NEW YORK STATE BAR EXAMINATION
JULY 2015 QUESTIONS AND ANSWERS

QUESTION-ONE

In 1990, Bob, then a resident of State X, purchased a lakefront home in New York State. From the time he purchased the property, Bob reasonably believed the northern boundary to be five feet north of the true northern boundary line and the southern boundary to be five feet south of the true southern boundary line.

Bob occupied the property every summer. The first summer he erected a fence along what he believed to be the southern boundary.

Bob did nothing to occupy or cultivate the five-foot strip north of the true northern boundary line until 2004, when he cleared it and extended his lawn onto that five-foot strip, which he then regularly mowed. That same year he also erected a storage shed on the northerly five-foot strip.

In 2010, Bob married Marsha in State X, where they resided, although they spent their summers at Bob's lakefront home. In May 2014, Bob and Marsha moved from State X to New York City.

Shortly after moving to New York, Bob and Marsha executed an agreement in which each agreed to waive any right of election against the other's will. Bob and Marsha signed the agreement before two witnesses who also signed the agreement.

In February 2015, Marsha left their marital home in New York and returned to State X, indicating that she was never going to return to New York or to Bob wherever he might live.

In June 2015, Bob commenced an action in New York against Marsha for divorce on the ground of irretrievable breakdown of the marriage and for equitable distribution of the marital assets. Bob caused the summons and complaint to be personally served on Marsha in State X by an authorized State X process server.

Marsha has moved to dismiss the complaint on the grounds that (a) it fails to state a cause of action as to the alleged ground for divorce, (b) the residency requirement for bringing the action was not satisfied, and (c) the court (i) lacks jurisdiction over the subject matter of the action and (ii) lacks personal jurisdiction over Marsha.

1. (a) If Bob brings an action to establish his having title to the northern strip, should he be successful?

(b) If Bob brings an action to establish his having title to the southern strip, should he be successful?

2. Should the court grant Marsha's motion to dismiss the complaint? Discuss each of grounds (a), (b) and (c).

3. Is the agreement signed by Bob and Marsha enforceable?

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First Answer to Question One

1. a. Bob will not be successful in an action to establish title to the Northern strip. The issue is whether lawn mowing and a storage shed constitute nonstructural encroachments deemed permissive by operation of law.

Under the Real Property Law, adverse possession is established (or, rather, the statute of limitations for an action to recover real property expires) when property has been possessed (i) actually and exclusively (ii) continuously for the statutory period of 10 years (iii) hostilely, i.e., without permission from the true owner, (iv) adversely under claim of right, i.e., a reasonable and good faith belief that one is the true owner, and (v) openly and notoriously, i.e., in a manner such that the true owner would be put on notice. However, activities such as lawn mowing and the placement of a storage shed, among other nonstructural encroachments, are deemed permissive and therefore non-adverse. A claim for adverse possession ripens upon the completion of the statutory period if all other elements are met.

In the case at bar, adverse possession would be established because (i) the statutory period has passed because 10 years have passed since 2004 (ii) Bob appears to have possessed continuously, (iii) the true owner would have realized had he seen Bob's shed if he had inspected the property (iv) Bob had a reasonable good faith belief in his right to possess. However, the acts of lawn mowing and erection of a shed will be deemed permissive as they are de minimis encroachments onto the true owner's property, and the claim only ripened during the summer of 2014. This defeats the element of hostility. Because of the Real Property Law amendment passed in 2008, dictating the new permissive non-structural encroachment rule applied to subsequently ripening claims, Bob's claim will be defeated.

b. Bob will be successful in an action to establish title to the Southern strip. The issue is if his claim ripened prior to July 7, 2008 and if his neighbor may have established a subsequent claim that will defeat his.

Under the Real Property Law, adverse possession is established (or, rather, the statute of limitations for an action to recover real property expires) when property has been possessed (i) actually and exclusively (ii) continuously for the statutory period of 10 years (iii) hostilely, i.e., without permission from the true owner, (iv) adversely under claim of right, i.e., a reasonable and good faith belief that one is the true owner, and (v) openly and notoriously, i.e., in a manner such that the true owner would be put on notice. However, activities such as the erection of a fence or a non-structural wall are now deemed permissive by operation of law. Further, a good faith and reasonable belief in ownership is not required for adversity for claims arising prior to July 7, 2008, so even if Bob was put on notice constructively via land records, his claim would succeed. A claim for adverse possession ripens upon the completion of the statutory period if all other elements are met.

Unlike in (a.), the claim in this case ripened during the summer of 2000, prior to the change in the law. By erecting the fence, he possessed adversely under claim of right, possessing exclusively, possessing openly and notoriously, and possessing adversely under claim of right (and a good faith and reasonable belief in the nature of one's possession was not required for claims ripening prior to July 7, 2008).

However, it is possible that the fact that 10 years passed since Bob's claim ripened dictates that Bob's neighbor may have established a claim for adverse possession that ran from the date of ripening of Bob's claim. This is because it is likely that the neighbor had a good faith and reasonable belief in his ownership of the property because we have no evidence he was informed of the prior claim and because for a claim ripening after 2008, a fence is deemed permissive. However, the Court may find that the fact that the neighbor did not move the fence or take any other action means that he fails to meet the actual possession element.

2. a. The Court should deny motion on the ground that the complaint fails to state a cause of action. The issue is how much time has passed since the cause of action arose and what is necessary to state a claim for irretrievable breakdown of the marriage.

Divorce actions are governed by the DRL. A cause of action on the ground of irretrievable breakdown of the marriage is stated when the plaintiff swears in an affidavit that the marriage is currently and has been irretrievably broken for 6 months. In the case at bar, we have no evidence to suggest that the marriage was irretrievably broken prior to February 2015. Because of this, it seems that a claim for divorce on the ground of irretrievable breakdown cannot be stated.

However, if the plaintiff swears in an affidavit that the marriage was irretrievably broken prior to 6 months before the cause of action arose, the claim should be granted as authority in New York currently suggests this is the only proof necessary to state a claim.

b. The Court should deny the motion on the ground that the residency requirement was not met. The issue is whether New York was the marital residence of the parties and one party resided in New York for one year or more prior to the commencement of the action.

In New York, a cause of action for divorce may be brought, as residency requirements are met, (i) if both parties reside in New York and the cause of action arose in New York (ii) if one party resides in New York for one year or more and the marriage was entered here, the cause of action arose here, or the marital residence was here (iii) if either party has resided here for more than 2 years.

In the case at bar, Bob and Marsha moved to New York City and lived here together. Therefore, Bob has lived in New York for more than one year and the marital residence was in New York. Therefore, the residency requirement was met.

c. i. The Court should deny the motion on the ground of lack of subject matter jurisdiction. The issue is whether the action was filed in Supreme Court and whether failure to meet the elements of the claim deprive the court of subject matter jurisdiction.

New York Supreme Court has exclusive subject matter jurisdiction over matrimonial actions, including divorce. Further, the US Supreme Court has held that the only requirement for subject matter jurisdiction over the res of a marriage is the domicile of one party. Domicile is intent to

remain combined with presence. Further, failure to meet residency requirements does not deprive a court of subject matter jurisdiction if it exists otherwise.

Here, the Supreme Court has subject matter jurisdiction over the res of the marriage because Bob resides here and intends to remain. The court is not deprived of it for equitable distribution because the substantive elements of the claims are not met. Further, under the CPLR, the court has subject matter jurisdiction over a matrimonial action if the non-domiciliary party has had a significant connection with New York in the recent past. Therefore, the court has subject matter jurisdiction over the entire action. Further, the Court has subject matter jurisdiction concurrent with the family court for equitable distribution actions.

The fact that an enforceable contract exists to prevent equitable distribution is an affirmative defense that does not deprive the court of subject matter jurisdiction, nor does the fact that the elements of the divorce claim are not met. ii. The Court should deny the motion on the ground of lack of personal jurisdiction. The issue is whether personal service on an out-of-state defendant was appropriate here and whether the cause of action arose in New York.

Under the CPLR, personal jurisdiction in a matrimonial action, including a claim for equitable distribution, is acquired over a non-domiciliary party when that party has had some significant connection to New York in the recent past and, inter alia, New York was the matrimonial domicile of the parties or the plaintiff was abandoned in New York or the cause of action arose in New York or the agreement accrued under the laws of New York or was executed in New York.

Further, personal jurisdiction in a matrimonial action may be obtained by service outside of New York in any manner appropriate within New York. In New York, personal jurisdiction in a matrimonial action may only be obtained, absent a court order, by personal service on the defendant. Personal service must be completed by any non-party to the action 18 years or over.

Marsha is likely a non-domiciliary because she has stated her intent not to return to New York and returned to state X. She has not declared an intent to remain there indefinitely, in which case New York would still be her domicile because a new one has not been established, which would grant personal jurisdiction because domicile is a basis for personal jurisdiction under CPLR 301.

Further, under the CPLR, there is personal jurisdiction for irretrievable breakdown because the cause of action arose in New York. Therefore, the Court has personal jurisdiction over Marsha in the divorce action and the equitable distribution action, in which personal jurisdiction is obtained in the same manner.

3. The agreement between Marsha and Bob is enforceable. The issue is whether an acknowledgment is required or whether the formalities of will execution were met and whether it will survive the marriage.

A prenuptial or postnuptial agreement is governed by contract law. In New York, postnuptial and prenuptial agreements are enforceable if no contract defenses exist and they are presumed to survive the marriage and to survive divorce. It must meet the requirements of an ordinary

contract, i.e., a lack of available defenses (including duress, fraud, or unconscionability, or the statute of frauds, none of which are suggested by the facts here), and must be either acknowledged in front of and signed in front of a notary or executed witnessed in the manner appropriate for a will.

Here, the agreement was not acknowledged in front of a notary public, so it must have been witnessed in the manner of a will to be enforceable.

Under the EPTL, a will must be (i) signed by the testator (ii) "at the bottom thereof" (iii) in the presence of the testator, who has either acknowledged his signature as his signature or signed in front of 2 witnesses (iv) following a request that they sign and (v) the testator must publish the will by declaring it to be his will to each witness (vi) the witnesses must sign within 30 days of each other.

In the case at bar, the fact that the agreement was (i) signed by both parties (ii) in their presence (iii) at the same time, and no facts are suggested to dictate that the parties did not declare the instrument to be their postnuptial agreement, that they intended for it not to survive divorce, that there was fraud or unconscionability, or that another defense applies. Therefore, Marsha will be able to enforce it as long as she raises it as an affirmative defense to the equitable distribution action and there is no suggestion the parties did not intent it to survive marriage.

Second Answer to Question One

1. ISSUE 1 - The issue is whether Bob should be successful in his action to establish title to the northern and/or southern strip.

Adverse possession is a doctrine by which trespassers can obtain title to property after possessing it for a prescribed period of time. In order to establish the elements of adverse possession, the adverse possessor must have possessed the land: 1) exclusively, not sharing it with the owner; 2) openly and notoriously, so as to put the owner on notice of a trespasser; 3) in hostile fashion, i.e., not recognizing the true owner as the owner, not asking for permission, and not offering to buy; and 4) continuously for a period of 10 years in New York. Further, New York requires a good faith basis on the part of the adverse possessor; they must in good faith believe that the property belonged to them. Further, New York requires that there must be some improvement to the property, and any adverse possession claims vesting after July 7, 2008 requires more than just landscaping, or building a shed or fence.

Here, Bob purchased a lakefront property in New York and believed that he owned five feet more than what he did to the north, and five feet more than what he did to the south. Therefore, for Bob to claim title to the northern and southern strips, he must prove the elements of adverse possession for each strip.

A - NORTHERN STRIP

To establish adverse possession, possession must be exclusive. Here, Bob satisfies exclusive possession, as he did not share use of the property with anybody else, and he cleared the northern

strip, extended his lawn to it, and regularly mowed it starting in 2004. He also erected a storage shed on the strip.

Possession must be open and notorious, putting a reasonable owner on notice of a trespasser.

Here, Bob's possession was open and notorious. Clearing someone else's property and building a shed on it would certainly give another notice of a trespasser.

Possession must be hostile to the interests of the owner, i.e. the possessor must not recognize the owner as the true owner of the property. New York requires a good faith belief that the property belongs to them.

Here, Bob satisfies this element, because he reasonably believed that the boundary was five feet north of the true northern boundary line, and that the southern boundary was five feet south of the southern boundary line.

