NEW YORK STATE BAR EXAMINATION
JULY 2007 QUESTIONS AND ANSWERS

Question-One
Crane was a bookkeeper employed by Art, an architect. On February 22, 2007, Crane prepared a check drawn on Art's account at B Bank, payable to the order of Kent in the amount of $5,000. Crane presented the check to Art for his signature. Crane told Art that the check was in payment of Kent's invoice for computer equipment that Kent had supplied to Art's office. Crane, however, knew that Kent's invoice had previously been paid. Art signed the check and returned it to Crane to mail to Kent, but Crane stole the check and took it home.

One week later, Crane's roommate, Dana, presented the check to B Bank for payment. The check was endorsed in the name of Kent and contained no other endorsements. B Bank cashed the check, giving the proceeds to Dana.

On April 4, Art learned that Kent had never received the check and that the endorsement in Kent's name had been forged. Claiming that B Bank was liable on the check for having paid the check on a forged endorsement, Art demanded that B Bank restore the funds to his account. B Bank refused.

Dana was thereafter indicted for the crime of criminal possession of a forged instrument in the second degree. The statute under which Dana was indicted, Penal Law § 170.25, provides as follows:

A person is guilty of criminal possession of a forged instrument in the second degree when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he utters or possesses any forged instrument of a kind specified in section 170.10.

A check is an instrument within the meaning of the statute.

At trial, Art and the B Bank cashier testified to the above relevant facts. Crane, who had previously pleaded guilty to grand larceny, testified to the drawing of the check. He further testified that he stole the check and brought it home, that he did not endorse the check but left it on the kitchen counter from which it disappeared, and that no one other than Dana had been in the apartment. Crane acknowledged that he did not tell Dana the circumstances pursuant to which he acquired the check and that he had previously told Dana that he worked for Art. Kent testified that he never received or endorsed the check, that he did not know Dana or Crane, and that he owed no debt to either of them. No proof was offered that the endorsement was in Dana's or Crane's handwriting. Dana did not testify or offer any evidence in her defense.

At the conclusion of the proof, Dana's attorney moved to dismiss the indictment on the ground that the evidence was insufficient to sustain the charge in the indictment.

(1) Is B Bank liable to Art for having paid the check?

(2) By what standard and how should the motion to dismiss the indictment be decided?

ANSWER TO QUESTION 1
1. The issue is whether Art's negligence in issuing a check to Crane renders B Bank not liable for having paid the check

Article 3 of the UCC, which New York has adopted, concerns statutory law for commercial paper and negotiable instruments. In order for an instrument to be negotiable, it must be payable in money or currency, that payment must be unconditional, the document must be in a writing properly signed by the maker of the check, payable on a certain time, for sum certain, and payable either to the order, bearer or to cash. If these elements are complete, then the document

validly qualifies as a negotiable instrument, and the rights arising out of it can be freely negotiated to others. Upon the signing or endorsing of such an instrument, the signer warrants that he has title to the instrument, that the instrument's signatures are genuine, and that there are no defenses that the endorser knows of that are good for the instrument. On every transfer of a negotiable instrument there exists two types of defenses. The different groupings are important when analyzing whether the possessor of the check is a holder in due course. A holder in due course takes an instrument for value (consideration past or present) in good faith (honesty in fact) , without any notice that the instrument had been dishonored, overdue, or that any real or personal defenses exist. A holder in due course takes the instrument subject to only real defenses, and personal defenses are not good against them. Personal defenses are mistake, unconscionable of the underlying transaction, failure of consideration, failure of condition precedent or subsequent, and fraud in the inducement. Fraud in the inducement arises when the drawer of an instrument signs the instrument through the deceit of another, who with intent to defraud, intentionally misstated the facts in order to induce the signature. Real defenses are duress (must be physical and not economic), material alteration, fraud in the factum (which exists where the signer of a check signs after being fraudulently lied to as to what exactly he is signing), forgery, illegality, intoxication, infancy, and insanity. Generally, New York follows the rule that for a bank to be liable for the cashing of a check, there must a forgery. Personal defenses do not exist against a Bank. Furthermore, under recent case law, liability will be imposed fully on the drawer of a check when he relies on another to maintain bookkeeping for a business, and that bookkeeper subsequently misrepresents to the drawer that there are more employees than in reality, and the drawer issues payment to the fictional payees. This is because the drawer is in a better position to reasonably determine if a fraud had occurred, and his negligence is responsible.

Here B Bank cashed the check upon Dana showing it. The check was originally signed by Art, who is the holder of the B Bank account. The check was a valid negotiable instrument, because it was for money ($5,000), which was a sum certain by a viewing of the check on its face, it was payable at a certain time (upon presentment to the bank) there was no condition, and was payable to the order of Kent. Art was fraudulently induced into drawing the check because Crane told him that it was to pay someone who had previously been paid. As such, a personal defense exists. Dana received the negotiable instrument (check) by taking it. She did not pay value, either past or present, and she took the instrument not in good faith, because she had no entitlement to it. Furthermore, she took it with notice that defenses existed, namely against her. The Bank is a holder in due course. It took the negotiable instrument for value (by paying the $500), in good faith (no reason to know it was improper) without notice that it was overdue, dishonored, or that defenses existed to it. As such, the bank takes subject only to real defenses. One real defense is forgery, and a signature was in fact forged, because Crane signed Kent's name to endorse the check. As such, a real defense exists against the bank. However, because Art would be in a better position to be a reasonable, prudent person in monitoring the activities of his employees, the exception applies.

Because of Art's failure to use reasonable care, B Bank will not be liable to Art.

It should be noted that Art may seek complete indemnification from Crane for his fraudulent acts in a subsequent trial.

2. The issue is whether the motion to dismiss the indictment should be denied because the prosecution established sufficient proof.

In order to prove a criminal violation in New York, the NYCPL requires sufficient evidence to prove that the accused is guilty beyond a reasonable doubt. Beyond a reasonable doubt generally means that if a reasonable, articulable ground exists for believing a defendant has not committed the crime, then the defendant is not guilty. Under the given penal law, there exists a requirement of both actus reus (physical illegal act) and mens rea (mental state). The statute requires that for a

person to be found guilty they must have both knowledge that the instrument possessed is forged, a specific intent to defraud, deceive or injure another, and he possesses the instrument. If sufficient evidence exists to establish all the elements, then an indictment survives. If however, evidence used for the indictment is not sufficient in that it does not make something more probable than not, the indictment should be dismissed. This probable cause standard insures that a defendant is not denied his due process rights by being subjected to a trial with no evidence against them. Purely circumstantial evidence may sustain an indictment. In a motion to dismiss, the court takes the evidence and looks at it in the benefit of the non-objecting party. A motion to dismiss will be denied if the facts and evidence submitted indicate any grounds for keeping the action.

Here, there is sufficient evidence to find that Dana had the specific intent to defraud, because Crane did not tell Dana about the check, yet Dana took it and cashed it at the Bank. This circumstantially can prove her intent. Furthermore, the possession was easy to prove, because B Bank cashier testified at trial and the check was left in an apartment where Dana was, and the testimony indicated that no one other than Dana or Crane were in that apartment. On the issue of knowledge, circumstantial evidence exists that Dana was aware of the forgery. Crane testified that he had not endorsed Kent's name. Kent himself testified that he too did not endorse it. There is sufficient evidence to establish the inference that Dana forged the check, or at least knows how it was forged, and thus it is more probable than not.

Because sufficient circumstantial evidence exists to sustain the prima facie elements for the penal law, the motion to dismiss the indictment should be decided against Dana.

ANSWER TO QUESTION 1
1. The issue is whether B Bank is liable to Art for having paid a check out of his account with a forged endorsement.

A drawee will be liable for the payment of a check when it is not properly negotiated and when any proper endorsement is forged. This situation is governed by Article 3 of the Uniform Commercial Code (UCC) dealing with commercial paper. The check signed by Art at the urging of his bookkeeper Crane is a draft under Article 3, and thus a negotiate instrument. The requirements for an instrument to be negotiable are: a signed writing, made payable to order or bearer, of a sum certain, unconditional, payable on demand or at a set time, and payable to a specific person. These requirements are met in this case as the instrument is a simple check drawn on Art's account for $5,000 signed by him and payable to the order of Kent. It is of no consequence that Crane, Art's bookkeeper, actually wrote out the check because Art signed it. In addition, the fact that the invoice that Crane was purporting to pay with the check had already been paid is of no consequence with respect to Bank's liability. It provides only a personal defense of fraud in the inducement that could have been asserted on behalf of Art. Crane's act of stealing the check and taking it home instead of sending it to Kent is important because this prevented Kent from endorsing it, which was required for the check to be properly transferred. In order for a check made payable to the order of a specific person to be duly negotiated (which is required for a transferee to become a holder or holder in due course), it must be endorsed by that person. Because the check was never endorsed by Kent, it could not be duly negotiated. Therefore, when B Bank received the check and paid Dana, it did not become a holder (or a holder in due course). B Bank can be held liable for the funds deducted from Art's bank account because the check was not duly negotiated and Kent's endorsement was forged. It should be noted that had Kent endorsed the check himself with a blank endorsement (not specifying any specific person or action), then the Bank would have properly paid whoever the check was to be cashed as long as it was in good faith and without notice of any problems. In addition, it should be noted that the Bank may be able to offset some of their liability based on a claim of negligence against Art for permitting Crane to deceive him into paying the same invoice twice.

2. The issue is the standard used in deciding a motion to dismiss an indictment and whether the evidence submitted was sufficient to sustain Dana's indictment for criminal possession of a forged instrument in the second degree.

In deciding a motion to dismiss an indictment, all evidence should be viewed in the light most favorable to the nonmoving party. If there is any basis for liability under the elements of the charge, the motion to dismiss should be denied. Also, under New York law, evidence in grand jury indictments must be legally sufficient, meaning that the evidence must be that which would be admissible in a regular court proceeding. In this case, the elements of the crime are: 1) possession of a forged instrument, 2) with knowledge that the instrument is forged, and 3) the intent to defraud, deceive or injure.

