

NEW YORK STATE BAR EXAMINATION
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Question-One

In April 2004, Main Corp., a New York corporation engaged in the manufacturing of shoes, formed a subsidiary corporation, Sub Corp. and transferred to Sub Corp. title to Blackacre, in exchange for a \$1,000,000 purchase money mortgage. Blackacre, a commercial building located in Westchester County, was occupied solely by Main Corp. Tom and Jerry were the officers, directors and sole shareholders of both Main Corp. and Sub Corp. The corporations maintained separate business records and bank accounts. Sub Corp. had no employees, held no board meetings, and had no letterhead.

In June 2004, Main Corp. vacated Blackacre, and Sub Corp. entered into a written contract with Amy, a duly licensed real estate broker, to sell Blackacre. The contract set forth in pertinent part that if Amy procured a purchaser for Blackacre, Amy would be entitled to a 6% commission upon closing of title, but that if Sub Corp. found a purchaser on its own, no commission would be due to Amy. On the day the brokerage contract was signed, Tom orally agreed with Amy that even if Sub Corp. found a purchaser for Blackacre, Amy would be entitled to a 2% commission on the sale.

Over the summer, Amy spent at least 100 hours trying to procure a purchaser for Blackacre, but was unable to do so. In October 2004, Amy advised Tom that she had found a buyer ready, willing and able to buy Blackacre for \$1,000,000. However, Tom told her that he had already found a buyer, to whom Sub Corp. had sold Blackacre. When Amy demanded that Sub Corp. pay her the 2% commission, Tom refused.

Amy hired Lawyer to sue both Sub Corp. and Main Corp. to recover her commission. The written and signed retainer agreement between Amy and Lawyer set forth in pertinent part that Lawyer would receive a nonrefundable retainer of \$10,000 against a rate of \$200 per hour. Lawyer duly commenced an action against Sub Corp. and Main Corp. asserting causes of action against both defendants for breach of contract, or in the alternative, for recovery under the theory of quantum meruit. In her complaint, Amy claimed, among other things, that (1) Main Corp. dominated Sub Corp. to such an extent that Main Corp. was the "alter ego" of Sub Corp. and was therefore liable under the contract as if it were a signatory, and that (2) the oral agreement between Tom and Amy was binding on both Sub Corp. and Main Corp.

Amy became dissatisfied with Lawyer's representation, discharged Lawyer and demanded the return of her \$10,000 retainer. Lawyer refused on the ground that pursuant to the express terms of the agreement, the retainer was "nonrefundable." At the time of Lawyer's discharge, Lawyer had provided ten hours of legal services on Amy's behalf.

(1) Can Amy's contract with Sub Corp. be enforced against Main Corp.?

(2) Can Amy recover against Sub Corp. (a) for breach of contract and/or

(b) in quantum meruit?

(3) What are the ethical and monetary consequences of Lawyer's refusal to return the \$10,000 retainer?

ANSWER TO QUESTION 1

1. The issue is whether the corporate veil of Sub Corp. should be pierced in order to hold Main Corp. liable on the contract with Amy because Main Corp. so dominated Sub Corp. as to make it their alter ego, justifying piercing even though Main Corp. was not an explicit party to the contract.

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Generally, only the corporation itself will be liable on its debts or obligations and courts will not pierce the corporate veil to attach liability to shareholders of the corporation or a parent corporation. However, if a corporation, or subsidiary of a parent, was merely created to perpetrate fraud, take unfair advantage of the corporate form, and has no independent identity, you may pierce the corporate veil of subsidiary to attach liability to the parent under the BCL. This test is very harshly construed in New York so that only if the subsidiary has no mind of its own and no independent business existence, will it be found to be an alter ego.

In this case, Sub Corp. had no mind of its own. Although it is true that it held property to Blackacre and so had an asset, a purchase money mortgage was retained by Main Corp., so it was not even outright ownership. Another factor against piercing the corporate veil of Sub Corp. is that they kept independent records. However, the mere formality of Sub Corp.'s independent records will be outweighed by the fact that Sub Corp. had no employees, no letterhead, and importantly held no separate board meetings. In addition, Tim and Terry were the sole shareholders and directors of Sub Corp., but also of Main Corp. This identity, coupled with the fact that there isn't evidence that Sub Corp. carried on any business independent of Main Corp. is enough to attach liability to Main Corp. as an alter ego of Sub Corp.

Thus, because Sub Corp. had no mind of its own independent of Main Corp., Amy may enforce her contract with Sub Corp. against Main Corp.

2. a. The issue is whether Amy can recover against Sub Corp. for breach of contract when a written term of the contract regarding commission has not been violated, and the only violation is an inconsistent oral term.

In general, under the Parol Evidence Rule, oral evidence of additional terms may not be admitted against a written contract about that transaction. Although oral evidence may be admitted if the contract is only partially integrated, it may not be admitted if it contradicts a specific term of the written agreement.

In this case, Amy's agreement regarding her commission was in writing and provided that she would receive 6% commission "upon closing of title" if she delivered a purchaser, but 0% if Sub Corp. found one on its own. The oral promise by Tom to pay Amy 2% commission even if Sub Corp. found a buyer was inconsistent with a term found in the writing regarding 0% commission, and thus the written agreement controls and the oral evidence is thrown out. Additionally, the facts state the oral promise was made on the same day as the written agreement, so the Parol Evidence Rule applies and we do not have to be concerned about whether the promise was a modification which would not have to comply with the Parol Evidence Rule, although arguably may have to be in writing to satisfy the Statute of Frauds.

Thus, because the oral promise will be excluded, Amy cannot recover on breach of contract, since she did not close title on her delivered purchaser.

b. The issue is whether Amy's work in procuring a buyer coupled with Tom's oral promise allows her to recover in quantum meruit.

Amy should recover in quantum meruit if her reliance caused her to expend energy and resources. Procuring a buyer and fairness would dictate that she fulfilled her duties under the contract. In this case, Amy spent over 100 hours working for Sub Corp. to find a buyer and did find one who was ready, willing, and able to buy. In addition, Sub Corp. never notified her of their independent buyer. It was foreseeable that Amy would rely on the promise made by Tom and she did reasonably rely to her detriment.

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Thus, Amy may be able to recover on quantum meruit for the reasonable value of her services rendered, of which 2% may be a good approximation.

3. The issue is whether the lawyer's refusal to return a non-refundable retainer is a violation of their ethical duties under the New York Code of Professional Responsibility.

In general, a lawyer may take a non-refundable retainer, except in a domestic relations case. If it is an availability retainer, the lawyer may keep all of it. However, all other retainers may be kept to the extent they reflect services rendered. If a lawyer withdraws or is discharged, they must return the unearned portion.

In this case, Lawyer earned only ten hours of legal services. Therefore, they may only keep the portion of the \$10,000 that reflects those ten hours. That is the monetary consequence to Lawyer. If this were an availability retainer, they could keep all of it, but not simply because it was labeled "non-refundable".

Thus, because the lawyer has refused to return the remainder of the retainer to Amy, they will be liable to Amy and could suffer disciplinary action for violating their ethical obligation to return the money.

ANSWER TO QUESTION 1

1. The issue is whether the court may pierce the corporate veil, and hold Sub Corp., the subsidiary corporation and or its officers and directors, Tom and Jerry, liable.

Upon proper formation of a corporation, pursuant to the laws of the New York Business and Corporations Law (BCL), individual corporate stakeholders receive protection from liabilities of the corporate entity. In addition, separate entities, such as parent and subsidiary corporations, which are duly incorporated by the state also receive protection from the liabilities of outside entities.

However, where extreme circumstances arise, New York courts may disregard the corporate form and hold individual corporate stakeholders personally liable for actions taken on behalf of the corporate entity. This drastic measure of "piercing the corporate veil", will generally be used by the courts in three circumstances: 1) where there is a total commingling of corporate assets and liabilities of two separate corporations, 2) where an individual utilizes the corporate form for personal reasons as his/her "alter ego", in order to enjoy the protection of the corporate form, and 3) where a parent corporation exercises such direction and control over a subsidiary, to the extent that the subsidiary can be said to have no identity of its own.

In this case, Sub Corp. was wholly owned by the owners of Main Corp. Both corporations were engaged in different business capacities. It appears as though the business purpose of Sub Corp. was to provide a manner for which Main Corp. could hold property while reducing exposure to liabilities arising from the property. However, this alone would not be sufficient for the courts to pierce Sub Corp.'s corporate veil, thus exposing Main Corp. to liability. Because both corporations maintained separate business records and bank accounts, there appears to be no commingling of assets.

Generally, claims calling for individual liability as a result from a corporation being maintained as an "alter ego" arise from situations where individual persons use the corporate form as a shield to liability for their personal, rather than business, endeavors. In this case, because the separate subsidiary corporation was being maintained in a business capacity with no evidence of overreaching by any party, the corporate form shall be maintained. Therefore, Amy's contract with Sub Corp. should not be enforced against Main Corp.