Possession must be continuous for a period of 10 years. Seasonal use of a property is sufficient to satisfy continuous use.

Here, Bob did not begin occupying the northern strip until 2004, when he cleared it and extended his lawn onto that five-foot strip, where he regularly mowed. There is no indication that he stopped regularly mowing or using the property, especially since he started using a storage shed he built that same year. Thus, occupation from 2004-2015 satisfies the statutory period. Further, he occupied the property every summer.

New York requires that all adverse possession claims vesting after July 7, 2008 must be sufficiently adverse. Landscaping, mowing lawns, building a shed or fence, or planting shrubs constitutes permissive use, and thus, an adverse possessor will not obtain possession simply on those basis.

Here, Bob did nothing to occupy the northern strip until 2004, which means that his adverse possession claim would vest in 2014, after July 7, 2008. Bob just regularly mowed the northern strip and constructed a shed, which constitutes permissive use under New York law. Thus, Bob's possession was not sufficiently adverse.

Thus, Bob would not be successful in obtaining title to the northern strip.

B - SOUTHERN STRIP

To establish adverse possession, possession must be exclusive.

Here, Bob occupied the property every summer since 1990 and built a fence that first summer, in 1990. This demonstrates that he did not share possession with anyone else.

Possession must be open and notorious.

Here, Bob possessed it in open and notorious fashion. Building a fence on someone else's property would put an owner on notice of a trespasser.

Possession must be hostile to the interests of the owner. NY requires a good faith belief on the part of the trespasser.

Here, Bob satisfies this element, as he reasonably believed the southern strip was his and therefore did not acknowledge anyone else as the owner.

Possession must be continuous for a period of 10 years.

Here, Bob occupied the property every summer since 1990, and he had built a fence on the southern boundary, presumably occupying that strip, the first year he was there. Thus, possession from 1990-2015 satisfies the requirement.

New York requires that all adverse possession claims vesting after July 7, 2008 must be sufficiently adverse. Landscaping, mowing lawns, building a shed or fence, or planting shrubs constitutes permissive use, and thus, an adverse possessor will not obtain possession simply on those basis.

Here, Bob's claim for possession would vest in the summer of 2000, which is before July 7, 2008. Thus, building a fence constitutes adverse action.

Thus, Bob would be successful in an action to claim title to the southern strip.

Therefore, Bob would be successful in claiming title to the southern strip, but not to the northern strip.

2. ISSUE 2 - The second issue is whether the court should grant Marsha's motion to dismiss the complaint.

A motion to dismiss, brought pursuant to CPLR 3211, should be granted if there exist valid reasons for dismissing a complaint, in whole or in part, brought by a plaintiff. A motion to dismiss can be based on various grounds, including lack of jurisdiction, failure to state a cause of action, and other grounds.

Here, Bob commenced a divorce action in New York on the ground of irretrievable breakdown in June 2015, and Marsha filed a motion to dismiss on three grounds. If any of her grounds have merit, the court should grant the motion; otherwise, the court should deny the motion.

A) FAILURE TO STATE A CAUSE OF ACTION

A motion to dismiss for failure to state a cause of action should be granted if the factual allegations of the complaint fail to make out each element of the offense or charge or petition.

Divorce constitutes the termination of a marriage. It can be based on fault and no-fault grounds. In New York, for a court to grant a no-fault divorce, the parties must allege that the marriage is irretrievably broken and has been so for a period of six months.

Here, Marsha left the marital home on February 15, indicating her intent never to return to New York or where Bob lived. It would appear from this action that the marriage is irretrievably broken. However, Bob commenced the action in June 2015, a mere four months after that action. Thus, the marriage was not irretrievably broken for six months, and because it wasn't, Bob's complaint fails to allege the elements of irretrievable breakdown.

Thus, the court should grant Marsha's motion on ground (a).

B) FAILURE OF THE RESIDENCY REQUIREMENT

To bring a divorce action in New York where one of the parties does not reside or is not domiciled in New York, there is a residency requirement. Either one of the spouses must have lived in New York continuously for a two year period, or one party resided in New York for a year and either: 1) the marriage happened in New York; 2) the parties resided in New York during the marriage, or 3) the cause of action arose in New York.

Here, Bob and Marsha moved to New York City from State X in 2014, after getting married in State X. In February 2015, Marsha left the marital home and moved to State X with no intent to return to New York, and Bob filed for divorce in June 2015. By that time, Bob had been living in New York for a year, and the parties resided in New York as a married couple from May 2014 to February 2015. Thus, Bob satisfies the residency requirement.

Therefore, the court should deny Marsha's motion on ground (b).

C) LACKING SUBJECT MATTER AND PERSONAL JURISDICTION

Conflict of law situations arise where one party is domiciled in one state and another party is domiciled in another state. To be domiciled in a state, there must be physical presence coupled with intent to remain indefinitely.

Here, at the time of the divorce action, Bob lived in New York, and Marsha lived in State X, with no intent to return to New York. Thus, both parties are domiciled in different states, and there is a conflict of laws issue.

With respect to divorce actions, the forum court, or the court in the plaintiff's state of domicile, has subject matter jurisdiction over divorce matters. If a court has subject matter jurisdiction, they can grant an ex parte divorce without having personal jurisdiction over the defendant. Other matters attendant to divorce, however, like property settlement, requires personal jurisdiction over the defendant.

Here, the action was brought in New York, which is Bob's state of domicile. Because Bob is the plaintiff, New York has subject matter jurisdiction, and thus can grant Bob a divorce even if Marsha never shows up.

Therefore, the court should deny Marsha's motion on ground (c).

Thus, the court should grant Marsha's motion on ground (a), but deny it with respect to grounds (b) and (c).

3. ISSUE 3 - The third issue is whether the agreement signed by Bob and Marsha is enforceable.

In New York, a spouse of a New York domiciliary is entitled to an elective share of her spouse's estate, equaling $50,000 or 1/3 of the net estate, whichever is greater. However, a spouse may waive their elective share in a prenuptial agreement, nuptial agreement, or separation agreement, provided that it is done in the manner necessary to record a deed.

Here, Bob and Marsha executed an agreement in which each signed to waive any right of election against the other's will. They signed the agreement before two witnesses who also signed the agreement. Thus, the agreement was in writing, signed and officiated in a manner required to record a deed, and is therefore enforceable.

The agreement signed by Bob and Marsha is enforceable.

QUESTION-TWO

In 1980 Drake, an art collector, and his wife, Win, had a son, Ron. Ten years later, as the result of an extra-marital affair with Mary, Drake fathered a daughter, Betty. No DNA test was ever performed, and Mary never sought a court order to establish paternity. Although Drake never openly acknowledged paternity, he entered into an agreement with Mary obligating him to provide financial support to Betty until she was 21 years old. Except for providing the agreed financial support, Drake had no contact with Betty.

In May 2010, Drake purchased a painting from a famous artist and hung the painting in his bedroom. In 2011, Drake made a series of bad investment decisions leading to significant financial losses. He borrowed $200,000 from B Bank and gave B Bank a security interest in the painting as collateral.

In 2012, on Ron's graduation from law school, Drake wrote Ron a letter stating, "I give you the painting in my bedroom in celebration of your graduation. You can take possession of the painting upon my death, but I want to keep possession of the painting for as long as I live."

The painting remained in Drake's bedroom until March 2014, when he died without a will, survived by Win, Ron and Betty. At the time of his death, Drake's estate, not including the painting, was valued at $1,000,000, the value of the painting was $300,000, and the balance of the debt owed to B Bank was $150,000.

Win and Ron both filed petitions for letters of administration for Drake's estate. Ron claimed that he was best qualified to administer the estate because he was a lawyer as well as being Drake's son, while Win claimed, that as Drake's wife, she should be appointed administrator of the estate. The Surrogate granted letters of administration to Ron.

Ron has informed Win that the painting is not part of the estate because the painting was a gift to him. Win claims that Drake's letter to Ron was insufficient to establish a gift of the painting. Ron informed Betty that, as a non-marital child of Drake, she would not share in the distribution of the estate. Ron also informed B Bank that its security interest in the painting was extinguished by the gift to him.

1. Was the Surrogate's ruling granting letters of administration to Ron correct?

2. Should the painting be included as part of Drake's estate?

3. Did B Bank's security interest survive the gift of the painting?

4. What are the respective rights, if any, of Ron, Win, and Betty, with respect to Drake's estate?

First Answer to Question Two

1. The court's granting of letters of administration to Ron was incorrect. The issue is who is the preferred person to administer the estate among the decedent's relatives.

Under the New York Estates, Powers, and Trusts Law, letters of administration are granted to a person in order to administer a decedent's intestate estate. Letters of administration are granted in order of preference to the following: (i) spouses; (ii) siblings; (iii) children. Whether a person is a lawyer or otherwise acquainted in administering estates does not play into the Surrogate Court's analysis in determining who should be granted the letters of administration.

Here, the Surrogate Court's ruling granting letters of administration to Ron was incorrect. Although Ron was a lawyer, the Surrogate Court should have granted the letters to Win because she was Drake's spouse, which is the statutory preference in New York.

Thus, the court's granting of letters of administration to Ron was incorrect.

2. The painting should not be included as part of Drake's estate. The issue is whether the gift was properly made more than one year before the decedent's death.

Under New York Property Law, a gift is made when a person, with the present intent to bestow a gift on another person, delivers to that person the gift, and the donee accepts the gift. Acceptance of a gift is generally presumed. The delivery of a gift can be constructive, as through a letter or a token that represents the gift. A person can be the recipient of the property without being in physical possession of the gift. Additionally, a gift made within one- year of a person's death is generally "pulled back" into the estate to be included in the estate.

Here, the gift to Ron was proper. Drake wrote a letter to Ron, stating that he gave him the painting. He had the present intent to bestow a gift upon Ron because he was "giving" it to him -- he was not saying that on Ron's death the painting would be given to him, or that in the future the painting would be given to Ron. Rather, Drake wrote that he was giving the painting to Ron. There was no physical delivery of the gift in this situation, but the letter will suffice. The letter acts as delivery in place of delivery of the painting. And, because acceptance of a gift is generally presumed, Ron did not have to write a letter back saying that he accepted the gift. Rather, his acceptance of the painting was presumed. Additionally, Drake wrote to Ron in 2012 giving him the painting. Drake died in 2014, two years after writing to Ron giving him the painting. Thus, the gift was made more than one-year prior to decedent's death, and will not be "pulled back" as part of the estate.

The gift was proper under New York Property Law and was made more than one year before decedent died, and thus the painting should not be a part of the estate.

3. B Bank's security interest survived the gift of the painting. The issue is whether an attached imperfect creditor has priority in the collateral over a donee. Article 9, of the UCC governs security interests in collateral (but not in real property, which is governed by mortgages). A party takes a security interest in collateral so that, if the debtor defaults on the payment, the secured party has a remedy, and that remedy is to foreclose on the collateral. Collateral can be a tangible or intangible property. Tangible property includes equipment, consumer goods, and inventory, among other things. Intangible property includes things like goodwill and patents. A security interest in collateral is established generally to secure a debt from a debtor to a lending party. A security interest in collateral is attached, which means it is enforceable against the debtor, when (i) the secured party gives value to the debtor; (ii) a record is made -- generally an agreement, signed by the debtor which gives a reasonable description of the collateral; and (iii) the debtor had rights in the collateral. To obtain priority over other interests in the same collateral, a secured party should perfect its interest. Perfection can be established for some types of collateral by possession, and by control. A perfected security interest in collateral can also be made by filing a UCC-1 statement with the Secretary of State.

An attached but unperfected security interest takes priority over buyers in non-ordinary course and over general unsecured creditors. They also take priority over donees. A perfected attached secured party takes precedence over almost all other interests, except prior perfected attached creditors, buyers in the ordinary course, and prior lien creditors.

Here, B Bank's security interest survived the gift of the painting to Ron. UCC Article 9 applies to the painting because the painting is tangible personal property. B Bank is an attached, unperfected creditor. B Bank property attached its interest in the painting. B Bank (i) gave $20,000 of value to Drake; (ii) there likely was a loan agreement from B Bank for the loan of value; (iii) and Drake owned the painting when he purchased it, thus he had rights in the collateral to give. B thus had an attachable interest in the painting in 2011. B Bank did not perfect its interest, however, by possessing the painting or by filing a UCC-1 financing statement with the Secretary of State. Thus, it is an attached, unperfected creditor. Ron received the gift as a donee; he did not buy the painting or give any value for it. His interest in the painting does thus

not have priority over B Bank, and the painting was given to Ron with the security interest still attached.

