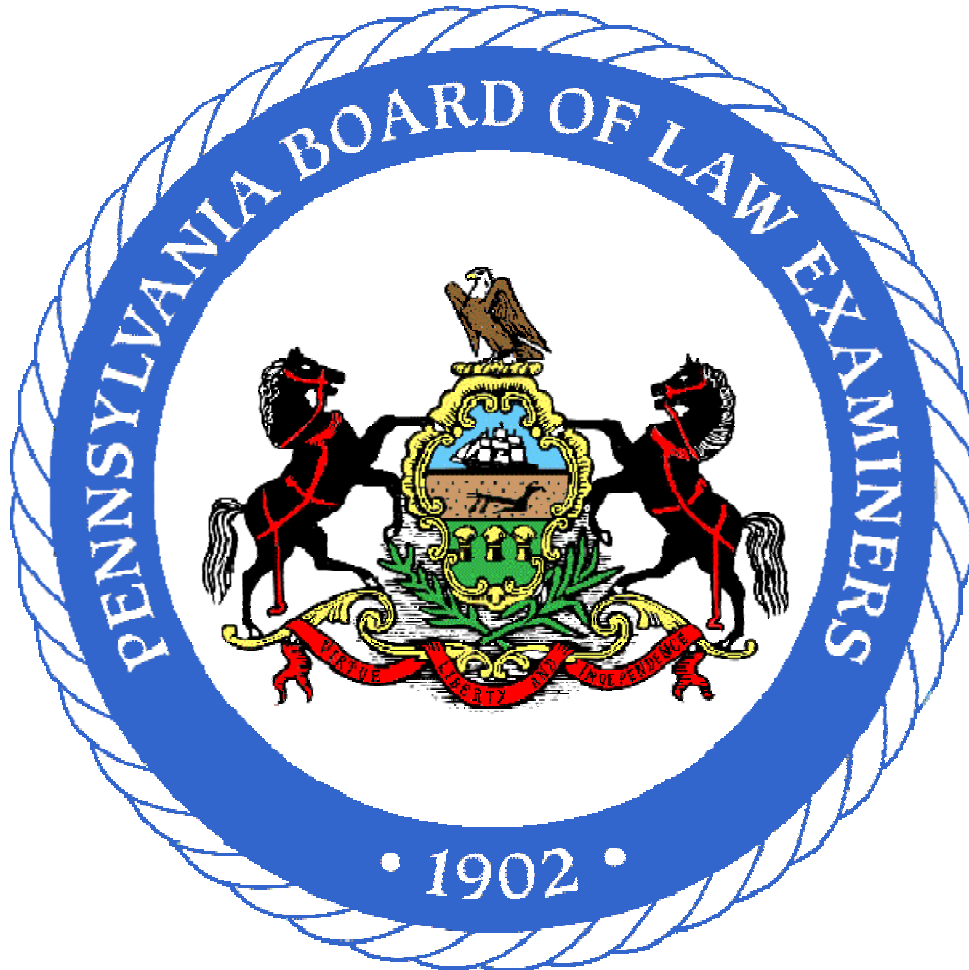


# FEBRUARY 2010 PENNSYLVANIA BAR EXAMINATION

---

## Sample Answers



Pennsylvania Board of Law Examiners  
601 Commonwealth Ave., Suite 3600  
Harrisburg, PA 17106-2535  
(717) 231-3350  
[www.pabarexam.org](http://www.pabarexam.org)

*This page intentionally left blank.*

## Performance Test: Sample Answer

February 23, 2010  
Mr. and Mrs. Benjamin Bridge  
Lot 3, Creek Estates  
Madison, Pennsylvania 19999

Re: Right to Use Lot 2 to Access Lot 3

Dear Mr. and Mrs. Bridge,

You have asked for an opinion regarding whether there are any legal theories that support the filing of suit against the Eastwoods to force the use of their property, known as lot 2, to gain entry to your property known as lot 3. Our firm has identified the legal theories of easement by necessity and easement by implication which may provide you a basis for suit against the Eastwoods to allow you use of their land to gain entry to your property.

It is unlikely that an easement will be created through necessity. No necessity exists because access to your land can be accomplished through the waterway. However, there is an easement by implication through the traditional test.

### 1. Easement by Necessity

Claiming the existence of an easement by necessity contemplates a situation in which a parcel of land is landlocked. Black's Law Dictionary defines landlocked as surrounded by land often with little or no way to get in or out without crossing the land of another. It is well settled law that when property is conveyed and is situated so that access to it from a highway cannot be had except by passing over the remaining land of the grantor then the grantee is entitled to a way of necessity over the lands of the grantor. An easement by necessity is always of strict necessity. An easement by necessity never exists as a mere matter of convenience. An easement by necessity is extinguished when the necessity from which it results ceases to exist. (Phillippi v Knotter)

There are three fundamental requirements to obtain an easement by necessity. The three requirements are:

A. The title to the alleged dominant and servient properties must have been held by one person. (Phillippi v Knotter) In Phillippi v Knotter the dominant and servient properties were found to be held by one person. The property was originally held by the O'Brien Coal Company. A part of the property was then conveyed to a subsequent owner, after which another portion of its property was conveyed to a new owner through a tax sale. (Phillippi v Knotter)

In our situation the dominant and servient properties were held by one person. Both properties were held by the Rancid Creek Development Corporation. Your lot and the lot of the Eastwoods were both originally part of the same property. The Eastwoods lot was sold to them by the Rancid Creek Development Corp. Your lot was sold to you through the tax sale, but like the sale in Phillippi v Knotter it was also a conveyance from the original land.