In this case, there is enough evidence viewed in the light most favorable to the prosecution to indict Dana for the crime of criminal possession of a forged instrument in the second degree. The testimony from B Bank's cashier is evidence of the first element of possession of the forged instrument (since Kent denies having signed it). While evidence of both the knowledge and intent elements are circumstantial (that Crane left the check at home and no one else lived there and the fact that there is no direct evidence that Dana specifically knew that the check was forged, although there is circumstantial evidence that she is the one who forged it), it is possible that a reasonable jury could conclude that the elements of the crime are met. Therefore, the indictment should be upheld based on the evidence viewed in the light most favorable to the prosecution tending to show that the elements of the crime have been satisfied against Dana.

Question-Two
In November 2006, Carol, an information technology ("IT") consultant, entered into a written contract with Large Corp., a manufacturer of consumer electronics. The consulting contract provided that: (a) commencing January 1, 2007, Carol would undertake a study of the IT needs of the corporation and identify a supplier of computers and software to meet Large Corp.' s needs; (b) on or before March 1, 2007, she would report her recommendations in writing to Pat, Large Corp.' s President; and (c) she would be paid a fee of $75,000 upon the delivery of her report.

In December 2006, Dave, a competitor of Carol, who had also sought the Large Corp. consulting contract, learned that Carol was retained. Dave had previously done extensive consulting work for Large Corp. Dave visited Pat, Large Corp.' s President, and after learning of the terms of Carol' s contract, he attempted to convince Pat that he should be given the consulting contract. Dave offered to complete the entire consulting contract for a fee of $50,000, if Pat would cancel Large Corp.' s consulting contract with Carol and enter into a contract with Dave. Dave also falsely told Pat that Carol had been discussing the possibility of a Large Corp. computer contract with an over-priced computer supplier and that "Carol has agreed to recommend that Large Corp. give them the contract in exchange for an illegal kick-back of $100,000."

As a result, Pat canceled Large Corp.' s consulting contract with Carol, refusing to pay her $75, 000 fee, and signed a consulting contract with Dave on behalf of Large Corp.

In January 2007, Carol learned of Dave' s conduct and commenced an action against Dave, setting forth causes of action for tortious interference with contractual relations and defamation.

Dave timely served an answer which denied the allegations of the complaint. With regard to Carol' s cause of action for defamation, Dave included an affirmative defense which asserted a qualified privilege based on common interest arising out of his business relationship with Large Corp.

Upon affidavits establishing the foregoing facts, Carol moved for summary judgment against Dave on both causes of action.

The court: (1) granted summary judgment to Carol on her cause of action for tortious interference with contractual relations, (2) rejected Dave's affirmative defense of qualified privilege, and (3) granted partial summary judgment to Carol on her cause of action for defamation and scheduled a hearing to determine damages.

Were the numbered rulings of the court correct?

ANSWER TO QUESTION 2
1. The issue is whether the summary judgment motion was correctly decided.

To prevail on a motion for summary judgment, a party must show, based on affidavits, documentary evidence, and depositions that considering the evidence favorably to the nonmoving party, there is no issue of material fact to be decided at trial, and that the case should be resolved as a matter of law. It is a post-answer motion, made after defendant has served the answer, and the court may "search the record", considering the evidence submitted by both parties, and can render judgment either for the moving or nonmoving party. It will consider all the elements of the cause of action in light of the evidence submitted.

a) Whether Carol established and proved the elements for tortious interference with business relations.

For a plaintiff to sustain an action for tortious interference with business relations, she must show; (i) a valid business contract or expectancy between herself and a third party; (ii) that defendant knew about this contract; (iii) that defendant induced the third party to end the contract, and (iv) that plaintiff suffered damages.

To meet the first element, plaintiff must show that there was a valid and enforceable contract. There must be mutual assent, valid consideration, and no defenses. Here, Carol agreed to provide services that Large Corp. required in return for payment. The agreement was memorialized in writing and appears to have no defenses in formation, or in enforcement. Therefore, there is a valid contract.

To meet the second element, plaintiff must show actual knowledge of the contract by the defendant. On these facts, Dave had actual knowledge of the contract, both before he approached Large Corp. and afterwards. Therefore, this element is met.

To meet the third element, plaintiff must show both (i) inducement and (ii) breach.

Sub-issue: Whether Pat's cancellation constituted a material breach sufficient to support a claim.

When one party to a contract communicates before performance of that contract an unequivocal intention not to perform, this is anticipatory repudiation. When the non-breaching party receives notice that the other party does not intend to perform, she may sue immediately. Here, Carol and Large Corp. had an enforceable contract. Pat communicated to Carol that Large Corp. did not intend to perform its contract (i.e. pay). This was an unequivocal statement of an intention not to perform, and constituted a material breach, on which Carol could have sued immediately. This breach is sufficient to support the element of breach in a tortious interference claim.

A party induces breach where he represents facts to another party that causes that party to take action that breaches a contract. As described above, Large Corp. anticipatorily repudiated Carol's

contract. This was the result of Pat offering a lower price and his false representations about Carol's kickback to a computer supplier. Therefore the inducement element is met.

Sub-issue: Whether Carol suffered damages.

Carol has established that she lost a $75,000 contract. This is sufficient to establish damages.

b) Whether Dave had a defense of a "special relationship.

An individual may assert the affirmative defense of qualified privilege to tortious interference with business relations if he establishes the elements of the defense with a preponderance of the evidence. Where it is proved that someone has tortiously interfered, it is an affirmative defense that he has a qualified privilege based on a "special relationship" with the individual who breached the original contract. Such "special relationships" are usually rooted in situations where one party relies on the other for advice or counsel, such as attorney and client, parent and child or clergy and penitent. Here, Dave was a former consultant for Large Corp. He approached Large Corp. with a false statement regarding Carol's honesty (which might have been a defense to Large Corp., had Carol been suing it for breach), but mainly came in order to submit his own bid. Submitting a bid for a contract is not providing advice and counsel, and even though Dave did extensive consulting work for Large Corp. in the past, there is no evidence to support that his advice on computer contracting would have been sufficient to support a special relationship. Finally, Large Corp. did not select Dave for this contract in the first place - it selected Carol over him, and he had competed for the contract - suggesting that his advice was less valuable than his low pricing. Dave has no defense to tortious interference, and the court therefore properly awarded summary judgment to Carol.

2. Whether a party who knowingly makes a false statement of fact can claim qualified privilege as a defense against defamation.

A party can claim qualified privilege as a defense to defamation where their speech serves a socially useful purpose. Often, in cases of qualified privilege, the speech is made by defendant in a situation where defendant is speaking to benefit plaintiff, though this need not be the case. Examples are situations where an individual is recommending an employee; someone is reporting wrongdoing by an agency or reporting facts to a police officer. The main issue is that the speaker must be speaking in good faith and not either be reckless as to the truth of his statement or say something affirmatively untrue.

Here, Dave's statement, if true, would arguably be useful for Large Corp. However, he knew that the statement was false when he made it. Therefore, he may not claim qualified privilege and the court properly dismissed his claim.

3. Whether Carol established and proved the elements for an action for defamation.

One party defames another where he makes a defamatory statement (that implicates plaintiff's reputation) of or about plaintiff, and publishes it to a third party. Plaintiff need not show actual damages if the statement is slander per se; one of the categories of slander per se is a statement making negative statements about plaintiff's business activities. There is a heightened standard for "First Amendment" defamation - if plaintiff is a public figure (either having injected herself into public controversy or having achieved widespread notoriety), she must prove also that the statement was false, and that the defendant spoke with recklessness as to the truth of the statement or with knowledge of its falsity. If defendant is a private figure speaking about a matter of public concern (regarding plaintiff), plaintiff need only prove that the statement is false and that the speaker was negligent.

Here, Dave made a statement about Carol (the plaintiff) that implicated her business honesty, suggesting that she was receiving kickbacks from an overpriced supplier. He published it by telling Pat, a third party. Because this related to Carol's business practices, it is slander per se. There is nothing to suggest that Carol is a public figure - she is an IT consultant. There is also little to suggest that Carol was a public figure or that Dave was speaking about a matter of public concern, since Carol's actions were with another computer supplier, and not the government or anyone of public importance.

Whether the court properly awarded partial summary judgment and scheduled a hearing to determine damages.

When a court has given one party summary judgment for having proven that there is no issue of material fact for trial, it may grant summary judgment and schedule a hearing for damages. In cases of defamation, a party can seek actual and punitive damages where the speaker acts with malice, even though the party does not need to prove damages in order to prevail for slander per se. Here, Carol established and proved the elements of defamation, and Dave spoke falsely. Carol can therefore seek punitive damages. In addition, Carol is very likely able to prove actual damages (because her business relations have been impugned). A hearing for damages is therefore appropriate, and the court ruled properly.

ANSWER TO QUESTION 2

1. Whether Carol's motion for summary judgment was properly granted on her claim of tortious interference with contractual relations when Dave approached her employer with information causing her employer to breach its contract with Carol.

In NY, a motion for summary judgment should be granted when, after being presented with evidence in the forms of pleadings and affidavits, a court searches the record and finds that there is no issue of triable fact which is appropriate for consideration by a fact-finder, and that therefore the moving (or sometimes non-moving party due to a boomerang effect) is entitled to a judgment as a matter of law on the case. The information included in the pleadings or affidavits must be evaluated in the light most favorable to the non-moving party. Here, Carol is the moving party, and Dave is the non-moving party. Therefore, Carol's motion for summary judgment should only be granted in her favor, if the evidence is evaluated in a light more favorable to Dave, and the record still shows that she is entitled to judgment because there are no issues of fact to be decided.