B Bank's security interest survives the gift of the painting to Ron.

4. Ron

Ron is entitled to $425,000 as his portion of Drake's intestate estate. The issue is how a decedent's issue takes from the intestate estate when there is also a surviving spouse.

Under New York Estates, Powers, and Trusts Law, a person dies intestate when that person has not made a will, or when a person makes a will that does not dispose of all their property (then the portions that are not disposed of pass through intestacy). The determination of how much of an estate a person receives depends on their relationship with the decedent. Surviving descendants (if a spouse also survives) receive, equally divided, the 1/2 of the estate that remains after taking out the first $50,000 and 1/2 of the remaining estate for the surviving spouse. Surviving descendants receive the amount per capita at each generation. If there is no surviving spouse (only surviving descendants), the descendants take all, per capita at each generation.

Ron is entitled to $425,000 because he is the surviving child of Drake (see discussion below, regarding Betty). Ron receives 1/2 of $950,000 (which is 1/2 of ($1,000,000 minus the first $50,000 for Win). Because Ron is the only surviving descendant of Drake, he receives the entire portion of the decedent's intestate share.

Ron can take $425,000 of the intestate share, which is the remaining portion left after taking out Win's share of the intestate estate.

Win

Win is entitled to her intestate share of Drake's estate after debts, but before taxes (which is $50,000 plus 1/2 of the remainder of the estate, equaling $475,000). The issue is how a surviving spouse (with issue of a decedent's) intestate share should be calculated.

Under New York Estates, Powers, and Trusts Law, a person dies intestate when that person has not made a will, or when a person makes a will that does not dispose of all their property (then the portions that are not disposed of pass through intestacy). The determination of how much of an estate a person receives depends on their relationship with the decedent. A surviving spouse receives $50,000 plus 1/2 of the remaining estate if she survives the decedent and the decedent has children. (If no issue of the decedent, the spouse would receive the entire estate). If the estate is worth less than $50,000 and there is a spouse and decedent's issue, the spouse takes the entire $50,000.

Here, Win would receive $475,000 as her intestate share of Drake's estate. (As discussed above, the painting is not included in the state and the security interest passes with the collateral). Because Ron is Drake's child and thus issue of Drake has also survived him, Win is entitled to $50,000 plus 1/2 of the remaining estate. So, she takes the first $50,000 of the $1,000,000,

leaving $950,000 of which she also inherits $425,000. Thus, Win receives a total of $475,000 from Drake's intestate estate ($50,000 + $425,000).

(Win may also be entitled to certain exempt marital property totaling $92,500 (which includes $25,000 of a car; $25,000 cash; $20,000 for farm equipment, etc.; and (iv) $22,500 for CDs, movies, etc.).

Betty

Betty has no right in Drake's estate. The issue is whether Drake's paternity of Betty had been established such that she could make a claim on Drake's intestate estate as his issue.

Under New York Domestic Relations Law, for a child to inherit from the biological parent, the relationship must be established. A biological relation to a mother is established conclusively (through birth of the child), but paternity of a father may have to be established through a filiation proceeding. A filiation proceeding establishes a biological parenthood between a child and a father. The Family Court has exclusive jurisdiction over this proceeding, and paternity must be established by clear and convincing evidence. The proceeding must be filed by the time the child is 21 years old. There are several ways to prove parenthood, which include (i) holding out a child as one's own; (ii) taking a DNA test (which provides a presumption that the child is yours); and

(iii) openly acknowledging paternity (from which you might be equitably estopped from later denying if it turns out the child is not biological child of that person). Financial support of a child is not enough to establish paternity.

Here, Betty has failed to establish that Drake was her father, and she is unable to file a filiation proceeding to do so. Betty cannot file a filiation proceeding because she is 25 (born in 1990 and it is now 2015). A filiation proceeding must be filed in the New York Family Court by the child's 21st birthday. Additionally, even if Betty could file a proceeding, she would not have sufficient evidence to prove that Drake was her father. Drake never had a DNA test performed, her mother never sought a court order (to make Drake go through a filiation proceeding) to establish paternity earlier. Additionally, Drake never openly acknowledged paternity. Drake did provide for financial support for Betty until she was 21 years old, but he had no other contact with her. Under New York Domestic Relations Law, providing financial support is not enough to establish paternity. Because Betty cannot establish paternity, she cannot inherit as a descendent of Drake through his estate.

Betty has no right to Drake's estate because she cannot establish paternity.

Second Answer to Question Two

1. The Surrogates granting letters of administration to Ron

In New York, the order of administration is by order of preference, the first preference is to the spouse the second is to the children.

Here, the court erred on giving the letters of administration to Ron. Win as the spouse of Drake, has the statutory preference over Ron, the son, to be the administrator of the estate.

2. Should the painting be included as part of the estate*

A valid inter vivos gift occurs when a donor with intent to make a gift, delivers the gift and the donee accepts the gift. Constructive delivery occurs if the object is not movable such as a home, where the transferring of the deed would be the proper method of delivery.

Here, Drake attempted to give a gift to his son Ron as a present for him graduating law school by writing a letter to his son. It appears that Ron accepted the gift at the time he graduated law school in 2012 but he agreed that the painting would be left in his father's possession until his death. Therefore, the gift was no longer part of Drake's estate at his death because it left his possession in 2012.

3. A secured party acquires an interest in collateral.

A party acquires a security interest in collateral if there is attachment and perfection. When the two parties enter into a financing statement, the statement describes the collateral and the statement is acknowledged by both parties. Perfection is where the secured party puts the world on notice that it has an interest in the collateral, usually by filing a financing statement. If the financing statement is filed then the interest is perfected and will give the party priority in the secured item pursuant to statutory guidelines.

Here, the facts are silent as to whether the financing statement was executed with the proper formalities or whether the security interest was perfected. However, if the agreement was perfected properly, then the financing agreement would survive the gift of the painting.

4. Respective rights of the individuals in the estate

If a person dies without a will, then the estate passes statutorily through intestate succession. If the deceased is survived by a wife and children of that wife, then the wife is able to take an elective share of $50k plus 1/2 of the net estate. After the wife takes her share then the surviving children would receive equal shares. An illegitimate child has no inheritance rights from the father unless the father acknowledges paternity in righting, an order of filiation is filed with the court, or a court decree establishes paternity through a DNA test. Furthermore, the estate will also be reduced by money owed to creditors.

Here, Drake was never established to be Betty's legitimate father. Mary never sought a court decree to order Drake as the father of Betty, never sought a DNA test and never acknowledged paternity in anyway. Drake only had a written agreement with Mary agreeing to provide financial support, but this will likely be insufficient to establish Betty as his daughter and entitling her to the intestate succession. Furthermore, as Drake's wife, Mary is entitled to her intestate share of $50k plus 1/2 of the residuary estate. Ron would be entitled to recover the remainder of the residuary estate.

QUESTION-THREE

ABC Appliance Store (ABC) put a sign in its window that read: "Super Bowl sale — Watch the Super Bowl on our super-sized 82-inch television." Dan saw the sign and told Manager, the manager of the store, that he needed a new television and wanted to buy the 82-inch television because he intended to have a big Super Bowl party. Manager agreed that this television would be perfect for watching the Super Bowl. Dan then purchased the 82-inch television for $6,000, signing a purchase agreement that provided for no money down and payment not due for 90 days. The television was delivered to Dan's house the next day together with a lengthy owner's manual, which contained the following statement on the last page in a footnote: "Operation may be affected by severe lightning." Dan did not read the owner's manual.

Dan used the television without incident over the next two months. However, on the day of the Super Bowl, Dan was unable to obtain reception on the channel that broadcast the game because of severe lightning storms near his house, and he had to cancel his Super Bowl party. Dan had incurred significant expense in planning for the cancelled Super Bowl party. The next day, Dan called Manager at ABC and demanded that ABC take the television back because it did not operate during the Super Bowl. Manager refused, citing to the statement in the owner's manual. Dan thereafter refused to pay for the television when payment became due.

Manager contacted Attorney to assist in obtaining payment for the television. Attorney agreed in writing to handle the matter on a contingent fee basis, in which Attorney would receive 50% of the amount recovered. Attorney then sent a letter to Dan labeled "final notice" which advised Dan that, unless Dan paid the $6,000 in full within 30 days, Attorney had been directed by ABC to bring a lawsuit against him. Dan received the letter, but did not reply and did not pay what was demanded.

ABC brought an action against Dan to recover the purchase price of the television. Dan answered and denied liability on the ground that he had properly revoked his acceptance of the television because the television was non-conforming. Dan counterclaimed, asserting that ABC had breached the implied warranties of merchantability and fitness for a particular purpose and seeking damages for the loss he incurred in cancelling the Super Bowl party. Neither the purchase agreement nor the owner's manual contained any mention of warranties or damages. In its reply to Dan's counterclaim, ABC alleged that the statement in the owner's manual effectively disclaimed any warranties.

1. Was Dan entitled to revoke his acceptance on the ground that the television did not conform to the contract due to its failure to operate during the Super Bowl?

2. (a) Did the statement in the owner's manual effectively disclaim the warranties of merchantability and fitness for a particular purpose?

(b) Assuming the statement in the manual did not disclaim any warranties, is Dan entitled to recover consequential damages based on breach of:

(i) a warranty of merchantability?

(ii) a warranty of fitness for a particular purpose?

3. Did Attorney's (a) contingent fee agreement and (b) sending of the demand letter comport with the Rules of Professional Conduct?

First Answer to Question Three

1. The issue is whether Dan, after accepting the 82-inch TV upon delivery and using it without incident for two months, and failing to exercise his duty to inspect the TV and owner's manual for defects, was entitled to revoke his acceptance due to the lightning storm that occurred on the day of the Super Bowl.

Under the UCC, where a buyer and seller contract for the sale of goods, the buyer is entitled to reject the goods if they do not meet the "perfect goods, perfect delivery" rule of the UCC. Under this rule, the seller must provide perfectly tendered goods and must exact perfect delivery. Unlike the common law substantial performance rule, this rule requires 100% conformity with the exception of requirement or installment contracts. If a seller tenders nonconforming goods, the buyer can do one of the following: (a) reject the goods right away and notify the seller of the rejection; (b) accept the goods and sue for damages for the difference between the conforming and non-conforming goods; or (c) accept the goods. Buyers have a right to inspect goods prior to acceptance. If a buyer accepts, the buyer can only reject for a latent defect if it was of the kind that's not easily discoverable and if the revocation of acceptance comes within a reasonable time.

Here, Dan presumably accepted the TV when it was delivered to his house because there is no indication that he thought there was anything wrong with the TV. He took the TV, along with the owner's manual, and proceeded to use the TV for the next two months without incident. There is no indication that Dan was not pleased with his purchase until the day of the Super Bowl where there was a lightning storm. The owner's manual gave warning that the TV might not operate properly in a lightning storm. It was at this point that Dan notified Manager to express his dissatisfaction with the TV. However, there is no indication that the TV tendered was not the exact TV that buyer had contracted to buy. Even when Dan called Manager, his dissatisfaction was over the fact that his Super Bowl party was cancelled, not the TV itself.

Furthermore, Dan did not inspect the owner's manual when he purchased the TV, which would have notified him that it didn't work during lightning storms. He failed to exercise his right to inspect in this situation, and furthermore, did not revoke his acceptance in a timely fashion because his revocation came at least two months after his acceptance. As such, he was bound by a duty to perform, and his non-payment was a breach of the contract.

Therefore, because Dan did not exercise his duty to inspect for latent defects and his failure to timely notify Manager of his revocation of his acceptance, he was not entitled to revoke his acceptance of the TV.

2. a. The issue is whether the owner's manual statement that the TV "may" be affected by a lightning storm, which was on the last page of the lengthy owner's manual in a footnote, clearly and unequivocally, disclaimed the implied warranties of merchantability and fitness for a particular purpose.

Under the UCC, the implied warranties of merchantability and fitness for a particular purpose are recognized. The warranty of merchantability is that the goods are fit for ordinary commercial use or purposes. The warranty of fitness for a particular purpose is a seller's guarantee that a particular item is fit for a particular use. In order to validly disclaim these warranties, especially the warranty of merchantability, the UCC requires a clear and unequivocal statement by the seller that it is disclaiming the warranty. A clear statement is one that states something to the effect of "product comes as is," or seller "waives all warranties for this item." Often this waiver is found on the contract of sale, or on a receipt. Clear language that the seller is waiving is required under the UCC.

