (through records contained in public offices showing the restriction) or inquiry notice, which applies here. Inquiry notice is imputed on a subsequent buyer when there is a sale of a lot in a common subdivision because someone like Jeff can look around and see only one-family houses are constructed. The proponent of the suit must show that there was a common scheme or plan and that it was obvious from looking at the subdivision. The court will then imply a reciprocal restrictive covenant enforcing the covenant contained in the original deed. This will be the result with Jeff because all the houses in the subdivision are one-family so he will be imputed with an inquiry notice.

Note that if Phil seeks an injunction against Jeff's plan, he will not need to establish privity between Jeff and Mary. However, if he seeks damages, he will need to prove privity. Horizontal privity exists because Mary and Jeff are grantor and grantee. They are successors in interest. Vertical privity also exists because there was a non-hostile nexus or convergence of the property between Mary and Jeff.

Thus, in conclusion, since Phil can demonstrate a common scheme in the subdivision (and that there has not been a substantial change in the scheme), the court will imply a reciprocal restrictive covenant and Jeff will not be permitted to modify his home to a two-family home.

ANSWER TO QUESTION 3

1. Mary can get more child support from Fred. The issue here is whether a separation agreement that has not merged into a judgment of divorce, can be modified to include more money for child support. The rule for modifying a separation agreement not merged into the divorce is by a showing of a substantial change in circumstances.

Mary unexpectedly lost her job that she held for ten years and started to experience financial difficulties. She tried to find another job, but was unable to find one for the last year. This would be sufficient enough to establish a substantial change in circumstances. Therefore, Mary should be entitled to modify the separation agreement and subsequent divorce judgment.

Another issue that could be raised with regards to increasing child support payments comes from the holding in the case of Brescia. Under the Brescia holding, Mary can argue that the modification of child support for Deb is based on the "needs of the child". Mary would have to show that Deb's financial needs are not met. Thus, Mary needs an increase in child support so she can properly provide for Deb's needs, which include activities, clothes, food, books, etc. Upon a showing of "need" for Deb, the court will most likely increase the child support payments made by Fred to Mary.

2. Fred will probably not get custody of Deb. The issue here is whether Fred could seek custody of their daughter Deb, based on Mary's lack of ability to meet her (Deb's) financial needs.

In a change of custody claim, the court looks to several factors in determining how custody should be awarded. Some of the factors the court will look at to award custody are, who was originally awarded custody in the separation agreement, abuse of parent(s), mistreatment, support, standard of living, education, health, preference, and the best interests of the child. The court will also consider not splitting up siblings.

There is no claim contained here that evidences any abuse or mistreatment by Mary. Mary was originally awarded custody in the separation agreement. There does not appear to be an issue regarding health, education, or even siblings being separated. It appears that Deb is an only child. There does not appear to be any complaints against Mary by Deb for neglect, abuse, bad parenting, or abandonment. The only claims that Fred can make is the monetary issue of supporting Deb, which does not have to be an issue provided he increases his child support payments and Deb's preference for wanting to live with him. Although this may sound like enough of an argument for Fred to be awarded custody of Deb, it is not. Although Deb's preference for living with her father is a factor in establishing custody, it is not a sole factor and therefore the courts look to not just one factor but to all of the factors discussed above, in determining custody. Therefore, sole custody of Deb will probably not be awarded to Fred, unless Fred can show that there are more contributing factors to consider in awarding custody of Deb to him.

3. Phil can successfully sue to stop Jeff from converting the house into a two-family residence. The issue here is whether Phil, who also owns a lot in Black Acre, can successfully sue to stop Jeff from converting the house into a two-family residence in violation of the restrictive covenant that binds all successors in interest.

A restrictive covenant that is properly recorded and intended to be a common scheme or plan has to meet the following elements; there must be intent to bind successors in interest, there must be notice of the restrictive covenant, it must touch and concern the land and it must meet the Statute of Frauds requirement. Privity is not required.

Here, the deeds from Grant to every lot, including Mary' s and Fred' s contained a restrictive covenant setting forth that only one single family house could be built on each lot, and the covenant would be binding on all successors in interest. There is intent by Grant to bind successors in interest, there is notice because it is recorded by Mary and Fred and should have also been recorded by Grant at the county clerk' s office (however, if it was not recorded by Grant, it runs with the land because it is expressed in the deed), the covenant also touches and concerns the land and it was in writing (so it satisfies the Statute of Frauds). Therefore, it can be concluded that the restrictive covenant runs with the land and is binding upon Jeff.

A subsequent purchaser of property is bound by the restrictive covenant even if it was not contained (notice) in the deed that was given to Jeff. Although, Jeff did not have actual notice of the plan, he could have had constructive or inquiry notice (check the records at the county clerks or observed and asked about the other houses in the lots) of the common scheme or plan. Therefore, Phil whose deed also contained the covenant can bind Jeff and any other subsequent purchaser to the common plan and scheme. Jeff can be sued by any party who is also bound by the restrictive covenants.

The zoning or local building code does not interfere with the restrictive covenant and cannot disrupt the intention of the common scheme. As a result, Jeff can be estopped from building his two-story home.

Question-Four
In December 2002, Frank gave his son, Sean, age 16, a powerful snowmobile. The next month Frank took Sean and Sean's friend, Phil, on a snowmobiling trip to the Adirondacks. Frank did not provide any special training to Sean in the operation of a snowmobile, and this trip was Sean's first time driving one. Sean is very nearsighted, but when his glasses did not fit under his goggles, Frank advised him that the goggles were more important and that he should remove his glasses.

With Phil as a passenger, Sean was driving on an established trail over land owned by Len. In one place, the established trail went close to a telephone pole and under a cable supporting the pole. Without his glasses, Sean was unable to see the cable and struck it, resulting in serious injuries to both Sean and Phil. Len knew his property was used by snowmobilers and never objected or attempted to prevent the use, but he had no knowledge of the location of the trails used.

