NEW YORK STATE BAR EXAMINATION
FEBRUARY 2011 QUESTIONS AND ANSWERS

QUESTION-ONE

In June 1998, Sam purchased Summer Acres, a large parcel of land in upstate New York. Summer Acres, the former site of a summer resort, contained 100 abandoned cottages and a hotel that Sam planned to renovate and sell. In the summer of 1999, Sam told Pete that, because of their past friendship, Pete could have Cottage One, the largest cottage on the property. No deed was ever delivered to Pete. Pete has occupied Cottage One each July from 1999 until the present. Due to financial difficulties, Sam was not able to renovate the cottages and hotel and, in 2000, sold Summer Acres to Dave, a real estate developer. The description in the deed to Dave included the property on which Cottage One was located.

Since 1999, Pete has maintained fire insurance and telephone and electric service for Cottage One and has claimed Cottage One as his voting residence. Pete has also posted no trespassing signs around Cottage One, placed bars and locks on the doors and windows and actively repelled trespassers. Pete claims that he holds title to Cottage One.

In 2005, a fire severely damaged the hotel. Acting under a county ordinance, the county obtained a court order compelling Dave to remove the hotel as a dangerous public nuisance. When Dave failed to demolish the hotel within the required time, the county entered into a demolition contract with Wreckco, a demolition contractor. The contract called for Wreckco to demolish the hotel and, after demolition, to remove all walls and foundations.

In January 2008, Dave began construction of a new building on the site of the old hotel. When construction began, Dave discovered that the foundations had not been removed as required by the contract between the county and Wreckco, substantially increasing Dave's cost for construction of the new building.

After renovating another cottage on Summer Acres, Cottage Two, Dave entered into a one year written lease with Tim for rental of Cottage Two at $1,000 per month, commencing January 1, 2010 and expiring December 31, 2010. After the expiration of the lease, Tim continued to occupy Cottage Two. On January 10, 2011, Dave accepted $1,000 rent from Tim for the month of January. On January 15, Dave served Tim with a notice to vacate Cottage Two as of February 28, 2011. Tim claims that Dave's acceptance of the rent for January renewed the lease for another year.

(1) Does Pete hold title to Cottage One?

(2) Is Dave entitled to maintain an action against Wreckco for breach of contract for its improper performance of the contract?

(3) What rights of possession, if any, does Tim have in Cottage Two?

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Answer to Question One

1. The issue is whether Pete has acquired any title to Cottage One, either through Sam's allowance to have Cottage One or through adverse possession of the property after Sam sold the property to Dave in 2000. The rule at common law is that adverse possession requires that a party (i) continually hold a piece of land (ii) openly and notoriously, (iii) actually possess with (iv) hostility. In NY, a fifth requirement for adverse possession is that a party must have a truthful and reasonable good faith belief that they have actual rights to the property. If the party does not in good faith believe that they have rights to the property, then adverse possession in NY, despite meeting the other four common law requirements, will fail. Also, the statutory period for adverse possession in NY is 10 consecutive years of possession.

Here, it appears that Pete has satisfied all five elements of adverse possession in NY, as well as met the 10yr statutory period, and should hold title to Cottage One. Pete has been on the land continuously and openly since 1999, and since 2000, when Dave took Title from Sam. Pete had posted no trespassing signs around Cottage One and placed bars and locks on the doors and windows, actively repelling trespassers. These actions give notice to anyone that would inspect the property, e.g. inquiry notice. Consequently, when Dave took title to the property in 2000, he had notice of Pete's possession. Moreover, Pete continuously and openly occupied this land for over 10 years, without Dave telling him it was either okay to possess the land or without Dave trying to eject him from the property. Consequently, Pete's possession remained adverse for the entire 10yr period. Pete also actually possessed the property. He would be there every summer and when he was not there, he maintained the property with the trespassing signs, and additionally paid fire insurance, telephone and electric service, and used it as his voting residence. Pete's possession was also hostile, because he did not in fact actually have title to the property of Cottage One, as no deed was ever recorded, and when the deed was transferred to Dave, it contained Cottage One as part of the conveyance. Thus, Dave's continued, open, actual, and hostile possession of Cottage One for 10yrs satisfies the statutory period and the elements of adverse possession. In addition, NY requires that the possessor have a good faith belief that he actually has right to the property to obtain adverse possession. Pete satisfies this prong as well. Pete was told by the lawful possessor, Sam, back in 1999 that he could have Cottage One as his, because of their long time friendship. This gift by Sam gave Pete a reasonable good faith belief that he actually lawfully had a right to possess and own the property. Therefore, Pete satisfies NY's fifth element of adverse. Thus, Pete holds lawful possession to Cottage One through adverse possession.

2. The issue is whether a third party that is not a party to a contract is able to maintain a breach of contract claim against one of the parties. The rule is that a 3rd party is only able to maintain an action against one of the contracting parties if his rights have vested. In order for a 3rd party’s rights to vested a few prongs must be met. First, the 3rd party must be an intended beneficiary, rather than an incidental beneficiary, of the contract. An intended beneficiary is a 3rd party that was intended to receive a benefit by the contracting parties and it was part of the understanding and intent of the contracting parties that the 3rd party would receive that benefit. Contrary to this would be a third party that was merely an incidental beneficiary to the contract.

Moreover, if the third party was an intended beneficiary, his rights to enforce that contract would not become vested unless the third party was aware of the contract and its intended benefit to him and made changes in reliance upon that intended contract and benefit. In addition, the parties of the contract may still modify the contract, even after the 3rd party's rights vest, if the contract terms allow for such. Furthermore, once a 3rd party's rights vest, the 3rd party is able to maintain an action against the parties in the contract for breach, to the extent that the party's in the contract could assert claims against each other, but only to that extent (e.g. if there is a defense for the party's breach, the 3rd party is subject to that defense).

Here, Dave is not an intended party. There are no facts that evidence that the contract was entered into for the benefit of Dave with the intentions of benefiting Dave. The county entered into the contract with Wreckco for the purposes of ensuring that the land and property were safe and was no longer a nuisance. Thus, Dave would be considered merely an incidental beneficiary, and would have no rights to sue Wrecko. However, an argument can be made that Dave was in fact an intended beneficiary of the contract. Assuming that Dave was an intended beneficiary, then Dave would have the right to assert a claim against Wrecko for breach of the contract if Dave had known of the contract of and made changes in reliance upon that knowledge. Again, there are no facts to indicate that Dave had any knowledge of the contract between the county and Wrecko. Therefore, even if Dave was an intended beneficiary, his rights had not vested and would not have the right to maintain an action for Wrecko's breach of contract with the County. Consequently, even though Dave's costs will be greater to remove the foundation, Dave was either not an intended beneficiary at all, or if he was, he rights had still not vested, because he had not known of the contract and made changes in reliance of the contract, and thus, an action for breach against Wrecko can only be brought by the county against Wrecko, not by Dave.

3. The issue is what type of tenancy was created between Tim and Dave after the original lease that they entered expired, and subsequently what rights does Tim have, if any, to possess Cottage Two, including whether proper notice was given to require Tim to vacate Cottage Two. There are four types of leaseholds that a tenant can hold in New York. Tenancy for years, periodic tenancy, tenancy at will, and tenant in sufferance. A tenancy for years is a tenancy with specific start and finish terms of the lease. No notice to vacate is required because the tenant already knows that the lease ends on a specified date, as indicated in the lease. Here, the original lease held by Dave and Tim was a tenancy for years. It was written and signed by the parties and was for a specified term of one year. Upon the end of the term, Tim decided to holdover. The rule in New York is that when a tenancy for year’s ends, and the tenant remains on the property, he becomes a tenant at sufferance until the landlord decides to either accept rent and create a periodic tenancy or to begin eviction proceedings. If the landlord chooses to accept rent, a periodic tenancy is created, the rule is that the term period for a month to month is based upon the payment period of the previous lease and the frequency that those payments were accepted will determine the periodic tenancy.

Here, the tenancy for years ended, and Tim remained on the land as a holdover. This made Tim a tenant in sufferance until Dave accepted his rent check. The acceptance of the rent check on January 10, 2011 created a month-to-month periodic tenancy because the previous tenancy for years had payments made on a monthly basis. Thus, as of January 10, 2011, Tim was a periodic month to month tenant because his payments in the previous lease were on a monthly basis.

The next issue is what Tim's rights are as a periodic month to month tenant. The rule is that in order for a landlord to evict a periodic month to month tenant, the landlord must give the same amount of advance notice as a period. In other words, if it's a month to month periodic tenancy, then one month advanced notice must be given. Here, Tim is a month to month period tenant, so one month advance notice must be given to evict Tim. Notice was given by Dave to Tim on January 15 to vacate. As of February 28, one month had passed since the end of January (the one month that Tim had paid for) and over a month of notice had been given to Tim by Dave. Therefore, Tim must vacate the premises and he has no right of possession in Cottage Two. Tim is incorrect to assert that the acceptance of January rent renewed the lease for another year. The acceptance of the rent created a month to month periodic tenancy which could be canceled by either party with one months notice, and thus, no rights to possess would continue beyond the termination.

Answer to Question One

1. The issue is whether Pete acquired title to Cottage One by adverse possession.

In order to gain title to adverse possession, a party must possess the land exclusively, continuously, open and notoriously, make actual use of the property, and hostile (meaning, hostile to the interests of the owner). In New York, a possessor must maintain this possession for a statutory period of 10 years. Further, a recent change to New York law requires that a party must also adversely possess land under a claim of good faith--the party has to reasonably and honestly believe that he has a valid claim to the title by way of being the true owner. The legislature's goal in enacting this recent change was to ensure that adverse possession law was not rewarding thieves, but instead protecting the interests of people who legitimately believed the land was theirs.

Here, Pete's habitation of the cottage satisfies the elements of adverse possession, as he has all the indicia of ownership. As to the genuine claim of right, the fact makes clear that Pete received the property from Sam as a gift based on their past friendship, after Sam acquired the property. While Sam's gift violated the Statute of Frauds, which requires that any transfer of an interest in real property must be in writing (and here Pete never received a deed), this only affects whether Pete had actual title to the land, not whether he believed he owned the land. For purposes of adverse possession, however, the only relevant consideration in the good faith requirement is Pete's honest belief that the land was his. There is no indication that Pete had any reason to believe otherwise here.