Here, the only indication that the TV might not operate correctly was found in a footnote at the back of a lengthy owner's manual. While Dan had a duty to inspect the item, including reading the owner's manual, the obligation is on the seller to effectively disclaim an implied warranty for a sale of goods contract. Even if Dan had read the entire manual, including the footnote, the statement "operation may be affected by severe lightning" is not at all clear that its purpose is to disclaim a warranty. Not only does it say nothing about a warranty, or that the TV comes "as is," it uses the word "may," which indicates its possible product may work correctly and possible that it may not. This is not a waiver of either warranty under the UCC.

Therefore, the owner manual's statement that the TV "may" not work during a lightning storm is not sufficient under the UCC to constitute a clear and unequivocal waiver of the implied warranties of merchantability and fitness for a particular purpose.

2. b. (i) The issue is whether Dan is entitled to the damages associated with the cancellation of his Super Bowl party if he sues on a breach of the implied warranty of merchantability, which only guarantees that a product is fit for ordinary commercial use.

Under the UCC, the warranty of merchantability guarantees that a product is fit for ordinary commercial use. This means that the product operates in a manner that is consistent with a reasonable consumer's expectation of how it will operate. If the product does not meet that reasonable expectation, the consumer can sue on breach of this warranty. However, with respect to consequential damages, which are additional damages flowing from the breach not ordinarily contemplated by the parties to the contract, the "breaching" party must be put on notice, at the time of contract, that these consequential damages will occur if there is a breach. Absent such notice, consequential damages are unforeseeable and the breaching party is not liable for them.

Here, as noted above, Dan used the TV for 2 months without incident, which means the TV operated according to one's reasonable expectations. The only time it didn't work properly was during a lightning storm, which the owner's manual put Dan on notice about. The facts do not suggest that the TV was permanently damaged by the storm. Just that it didn't work for a short period of time. Overall the TV operated according to what one reasonably expects from a TV,

and thus the warranty of merchantability was not breached. Even if it had been breached, Manager, while aware that Dan intended to throw a Super Bowl party, had no notice that Dan planned to sink in such a heavy investment into the party or that he would sustain the type of monetary damages he did. Dan did not explicitly tell Manager that he would suffer such damages if the TV failed to work. Because Manager was not on sufficient notice of this possibility, he is not liable for these consequential damages.

Therefore, Dan is not entitled to consequential damages resulting from his cancelled Super Bowl party based on Manager's alleged breach of the warranty of merchantability.

2. (ii) The issue is whether Dan is entitled to consequential damages for the same reason above if he sues on a breach of the implied warranty of fitness for a particular purpose, which is a guarantee that the product will operate for the purpose articulated at the time of contract.

Under the UCC, the warranty of fitness for a particular purpose applies where (a) the seller guarantees that an item will operate sufficiently for the buyer's stated purpose at the time of sale, (b) with the intent that the buyer relies on that guarantee, and (c) where the buyer actually does rely on that guarantee. This must be more than the seller's mere opinion. If the product does not operate accordingly, the buyer may be eligible to sue for breach of that warranty and recover actual damages. As stated above, consequential damages are only available where the seller is put on notice of unforeseeable damages that will result from a breach.

Here, it is arguable whether the implied warranty of fitness for a particular purpose even applies. While Dan did state that he intended to host a big Super Bowl party, Manager's agreement that the TV would be "perfect" for such a purpose is vague. First, Dan did not ask Manager whether the TV would meet his needs for this particular purpose, and Manager only agreed that the TV would be "perfect" to watch the Super Bowl. Even if his statement that the TV would be "perfect" for a Super Bowl party could be construed as a guarantee, nothing in the facts illustrate that Manager intended for buyer to rely on his statement, or that Dan did, in fact rely on it. But even if there was a warranty for a particular purpose present in this case, all Manager knew was that Dan wanted to host a big Super Bowl party. Manager did not know that Dan intended to incur a significant expense in planning for that party. All that Dan would be entitled to under these facts are any actual damages that accrued from the breach, not the consequential damages of the party planning expenses.

Therefore, assuming that a warranty for a particular purpose existed here, and the facts indicate that it likely did not, Dan would only be entitled to recover damages from the breach itself and not the unforeseen consequential damages in the form of the party planning expenses.

3. (a) The issue is whether Attorney violated the Rules of Professional Conduct where he charged a contingency fee in a non-matrimonial and noncriminal defense case.

Under the Rules of Professional Conduct, an attorney must not charge excessive or unreasonable fees. Attorneys are free to enter various fee arrangements with their clients, so long as they explain, in writing, the fee to the client, and the basis for the fee. Contingency fee agreement is allowed under the Rules so long as they are not used in matrimonial or criminal cases. The

attorney must disclose the exact terms of the agreement, including what fee the attorney will take should the cause of action be successful.

Here, Attorney informed Manager that he would agree to take the case on a contingent fee basis. This is a case for a breach of contract, and thus does not fall under the prohibitions on matrimonial or criminal cases. Attorney also informed Manager, in writing, that he would be charging a contingency fee of 50% of the amount recovered from Dan. The facts do not indicate that Manager had any objection to this arrangement. Since Attorney complied with the requirements under the rules of disclosing the contingent fee in writing to the client, the use of a contingent fee in this scenario did not breach Attorney's ethical obligations.

Therefore, the use of a contingency fee in this case did not violate the Rules of Professional Conduct.

3. (b) The issue is whether Attorney unethically communicated with an unrepresented adverse party when he sent an adversarial demand letter entitled "final notice" to Dan, and Attorney had no knowledge as to whether Dan was represented by counsel.

Under the Rules of Professional Conduct, an attorney may not communicate with an adverse party if he knows that party is represented by counsel. The only time an attorney may communicate in this scenario is upon consent or, or in the presence of, that other attorney. If a party is not represented, an attorney may communicate with an adverse party so long as he discloses to the party that he represents a client whose interests are adverse to the party's. Attorneys must refrain from misleading unrepresented parties, but have no obligation to advise them to seek counsel.

Here, the facts do not suggest that Attorney knew, or had reason to know, that Dan might be represented by counsel. The facts also do not say that Dan was, in fact, represented by counsel, and this analysis assumes that he is not. With respect to his communication with Dan, Attorney made it abundantly clear that he represented Manager, and did so through an adverse demand letter. This was more than sufficient to put Dan on notice that Attorney represented an adverse party. Additionally, the letter was not misleading in any way. It informed Dan of Manager's demands, and informed him that failure to pay would result in a lawsuit within 30 days. Thus, Attorney abided by the rules for communicating directly with an adverse party.

Therefore, Attorney's demand letter, which put Dan on sufficient notice that Attorney represented an adverse party, did not violate the Rules of Professional Conduct.

Second Answer to Question Three

1. The issue is under what circumstances a consumer purchaser of goods under the UCC may revoke acceptance of goods two months after delivery.

The UCC controls contracts for the sale of goods, and requires perfect tender. When the goods delivered by a seller are non-conforming, a buyer has three options. The buyer may promptly reject the goods, may accept the non- conforming goods and sue for damages, or may inform the

seller of the non- conformity and allow the seller an opportunity to cure the defective tender. If the defect in the goods is not readily evident to the buyer, the buyer may reject the goods upon discovery, but only within a commercially reasonable time.

Here, Dan accepted delivery of the television, but he did not attempt to reject the goods until two months later. Dan could have discovered the alleged defect - a susceptibility to electrical interference - through reasonable investigation, because the operational limitation was disclosed in the users' manual, which Dan failed to read. Therefore, Dan is likely not entitled to revoke his acceptance of the television, because a reasonable time has elapsed. Moreover, the alleged defect may not be a sufficient basis to revoke acceptance, because a minor and common susceptibility to electrical interference likely was not a sufficient defect to render the goods non- conforming, even under the UCC's strict perfect-tender standards.

2. (a) The issue is whether a warning of operational limitations in a user manual disclaims the warranties of merchantability and fitness for a particular purpose.

The implied warranty of merchantability (IWM) is presumed in every sale of goods by a merchant. This warranty implies that the goods are suitable for the ordinary purposes for which they are intended. However, the IWM may be disclaimed by a merchant in clear written language that effectively communicates that the goods are sold as-is, and that the merchant disclaims responsibility for defects. While such a waiver may be ineffective for manufacturing or design defects that cause personal injury, such a waiver will generally be effective as to merely economic or contractual damages.

The warranty of fitness for a particular purpose (WFPP) is given when a buyer reasonably relies on a seller's expertise in selecting merchandise for a particular purpose which the buyer has communicated to the seller. If the seller, based on the buyer's expressed purpose, recommends specific goods, then the seller has given a WFPP. This WFPP cannot be disclaimed, even by clear and specific written language purporting to do so. The negligence of a buyer in failing to verify the validity of a seller's recommendation (such as by reading the manual) will not void the WFPP, unless the buyer's reliance on the seller's expertise was objectively unreasonable under the circumstances.

ABC's sale of the television to Dan was subject to the IWM. The language in the manual stating that severe lightning could affect the television's operation does not clearly disclaim the seller's implied warranty of suitability for ordinary purposes. Thus ABC was obligated to provide Dan with a television that was suitable for ordinary purposes.

While the language in the manual could disclaim a WFPP if one had been given. However, under the circumstances, it is highly unlikely that ABC gave Dan a WFPP as to his use of the television to watch the Super Bowl. While Dan informed Manager, an agent of seller ABC, that his purpose for the goods was to watch the Super Bowl, this statement likely only expressed the occasion of Dan's purchase, not any distinct purpose different from watching television in general. Moreover, Manager's reply regarding the appropriateness of the television for watching the Super Bowl was likely a mere opinion, rather than a representation about any inherent property of the television on which Dan could reasonably rely. Only if other goods existed that were more suitable to Dan's

expressed purpose, such as a vastly more reliable technology that made it objectively unreasonably for Manager to recommend this model for use at a Super Bowl party, could Dan possibly have a colorable claim that a WFPP was given.

(b) The issue is under what circumstances consequential damages are available to the buyer of goods with operational limitations.

(i) Dan likely cannot recover anything because there was no breach of ABC's IWM. The television ABC provided to Dan was suitable for ordinary purposes. The possibility of interference by severe electrical storms is generally known to the public, such that the TV's susceptibility to such effects does not affect its suitability for ordinary purposes. The manufacturer's decision to include the warning in the manual was likely merely informational. Unless the TV was more susceptible to electrical interference than a typical television, to such an extent that it was not suitable for ordinary use, Dan likely has no claim whatsoever. Given that the television only "failed to obtain reception on the channel that broadcast the game" and only during "severe lightning storms" near Dan's house, it is highly unlikely that IWM was breached. If a court found that the IWM was breached, Dan could only recover those consequential damages which would be foreseeable in light of the television's ordinary use. While consequential damages for personal injury are always recoverable, Dan's costs for the Super Bowl party are likely not foreseeable consequential damages, even if the television breached the IWM.

(ii) Dan likely cannot recover anything under the WFPP because ABC likely never gave such a warranty. If, however, a court found that ABC did warranty that the television would be suitably reliable and free from electrical interference for the purposes of a large social event, then Dan's damages in holding the event would be foreseeable consequential damages. Since Dan made the purpose of his event clear, and the television was central to its purpose, a court could award consequential damages if it found liability for ABC.

3. (a) Attorney's fee arrangement likely did not violate the Rules of Professional Conduct. Attorneys may generally charge a fee which is contingent on the outcome of the litigation, so long as the fee agreement with the client discloses clearly and in writing the attorney's percentage and, if applicable, any variance based on how the case is resolved. An attorney is barred from charging an unreasonably high fee. However, any challenge to the fee as unreasonable fee will depend on its reasonableness in light of other factors including typical fees in the area, in light of the lawyer's particular level of expertise, the difficulty of the task, and the likelihood of success in the action.

Here, Attorney has been engaged to recover a consumer debt. Given the generally low likelihood of success in such actions, Attorney's 50% fee may be reasonable, depending on many other factors.

(b) Attorney's letter likely did not violate the Rules. Attorneys may not make impermissible threats of litigation. However, Attorney's letter was not a threat, but rather a reasonable offer of out-of-court settlement and compromise, which would avoid the necessity to bring an action on ABC's claim against Dan. So long as Attorney did not believe or have reason to believe that Dan

was represented by counsel, Attorney may communicate with Dan on behalf of ABC in order to seek an out-of-court resolution of the dispute in good faith.