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2. a. The issue is whether an oral modification of a written contract for the brokerage of real property is enforceable.

Pursuant to the New York General Obligations law, a contract for commissions arising from the brokerage and sale of real property must be in writing and signed by the party to be charged. Such writing shall include the nature of the brokerage agency and the percentage of commission. Subsequent modifications to the contract are enforceable provided that they too are embodied in a signed writing, or if consideration has been furnished for the modification.

In this case, the original brokerage agreement, which provided for the 6% commission was properly executed in writing. By providing that Amy would not be entitled to a commission should the seller make the sale on his own, Amy was not granted an exclusive right to sell. Therefore, regardless of how much effort she put forth, if the seller is able to find a buyer prior to Amy, then she would be entitled to nothing.

The subsequent contract modification to provide Amy with 2% commission should the seller secure a buyer without Amy's help, was unsupported by consideration, and not otherwise embodied in a writing. Therefore, Amy will be unable to recover on a basis of breach of contract.

b. The issue here is whether Sub Corp. is liable to pay Amy based on the receipt of unjust enrichment as a result of Amy's efforts.

Courts will construe an otherwise unenforceable contract as a quasi-contract in order to prevent the unjust enrichment of a party. Such cases arise when there is an unenforceable agreement, one party benefited from the performance of another party, without performance of a mutual obligation of its own.

In this case, Amy is claiming in the alternative that she is entitled to recovery under a theory of quantum meruit. Amy claims that she exerted great time and effort, and was able to secure a buyer who was "ready, willing, and able" to purchase Blackacre. However, regardless of the extent of Amy's efforts, unless Sub Corp. sold Blackacre to any buyer, which was located as a result of Amy's efforts, Sub Corp. cannot be found to have benefited from Amy's efforts. Therefore, Amy may not recover under a theory of quantum meruit.

3. The issue is whether an attorney may request and keep a non-refundable retainer.

Pursuant to the Ethical Considerations (EC) governing lawyers in New York State, unless an attorney is hired on a retainer basis to be ready to represent and assist their client at all times on instant notice, an attorney may not keep fees for work not performed. Clients are permitted to advance funds to satisfy fees to an attorney. However, the fees must be kept by the attorney in a separate account, and withdrawals may be made only upon completion of work performed.

In addition, attorneys must provide clients with an engagement letter indicating the terms of the representation and the method of disbursements for fees and other expenditures.

In this case, Amy's lawyer agreed to work on an hourly basis. Although it was permissible for the lawyer to accept an up-front advancement, he may take from this advancement only as work is completed.

Upon discharge by Amy, the attorney must make an accounting for all work completed and take an appropriate sum for such work. Any funds remaining from the advancement must be returned to Amy. Furthermore, if any dispute arises from the amount of work performed by the lawyer and

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the amount taken as a fee, the amount of the dispute shall be held in an escrow account, until the dispute is rectified.

Amy's attorney acted improperly by commingling funds, refusing to return unused advance monies, and by failing to execute an engagement letter. As such, he may be sanctioned by the appropriate bar association, while also remaining liable to Amy in a civil action.

Question-Two

Joe approached Pat, an undercover police officer, and asked if Pat had one pound of marijuana for sale. Pat replied that he could provide him with one pound of marijuana at a price of \$1,500, and they made arrangements to consummate the sale. At the appointed time and place Joe paid \$1,500 to Pat, who delivered one pound of oregano to Joe. Pat then arrested Joe and charged him with criminal solicitation and attempted possession of marijuana.

Pat took Joe to the police station where he gave Joe his Miranda warnings. Joe refused to make any statements, asserting his right to counsel, and immediately called his lawyer, Ann.

At Joe's trial the sole witness produced by the prosecutor was Pat, who testified to the foregoing facts. After the jury returned a guilty verdict on both charges, Ann moved to set aside the verdict (1) as to the solicitation charge, on the grounds (a) that the facts presented could not support a guilty verdict, and (b) that corroboration of Pat's testimony was required because Pat was an accomplice in the underlying crime, and (2) as to the attempt charge, on the ground that the proof was that Joe obtained only oregano.

While awaiting trial on the foregoing charges, Joe entered Linda's liquor store near closing time and hid while Linda closed the store and locked the front door. Thinking Linda had left the store, Joe removed some bottles from the shelves and placed them in a carton. When Linda suddenly appeared, Joe fled the building empty-handed. Shortly thereafter, based on a description that Linda gave to the police, Joe was arrested. The arresting officer, Cal, was aware that Joe was represented by Ann on the pending criminal solicitation and attempted possession charges. After Cal gave Joe his Miranda warnings, Joe said that he did not want to consult Ann because no one was hurt and nothing was stolen, so he should not be in any trouble. Joe then admitted that he was the person Linda had described as being in the liquor store and that he had moved some bottles from a shelf to a carton. After a grand jury indicted Joe for the crime of burglary based on the foregoing facts, Joe asked Ann to represent him on the burglary charge. Ann has moved (3) to suppress Joe's admissions on the ground that he could not waive his right to counsel without Ann being present, and (4) to dismiss the indictment on the ground that the facts alleged do not support the crime.

How should the court rule on the motions numbered (1) through (4)?

ANSWER TO QUESTION 2

1. a. Solicitation

The issue is whether the elements of criminal solicitation have been satisfied. Under the NYPL, solicitation is the asking, inciting, or requesting that another commit a crime with specific intent that the crime be committed. New York follows the unilateral approach to solicitation. This means that a person being solicited is not of a guilty mind because they are a police officer.

Here, Joe asked Pat to sell him marijuana. Joe was unaware that Pat was a police officer and unaware that Pat was really going to sell him oregano. Regardless, Joe asked Pat to commit the

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crime of selling marijuana and Joe intended that Pat commit such crime. Therefore, Joe is guilty of the crime of solicitation.

b. Corroboration of Accomplice' s Testimony

The issue is whether corroboration of an accomplice' s testimony is necessary in order to convict an accomplice of the underlying crime. An accomplice is a person who aids or encourages another to commit a crime with the specific intent that the crime be committed. An accomplice is liable for the crime itself and all other foreseeable crimes. Further, an accomplice cannot be convicted solely on the uncorroborated testimony of an accomplice.

Here, Pat was not an accomplice to Joe' s crime of solicitation because Pat did not induce Joe to purchase the marijuana. Joe approached Pat. Further, even if he is an accomplice as an undercover police officer with personal knowledge of the transaction, he can testify.

Joe can raise the affirmative defense of entrapment, but it will be unsuccessful. Joe would need to prove by a preponderance of the evidence that the criminal plan originated with the police and that he was not predisposed to commit the crime. As the facts indicate, Joe approached the officer. As a result, Joe can be convicted of solicitation based solely on the officer' s testimony.

2. Attempt

The issue is whether a person can be liable for attempting to commit a crime that was impossible. An attempt occurs when a person, with specific intent to commit a crime, takes a substantial step beyond mere preparation in furtherance of the crime. In New York, the defendant must come very near or dangerously near the commission of the crime. Under NYPL, impossibility of actually committing the crime because the facts were not as the defendant thought them to be is no defense.

Here, Joe attempted to purchase marijuana because he approached Pat and asked if he had marijuana for sale. Further, Joe paid \$1500 and took possession of the alleged marijuana. The fact that he was really given oregano is irrelevant. Therefore, because impossibility is not a defense, Joe can be convicted of attempted possession of marijuana even though he was given oregano.

3. Waiver of Right to Counsel

The issue is whether a defendant who is represented by counsel on one charge and is subsequently released and arrested on another charge can waive his right to counsel without his attorney present. Under the 5th Amendment of the U.S. Constitution, before a confession is admissible, a defendant who is in custody and under interrogation must be read his Miranda rights. The 14th Amendment due process clause requires such waiver to be knowing, voluntary, and intelligent. Similarly, the 6th Amendment provides a right to counsel once formal charges for a serious crime have been filed. Under New York law, a defendant has an indelible right to counsel that attaches when a defendant is in custody and experiencing activity overwhelming to the lay person, when the defendant is arraigned, upon filing of the accusatory instrument, and when there is any significant judicial activity. Once the indelible right to counsel attaches, and if police are aware that the defendant is represented by counsel, the defendant may only waive his right to counsel in counsel' s presence. However, when the indelible right to counsel attaches for one charge and then the defendant is arrested on an unrelated charge, waiver need not occur in the attorney' s presence. This is because the 6th Amendment right to counsel is offense specific.

Here, Joe was awaiting charges for solicitation and attempted possession of marijuana when he was subsequently arrested for burglary. Although the arresting office was aware Joe was being represented by counsel on another charge, his indelible right to counsel for the burglary charge

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did not attach until he was in custody and requested an attorney. Here, he did not request Ann's presence. Therefore, the admissibility of the confession will be determined by the Arthur Hobson rule, which deals with voluntariness and length of interrogation.