The fact that Pete maintains the residence as a seasonal home does not interfere with his adverse possession rights. An adverse possessor is merely required to hold himself out as the owner and to make regular use of the land. An adverse possessor does not have to reside at the land on a full-time basis, as long as he makes actual, continuous use of the land (for instance, a person can take through adverse possession even if they rent the land out to others during the statutory period). Here, it is clear that Pete uses the land regularly, and moreover, that he has all the indicia of true ownership. Pete did occupy his portion of the parcel exclusively from the owner. There is

no indication that his use of the cottage was ever interfered with by Sam or Dave, the later owner. And Pete certainly treated the property in a way that was open and notorious. He has maintained fire insurance, telephone service, electricity, and has even claimed Cottage One as his voting residence. These are all activities that true owners of property do. Also, Pete has made outward manifestations that the property is his by placing no trespassing signs around the cottage and putting protective guards on his windows to repel trespassers. All these facts indicate that Pete believed the property to be his. Finally, Pete has maintained these indicia of ownership for the 10 year statutory period. He occupied the cottage on a seasonal basis since July 1999.

In all, Pete obtained title to Cottage One by adverse possession. To the extent that this interferes with Dave's use of the land (as adverse possess does make the title for land unmarketable), his only claim must be against Sam based on any warranty in his deed.

2. The issue is whether Wrecko can be held liable on its contract with the county by Dave.

A public nuisance is a condition on a property that endangers the public. A municipality is within its police power to remove such a condition without having to compensate the owner of the property (this is distinguished from a taking under the 5th Amendment, which does require that just compensation be paid for land the government takes for public use). Here, the county determined that the hotel was a public nuisance, and acted appropriately by instructing Dave to remove it. When Dave did not do so in a timely manner, the county contracted with Wreckco to do the job.

It is clear that Wreckco failed to perform substantially on its contract. A party materially breaches a common law contract when it fails to substantially perform the duties that it contracted to do. And normally, a party to a common law contract can easily sue for breach of contract. The problem with Dave's claim, however, is that he was not a party to this contract. The only party in contractual privity with Wreckco is the county, and it was to the county that Wreckco was obligated to fulfill its duties under the contract. Dave could argue that he is a third party beneficiary of the contract, but this argument would be unsuccessful. A third party beneficiary is a party for the benefit of whom 2 other parties enter into a contract. A third party beneficiary is usually named in the contract, and this beneficiary is able to sue the promisor for breach of contract if that party breaches. Here, however, Dave was not a beneficiary, as he was not named in the contract, and the contract was not intended to benefit him. It was to benefit the public to protect them from the dangerous condition on Dave's land. As such, Dave has no claim against Wrecko.

It should be noted that Dave could attempt to bring suit against the county under a theory of municipal liability for its negligence in hiring Wreckco, but such a claim would probably fail because there is no indication that the county acted negligently, nor would Dave be able to prove that the county owed him any sort of duty (municipal liability is a high standard because municipalities generally owe no one any particular duty unless they have a special relationship with the party). The bottom line here is that, if Dave wished for the property to be torn down correctly, then he should have done so himself after receiving notice of the public nuisance on his property.

3. The issue is whether Tim has any possession rights in a rental property after holding over, and if so, what kind of tenancy has been created.

Leasehold estates in land can take a number of different forms, including a life tenancy ("to X for life"), a periodic tenancy (in which the term of the tenancy is dictated by time at which rent payments are received), or a tenancy for a distinct term of years. When a term of years tenancy expires, the tenant is required to leave, and may do so without notice. However, a tenant may also holdover by staying beyond the expiration date of the lease. When a tenant holds over, this creates a tenancy by sufferance. When a tenant improperly holds over, a landlord may either evict the tenant or may allow the person to stay on the land and sue for damages. Alternatively, a tenant may continue to pay rent, and the rent will create an implied periodic tenancy, based on the rent payment schedule. An implied periodic tenancy applies the same terms of the previous lease (with respect to the landlord and tenant's obligations), but it may be terminated on reasonable notice of either party. For residential leases in New York, a landlord who wishes to end such a tenancy must give the tenant at least 30 days notice.

Here, Tim's occupation of Cottage Two was initially a tenancy for term of years, which ended on December 31, 2010. Rather than vacating on or before that date, Tim held over, thus creating a tenancy by sufferance. When Tim paid for a month's rent in January, this created an implied periodic tenancy, that will run from month to month because that is the schedule for rent payments. However, this does not extend the lease for an entire year. Rather it merely changed the lease to a month to month tenancy, which Dave could terminate by giving only 30 days notice. Thus, Dave's notice for Tim to vacate by the end of the next month was appropriate, and Tim has no rights to the property beyond that date unless he and Dave enter a new lease.

QUESTION-TWO

Art and Ben were fired from their jobs with Warehouse Co. Seeking revenge, they decided to set fire to the warehouse owned by Warehouse Co. One night, they went to the Warehouse Co. property, each bringing along a can of gasoline, and hid in some bushes. They intended to set fire to the warehouse later that night when no one else was there.

Just as they were about to pour the gasoline around the warehouse, they saw a policeman patrolling the area. Afraid they would be caught, Art ran away. Ben waited until nobody was around, then spread the gasoline around the outside of the warehouse and lit a match to it.

When the fire department arrived to extinguish the fire, Fireman entered the building and was killed when the roof collapsed on him.

Art and Ben were subsequently arrested and indicted for the crimes of conspiracy, arson and murder. Through their lawyers, the district attorney separately offered each of them a plea bargain which would permit them to plead guilty to arson in satisfaction of all of the charges. Ben agreed to plead guilty. Art’s lawyer did not tell Art about the offer, because he did not think Art would be found guilty of either arson or murder given that Art was not present when the fire was started.

After a trial at which competent evidence of the foregoing relevant facts was produced, Art was found guilty of conspiracy, arson and murder. After he was sentenced, Art learned of the plea offer, fired his lawyer, and hired a new one.

1. Was Art properly found guilty of (a) conspiracy, (b) arson and (c) murder, considering both the elements of the crimes and any affirmative defenses Art could have raised?

2. If Art's new lawyer moves to vacate Art's judgment of conviction on the ground of ineffective assistance of counsel, should the motion be granted?

Answer to Question Two

The New York Penal Law governs.

1. The first issue is whether Art is guilty of the crimes of conspiracy, arson, and murder.

Conspiracy is when a person agrees with another to commit a crime. In New York, the parties must also take an overt act in furtherance of the crime. Lying in wait is sufficient to constitute an overt act. Here, Ben and Art agreed to commit a crime when they decided to set fire to a warehouse owned by their former employer. They committed an overt act in furtherance when they went to the warehouse toting gasoline and laid in wait to set the fire. Based upon these facts, Art committed conspiracy. The defense to conspiracy is withdrawal, which occurs when a party renounces the conspiracy and makes efforts to prevent the crime from taking place. Art did not renounce the conspiracy - under the facts provided he simply ran away. He did not tell Ben not to commit the arson, or that he didn't want to participate any more. He also made no effort to prevent the arson from taking place (e.g. by telling the police officer or taking the gasoline with him). The defense of withdrawal is not available and Art was properly convicted of conspiracy.

Arson is the intentional burning of a building or dwelling of another. More than charring is required; there must be material wasting of the building. After Art left, Ben set fire to the warehouse as planned. He did so intentionally. The facts indicate the roof of the building collapsed, and this indicates there was more than mere charring from the fire. As a result, Ben committed arson. The issue is whether Art can be held responsible for the crime of arson given that he left the scene before Ben set the fire. In New York, a co-conspirator is not guilty for the crimes of other co-conspirators in furtherance of the conspiracy unless he has accomplice liability. To be held so liable, an aider or accomplice must encourage a person to commit a crime and take some act to assist. Merely being present is not sufficient. Here, we understand that Art decided with Ben to commit the arson to commit revenge. As such, Art encouraged Ben to commit the crime. Art also helped bring gasoline to the building, and this act is sufficient to meet accomplice liability. He did not withdraw from the crime (renounce and try to prevent it from happening), and he can be held guilty as an accomplice.

In this case, Art may be guilty of felony murder. In New York, felony murder is the killing of a person (other than a co-felon) during the commission of a serious felony, including arson. Here, a firefighter died while responding to the arson fire set by Ben. The issue is whether Art is guilty

for the firefighter's death under the felony-murder rule. Under New York law, a defendant is guilty of murder of a person killed during commission of a murder if he is guilty of the underlying felony. As discussed above, Art is guilty for arson because he conspired to commit arson and has accomplice liability for the crime. Under New York law, a co-felon is guilty for the killing of a non-participant by a co-felon unless the defendant (1) was unarmed, (2) had no reason to believe that the co-felon would kill anyone, and (3) did not consent to the killing. In this case, both Art and Ben were unarmed, Art did not consent to the killing, and he had no reason to believe Ben would kill anyone. Indeed, Ben and Art were waiting for nightfall so that they could burn the building while it was empty, and thus avoid harming anyone. Nonetheless, it was foreseeable that a firefighter would respond and possibly be killed in the fire, and Ben and Art are criminally liable for his death. Because they did not intentionally kill the firefighter, but are guilty of arson which caused the firefighter's death, the murder charge would properly be for murder in the second degree, felony murder, and Art can properly be convicted. For the reasons set out in the discussion of arson, Art cannot successfully assert a defense of withdrawal to defeat the murder charge because he did not renounce the arson and try to prevent it from happening, and therefore he is liable for the deaths that resulted from it.

2. The next issue is whether Art's judgment of conviction can be vacated on grounds of Ineffective Assistance of Counsel. There are three grounds for changing a plea once entered (e.g. confusion or mistake in plea ceremony, IAOC, or failure of prosecutor to hold up bargain). Ineffective assistance of counsel refers to assistance from a lawyer that is so deficient that it materially affects the outcome of a case, considering the law, fact, and evidence. The standard considers the totality of the case, and considers whether, if effective counsel had been given, the outcome of the defendant's case would have been different. The standard is based upon what a reasonable attorney in the position would do, given the facts and circumstances.

Whether to accept a plea is a decision that counsel must present to clients - it is not a procedural question of the sort that is left to an attorney's discretion and judgment. A reasonable attorney would not neglect to inform a client about a plea offer. This is particularly so given the totality of the circumstances in Art's case. Here, there were charges of very serious crimes, and it was patently unreasonable for the attorney to do decide for the client to reject the plea without a detailed discussion of the risks involved. This was ineffective assistance that materially affected the outcome of Art's case. A decision not to take the plea required Art to go to trial, where he risked, and was, convicted of three serious crimes. In contrast, Ben was apparently able to plead guilty only to arson. This fact alone is evidence that the counsel's ineffective assistance materially affected Art's outcome.