In NY, a cause of action based on tortious interference with a contractual relations is grounded on a theory that the defendant knew of a contract between the plaintiff and a third party, that the defendant used this knowledge to convince the party to break the contract with the plaintiff, and that the 3rd party actually breached its contract with the plaintiff as a result of the interference by the defendant and that the 3rd party suffered some loss or damage as a result.

In this case, Carol entered into a contract with Large Corp. to provide various computer consulting services. She and Large Corp. agreed to all of the material terms of the employment contract, and it was duly executed by both parties signing the contract, essentially solidifying the contractual relationship. This was concluded in November of 2006. In December of the same year, Dave uncovered the terms of the contract between Carol and Large Corp., and disgruntled that he had not been awarded the contract, went to Large Corp. with the knowledge of Carol's contract, thus satisfying the first component of the Carol's claim.

After approaching Large Corp. about the contract, Dave proceeded to tell Large Corp. several things about Carol's contract that he did not know to be true, with the intent to induce a breach of contract on Large Corp.'s part so that he could usurp the opportunity with Large Corp. for

himself, thus satisfying the second component of the tort. Lastly, Dave was convincing enough, that Large Corp. chose to abandon its contract with Carol, and signed a consultation contract with Dave, causing Carol to loose all of the benefits of her employment with Large Corp., establishing the last two claims under the cause of action.

Under the forgoing facts, the court was correct in granting Carol's motions for summary judgment as there is no issue of material fact to be considered by a fact finder, since she established all of the elements of the prima facie case required and there appears to be no question as to any fact.

2. Whether the court was correct in rejecting Dave's affirmative defense for qualified privilege when he had a pre-established relationship with Large Corp.

The defense of qualified privilege is available to a defendant charged with defamation or a claim of tortious interference with contractual relations only upon a showing that there was some special relationship with the party with whom the conversation took place, and that the scope of the conversation did not exceed the bounds of which the privilege would prescribe. Therefore, in order to reject this affirmative defense, the court would have to find that either: (1) there was no special relationship between the party or (2) that the defendant exceeded the scope of his privilege in the comments that he made because he did not know or believe them to be true.

In this case, Dave asserted the qualified privilege because of his "common interest arising out of his business relationship" with Large Corp. Under the privilege, a special relationship is usually confined to more than simply a common interest business relationship. It usually requires some fiduciary duty like spousal relations or family relations, and in some instances it has been extended to include those people filling out recommendations for job seekers or admission to certain professions. In Dave's case, although Dave had done extensive work for the corporation, he was not an employee, but rather as the facts indicate an independent contractor, who served in no fiduciary capacity to Large Corp. Rather, he was a person who approached Large Corp. not out of his duty, but out of his own self benefit to tell them things which he did not know to be true, nor did he believe them to be true. Furthermore, even if Dave was in a fiduciary relationship with Large Corp., so that his disclosure would be privileged, based on the fact that Dave apparently made up the allegations against Carol, and did not have any reasonable or knowledgeable basis for his statements concerning her employment with Large Corp., there is no possible chance that Dave's statements can be found to be within the scope of his privileged disclosures to Large Corp. Because Dave was not in a special relationship with Large Corp., because he was merely a past employee and even if he was found to be in a special relationship with Large Corp., he exceeded the scope of the privilege by conveying statements that he either knew were false or did not reasonably believe to be true, he is not entitled to assert the qualified privilege. The court properly rejected Dave's affirmative defense.

3. Whether the court's grant of partial summary judgment in favor of Carol's defamation claims with a scheduled hearing on damages was correct in the interest of expediting litigation.

As mentioned in (1.), a motion for summary judgment is correct when based upon the evidence presented, evaluated in the light most favorable to the non-moving party, there is no triable issue of fact to be presented to the fact finder. In this situation, a claim by Carol for defamation (not First Amendment defamation) must include (1) defamatory statements about Pat made by Dave, (2) published to a 3rd party, and (3) damages in order for Pat to be successful in her prima facie case. In Carol's case here, she was slandered by Dave because the defamation was spoken and not written. A case in defamation is aimed at recovering damages for harm to a plaintiff's reputation.

In this case, Dave made defamatory statements about Pat to Large Corp. by telling them falsely, that she was planning on entering into a large contract with a corporation that was notoriously overpriced in an attempt to self-deal. This satisfies point one because it was a false and

defamatory statement concerning Carol made to Large Corp., her employer. This statement was published when it was told by Dave to Large Corp. because publication only requires conveyance of the defamatory statement to a single third party, and this statement need not even be intentional although it was here.

Lastly, with respect to damages, when dealing with slander, there are five categories in NY which constitute slander per se in which a plaintiff need not prove her damages in order to make out her claim. The five categories are defamation about; (1) Pat's employment or job, (2) that Pat is unchaste, (3) that Pat has a loathsome disease, (4) that Pat has committed a crime, and (5) that Pat is a homosexual. Here, Carol is alleging that Dave defamed her by making defamatory and false statements about her employment, job, or profession, which would fall under the categories of slander per se.

Specifically, Dave stated that Carol had been discussing the possibility of a large computer contract for Large Corp. with an over-priced producer and that Carol had been self-dealing with that company, calling into question her integrity in the administration of her job. Such statements would certainly be damaging to Carol's reputation, as it would of course affect any job she might take in the future because no other corporation would seek to hire her for fear of impropriety on her part. This is enough to presume that damages naturally flow from the statement and there is no need for Pat to prove actual damages, they are presumed. Pat has shown that there is a sufficient prima facie case to support her cause of action. Dave has not presented any evidence to the contrary, and in fact, he admitted making the statements but justified them under a qualified privilege defense. Since the judge ruled properly that such a defense was not applicable to the situation at hand, it would be proper for the judge to grant a partial motion for summary judgment to Carol, because there are no triable issues of fact for the fact finder to consider, as no party has presented evidence that the other contradicts.

Lastly, it is important to consider whether the partial motion with a trial on damages to follow was proper. Under the CPLR, a court may grant a partial motion for summary judgment, where it is appropriate, as it is here, in order to expedite litigation, and then order a trial only on damages. Here, there is no triable issue of fact for the jury to consider, except for the amount of reputational damages caused to Carol by Dave's defamatory statements. Due to that fact, the court properly ordered a trial on the issues of damages alone in the interest of expediency and the judicial system.

Question-Three
In May 2006, Ron was diagnosed with a rare disease that made him physically weak, though he remained mentally alert. Thereafter, Ron had Lawyer draft a will which included, in pertinent part, the following paragraphs:

(1) I give to my Trustee the sum of $1,000,000 to be held in separate and equal trusts for my sisters, Lynn and Ethel, with the income paid to each beneficiary annually until her death, when the principal is to be paid to the estate of the beneficiary.

(2) I give the rest, residue and remainder of my estate to my dear friend, Fred, without whose loyalty and friendship I never would have been able to achieve the success I had in my life.

(3) I nominate Fred as Executor of my estate and Trustee of the trusts created herein for my sisters.

(4) My Executor and Trustee shall not be liable for any failure on his part to exercise reasonable care, diligence and prudence in the administration of my estate or the trusts created herein.

(5) Anyone who shall contest this will for any reason whatsoever shall forfeit any right that may have accrued to him or her under the provisions of this will.

Lawyer brought the will to Ron's bedside where Ron's neighbors, Sam and Dave, were present to witness his will. Ron read the will, told Lawyer it was exactly what he wanted, and declared to Sam and Dave that it was his will and he wanted them to witness the will's execution. Lawyer gave Ron a pen with which to sign his name, but because Ron was so physically weak, he was unable to lift his arm. At Ron's request, Lawyer held Ron's arm while he signed the will at the end. Sam and Dave watched and then signed the will as witnesses.

Ron died in August 2006. He never married and had no children. At the time of his death, his net estate was worth $5 million. Lawyer filed Ron's will for probate. Ethel, a competent adult, timely filed an objection to probate claiming that the will was not properly executed. The court denied Ethel's objection, admitted Ron's will to probate, and granted letters testamentary and letters of trusteeship to Fred. No appeal was taken.

In September 2006, Fred took control of the estate assets and funded the testamentary trust for Lynn. Fred did not fund the trust for Ethel, relying on paragraph (5) of the will. After paying all creditors, Fred paid the balance of the estate to himself as residuary beneficiary.

As trustee of the trust for Lynn, Fred made an unsecured loan of $250,000 to his friend, Eric, despite his admitted knowledge that Eric had been unable to obtain any bank or other financing because of his poor credit rating. Eric is in default on the loan, having never made a single payment.

Fred recently filed his account as executor, and Ethel and Lynn filed objections thereto, (a) Ethel seeking to compel Fred to fund Ethel's trust, and (b) Lynn seeking reimbursement from Fred for the loss of trust funds from the default of the loan to Eric. Fred does not dispute the facts of the loan transaction.

(1) Did the court properly deny Ethel's objection to probate?

(2) How should the court rule on objections (a) and (b)?

ANSWER TO QUESTION 3

1. The issue is whether Ron's will was properly executed.

Under the EPTL, a will must be executed with proper formalities. It must be signed by the testator at end of the will; signed in the presence of two witnesses (although witnesses don't need to sign in each other's presence); publication to the witnesses of the document as testator's last will and testament; signature by two attesting witnesses; and the entire execution ceremony must be completed within 30 days of the first witness signing.

The testator's signature must be his own signature or any mark he would make as his signature. If someone else signs on behalf of the testator, this would require additional formalities and would have to be notarized. However, if someone merely helps hold up the testator's hand because the testator is otherwise too weak, the testator's signature is still valid as his own. In that, the attesting witnesses provide sufficient evidence and security that the drafting and execution of the will was proper and that the signature itself was not procured under duress.

In this case, Ron's will satisfies all of the required formalities. He signed the document, albeit with the assistance of his lawyer, at the end of the will; he signed in the presence of witnesses and published his will to them; and the witnesses both signed in the presence of the testator and each

other. The fact that Ron's lawyer helped him lift his arm is not problematic because Ron was still able to sign his name himself and the whole process was properly witnessed.