Sean commenced an action against Frank and Len to recover damages for his injuries. The complaint alleged the foregoing facts. The cause of action alleged against Frank stated that he was negligent in supervising Sean. The cause of action alleged against Len stated that he negligently permitted a dangerous condition to exist on the trail across his property. Frank moved to dismiss Sean's complaint as to him for failure to state a cause of action and the court (1) granted the motion.

After answering the complaint, Len moved for summary judgment. In support of his motion, Len submitted uncontroverted proof by affidavit that he had no knowledge concerning the trails used

by snowmobilers on the property and had never received compensation for that use. The court (2) denied Len's motion.

Phil commenced an action against Sean and Frank to recover damages for his injuries. Phil's complaint alleged that Frank's negligence in failing to supervise Sean contributed to the accident. Phil moved to dismiss the complaint for failure to state a cause of action. The court (3) denied the motion.

After trial, Phil duly entered a judgment against Sean and Frank based on a jury verdict finding Sean 40% responsible and Frank 60% responsible for Phil's damages, consisting of $50,000 in medical expenses plus $100,000 for pain and suffering.

(a) Were the numbered rulings correct?

(b) What is the maximum amount Phil may recover from Sean?

ANSWER TO QUESTION 4
A. 1. The issue is whether a child can assert a cause of action against a parent for negligent supervision.

Under the CPLR, an action brought in a New York court can be dismissed for failure to state a cause of action, if the plaintiff has failed to plead all the required elements of the requisite action in his complaint.

A cause of action for negligence requires a showing of the following elements: defendant's duty owed to a foreseeable plaintiff; breach of that duty; causation, both factual and proximate; and damages. New York has abolished intrafamily immunities in torts action, thus allowing a child to assert a cause of action in tort against a parent. However, in New York, parents owe no duty to their children in supervising them; as a result, a child has no cause of action against a parent for negligent supervision.

Here, Sean, a child, sued his father Frank alleging in the complaint that Frank had a duty to supervise Sean and that he had negligently breached that duty. As explained, Frank did not owe any duty to supervise Sean; therefore, there can be no breach of this non-existent duty. Thus, Sean has failed to prove the very first element of his cause of action against Frank. Therefore, the court was correct in granting Frank's motion to dismiss Sean's complaint for failure to state a cause of action.

2. The issue is what duty does the landowner use to entrants onto his land.

Under the CPLR, the court may grant a motion for summary judgment if there is no genuine issue of material fact that remains for trial and the moving party is entitled to judgment as a matter of law. The initial burden is on the moving party to prove that no genuine issue of material fact is disputed. After that, the burden shifts to the non-moving party to show that there is any dispute regarding any issue of material fact. Neither party can meet its burden merely by allegations raised in the complaint or the answer; rather, the party must submit additional proof of such allegations.

As stated above, the elements of the negligence cause of action are: defendant's duty owed to a foreseeable plaintiff; breach of that duty; causation, both factual and proximate; and damages. In New York, a landowner owes a duty of reasonable care to all entrants upon his land, irrespectively of their status on the land. In other words, landowner must exercise the care of a

reasonably prudent person under the circumstances. However, the status of the entrant upon the land is relevant for determining what care would be owed by a reasonably prudent person.

Here, Sean's status on Len's land was that of an anticipated trespasser, because Len knew that property was used by snowmobilers and had never objected to such use or attempted to prevent it, and because Sean was using a trail on Len's land for riding a snowmobile. At the same time, Len submitted affidavits in support of his motion for summary judgment that he did not know what exactly parts of his land were used by snowmobilers. In addition, Len had no duty to inspect his land to find out which parts of his land are being used by snowmobilers, because he did not receive any compensation for such use and had never expressly authorized such use. Consequently, Len established that he acted as a reasonably prudent person would have acted under the similar circumstances. The burden of proof then shifted to Sean to produce additional evidence showing that Len, in fact, did have the relevant knowledge or that he had duty to obtain such knowledge. Sean failed to submit any such evidence, because the facts state that Len's affidavit supporting his motion for summary judgment was uncontroverted. Therefore, Len met his burden on the issue of summary judgment, because no material issue of fact remains for the trial. Because Len did not breach his duty to Sean, Len is entitled to summary judgment on the issue of his negligence as a matter of law. Therefore, the court was incorrect in denying Len's motion for summary judgment on Sean's claim for negligence.

3. The issue is whether parents may be held liable to their parties for negligent supervision of their children.

As stated above, in New York parents owe no duty for supervising their children. Consequently, they cannot be liable to any third parties for negligently supervising the children and cannot be held vicariously liable for the children's torts. However, a parent may be held independently liable for their own negligence, if such negligence contributed to the degree of third party's injuries sustained as a result of tort committed by a child.

Here, Frank, the father could not be held liable to Phil for negligent supervision of Sean, the child. However, Frank may be held independently liable for his own negligent acts, because his negligence contributed to the degree of Phil's injuries. Specifically, Frank has entrusted his 16-year-old child with a powerful snowmobile. Sean had no prior experience operating the snowmobile and Frank failed to provide him with any special training. Moreover, despite knowing that Sean is nearsighted, Frank had negligently advised him to remove his glasses. Therefore, he did not act as a reasonably prudent person would have acted under similar circumstances.

In addition, it can be said that Frank's acts were a factual and a legal cause of Phil's injuries. Factual causation exists when it can be shown that but for the defendant's breach of duty, the plaintiff would be free of injuries. Legal, or proximate causation exists when it is foreseeable that defendant's breach of duty would result in certain injuries. By his negligent acts, Frank created a foreseeable risk that while driving the snowmobile; Sean could fail to see the obstructions on his way and could injure himself and Phil, who was Sean's passenger. Arguably, but for Frank's instruction to Sean to remove his vision glasses, Sean would have been able to see the cables on the trail of his snowmobile and would have been able to avoid the accident.