Answer to Question Two

1. a. The first issue is whether Art is guilty of conspiracy despite the fact that he ran away.

Under New York Penal Law, the offense of conspiracy is committed when two or more people agree to commit a crime and take an overt action in furtherance of the agreement. The crime of conspiracy at the time of the agreement and it is irrelevant whether the underlying lying crime is ultimately committed.

Here, Art and Ben clearly agreed they were going to burn down the warehouse because the facts state that "they decided" they were both going to go to the warehouse. Further, he took overt action by actually going to the warehouse with a can of gasoline. Thus, the conspiracy was committed at this point.

The next issue is whether Art can invoke the defense of withdrawal to the conspiracy because he ran away and did not actually commit the crime. Withdrawal is an affirmative defense that Art must plead and prove by a preponderance of evidence. That defense is available if Art can prove that he fully renounced his role in the conspiracy and actually prevented the crime from occurring. Further, the withdrawal must be because of a change in the person's desire to commit the crime and not out of a fear of being caught. Here, Art can't establish the defense of withdrawal because he did not prevent the occurrence of the crime because Ben still started the fire. His withdrawal was also a reaction to the police patrolling the area and his "fear that they would be caught."

Note that Art may claim that he was not the actual person who committed the crime, but this is not a defense to the crime of conspiracy only the underlying criminal conduct.

Thus, Art was properly found guilt of conspiracy to commit arson.

b. The next issue is whether Art is guilty of the underlying crime of arson because he did not actually set fire to the warehouse.

Arson is the intentional act of setting fire to a building.

Under New York Penal Law, a person is guilty of a crime if he or she commits the offense, or is an accomplice to the offense. A person is an accomplice if they aid or abet the primary actor in committing the crime. In New York, it doesn't matter whether the person intended the underling crime to occur if the person has knowledge it will occur and helps the actor.

Also, in New York co-conspirators are liable for the crimes committed by other co-conspirators if they are foreseeable and in furtherance of the crime. But New York has rejected the Pinkerton rule and a co-conspirator will only be liable if they actually played an active role in the underlying act committing the crime.

Here, Art clearly was an accomplice to the crime because he accompanied Ben on the trip to the warehouse and intended to help him burn it down. Further, he can is also guilty under theory that he was a co-conspirator who was actually present at the scene and was active in the underlying crime.

Unlike with conspiracy, the defense of withdrawal to accomplice liability requires that the accomplice fully renunciate prior to the crime and make a substantial effort to prevent the crime. Here, Art did not even make a substantial effort and withdrawal will not be a defense.

Further, New York has adopted the unilateral approach to conspiracy which does not require that there be two guilty minds. Thus, regardless of the fact that Ben only pleaded guilty to arson, Art is guilty of the conspiracy.

Also, in New York conspiracy does not merge with the underlying crime; instead, the conspiracy itself is the actual crime committed. Therefore, Art was properly convicted of conspiracy despite the fact that he was also convicted of the underlying crime of arson.

c. The next issue is whether Art is guilty of murder under New York's felony murder rule because the fire killed the fireman.

Under New York Penal Law, a person commits a specifically enumerated crime, of which arson is one, and during the commission of that crime a person beside a co-conspirator is killed. It is first degree felony murder if during the commission of the crime the person is killed intentionally, and it is second degree felony murder if the person is killed negligently or recklessly.

As stated in sub issue (b) an accomplice can be liable for the crimes actually committed by others. It makes no difference that Art ran from the scene because he played a significant role in the crime and was present at the scene in an attempt to perpetrate the crime with Ben. Here, Art will be guilty of second degree murder because the first started by Ben killed the firefighter, but it will only be the second degree because Ben did not intend to kill anyone but only to burn down the warehouse. It is important to note that it makes no difference that the person killed was a rescuer. The only person the penal law exempts from the felony murder rule is a co-conspirator.

The next issue is whether Art can succeed on the non-slayer affirmative defense to felony murder.

The penal law provides an affirmative defense to felony murder if the person can prove by a preponderance of the evidence that (i) he was not the one who actually caused the killing; (ii) he did not carry a dangerous weapon; (iii) he had no knowledge that others were carrying a dangerous weapon; and (iv) was not foreseeable that substantial bodily injury or death would occur. If this defense is proven by the defendant it mitigates the crime to 1st Degree manslaughter and not 2nd degree murder.

Here, Art is unlikely to meet the elements of this defense. Although the facts are silent as to whether either Art or Ben were carrying a conventional weapon such as a gun or knife, gasoline and a lighter is also a dangerous weapon, especially when carried for the purpose of lighting a building on fire. Thus, the court will likely find that Art cannot meet his burden to establish the non-slayer affirmative defense and he was properly convicted of murder.

2. The next issue is whether Art is entitled to have his judgment vacated because his lawyer did not inform him of the plea bargain.

Under New York, a defendant is entitled to have his convicted vacated due to ineffective assistant of counsel only when the counsel committed a substantial mistake that was not merely

procedural. Further, the mistakes must have been material, meaning that there is substantial likelihood that the outcome would have been different.

Here, this action clearly meets this requirement. Lawyers are obligated under the New York Professional Responsibility Rules to take all plea offers to their clients. This is because whether or not to accept a plea is exclusively a decision to be made by the client. This action was material because if he would have known about the deal he may have taken it and been convicted of only arson and not conspiracy and murder.

Further, the lawyer should be reported and suffer disciplinary action because he did not report a plea deal to his client and thus rejected unilaterally, which is an act an attorney can't make. The disciplinary board can censure, reprimand, suspend his license, or even disbar him entirely.

Thus, the motion should be granted and Art's conviction should be overturned.

QUESTION-THREE

Husband and Wife are the only shareholders of Retail Corp., which operates a department store. Husband owns 70 shares and Wife owns 30 shares. Until 2009, Husband and Wife were the sole directors of Retail Corp., Husband was President/Treasurer and Wife was Vice-President/Secretary.

In 2009, Husband began an affair with a Retail Corp. sales clerk, as a result of which she became pregnant. That same year at a duly called meeting of shareholders, Husband voted to amend the by-laws to require only one director and to elect himself as the sole director. Husband, acting as director, adopted resolutions (1) electing himself to all corporate offices, (2) authorizing Retail Corp. to lend $50,000 to Husband for his personal use, and (3) authorizing Retail Corp. to borrow $40,000 from Husband's friend ("Friend") to cover its operating expenses.

Retail Corp. then loaned $50,000 to Husband and borrowed $40,000 from Friend. Husband told Friend that he could have a security interest in Retail Corp.'s inventory, but they did not execute any security agreement. Friend filed a financing statement with the New York State Department of State stating he had a security interest in Retail Corp.'s inventory.

After Wife learned of Husband's affair, she continued to cohabit with him. Wife later attended a college class reunion where she had sexual relations with an old boyfriend. When she returned from the reunion, she told Husband. Husband reacted by moving out of their marital home, and Husband and Wife have not cohabited since then.

Wife has now duly commenced the following actions for which the complaints set forth all of the relevant foregoing facts:

(a) An action against Husband to obtain a divorce on the ground of adultery. In his answer to Wife's complaint, Husband has raised all available defenses.

(b) An action on behalf of Retail Corp. against Husband seeking to recover funds loaned to Husband. Prior to commencing this action, Wife made no demand on Husband as sole director of Retail Corp. to commence such an action.

(1) Assuming uncontroverted proof of the foregoing relevant facts, is Wife likely to be successful in actions (a) and (b)?

(2) Was Friend entitled to file a financing statement covering Retail Corp.'s inventory?

Answer to Question Three

1. a. The issue is whether a divorce can be granted on the grounds of adultery.

Under New York's Domestic Relations Law ("DRL"), divorce can be granted for fault grounds, as a conversion of a separation decree/agreement, or under the new "no-fault" divorce. When a spouse sues for divorce on the grounds of adultery, she must show that her spouse had sexual intercourse or performed a deviant sexual act, voluntarily, with a person not his spouse. A spouse's accusation of adultery, on its own, is not enough -there must be corroborating evidence beyond the accusation. Here, Husband did commit adultery, and it can be corroborated by the sales clerk, or by proving Husband is the father of the sale's clerk's baby.

However, under the DRL there are several affirmative defenses to adultery. The first is "recrimination" -- a divorce will not be granted on the ground of adultery if both partners have committed adultery. This is akin to the affirmative defense of "unclean hands" available at equity. Here, since Wife also committed adultery, she cannot sue for divorce on the grounds of adultery. There is an additional defense available to Husband. A divorce predicated on adultery will not be granted where the spouse who was the victim of the adultery continued to cohabitate after finding out about the adultery. Here, Wife continued to cohabitate with Husband after learning of the adultery.

Therefore, Wife is unlikely to be successful in her action to obtain a divorce on the grounds of adultery.

It should be noted that Wife has other grounds under which she can sue for divorce. She is free to seek a divorce under New York's new no-fault divorce -- if she is able to testify (or even if Husband would testify -- just one spouse needs to testify) that the marriage has had an irrevocable breakdown for at least 6 months. Furthermore, she could also wait and sue for divorce based on abandonment because Husband moved out. Divorce based on abandonment is satisfied where a spouse left, without justification or consent, with no intent to return, and the action may be brought after a period of 1 year.

b. The issue is whether a shareholder can prevail in a derivative suit when the sole director (who was also the president and majority shareholder) loaned himself money.

A derivative suit is a corporation's suit, not the suit of the individual shareholder bringing it. To bring a derivative suit, the shareholder must plead both the underlying basis for suit and also that demand to sue on behalf of the corporation was made on the board, or demand would have been futile. Here, Wife has cause for a derivative suit based on breach of the duty of loyalty. The duty of loyalty requires all corporate directors and officers to act with the honesty and integrity that the law requires of fiduciaries. While a personal loan is not per se in violation of this fiduciary duty, there is always a question of breach of the duty when the corporation is dealing with an interested director. Here, Husband was the sole director to vote on the loan to himself - he was clearly an interested director. In order to satisfy fiduciary obligations while dealing with an interested director, the director must show that the deal is inherently fair to the corporation, or disclose his interests and the material terms of the deal and then gain approval from either noninterested directors or shareholders. From the facts, it is clear that Husband did not do either. Therefore, Wife has grounds to bring a derivative suit.