In addition, a challenger may challenge the will's validity and execution based on a claim of duress or mental defect of the testator. However, the facts do not appear to support either of these grounds for contesting a will's validity and it appears that Ethel was contesting probate solely based on the will's execution.

The will was thus properly executed and may be admitted to probate, assuming the witnesses are available to testify regarding the due execution.

2. a) The issue involves the validity of the no-contest clause in the will and whether Ethel lost her devise by contesting the will's execution.

Unlike many other jurisdictions, in New York no contest clauses are given full effect. New York law enables testators to make the dispositions they desire without their intentions and dispositions being questioned after death and without people challenging their mental sanity and free will. Consequently, anyone who contests the will's validity or provisions forfeits rights under the will. However, there are a few exceptions. No-contest clauses do not apply when: 1) the contestant is alleging fraud or that the will was revoked by another will, and there is good basis for the claim; 2) the contest is on behalf of a minor or incompetent; 3) the contestant is alleging that the court does not have jurisdiction; and 4) the contestant is merely asking the court to interpret/construe the will's terms. Unless one of those narrow exceptions apply, the no-contest clause will be given its full effect.

In this case, Ethel forfeited her trust interest under the will by bringing an objection of improper execution. She is not alleging fraud or the revocation of the will; she is competent and bringing the contest herself; she is not disputing the court's jurisdiction; and she is not merely asking the court to construe a provision in the will.

Thus, the Court should overrule Ethel's objection seeking to compel Fred to fund her trust because she forfeited her rights under the will based on the no-contest clause.

b) The issue is whether Fred breached his duties as trustee by making the unsecured loan and whether his actions are excused under the will's exculpation clause.

Trustees have broad powers to manage trust assets, but also have duties to the trust beneficiaries and are prohibited from engaging in certain activities. Among those duties are the duties not to commingle funds, not to loan or borrow money from the trust, and the duty of loyalty. If a trustee is charged with breaching his duty of loyalty, his actions are subject to the no further inquiry rule, thus any actions constituting a breach of loyalty will be an automatic breach.

Furthermore, under the Uniform Prudential Investment Act (UPIA), the trustee must make reasonable investments, based on maximizing total return and value to the trust. While a trustee's investment decisions must be examined as part of an overall portfolio and no investment should be looked at completely in isolation, there are still certain investments that will raise red flags because an ordinarily prudent investor would not make them, such as making a large unsecured loan to a creditor with a poor credit rating.

When a trustee breaches his trustee duties, the beneficiaries can choose to ratify the breach (if it actually helped the trust), remove the trustee, and/or sue the trustee for losses to the trust.

In this case, Fred did not invest trust assets as would an ordinarily prudent investor, and he may have also breached his duty of loyalty by making an unsecured loan to his friend. A prudent

investor would not invest 1/4 of the trust corpus into an unsecured and risky loan, particularly given his knowledge that the lendee could not obtain other financing because of his poor credit rating. Furthermore, the fact that this risky loan was made to Fred's friend raises at least the inference of breach of loyalty.

Effect of the exculpation clause, Paragraph (4) of the will exculpates the executor and trustee for failure to exercise reasonable care, diligence, and prudence in the administration of the estate or trust. In New York, the settlor can limit a trustee's personal liability for failure to exercise case and prudence in trust administration. This may be particularly necessary since the settlor can designate almost anyone as trustee, including people that lack investment skills and abilities. However, the settlor cannot completely indemnify the trustee for liability for breaches of duty of loyalty and grossly unreasonable acts. Thus, he cannot give a trustee free reign to mismanage and divert trust assets because this would amount to waste and destruction of property, which is against public policy. Despite this exculpation clause, trustee Fred will still be liable for his grossly unreasonable mismanagement of the trust.

Thus, the Court should rule in favor of Lynn and seek reimbursements from Fred for the loss to the trust.

ANSWER TO QUESTION 3

1. The issue is whether a signature made with physical help qualifies as a valid signature required for due execution of a will.

Under the EPTL, in order to be valid a will must be (1) signed by the testator (2) at the end thereof. Additionally, (3) the testator must publish the will to two witnesses, declaring it to be his last will and testament and (4) acknowledge his signature or sign in the witnesses' presence. Finally, (5) two disinterested witnesses must sign the will within (6) thirty days.

The facts indicate that Ron "signed the will at the end", that he told Sam and Dave that it was his will, and that he "signed" the will in their presence. Additionally, neither Sam nor Dave is listed as a beneficiary or executor to the will, and, therefore both qualify as disinterested witnesses.

The only issue Ethel could have contested was the signature.

Under the EPTL, the requirement of a "signature" is interpreted broadly. Any mark intended to serve as a signature will suffice. Additionally, a third person may help the testator complete the signature if necessary (here made necessary by Ron's disease), so long as the help is at the request of the testator and is in the presence of two witnesses. This signature must be proved at the probate proceeding.

Here, the facts indicate that Ron was so physically weak he was unable to lift his arm. They indicate that Ron himself requested that Lawyer hold his arm while he signed. Both Sam and Dave were present to witness this, and both appear to be able to testify as to the validity of the signature at the probate proceeding.

Because the will was appropriately executed under the requirements of the EPTL, the court's decision to deny Ethel's objection was proper.

2. a) The issue is whether Ethel's objection rendered her ineligible to take her gift under the no-contest clause in the will.

Under the EPTL, no-contests clauses are enforced with four exceptions. A challenge to a will will not work a forfeiture under a no-contest clause if the protest: (1) claims that the will has been

revoked in writing or by a later, valid will or codicil and the court finds that the objection was made with probable cause (probable cause is defined as a reasonable basis for making the objection and that the objection was made in good faith), (2) the contest is filed by a guardian on behalf of an infant or incompetent (3) the request is merely a request for construction of what the will means or (4) if the contest is a challenge to the court's jurisdiction.

Here, Ethel's objection claimed that the will was invalid due to improper execution. An objection to the signature or the execution in general is not an objection that the law will disregard with respect to a no-contest clause. Ethel did not assert that the will was revoked. Additionally, Ethel was a competent adult at the time of her objection, and therefore, her objection was not filed by a guardian. Ethel was challenging the will's execution (presumably in hopes of obtaining her $2, 500,000 intestate share) and not requesting a construction by the court of what the will provisions mean. Ethel also was not merely challenging the court's jurisdiction.

Because Ethel objected to the will for a reason not excused by law, Fred properly refused to fund the testamentary trust indicated in the will.

Therefore, the court should refuse to compel Fred to fund Ethel's trust.

It should also be noted, that the trust is a testamentary trust and had not been funded ahead of time. An inter vivos trust, funded prior to death could not be forfeited as a result of contesting a will with a no-contest clause. However, because the trust is a testamentary trust, to be funded with probate assets, the trust is a forfeitable gift.

b) The issue is whether a testator can waive all liability for failure to exercise due care on the part of a trustee, and whether Fred's actions violate the duty of loyalty and the statute governing trustee management of the trust.

Under the EPTL, a trustee is a fiduciary of the trust for which he acts as trustee. The testator who creates a testamentary trust cannot waive the trustee's fiduciary duty to the trust. Such a waiver would be contrary to public policy, as it would undermine the duties the law assigns to a trustee, which are owed to the trust and beneficiary, not the settlor. For that reason, the exculpatory clause in the will will not serve as an absolute defense for Fred's breach of fiduciary duty and negligence.

Under the EPTL, as a trustee, Fred owes fiduciary duties to the trust and the trust's beneficiaries. These duties include the duty of loyalty, requiring that the fiduciary not engage in self-interested transactions, not make secret profits, and not waste the assets of the trust. If the trustee violates this duty in any of those manners, the trustee is liable to the beneficiary and must refund the losses and may be liable for any additional damages as well.

Here, Fred loaned money from the trust to a friend. The loan was unsecured and made with the knowledge that the person to whom he was lending the money had been "unable to obtain any bank or other financing because of his poor credit rating." Such a loan to a known unreliable third party is considered a waste of the assets of the trust. Because Fred breached the duty of loyalty and wasted the assets of the trust, Fred is liable for reimbursement from the loss of trust funds and any other damages that accrued as a result of the loan. Additionally, under the EPTL, once a breach of a fiduciary duty is established, the trustee can offer no defense. An assertion of good faith or reasonableness under the circumstances will not undue the breach. This is called the one look doctrine.

Additionally, under New York statutory law, a trustee must invest the res of the trust in the manner that a reasonably prudent person would under the circumstances. This standard is designed to be flexible. New York law wishes that trustees use reasonable care and skill and

assess investments in light of their overall contribution to the portfolio. This standard requires courts to review trustee actions both at the time of the investment and with respect to the entire portfolio, and not just the specific investment itself. This portfolio outlook on trust investment does mean that trustees can appropriately make risky investments with the res of the trust if the risky investments are likely to result in a higher, overall, return. This investment, however, was an unreasonable risky investment to a known terrible credit risk. For that reason, even under the flexible approach, Fred's actions are not within his statutorily appropriate discretion for managing the res of the trust. Because of this he is liable for the loss of trust funds.

Because Fred breached his duty of loyalty and because Fred violated the statute governing trustee investments, the court should grant Lynn's request for reimbursement for the loss of trust funds from the default of the loan to Eric.

Question-Four

Alan and Barbara were married in 1988. They purchased a home as tenants by the entirety, using wedding gift money for the down payment and financing the balance with a mortgage loan. Prior to the marriage, Barbara owned an apartment building known as the Towers. She continued to own the building in her own name following the marriage. From the time of the marriage, Alan helped manage the Towers, splitting the work equally with Barbara.

The couple had two children, Corrine and David. Barbara gave up her job as a dance instructor to take care of the children and the home. She returned to work part time as a receptionist when the younger child entered school. Alan worked as an engineer when the couple met. He received several promotions over the years following the marriage.