Finally, Phil had sustained serious injuries as a result of the snowmobile accident; therefore, he can sufficiently satisfy the required showing of damages as a result of Frank's negligence. Therefore, the court was correct in denying Frank's motion to dismiss Phil's complaint for failure to state a cause of action in negligence because Phil has pleaded all of the required elements of his cause of action against Frank.

B. The issue is to whether Sean and Frank are jointly and severally liable to Phil for his damages.

Under the CPLR, joint tortfeasors who have together contributed to the extent of the plaintiff's damages are held jointly and severally liable for the entire amount of plaintiff's economic damages. However, CPLR creates an exception to the rule of joint and several liability. Specifically, if one of the tortfeasors is less than 50% at fault for the plaintiff's non-economic damages, such tortfeasor can only be held liable for his equitable share of the plaintiff's non-economic damages.

Here, Sean was found 40% at fault for Phil's damages. This includes $50,000 in medical expenses, which are economic damages. Therefore, Sean can be held liable for the entire $50,000 (however, he would have a right of contribution against Frank if he pays in excess of his equitable share of liability). Phil's damages also include $100,000 in pain and suffering, which are non-economic damages. Therefore, Sean, who is less that 50% at fault, may only be held liable to the extent of his equitable share, i.e., 40% or $40,000. None of the exceptions applies here that would allow Phil to hold Sean liable to the full extent of Phil's non-economic damages. Therefore, the maximum amount that Phil can recover from Sean is $90,000 (up to $50,000 in medical expenses and up to $40,000 in pain and suffering).

ANSWER TO QUESTION 4

A. 1. The court correctly granted Frank's motion. The issue is whether Sean can assert a claim for parental negligent supervision against Frank, his father.

Under Torts, negligence is defined as conduct that falls below standards established by law to prevent unforeseeable risks of harm to others. Negligence requires: 1) duty, 2) breach of duty, 3) actual and proximate cause and 4) damages. Duty requires the plaintiff to be a foreseeable plaintiff, under Cardozo theory. The question turns on applicable standard of care owed to the plaintiff. Duty can arise through relationships or by statute. Here, there is a relationship by family because Frank and Sean are father and son. New York has abolished intrafamily immunity thus a cause of action could be asserted under the proper circumstances. However, there is no cause of action in New York for negligent supervision of a child. Therefore, since there is no duty, then there is no liability. There is no need for further discussion on the other element. However, an action could be asserted for negligent entrustment because Frank had a duty to Sean, not to put a dangerous instrument (snowmobile) in care of Sean, especially since he let him where his goggles without glasses knowing he was nearsighted.

2. The court correctly denied Len's motion. The issue is whether Len, as a landowner had a duty to Sean to keep his property safe from danger to others. Generally, under common law, landowner's duty was based on Phil's classification. Under New York law, New York no longer makes classifications regarding landowners (i.e., invitee, licensee). However, New York will distinguish classifications to determine foreseeability. New York test is determined by a reasonableness standard.

In applying the rules, Len had a duty based on reasonableness test, because he knew the trail was an established one that people would reasonably use. Therefore, Len had a duty to make the land safe. Because under common law, Sean would be a licensee, landowner (Len) would have had a duty to warn others about the telephone pole and the cable. New York courts would look at this classification to determine the foreseeability of this danger. The fact that Len never received compensation is irrelevant because he is not subjecting his lands to recreational use by the public without a fee.

Therefore, Len would not be able to assert that defense and the court should deny his motion. Note: Len is asking for summary judgment. Under CPLR, it requires that there be no genuine

issue of fact. Here, clearly there are triable issues for the court to determine with respect to his liability. Therefore, the court should deny it.

3. The court incorrectly denied Phil's motion. The issue is whether Frank had a duty to a third person for conduct of Sean. As stated before negligence requires: 1) duty, 2) breach of duty, 3) causation and 4) damages.

Here, Frank had a duty to control the conduct of Sean. Under negligent entrustment of dangerous instrumentality it would be foreseeable that danger would occur. Frank enhanced that danger by letting Sean drive the snowmobile without his glasses and he was nearsighted. He breached the duty because he let Sean drive without glasses.

Actual and proximate causation is satisfied because but for Sean not have glasses on, the accident would not have occurred. It was also a substantial factor in Phil's injuries.

Damages are satisfied because Phil was injured and he was a foreseeable plaintiff. Note: Sean would be held to standard of care as an adult because he engaged in an adult activity. Therefore, the court incorrectly denied Phil's motion.

B. The maximum amount Phil should recover from Sean is $90,000.

Generally, New York law for injury action is based on comparative negligence theory. This theory allows plaintiff to recover from a tortfeasor regardless of his apportioned fault.

Under joint and several liability (CPLR), a plaintiff can recover the total amount from either tortfeasor. The tortfeasor who pays his excess share is allowed to seek that excess by contribution. Phil is entitled to recover economic damages from tortfeasors at fault of 100%. Under Article 16, joint and several liability limits non-economic damages of tortfeasors to their apportioned fault with some exceptions.

Here, Phil has $50,000 (economic damages) and $100,000 in (non-economic damages). Phil can recover $40,000 or 40% of $100,000 for non-economic damages because under Article 16, limited liability for those under 50% to their apportionate amount. Phil can recover the whole $50,000 for economic damages because of joint and several liability theory where Phil can collect the entire amount from one tortfeasor. Therefore, the maximum amount Phil can recover from Sean is $90,000, which is 40% or $40,000 for non-economic damages plus $50,000 in economic damages to which Sean would have to seek any excess by contribution from Frank. Note: Since Frank is 60% responsible for non-economic damages, he would not be protected by CPLR Article 16 limitations.

Question-Five
Tim, a widower, had a son, Art, and two sisters, Bonnie and Connie. Bonnie is divorced and has a son, Ned. Connie is widowed and has two daughters, Dede and Edie.