A shareholder bringing derivative suit must either made demand on the board to sue, or plead that demand is futile. Demand is considered futile where the Board is comprised of a majority of interested directors, or controlled by an interested director, or the terms of the deal are so egregious that the Board must not have made a valid inquiry in the first place. Here, the Board is entirely comprised of the interested director. Thus, demand is clearly futile here.

Therefore, wife will be successful with her derivative suit on behalf of Retail Corp.

2. The issue is whether a secured creditor may file a financing statement without having first attached the security interest.

A security interest is interest in collateral in exchange for a loan from a creditor to a debtor. Security interests are covered by Article 9 of the UCC. Under the UCC, the creditor must both attach the collateral and perfect his interest in order to obtain status of a secured creditor. Attachment occurs when there is a security agreement, the creditor gives value, and the creditor gains an interest in the collateral. Perfection is obtained by either obtaining possession of the collateral, or making a filing with the Department of State (or, where the collateral is fixtures, timber, or minerals, a filing with the county where the collateral is located). The UCC does not require that attachment occur before perfection. Creditors can perfect before attachment, while negotiating the terms of the security agreement. Here, Friend perfected before attaching the security interest. Friend would need to attach in order to assert his secured interest against other parties, but he was entitled to file the financing statement anyway.

Therefore, Friend was entitled to file a financing statement covering Retail Corp's inventory even though he did not yet have an executed security agreement.

Answer to Question Three

1. a. The issue is whether Husband has an available defense to the matrimonial action on the ground of divorce.

In New York, a matrimonial action may be commenced on one of five grounds. Adultery is one ground a matrimonial action may be commenced. A person commits adultery when they have sexual intercourse, consensually, with another person.

In the instant case, the facts clearly indicate that Husband committed adultery when he had an affair with the sales clerk. The consensual sexual intercourse may be inferred from the fact that sales clerk became pregnant.

However, the defenses to adultery consist of: (i) recrimination (i.e. unclean hands -other spouse committed adultery); (ii) condonation (cohabit after discovery); and (iii) connivance (entrapment). In the instant case, the facts indicate that Wife continued to cohabit with the Husband after she learned of the affair. This example of condonation is sufficient to support Husband's affirmative defense to divorce. However, the Husband may also raise the defense of recrimination because the Wife also had sexual relations during the marriage at her class reunion.

The Husband will further argue that as soon as he learned of the recrimination or the adultery committed by the Wife, that he immediately left and did not cohabit (i.e. condone the adultery) subsequent to the discovery of the adulterous act. For these reasons, the Husband will be successful in defending the divorce action. Note that the wife cannot amend the action for the Husband's abandonment because it presumptively has not been for more than 1-year and more importantly, it was justified by her adultery.

It should be noted that New York now recognizes "no fault" divorce as a ground for matrimonial action. This separate ground is for the irretrievable breakdown of the marriage for a period of longer than 6-months, but does not assign blame to either party. The "no fault" ground only requires one spouse to testify that the marriage is irretrievable and void of any hopes of rehabilitation.

b. The first issue is whether a corporation may recover for private loans made to its directors and officers that do not benefit the corporation.

Shareholder action normally requires unanimous written consent or approval at a duly commenced meeting by a majority of shares actually voting. Shareholders may take any necessary action at a meeting unless it is a special meeting, and then shareholders may only act for the special purpose of the meeting being called.

The facts indicate that Husband duly called a meeting of shareholders. It is unclear whether the Wife attended the meeting and how she voted her shares. However, because the Husband owned 70% of the outstanding shares, his presence constituted a quorum (majority of share entitled to vote) and he could approve any proposed action.

The amendment of bylaws is a fundamental change that requires approval by a majority of all share entitled to vote, not just the shares in attendance. Again, because the Husband has 70% of the shares, he was allowed to take any action necessary. In the instant case, the Husband, as a shareholder, amended the bylaws, reducing the number of directors to one and elected himself as

the sole director. These actions were permissible actions by shareholders. New York allows a board of 1 director.

Actions by board must be by unanimous written consent or by a majority of votes constituting a quorum. Here, there are no issues with majority votes or quorums because there is only 1 director. A board has broad power to direct the corporation, but it is not limitless.

The issue is whether the Husband, as director may properly elect himself as an officer (and all officers). A director may serve as an officer and may serve as all officers in New York. This appointment was not improper.

The next issue is whether a director may authorize the corporation to lend money to a director for personal use that does not benefit the corporation. In general a corporation may lend money to its officers or directors if it benefits the corporation. However, when a loan does is not for the benefit of the corporation, a vote of 2/3 of shares entitled to vote must be obtained. Thus the action by a director is impermissible. The Husband should have acted as a shareholder.

Furthermore, a director owes a duty of care and loyalty to a corporation. A director has a duty to perform in good faith and with the conscientiousness, morality, honesty, and care that the law places upon fiduciaries. Further, a director has a duty to discharge his duties in good faith and with the diligence, care, and skill, of an ordinarily prudent person in like position.

A shareholder may maintain an action on behalf of the corporation (a shareholder derivative action) for violations of the duty of due care and duty of loyalty. In general, prior to making such an action, a shareholder must demand the directors pursue the action. This requirement may be waived, however, if it can be shown that demand would be futile. One way to show futility is by showing that a majority of the directors are disinterested. In the instant case, that is clearly shown because there is only 1 director, the Husband, and he is the one being charged with the wrongdoing. Thus, the wife properly may maintain a derivative action.

The derivative action is for the benefit of the corporation. Any recoveries will be given to the corporation. However, in a close corporation, where the wrongdoer will be enriched, the court may dictate that the recovery go to the minority shareholders, in this case Wife.

Wife will succeed in her derivative action because the Husband violated his duties of care and loyalty. The duty of loyalty is violated when a director usurps a corporate opportunity and acts in a self-dealing (interested director transition). In the instant case, Husband clearly acted as an interested director by loaning himself the money. The Husband did not get approval by disinterested directors. Nor did he get approval by the wife - disinterested shareholders.

2. The issue is whether a financing statement may be obtained without a valid security agreement.

Article 9 of the UCC applies to personalty and fixtures. Under Article 9, a security interest attaches when there is value, a contract, and rights to the property vest in the debtor. However, a security interest is not effective against third parties until it is filed in the proper office (NY

Secretary of State). In the instant case, the Friend gave value ($40K) and took a security interest in the corporation's inventory, which is permissible. After-acquired property clauses for inventory are permissible in NY. However, the description in the security agreement must adequately describe the property and cannot be super generic. Again "after-acquired" clauses are not too generic for security agreements. Further, a financing statement may contain super generic terms to describe the collateral.

In the instant case, although there was value, there was no security agreement. The Friend did not execute a security agreement. This prevents the Friend from filing a financing statement. In other words, the security interest had not attached. However, a financing statement may be prospectively filed (during negotiations). Thus, it is possible that if the Friend and the corporation later sign a security agreement, the Friend's financing statement will become retroactively effective to the time of filing the initial financing statement.

QUESTION-FOUR

Ed was employed as a laborer by T Town. On May 5, 2010, Ed was sent to the T Town Park and instructed to plant a row of saplings along the property line between the Town Park and the neighboring property, owned by Nora. Ed went to the Town Park and began to dig holes for the saplings along the line he believed was the property line between the properties, relying on stakes that were erroneously placed by T Town on Nora's property. After he had dug several holes, Nora came out of her house, advised Ed that he was digging on her property, and ordered him to leave. Ed became enraged and swung his shovel at Nora, narrowly missing her head. Frightened that Ed would strike her, Nora turned to run away, tripped and broke her ankle.

On October 5, 2010, Nora, by her attorney, commenced an action against T Town and Ed, alleging a cause of action in trespass, seeking damages for the cost of restoring and reseeding her property, and a cause of action for assault, seeking damages for pain and suffering due to her broken ankle.

The service of the summons and complaint was the first notice to T Town of the incident. T Town's attorney immediately contacted Nora and took a recorded statement from her. Nora was not given a copy of the statement.

After issue was joined, Nora's attorney learned of the statement Nora had given to T Town's attorney and demanded a copy. T Town's attorney refused to provide a copy to Nora's attorney on the ground that it was material prepared for litigation.

Thereafter, on due proof of the above relevant facts, which are undisputed, Ed moved for summary judgment on the grounds that (a) he reasonably believed he was digging holes on T Town's property, and (b) he never struck or in any way physically contacted Nora.

T Town likewise moved for summary judgment on the grounds that (a) T Town could not be held liable for Ed's actions, and (b) in any event, Nora's action could not be maintained, as T Town had no prior notice of the incident.

(1) (a) Did T Town's attorney act properly in taking the statement from Nora? (b) Is Nora entitled to discovery of the statement?

(2) How should the court rule as to grounds (a) and (b) of Ed's motion for summary judgment?

(3) How should the court rule as to grounds (a) and (b) of T Town's motion for summary judgment?

Answer to Question Four

1. a. T's attorney did not act properly in taking Nora's statement.

An attorney should not contact and communicate with a party she knows is represented by a lawyer. If the lawyer wants to make such contact with a represented person, the lawyer should contact that party's attorney. Because Nora had an attorney and commenced the actions against T and E by her attorney, T had notice that she was represented, and it was improper for the attorney to speak directly to Nora and take a statement from her.

b. Nora is entitled to discovery of the statement she made to T's attorney.

When requested by Plaintiff's attorney, defendant must produce any statements made by the plaintiff, videos taken of plaintiff, examinations of plaintiff. The work-product privilege does not protect such material, and it is a discovery violation not to produce them. Therefore, Nora is entitled to a copy of her statement.

Motion for Summary Judgment

Either party can move for summary judgment at any time prior to trial. The standard for determining whether to grant such motion is whether, accepting the facts in the pleadings as true, there is a triable material issue of fact. If there is or the facts are in dispute, then summary judgment should not be granted. If the issue is only a question of law, then it may properly be decided by the court. The court can grant partial summary judgment. The court may also search the record and grant relief for the non-moving party even if it was not requested.

2. a. The issue is how the court should decide Ed's motion for summary judgment on Nora's trespass claim where the facts are not disputed and Ed reasonably believed he was digging on T Town's property, not Nora's.