In 2006, Barbara commenced a divorce action alleging cruel and inhuman treatment, seeking maintenance and equitable distribution. Barbara’ s action also seeks custody of both children and child support. David, age 9, has indicated that he wants to live with his father. Alan seeks custody of David, but because Alan does not get along with 14 year old Corrine, he requests only holiday visits with her. Alan travels frequently for his job, and plans to hire a nanny to help care for David.

The court appointed a law guardian who interviewed the parties and the children. The two children, who are currently living with Barbara under a temporary order of custody, get along well. The law guardian reports that Barbara runs the family household very efficiently as the primary caretaker of the children. The law guardian also reports David has expressed anger toward his mother, primarily because Alan told David that Barbara was seeking to break up the family. The law guardian believes that David's anger toward his mother is temporary and recommends some counseling for David.

At the time of the marriage, the Towers was worth $75,000. It increased in value to $275,000 by the time the divorce action was commenced. All of the appreciation was due to improvements made to the property from the joint and equal efforts and resources of Alan and Barbara. The Towers remains in Barbara’ s name.

Beginning in 1989, Alan’ s employer provided a pension plan fully funded by employer contributions. Alan’ s pension plan account was fully vested and worth $1,000,000 when the divorce action was commenced. He will not be eligible to receive any funds from the plan until he reaches retirement age in 2017.

The marital home was purchased for $150,000. Due to market conditions only, its value increased to $225,000 by the time the divorce action was commenced. The mortgage on the marital home was fully paid and satisfied in 2005.

(1) How should the Court rule regarding the equitable distribution of

(a) the Towers, (b) the marital home, and (c) Alan's pension plan account?

(2) How should the court rule regarding custody?

(3) How should the court rule regarding child support?

ANSWER TO QUESTION 4

1. The issue is the equitable distribution in a divorce action of an apartment owned before marriage and the active appreciation on it; the marital home and passive appreciation on it; and a fully vested pension plan of one spouse, which will not be reachable until the future. In a divorce, a court will divide all property owned by the two spouses into three categories: 1) the wife's individual property, 2) the husband's individual property, and 3) marital property owned jointly between them. Each spouse will be awarded full rights in their individual property. Individual property includes personal injury awards, property owned individually before marriage, property the parties agree to treat as separate and passive appreciation on any of these categories. All other property will be considered marital property. This is true even if the property is in the name of one spouse only, or the assets of only one souse are used to purchase it. The court will divide marital property between the souses by any percentage it sees fit, although an even 50-50 distribution is more common in longer marriages. The court may consider fault when it is egregious in making these calculations. The court has broad discretion in this area.

a) The Towers apartment was Barbara's pre-marital property in this case. However, it's value was increased through the active appreciation efforts of both spouses. It should be noted that although passive appreciation on a pre-marital asset is individual property, active appreciation is marital property. Therefore, because Barbara owned the Towers apartment before marriage, she is entitled to $75,000 of its value as an individual asset. However, the $200,000 worth of active appreciation is a marital asset and will be subject to the court's equitable division. Barbara may keep the apartment and pay $200,000 into the collective pool of assets for the court's distribution, or she may sell it and the court will award her alone $75,000 of its value and distribute the remaining $200,000 as it sees just.

b) The marital home was marital property. Alan and Barbara were married when they bought it and owned it as tenants by the entirety. Furthermore, the $75,000 worth of passive appreciation on a marital asset is also marital property. Consequently, the entire $225,000 value of the home is to be divided according to the court's discretion. Again, one spouse may keep the home and pay the other his or her share of the value, or the house may be sold and the amount distributed per the court's order.

c) Alan's pension plan, although in his name and through his job, is marital property under New York statutory law. It is irrelevant that the plan is in Alan's name and through Alan's job. The fact that Barbara cut back on her career to take care of the couple's children and home means that she also contributed to Alan's career and ability to advance. Consequently, New York courts treat vested employee benefits as marital property. The pension plan is vested, but Alan cannot receive benefits until 2017. Therefore, the court may order Alan to pay Barbara her share of the benefits in 2017. Family courts retain continuing jurisdiction over alimony judgments, so the future pay-out will still be under the court's jurisdiction and supervision. Alternatively, the court may calculate Barbara's share of the plan and order Alan to pay her now.

2. The issue is whether it is in the best interests of David and Corrine to stay with their mother or father. Legal custody gives a parent decision-making power over their kids, and physical custody

gives parents the right to have their children stay at their home. Courts may divide these powers as it sees fit between the parents. When determining matters of child custody, courts use the best interests of the child standard. Courts may consider any factors it deems relevant in making that determination, including a parent's income, relationship with their kids or third parties, the parent's wishes, the wishes of children over sixteen, who will care for the children (parent or nanny); stability, keeping siblings together, etc. In this case, Barbara works part-time. She likely earns less money than Alan, but would care for the kids herself. Alan travels frequently and would require a nanny. Alan does not want custody of Corrine, while Barbara wants custody of both. Although David would prefer to live with Alan, he is only 10 so a court would not consider his opinion. Also, his feelings would likely change with time per his guardian. Living with Barbara would provide stability because she already is the primary caregiver. Also, Barbara sued for divorce successfully on grounds of cruel and inhuman treatment. This implies Alan is emotionally or physically abusive, and therefore less stable and less fit to parent. Also, Alan has tried to "poison" his kids against their mother, which suggests maintaining a good relationship with Barbara if Alan had custody would be difficult. As a result, the court should find these factors weigh in favor of Barbara having custody. Alan may have visitation, but if he is abusive it should be supervised.

3. The issue is how the court should rule regarding child support. A parent has the duty to financially support his/her children until the age of 21. The parent without full physical custody may therefore be required to pay support to the other parent (for use to support the children). A court will determine what support level is required by using a statutory formula, which accounts for a percentage of the parent's income and the total number of children to support. Here, Alan is the parent who earns more money. Also, a court will likely grant Barbara full physical custody. Consequently, Alan should be required to pay Barbara support based on the statutory formula.

ANSWER TO QUESTION 4

1. The first issue is how the court should determine equitable distribution of the indicated assets of Alan and Barbara.

Under New York statute, marital assets are to be divided equally among parties to divorce. Generally, except in very rare cases, the fault of either party is irrelevant to distributions of marital property.

Marital assets include property in which title is held by either party or both parties jointly, subject to the following limitations. First, property held by a party prior to a marriage is considered that party's asset as opposed to joint marital property. Second, any property that is given specifically to one of the parties (by name) is viewed as a gift only to that party. This includes specific bequests in a will, for example. Third, personal injury compensation paid to either party is viewed as that party's individual property. Fourth, any property that the married couple agrees will be viewed as separate marital property will not be considered a marital asset. Finally, any passive appreciation on the value of property in any of these four categories will be considered the individual asset of the party owning that property. But, active appreciation due to the effort of either or both parties will be considered marital assets.

In making an equitable division, the court will look at tangible, as well as intangible property. Intangible property, for example, can be a professional license. In short, the court will take into account increased earning potential of a party (that accrued over the marriage) as a marital asset. In addition, the services provided by one spouse who stayed home or put a career "on hold" will be considered in order to reach an equitable division.

a) The first sub issue is how to divide the Towers apartment building. It was owned by Barbara prior to the marriage and hence at first glance it seems to be her independent property. There was,

however, significant appreciation to the value of the Towers. That appreciation was active, as opposed to passive. Alan and Barbara both worked actively on the Towers during the marriage. Hence, although the original value of the Towers (at the time of the marriage) should remain with Barbara, any increase value should be considered a marital asset.

Thus, in splitting up the Towers value, Barbara should receive $75,000 up front for the pre-marital worth. Then, the active appreciation of $200,000 should be considered marital assets that will be distributed between the couple equally.

In equity, one party will likely have to buy the other party out or the property can be maintained by the two as tenants in common. Still, due to the public policy interest of keeping adverse parties from being co-owners, a buyout is preferential. Since, Barbara was the original owner of the property, equity will probably lean to her getting ownership of it. Thus, she should be required to pay $100,000 to Alan for sole ownership (that is, her equitable value of marital assets should be reduced by $100,000 in exchange for sole ownership).

b) The second sub issue concerns how the marital home should be divided up. The home was purchased after the wedding with wedding gifts and the two became tenants by the entirety (meaning they have right of survivorship to the property). This is clearly a joint, marital asset.

The home has a current value of $225,000. Although some of that gain was due to passive appreciation, that gain is still a marital asset since it was gain on a joint property. The $225,000 value should be split equally. In equity, this will likely happen by terminating the tenancy by entirety and having one party "buy" the other half out for half the purchase price. The court should look at the parties desires in making the determination of which party buys which out; as well as the issue of which party needs the house more (for example, due to that party obtaining custody).

c) The final sub issue concerns the equitable distribution of Alan's pension plan. The plan came into being after the marriage. It is fully funded by Alan's employer and is akin to income earned during Alan's participation in the marriage. This is a marriage asset that also must be divided between the parties. It is important to emphasize the rationale behind making an employer contribution a joint marital asset. Barbara contributed services to the home and family that were not compensated. She quit her job and worked part time, so that she could take care of her kids and let Alan focus on work. It would be inequitable if she were then cut out of the economic income that Alan earned (with her help).

This is a vested pension that will not be paid until 2017, when it will be paid directly to Alan. Thus, the court must determine the present value pension plan. Then that value can be divided in two in order for Barbara to get her equitable share.

All in all, in determining the equitable distribution of property the court should look at all of the transactions and determine a financial pay out that puts both parties on equal footing. Although in the case of each property, one party may have to "buyout" the other by providing half of the present day value, in reality many of these transactions will off-set simplifying the process.