QUESTION-FOUR

Ed owns a 20-acre parcel of land in a rural area and keeps an all-terrain vehicle (ATV) there for his family's use. The ATV, a motorized vehicle used for recreational purposes, is designed to travel on unpaved surfaces at speeds up to 25 miles per hour. Ed regularly permits his children to use the ATV unsupervised, including his 12-year-old son, Bill, who has done so on many occasions without incident. Passengers ride the ATV by holding onto the waist of the operator.

An unimproved dirt trail runs through Ed's property and extends across multiple adjoining properties, including a 30-acre property immediately adjacent to Ed's property, owned by Ward, a farmer. The dirt trail is used by Ed, his family, and various other users for recreational purposes, including hiking, biking, cross-country skiing, and snowmobile/ATV operation.

One afternoon, Ed left Bill and his 11-year-old friend, Tom, alone at his property. Ed told Bill that while he was gone Bill could take Tom for a ride on the ATV, but only on Ed's property. Bill initially rode the ATV with Tom as a passenger on his father's property. Bill eventually became bored and decided to enter onto Ward's property, despite "No Trespassing" signs on the perimeter of Ward's property. A short distance later, Bill, traveling at an excessive speed, crossed a ditch in the trail, which caused the ATV to flip over and land on Tom, who sustained serious injuries in the accident. Ward had created the ditch several years earlier to promote the drainage of surface water from his field to a nearby stream. Although Ward did not place any warnings on the trail to alert users to the ditch, he had made it shallower at the location where it crossed the trail and periodically checked its depth.

Tom, through his guardian, commenced an action against Ed and Ward seeking damages for his injuries. The complaint alleged the above relevant facts. In his first cause of action against Ed, Tom alleged that Ed negligently supervised Bill. In his second cause of action against Ed, Tom alleged that Ed negligently entrusted Bill with a dangerous instrument, i.e., the ATV. In a cause of action against Ward, Tom alleged that Ward had created a dangerous condition on the property, which he failed to adequately warn against.

After discovery was complete, Ward moved for summary judgment to dismiss the complaint by Tom on the grounds that (a) he owed no duty of care to Tom as a matter of law because Tom was a trespasser on his property and, in any event, (b) he is immune from liability to Tom for negligence on the facts alleged in the complaint.

Ed also filed a motion seeking summary judgment to dismiss the complaint by Tom on the grounds that the allegations of (c) negligent supervision and (d) negligent entrustment of a dangerous instrument fail to state cognizable causes of action under New York law.

The court denied both Ward's and Ed's motions, and the case proceeded to trial. After finding both defendants negligent, the jury awarded Tom damages of $1,000,000 for his pain and suffering, and it apportioned liability 40% to Ward and 60% to Ed.

1. Did the court properly deny Ward's motion on grounds (a) and (b)?

2. Did the court properly deny Ed's motion on grounds (c) and (d)?

3. Assuming that Ward's and Ed's motions were properly denied, what is the maximum amount Tom may recover from each of Ward and Ed?

First Answer to Question Four

1. The issue is whether the court properly denies Ward's motion.

There are two grounds for the motion so two sub-issues which will be explained separately.

(a) The first issue is whether the court properly denied Ward's motion based on his lack of duty of care.

Under the CPLR, a motion for summary judgment to dismiss will be granted where there are no genuine issue of facts and that, taking all the facts as true and in the light most favorable to the non-moving party, no reasonable juror could ever find for the non-moving party. Under New York law, for an action in negligence to be successful, the following elements must be proven: 1) a duty of care, 2) a breach of that duty, 3) causation, and 4) damages. New York law has abolished the traditional distinction between trespassers, invitees and licensees for purposes of premise liability. Instead, a landowner owes a reasonable duty of care to foreseeable plaintiffs on his land.

In this case, Tom is suing Ward for a dangerous condition on Ward's property that caused Tom's injuries. Ward is alleging that he owes no duty of care to Tom because he was a trespasser. It is true that Tom was trespassing since he entered onto Ward's land without his permission despite the "no trespassing" sign. However, since New York law has abolished the rule under which no duty of care was ever owed to a trespasser, Ward's allegations are not necessarily true. Whether or not Ward owed a duty of care will be determined under the foreseeable plaintiff test. Since Ward was aware that people were using the trail (as evidenced by the fact that he made the ditch shallower there), Tom was a foreseeable plaintiff to whom Ward owed a duty of care.

Therefore, the fact that Tom was a trespasser is not enough to relieve Ward of his duty of care and thus the court was right to deny his motion.

(b) The second issue is whether the court properly denied Ward's motion based on his immunity to liability.

The standard for whether or not a motion for summary judgment to dismiss should be granted has been explained above. The elements for negligence have also been described above. Under

New York law, although it is true that landowners owe a reasonable duty of care to foreseeable plaintiff, they still benefit from some protection in an action for negligence. Indeed, landowners benefit from an immunity where the action arose in negligence based on recreational activities that took place on the landowner's land.

In this case, as explained above, Ward probably owed a duty of care to Tom. It could be said that his duty was breached because although he knew people were using his trail, he failed to signal the ditch. As a result of the ditch Tom, who was riding on an ATV, was injured. These elements seem sufficient to establish the elements of negligence. However, Tom was using the land for recreational activities, to wit the use of an ATV. Thus created a shield against liability for negligence for Ward.

Therefore, despite the facts that all the elements for negligence appear present, Ward benefits from an immunity from liability based on the nature of the activities that led to the injuries and the court erred in denying Ward's motion.

In conclusion, since there are at least some genuine issues of facts as to whether Ward owed a duty to Tom, his motion to dismiss was properly denied. However, since he benefits from a shield against liability, the court should have granted his motion to dismiss on the second ground.

2. The issue is whether the court properly denies Ed's motion.

There are two grounds for the motion so two sub-issues which will be explained separately.

(c) The first issue is whether Ed's motion based on failure to state a cause of action on the allegations of negligent supervision was properly denied.

Under the CPLR, courts should grant a motion to dismiss for failure to state a claim where the claim asserted does not exist under the applicable law. Under New York law, parents cannot be held liable to third parties for the negligent supervision of their children.

In this case, Tom is asserting that Ed was negligent in supervising his child, Bill, with regard to the operation of the ATV. However, there is no such a cause of action under New York law.

Therefore, the cause of action alleged by Tom does not exist and the court should have granted Ed's motion to dismiss.

(d) The issue is whether Ed's motion based on failure to state a cause of action on the allegations of negligent entrustment of a dangerous instrument was properly denied.

Under New York law, although parents cannot be held liable for the negligent supervision of their children, they can be held liable for negligent entrustment of a dangerous instrument to their children. For such a claim to arise, the parents must have entrusted their child with a dangerous instrument, negligently. The elements for claim in negligence have been explained above.

In this case, Tom alleges that Ed negligently entrusted Bill, his son, with an ATV. Ed probably had a duty of care towards Tom since he was a foreseeable plaintiff as Ed knew Tom and Bill were going to use the ATV. The issue is whether he breached his duty of care by negligently entrusting the ATV to Bill. The ATV can reasonably be classified as a dangerous instrument since it is a powerful vehicle, especially if entrusted in the hands of a child. Although Ed had let his son use the ATV in the past without any incident, this is probably insufficient to relieve him from liability. Indeed, Bill is only twelve, and an accident is likely to occur when two twelve year-olds are given an ATV to play with without supervision. As a result of the use of the ATV by Bill, Bill and Tom had an accident and Bill was injured.

Therefore, Tom had a cause of action against Ed for negligent entrustment of a dangerous instrument and the court properly denied Ed's motion on this ground.

3. The issue is to what extent Ed and Ward are liable for Tom's injuries.

Under the CPLR, joint tort-feasors are jointly and severally liable. This means that the plaintiff can recover the whole amount of damages from one of the defendant who can then seek contribution from the other. Under New York law, however, there is an exception to that rule when the damages awarded are for pain and suffering. In that case, a defendant will be liable to the full extent only if he is more than 50% liable. If his liability is 50% or less, he will only be liable to the extent of his fault for the damages for pain and suffering.

In this case, the jury awarded Tom damages of $1,000,000 for his pain and suffering. Ward was held 40% liable and Ed 60%. Since Ward's liability is no greater than 50%, Tom can only recover damages from him to the extent of his liability, to wit 40% or $400,000. However, Ed was held more than 50% liable and is therefore liable for the full extent of the damages, even though they are for pain and suffering. Tom can recover the full $1,000,000 from him.

Therefore, Tom can only recover $400,000 from Ward but can recover $1,000,000 from Ed. However, Ed can always seek contribution from Ward for $400,000.

Second Answer to Question Four

Relevant to the overall analysis of question 4 is the standard for motion for summary judgment. Under the CPLR, a motion for summary judgment will be examined in the light most favorable to the non-moving party. The moving party bears the burden of providing sufficient evidence to prove that there is no triable issue of fact and that he is entitled to judgment as a matter of law. If the movant satisfies this burden, the burden shifts to the non-movant to prove that there is a triable issue of fact. If the non-movant fails to satisfy this burden, the court may "search the record" and issue summary judgment in favor of either party, regardless of who was the moving party. It is noteworthy that NY courts have characterized a motion for summary judgment as a "drastic" remedy given its res judicata effect.

1. Issue 1(a): Does Ward owe a duty to ATV riders on his land even if they are trespassing on his land when they are injured?

The common law traditionally differentiated the duties owed by landowners to those occupying the land based on the occupier's status as licensee, invitee, or trespasser. And indeed, under the common law, landowners owe very few duties to trespassers. However, NY has moved away from the categorical distinctions and duties owed by landowners based on an occupier's status. Instead, under NY law, a landowner owes a reasonable duty of care to prevent unreasonable risk of harm to foreseeable plaintiffs on his land. A foreseeable plaintiff is one who is within the zone of danger created by the defendant's negligent conduct. In assessing whether there was a breach of this duty of care, however, it is of course relevant to the analysis whether the occupier of the land was a licensee (guest), invitee (patron), or trespasser and how foreseeable was their presence.

Here, Ward owed a duty to Tom because it was foreseeable that Tom would be on his property. As NY has done away with the strict rules of the common law, Ward owed a duty to all foreseeable plaintiffs to prevent unnecessary risk of harm on his property. Tom was a foreseeable plaintiff because: (1) many people used the dirt trail on Ward's land for the express purpose of riding the ATV, and (2) Tom was within the zone of danger caused by Ward's dangerous conduct of digging a ditch through a path that ATV riders frequent. In sum, therefore, as Tom was a foreseeable plaintiff, Ward owed him a duty of care and the court was correct to dismiss his claim that he owed Tom no duty of care.

Issue 1(b): Can Tom make out a Prima Facie Case of Negligence as against Ward?

In order to make out a negligence cause of action, the plaintiff must show: (1) that the defendant owed the plaintiff a duty of care, (2) that the defendant breached the duty of care owed to the plaintiff, (3) that the breach was both the actual cause and proximate cause of the plaintiff's injuries, and (4) that the plaintiff suffered legally cognizable injuries. As mentioned, the landowner owes a duty to prevent unreasonable risk of harm to others on his land. He breaches this duty where his conduct falls below the standard of care - typically measured by a carroll-towing type analysis of whether the burden of preventing the harm was outweighed by the likelihood and gravity of harm. A defendant is the actual cause of the plaintiff's injuries where "but for" the defendant's conduct the plaintiff would not have been injured. Proximate cause is satisfied where the injuries suffered by the plaintiff are a foreseeable result of the defendant's conduct. It is noteworthy that intervening acts of negligence generally do not break the causal chain. Finally, tort law recognizes injuries to the person and awards both pecuniary damages (for economic loss) and non-pecuniary damages (pain and suffering) as parasitic to the economic losses.

Here, Ward owed a duty to prevent unreasonable risk of harm to others on his property. It is foreseeable that others would be on his land - including those who are technically trespassers - in order to use the dirt trail. Indeed, the trail is often used by Ed, his family, and various others for recreational purposes, including hiking, biking, cross-country skiing, and snowmobile/ATV operations. Ward likely breached this duty when he failed to place any warnings on the trail to alert users that he had dug a ditch across the path. The likelihood of harm is high given that ATV's often travel down this path and all Ward needed to do was put a warning sign out to warn potential riders of the danger of the ditch. The breach was the actual cause of Tom's injuries because but for the ditch, the ATV would not have flipped over. The breach was the proximate

cause because it is foreseeable that an ATV rider would be on the trail and the ATV would flip over when crossing an exceptionally uneven surface where there had been a ditch dug across a trail. That Bill was negligently driving too fast does not cut the causal chain because intervening negligent acts typically are foreseeable. Finally, Tom suffered legally cognizable harm - serious bodily injuries. Taken together, Tom can make out a prima facie case of negligence against Bill based on Bill's negligence in failing to warn ATV riders of a dangerous condition on his property. In sum, therefore, the court correctly denied Ward's motion to dismiss on the grounds that he was not negligent.