The elements of a trespass claim are that defendant intentionally entered or remained on another's real property without permission. Tortious intent is defined as conscious purpose or knowledge to a substantial certainty. The intent required for trespass is not actual specific intent to invade another's property, but merely to make the volitional act. Reasonable belief that the

person has authorization to be there or that it belongs to a different party than the plaintiff is not a defense or privilege to trespass. In that way, it is much like strict liability (although necessity and recapture of chattel are defenses).

Here, it was Ed's conscious purpose to dig holes to plant saplings in. Due to T Town's negligence is setting stakes to mark the property line, Ed dug holes on Nora's property. Because such digging was a volitional act that happened to be on Nora's property, he committed the intentional tort of trespass, and his reasonable belief that he was digging holes on T's property was no defense. Further, because the facts are not in dispute, court should grant summary judgment in favor of Nora on the trespass, because even though she did not request summary judgment, the court is permitted to search the record and grant it to the non-moving party if warranted.

b. The issue is how the court should decide Ed's motion for summary judgment on Nora's assault claim where the facts are not disputed and Ed never actually made physical contact with Nora.

The elements of the tort of assault are that the defendant intentionally caused the plaintiff apprehension of an imminent harmful or offensive bodily contact. Such apprehension must be reasonable under the circumstances. Actual physical contact is not required (it is required for battery claim).

Here, Ed became enraged when Nora told him he was digging on her property and to stop it and leave. He then swung his shovel and her and narrowly missed her head. She was afraid of being hit with the shovel and turned to run away but tripped and broke her ankle in the process. Intent to cause apprehension (knowledge to a substantial certainty or conscious purpose) may be inferred from the action of swinging a shovel near someone's head. A reasonable person in the situation facing an enraged person swinging a shovel near her body would be apprehensive of physical injury (harmful contact). The contact would have been imminent since it was not a threat but a shovel coming toward Nora's head. Because such apprehension is reasonable, and Ed's act of swinging the shovel was impliedly intentional to cause apprehension, the facts support the claim of assault. The fact that E didn't actually cause physical contact with Nora would be a defense to battery claim, but not assualt where not contact is required. Because the facts are not disputed, the court should grant summary judgment on assault in Nora's favor.

3. a. The issue is how the court should decide T Town's motion for summary judgment on the issue of liability for Ed's torts against Nora while he was on the job.

By operation of the doctrine of respondeat superior, an employee's employer may be held liable for the employee's torts if they were committed while employee was acting within the course and scope of employment. An employer is generally not liable for an employee's intentional torts unless foreseeable or at employer's direction.

Nora is claiming that Ed committed trespass and assault (see above)--intentional torts that an employer would generally not be liable for. The court should partially grant T's motion for summary judgment on the assault claim because it is clear that the assault was not done against Nora in furtherance of T Town's business or the scope of Ed's employment (not part of planting new tree saplings to swing a shovel at someone). The facts also have not been disputed by Ed.

Taking the pleadings on their face, there is no issue of fact on the assault, and it was an intentional tort not within scope of employment. T should get summary judgment in his favor and not be vicariously liable for the assault.

However, trespass in this case is foreseeable, even though it is an intentional tort. T instructed Ed to plant saplings directly along a property line but did not provide a proper survey to show the line. In fact, T was responsible for negligently placing stakes that incorrectly marked the line further than it should have been into Nora's property. T's negligence made it foreseeable that employee Ed would trespass. But these facts are disputed between T and Nora so summary judgment should not granted on T's vicarious liability for Ed's trespass.

b. The court should rule in favor of T and grant the motion for summary judgment on the basis that T did not have prior notice of the incident.

The Statute of Limitations for a tort claim against a municipality is 1 year and 90 days, but a prerequisite to commencing such an action is that plaintiff must provide notice of the claim to the municipality within 90 days of the incident. Here, the action was commenced on October 5, 2010, 5 months after the incident. The summons and complaint was T's first notice of the incident to them. The claim against T is therefore barred since notice was not provided within 90 days, but instead 5 months later.

Under the standard for summary judgment, the motion should be granted because a simple review of the pleadings would show the court the dates of the incident and the date the action was commenced, leaving not triable issue of fact, only the statute of limitations issue of law.

Answer to Question Four

1. a. Although the parties to a suit are free to conduct pretrial investigations, even before the issue is joined by filing an answer, there is a further issue as to whether a party to a lawsuit is allowed to take evidence from a counterparty to the suit in the absence of the counterparty's attorney when he knows that the counterparty is represented by counsel. Under the New York Rules of Professional Conduct, where an attorney knows that the counterparty in a lawsuit is represented by counsel, it is a disciplinary violation for that attorney to speak to the counterparty, and in particular to question the counterparty about the case at hand, without the permission, presence or waiver of the counterparty's counsel. Here, Nora filed suit by her attorney, and this would have informed T Town's attorney that Nora was represented. Accordingly, it was improper for T Town's attorney to question Nora about the case without first obtaining the permission of Nora's attorney, and T Town's attorney may be subject to discipline for this conduct.

b. The issue is whether Nora is entitled to discovery of the statement T Town's attorney took of her prior to joining the issue, or whether this material is protected as privileged work product prepared in anticipation of litigation. Under the New York Civil Practice Laws and Rules (CPLR), a party to a lawsuit is entitled to any recorded statement given by her to the other party

to the suit. Accordingly, Nora is entitled to receive a copy of her statement, notwithstanding the claim of privilege.

2. a. On a motion for summary judgment, the Court will search the record and construe any disputed facts in favor of the non-moving party. Summary judgment on a given issue will only be appropriate where there is no material issue of fact remaining, such that no reasonable jury could find for one party. Under the New York Civil Procedure Law and Rules (hereinafter, "CPLR"), a Court considering a motion for summary judgment by one party may, under appropriate circumstances, grant the motion in favor of the moving party, deny the motion, or grant the motion in favor of the non-moving party. The first issue is whether Ed's reasonable mistake (i.e., his reasonable belief that he was digging holes on T Town's property) is a valid defense against the tort of trespass. Under the common law, a person is liable for the tort of trespass when he intentionally causes the physical invasion of the property of another, without license, privilege or consent. The intent requirement of trespass only requires that the act resulting in the invasion was committed intentionally, and not that the alleged tortfeasor know that the property invaded belongs to another or that he intend that a trespass occur. Thus, for example, a person will be guilty of trespass if he intentionally walks across a path delineating the boundary line of the property of another, even if that person reasonably believes that the boundary line is actually beyond the area he has walked on. In the present case, Ed claims as a defense that he reasonably believed that the holes he was digging (which constitute the physical invasion) were being dug on T Town's property, and not on Nora. All that matters in this instance are that Ed intentionally dug the holes and that the holes were dug on Nora's property, which are both undisputed facts here. Accordingly, Ed's mistake is no defense to the tort of trespass, and summary judgment for Nora is appropriate in this instance.

b. The issue is whether not striking or in any way physically contacting another is grounds for defense against the tort of assault. Under the common law, a person is liable for the tort of assault where he intentionally causes a reasonable apprehension in the mind of another of an immediate bodily injury. Here, the facts indicate that Ed, in a rage, swung his shovel at Nora, implying an intentional act on his part. Furthermore, the shovel narrowly missed her head, which would cause a reasonable person to apprehend an immediate bodily injury. In fact, we are told that Nora was frightened that Ed would strike her and that is what caused her to run, resulting in the fall and injury. Since Ed's actions satisfy the elements of the tort of assault, he will be liable for all injuries actually and foreseeably flowing from his tortious conduct. In this case, it is clear that Nora would not have injured her ankle in this way were it not for Ed's conduct, and it is foreseeable that Nora would attempt to flee or escape from one swinging a shovel at her. Ed's defense that he never actually struck or physically contacted Nora is immaterial to the tort of assault, and thus his motion for summary judgment on this point should be denied, and an order of summary judgment should be entered on Nora's behalf.

3. a. The issue is whether T Town will be held vicariously liable for an intentional tort committed by its employee Ed. According to the law of agency, for vicarious liability to exist for an action in tort, there must be an agency relationship and the tortious conduct must have been committed within the scope of that agency relationship. For an agency relationship to exist, there must be assent (i.e., an informal agreement between the principal and the agent related to the agency), benefit (i.e., the agent must be acting for the benefit of the principal) and control (i.e.,

the principal must have the right to control the conduct of the agent, and the agent must be obligated to follow all reasonable instructions of the principal). Here, we are told that Ed was the employee of T Town. An employee will be considered to be in an agency relationship with his or her employer, because the employment arrangement itself constitutes the requisite assent, the employee acts for the benefit of the employer, and the employer typically has the right to control the actions of the employee in the context of his employment. Accordingly, there is an agency relationship here.

The remaining question is whether Ed's conduct (i.e., the trespass and the assault) was committed within the scope of the agency relationship. Under the law of agency, the conduct of an agent will be deemed to be within the scope of the agency relationship where it is either of the kind that the agent was hired to perform (i.e., within the job description), was performed on the job (i.e., was not part of a new and independent endeavor, or frolic, but rather was on the job or in a minor departure from job tasks, or a detour), or was performed for the benefit of the principal. Generally, intentional torts will not be considered to be committed within the scope of the agency. However, there are three exceptions: where the conduct was authorized, where the conduct was natural to the agency relationship (e.g., battery for a bodyguard), or where the conduct was committed under a mistaken belief that it was in the best interest of the principal.

Here, with regard to the trespass, it is clear that T Town instructed Ed to plant the saplings and told him where to do so. The facts even indicate that the stakes he relied on to discern the property line were placed by T Town. Accordingly, the trespass was an authorized intentional tort, and T Town should deny summary judgment for T Town on this point, and grant summary judgment to Nora.

With regard to the assault, there is no indication that T Town in any way authorized Ed to undertake this conduct, nor could this conduct be characterized as natural to the type of work Ed was hired to perform (i.e., landscaping labor). The fact that Ed committed the tort in a rage after Nora protested about the digging also suggests that he wasn't performing the act under a mistaken belief that the conduct was in the best interest of T Town. Accordingly, T Town should be granted summary judgment with regard to vicarious liability for the assault.

b. The issue here is whether T Town, as a municipal defendant, is entitled to summary judgment based on Nora's failure to provide notice of her claim in advance of the proceeding. Under the New York General Municipal Law, a condition precedent to bringing any claim against a municipal defendant in the state of New York is that the plaintiff provide sworn notice of the claim to that defendant within 90 days of the accrual of the claim, and the statute of limitations for filing the claim is 1 year and 90 days from that accrual. According to the facts provided, Nora has not provided the requisite notice, and thus T Town is entitled to seek dismissal of the claim on that basis. However, it should be noted that the Court is free to excuse the failure to provide notice to the municipal defendant upon a showing of good cause by the Plaintiff.