Because the indelible right to counsel did not attach for the subsequent unrelated charge of burglary, Joe was free to waive his right to counsel without Ann present. Therefore, Joe's admission should not be suppressed.

4. Burglary

The issue is whether the elements of burglary have been satisfied. Under NYPL, burglary is the knowingly entering or remaining unlawfully in any structure with intent to commit any crime inside. A grand jury may indict if the evidence is legally sufficient, all the elements of the cause of action are satisfied, and there is reasonable cause to believe the defendant was the perpetrator.

Here, Joe knowingly entered a liquor store, which is a structure. He remained unlawfully because he hid while Linda closed the store and he had intent to commit the crime of larceny (taking personal property of another with intent to deprive them of possession) when he entered. The burglary was committed when he remained unlawfully with intent to steal the bottles. Therefore, it is irrelevant that he left empty handed. Therefore, the grand jury could properly indict Joe for third degree burglary.

ANSWER TO QUESTION 2

1. a. The issue is whether Joe is guilty of solicitation.

Under the New York Penal Law, solicitation is defined as requesting that another commit a crime with the intent to commit that crime. Solicitation merges with the substantive offense. When two parties are necessary for the commission of a crime, there can be no solicitation.

Here, Joe requested that Pat provide him with marijuana with the intent to possess marijuana. The elements of solicitation are met. Possession is not a crime requiring two people (as would be sale). However, solicitation merges with the substantive offense (possession), so Joe cannot be guilty of solicitation and attempted murder.

The court should sustain the motion to set aside the verdict.

b. The issue is whether an undercover police officer's testimony must be corroborated.

Under the New York Penal Law, an accomplice's testimony must be corroborated by other evidence to sustain a conviction against the principal. An accomplice is a person who aids or encourages the principal with the intent of facilitating the target crime.

Here, Pat, the undercover officer did not intend to commit the target crime. Consequently, he is not an accomplice. Pat's testimony does not need to be corroborated. The court should overrule the motion to set aside the verdict.

2. The issue is whether Joe can be convicted of attempt when it was impossible to commit the target crime because of a mistake of fact.

A person is guilty of attempt when he takes a substantial step towards completion of a crime with the intent to commit the target crime. It is not a defense that the defendant could not have completed the crime because he was mistaken about the attendant facts or circumstances.

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In this case, Joe intended to commit the crime of possession of marijuana. He took a substantial step towards completion when he paid \$1,500 for what he thought was marijuana. It is irrelevant that he was mistaken as to whether the goods were marijuana or oregano. Thus, the court should overrule the motion.

3. The issue is whether a defendant can waive his rights to counsel outside the presence of counsel when he is detained on an unrelated charge and the police know that he is represented by counsel.

The exclusionary rule suppresses evidence obtained in violation of a defendant's Fifth Amendment right to counsel. Under the Fifth Amendment, a criminal defendant has a right to counsel when he is in custody and subject to interrogation. He may waive his Miranda right to counsel if the waiver is knowing, voluntary, and intelligent. New York protects defendant's indelible right to counsel, which attaches when: 1) the defendant is subject to police activity overwhelming to the lay person and requests counsel, 2) upon the filing of an accusatory instrument, 3) upon arraignment, and 4) upon significant judicial activity. A defendant may waive his rights to counsel, but if the police know that he is represented by counsel in the matter, the waiver may be obtained only in the presence of the attorney. However, if the defendant is released and later detained on an unrelated charge, the waiver may be obtained outside the presence of counsel even if the police know of the representation.

In this case, Joe was represented by Ann on the charges of criminal solicitation and attempted possession. He was released from police custody and later arrested on the unrelated charge of burglary. Even though Cal was aware that Joe was represented on the unrelated charge, he was not required to obtain the waiver in the presence of Ann. Thus, the waiver was valid, and the court should overrule the motion to suppress the confession.

4. The issue is whether the alleged facts satisfy all elements of burglary.

Under New York Penal Law, burglary is 1) breaking, entering, or remaining unlawfully, 2) in the premises of another, 3) without consent, and 4) with the intent to commit a crime inside. New York does not limit burglary to dwellings.

Here, the facts indicate that Joe satisfies all the elements. First, he remained unlawfully in the store because he had no right to be there after closing time. He remained by unlawfully hiding himself. Second, the liquor store was the premises of another, Linda, and she did not give Joe consent to be there. Finally, it can be inferred from the circumstantial evidence that Joe intended to commit the crime of larceny inside. By removing bottles from the shelves, Joe intended to take and carry away the property of another with the intent to permanently deprive the owner of the property. His intent to commit the crime can also be inferred from his hiding in the store. Thus, all elements are met and the motion should be overruled.

It should be noted that Joe can only be guilty of third-degree burglary. None of the elements for second-degree burglary are met – dwelling, armed, or physical injury to a non-participant.

Question-Three

Tom and Beth, both age 30, were married in New York in 1996. At the time of their wedding, Tom was a successful business executive, and Beth was a first year law student with no assets, living off the proceeds of a student loan. Before they were married, Tom and Beth consulted separate attorneys and agreed, in a duly executed and acknowledged pre-nuptial agreement, that in the event they were to divorce, neither party would seek equitable distribution from the other. The agreement contained no provision with regard to maintenance in the event of their separation or divorce.

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Immediately after they were married, Tom persuaded Beth to quit law school so that they could travel together in his business and she could assist him in hosting business dinners and other events.

Tom and Beth lived a lavish lifestyle over the next several years, traveling extensively and maintaining two elegant homes in New York, both owned by Tom. Tom gave Beth access to a substantially funded checking account to pay for household expenses for their homes and for her personal use. Beth managed the homes and assisted Tom's career by overseeing the social obligations of his business and community affairs.

Tom and Beth lived together in New York until January 2002, when Tom abandoned Beth, sold his New York homes, and moved to State X, where he established his domicile and has since resided. Beth has continuously resided in New York.

In March 2004, Tom commenced an action for divorce in State X upon the ground of irreconcilable differences, a ground recognized in State X. No economic relief was sought in the action. Beth was personally served with the summons and complaint in New York, but did not appear in the State X action. In July 2004, the State X court granted Tom a divorce from Beth, valid under State X law, and made no findings with respect to their economic affairs.

Although his business has continued to flourish and he has amassed considerable wealth, Tom provided no support to Beth after he abandoned her. Beth has been able to support herself over the last few years by working as a caterer earning \$30,000 per year. However, she has been unable to save or borrow sufficient funds to return to law school.

In October 2004, Beth commenced an action against Tom seeking: a declaration of nullity of the State X judgment of divorce; a divorce on the ground of abandonment; and an award of maintenance from Tom. Tom was personally served with the summons and complaint in State X.

Tom moved to dismiss Beth's complaint on the grounds that the State X judgment of divorce was valid and effective to bar any action for divorce or maintenance, and that, in any event, the New York court lacked any basis for the exercise of personal jurisdiction over him. The court (1) granted Tom's motion based on the prior State X judgment to the extent of dismissing Beth's action for a divorce, but (2) denied Tom's motion as to Beth's action for maintenance. The court (3) denied Tom's motion to dismiss for lack of personal jurisdiction.

At the trial of Beth's action for maintenance, proof of the foregoing facts was presented. Beth argued at the close of the proof that the facts entitle her to an award of maintenance. Tom argued that, considering the relative brief duration of the marriage and Beth's present ability to be self-supporting, such relief was not warranted. The parties were directed to submit post-trial briefs in support of their positions.

(a) Were the numbered rulings of the court correct?

(b) What arguments should Beth make in her post-trial brief in response to Tom's arguments at trial and in support of her claim for maintenance?

ANSWER TO QUESTION 3

A. 1. The issue is whether an ex parte divorce validly granted in another state is entitled to full faith and credit in New York.

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A court may grant a divorce if it has subject matter jurisdiction over the marriage. If one of the spouses is domiciled in the state where the divorce action is commenced, that is sufficient to give the court subject matter jurisdiction over the marriage. A state is a person's domicile if the person is present there with the intent to remain there indefinitely.

Here, Tom's domicile was in State X at the time the divorce was granted in 2004, because in 2002 Tom moved to State X, thus satisfying the presence element of domicile, and he sold his houses in New York, demonstrating that he intended to remain indefinitely in State X. State X therefore had subject matter jurisdiction over the marriage of Tom and Beth.

If the spouse not seeking the divorce is duly served, but does not appear in the action, the court may grant a valid ex parte divorce. An ex parte divorce validly granted in another state is entitled to full faith and credit in New York even if the divorce would not have been valid under New York law.

Here, Beth was duly served with process but did not appear in the action. State X granted a valid ex parte divorce based on its subject matter jurisdiction over the marriage. The ground for the divorce, irreconcilable differences, is not recognized in New York, but the divorce is nonetheless entitled to full faith and credit in New York. The court was correct in granting Tom's motion to dismiss Beth's action for a divorce.