On March 10, 2002, Tim duly executed a will, which made the following dispositions:

1. I leave my home, Greenacre, to my sisters, in equal shares.

2. I leave my boat to my friend, Fay.

3. All the residue of my estate I give and devise to my trustee,

Evan, to be held, administered and distributed pursuant to the terms of the trust which I intend to establish with Evan as Trustee.

4. I appoint Evan the executor of my estate.

On May 3, 2002, Tim duly executed a trust instrument, appointing Evan as trustee, and delivered an investment account valued at $100,000 to Evan to fund the trust. The trust instrument provided that the income would be paid to Tim for his life, and that upon his death, the income was to be paid to Art. Upon Art's death, the trust instrument provided that the principal of the trust was to be paid to C Charity. The trust instrument provided that it could be amended or revoked by Tim at any time.

Connie died on June 1, 2003.

On January 15, 2004, Tim and Fay were killed in a car accident. It was impossible to determine who died first. Fay died intestate, survived by her daughter, Gina.

On the date of his death, Tim owned Greenacre, valued at $300,000, the boat valued at $50,000, and a bank account having a balance of $200,000. Evan continued to hold the investment account in trust, pursuant to the trust agreement Tim executed in May 2002. Tim was survived by his son, Art, his sister, Bonnie, his nephew, Ned, and his nieces, Dede and Edie.

Tim's will has been admitted to probate, and Evan has duly qualified as executor.

Bonnie has validly renounced her interest in Tim's estate.

Art claims that the gift by will to the trust was invalid, and that he is entitled to inherit the residuary of Tim's estate outright, under the laws of intestacy. C Charity claims that Tim's entire estate passes to the trust, as the specific legacies provided for in the will both failed.

Ned claims that he alone is entitled to inherit Greenacre. Dede and Edie claim that they are entitled to share in Greenacre. Gina claims that she is entitled to inherit Tim's boat.

Evan retained you to represent the estate, and has posed the following questions:

1. (a) What is the effect of (i) Connie's death and (ii) Bonnie's renunciation of her interest in Tim's estate on the disposition of Greenacre?

(b) Who will inherit Greenacre?

2. What is the effect of Tim's and Fay's simultaneous deaths on the disposition of Tim's boat?

3. (a) Was the gift of the residue to the trust valid?

(b) How should the residuary estate be distributed?

ANSWER TO QUESTION 5
1. a. Effect of Connie’ s death on the disposition of Greenacre

The issue is what effect does a beneficiary’ s death have when the beneficiary is one of the testator’ s sisters.

The general rule in New York, under EPTL, is that if a beneficiary predeceases the testator, the gift to that beneficiary lapses and falls into the residuary estate. An exception is found in New York' s anti-lapse statute, which provides that if the beneficiary is a sister, brother, or issue (descendant) of the testator and that beneficiary leaves issue, then the gift does not lapse but will be shared by the beneficiary' s issue per capita at each generation (people in same relation to the testator take equal shares).

Connie' s share of one half of Greenacre (as provided to her in Tim' s will) does not lapse because Connie is Tim' s sister and Connie has surviving issue (Dede and Edie). As Connie' s issue, Dede and Edie will split Connie' s one half share of Greenacre equally because they are in the same generation as Connie' s daughters. Therefore, Dede will have a quarter of interest in Greenacre and Edie will have a quarter of interest in Greenacre.

There is an effect of Bonnie' s renunciation of her interest in Tim' s estate on the disposition of Greenacre. The issue is what effect does a beneficiary' s renunciation of her interest have when the beneficiary is one of the testator' s sisters.

The rule in New York, under EPTL, is that a beneficiary who validly renounces his/her interest in the testator' s estate will be treated as though he/she predeceased the testator for the purposes of executing the will. The general rule in New York, under EPTL, is that if a beneficiary predeceases the testator, the gift to that beneficiary lapses and falls into the residuary estate. An exception is found in New York' s anti-lapse statute, which provides that if the beneficiary is a sister, brother, or issue (descendant) of testator and that beneficiary leaves issue, then the gift does not lapse but will be shared by the beneficiary' s issue per capita at each generation (people in same relations to the testator take equal shares).

Bonne will be treated as though she predeceased Tim because she validly renounced her interest in Tim' s estate. Bonnie' s share of one half of Greenacre (as provided to her in Tim' s will) does not lapse because Bonnie is Tim' s sister and Bonnie has surviving issue (Ned). As Bonnie' s issue, Ned will take his mother' s share. Therefore, Ned will have one half of interest in Greenacre.

b. Inheritance of Greenacre

The issue is what happens when New York' s anti-lapse statute causes shares not

to be distributed per capita at each generation. When shares are distributed per capita at each generation, people with the same relation to the testator take equal shares.

Distributing Greenacre per capita at each generation would mean that Dede, Edie and Ned each get one third of Greenacre because they are all children of Tim' s siblings (nieces/nephews). However, the anti-lapse statute would require that Dede and Edie split Connie' s share and that Ned take Bonnie' s share based on the foregoing analysis. Because the anti-lapse statute trumps the default of distributing per capita at each generation, the nieces and nephews will take via the anti-lapse statute. Therefore, Dede, Edie and Ned will take Greenacre as tenants in common. Dede will have one quarter interest, Edie will have one quarter interest and Ned will have one half interest.

2. Effect of Tim and Fay' s simultaneous deaths on the disposition of Tim' s boat

The issue is what happens to the disposition of personal property that was bequested to a beneficiary who died simultaneously with the testator.