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2011 QUESTIONS AND ANSWERS

QUESTION-FIVE

In 1970, Thea had a child born out of wedlock. She named him Chip. When Chip was one year old, with the proper legal consent of Chip's birth father and Thea, he was duly adopted by Frannie, Thea's close friend. Thea married Herb in 1975, and they had two children, Annie and Burt. Herb and Thea were divorced in 1995, and Thea never remarried.

On May 25, 2007, Thea duly executed a Will which contained the following dispositions only:

"I give and bequeath my Opulence china set to my friend, Frannie."

"I give and devise my house, Blackacre, to my son, Burt, and my daughter, Annie."

"I give and bequeath $5,000 to Adoption Network, Inc. for use in its charitable purposes."

"I give and bequeath the rest of my estate to my children."

In October 2010, when Thea was alone in her home, she took out her original Will dated May 25, 2007, and crossed out the bequest to Adoption Network, Inc. Thea wrote her initials next to the crossed-out bequest and put the date next to her initials.

Annie, a widow, died in November 2010, survived only by her daughter, Denise.

Thea died in December 2010, survived by Herb, Burt, Denise, Frannie, and Chip. At the time of her death, she owned a silver collection worth $5,000 that she obtained when she traded her Opulence china for the silver collection at an antique show. She also owned Blackacre, $76,000 in bank accounts in her name alone, and $18,000 in a bank account she created in 1980 in her name "in trust for Herb".

Thea's Will has been admitted to probate.

1. Is Herb entitled to the $18,000 bank account?

2. Was the bequest to Adoption Network, Inc. effectively revoked?

3. Is Frannie entitled to the silver collection?

4. Who owns Blackacre?

5. Is Chip entitled to share in Thea's residuary estate?

NEW YORK STATE BAR EXAMINATION
FEBRUARY 2011 QUESTIONS AND ANSWERS

Answer to Question Five

1. The issue is whether a former spouse is entitled to take under a Totten Trust, or whether divorce revoked this distribution.

In NY, a Totten trust is created when a bank account holder designates another person on their signature card. A Totten trust is unlike a traditional trust in that the named beneficiary simply takes the "trust" assets upon the account holder's death. In NY, a Totten trusts is considered a testamentary substitute and are included in calculation of a surviving spouse's elective share. Upon divorce, provisions to the former spouse are automatically revoked by operation of law. As a testamentary substitute, Totten trusts are also subject to this rule.

Here, the facts indicate that Thea and Herb were divorced in 1995. At that time, all testamentary provisions related to Herb were revoked as a matter of law.

Thus, Herb is not entitled to the $18,000 bank account.

2. The issue is whether a bequest in a will may be partially revoked by physical act by testator crossing out the provision and signing her initials.

In NY, a will is revoked by physical act when a testator burns, shreds, or otherwise obliterates the original document, evidencing his or her intent to destroy the will. A will may not be partially revoked by physical act (note: there is a practical exception to this rule when the marked out provision is wholly incapable of being deciphered). Rather, a provision may only be amended by codicil or republication, complying with the requisite formalities in making a will. Will formalities include: (1) testator being of legal age and sound mind; (2) writing; (3) signed at the end; (4) publication (declaring "this is my will/codicil"); (4) in the presence of 2 witnesses; (5) who sign the document within 30 days of each other. Formalities address the problems of unreliability and fraud.

Here, the facts indicate that Thea crossed out the bequest to the Adoption Network and signed her initials next to the edited provision. This is not enough in NY. Specifically, Thea did not comply with the requisite formalities needed to change her will. If she wishes to revoke her will all together, she needed to destroy it in its entirety. If she wished to eliminate the gift to the Adoption Network (as the facts show), she needed to execute a codicil to her original will or execute a new will all together.

Thus, the Adoption Network is entitled to the $5,000 gift, to be satisfied from the $76,000 in Thea's bank account.

3. The issue is whether a specific devisee of a china set is entitled to a replacement gift of silver, when the china was sold to obtain the silver.

In NY, gifts in a will are one of three types: (1) specific; (2) demonstrative; or (3) general. Specific gifts refer to certain property. Specific gifts not in the testator's estate at death "adeem." When a specific gift adeems, the devisee is not entitled to have his or her gift replaced. It is simply gone. (Exception: where there is a specific devise of real estate and contract of sale executed before testator's death; the devisee may be entitled to the proceeds from the sale if not yet paid). Demonstrative gifts are monetary gifts ordered to be paid from certain property. General gifts are monetary gifts with no instructions. Demonstrative and general gifts do not adeem.

Here, the facts indicate that Thea left Frannie her china set and that Thea no longer owned the china set when she died. Because a china set is a specific bequest, this gift to Frannie was adeemed.

Thus, Frannie is not entitled to the silver collection.

4. The issue is who owns real property when one of the beneficiaries is now dead but leaves issue.

At common law, a beneficiary was required to survive the testator's death in order to take under the will. Pursuant to NY's anti-lapse statute, gifts are "saved" for the benefit of sufficiently close family members. These family members include one's issue, brother, or sister. If a sufficiently close family member dies leaving issue (children, grandchildren), the gift will pass to the issue following the statutory scheme of per capita at each generation. Under that scheme, a devise is divided amongst living members at the first generation, the remaining shares are added together, and redistributed at the next generation. Although this is the default anti-lapse distribution rule, testators are free to select another distribution scheme (i.e., per stirpes).

Here, the facts indicate that Thea left Blackacre to Burt, her son, and Annie, her daughter. As Thea's daughter, Annie is a sufficiently close family member under the anti-lapse statute. This means that although Annie did not survive her mother, the gift to Annie will be saved for the benefit of her issue, Denise. The facts also indicate that Thea conveyed the house with no specific language indicating the type of estate the parties would take. In NY, the default concurrent estate is a tenancy in common. Tenants in common have equal rights to possession and may seek partition by the courts.

Thus, because Annie's gift was saved for the benefit of her issue, Denise, Bert and Denise each own a 1/2 divided interest in Blackacre as tenants in common. 5. The issue is whether an adopted child is permitted to share in his natural mother's estate, when both of his natural parents consented to his adoption by his natural mother's close friend.

In NY, adoption severs all inheritance rights from the child's natural parents unless: (1) the child was adopted by a person to whom a natural parent became married (i.e., step-parent adoption); or (2) the child was adopted by a close family member (e.g., when the child's natural parent was presently unable to care for the child, but intended to stay in the child's life).

Here, the facts indicate that Chip was duly adopted by Frannie, Thea's close friend. While these facts undoubtedly indicate that Thea intended to maintain a relationship with Chip, Frannie was not a close family member nor was she the spouse of either of Chip's birth parents. Because Thea consented to giving Chip up for adoption at the age of 1, Chip was no longer the legal child of Thea.

Thus, Chip is not entitled to share in Thea's residuary estate, and it should be distributed amongst Bert, as Thea's child, and Denise, as Annie's issue (see: anti-lapse discussion above).

Answer to Question Five

1. The issue is whether Thea and Herb's divorce revoked the Totten Trust in favor of Herb.

A totten trust is a bank account that is named in trust for a beneficiary and they are revocable at any time. The bank account in question is a totten trust because it is named "In trust for herb." New York law provides that a valid divorce automatically revokes all testamentary dispositions in favor of the former spouse. This includes totten trusts in favor of the former spouse. Thus, upon divorce Herb was automatically revoked as the beneficiary of the trust as a matter of law, and he is not entitled to the $18,000. The account will pass by the residuary clause in Thea's will to her children.

2. The issue is whether a will can be revoked by striking through a provision.

Under the New York Estate Powers, and Trust Law, a will can only be revoked by a subsequent document executed with like formalities to a will or by physical act. New York, however, does not recognize partial revocation by physical act.

Here, Thea attempted to only revoke the provision given to the Adoption Network by striking it out and initially it. This is a physical act that is only attempting to revoke one provision of the will. As such, a revocation by physical act is improper. Thus, the only way this act would be proper is if it was executed with like formalities to a will. Under the EPTL, to properly execute a will a testator must have capacity to create a will; the testator must sign the will at the end of the document (i.e., subscribe the will); there must be two attesting witnesses that witness the testator sign the instrument or the testator acknowledges his signature in their presence; and the testator must publish the will--i.e., inform the witnesses that he is a signing his will; and the witnesses must sign in the testators presence.

Here, all Thea did was initial the crossed out provision. She did not meet any of the other requirements of attesting witnesses and related formalities; instead she merely initialed her change in the margin. Thus, her revocation of the gift to Adoption Network was ineffective.

3. The issue is whether a beneficiary is entitled to the proceeds of a specific bequest when the actual item is no longer in the testator's estate.

Under the EPTL, a specific bequest not in the testator's estate at death adeems--fails, and the beneficiary does not receive any compensation for the adeemed gift. There is no tracing principal, the gift is either in the estate or it is not. There are a few exceptions but none are applicable in this situation. Here, Thea left her Opulence China set to Frannie. The china set was a specific bequest by it was denoted by the language "my Opulence china set." But after the will's execution Thea traded the china set for the silver collection. Under the EPTL, Frannie is not entitled to the silver collection as proceeds of the china set. Thus, Thea's gift of the silver collection adeemed and Frannie is not entitled to the silver collection.

4. The issue is whether Denise is entitled to receive Annie's share in the devise of Blackacre.

Under the EPTL, a gift to a beneficiary lapses when the beneficiary predeceases the testator. The EPTL's anti-lapse statute, however, provides that a bequest or devise will not lapse if the gift is made to a beneficiary that is the issue (children), brother or sister of the testator and the beneficiary leaves issue that survives the testator. Here, Thea devised Blackacre to Burt and Annie as tenants in common. Annie predeceased Thea and her share of the devise would lapse unless Annie satisfies the anti-lapse statute. Annie satisfies the anti-lapse statute because she is the issue of Thea and she has left issue of her own, Denise, who has survived Thea. Thus, the gift will not lapse and Denise will be entitled to Annie's share under the gift. Thus, Denise and Burt will share in Blackacre equally as tenants in common.