2. The issue is whether a New York court can issue an award of maintenance arising out of a divorce granted in another state.

Under a valid bilateral divorce from another state, all issues arising out of the marriage which one party could have raised in the action are res judicata. However, under the doctrine of divisible divorce, if an ex parte divorce is granted in another state and no orders are made with regard to economic issues, the economic issues may be resolved in a separate action in another state.

Here, the State X divorce was a valid ex parte divorce, for reasons discussed above. Since it was not a bilateral divorce, Beth is not precluded in New York from litigating the economic issues arising out of the divorce. The court correctly denied Tom's action as to Beth's action for maintenance.

3. The issue is whether Beth has personal jurisdiction over Tom, an out-of-state resident, in Beth's matrimonial action.

In a matrimonial action involving economic issues, the court must have personal jurisdiction over the defendant spouse. For personal jurisdiction to exist over a defendant spouse in a matrimonial action in New York, the defendant must be personally served in New York, must be a New York domiciliary or must be subject to jurisdiction under the matrimonial long-arm statute. Under the matrimonial long-arm statute, personal jurisdiction over a defendant may be obtained if the defendant spouse abandoned the plaintiff spouse in New York.

The first two grounds for personal jurisdiction are not satisfied because Tom was not served in New York, but rather he was served in State X; and he was not a New York domiciliary at the commencement of an action, but rather a domiciliary of State X, as established above. However, the court has jurisdiction over Tom under the matrimonial long-arm statute because Tom abandoned Beth in New York. The court correctly denied Tom's motion to dismiss for lack of personal jurisdiction.

B. In the absence of an agreement on maintenance, the court may award maintenance based on what it deems to be fair and reasonable. The fault of the parties may be considered. The test is a "means" test, based on each party's financial resources. Factors that the court may consider

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include the education and job skills of the spouses and the standard of living that would have been enjoyed by the plaintiff had the marriage continued.

Here, the pre-nuptial agreement did not address maintenance. In her post-trial brief, Beth should argue that Tom, a successful business executive, has the means to pay Beth a substantial amount in maintenance. There is no indication, based on the "irreconcilable differences" ground for the divorce, that Beth was at fault for the divorce. Beth would have enjoyed a high standard of living had the marriage continued. Moreover, it was at Tom's instigation that she gave up her opportunity to finish law school and enter a law career. Tom should be obligated to pay her enough to return to law school.

ANSWER TO QUESTION 3

A. 1. The issue is whether Tom obtained a valid divorce in State X in March of 2004. The court has proper subject matter jurisdiction over a divorce where one spouse is living in another state and seeks to dissolve the marital res which is subject to the action. The court can properly grant a unilateral divorce over the marital res based on the residence of the spouse, which is Tom, who resides in State X. Although Beth was personally served with summons in complaint in New York, she failed to appear in this action. This does not preclude the unilateral divorce. Notwithstanding personal jurisdiction over Beth, the court in State X still had subject matter jurisdiction over the divorce. Although irreconcilable differences is not a ground for a divorce in New York, New York will give full faith and credit to a valid divorce decree from a sister state. The grounds for the divorce merges into the divorce decree and New York will uphold the State X's adjudication. The court was correct in granting Tom's motion to dismiss Beth's action for divorce.

2. In order to receive maintenance, it must be established that personal jurisdiction could not be retained over Amy in State X. If Tom could have commenced the action in State X and had the maintenance agreement adjudicated in State X, the issue would be res judicata in New York. However, in July 2004, State X granted Tom a divorce and made no findings with respect to economic affairs. Since the maintenance issue was never litigated, Amy can seek judicial relief for maintenance in New York. Amy had been domiciled in New York and the abandonment by Tom took place in New York. Therefore, Amy is a resident of the State of New York.

3. The issue is whether the court has long arm jurisdiction over an out-of-state defendant in a marital action seeking maintenance. The court would have valid long arm jurisdiction over Tom. The abandonment took place in New York giving the court long arm jurisdiction over the action. Tom intentionally left Amy, for over one year, and this was without her consent. In addition, Amy validly had Tom served by personal service in State X, which is the only method of service allowed in a matrimonial action. In addition, Amy must have properly pled the durational residency requirements in her cause of action. The proper procedure for failure to plead the durational residency requirements is failure to state a cause of action.

B. The issue is whether a spouse is entitled to maintenance in a short duration marriage, even when the spouse seems capable of self-support. The parties entered into a prenuptial agreement waiving equitable distribution from each other. Assuming this agreement was fair and reasonable and not unconscionable at the time of trial and the court will enforce this. However, the parties did not waive Amy's right to receive maintenance. In considering maintenance payments, the court will consider the duration of the marriage, the marital standard of living, whether one spouse gave up their career in order to help the other spouse, the relative income and ability for one spouse to support him or herself, and other factors of the marriage. Since Amy was a first year law student and then stopped working in order to care for the home, this is a factor that the court will consider in determining the maintenance award. In addition, the court will also value

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Tom's professional license separately from his income at his job. The professional license can be considered in awarding maintenance since there was no equitable distribution and there is no double dipping into the marital asset. Given that Amy is only making \$30,000, the court should consider the standard of living in the marriage, and award Amy with a maintenance award. Amy made substantial sacrifices and contributions to the marriage and although the marriage was of a "shorter" duration, this will not excuse Tom's obligation of maintenance.

Question-Four

Bobby, age ten, attended Golden Sunshine Camp during the second week of July 2001. On the morning of July 10, the camp counselors decided not to postpone a previously scheduled softball game for the campers despite the fact that the grassy field on which the game was to be played was wet from a recent heavy rain. When Bobby came to bat, he hit the ball past the outfield. As he was running between first base and second base, Bobby slipped on the wet grass, and he fell, sustaining a fracture of his left arm.

Don, a handyman at the camp, who had been watching the softball game, drove Bobby to a local emergency room for medical care. On the way to the hospital, Don said to Bobby that he told the camp director not to let the children play softball on the wet grass that day, because he thought someone might slip and get hurt.

At the time he registered his son for camp and paid the required fee, Bobby's father signed a form captioned "RELEASE," which provided, "It is hereby agreed that in consideration of the opportunity to participate in Golden Sunshine Camp (the Camp), I, as the parent of a camper, fully release and discharge the Camp of and from any and all potential liability to me or my child in the event my child is injured during the course of participation in any events held at the Camp."

1. Can Bobby's father bring timely claims for his son for his injuries and for himself for medical expenses associated with the softball accident?
2. Assuming a claim can be timely asserted, and without regard to the release, provide a detailed analysis of the camp's potential liability.
3. Assuming Bobby is ruled competent to testify at trial, discuss the admissibility of his testimony regarding Don's statement.
4. Does the release signed at the time of registration bar any claims?

ANSWER TO QUESTION 4

1. At issue is the Statute of Limitations for a negligence action under New York law.

Under New York law, the Statute of Limitations controls the amount of time a plaintiff has to commence an action against a defendant. The Statute of Limitations for a negligence action is three years from the negligent act. The Statute of Limitations is tolled for a defendant who is 1) a minor or 2) insane and thus unable to commence an action. The tolled time period allows a minor to commence the action within three years (the original Statute of Limitations in this case) from the date of the minor's 18th birthday (when his incapacity/disability ends).

Here, the alleged negligent act took place in July 2001 and thus, the Statute of Limitations to commence an action would expire in July of 2004 (three years from the negligent act). In this

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case, assuming he had a valid claim, Bobby's father would be unable to commence an action for himself based in negligence because three years have passed since July 2001.

The toll applies to Bobby however, as he was a minor at ten years of age when he fell and fractured his arm. Thus because of the toll, Bobby may commence an action on his own when he reaches 18 and will have three years to do so. His father may not, at this point, commence an action on Bobby's behalf, as the original Statute of Limitations has expired. Thus, Bobby's father may not bring timely claims for his son's injuries and for himself.

2. At issue is whether the camp will be held liable for the actions of its counselors.

Under New York law, an employer will be held vicariously liable for the negligence of its employees acting within the scope of their employment. The concept of respondent superior applies. This concept was developed so that a harmed defendant might recover damages for her injuries from the employer, who likely has more economic security than the employee.

Here, camp counselors are working to serve the Golden Sunshine Camp. Camp counselors receive salaries and tips in exchange for their service of employment. Thus, while acting within the scope of their employment, their negligence will be passed to the camp through vicarious liability. The camp will only be held liable however, if the counselors were negligent and thus caused Bobby's injuries.

Negligence is duty owed to the plaintiff, breach of that duty by the defendant, causation (actual/proximate), and damages caused by the breach.