New York has adopted the uniform Simultaneous Death Act, which provides that if there is no evidence of who died first, it will be assumed that the beneficiary predeceased the testator (in other words, that the testator survived) for purposes of executing a will. New York does not follow the Uniform Probate Code' s 120-hour rule, which requires that the testator survive a beneficiary by 120 hours. The general rule in New York, under EPTL, is that if a beneficiary predeceases the testator, the gift to that beneficiary lapses and falls into the residuary estate. An exception is found in New York' s anti-lapse statute, which provides that if the beneficiary is a sister, brother or issue (descendant) of the testator and that beneficiary leaves issue, then the gift does not lapse but will be shared by the beneficiary' s issue per capita at each generation (people in same relation to the testator take equal shares).

Fay will be treated as though she predeceased Tim because she was a beneficiary and both she and Tim were both killed in a car accident in which it was impossible to determine who died first. Fay' s gift will lapse because Fay is a friend of Tim (not a brother, sister or issue of Tim). Therefore, Tim' s boat will pass to the residuary estate.

3. a. Validity of the gift of the residue to the trust

The issue is whether a testator can bequest the residue of his/her estate to a trust in his/her will.

The rule in New York, under EPTL, is that reference by incorporation is impermissible. Documents referred to in the will must be executed with the same formalities required of a will in order to be valid. An exception exists for a pourover gift made in a will to a trust. The requirements of a pourover trust are that the trust was validly executed, the trust was revocable, and the trust existed before (or was created simultaneously with) the will.

The trust was validly executed because Tim had the present intent to create a trust for the benefit of beneficiaries and delivered the trust instrument to the trustee. The trust was revocable because the trust instrument provided that Tim could amend or revoke the trust at any time. However, the trust was executed after the will was executed because the will was executed on March 10, 2002, and the trust was executed on May 3, 2002. Therefore, the gift of the residue to the trust was not a valid pourover trust.

b. Distribution of the residuary estate

The issue is how should the residuary estate be distributed when it was bequested to a trust that has failed.

The rule in New York, under EPTL, is that when a will fails to properly distribute all property, there is partial intestacy. Any property not accounted for in the will (including residuary estate) will be governed by the intestacy statutes in New York. Intestacy provides for the spouse to get $50,000 and one half of the estate with the other one half of the estate to the children (spouse gets entire estate if no children) OR if no spouse, the children inherit the entire estate OR if none to the parents and issue of parents OR if none to one half maternal grandparents and their issue and one half paternal grandparents and their issue OR if none one half to great-grandchildren of maternal grandparents and one half to great-grandchildren of paternal grandparents OR if none to the state of New York, always distributing per capita at each generation. It should be noted that when a trust fails, there is a resulting trust (not a real trust).

Tim' s will has not properly disposed of the residuary estate because the pourover trust failed. Tim' s residuary estate will be distributed in accordance with intestacy statutes because it was not properly disposed of in the will. The boat ($50,000) is included in the residuary estate because the gift lapsed, as explained above. The bank account with a $200,000 balance will also be in the residuary estate. Therefore, Tim' s son will take the entire residuary estate.

ANSWER TO QUESTION 5

1. a. The issue is whether the death of a beneficiary prior to the death of the testator will cause the gift to lapse and fall into the residuary estate.

Generally, if a beneficiary under the testators will predeceases the testator, the gift to that beneficiary lapses and it will fall into the testator's residuary estate. However, the New York anti-lapse statute, which applies to gifts to the issue/descendents or the brothers and sisters of the testator, prevents these gifts from lapsing and the gifts will go to the issue of the predeceased beneficiary.

Here, the gift to Connie was a gift to the testator's sister. Accordingly, the anti-lapse statute applies and Connie's legacy will go to her issue, Dede and Edie.

The issue is what effect Bonnie's renunciation of the gift will have on the gift. A beneficiary is permitted to renounce a gift. In the case of a valid renunciation, we act as if the renouncing beneficiary predeceased the testator.

In this case, the facts indicate that Bonnie's renunciation was valid. Accordingly, the gift to Bonnie will be treated as if she predeceased Tim. Since Bonnie is Tim's sister, the anti-lapse statute applies and Bonnie's share of Greenacre will pass to her issue Ned.

b. The issue is who will inherit Greenacre and in what shares.

Since, as noted above, Connie and Bonnie's gifts will pass to their children Dede, Edie and Ned, we must determine in what shares they will own Greenacre. The general rule in New York is that inheritance will be per stripes, per capita at each generation. Per stripes indicates that the share of a predeceased or renouncing beneficiary will pass to that individual's issue. Per capita at each generation indicates that of each generational level, the gift will be divided equally between all takers.

Here, Bonnie and Connie each would have inherited one half of Greenacre. As they have either predeceased the testator or validly renounced their gift both one-half shares will pass to their issue. Since we distribute these shares per capita at each generation both one-half shares will be added together and Dede, Edie and Ned will each take one third of the total. Note: If it were not per capita at each generation, Ned would take one half of Greenacre and Dede and Edie would have taken one quarter each.

2. The issue is what effect simultaneous deaths will have on a testamentary disposition.

In New York, when a testator and a beneficiary under his will die simultaneously or under such circumstances that it is impossible to tell which one died first, we assume that the testator survived the beneficiary.

Here, since Tim and Faye were killed together in a car accident and it is impossible to determine who died first we will assume that Tim survived Faye. Having survived Faye, the gift in Tim's will to Faye, of his boat will lapse. Faye is merely a friend, not a sibling or a descendent/issue so the New York anti-lapse statute does not apply. A lapsed gift will fall into the residuary estate. Therefore, the boat becomes part of the residuary estate and Gina takes nothing.

3. a. The issue is whether a will can make a disposition to a trust, which is not in

existence at the time the will is executed.

A testator may make a valid "pourover" disposition to a trust that is in existence at the time of the testator's death. However, the trust must also be in existence at the time of creation of the testamentary instrument.

In this case, the gift of the residuary estate to the trust was invalid because the will was executed on March 10, 2002, and the trust was not created until May 3, 2002, nearly two months later.

b. The residuary of Tim's estate will pass under the laws of intestacy. The clause disposing of the residuary estate will be stricken from the will and Tim's estate not provided for in the will passes intestate.