5. The issue is whether a child given up for adoption is entitled to inherit from the child's biological parents.

Under New York law, an adopted child is treated for all purposes the same as a biological child of the adoptive parents. Likewise, the EPTL provides that an adopted child is entitled to inherit from the adoptive parents. The EPTL further provides, however, that termination of the biological parent's parental rights results in the adopted child having no rights of inheritance from the biological parents. It makes no difference that the residuary gift is a class gift to all of Thea's children because the EPTL treats the relationship as terminated.

Thus, Chip is not entitled to share in the class gift to Thea's children under the residuary clause to her will.

MPT – Butler v. Hill

Applicants' law firm represents Jennifer Butler in a divorce action against Robert Hill. Jennifer was 17 when the marriage ceremony was performed, and Robert forged the required signatures on the parental consent form. However, the couple lived together, had two children, and presented themselves as a married couple. When Jennifer learned that Robert had been having an affair, she decided to end the marriage. Shortly thereafter, she discovered that Robert had been married before, and that he and his first wife were divorced in 2008—that is, several years after Jennifer and Robert's marriage ceremony. Applicants' task is twofold. First, they are asked to draft a brief objective memorandum for the supervising partner analyzing whether the parties'

marriage ceremony in September 2003 had any legal effect under the Franklin Family Code. Second, applicants are to prepare a closing argument in which they persuasively set forth the case for why the court should conclude that Jennifer and Robert are married under Franklin law (Franklin recognizes common law marriage) and that Jennifer should be awarded more than 50 percent of the marital property. The File consists of the task memorandum, the partner's memorandum to the file, a transcript of an interview with a neighbor, the couple's marriage certificate, the divorce judgment for Robert's first marriage, the deed for the parties' residence, and an invitation to their anniversary party. The Library contains the relevant sections of the

Franklin Family Code and three cases relating to void marriages, common law marriages, and the division of marital property.

ANSWER TO MPT

To: Sophia Wiggins

From: Applicant

Date: February 22, 2011

Re: Jennifer Butler v. Robert Hill

Introduction:

This memo addresses the question of whether the ceremonial marriage on September 1, 2003 (the "Marriage") of Jennifer Butler ("Butler") and Robert Hill ("Hill") had any legal effect under Franklin Family Code s. 301 et. seq. (the "FFC")

Short Answer:

The Marriage did not have any legal effect because Hill was already married at the time.

Long Answer:

Butler and Hill we married in 2003 when Butler was 17 and pregnant and Hill was 22. The Franklin family code provides two circumstances under which a 17 year old's marriage can be valid. First, a 17 year old can marry with parental consent. FFC s. 301(a)(1). Though Butler presented the presented a parental authorization form at the ceremony, the signature on it was forged and thus her marriage could not be validated by means of parental consent. Second, a 17 year old can marry without parental consent if a licensed physician gives the clerk a certificate attesting that the woman to be married is pregnant. FFC s. 301(a)(2). Although Butler was pregnant at the time, there is no evidence that she presented such a certificate to the clerk, so the marriage cannot be validated by physician either.

The FFC further provides that a marriage entered into by a 17 year old without consent or physician's attestation is merely voidable and can be ratified by subsequent events. FFC s. 301(b). One such event which will serve to ratify an otherwise voidable marriage is the continued cohabitation of the couple as husband and wife after the minor party reaches the age of consent. Here Butler and Hill have satisfied this condition. They lived together for almost seven years, well after Butler reached the age of majority. Furthermore, we have strong evidence that they considered themselves husband and wife and held themselves out to the community as such. See Transcript of Telephone Interview with Louisa Milligan (January 28, 2011). Therefore, under FFC s. 301(b), the Marriage was legally ratified.

However, Butler recently discovered that Hill was already married at the time of their September, 2003 wedding, and was only legally divorced in April, 2008. FFC s. 310(1)(a) provides that "a marriage entered into prior to the dissolution of an earlier marriage of one of the parties" is strictly prohibited. This conclusion is reinforced by the Franklin Court of Appeal's holding in Hager v. Hager, where the court stated flatly that "a bigamous marriage is void ab initio ... notwithstanding [FFC] s. 301." Thus, the fact that Hill was already married in September 2003 controls over ratification by operation of FFC s. 301. The Marriage was void ab initio, or in the words of the Franklin Court of Appeal, "it was as if no marriage had been performed." Hager v. Hager (1996).

CLOSING ARGUMENT IN BUTLER V. HILL

Introduction

Ladies and Gentlemen of the Jury (if it is a jury trial)/ Your Honor (if it is a bench trial),

In 2003, Jennifer Butler was a scared 17 year girl, pregnant and under the influence of a much older and more experienced man--Robert Hill. She agreed to marry this man, against her family's wishes, and together they had two children. She stuck with him for nearly seven years, raising the kids and contributing financially to the household. She did all this despite his abuse, his infidelity, and--as you have heard--his lies. Now she seeks only what is the legal right of any spouse in her position--a divorce which is more than justified and the martial property which is rightfully hers. Mr. Hill, on the other hand, seeks to deprive her of these rights on the basis of his own lies. As our evidence has shown, however, the law will not allow Mr. Hill to take such advantage of his own wrongdoing.

Argument

Mr. Hill argued to you that his marriage to Ms. Butler was never valid because he was already married at the time of their wedding in 2003. He quoted the Franklin Supreme Court in Hager v. Hager, where they held that any bigamous marriage is a nullity from its beginning. While Mr. Hill's reading of that case is correct, his depiction of the relationship between himself and Ms. Butler is fatally flawed.

The inquiry into that relationship does not end on September 1, 2003. The Franklin Family Code clearly states that Franklin is a state which recognizes common-law marriage. The Franklin

Court of Appeal, in Owen v. Watts, has further stated that "Franklin has long recognized common law marriage." In that case, the Court also clearly stated the requirements for a common law marriage entered into after a legal impediment was removed. Such a marriage requires, and I quote: "a manifestation of mutual agreement, by parties able to enter into a valid marriage, that they are presently married, followed by cohabitation, including holding themselves out to the community as being husband and wife."

Mr. Hill and Ms. Butler satisfy this description to the letter. To begin with, there was a legal impediment to their marriage--Mr. Hill's former wife. But that legal impediment was removed in April of 2008, when Serena and Robert Hill were officially divorced. Since then, Mr. Hill and Ms. Butler have clearly manifested their mutual agreement that they are presently married--as evidenced by the wedding anniversary invitation dated September 1, 2009--over a year after Mr. Hill's divorce was finalized. Both are competent to enter into a common law marriage under Franklin Family Code Section 410. And they cohabited for over two years after Mr. Hill's divorce. Finally, as Ms. Milligan's testimony made abundantly clear, Mr. Hill and Ms. Butler have regularly held themselves out to the community as husband and wife. Thus, according to the well-established and long recognized law of Franklin, Mr. Hill and Ms. Butler are Husband and Wife, and she is entitled to divorce and a share of the marital property.

Furthermore, Ms. Butler is entitled to the majority of that property, including the home that she now lives in. Mr. Hill's argument that the home is his sole property based on the fact that his name is on the title is unavailing. Under the Franklin Family Code, section 410, the name on the title is irrelevant to ownership of marital property. The relevant inquiry is into when the property was acquired. Property acquired during a marriage belongs to the marital estate, period. Mr. Hill and Ms. Butler bought their house in the summer of 2008, months after Mr. Hill's divorce had become final. It was thus purchased after the inception of the marriage and rightly should be counted as marital property.

Finally, equity demands that Ms. Butler be granted more than half of the existing marital property. Franklin Family Code s. 410 states that a court may take into account a variety of factors in determining an equitable distribution of marital property, including but not limited to the needs of each party and the circumstances which contributed to the estrangement. Every equitable factor in this case tilts in favor of Ms. Butler. To begin with, she put up with years of verbal abuse and lies from her husband in the interests of the family and her children, while he was demonstrably unfaithful and even went so far as to burden the family finances by giving a substantial amount of money to his paramour. As the Franklin Court of Appeal has noted, an extramarital affair that places a burden upon the non-offending spouse can justify a disproportionate distribution of marital property. $10,000 is a substantial burden for just about any spouse--especially one with two young children to take care of. Incidentally, Ms. Butler has always been the primary caretaker of the Hill children, and now that Mr. Hill has moved out, is their only caretaker. This is another factor which should significantly tilt the distribution of martial property in favor of Ms. Butler. Section 410 specifically notes that both "contribution to the family unit" and "needs of each party" should be considered as a factor in equitable distribution--here, Ms. Butler has not only always taken care of the children, but also contributed a significant income to the household.

Though the Franklin Court of Appeal in Charles v. Charles noted that in the absence of injustice, "the division of marital property should be substantially equal", such a result here would amount to injustice writ large. Mr. Hill--who has abused, lied to, and cheated on Ms. Butler, and now wants to kick his own children out of their home--should be lucky to be awarded the shirt on his back.

We therefore ask you, the jury/your honor, to grant Ms. Butler's petition for divorce, and to award her whatever portion of the marital property you determine is just and equitable, but in no event less than 50% of its total value. Thank you.

ANSWER TO MPT

TO: Sophia Wiggins

FROM: Applicant

DATE: February 22, 2011

RE: Jennifer Butler v. Robert Hill

We represent Jennifer Butler in a suit against Robert Hill seeking a divorce and property distribution. Robert has challenged the validity of the parties' underlying marriage. You asked for an analysis of whether the parties' September 1, 2003 ceremonial marriage had any legal effect under Franklin Family Code §§ 301 et seq. The short answer is that, under the analysis set forth below, the ceremonial marriage did not have any legal effect because Robert was already married to someone else.

Under Franklin Family Code §§ 301 et seq., an individual 16 or 17 years old may not marry unless the individual "has the consent of a parent or guardian" who "swears that the individual is at least 16 years old" or either party to be married provides "a certificate from a licensed physician stating that the physician has examined the woman to be married and has found that she is pregnant or has given birth to a child." Frank. Fam. Code § 301(a)(1)-(2). A marriage without valid consent under this section "may be ratified and become completely valid and binding when the underage party reaches the age of consent," including by "continued cohabitation as husband and wife after reaching the age of consent." Id. § 301(b). Separately, the Franklin Family Code defines "prohibited" marriages to include any marriage "entered into prior to the dissolution of an earlier marriage of one of the parties." Id. § 310(1)(a). The Court of Appeal has made clear that "a bigamous marriage is void ab initio," "has no effect," and "cannot be ratified." Hager v. Hager, at 1 (1996).