The counselors had a duty to act without negligence under 1) the reasonable person standard and 2) because the counselor/camper special relationship. The counselors breached that duty when they refused to postpone a softball game, despite knowing that the field was wet from a very heavy rain. Common sense would have revealed that such muddy conditions were likely to cause an injury. Here, Bobby played in the game scheduled by the counselors, fell, and fractured his arm. But for the counselors' decision to schedule a game in dangerous conditions, he would not have been injured. Thus, a fractured left arm was the result (both actual and proximate because no intervening/superseding event) of the counselors' breach. Hence, because the counselors were negligent while acting as "servants" of the employer, the camp will be held liable for Bobby's injuries.

3. The issue is whether Don's statement qualifies as an admission, an exception to hearsay under the federal rules of evidence.

Hearsay is an out-of-court statement, made by someone other than the declarant who is testifying, to prove the truth of the matter asserted. An admission is an exception to the hearsay rule under New York law. An admission is an incriminating statement made by a party to the case or one of his agents. Under New York law, an agent must be authorized to speak.

Here, Don's statement was hearsay as it was made out of court and offered for its truth. Don, a handyman, however would not be considered an agent of the camp, because he did not have "speaking authority". While his statement would have been admitted had he been the camp owner (party to case) or an agent with speaking authority (lawyer), his statement will not be admitted as an admission/exception to hearsay.

Don's statement may be offered for its relevance however. Relevant information/evidence tends to make a material fact more or less likely.

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Here, the camp's knowledge of wet grass and the fact that a child might slip and get hurt would be relevant to proving negligence. Furthermore, it would be admitted, absent a showing it is unduly prejudicial, to prove the camp's knowledge of a dangerous situation. Thus, Don's statement would be admitted.

4. At issue is whether the release signed by Bobby's father bars his ability to bring a claim against the camp.

Under New York law, an individual who pays a required fee may not be denied his right to bring a claim against a negligent party who benefits from that fee.

Under New York law, a parent who pays a required fee to a camp expects that his child will be treated without negligence, as the existence of a special relationship exists. Camp counselors are receiving a salary to supervise children. The fee requires extra attention, as it is indicative of a contract.

A child who is injured because of a camp's or counselor's negligence has a right to receive damages for such injury.

Potentially, the camp could argue that Bobby "assumed the risk" by participating and consenting to play in a sports event, but when such injury is caused by a counselor's negligence and not the inherent danger of a game, the camp will be held liable. Thus, the release did not bar a claim for negligence.

ANSWER TO QUESTION 4

1. The issue is whether Bobby's father has any claims that will not be barred by the Statute of Limitations.

Under the CPLR, the Statute of Limitations for negligence is three years. The date begins to accrue at the time of the injury. Since the injury occurred on July 10, 2001, Bobby's father is now time-barred from recovering under a negligence claim. Therefore, Bobby's father is time-barred from bringing a claim for his medical expenses related to the accident.

Importantly, the timing for the Statute of Limitations tolls for infants until they reach their 18th birthday. Therefore, even though Bobby's injury took place four years ago, the Statute of Limitations has not yet begun to run. It is important to note that the tolling still takes place even though it is Bobby's father, who is presumably a competent adult guardian, who seeks to bring the claim. Since Bobby's father is bringing the action on behalf of Bobby, it is not time-barred. Therefore, Bobby's father can bring timely claims for his son's injuries.

2. The issue is whether Bobby has a valid claim for negligence against Golden Sunshine Camp for allowing the children to play on the wet grass.

In order to bring a claim for negligence, the plaintiff must show a) that the defendant owed a duty to the plaintiff who was foreseeable, b) that the defendant breached that duty, c) that the breach was both an actual and proximate cause of plaintiff's injuries, and d) that the injury resulted in damages.

Parties generally owe one another a duty of care to act as a reasonably prudent person would in similar circumstances. In certain situations, parties assume a heightened duty of care. Here, Golden Sunshine Camp had assumed the role of taking care of Bobby while he was there as a camper. In essence, they assumed the duty as *parents patriae* to care for Bobby as a normal caregiver would, a duty above and beyond that of a normal third party. In conducting the normal

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camp activities, the camp had a duty to ensure that the counselors would be reasonably prudent in designing the activities so that no one would be hurt. It is also quite certain that Bobby was a foreseeable plaintiff. As a member of the camp who was actually participating in camp-run activities, it was foreseeable that he would be injured by the camp's negligence. Therefore, Golden Sunshine did owe a duty to Bobby, who was a foreseeable plaintiff.

Breach occurs when the defendant has failed to observe the duty of care it owes to the plaintiff. Here, reasonably prudent camp counselors would not allow the campers they are entrusted with to participate in softball on a wet grassy field. Reasonably prudent people know that wet grass is slippery, that kids will be energetically running around the bases, and that it is likely that they might fall and injure themselves. By failing to postpone the scheduled game, the camp breached the duty of care it owed to Bobby.

Actual causation means that "but for" the breach of duty, the plaintiff would not have been injured. Here, the failure to cancel the games was a but-for cause of Bobby's injuries. If the counselors had properly cancelled the game, Bobby would not have hit the ball to the outfield and sped around first base. Thus, the camp's breach of duty was the actual cause of Bobby's injuries. In addition to actual cause, the breach of duty must have been the proximate cause of the injury, meaning that the injury must have been foreseeable from the breach, not highly speculative. In some cases, courts look to see if the plaintiff was in the "zone of danger" to see if the injuries were proximately caused by the breach. Here, Bobby slipped on the wet grass when he rounded the bases. It was foreseeable that such a fall would result from slipping and that a broken arm would result from such a fall. It is in fact exactly the type of injury that one might expect from allowing children to play on a wet field. It is not so attenuated as to be unrelated to the breach that it was not foreseeable. By failing to observe its duty of care to Bobby, the camp could have foreseen that such an injury occurred. Therefore, the camp's breach of duty was the proximate cause of Bobby's injuries.

Finally, the breach of duty that caused the injury must cause damages that are recoverable under a tort claim. Damages are designed to make the plaintiff whole by granting money for the expenses incurred as a result of the negligence by the defendant. Here, Bobby's injuries resulted in a broken arm. Included in the damages will be the medical expenses it took to fix the arm, including the recovery time and rehabilitation that is necessary. In addition, Bobby's father may attempt to recover for wages lost by having to come to get Bobby from camp, or for the lost value of the remainder of Bobby's camping experience. Any other expenses that resulted directly from the injury will be recoverable. Punitive damages are available if the conduct by the defendant is wanton or willful or grossly negligent. Here however, the action of the camp does not appear to rise to that level. They merely thought they could get a game in when they should not have.

It should also be noted that even though it was the camp counselors who breached their duty by failing to postpone the game, the camp itself will be liable under the doctrine of respondeat superior. An employer is liable for the torts of its employees if done within the scope of their employment. Here, the camp counselors were performing their very job when they were negligent so they were within the scope of their employment. In addition, their actions were not intentional torts so the camp will be liable for their actions.

3. The issue is whether the out-of-court statement by Don to Bobby is admissible into evidence.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Generally, hearsay is inadmissible. There are numerous exceptions that apply, however. Here, Don told Bobby that he had told the camp director not to let the children play softball on the wet grass that day because he thought someone might get hurt. It is clearly an out-of-court statement. Bobby's attorney will contend that it is not being offered for the truth of the matter asserted, but rather to show the effect on the hearer. Effect on the hearer is nonhearsay because it is admitted not to

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show the truth of a declaration, but to show how that statement affected the hearer. Here, Bobby's attorney will suggest that the testimony is being admitted to show that the camp director had notice that the grass was wet and yet still failed to prevent the softball game. The statement is not being offered to show that the grass was wet. Since the purpose is not the truth of the matter, it is admissible.

In the event that the court does not accept that argument and believes that the statement is being offered for its truth, Bobby may still prevail if it fits under a hearsay exception. Admissions, although nonhearsay under the federal rules of evidence, are exceptions to hearsay in New York. A vicarious admission is where an employee, within the scope of his employment makes a statement, and is admissible against the principal. However, in New York, in order to use an employee's statement against his employer, he must have a role in the company such that he had speaking authority. Here, while Don is an employee of the camp, as a handyman he does not likely have speaking authority to make an admission. Therefore, the exception will fail. The statement against interest exception will fail. The statement against interest exception will not work because there is no evidence that Don is unavailable. No other hearsay exception appears to fit in.

There is also a hearsay within hearsay problem. It is important to note that there are two statements. The first is Don's statement to the director. The second is Don's statement to Bobby. Although Don's statement to the director is admissible because it is being offered for its effect on the hearer, there must also be a valid hearsay exception for his statement to Bobby. The latter statement is being offered for its truth, i.e. that he told the director not to let the children play softball. There does not appear to be a hearsay exception, so the entire statement must be excluded. Don may come to the stand and testify as to his statement to the director, however.