2. Issue 2(c): Does Ed, a parent in NY, owe a duty of supervision to his child, Bill?

NY does not generally recognize intra-family immunity for tort actions. However, as a limit to this general rule, a child is not permitted to file a negligent supervision claim as against his or her parents. Given this limitation, a plaintiff is not permitted to recover as against a parent on the ground that the parent negligently supervised his child, leading to the plaintiff's injury.

Here, Ed is Bill's child. Thus, Ed cannot be held liable by Bill for negligent supervision. As such, Tom cannot make out a claim of negligent supervision as against Ed because Ed had no duty to supervise Bill non-negligently. In sum, therefore, the court should have granted Ed's motion on the ground that NY does not recognize a cause of action based on negligent supervision by a parent.

Issue 2(d): Did Ed negligently Entrust Bill with the ATV, thereby causing Tom's Harm.

While a parent in NY does not owe a duty to supervise his child non- negligently, a parent may be held liable for negligently entrusting a dangerous instrument to the child under circumstances where such entrustment leads to unreasonable risk of harm to others. In other words, NY recognizes a cause of action for negligent entrustment. A parent owes a duty to others not to entrust his child with a dangerous instrument if it is likely that such entrustment will lead to another's harm. As this is a negligence cause of action at heart, the same elements of a prima facie case of negligence laid out in Issue 1(b) apply to the plaintiff's claim for negligent entrustment.

Here, Ed owed a duty not to entrust Bill with dangerous instruments, such as an ATV, under circumstances that would likely lead to an unreasonable risk of harm to others. Tom is a foreseeable plaintiff because Ed allowed Bill to take Tom on a ride on the ATV. However, Ed likely did not act negligently in entrusting Bill with the ATV. The evidence demonstrates Bill has driven the ATV unsupervised on numerous occasions without any type of injury or incident resulting. Moreover, Ed expressly limited the scope of Bill's use of the ATV when entrusting it to him to take Tom on a ride - he could only do so on Ed's property. Presumably Ed would have reason to know of any dangerous conditions on his own property. As Ed's entrustment of the ATV to Bill, an experienced driver with a safe driving history, on a limited parcel of land did not create an unreasonable risk of harm towards Tom, Ed did not breach a duty owed to Tom. Thus, while allowing Bill to drive was both the cause (but for the entrustment Tom would not have been injured) as well as the proximate cause (it is foreseeable that Tom would be injured when the ATV flipped over) and Tom suffered a legally cognizable harm, he will not be able to make

out the element of breach. In sum, therefore, the court correctly denied Ed's motion because NY does recognize a cause of action for negligent entrustment, but Tom will not prevail as Ed did not breach.

3. Issue 3: Do either Tom or Ward benefit from the protection of CPLR Article 16, which limits a tort-feasor's liability for non-economic harms.

Under joint and several liability, a defendant can be held liable for the entirety of the plaintiff's harms - regardless of how much of the harm he actually caused vis-a-vis other tort-feasors - where more than one tort-feasor both act negligently and cause the plaintiff to suffer a single-indivisible injury. Under CPLR Article 16, which is an affirmative defense that must be pled or it is lost, in order to mitigate the harshness of joint and several liability, a tort-feasor who is jointly and severally liable for a plaintiff's economic harms will only be held severally liable for the plaintiff's non-economic harms,

i.e. pain and suffering, if the defendant was 50% or less at fault for the plaintiff's injuries. The Article 16 shield does not apply, however, if the defendant acted recklessly with regards to the health or safety of others, released a harmful substance into the environment, or was driving an automobile at the time of the negligence.

Here, both Ed and Ward are jointly and severally liable as they both negligently contributed towards the single, indivisible injury suffered by Tom. The jury has awarded Tom non-economic pain and suffering damages of $1,000,000. Additionally, the jury has apportioned 40% of the fault to Ward and 60% of the fault to Ed. Ed cannot seek the benefit of the protection of Article 16 because he is more than 50% at fault. Thus, he will be jointly and severally liable for up to the entire amount of Tom's harm. Ward is less than 50% at fault, thus he is within the scope of Article 16. It is likely that he was not reckless as to a risk of harm to others - where a defendant was aware of and disregarded a substantial and unjustifiable risk of harm to others - because he recognized the risk of harm and attempted to mitigate it by making it shallower at the location where it crossed the trail and he often checked the depth. Thus, his conduct does not amount to a conscious disregard of the health and safety of others on his land. As a result, Ward will be able to seek the benefit of Article 16 protections, and he will only be severally liable for his share of the pain and suffering - $400,000. In sum, therefore, Tom may recover the full $1,000,000 from Ed, but only $400,000 from Ward.

It is noteworthy that if Tom seeks the full amount from Ed, Ed can thereafter file a suit for contribution as against Ward to recover the $400,000 extra that tom paid over his share of liability.

QUESTION-FIVE

Rose was a tenant in a public housing apartment building operated by the C City Housing Authority. Rose's adult son, Robert, was living in the apartment with her. On several occasions, tenants complained to the Housing Authority regarding Robert's menacing behavior.

Following a meeting with Rose to discuss the problem, the project manager for the building determined that Rose's tenancy should be terminated for breach of her obligation under the lease to assure that neither she nor any member of her household threatened the health, safety or right of peaceful enjoyment of the other tenants in the building. Rose was thereafter personally served with a Notice of Charges, in which the Housing Authority set forth in detail the tenants' complaints and how Robert's conduct violated the lease. The Notice advised Rose that a hearing would be held on a stated date and time at a designated location to determine whether her tenancy should be terminated because of Robert's conduct. The Notice further advised Rose that she had a right to be represented by counsel, to present evidence, and to cross-examine witnesses at the hearing.

Rose appeared at the hearing without counsel. At the hearing, among other evidence, the Housing Authority presented a certificate of mailing of the Notice, affidavits of the complaining tenants detailing the menacing acts of Robert, and the lease, all of which were received into evidence, over Rose's objection. Although invited to do so by the hearing officer, Rose offered no evidence in response and did not request an adjournment to obtain counsel, gather evidence or subpoena witnesses.

Following the hearing and after Rose exhausted her administrative appeal, the Housing Authority issued a final Determination finding that Rose had violated her lease, and it terminated her tenancy and directed that she vacate the premises. Rose received the Determination on August 27, 2014, but she continued to occupy the apartment.

On February 12, 2015, Rose commenced a special proceeding against the Housing Authority asserting that her procedural due process rights were violated in the termination of her tenancy, and that the hearing officer improperly admitted hearsay evidence, in the form of the affidavits, thereby denying her the right to cross-examine the witnesses. The Housing Authority moved to dismiss Rose's petition, asserting that it was not timely commenced. The court denied the motion and, following a hearing on Rose's petition, ruled that (a)(i) Rose was entitled to procedural due process in connection with the termination of tenancy proceeding, but (a)(ii) her rights in that regard were not violated. In addition, the court ruled that (b) the hearing officer improperly admitted hearsay evidence. The court remanded the matter back to the Housing Authority for further proceedings.

Rose and the Housing Authority thereafter entered into a stipulation to permit Rose to continue to reside in her apartment, subject to Robert not being allowed to live or visit there. Rose then informed Robert that he could no longer live in or visit her apartment pursuant to the stipulation, and Robert moved out on June 18.

In the lobby of the building, prominently displayed, is a sign that says "NO TRESPASSING. TENANTS AND THEIR GUESTS ONLY." On July 10, a tenant saw Robert in the building and called the police. The police arrived finding Robert in a hallway on the second floor of the building. When questioned by the police, Robert claimed that he was in the building to visit his mother. The police thereafter questioned Rose, who truthfully reported that she had forbidden Robert to enter the building to visit her. The police arrested Robert, charging him with criminal

trespass in the second degree. A person is guilty of criminal trespass in the second degree when he knowingly enters or remains unlawfully in a dwelling.

1. Did the court properly deny the Housing Authority's motion to dismiss Rose's petition on the ground of the statute of limitations?

2. Was the court correct in its determination that:

(a)(i) Rose was entitled to procedural due process in connection with the termination of tenancy proceeding?

(a) (ii) Her rights in that regard were not violated?

(b) The hearing officer improperly admitted hearsay evidence?

3. Is Robert guilty of criminal trespass in the second degree?

First Answer to Question Five

1. The court erred in denying the Housing Authority's motion to dismiss on the ground of the statute of limitations. The issue is whether commencing a special proceeding following a final determination by an agency is timely commenced more than 4 months after the final determination.

Rule: Under the CPLR, the statute of limitations to commence an Article 78 proceeding is 4 months from the date of the agency's final determination. Special proceedings also have a statute of limitations of 4 months from the date of the agency's final determination, because they are a type of Article 78 proceeding. Quasi-judicial proceedings conducted by an agency are one type of proceeding that Administrative Agencies may engage in and they may determine the rights of individual's in this context. If an Article 78 proceeding is not timely commenced, it should be dismissed by the court.

In this case, Rose's agency final determination was issued on August 27, 2014 and she commenced a special proceeding against the Housing Agency on February 12, 2015, well over 4 months from the agency final determination. The fact that Rose instituted a special proceeding does not clear her action from being an Article 78 action under the CPLR and thus, the claim should have been dismissed.

The court erred in denying the Housing Authority's motion regarding the statute of limitations.

2. (a) (i) The court was correct in determining that Rose was entitled to procedural due process in connection with the termination of the tenancy proceeding. The issue is whether an individual who will be adversely affected by an agency determination has a right to procedural due process.

Rule: Procedural due process under the Constitution of the United States applies to states and state agencies under Article 14. This requires that before a deprivation of life, liberty, or property

can occur, there must be a chance for a fair hearing. The eviction of an individual from their home is a significant deprivation of a property interest.

In this case, Rose has a right to procedural due process before she can be removed from her home. This requires (among other things, listed in part ii) that she be given notice and a chance for a hearing before she is denied her property rights. Rose is a tenant in a public housing apartment building that is operated by the C City Housing Authority, and thus even though she may have breached her lease in regards to assuring that neither she nor any member of her household threatened the health safety, or right of peaceful enjoyment of other tenants in her building, she should still be allowed a fair hearing before her tenancy is terminated.

Because Rose has a property interest in her tenancy, and the agency's determination could adversely affect her, she is entitled to procedural due process.

(ii) The court was correct in stating that Rose had received procedural due process. The issue is whether an agency determination proceeding in a quasi- judicial manner can satisfy the requirements of procedural due process.

Rule: Procedural due process under the Constitution of the United States applies to states and state agencies under Article 14. This requires that before a deprivation of life, liberty, or property can occur, there must be a chance for a fair hearing. The eviction of an individual from their home is a significant deprivation of a property interest. A quasi-judicial agency hearing must first provide the affected party with notice of the action, including the subject matter of the action, the reasons for the action, the date and time and location that the hearing will be held, as well notifying the party that they have a right to be represented by counsel, present evidence, and cross- examine witnesses at the hearing.

The Hearing must be overseen by a presiding officer who is without bias. The hearing must be determined by the officer and his decision will be determined reasonable if the substantial evidence shows that a reasonable person might construe the evidence presented in a similar way.

In this case, Rose received a notice of the hearing from the Housing Authority. She was personally served with the notice of charges which explained in detail the tenants' complaints and how her son's conduct violated the lease, as well as the date, time, and location of the hearing which her rights will be adjudicated. The notice from the Housing Authority also explained her right to counsel, as well as to present evidence and to cross- examine witnesses. There is no indication of bias by the presiding officer in Rose's hearing, and the judgment of the agency was based on substantial evidence that could be construed in a way to achieve the result that the agency did. The court had affidavits to show that Rose had violated the lease, which will satisfy the substantial evidence requirement in the court's review of the final agency determination.

(b) The court erred in its determination that the hearing officer improperly admitted hearsay evidence. The issue is whether hearsay can be properly admitted to a quasi-judicial proceeding.