2. The second issue is to whom the court should give custody.

New York courts determine custody on the "Best Interests of the Child" theory. The interests of the child are paramount to that of the parents. In evaluating the "Best Interests of the Child," courts will look to the following: 1) the interests of the parents, 2) the interests of the child if the child is over 12, 3) the age, financial well-being, and health of each parent, 4) the existence of new individuals in each parents life and who that person is (e.g.: mistress), 5) the effect a given custody will have on the child's ability to foster relationships with extended family, 6) history of

domestic violence by either party, and 7) anything else the court thinks it will be equitable to evaluate.

This is clearly a broad standard that gives a lot of discretion to the court.

Based on the limited information in the fact pattern, it is difficult to begin a proper "best interests of the child analysis." Both parents seem to be of adequate age, health, and financial disposition. There is no evidence that either has a history of domestic violence or has begun a new relationship with a third party.

Still, Barbara probably should get custody over Corrine. Looking at the first factor delineated above, Barbara wants custody whereas Alan only wants visitation rights. Corrine is old enough that her opinion should be taken into account by the court, but the facts are silent as to her opinion. But, based on Alan's desire to only receive visitation, Barbara should likely receive custody.

The issue of David is more difficult. Both parents want custody over David. In addition, David wants to live with his dad. David is still young, so the "best interests of the child" analysis does not give enormous weight to his decision (as he is under 12). But, in the interests of equity, his desire to be with his Dad can be taken into account. In addition, David has resentment towards his mother and is generally angry living with her. Alan has also indicated that David does not get along with his sister. All these factors point to the father getting custody.

However, a number of factors point against the father getting custody. First, he travels a lot. Second, the court may decide it is in the best interest of the child to keep him with his sister to develop better familial relations. Third, if the allegations of cruel and inhuman treatment are true, the father may not be as good of a choice as the mother (especially if violence was involved). Finally, the law counselor's opinion should be taken into account. That counselor indicated that the mother runs the household well and that the anger is only temporary.

The court could rule either way regarding the custody on this matter depending on the existence of other factors, such as which parent will stay in the same home as stability is important in one of these decisions. From the fact pattern, the court should be slightly more likely to award custody to Barbara due to Alan's frequent travel, the young age of David, and the fact that the anger may stem only from the dad's claim to him that the divorce was his mother's fault. But, if Barbara proves cruel and inhuman treatment (with violence) she should definitely receive custody.

3. The third issue is what the proper child support award should be.

New York courts follow set guidelines in awarding child support based on the number of children in the family. For couples' incomes that accumulate to $80,000, 17% of that should be allocated to one child, and in the case of two children, 25% should be allocated. If the parents are far wealthier, the court can adjust such a ruling to take into account the added wealth. The court can also take into account any income disparities between the parties. If, for example, the paying parent makes far more money than the custodial spouse, the amount paid can be increased. If the paying parent is indigent and the custodial spouse is not, this can also be taken into account.

Although fault would play a role in determining maintenance for the wife, maintenance and child support are separate issues. Child support revolves around the equitable amount needed to care and support the children.

It should be noted that under New York law, parents have an obligation to care and support their

children until they are 21. This can be extended into college if the parents are well to do and the child agrees to follow the parents' reasonable demands.

It should also be noted that under federal statute, sister states must recognize the forum state as the state with jurisdiction over the child support claim. Hence, the support claim can be enforced regardless of the state in which the paying spouse ends up in.

In the case at hand, if Alan ends up without custody, he should pay his share of income to ensure that 25% threshold is met. If he receives custody of David and Barbara gets Corrine, there should be an equitable off-set until Corrine reaches age 21.

Question-Five

Four years ago, Lawyer represented Client in the purchase of a house and in the preparation and execution of Client's will. Shortly thereafter, Client contacted Lawyer and asked Lawyer to represent Client, Sam and Tom in the formation of a corporation to operate a restaurant. Client was to be the chef and general manager of the restaurant and Sam and Tom were each investors. Lawyer filed a certificate of incorporation with the New York Secretary of State, creating R Corp. Client, Sam and Tom were named initial directors.

At their organizational meeting, Client was elected president, secretary and treasurer, and Sam and Tom were elected vice-presidents. Client, Sam and Tom, the sole shareholders, were each issued 50 shares of R Corp. Sam and Tom each paid $50,000 for their shares. The consideration for Client's shares was his binding obligation to act as president of R Corp. and general manager of the restaurant for a period of one year, the agreed value of which was stated to be $50,000.

Lawyer prepared the minutes of the organizational meeting. Since that time, he has continued to represent R Corp. in various general corporate matters, including disputes with its landlord and vendors.

When the corporation was formed, Sam and Tom orally agreed with Client that Client would be the chef of the restaurant at an annual salary of $60,000 for as long as Client is a shareholder in R Corp.

The restaurant was an immediate success and has been very profitable. Nevertheless, Sam and Tom have refused to vote to authorize any increase in Client's salary or any distribution of earnings to the shareholders.

Last week, at the annual meeting of directors of R Corp., with all directors present, Sam and Tom voted to oust Client as president, secretary and treasurer and to terminate his services as chef and general manager. They voted to elect Sam as president and Tom as secretary and treasurer and to hire Sam's son to be chef and general manager. Lawyer prepared the minutes for the meeting.

(1) Were Client's shares issued for proper consideration?

(2) Is the agreement regarding Client's employment as chef enforceable?

(3) Assuming Client's shares were properly issued, will Client likely be successful in a proceeding to dissolve R Corp.?

(4) Under what circumstances, if any, may Lawyer properly represent Client in a proceeding to dissolve R Corp.?

NEW YORK STATE BAR EXAMINATION
JULY 2007 QUESTIONS AND ANSWERS

ANSWER TO QUESTION 5
1. The issue is whether a promise of future services to a corporation is valid consideration for shares in the corporation.

Under the BCL, shares may be issued in exchange for almost any type of consideration, including money, real property, personal property, past performance of services for the corporation (including services in establishing the corporation), and future promises of service to the corporation, among others. The Board of Directors may determine the value of any non-monetary consideration given, and absent fraud or bad faith, their determination is conclusive on the issue. The value determined is important primarily in the context of a corporation whose certificate of incorporation sets a par value, as shares may not be issued for less than the par value.

In this case, Client entered a binding obligation to serve the corporation as president and general manager for the restaurant for a period of one year. This constitutes valid consideration. Client, Sam, and Tom, in their capacity as directors, agreed that the value of Tom's obligation was $50, 000. This amount seems reasonable, so that no fraud is apparent, and there is no indication that the parties acted in bad faith. The facts are silent as to whether the certificate of incorporation sets a par value for the stock, but if it does, Client's obligation likely meets or exceeds the par value requirement, since it is valued at $50,000, the same amount that Sam and Tom paid for the same number of shares.

Client's shares were thus issued for proper consideration.

2. The issue is whether the oral agreement between Sam, Tom, and Client that Client would be chef of the restaurant at an annual salary of $60,000 for as long as Client is a shareholder in R Corp. violates the Statute of Frauds.

The Statute of Frauds requires that certain contracts be recorded in writing and signed by the party against whom they are asserted in order to be enforceable. These contracts include: 1) contracts made in consideration of marriage; 2) contracts for services which cannot be completed in less than one year; 3) contracts concerning the sale or use of land; 4) contracts in which an estate representative agrees to be personally liable for the estate's debts; 5) contracts for sale of goods for $500 or more; 6) suretyships; and 7) leases of personal property with total payments of $1,000 or more.

The agreement between Sam, Tom, and Client regarding Sam's employment does not violate the Statute of Frauds. This does not constitute a contract for services that could not be completed within one year because, although it seems clear from circumstances that all parties expected Client to own stock in the corporation, and thus be employed as chef for more than one year, there remained a possibility that he would not. The oral agreement specified no exact time frame. Therefore, the agreement is valid and enforceable.

3. The issue is whether Client will be able to show that Sam's and Tom's actions are sufficiently "oppressive" to him as a minority shareholder to warrant dissolution of the corporation.

In a close corporation whose shares are not traded on an exchange or OTC market, a minority shareholder owning 20% or more of a corporation's stock may petition the court to dissolve the corporation if he can show that the controlling shareholders are engaging in fraudulent activity or committing waste, or are acting in a way that is oppressive to the minority shareholder such that the minority shareholder is blocked from receiving his anticipated return on his investment. Within 90 days of the petition, however, the controlling shareholders may offer to purchase the minority shareholders' shares at a reasonable price to avoid dissolution. If the parties cannot agree on a reasonable price, the court may set one. Generally, although shareholders do not ordinarily

owe a duty of care to fellow shareholders, in a close corporation, the controlling shareholders owe a duty of utmost good faith to minority shareholders and must not act to prevent them from getting a return on their investment.

In this case, Client owns 50 of the 150 issued shares in the corporation, or 33%, so he is eligible to petition the court for dissolution. As to Sam and Tom's actions, their initial actions in refusing to vote to increase Client's salary or to distribute earnings to shareholders likely would not be considered oppressive, as Client initially agreed to a set salary of $60,000, so the lack of increase was not counter to his expectations, and generally courts defer to the business judgment of boards of directors in determining distributions. A shareholder has no general right to distributions. However, Sam and Tom's actions in ousting Client as president, secretary, and treasurer and terminating his services as general manager and chef will likely be considered oppressive. The oral agreement regarding Client's employment, even if not enforceable, clearly indicates that Client's main expected return from his investment was in his salary as chef, and absent that, any management role, or any distributions, he has no way to get any return on his investment whatsoever.

Thus, Client would likely succeed in a proceeding to dissolve the corporation, although as noted above, Sam and Tom would have the option of purchasing his stock at a reasonable price.