4. The issue is whether the release form validly relieved Golden Sunshine Camp of its liability.

In order to include a valid waiver of claims, a contract must clearly state so on its face. Here, the term RELEASE was written in big letters and the father signed the contract in consideration for the camp attendance. Therefore, he is unable to make a claim against Golden Sunshine Camp. However, the father is unable to release Bobby. Bobby is an infant because he is under 18 and he is incapable of waiving his rights. The mere fact that his father signed a release form did not waive his rights. A party cannot waive all liability.

Question-Five

On July 1, 2000, Theresa, a widow, duly executed a will prepared by her attorney, Art, which was witnessed by Art and Wendy, Art's assistant. The will contained the following provisions:

1. I direct that ten per cent (10%) of my net estate be given to a charity which helps indigent children, in accordance with a writing which will be found in my safe at home.
2. I give \$10,000 to my daughter, Debra.
3. I give my residuary estate to my friend, Frank.
4. I designate my sister, Sarah, as Executrix.
5. If any beneficiary contests this will for any reason whatsoever, he or she shall forfeit all rights granted under this will.

Art kept the original of Theresa's will at his office. Art gave Theresa a photocopy of her will and

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a written receipt stating that he had retained the original. Theresa kept these two documents in the safe at her residence.

On June 30, 2005, Theresa died, leaving a net estate valued at \$1,000,000. Theresa was survived by her adult daughter, Debra, her sister, Sarah, and her friend, Frank.

After Theresa died, Sarah opened the safe in Theresa's home, where she found the photocopy of Theresa's will and the written receipt from Art for the will. Theresa's safe also contained a letter signed by Theresa dated August 1, 2000, which directed Sarah to give ten per cent (10%) of Theresa's net estate to C Co., a charitable organization which helps indigent children. Theresa had made substantial gifts during her lifetime to C Co.

When Sarah contacted Art to obtain the original of Theresa's will so that she could have it probated, Art informed her that recently a fire had destroyed his entire office, including Theresa's will. Thereafter, Sarah filed the photocopy of the will found in Theresa's safe with the Surrogate's Court, and petitioned to have the will probated. Debra filed objections to the probate of Theresa's will on the basis that the will submitted was not an original, but only a photocopy. In addition, C Co. argues that (a) Theresa's letter of August 1, 2000 should be incorporated by reference into the will or, in the alternative, (b) the court should apply the doctrine of cy pres and award the charitable bequest to C Co.

(1) Should Theresa's will be admitted to probate over Debra's objection that only a photocopy was submitted?

(2) If Theresa's will is admitted to probate, will Debra be entitled to inherit?

(3) If Theresa's will is admitted to probate, how should the court rule on C Co.'s arguments?

ANSWER TO QUESTION 5

1. The issue is if there is sufficient proof of the will to admit a photocopy to probate. A will is a revocable instrument intended to provide for the disposition of one's property at death. If the original will was last in the testator's (i.e., the creator of the will) possession and cannot be found, there is a rebuttable presumption that the will was subsequently revoked by a physical act. However, such a presumption will not apply if the will was given to someone else to hold. Furthermore, if a will is lost, it can still be admitted to probate if it can be sufficiently proved. This requires: 1) proof of due execution, 2) proof it was not revoked, and 3) proof of the will's contents. As applied here, there is evidence that the will was not in Theresa's possession, which can be shown by the receipt from Art and his testimony. Therefore, there is not a presumption that she revoked it by physical act. Additionally, the will can be sufficiently proved. Art and Wendy can testify as to the due execution and theirs and Theresa's signatures will be on the photocopy. Art can provide an explanation for not providing the will (the fire) and there is no evidence it was revoked. Lastly, because there is a photocopy of the will, its contents can be shown. Therefore, the photocopy should be admitted to probate.

2. The issue is whether Debra's objection to the probate of the photocopy of the will will disqualify her from taking under the will due to the "no contest" clause. A "no contest" clause to a will provides that if a beneficiary contests the provisions of the will (that is, if the beneficiary disputes whether the will is admitted to probate), he/she will forfeit his/her rights under the will. In many states, such clauses do not disqualify a beneficiary from taking as long as the objection is made in good faith. However, in New York, good faith is no defense and a beneficiary who objects to the will will forfeit her interest even if made in good faith or with probable cause. There are exceptions to this rule, and a beneficiary will not forfeit her interest if she disputes the will due to lack of the court's jurisdiction, a matter of construction, or if she asserts revocation

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by a subsequent will. As applied here, Theresa's will contained a no-contest clause. Debra, a beneficiary of the will, has argued it should not be admitted to probate. Whether she has good cause, if Debra's objection does not fall under one of the exceptions, she will forfeit her rights under the will. Here, Debra's objection is that only a photocopy of the will is being admitted to probate. She has not raised an objection that a subsequent will has revoked this will. Instead, her theory likely rests on the grounds that if an original will is not provided, then the presumption is that it has been revoked by physical act. This is not an exception to the no-contest provisions in New York. Therefore, Debra will forfeit her rights under the will, and her share will pass to the residuary clause to Frank. It should be noted that the question asks if Debra will "inherit". If a will does not make a complete provision for distribution of the testator's property, the remaining property will pass through the rules of intestacy, which would allow Debra to inherit as Theresa's daughter. However, as there is a residuary clause, the remainder of the estate will go to Frank and the intestacy rules will not apply.

3. a. The issue is whether a clause referring to an outside writing can be incorporated into a will by reference. In New York, all provisions of a will must satisfy the six-point formalities for due execution (writing, signed by the grantor, in the presence of two witnesses, the witnesses sign within 30 days of each other, and the will is published, i.e., declared to be a will). Any writing not part of the will cannot be incorporated into the will by merely referring to it in the will because such writing does not independently satisfy the six-point formalities. The exception to this is a valid pour over devise. A testator can incorporate a trust's provisions into a will if the trust was created contemporaneously with or prior to the will. To create a valid trust, it must be in writing, signed by the settlor, and acknowledged. As applied here, the writing does not qualify as a valid pour over devise. The writing does not attempt to create a trust (nor would it qualify) and it was created after the will was executed. The writing was not separately witnessed or published and therefore cannot be incorporated into the will.

b. The issue is whether applying cy pres will allow the court to award the bequest to C Co. In the creation of charitable trusts, courts will apply cy pres, i.e., "as near as possible" to satisfy the settlor's (the creator of the trust) intent if the trust is frustrated. To create a charitable trust, the trust must be on behalf of unascertainable beneficiaries, for a charitable purpose, and satisfy the requirements for a trust (in writing, signed and acknowledged, yet no delivery is necessary in a testamentary trust). Furthermore, if the settlor fails to create a valid trust, the court can grant a constructive trust on the assets, which is merely an equitable remedy. Here, Theresa did not create a valid trust. Whereas cy pres would apply to distribute a trust income as closely as possible to the settlor's intent, there is no trust here. The court could imply a constructive trust and decide to distribute the money to C Co. regardless. However, this is usually done only when there is unjust conduct, which is not the case here. Rather, Theresa failed to give C Co. a legally enforceable interest. Therefore, the court should not apply cy pres and C Co. will not benefit under the will.

ANSWER TO QUESTION 5

1. Probate of a Photocopy

The issue is whether the court should admit a will to probate that is a photocopy because the original has been lost in a fire. When a will is lost or missing at testator's death and testator was the last in possession, there is generally a presumption that the testator revoked it. However, this presumption may be rebutted by evidence that this is not the case. Here, the original will was missing because a fire destroyed Art's office. The presumption will not arise however because Theresa left her will with Art for safekeeping and it was not last seen in her possession. A will that is missing may be probated still under the proof of lost wills statute. The executrix must prove due execution, rebut any presumption that the will was revoked and prove the contents of the will. They may do this through the use of a photocopy as long as Art can testify that it is not

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altered from the copy that was in his office and Art and Wendy testify to the will's due execution. Therefore, provided that these showings are made, a court may admit a photocopy to probate over Debra's objection.

2. No Contest Clause

The issue is whether the no contest clause in Theresa's will will cause Debra to forfeit her gift by contesting the will. No contest clauses are fully enforceable in New York regardless of whether the contestant had good cause. However, there are some exceptions under which a contest will not cause a gift to fail, such as a suit brought by a guardian, one contesting jurisdiction, and to interpret the will's provisions. There is no exception that Debra's objection falls into because she is contesting the validity of the will itself. Therefore, the no contest clause may be enforced against her, and she will not receive her \$10,000 general devise, which will fall into the residuary.