Since Tim is a widower and has only one son, Art, the residuary estate, including the boat valued at $50,000 and the bank account with a $200,000 balance will pass to Art, Tim's only son. The trust that was established on May 3, 2003, and funded with investments totaling $100,000, will pay the income to Art for life and upon Art's death, the principle will be paid to charity.

MPT

State v. Miller (MPT-1) In this item, applicants are employed by the State's Attorney and are assisting in the prosecution of the defendant, Tom Miller, on two counts of aggravated assault involving domestic violence. Pursuant to the Franklin Evidence Code, the prosecution has given notice that it intends to introduce evidence of three prior acts of violence committed by the defendant against Jan Adams and her daughter, Sara. Ms. Adams, Sara, and the defendant used to live together. Defense counsel has objected to the introduction of this "other acts" evidence and the court has ordered both sides to submit briefs on the issues raised in defense counsel's objection. The File consists of the instructional memo from the supervising State's Attorney, which sets forth the three grounds of defense counsel's objection, an office memo prescribing the format and contents of briefs, and a transcript of a police interview with Jan Adams. The Library contains various sections of the Franklin Evidence Code and the Franklin Penal Code, as well as two appellate cases.

ANSWER TO MPT

Memorandum of Points and Authorities

Statement of Facts

Jan Adams met Tom Miller in June 2001, when they began what Jan has described as an "intimate" personal relationship. Almost immediately, Tom showed signs of jealousy regarding Jan's former husband, Charles Kelly, the father of Jan's daughter, Sara. On July 4, 2001, Tom and Jan were out with friends and Tom became angry and pushed Jan after a friend asked Tom what it was like "to date Charles' woman". Tom pushed Jan so hard that she fell. Jan did not call the police or file charges.

Around the same time, Tom moved in with Jan and Sara. Jan added Tom to her lease and began sharing expenses with him. After a little over a year, Jan and Tom planned to move together; they split the cost of the security deposit on a new lease and had keys made for them both.

But in September 2002, Jan decided to move without Tom because of an incident involving Sara. Sara was sick, whiny and cranky, which angered Tom and caused him to yell at her to shut up and

then to push her into a wall. Jan believes that Tom's anger towards Sara is a reflection of his resentment towards Charles, and that Tom intentionally hurts Sara because he knows it hurts Jan to see her child harmed. Jan witnessed this incident and told Tom to pack his stuff and leave. This time, Jan called the police and filed charges. Tom later pled guilty to assault.

Then, in February 2003, after Jan and Sara had moved, Tom entered Jan's apartment with his extra key and angrily yelled at Jan to change her story and retract the assault charges, threatening that Jan would live to regret filing the charges, and then sticking his finger in her eye, and hitting and choking her. After he left, Jan called the police and filed charges. Shortly after the police left, a rock broke through her living room window. Sara went to investigate and saw Tom's car drive away. Tom later pled guilty to assault arising out of the February 2003 incident.

The incidents underlying the current charges of aggravated assault pending against Tom occurred on October 29, 2003 and November 5, 2003. In October, Tom once again let himself into Jan's apartment with his extra key and went into Jan's bedroom, yelling and swearing at her about her ex-husband Charles, with whom Jan had recently been in contact. Tom told Jan to stay away from Charles or "there'll be trouble". He then slapped her so hard she hit her head against the wall, and warned her that if she reported him and he went to jail, he would kill her and Sara when he got out.

A week later in November, Tom returned at one in the morning, pounding on Jan's door and window to let him in. After the apartment manager told him to leave, Tom left, but then started calling on the phone and leaving messages. Tom said that he would never allow Jan to leave him because she was his woman until he said so. Finally, about two hours after the last phone call, Jan heard a crash in Sara's room and saw a big rock and glass on the floor. When she looked out she saw Tom standing outside.

Jan has since sought counseling and has filed the pending charges against Tom. Tom now seeks to suppress evidence of the three prior incidents of violence against Jan and Sara. However, for the reasons stated below, the three incidents should be admitted.

Argument

1. Because Tom physically harmed Jan, who is another adult with whom he has had an intimate relationship and co-habited, and intentionally harmed Sara knowing that harming her put Jan in fear, Tom engaged in domestic violence, and evidence of such violence is admissible in a subsequent prosecution for domestic violence.

Under Franklin Rules of Evidence 418, "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible" under

Rule 404, which excludes character evidence to prove conduct in conformity therewith. "Domestic violence" is defined in Franklin Penal Code 501 as "abuse" – meaning, intentionally or recklessly causing or attempting to cause a person bodily injury, or placing a person in reasonable apprehension of imminent serious bodily injury – committed by an adult who is a "former cohabitant" or a person with whom the individual "has had a dating…relationship". Cohabitant means "two unrelated adult persons living together for a substantial period of time, resulting in some permanency of the relationship" and is evidenced by sexual relations between the parties, sharing of income of expenses, joint use or ownership of property, the continuity of the relationship, and the length of the relationship.

Here, it is clear that each of the incidences of violence qualifies as "domestic violence" and should therefore be admitted under Rule 418. First, Jan and Tom have had a "dating relationship",

as evidenced by Jan's description of the relationship as "intimate" and also by Tom's own statement that Jan is "his woman until he says so". Second, Jan and Tom were also cohabitants: they lived together for over a year, a significant period of time. Jan added Tom to her lease, which evidences sharing of property use, and also shared expenses with him. They later split the security deposit on the new apartment. Clearly, then their relationship falls under the requirements of 418.

Furthermore, Tom's actions also qualify as "abuse". First, in the July 2001 and February 2003 incidents, Tom directly physically injured Jan. This very clearly fits under the definition. Regarding the September 2003 incident with Sara, which was abuse because it was intended to put Jan in immediate fear of harm. Although Jan herself was not harmed, she witnessed the attack on her daughter and was near, and reasonably apprehended that injury to herself was imminent.