4. The issue is whether Lawyer has a conflict of interest in representing Client in a proceeding to dissolve R Corp.

A lawyer faces a conflict of interest if a matter is likely to involve issues in which the client's interests will be opposed to the lawyers' personal interests, his business interests, or the interests of another client or former client. If there is a conflict of interest, a lawyer may not represent the client on the matter at hand, unless 1) the lawyer explains the conflict, all material facts, and the potential consequences to the client or clients (if more than one party involved are current clients) , and they agree in writing, and 2) a reasonably prudent lawyer would accept the case despite the conflict. If a lawyer has come to know facts material to the dispute through his previous representation of another client, he must get that former client's permission to represent the new client, and he may not use those facts to the former client's detriment in the course of his representation on the matter.

In this case, Lawyer has a conflict of interest in his representation of R Corp. on general corporate matters and his proposed representation of Client in the matter of R Corp.'s dissolution. Even if Lawyer were able to obtain Sam's, Tom's, and Client's written permission to represent Client in the matter despite the conflict, a reasonably prudent lawyer would question Lawyer's ability to represent Client on this matter. Lawyer would be wise to decline to represent Client.

ANSWER TO QUESTION 5

1. The issue is whether Client's promise to act as the corporation's president and general manager of the restaurant for a period of one year was sufficient consideration for shares that had an agreed value of $50,000. Several things that corporations will offer shares for will be considered valid consideration. Among other things, proper consideration for a corporation's shares include money, property, services, a promise of future property or money, as well as a promise of future services all are considered proper consideration for a corporation's shares. Moreover, as in here, absent any evidence of fraud, the stated value by the Board for any consideration in return for shares will be presumed to be valid. Here, the only three directors of the corporation agreed that Client's future services promised are worth $50,000. Therefore, the client's shares were issued for proper consideration.

2. The issue is whether the oral agreement regarding Client's employment as chef of the restaurant was binding. Generally, oral service agreements are enforceable unless they fall within the Statute of Frauds. If the contract falls within the Statute of Frauds, for the contract to be enforceable, it must be in writing. Among other things, contracts for real estate, suretyships and contracts that cannot be performed within one year are within the Statute of Frauds and thus need a writing to be enforceable by the party it is being enforced against. The contract between the chef and Sam and Tom was an oral agreement. Moreover, the contract was for an annual salary of $60,000 and was for an indefinite period. The indefinite period was for as long as Client is a shareholder in R Corp. Assuming, because the agreement is for an indefinite period that may not necessarily be completed within 1 year, the employment contract does fall within the Statute of Frauds and thus must be in writing signed to the party charged to be enforceable. Thus, the agreement for Client's employment is enforceable. Nevertheless, it should be noted that Client still would receive either full compensation or quantum meruit for his services while he is working for the restaurant.

3. The issue is whether the Client will be successful in proceeding to dissolve R Corp. on the basis that the majority shareholders in the corporation have refused to distribute any earnings to shareholders and ousted Client from his various roles within the corporation. There are a few different methods to dissolve a close corporation like R Corp. A close corporation is a non-publicly traded corporation with a few shareholders. Because of the lack of liquidity that shareholders have in a close corporation, special dissolution protections have been established under the BCL to protect minority shareholders' interests. The main rule is that any shareholder with at least 20% of the shares in the corporation could petition the court to dissolve the corporation on the basis that the majority shareholders/directors are acting fraudulently or oppressively or that they are wasting or looting the corporation's assets. Although majority shareholders generally do not have fiduciary duties to other respective shareholders, they do have the duty not to oppress minority shareholders. This is to take into account the fact that minority shareholders can have their expectations in the corporation easily defeated and find no means of exiting the corporation because it is not publicly traded. Oppressive acts are those acts that defeat the reasonable expectations of minority shareholders. It must be determined whether Sam's and Tom's refusals to authorize any increase in client's salary or any distribution of earnings to shareholders was oppressive. Generally, the Board has great discretion in making dividend payments or increasing salaries provided they are acting in good faith. Only after they promise to make a dividend payment, are they ultimately obligated to make the payment. Moreover, upon the corporation making a dividend payment, it must be pro rata based on the shareholders' percentages of shares. Although here they made no such dividend payments so that they were specifically excluding Client, there is a lot of evidence they were not acting in good faith in their decision not to distribute earnings to shareholders. It is possible that the court may find this oppressive. Furthermore, the decision to oust Client from all his roles including that of President, Secretary and Treasurer surely were oppressive as no reason was given to defeat the reasonable expectations Client had when he came into the corporation. Thus, Sam and Tom used their power as majority shareholders to oppressively oust Client from the corporation. Consequently, Client will likely be successful in proceeding to dissolve R corp. It should also be noted that Tom and Sam, in an effort to maintain the corporation with the court's approval, could buy back Client's shares at a reasonable price to be determined.

It should be noted to remove an officer without cause, in the event that the certificate and bylaws are silent, the Board can remove the officer by majority vote, but subsequently can be found liable for any breaches of duties, etc.

4. The issue is whether Lawyer may represent Client in a proceeding to dissolve R Corp. when he originally represented R Corp. in its formation. A lawyer when representing a corporation, owes their professional duties and obligations to the corporation itself (the shareholders that make up the corporation), not directors or officers of the corporation that they may be in direct contact

with. Thus, the Lawyer must act in the best interests of the corporation as a whole, not in the best interests of individual directors or officers.

Additionally, a lawyer cannot represent a new client when it produces a direct conflict of interest that cannot be overcome with consent of all necessary parties. There is a conflict of interest when representing a new party because it might conflict with the representation of a former client. In the event of a conflict of interest, the lawyer must obtain fully informed consent from all relevant parties (former client and new client). Even in the event consent was gathered properly, the lawyer still cannot agree to take the case when a disinterested lawyer in his position would feel that the conflict of interests will prevent him from adequately representing the interests of the new potential client. Here, there is a conflict of interest because Lawyer initially represented the initial shareholders, Tom, Client and Sam in the formation of the corporation to operate a restaurant. Furthermore, he has continued to represent R Corp. in various general corporate matters subsequent to its formation. Thus, as representing R Corp., there would be a direct conflict were he to represent Client in his attempt to dissolve the corporation. Furthermore, given the lawyer prepared the organizational minutes, etc. he may have received confidential information in his representation of R Corp. In the event he did receive confidential information that would be of use to Client, he could not represent Client as it would be a violation of duties to his former client R Corp. Moreover, because he acted in matters directly related to any lawsuit for dissolution, he cannot represent Client. The preparation of the minutes and the formation of R Corp. all are directly relevant to any potential dissolution now as they go to the rights of the shareholders, etc. Based on the facts, even if lawyer were to receive consent from both R Corp. and Client, he will not be able to represent Client.

MPT
Acme Resources, Inc. v. Robert Black Hawk et al. (July 2007, MPT-1)

Applicants' law firm represents Robert Black Hawk and other members of the Black Eagle Tribe who have sued Acme Resources, Inc., a mining company, in tribal court seeking to recover for damage caused by Acme's mining coal bed methane from under reservation land, in addition to an injunction ordering Acme to cease its mining activities. The Tribe members claim that their water wells are running dry, leaving them without water for livestock and crops, because Acme's mining activities are depleting the water table. Acme's answer to the tribal court complaint denies liability for the alleged harm and also denies that the tribal court has jurisdiction in this matter. Subsequently, Acme filed suit in federal court requesting a declaratory judgment that the tribal court lacks jurisdiction over Acme and seeking an injunction against the tribe members' prosecution of the tribal court action. Applicants are asked to draft the argument section of a brief in support of a motion for summary judgment in the federal action or, in the alternative, to dismiss or stay the action on the grounds that the tribal court has jurisdiction and that Acme has failed to exhaust its tribal court remedies before pursuing its complaint in federal court. The File contains an instructional memorandum, a transcript of a client interview, a copy of Acme's complaint filed in U.S. District Court, a draft motion for summary judgment or, in the alternative, to dismiss or stay, and affidavits from a tribe member and a geologist. The Library contains excerpts from the tribe's constitution and tribal code and one case.

You may order copies of the July 2007 MPTs and their corresponding point sheets from NCBE, in January 2008 on the NCBE website, http://www.ncbex.org, or telephone, (608) 280-8550.

ANSWER TO MPT
1. The Black Eagle Tribal Court has jurisdiction over this claim, and the defendants are entitled to summary judgment, because this dispute arises from Acme's consensual relationship with the

Tribe and the claim concerns the Tribe's political integrity, economic security, and health and welfare.

As the Supreme Court has recognized, Indian tribes have "inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations." Montana. This power extends even to "nonmember fee lands," meaning those lands on Indian reservations that are owned in fee simple by persons who are not members of the tribe. AO Architects. This sovereign power includes, in some instances, the power to adjudicate disputes arising on tribal land or in which the tribe has an interest.

As the Supreme Court recognized in Montana, the tribes' inherent sovereign power has limitations. As a general rule, these powers do not extend to the activities of nonmembers in the absence of express authorization by federal statute or treaty. This "main rule," however, has two significant exceptions. First, a tribe may regulate "consensual relationships with the tribe or its members through commercial dealings, contracts, leases, or other arrangements," and may do so by regulation, taxation, licensing, or other means. Second, as the Supreme Court has stated, "[a] tribe retains inherent power to exercise civil authority over the conduct of non-Indians on fee land within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe."

Under the first ground for tribal jurisdiction, a tribal court will have jurisdiction over consensual relationships between the tribe and nonmember so long as there is a "direct nexus" between the relationship and the claim, (Funmaker), and the issue is not of a "distinctly non-tribal nature," (Strate). For example, in Funmaker, a tribal court was held not to have jurisdiction over a product's liability action arising from injuries sustained by a member of the tribe in a car leased from the defendant, a nonmember. Although the nonmember had entered into a lease agreement with the tribe, there was no direct nexus between the lease and the injury to the member. Similarly, in Strate, the Supreme Court held that a tribal court did not have jurisdiction over a personal injury lawsuit between two nonmembers whose sole contact with the tribe was that the car accident between them occurred on a state highway running through tribal land. On the other hand, the Fifteenth Circuit held in AO Architects that a tribal court might be able to exercise jurisdiction over a wrongful death action by the families of tribe members who were killed when the roof of a building designed by the defendants, a nonmember architectural firm, collapsed on them.