Rule: Typically, under the FRE and NY Rules of Evidence, a court may not consider evidence unless it falls under a listed exception. However, though an administrative agency can perform quasi-judicial hearings in a manner similar to the courts, it is not bound by the typical exclusionary rules or rules of evidence and may accept any relevant evidence to the proceeding, including hearsay. The hearing officer has discretion as to what evidence will come in. Evidence is relevant if its probative value outweighs its prejudicial effect.

In this case, the hearing officer was performing a quasi-judicial hearing for the Housing Association. Because the standard rules of evidence do not apply, he had discretion to allow all evidence that may be relevant to the agency determination, including the hearsay evidence of Rose's neighbor's affidavits. These affidavits are highly relevant as they are probative in showing how Rose violated the lease, and while prejudicial, the probative value of the affidavits outweighs this concern for Rose.

Thus, the court erred in stating that the hearing officer improperly admitted hearsay evidence.

3. Robert is guilty of criminal trespass in the second degree. The issue is whether an individual knowingly enters a building unlawfully when he previously had a right to do so.

Rule: Criminal trespass in the second degree under the New York Penal Law requires that a person knowingly enters or remains unlawfully in a dwelling. A person acts knowingly when he is aware of his conduct and the result of his conduct is clearly foreseeable. A dwelling is a place inhabited by individuals and where they sleep. Common areas of an apartment building are a part of the dwelling. A person enters unlawfully when they lack the permission to enter.

In this case, Robert knew that he was not allowed to enter the apartment building. Not only had he been previously banned and his right to reside revoked on June 18, but Rose had truthfully forbidden him to enter the building to visit her. There is no other indication that Robert had any permission to enter the apartment building, and the sign which forbade trespassers was visible in the lobby, which Robert presumably must have seen. The building is a dwelling, as tenants including Rose live there and sleep there. The common areas, including the hallway are included as part of the apartment dwelling, and the sign of no trespassing would clearly apply to these areas, conveying notice to Robert of the restriction. Robert entered the apartment complex in some manner, likely the lobby, and found himself in the hallway. He knew that he did not have a right to visit his grandmother and that he was not allowed on the premises due to the sign. He knew that he was entering the building when he entered, absent contrary evidence. He knew that he had no lawful right to be in the building, and thus entered unlawfully.

Robert is guilty of knowingly entering or remaining in a dwelling, which under the NYPL is criminal trespass in the second degree.

Second Answer to Question Five

1. The court should have granted the Housing Authority's motion to dismiss on the grounds of statute of limitations. At issue is what the statute of limitations is on challenging an agency determination at a trial-type hearing.

Under the CPLR, a person can challenge an agency determination by initiating an Article 78 special proceeding. The proceeding is initiated by filing a petition and serving the petition on the opposing party. Article 78 special proceedings have a statute of limitations of four months. The statute begins to run when the agency determination becomes final and binding on the petitioner.

In this case, Rose received the final determination of the Housing Authority on August 27, 2014. This is when the determination became binding on Rose, so this is when the statute of limitations began to run. The four month statute of limitations expired on December 27, 2014. Rose commenced the special proceeding on February 12, 2015. This is after the statute of limitations had run.

Thus, the court should have granted the Housing Authority's motion to dismiss on the grounds of statute of limitations.

2. (a) The court was correct in determining that Rose was (i) entitled to procedural due process and (ii) that her rights were not violated. At issue is (i) whether a tenant in a public housing apartment is entitled to procedural due process prior to termination of their lease and (ii) whether the procedures afforded Rose were sufficient.

Under the Fourteenth Amendment, everyone is entitled to due process of law before the government deprives them of life, liberty, or property. Due process has two aspects, procedural due process and substantive due process. Procedural due process asks whether the individual was afforded adequate procedures prior to the deprivation of life, liberty, or property. A person is deprived of property if they have an entitlement to a government benefit and that entitlement is not fulfilled. In determining whether the procedures afforded an individual were constitutionally adequate, the court weighs the importance of the interest to the individual and the ability of additional procedures to improve the quality of the fact finding against the government's interest. Deprivations of property typically require that an individual be afforded both notice and an opportunity to be heard. Whether the individual actually avails herself of that opportunity is irrelevant. New York has enacted the State Administrative Procedures Act, which statutorily mandates procedures for agency hearings. The procedures under SAPA are constitutionally adequate.

(i) In this case, the Housing Authority was attempting to deprive Rose of property. Rose's lease was a property interest because, under the contract, she was entitled to reside at the public housing building so long as she abided by the terms of the lease. If Rose were evicted, that entitlement would not be fulfilled. Therefore, the Housing Authority was attempting to deprive Rose of property when it wanted to terminate her lease. Therefore, Rose was entitled to due process protections.

(ii) In this case, the interest was very important to Rose because it involved her primary residence; if Rose were deprived of the lease she would be homeless. However, extensive procedures were afforded to Rose: she was personally served with a notice of charges before the hearing, the notice set forth in detail the tenants' complaints about Robert, explained how that conduct violated the lease, and stated a date and time and a designated location at which the

hearing would take place. It also told her that she had a right to be represented by counsel, present evidence, and cross-examine witnesses at the hearing. Because the notice was so specific, Rose had constitutionally adequate notice of the hearing. Rose also had a constitutionally adequate opportunity to be heard because she could have offered evidence in response at the hearing, requested an adjournment to obtain counsel, gather evidence, or subpoena witnesses. Rose chose not to use these rights. Her choice not to avail herself of the procedures she was granted does not render those procedures inadequate. Because the notice was specific, detailed evidence, including a certificate of mailing of the notice, affidavits of the complaining tenants, and the lease, was presented at the hearing, and Rose could have presented her own evidence, obtained counsel, and subpoenaed witnesses, additional procedures are unlikely to increase the accuracy of the fact-finding. The government has an important interest in efficiently adjudicating lease violations and removing individuals, such as Robert, who threaten the health, safety, or right of peaceful enjoyment of the other tenants, promptly. Therefore, weighing Rose's interest and the existing procedures against the government interest, Rose received adequate due process prior to the final decision terminating her lease.

Thus, Rose's due process rights were not violated.

(b) The hearing officer did not improperly admit hearsay evidence. At issue is whether hearsay is admissible at an administrative hearing.

Under New York evidence law, relevant evidence is generally admissible, unless it is prohibited by a specific rule of evidence. Evidence is relevant if it has some tendency to make a material fact at issue more or less likely than it would be without the evidence. In the courts, hearsay is generally inadmissible. Hearsay is an out-of-court statement offered for the truth of the matter asserted. However, the rules of evidence do not apply in administrative hearings. Therefore, a hearing officer can properly admit hearsay evidence.

In this case, the hearing officer admitted affidavits of the complaining tenants. This was hearsay because the tenants made the statements outside of the agency proceeding and they are being offered to prove the truth of the matter asserted--that Robert engaged in menacing conduct that threatened the health, safety, and right of peaceful enjoyment of the other tenants as described in the affidavits. In a court, such evidence would be inadmissible hearsay. However, the rules of evidence do not apply in this instance because the Housing Authority, an administrative agency, is conducting the hearing.

Thus, the hearing officer properly admitted the hearsay evidence.

3. Robert is guilty of criminal trespass in the second degree.

Criminal trespass in the second degree is knowingly entering or remaining unlawfully in a dwelling. A person acts knowingly when they are aware of what they are doing. They act knowingly with regards to a result if they are practically certain that their conduct will bring about that result. In general, when a statute defining an offense uses a term like "knowingly" that sets out a required mental state for the crime, it applies to all the elements of the crime. A dwelling is a building in which a person regularly sleeps.

In this case, Robert entered and remained in the building because he was found in the hallway on the second floor of the building. Robert was there unlawfully because only tenants and their guests are permitted in the building and Rose had forbidden Robert from entering the building to visit her. The building was a dwelling because it is an apartment building and people regularly sleep in their apartments. Robert acted knowingly because Rose had specifically forbidden him from entering the building and there was a prominently displayed NO TRESPASSING sign. In addition, it can be inferred that Robert knew he was not allowed in the building because he previously lived there and would be aware of the building's rules and because he lied when questioned by the officer, showing consciousness of guilt. Robert knew the building was a dwelling because he knew it was an apartment building. On these facts, there is nothing to indicate Robert was not aware of where he was, so he knew that he had entered and remained in the building.

Thus, Robert is guilty of criminal trespass in the second degree.

MPT-ONE
MPT - In re Bryan Carr

In this performance test item, examinees are associates at a law firm representing Bryan Carr, who seeks legal advice regarding his potential liability for certain credit card purchases that his father made using Bryan's credit card account. There are a number of credit card transactions (automotive repair, groceries, fuel, books, and power tools) made at different vendors over a period covered by four credit card statements. Bryan has not yet paid the most recent statement, but he paid the others before realizing that his father had used the credit card for items other than the automotive repair (which is the reason he gave his father the card). Examinees' task is to draft an opinion letter to the client. In the letter, examinees are to analyze each of the credit card transactions in light of the facts, relevant statutes, and case law to determine the client's responsibility for payment for each charge. The File contains the instructional memorandum from the supervising attorney, the firm's guidelines for drafting opinion letters, a transcript of the partner's telephone conversation with the client, a copy of a letter Bryan Carr wrote authorizing his father to use the credit card, and credit card statements for the months at issue. The Library contains various sections of the federal Truth in Lending Act, excerpts from the Restatement (Third) of Agency, and two cases.

First Answer to MPT
July 28, 2015

Dear Bryan,

You have asked me to advise you on whether the bank can hold you responsible for the charges made by your father, Henry Carr, during March, April, May, and June using your credit card and account information. I will address the charges made in March for the auto repair, the charges

made in April and May for the gasoline and book store charges, and the charge in June for the power tools separately.

Before addressing each of these charges individually, I want to give you a summary of the overall applicable law.

For each of these charges, your liability depends on whether the court finds that your father had actual, implied, or apparent authority to use your credit card for the transactions. Under the federal Truth in Lending Act, a cardholder has limited liability for unauthorized purchases made with a credit card. The statute says that "unauthorized" use of a credit card is determined by the principles of agency law. This means that if the person using your card had actual, implied, or apparent authority to use your card, that person is your agent for purposes of the law, he may bind you to the purchases made by him, and the limited liability under the Truth in Lending Act does not apply.

Actual authority exists when a cardholder gives explicit permission to the user to enter into particular transactions. Implied authority exists when a cardholder indicates to the user of the card that he may enter into other transactions through his actions toward the user. Apparent authority exists when the cardholder indicates, either through words or actions, to third parties that the user of the card is acting with the cardholder's consent. Apparent authority, then, focuses on what third parties believe based on the card holder's actions, rather than what the person using the card believes.

It should be noted that even though the Truth in Lending Act precludes a finding of apparent authority to use a card where the transfer of the card was without the cardholder's consent (i.e. it was stolen), this principle does not apply to voluntary transfers of credit cards. In cases such as yours, in which the initial transfer of the card was voluntary, agency principles govern, and there may be a finding of apparent authority through the possession of the card. BAK Aviation Systems, Inc. v. World Airways, Inc., Franklin Ct. App (2007).

Was there actual authority for the charge made by Mr. Carr at Schmidt Auto Repair in March?

Yes, there was actual authority for the charge made by your father at Schmidt Auto Repair in March. As a result, he may bind you as an agent, the limited liability under the Truth in Lending Act will not apply, and you are obligated to pay the bank for these charges.

When you gave Mr. Carr permission to use your card to pay for the repairs to his van, you gave him actual authority to make these purchases. As I have explained, agency principles will determine whether you are liable when someone else uses your credit card. Here, you explicitly told your father that he could charge "whatever it cost" to have his van repaired. It is true that the actual repairs cost $350 more than the original estimate, but it seems that by your actions and words you at least gave implied authority to your father that he could charge whatever was necessary for the repairs. The fact that you issued the letter to your father stating that he had permission to use your card bolsters this authority. As a result, you will likely be held liable for the whole $1850 for this reason.

It does not matter that your father subsequently used your card to make purchases that were not within the scope of the actual authority you granted him; he still had actual authority to make this purchase.

Was there apparent authority for the charges made to Friendly Gas Station, the Corner Store, and Rendell's Book Store in April and May?

Yes, with regard to the charges made by your father at Friendly Gas Station, the Corner Store, and Rendell's book Store in April and May, a court would likely find that you conferred apparent authority upon your father for these purchases. Even though it is clear that you gave no actual or implied authority to your father to make these purchases, apparent authority is legally sufficient to obligate you to pay for the purchases.