Therefore, the three incidents should be admitted under Rule 418 as prior incidents of domestic violence, as this is a prosecution for offenses involving domestic violence, because in both incidences pending here Tom directly harmed Jan.

2. Because the three prior incidences evidence both Tom's motive of jealousy about Charles and his identity as the person throwing the rock through the window, they should be admitted as non-character evidence.

Under Rule of Evidence 404B and Grubb, evidence of prior bad acts is admissible for purposes other than proving a person's character. For example, it may be admitted to prove motive, intent, absence of mistake, or identity when those are in issue. In Grubb, the Supreme Court made clear that where a defendant puts another purpose at issue, prior acts are admissible to disprove defendant's allegations. There, the defendant alleged that his wife's injuries were accidental, and the court held that because the defendant had put intent and mistake at issue, evidence of prior bad acts was admissible to disprove those allegations.

Here, Tom has stated that it was not him who threw the rock through the window in the November 2003 incident. Therefore, evidence that he had thrown a rock through Jan's window on prior occasions would go to identity, because it would tend to identify him as the one who threw the rock on this occasion. Therefore, the February 2003 incident should be admitted.

The July 2001 and September 2002 incidents should be admitted as evidence of Tom's motive for harming Jan. In both of those instances, Tom was angered by jealousy of Charles, Jan's ex-husband and Sara's father. In the first, the mention of Charles was the direct precipitating event. In the other, Jan has stated that the reason Tom harms Sara is because of his jealousy. These two incidents would therefore shed light on why Tom harmed Jan in October 2003 and November 2003 and provide a motive.

Thus, the evidence should not be barred as inadmissible character evidence because it goes to other purposes, which Tom has put at issue, and is therefore admissible under Rule 404B and Grubb.

3. Because the prior incidents display the same pattern of physical abuse, were no more egregious than the charged offenses, were definitely committed, and will not confuse or mislead the jury, this court should exercise its discretion to admit the prior incidents.

Under Rule 403 and Beck, this court has discretion to determine whether the probative value of the prior incidents is outweighed by the probability that their submission will create a substantial danger of undue prejudice, confuse the issues, or mislead the jury. The factors to be considered include the nature, relevance, and possible remoteness of the offenses, the degree of certainty of the offenses commission, the burden on the defendant of defending against any uncharged

offenses, the likelihood of confusing, misleading, or distracting jurors, and the likely prejudicial impact on the jurors.

In Beck, the Court of Appeals upheld the trial court's decision that two prior incidents of domestic violence against the same woman who had filed the pending charges against the defendant were admissible. The prior incidents involved slapping and hitting on the upper body, as did the charged incident. The defendant had pled guilty to both prior charges. The court held that the trial court had not abused its discretion in finding that the incidents were of the same nature and displayed a pattern of abuse, that they were near in time, similar to and no more egregious than the charged crime, and that there was no question about their commission because the defendant had plead guilty. There was thus "little reason to believe that the jury will be confused, mislead, distracted, or unduly prejudiced" be the evidence.

The same holds true here. First, as to the September 2002 and February 2003 incidents, as in Beck, Tom has pled guilty to both charges. Furthermore, both incidents are extremely similar and display a pattern of abuse against Jan and Sara arising out of Tom's jealousy regarding Charles. The incidents are no more egregious than those charged here, and occurred within the past eighteen months. The February incident is especially probative because it also involves the rock through the window and similar physical abuse. Thus, under Beck, the incidents should be admitted.

Though the July 2001 incident is uncharged and more remote in time, and thus poses a greater risk that Tom will have to defend against it, it too should be admitted as it is highly probative of Tom's motive and jealousy regarding Charles. If anything, it is slightly less egregious than the incidents charged here because it involves a pushing but not the same degree of yelling an abuse, therefore it will not be unduly prejudicial. Though it was not proven in court or charged, it would not unduly distract the jury because it would be easy to prove since there were so many witnesses. Because of the important probative value of this incident, the court should exercise its discretion to admit the evidence.

Conclusion

Because the three prior incidents were all "domestic violence", evidence Tom's motive of jealousy and his identity as the one throwing the rocks through Jan's window, and because their probative value is not outweighed by undue prejudice or confusion, this court should admit the prior incidents.

ANSWER TO MPT
Statement of Facts

Defendant Tom Miller is charged with two counts of aggravated assault, which involved domestic violence against Jan Adams, his former cohabitant. The charges result from actions he took 1) on October 29, 2003, the incident in which he slapped Jan hard so that her head hit against the wall and threatened to kill Jan and her Daughter Sara, and 2) on November 5, 2003, the incident in which he threw a rock and broke the window in Jan's apartment. Miller denies the allegations and pleads not guilty to the charges.

In accordance with Franklin Rule of Evidence 418E, we gave Miller timely notice of our intention to introduce at trial evidence of his three prior acts of violence: 1) conviction of a prior assault upon Jan on February 12, 2003, which involved Miller pushing Jan against the wall, sticking his finger in Jan's eye, hitting Jan in the face, choking Jan and subsequently breaking Jan's living room window with a rock; 2) conviction of an assault upon Sara, a minor, in the

presence of her mother Jan, on September 21, 2002, which involved Miller yelling at and pushing Sara against a wall, Sara being sick on that day; and 3) an uncharged assault upon Jan on or about

July 4, 2001, whereupon Miller, in a rage, pushed Jan so hard that she fell in front of her friends in the parking lot of a bar.

The defense counsel has objected to the admission of the above-mentioned evidence, and at the request of the court, we hereby set forth the arguments in response to those three objections and supporting why all of the evidence should be admitted.