Under the second ground for tribal jurisdiction, a tribe may properly exercise jurisdiction over claims that concern the political integrity, economic security, or health and welfare of the tribe. This exception should be interpreted in light of its purpose, which is to "protect tribal self-government and control of internal relations." Montana. That is, tribal jurisdiction is appropriate where the issue concerns "the right of Indian reservations to make their own laws and be ruled by them." Strate (quoting Montana). Thus, in Strate, the Supreme Court held that a tribal court could not exercise jurisdiction over a car accident between two nonmembers on a state highway passing through tribal land. Although the conduct of drivers on roads passing through tribal lands presented an issue affecting the health and safety of tribe members, it did not come within the second Montana exception because it did not present an issue touching on tribal self-government or internal relations. On the other hand, the Fifteenth Circuit in AO Architects held that a tribal court might have jurisdiction under this exception because the building in question was used, as the defendants knew, for tribal meetings involving the tribe's governance functions.

Here, both of the Montana bases for tribal jurisdiction are satisfied, and the Black Eagle Tribal Court has jurisdiction to adjudicate this dispute. Under the first basis, there is a direct nexus between this claim and the consensual relationship between the tribe and Acme Resources, Inc. (Acme), namely, the tribe's granting of a lease to Acme to extract natural resources from the land. As Dr. Bellingham's affidavit states, the depletion of the tribe's water supplies is the direct result

of Acme's activities authorized by the lease. This case is unlike Funmaker, the injury complained of was only incidentally connected to the lease of a car from the defendant. Moreover, unlike Strate, in which a tribe attempted to assert jurisdiction over two nonmembers who merely were passing through the reservation on a state road, the issue here is of a distinctly tribal nature. As the Black Eagle Tribal Constitution makes clear in its first section, "[t]he land forms part of the soul of the Black Eagle Tribe." The same section makes clear that preservation of a "clean and healthful environment" is of fundamental importance to the tribe. Thus, the tribe should be able to assert jurisdiction over this claim.

The second basis for tribal jurisdiction is also met because this issue intimately concerns the Black Eagle Tribe's self-governance and control of internal relations. First, this lease was entered into by the Tribe itself, as a result of a decision of the Tribal Council. It should be the Tribe's right to adjudicate any disputes arising from its exercise of its core sovereign powers. Second, as noted above, the Black Eagle Constitution makes the preservation of the reservation's natural environment an issue of fundamental importance, one going to the heart of the tribe's self-governance and internal relations. Moreover, Dr. Bellingham predicts that the water supply of the entire tribe will eventually be depleted by Acme's actions. If the collapse of a building used for tribal governance could possibly satisfy this exception, then so should an issue involving a fundamental issue of tribal governance that affects the welfare of the entire tribe.

For the foregoing reasons, this court should hold that the Black Eagle Tribal Court has jurisdiction over this case and grant summary judgment for the defendants dismissing Acme's case for lack of jurisdiction.

2. In the alternative, principles of comity dictate that this court should remand the case to the Tribal Court to consider its jurisdiction.

As the Supreme Court and Fifteenth Circuit have recognized, principles of comity require that tribal courts be given the first opportunity to address the question of its own jurisdiction and explain to the parties its conclusion. The "tribal exhaustion doctrine" reflects the "policy of supporting tribal self-government and self-determination." AO Architects (quoting Strate). The only exception to this principle is when it is clear that the tribal court has no jurisdiction and requiring exhaustion would serve no purpose other than delay.

In this case, comity clearly dictates that if summary judgment is not appropriate at this stage, the tribal court should have the first opportunity to determine its jurisdiction. This case does not present the narrow case in which it is clear on the face of the complaint or the facts presented that the tribal court could not possibly validly exercise jurisdiction over the tribe's claim. As discussed above, there is ample basis for tribal jurisdiction here under Supreme Court and Fifteenth Circuit precedent, or at the very least a strong argument for jurisdiction that requires further factual development. There is simply no basis to conclude that respect for the tribal exhaustion doctrine would serve only to delay.

Thus, in the alternative, this court should hold to stay this action pending the Black Eagle Tribal Court's determination regarding its jurisdiction over this case.

Robert Black Hawk is entitled to summary judgment because there is no issue of material fact as to whether there is jurisdiction over Acme Resources.

Pursuant to Black Eagle Tribal Code § 23-5, which is specifically authorized by its own constitution, any member of the Black Eagle Tribe may bring civil action for injunctive relief and damages against anyone who pollutes or otherwise degrades the environment of the Black Eagle Reservation. Though ordinarily a tribal court may not exercise jurisdiction over non members absent a treaty or federal statute, a tribal court may exercise jurisdiction over a non-tribal member

in two instances. First, "a tribe may regulate...the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing contracts, leases or other arrangements." Second, "a tribe may retain inherent power to inherent power to exercise civil authority over the conduct of non-indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security or health and welfare of the tribe." Montana.

ANSWER TO MPT

1. The Tribal Court may exercise jurisdiction over Acme Resources because it entered into a consensual relationship by leasing mineral rights from the Black Eagle Tribe.

Acme Resources entered into a royalty contract with the Black Eagle Tribe to remove the methane found in the ground below the Reservation. This contract was directly negotiated between the Tribe and Acme Resources and provides the requisite connection between Acme Resources and the Tribe in order to allow the Tribal Court to exercise jurisdiction. This case is not like AO Architects v. Red Fox et al where the consequences took place entirely on lands that were owned by a non-member of the Tribe. Here though, it is true that the lands directly over the minerals are owned by someone who is not a member of the Tribe. The true dispute is over consequences that take place on other parcels of land, and in regards to the mineral rights below that land. Even in that case, the court did not rule on the jurisdiction of the court and remanded for further investigation on a more complete record.

State v. A-1 Contractors can be distinguished. In that case, the court held that an accident between two non-tribe members that happened on a state-owned right of way that ran through Indian lands was not the type of voluntary association that would allow the Indian reservation to exercise jurisdiction. The court reasoned that his land was essentially alienated by the State of North Dakota and was non-Indian land. The only connection was a chance encounter between two motorists that happened to occur in the middle of the reservation. That is not the case here. In the present situation, there was an actual contractual agreement between the Tribe and Acme Resources involving mineral rights that were held exclusively by the Tribe. Though it is true that the land from where the minerals are mined is not owned by the Tribe, the minerals underneath are. There is a direct connection between this contract and the rights of the Black Eagle Tribe.

Finally, Franklin Motor Credit Corp v. Funmaker does not require a different result. In that case, the court held that there was no "direct nexus" between a tribe member and a nonmember who were parties to a car financing lease. On the contrary, in this situation there is a direct nexus between the contract and the lands and the members of the Black Eagle Tribe. These mineral rights were owned by the Tribe and the lease was entered into to remove mineral from within Tribal land. The relationship is much more direct than the relationship in Franklin. As such, given that Acme Resources freely entered into a contract with the Black Eagle Reservation for mineral rights they have subjected themselves to the jurisdiction of the Tribal Court despite the fact that any mining was taking place on land that was not owned by any member of the Tribe.

2. The Tribal Court may exercise jurisdiction over the Acme Resources because their extraction of minerals from within the reservation is drying up the wells on the Black Eagle Reservation endangering economic security and general health and welfare of the people of the Black Eagle Reservation.

The purpose of the second exception to the Montana rule is to protect tribal self government and allow the Tribe to control their internal relations. It expressly authorizes the inherent power to exercise civil authority over non-indians on fee lands within the reservation when the conduct threatens or has some direct effect on the economic security or the health and welfare of the Tribe. In Montana, the court held that exercising jurisdiction over an accident on a road running

through tribal lands had no relationship to the right of reservation Indians to make their own laws and be ruled by them. In that context, however, the safety of tribal members was much more attenuated. There was just a general concern for the safety of tribe members who could have been injured on the road. Here the relationship is much different. The tribe member's livelihood and wellbeing is being directly threatened by Acme Resources. There is evidence that many wells have already dried up and that within the next five years all wells will eventually dry up. The Black Eagle Indians are ranchers and farmers and directly rely on the water beneath the ground to ensure their livelihood and their wellbeing. Without this water they can not raise their livestock, water their crops, or even live on their land. This relationship is not attenuated like the general interest that was present in Montana. There is a direct relationship between the activity that is the subject matter of this litigation and the Black Eagle Indian Reservation. The conduct of Acme Resources is severely threatening the entire lifestyle of the Black Eagle Reservation and as such the tribal government should be entitled to exercise jurisdiction over Acme Resources.

In the event that summary judgment is not granted, the district court should stay proceedings until the Tribal court has had a chance to assess its jurisdiction over the claim against Acme Resources.

The Supreme Court has held that according to the doctrine of tribal exhaustion, a party must exhaust its remedies in a Tribal Court before it seeks remedies in a federal court. "This Doctrine is based on a policy of supporting tribal self government and self determination," and requires that ordinarily a federal court should stay proceedings until the Tribal Court has had a full opportunity to determine its own jurisdiction. This doctrine is based upon comity and should not give way unless it is clear that there is no jurisdiction or that it would serve no purpose other than delay.

Here, the Tribal Court has not been given a chance to decide whether or not it has jurisdiction over the subject matter of this dispute. The rule laid down in National Farmers requires that the district court stay their proceedings until the Tribal Court has had an opportunity to assess their own jurisdiction over the case. This is not a clear cut case where there is obviously no jurisdiction. There is a voluntary relationship between Acme Resources and the Black Eagle Tribe that is having a direct effect on the economic security and health and welfare of the Tribe. It cannot be said that allowing the Tribe to assess their own jurisdiction would "serve no other purpose than delay." As such, in the event that summary judgment is denied, the proceedings should be stayed until the Tribal Court has a chance to rule on the issue.