3. C Co. Charity

a. Incorporation by Reference

The issue is whether the letter left by Theresa in her safe naming C Co. as the charity to receive 10% of the net estate should be incorporated by reference. New York does not recognize incorporation by reference except for pour over wills. This is not a pour over devise, and even if it was, it would still fail because the doctrine of incorporation by reference would require the letter to be in existence or executed contemporaneously with the will. In this case, the will was executed on July 1, 2000, and the letter was dated August 1, 2000. Therefore, C Co.'s argument that the letter should be incorporated by reference fails.

b. CyPres

The issue is whether a court may apply the doctrine of cy pres to award the charitable bequest to C Co. despite the fact that they may not incorporate the letter by reference. Cy pres is an equitable doctrine that applies to outright bequests as well as charitable trusts. It seeks to apply equitable principles to modify a devise consistent with the testator's intent. It is necessary in this case because the devise to C Co. otherwise fails because there is no ascertainable beneficiary on the face of the will. It is clear that Theresa wanted to give a good portion of her net estate to a charity while making only a limited gift to her daughter. The court may consider the letter, which was written and signed as further evidence of which charity Theresa wanted to get the devise, even though the letter could not be incorporated by reference. It is further supported by evidence that during her life, Theresa had made substantial gifts to C Co. Also, C Co. is a charity that helps indigent children and is thus consistent with the will. It would seem inconsistent with Theresa's intent to let the \$100,000 either fall into the residuary or be distributed to Debra, who she only left a \$10,000 devise to. Therefore, the court may, in its discretion, award the charitable bequest to C Co. under the doctrine of cy pres because it is consistent with Theresa's intent and when she designated C Co. in the letter, she was not aware it would not be incorporated into her will.

MPT

In re Brigham (705-2) Applicants represent Dr. Barbara and Len Brigham before the Bay County Zoning Board of Adjustment (ZBA) regarding their petition for a use variance to move Barbara's dental office into the Brigham's home. Dr. Brigham specializes in geriatric dentistry, devoting 20-25% of her practice to serving pro bono patients. She will be unable to maintain her pro bono commitment and stay in her current office due to a substantial rent increase. She has just learned that the County Supervisors recently passed an ordinance rezoning a parcel near the Brighams' home from R-1 to R-R (multi-family, catering to senior citizens). The Brighams are

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seeking to move Barbara's dental office into their home, located in a R-1 (single family residential) zoned neighborhood. They have asked applicants' law firm to file the letter brief to the ZBA in support of their petition for a use variance. The File consists of the instructing memorandum, notes from the partner's interview with the Brighams, a neighborhood map, letters from neighbors, and a newspaper article about the rezoning ordinance passed by the County Supervisors. The Library contains excerpts from a Treatise on Franklin Land Use Planning and the Bay County Code, as well as a case bearing on the subject.

ANSWER TO MPT

Dear Members of the ZBA Board:

Barbara Brigham, DDS, and her husband Len Brigham, seek a variance to allow Dr. Brigham to move her dental practice into their home to meet the professional service needs of the Rollingwood neighborhood. Dr. Brigham specializes in geriatric dentistry, and is the only specialist of the kind in Cooper City. Dr. Brigham, in response to her new economic conditions, as well as the opening of Senior Citizen Center on the Rollingwood Parcel, wishes to move her medical office to make it more convenient both for herself and for the needs of the elderly.

Currently, Dr. Brigham's property is zoned R-1 single-family residential. However, Dr. Brigham wishes to request a variance from this residentially zoned property and proves, by a preponderance of the evidence, why such variance to a commercial-business is needed. Below are the reasons and arguments why you, the ZBA Board, should permit the Brigham's variance to allow for a dental office in their home.

I. Variance Won't Create Detriment To Adjacent and Nearby Property

Dr. Brigham's variance will not create a detriment to adjacent and nearby properties because her dentistry is actually needed in the neighborhood and because all neighbors have given permission and support for the variance.

First, the dentist office is needed in Cooper City due to the fact that a new senior citizen's home has been built in the neighborhood. Dr. Brigham is a geriatric dentist, and is the only specialist within 12 miles of the new Senior Citizens home. The senior citizens, according to a statement made by Thelma Stamp, director of the Seniors Alliance in Cooper City, stated that the seniors need, "a full range of medical specialists; a dentist specializing in geriatrics...". All of the seniors will be able to obtain dentistry services from Dr. Brigham. Dr. Brigham's practice is typically between 20% - 25% pro bono. Therefore, many of the elderly patients, who cannot afford a dentist, will receive proper medical care. Therefore, it is incumbent that the senior citizens have a dentist close by.

In addition, previous ZBA decisions are relevant to the current variance decision being made. In 1969, the ZBA issued a variance in the Rollingwood neighborhood where the Brigham's home is located. There, the area variance granted on the request of Parc 55 Development, was for the purpose of building a single-family dwelling of approximately 5,000 sq. ft. There, the ZBA relied on the written statements of four contiguous property owners that they had no objections to the variance.

Here, the variance will not create a detriment to the adjacent and nearby properties as evidenced by the letters written by the neighbors. All of the neighbors that live immediately adjacent to the Brigham's property wrote the following: "Our neighbors, Dr. Barbara and Leonard Brigham, have informed us that they are seeking a variance to allow them to add a dental and an entrance/reception area for the office in their home. We have reviewed their plans and have no objection to the granting of the requested variance."

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In addition, and most importantly, the addition of the dentist office will actually have a positive impact on neighborhood property values. According to Len Zukor, owner of Cooper Realty, the values in the area will rise about 10%. Zukor believes that there is no chance for the property value to decrease as a result.

Therefore, it is clear that the variance permitting the Brigham' s to use their house as a dentist office will not create a detriment to adjacent property.

II. Variance Will Not Substantially Alter General Character of Area

The variance will not substantially alter the general character of the surrounding area because the Brigham' s voluntarily assured the town and their surrounding neighbors that they will take the necessary steps to ensure to alteration. Principally, in response to a letter of two neighbors who have a concern about the traffic due to the dentistry, the Brigham' s have offered to pay for new speed bumps to slow cars to the present 25 mile per hour speed limit or less.

Officer David White is a neighbor of the Brigham' s, a 16-year veteran of the Cooper Police Department, and is the sergeant in charge of the Traffic Control Division. Officer White believes that excess speed, in contrast to the amount of traffic, is the primary cause of accidents. He fervently believes that mid-size speed bumps, like the one' s the Brigham' s will buy, will reduce the speed and actually help reduce the risk of accidents.

Paul Heinz, a certified Traffic Engineer, analyzed the traffic patterns of the Rollingwood neighborhood, and stated that the existing traffic in the area is due to the limited access and relatively few residences. The average automobile speed on the street is 28.5 MPH. The addition of the speed bumps will control the speed of increased traffic to 23.5 MPH. This is an obvious decrease in speed.

Further, according that a ZBA prior decision in 1986, a variance may be granted if the building blends in with the residential neighborhood despite the intrusion on structure and parking setback limits. Again, the ZBA relied on the statements of property owners. Here, the dental office construction need not add on any square footage to the existing house. In addition, Barbara only works during the day, and will only be open on weekends for an occasional emergency visit (to help elderly). Further, Barbara on average only schedules three patients a day.

Thus, the dentistry will do nothing to alter the general character of the neighborhood. The traffic will be substantially curtailed, and the house will be the same, despite the improvements.

III. Variance Is In Harmony With Overall Intent of Code

The variance will be in harmony with the overall intent of the code. The overall purpose of the residential districts is to provide a variety of residences and complementary uses that conform to the density requirement, policies and objectives of the Cooper City Land Use Plan.

Here, the objective of the Cooper City Land Use Plan, when it allowed a senior citizen center to be built on R-1 land, was to provide for senior citizens. Thus, the seniors must be provided with complementary uses. One such complementary use is to have a local dentist to go to. Many senior citizens lack the type of car necessary, and many cannot obtain dental care. Dr. Brigham is a solution to both. She will be able to take care of the senior citizens, and will be able to provide proficient, and in some cases free, medical care.

In addition, the variance is in harmony with the provisions in the Code. The code allows home offices on residential property. The Brigham' s office is not most different than a standard home

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office. The office will not take up more than 20% of the dwelling. Their property is 5,000 plus sq. ft., and the office will merely total 800 sq. ft. (less than 20%). In addition, only office equipment will be stored in the dwelling unit. Finally, Dr. Brigham does not have a partner, and her clientele will be limited in size; presumably to the elderly in the senior citizen house. Although there will be incoming traffic due to the dental business, the Brigham' s will supply enough parking space for all customers, and will install speed bumps to quell future accidents.

In addition, a commercial business district is intended to meet the personal and professional needs of the local neighborhood. All activities of permitted uses are limited to the interior of the building, except for a sign. Here, the dental business would indeed meet the personal and professional needs of the local neighborhood. It would provide for all of the surrounding neighbors, and would increase the value of their property. Therefore, the variance is in harmony with the overall intent of the code, and specifically, the home offices on residential property.

IV. (a.) Unique and Peculiar Circumstances Create Practicable Difficulties or Unnecessary Hardships

The unique circumstances of the Brigham' s would certainly create difficulties and unnecessary hardships to them if the variance were not given. The court in Anton held that the difficulties must be found in the land itself, and the test is whether the land as presently zoned cannot be used in any economically viable manner. Here, the land is zoned as R-1, merely for the use as a residence. There is no economically viable manner in which this house may be used. In contract to the Anton decision, where the court held that the land could be used as agricultural land, here, the land cannot be used for agriculture, or any other business. In fact, without using the land for a dentist office, there is no economic use to the land.