In this case, when Jennifer and Robert observed their ceremonial marriage in 2003, Jennifer was 17 years old and pregnant with their first child. Because Jennifer's parents objected to the marriage, Robert forged a parental consent form. (There was never a certificate from a doctor attesting to Jennifer's pregnancy.) Robert was then 22 but, unbeknownst to Jennifer, he already

was married to Serena (Jordan) Hill, with no dissolution or divorce decree having been entered with respect to that marriage. If the only defect in the 2003 ceremony had been Jennifer's age, then the ceremony still would have had some legal effect because it could have allowed Jennifer and Robert to ratify their marriage by cohabitating after Jennifer turned 18. See Frank. Fam. Code § 301(b). In light of the fact that Robert already was married in 2003, however, the marriage was prohibited under Franklin law and the 2003 ceremony had no legal effect. Indeed, in the Court of Appeals' controlling Hager case, the court ruled that a marriage ceremony when one party already was married "could confer no legal rights," and "[i]t was as if no marriage had been performed." Hager v. Hager, at 1 (1996).

Please let me know if you have any questions. I would be happy to research this issue further.

DRAFT CLOSING ARGUMENT BUTLER v. HILL

1. Brief Introduction

Thank you, Your Honor, and may it please the Court.

My name is Sophia Wiggins, and I represent Jennifer Butler in this divorce action. After years of deception and verbal and emotional abuse by the defendant, Robert Hill, my client seeks what is rightfully hers -- a divorce decree and a fair share of the marital property, including a majority interest in the marital home she has worked to maintain. Over the course of this trial, you have seen and heard the unrebutted evidence that Robert and Jennifer have held themselves out as husband and wife for many years. You also know the evidence of Robert's lies that strike at the heart of the marital relationship -- his lies about his previous marriage and divorce, and his extramarital affair -- as well as his abusive behavior to the mother of his two children. On the record before this Court, it is clear that there was a valid marriage, that the home is marital property, and that Jennifer is entitled to a property distribution that includes more than 50 percent of the value of the home. I will address each issue in turn.

2. Argument

To begin with, there is a valid marriage between Jennifer and Robert, and Jennifer is therefore entitled to pursue a claim of divorce. As you know, Jennifer and Robert were married when Jennifer was only 17 and was seven months pregnant with their first child (their now 7-year-old daughter, Christina). Jennifer was not yet 18, and her parents objected to the marriage, meaning that under the Franklin Family Code, Jennifer and Robert needed a doctor's certificate of her pregnancy to go forward with the wedding. Caught in this difficult situation, they went ahead with the marriage but without seeing a doctor. Instead, Robert forged a parental consent form, and they were married by the District Court here in Ocean City. That marriage was invalid but capable of ratification after Jennifer reached the age of 18, so long as Jennifer and Robert continued to cohabit as husband and wife.

As we now know, however, Robert was hiding a key fact from Jennifer. Robert concealed that he previously had married Serena Jordan and that he had not obtained a divorce from her. The fact that Robert was married rendered the 2003 wedding ceremony a nullity under Franklin law, and

we do not contend otherwise. Ironically, Robert now relies on his past deceit to try to prevent Jennifer from obtaining a divorce from him. But despite Robert's effort now to avoid the consequences of his actions, there is a valid marriage here under the doctrine of common law marriage. That doctrine has long been recognized under the Franklin Family Code as well as the case law. Under Section 309 of the Family Code, common law marriage is recognized where both parties are 18 and the marriage is not a bigamous one or entered into between blood relatives. The Court of Appeals, in the controlling case of East v. East in 1931, held that the elements of common law marriage are manifestation of mutual agreement, by parties able to enter into a valid marriage, that they are presently married, followed by cohabitation, including holding themselves out to the community as behind husband and wife." The court reaffirmed this principle in 2003 in Owen v. Watts, and neither the cases nor the Family Code set a durational requirement in order for a relationship to be considered a common law marriage. The facts of Owen are so important that I want to set them out for you very briefly. In Owen, words of marital intent were spoken only when one of the parties was not yet divorced and therefore could not legally agree to marry the other party. After the divorce was final, the parties conducted their affairs as single persons; the woman referred to herself as single or as a widow who had not remarried; and in her will, the woman left property to the man as her "friend," not as her "husband." Of course, on those facts, the court found no common law marriage, but the court stated that cohabitation after the removal of a legal impediment to marriage can ripen into a common law marriage if it was pursuant to mutual consent or an agreement to be married made after the impediment was removed.

Under the holding and reasoning of Owen, it is clear that there is a valid common law marriage in this case. Not only have Jennifer and Robert held themselves out as husband and wife from the beginning of their relationship in 2003, but they have done so in numerous ways -- and publicly -- since Robert obtained the divorce from his first wife in 2008. Robert and Jennifer have cohabitated since that time. They have continued to raise their two children -- Christina and their son, William, who just celebrated his 4th birthday. They have contributed together to the financial support of the family and the household, kept a joint checking account, and even put their marital assets toward the purchase of the marital home in 2008 -- four months after Robert's divorce was final. You also heard testimony about the celebration of Jennifer and Robert's sixth wedding anniversary in 2009. The invitation asked their guests to celebrate "the 6th wedding anniversary of Jennifer and Robert." As Louisa Milligan testified, it was a big barbecue for everyone in the neighborhood, and all of Jennifer and Robert's family and friends were there. Robert even gave a toast, saying that marrying Jennifer "was the smartest thing he'd ever done." Ms. Milligan also testified that Jennifer and Robert "always" refer to themselves as husband and wife and that she had no reason to believe that Jennifer and Robert were not married.

There has been no contradictory evidence, Your Honor. There is nothing to suggest that Jennifer and Robert did not hold themselves out as husband and wife or that they did not mutually consent to be in a marital relationship -- not only from 2003 to 2008 but also, critically, from Robert's divorce in the spring of 2008 to the time of their separation in 2010. Under Owen and in light of the sheer weight of the evidence, Jennifer has more than satisfied the preponderance standard to show that a valid common law marriage exists, and this Court should not allow Robert to use his past misdeeds to escape his marital and family obligations to Jennifer and their children.

The second point, Your Honor, is that the home is marital property subject to distribution. Jennifer and Robert have lived in the same home since their marriage ceremony in 2003. For the first five years, they rented the house, but in the summer of 2008 they were given the chance to purchase it outright. Using their joint income tax refund as a down payment, Jennifer and Robert purchased the home on August 12, 2008. Jennifer did not attend the closing, and she was shocked to learn that Robert recorded the deed in his name only. This is but one of many examples of Robert's misleading conduct that has come to light in this proceeding. Fortunately, Robert's action has no effect on whether the home is considered marital property. Franklin law is clear on this point. Under the Franklin Family Code, marital property includes "all...property...accumulated during the marriage, regardless of whether title is held individually or by the parties in a form of joint tenancy or tenancy by the entirety." The Code considers as separate property only that property "acquired prior to the marriage" -- which the home clearly was not -- or property acquired by one spouse "during the marriage by gift, bequest, devise, or descent."

Robert's only rebuttal point here is to deny the common law marriage and to contend that, even if he and Jennifer are considered married now, he obtained the property in August 2008 prior to the common law marriage taking effect. That is not supported by the facts. Robert's divorce from Ms. Jordan was final on April 15, 2008. Jennifer and Robert purchased the home using joint funds almost four months later, on August 12, 2008. Not only is their decision to use their joint tax return to purchase the home sufficient to establish their intent to be in a marital relationship, but also during that time they were operating as a married couple and holding themselves out to the public as married. Again, there is no durational requirement for a common law marriage to take effect under Franklin law, and there is no basis to conclude that the common law marriage here somehow did not take effect until after the purchase of the home in August 2008.

Third and finally, Jennifer is entitled to a property distribution that includes more than 50 percent of the value of the home. In distributing marital property, this Court is charged by the Franklin Family Code with dividing marital property in a manner that is "equitable, just, and reasonable." The relevant statutory factors include the needs of the parties, each party's contribution "as a homemaker or otherwise to the family unit," and "the circumstances which contributed to the estrangement of the parties." Your Honor's discretion is guided by the Court of Appeal's ruling in Charles v. Charles, in which the court repeated its command that the starting point is an equal division for the parties "unless one or more statutory factors causes such a division to be unjust." The Charles court held that an extramarital affair alone can "be an added burden sufficient to justify a disproportionate division of marital property provided that the evidence establishes the specific added burdens that the non-offending spouse suffered as a result of such misconduct."

The statutory factors and the equitable distribution analysis tilt decidedly in favor of a distribution for Jennifer that includes more than 50 percent of the value of the home. Both parties have worked during the marriage and contributed financially to the household. Not only has Jennifer made financial contributions, she also has cared for their two young children, which alone would be a substantial contribution to the marital relationship. If the Court needed any further proof that Jennifer is entitled to at least 50 percent, it is undisputed that Jennifer and Robert's joint tax refund was the source of the money for the down payment on the property.

On top of this, from a starting point of equal division, now add the fact of Robert's extramarital affair, which placed a direct burden on Jennifer because Robert was having an affair with a coworker and lending her money -- marital assets to the tune of $10,000.

That is substantially more burden than was present in the Charles case, Your Honor. Furthermore, although only an extramarital affair was present in Charles, here Robert has been misleading Jennifer since the beginning of their relationship. He fathered a child with her and they rushed into marriage with Robert hiding the fact that he was married to someone else. The testimony shows that Robert has been verbally and emotionally abusive throughout their relationship. Robert used joint funds and purported to buy the marital home in his and Jennifer's name, but as a result of this action Jennifer has learned that Robert actually titled the house in his name only -- apparently as part of a plan to assert that the house somehow was "separate property." All of these offenses against Jennifer and the relationship should weigh heavily on the distribution of property in this matter. I would also note that Robert has demanded that Jennifer and the children leave the home so that Robert can sell the house. It is in the children's best interest that they remain in the marital home.

3. Relief Sought

In closing, Your Honor, we thank the Court for its time and for hearing this important case. We ask only that Jennifer receive the basic relief to which she is entitled after enduring a relationship in which she was abused and misled from the very beginning. Franklin law is clear that there is a valid, common law marriage here, that the home should be considered marital property, and that Jennifer is entitled to a fair division of the marital property, including a more than 50 percent interest in the marital home. Thank you.