When you gave your credit card to Mr. Carr to purchase the repairs for his van, it is true that you specifically told him that it was only for the purchase of the repairs and for no other purposes. This makes it clear that there was absolutely no actual or implied authority for these purchases. However, the other vendors from whom your father made purchases had no way of knowing that your father lacked the authority to make them, and there still may have been apparent authority in these cases.

When evaluating apparent authority, the determination must be made based on what the vendors selling the goods to your father perceived. Your father was in possession of your credit card and also in possession of a letter stating that he has permission to use your credit card. The letter provided no limitations that would indicate to the vendors that you had limited your permission to specific purchases. It is true that if your father had stolen your credit card, the Truth in Lending Act would prohibit an inference of actual authority from mere possession of your card, but that rule does not govern when there was an initial voluntary transfer of the card.

This case is similar to BAK Aviation Systems, Inc. v. World Airways, Inc. (Franklin Ct. App. 2007), in which a BAK issued a credit card to World Airlines for purchase of fuel for a corporate jet leased by World. In that case, an independent contractor working for World made purchases outside of his actual authority given by World. Similar to this case, the independent contractor had been given permission to use the card for a limited purpose and made later charges that exceeded the authority he was given. The court ruled that the contractor nevertheless had apparent authority to make the purchases, and World would be held liable to BAK. The court emphasized that even though the contractor knew he was acting outside of his actual authority, this was insufficient to provide notice to those who sold the fuel to him that he lacked the authority for the purchases.

One difference between that case and yours may be that the court noted that a pilots are often authorized to make gas purchases with credit cards issued by their employer, and that this might confer more apparent authority than might arise from voluntary relinquishment of a credit card in other contexts. However, the fact that you also provided your father with a letter stating unlimited permission to use the card likely means that there was certainly apparent authority for your father to make the gas and book store purchases. Furthermore, it is fairly common for family members to lend their credit cards to family for daily purchases such as gas and books.

One argument you may try to make is that under Transmutual Insurance Co. v. Green Oil Co. (Franklin Ct. App. 2009), a cardholder is only bound by a card user's purchases made under apparent authority when the seller has incurred liability in good faith and without ordinary negligence. Thus, you could try to claim that, as you have noted, your father is a senior citizen in an obvious state of considerable distress, and that the gas station vendors and bookstore sellers should have known that your father did not have permission to use the card. You could argue that this amounts to negligence on their part, and that you should not be liable to them. However, in Transmutual the court also noted that the cardholder's negligence can overcome a seller's negligence, and he may still be held liable. The court said that a cardholder has a duty to examine his credit card statement promptly and must use reasonable care to discover unauthorized signatures or alterations. If the cardholder fails to meet this duty, he is precluded from asserting his unauthorized signature against the card issuer after a certain time.

It is likely that a court would find that you did not meet your duty to examine your card statements, since you paid two separate bills that contained your father's fraudulent transactions. As you noted, you only made a cursory look, and did not notice the purchases because you and your father shop at similar locations. However, it is likely that this was sufficient negligence to negate any claim of negligence on the part of the gas station and book store vendors. By failing to contest the fraudulent charges, under Transmutual you conferred additional apparent authority on your father to make the purchases.

Because you cloaked your father with apparent authority to make these purchases in the form of the letter and the payment of your bills without protest, you are liable to the bank for the charges made by your father in April and May.

Was there apparent authority for the charges made to Franklin Hardware Store in June for the power tools?

No, there was no apparent authority for the charges made by your father to buy the power tools. Unlike the other purchases, your father was not in possession of the credit card or the letter when he made this purchase. It is very likely that under the principles discussed above in Transmutual, a court would find that Franklin Hardware Store was negligent in its allowing Mr. Carr to use the account information.

It should have been clear that your father did not have the authority to make the purchase of the power tools. He did not possess the card, and only had a piece of paper containing the account information. This should have alerted the vendor that he was acting without authority, especially for a large purchase of $1200. You made no actions that cloaked your father with apparent authority from the perspective of the vendor, and you did not pay the bill and confer apparent authority that way.

Because there was no apparent authority for your father's purchase of the power tools, you will not be obligated to pay the bank for these purchases. Instead, the limited liability of the federal Truth in Lending Act will apply, and you will be liable for only up to $50 for this purchase.

Conclusion

As I have explained, your father likely had actual or apparent authority for all of the credit card purchases except the purchase of the power tools, and you will be obligated to pay for all of the authorized purchases.

Please feel free to contact me if you have further questions or concerns.

Very Truly Yours,
Miles Anders

Second Answer to MPT
Anders, Davis & Waters Attorneys at Law

6241 Lowell Street

Franklin City, Franklin 33205

July 28, 2015

Dear Bryan,

We spoke on July 24, 2015, regarding charges on your Acme Bank credit card made by your father, Henry, both with and without your authorization. You asked me to determine whether Acme Bank can hold you responsible for all the charges your father made to your card. I've looked into the law on the question of unauthorized credit card charges and have determined, as I'll explain in more detail below, that you will probably be responsible for paying the charges from March, April, and May. However, we will likely be able to establish that you are not responsible for all but $50 of the $1,200 your father charged to your card in June.

1) Are you required to pay the charges from March?

You will likely be responsible for the $1,850 your father charged to your Acme card in March. Under the Federal Truth in Lending Act, a cardholder can only be excused from a charge to the cardholder's card if the charge exceeds $50 and is also "unauthorized," meaning that the person using the card has no authority from the cardholder to use the card. 15 U.S.C. §§ 1602(o), 1643(a) (1), (d). Authority comes in a variety of flavors. Relevant to the March charges is what is called "actual authority." A person, acting as an "agent," has "actual authority" to take an act on behalf of another, serving as the "principal" over the "agent," if the agent reasonably believes that the principal wants the agent to take that act. Restatement (Third) of Agency § 2.01. The Franklin Court of Appeal has explained that a principal creates "actual authority" for another to act in his place by expressing to the agent that you consent to the "particular transactions" in question. BAK Aviation Systems, Inc. v. World Airways, Inc. (2007) (citing Restatement (Third) of Agency §3.01). In other words, your father had "actual authority" to charge $1,850 to your Acme card in March because you specifically authorized your father to use your card to pay for

those repairs and you set no limit on the amount you would pay towards those repairs, even though you thought they would only total $1,500. Because you told your father to use your card to pay "whatever it cost," as you said to me on the phone last week, he could reasonably believe that you authorized him to pay the bill no matter the amount. Therefore, under the Federal Truth in Lending Act, the March charge was not "unauthorized;" you told your father he could make it. For these reasons Acme will be able to hold you responsible for these charges.

2) Are you required to pay the charges from April and May?

You will also likely be responsible for the total of $252.20 your father charged to your Acme card in April and May. As I said above, the Federal Truth in Lending Act only shields cardholders from charges made in their name if the charges were "unauthorized." 15 U.S.C. §§ 1602(o), 1643(a)(1), (d). Though your father no longer had "actual" authority to make those charges because you did not consent to him using your card for those "particular transactions," BAK Airlines (citation omitted), your father probably had what is called "apparent authority" to make those charges. Your father did not when courts determine whether an agent held "apparent" authority to take some action on behalf of a principal -- like your father charging purchases to your credit card. They consider whether a third party entering into the transaction with the actor could reasonably believe that the actor is authorized to take that action. Restatement (Third) of Agency § 2.03. A principal creates apparent authority when he take some act or makes some expression regarding the agent's authority to act on his behalf that a third party could rely on to conclude the agent has the principal's blessing. Id. § 3.03. The Franklin Court of Appeals has explained that a cardholder is still responsible for charges made on his card by an agent acting in the cardholder's name if "apparent authority" exists as well, meaning that a third party could reasonably interpret the circumstances to believe that the cardholder has authorized the person using the card to make the charges. BAK Airlines. In particular, the Franklin Court of Appeals has held that a "cardholder's voluntary relinquishment of the card for one purpose," as when you gave you card to your father to pay for the repairs to his van, "gives the bearer apparent authority to make additional charges." Id. In other words, because you gave your card to your father and did not retrieve it when he no longer had authority to use it, you created a set of circumstances in which third parties like the clerk at Rendell's Book Store could assume that you had authorized him to keep using it; he had "apparent authority" based on your voluntary decision to give him your card. There was no fact or circumstance that should have provided "notice to those who sold the [goods] that [your father] lacked authority for the . . . purchases." Id. For that matter, though you carefully provided your father with a letter confirming that he had actual authority to make charges in March, that letter set no condition or termination on your authorization; your father could easily have produced that signed letter from you to soothe any suspicions a store might have had that he was charging more than he was authorized to charge, making it even more reasonable for third parties to accept his apparent authority to use your card.

Separately, even if you could argue that the merchant shouldn't have accepted the card when your father used it, you would probably still have to pay Acme and seek recovery from the merchant. Acme had no reason to suspect the charges made in these months and so was entitled to assume they were legitimate and hold you responsible for them. The Franklin Court of Appeal has held that a card issuer can require a cardholder responsible for unauthorized charges on the cardholder's card if the cardholder negligently fails to notice the charges and pays them without

protest. The court explained that a cardholder "has a duty to examine his credit card statement promptly, using reasonable care to discover unauthorized" charges. Transmutual Insurance Co. v. Green Oil Co. (2009). In other words, if a cardholder negligently allows someone else to make charges in his name and then pays those charges without objection, "the cardholder is precluded from asserting [unauthorized charges] against the card issuer after a certain time." Id. That rule would likely apply here as well. Because you voluntarily let your father have your card and then paid his charges, you allowed Acme to reasonably believe that the charges were authorized. Thus neither a third party to whom your father presented your card nor Acme itself had any reason to doubt the charges made in April and May, and you will likely be responsible for them to Acme and cannot recover from the merchants for allowing your father to use the card without authorization.

3) Are you required to pay the charges from June?

You probably will only be responsible for $50 of the $1,200 your father charged in June. The Federal Truth in Lending Act shields cardholders from any charges in excess of $50 that are made without any authority at all. 15 U.S.C. §§ 1602(o), 1643(a). The Franklin Court of Appeal has explained that this Act was passed principally to protect cardholders from "charges incurred as a result of involuntary card transfers." BAK Airlines (emphasis in original). In other words, if someone steals your card and charges more than $50 to it, you can only be held responsible for $50. Your father's use of the card to buy $1,200 of power tools in June after you recovered it from him probably qualifies as an "involuntary" transfer of the card. That is, because you had taken the card back, you dissolved any appearance of authority and removed any apparent authority on which third parties might have relied to assume that your father was allowed to charge purchases to your account. It is extremely unusual to make a credit card purchase by presenting the account number, the name of the cardholder, and the expiration date at the point of purchase instead of simple presenting the credit card itself. It would not be reasonable, in that circumstance, "to believe that the agent had authority to act for the principal" by charging purchases in the principal's name. Transmutual Insurance. Perhaps, had your father purchased the power tools online where it is customary to make purchases using only account details, it may have been reasonable for the seller to assume the transaction was authorized. But when your father appeared in person and handed the clerk at Franklin Hardware a piece of paper with these important pieces of information written down on it, the clerk should have had "notice . . . that [he] lacked the authority for the . . . purchases." BAK Airlines. Therefore you likely will be able to show that the charges were not authorized and you should not be responsible for them. Nor can Acme claim that you've given up the right to protest these charges, unlike the charges made in April and May for which you have already paid. Because you've detected the fraud now before paying the bill, you have prevented Acme from "reasonably believ[ing] that [your father] was authorized to use the credit card." Transmutual Insurance. Therefore you likely will be able to demonstrate that Acme cannot hold you accountable for the charges, beyond the $50 cap imposed under the Federal Truth in Lending Act. 15 U.S.C. §1643(a)(1)(B).

In summary, you will probably not be able to recover any portion of the sums you have already paid Acme to cover your father's charges, including the $1,850 you expressly authorized your father to charge in March and the $252.20 he charged without your authority in April and May. However, because you recovered your card and dissolved your father's apparent authority to use

it before he purchased the power tools at Franklin Hardware Store, and because you have not paid Acme for that transaction, you will probably not be responsible for all but $50 of the $1,200 charged in June.

Please feel free to give me a call once you have a chance to digest this. I am happy to discuss any steps you would like to take going forward if you would like to continue protesting the June charge to Acme before it is due on July 31.

Sincerely,
Miles Anders