In addition, it is economically necessary for the Brigham' s to build the dentist office. Their old landlord gave notice of a 35% rent increase. They cannot afford a rent increase. Dr. Brigham sees elderly clients, and many times, does not charge them a fee. Further, the savings in the office rent, plus additional value if the variance is granted, would provide the Brigham' s with an economic benefit. The land would thus be economically viable.

IV. (b.) The Public Interest Will Be Served

The public interest will certainly be served by granting a variance to the Brigham' s. In Anton, the court stated that the variance must further an important public interest that would otherwise go unmet without the variance. In addition, in Van Every, the court permitted a variance that permitted a homeless shelter in an industrial district where the shelter advocates presented substantial evidence of local need.

Here, the dentist office will further an important public interest – that is the interest in providing the senior citizens with viable dentistry. Again, Dr. Brigham is the only specialist in the area who can provide the requisite care that is needed for an elderly person.

In addition, the nearest geriatric dentistry is located over 12 miles away. As Stamp stated, "Cooper City' s unreliable mass transit system makes proximity to services all the more important to seniors with limited mobility". Dr. Brigham' s office is located within walking distance to the senior citizen house. She will install a handicap ramp to allow all seniors to enjoy the benefit of her care. She is a needed commodity in the city.

In addition, although the court in Elwyn stated that the standard of review is not whether variances have been granted to similarly situated applicants, these prior variances may provide insight into whether the current request meets the above listed factors. Here, the Council allowed a variance from an R-1, to an RR for the senior citizens house. Thus, although not conclusive

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evidence, this is prima facie evidence that the Council will allow a variance if there is a public need. Again, there is a public need to ensure that all seniors are cared for.

Therefore, the public interest, and in particular, the interest of the elderly, will be served by allowing Dr. Brigham to continue her dentistry in her home.

V. Conclusion

In conclusion, Barbara Brigham, DDS, and her husband Len Brigham, hope that you will permit a variance to allow Dr. Brigham to move her dental practice into their home to meet the professional service needs of the Rollingwood neighborhood.

Warm Regards,

Applicant

ANSWER TO MPT

Dear Members of Cooper City Zoning Board of Adjustment,

On behalf of Barbara and Len Brigham of 2050 Maple Street, we are petitioning the Board for a Variance to allow Barbara Brigham, a geriatric dentist well-respected within Cooper City, to see patients at a dental practice within her own home. The variance would allow the Brighams, whose home currently is zoned R-1 for single-family residential use, to construct a small, 800 sq. ft. office within their home for Dr. Brigham to operate as a small dental practice. The Brighams will not have to expand their home in any way, and therefore are seeking only a use variance.

The variance we are seeking would serve the community's need for nearby, affordable dentistry, and be in full harmony with both the provisions of, and recent changes to, the Cooper City Zoning Code. The Brigham's variance would also satisfy all statutory criteria for a variance.

A. The Variance Will Not Create a Detriment to Adjacent and Nearby Properties

The Brighams are seeking to convert part of their home into office space for administrative use and for the purpose of seeing dental patients. The Brighams already had planned a substantial renovation of their house, and the office insertion would not extend the time that the renovations will inconvenience any of the Brighams' neighbors. The Cooper City Zoning Code requires that a variance "not create a detriment to adjacent and nearby properties". Zoning Code § 35(D)(1). Instead of creating a detriment to adjacent and nearby areas, though, the Brighams planned use will benefit the area around them. All five of the Brighams' adjoining neighbors have submitted No-Objection letters to the Board in which they state that they have no objections to this Board granting the Brighams' variance. These neighbors see no detriment resulting from the variance.

Similarly, far from hurting the property value of the neighborhood, Rob Zukor, the owner of Cooper City Realty, is available to tell you how property values in the area will rise by about 10% as the sole result of the Brighams remodeling of their home. Mr. Zukor does not believe, based on his long experience in the Cooper City real estate market, that Dr. Brigham's dental office would negatively impact property values in any way. One of the Brighams' neighbors, Sergeant David White of the Cooper City Police Department, is eager for the Brighams to open the dental office because of the increased property values in the neighborhood.

While a possible concern has been raised that the office might increase traffic in the area and therefore impact the ability of children to play in the street, we can assuage those fears by

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installing speed bumps in the area to control the speed of traffic down the streets leading to Maple Street. Most of the increased traffic in the area would not, in fact, be due to the Brighams' dental office, but instead be due to the new apartment complex between 20th and 21st Streets, and Stirling and Chestnut Streets, and the new access road from Palm Avenue. The Brighams are willing to alleviate all of this increased traffic, though, and pay for the speed bumps recommended by certified Traffic Engineer Paul Heinz, who will be available to speak with you at the hearing. Moreover, Sergeant White, who is the head of Cooper City's Traffic Control Division in addition to being a neighbor of the Brighams, is confident that the traffic impact of the Brighams' office will be negligible, and completely controllable.

B. The Variance Will Not Substantially Alter the General Character of the Area

While the Brighams' home is currently zoned R-1, areas around the neighborhood area already permit various uses, commercial and residential. Dr. Brigham's office will be contained wholly within her house, which will still appear identical from the outside. The neighborhood will remain residential, in appearance and function. The variance will not substantially alter this residential character of the area, as required by Zoning Code § 35(D)(2).

C. The Effect of the Variance is in Harmony With the Provisions and Overall Intent of the Zoning Code

The Brighams' planned use of part of their home is in substantial compliance with two uses already permitted in the Zoning Code in or near residential areas. The variance therefore would be in harmony with the Zoning Code, as required by Zoning Code § 35(D)(3).

Zoning Code § 237 already allows Home Offices, which restrict themselves to less than 20% of the dwelling unit, which do not require commercial vehicles, are not identified by signage outside the home, and which do not require the delivery or dispensing of business merchandise or products other than normal office equipment. Dr. Brigham's office would comply with every one of these requirements. Her office would be small (only 16% of the overall home), would not require commercial vehicles or delivery of non-ordinary business merchandise, and would not need to be identified by outside signage.

Zoning Code § 293 already allows B-1 limited commercial business districts to serve the "personal and professional services needs of the local neighborhood". These districts are usually around local access roads, and contiguous to residentially zoned properties. However, the Maple Street area was never near an access road until now with the proposed road from Palm Avenue to 20th Street, and there is no available land to rezone B-1. The "services needs" of the neighborhood can therefore only be served by a variance such as the Brighams', which would be similarly unobtrusive to its contiguous residentially zoned properties. The Brighams' variance would be in full harmony with the Zoning Code's allowance of small, unobtrusive home offices, and commercial service providers next to residential areas.

D. The Variance Would Serve the Public Interest

Zoning Code § 35(D)(4) finally requires that absent unique and particular circumstances of the land, which the Brighams do not suggest here, the variance serve the "public interest". This "public interest" variance would have to be approved by 2/3 of the Board. Dr. Brigham's office would amply serve the public interest, by furthering an "important public interest that would otherwise go unmet without the variance". (*Anton v. Cooper City Zoning Board of Adjustment*).

The area around Maple Street is in dire need of dental services, and particularly geriatric dental services. Dr. Brigham's current office is the only dental care provider within a 3.5 mile radius, and the only office specializing in geriatric dental care within 12 miles. Dr. Brigham serves

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almost 1/4 of her clients on a pro bono basis. The City Council has just approved 134 new senior citizen apartments in the Rollingwood area, a mere block from the Brighams' proposed geriatric dental office. This decision was made, in part, in reliance on Dr. Brigham's geriatric dental practice, which will no longer be located in its current position due to commercial necessity. If the Brighams' variance is not granted, and Dr. Brigham is forced to move her practice nine miles away, these new residents will be unable to receive the dental care they were counting on. Dr. Brigham's geriatric dental practice serves a large need, which will go unmet if Dr. Brigham is unable to keep practicing in the area. This is surely the kind of "important public interest", which supports the granting of a variance.

E. Other Variances

While other variances this Board has granted in the area are not, of course, conclusive evidence that the variance is warranted here, this Board is permitted to take notice of the fact that similar non-residential uses have been approved. (*Anton v. Cooper City Zoning Board of Adjustment*). This Board approved the construction of a church on the edge of Maple Street, which includes parking for 40 cars, as well as intrusion on structure and parking setback limits. The Brighams are seeking none of these structural changes – merely a use variance to allow a small office, without changing the overall look of the neighborhood.

We are confident that we will be able to show you, by a preponderance of the evidence that the Brighams' variance should be granted. We look forward to answering any questions you may have regarding the variance.

Sincerely,

Stubbs, Friedland & Oglethorpe, P.C.

Two Stirling Professional Center

Cooper City, Franklin 33024