Arguments

1. The three prior acts, all involving intentionally inflicting bodily injury on Jan or intentionally placing Jan in reasonable apprehension of imminent serious bodily injury, constitute domestic violence under Franklin Penal Code §501 such that Franklin Rule of Evidence 418 applies.

Jan is a former cohabitant of Miller under Franklin Penal Code §501. Penal

Code §501 defines domestic violence as abuse committed by one against an adult who is, among other enumerated statuses, a former cohabitant. Cohabitant is defined to mean two unrelated adults living together for a substantial period of time, resulting in some permanency of the relationship. Factors to determine cohabitation include a combination of circumstances, such as 1) sexual relations between the parties while living together, 2) sharing of income or expenses, 3) joint use or ownership of property, 4) the parties' holding themselves out as husband and wife, 5) the continuity of the relationship and 6) the length of the relationship.

In the case at the bar, Jan and Miller lived together for a significant length of time between June 2001 and September 2002. While living together, they shared expenses, as evidence from their splitting the cost of the security deposit for the new apartment. They even had keys made for the both of them. Furthermore, Jan considered the relationship between her and Miller a close, personal one. Thus, Jan should be considered as having "cohabited" with Miller under the statute.

The three prior acts, all involving physical injury to Jan or to Sara, constitutes abuse under Franklin Penal Code §501. Penal Code §501 defines "abuse" as intentionally or recklessly causing or attempting to cause a person bodily injury, or placing a person in reasonable apprehension of imminent serious bodily injury.

Miller has intentionally caused bodily injury to Jan or placed her in reasonable apprehension of imminent serious bodily injury on all three occasions. On

February 12, 2003, Miller pushed Jan against the wall, stuck his finger in her eye, hit her in the face and choked her. Moreover, he threatened her by saying that she would live to wish she had never called the police, thereby intentionally placing her in reasonable apprehension of imminent serious bodily injury, which was further aggravated when Miller threw a rock breaking Jan's living room window.

Miller has recklessly placed Jan in reasonable apprehension of imminent serious bodily injury on September 21, 2002, when he yelled at and pushed Sara against a wall. Although Miller did not directly injure Jan, he should have known that Jan could not stand to see Sara get hurt. In fact, Jan admits that Miller knows how much Jan cares for Sara and that whatever injury Miller inflicts on Sara hurts Jan. Therefore, his actions towards Sara recklessly placed Jan in reasonable apprehension of imminent serious bodily injury. Miller also intentionally caused Jan bodily injury on July 4, 2001, when he pushed Jan so hard that she fell onto the ground in a parking lot.

The three incidents, therefore, all involved "abuse" as defined in the criminal statute. Because Miller has committed abuse against a former cohabitant, Jan, on all three prior occasions, they constitute domestic violence under Penal Code §501 and the Rule of Evidence 418 should apply.

2. The three prior incidents of abuse are admissible under Franklin Rule of

Evidence 404A because Miller denies the essential elements of aggravated assault and denies any responsibility for Jan's injuries, making intent and identity issues of the case.

Rule of Evidence 404A states the general rule that evidence of a person's character is not admissible for purpose of proving that the person acted in conformity with his character on a particular occasion. Rule of Evidence 404B, however, allows other prior acts to be admissible for other purposes, such as proof of motive, intent, identity or absence of accident. The Supreme Court in State v. Grubb has applied the rule to a case involving assault and battery on a spouse. It held that where the defendant asserts only self-defense and does not deny the essential elements of the charged crime, the state cannot use prior crimes or wrongs to establish his intent or to demonstrate that the injuries suffered by the victim were not the result of accident. However, where the defendant denies the victim's injuries as being a result of any intentional conduct on his part, intent is at issue, in which case the state can use defendant's prior assaults on the victim to prove that the defendant intended to injure the victim and that her injures were not accidental.

In the present case, Miller denies the charges and even blames another, Charles, Jan's former husband, for being responsible for the broken window. Because Miller has raised both the issues of intent, by denying that Jan's injuries and property damage were the result of his intentional conduct, and of identity, by pointing the finger at Charles, Rule of Evidence 404B is triggered. The state should therefore be permitted to submit prior acts evidence to show intent and identity under Rule 404B.

3. Because of the repetitive nature of the conduct, the closeness in time of the offenses, the unlikely prejudicial impact on the jurors, and the certainty of their commissions, the court should not exercise its discretion under Rule of Evidence 403 to exclude the evidence of the three prior acts committee against Jan by Miller.

Rule 418D makes the admissibility of evidence of prior domestic violence under Rule 418B contingent on whether the evidence is more probative than prejudicial under Rule 403. Under the Court of Appeal decision State v. Beck, Rule 403 requires a weighing of the following factors: 1) examination of the nature, relevance, and possible remoteness of each offense, 2) the degree of certainty of its commission, 3) the burden on the defendant of defending against the uncharged offense, 4) the likelihood of confusing, misleading or distracting the jurors from their main inquiry, and 5) its likely prejudicial impact on the jurors. The weighing process depends on the trial court's consideration of the unique facts and issues of each case (Beck). Where the incidents of prior abuse are of the same nature, displaying a pattern of abuse, all within a short period of time prior to the crime being charged, and where they are very similar and no more egregious than the charged offense, and there is no question about their commission, they should not be excluded (Beck).

In the present case, the prior incidents all occurred within a couple of years from the two incidents being charged, and they are all of the same nature in that Miller physically abuses Jan or breaks a window in her apartment. There is also little doubt as to the question about their commission, since Miller was convicted on two of the acts and in the uncharged incident of July 4, 2001, it occurred in the presence of a lot of Jan's friends. They displayed the same pattern of abuse – pushing Jan and breaking her window and were similar to the crimes being charged. Also, they were no more egregious than the two incidents for which Miller is being currently charged, thus there is little reason to believe that the jury will be confused, misled, distracted, or

unduly prejudiced by this evidence. Thus, the court should not exclude the evidence in it discretion under Rule 403.