B. The unity of title must have been severed by a conveyance of one of the tracts. (Phillippi v Knotter) In Phillippi v Knotter the unity was severed by the conveyance of the tract by the O'Brien Company due to the sale to the owner.

Like in Phillippi, the severance occurred through the conveyance of the tract of lands. The sale to the Eastwoods created the severance. This conveyance broke the unity of title and thus the second element of easement by necessity is met.

C. The easement must be necessary in order for the owner of the dominant tenement to use his land with the necessity existing i) at time of the severance of title and ii) at the time of the exercise of the easement. (Phillippi v Knotter)

In Phillippi v Knotter the land that was severed to EJ O'Brien was always accessible from a public road. The court found that having access to a public road meant that the easement of necessity did not exist at the time of severance, thus the court found that the easement by necessity did not exist.

In our situation the necessity of using the Eastwoods land may not have existed at the time of severance. The Rancid Creek Development Corp. may have been able to gain access to their land from the waterway. All navigable rivers are deemed public highways under 43 USCA Section 931.

In Phillippi v Knotter the court found that when usage was temporary and ceased after the activities were completed then the easement did not continue to the time of the exercise of the easement.

Again at the time of the exercise of your easement the necessity may not have existed because navigable rivers are deemed public highways. Since you can access your land through the waterway using the public road may not be a necessity. An inconvenience is not a reason for easement by necessity.

## 2. Easement by Implication

You do have a strong argument that an easement by implication should be granted given that the circumstances indicate an implied intention of the parties that such an easement should exist. The Supreme Court in the case of Bucciarelli v. DeLisa, held that although the language in a granting clause does not contain an express easement or right of way, such an easement could be granted by implication. Such a grant is appropriate where there is a continuous use of a permanent right of way such that there is an implication that the parties intended that the use continue even though the necessity for such a use may no longer exist. This easement must exist at the time of severance and must be open, visible, permanent and continuous. These factors are clearly met in your case.

First, it clear from the letter from the Eastwood's ("Eastwood Letter") and the Affidavit of Ronald Rancid and the Affidavit of the Smiths that the easement was in existence at the time the land was severed. It is clear from the record that Rancid Creek Development Corp. had used what is now the driveway of Lot 2 to access Lot 3 from 1983 to 1987. Furthermore, this use had

continued for some number of years after the Eastwoods had purchased the land in 1987. Second, it is clear that the use was open, visible, permanent and continuous. The affidavits clearly indicate that the driveway was used by Rancid Corp. at "frequent intervals, at least on a weekly and sometimes on a daily basis." Although this use became less frequent over the years and eventually stopped, it nonetheless continued for a prolonged period of time during which, the Eastwoods failed to object to the use. This use was open and not conducted in secrecy as is clearly evidenced by the record. The Affidavit of the Smiths indicates that the use was visible. The Affidavit states that, over time, "as a result of this traffic, a definite dirt trail, approximately twenty feet wide came into existence by the time Lot 2 was purchased ... in July 1987. " The affidavit goes on to say that the trail was never paved, however, it was clearly visible from the adjoining road, Maple Street as well as from the adjoining property owned by the Smiths. The affidavit indicates that the trail had faded after Rancid Corp. stopped using the property, however, this fact will likely not be held against you.

The Supreme Court wrote that permanent or continuous use simply means that the use was not "occasional, accidental or temporary." This clearly was not the case here. It is clear from the record that the use continued over a prolonged period of time before the sale to the Eastwoods, and more importantly after the sale. Although the use became less frequent over the years and eventually stopped, there clearly can be implied, an intent by both parties, that the use existed. There was no protest from the Eastwoods during the relevant period. It could be implied that were Rancid Creek Corp. to resume moving the construction equipment today, that use would now be met with protest, given that the roadway was now paved and gated. However, this fact may be the only factor in the favor of the Eastwoods. Overall, the balance of the facts clearly indicate an intent to allow such use. As such, your claim will likely be meritorious.

In conclusion, I believe that there exist two different theories whereby you may seek access through Lot 2. My research indicates that an easement by implication is likely to be meritorious. If you have any further questions, please do not hesitate to contact me.

Thanking you.

Sincerely,

## Question No. 1: Sample Answer

1. Angela can only exercise control over the funds in the account held in joint tenancy during her lifetime. A joint tenancy creates a right to survivorship among the joint tenants. At Angela's death, title to the entire account passed to Melissa. The joint tenancy was valid at its inception because such can be established by donative transfer. The transfer was donative because Angela made it without consideration from or on behalf of Melissa (that we know of). Angela's will may have been a unilateral attempt to dissolve the joint tenancy, since it would have effectively destroyed Melissa's right of survivorship over the account. A joint tenancy can be dissolved by death of one party. Angela's will did not dissolve the joint tenancy. Therefore, the executor may not use the account previously held by "Angela and Melissa as joint tenants." Melissa is now the only person with access to the account. Also, Angela's will did not revoke the joint tenancy.

2. The account Angela left for Charles is a Totten Trust. As such Angela retained complete control over that account, i.e. deposits/withdrawals while she was alive. This account would not be an *intervivos* gift to Charles while Angela was alive. An *intervivos* gift is a gift to the beneficiary made while the testator is still alive. This account does not qualify as such. Because of the clear language in Angela's will regarding the use of this account, executor will be able to take the portion from it to pay expenses of the estate.

3. The fee-sharing arrangement did not violate any of the PA Rules of Professional Conduct.

Fee-sharing between attorneys is permissible as long as the client is aware of the fee sharing, and the client does not object. The fee agreement must be in writing, if it was a contingency fee agreement, where the client must be totally informed up front of the amount of the contingency fee and if there will be any changes in the fee upon settlement, litigation, etc. A 1/3 contingency fee is a normal amount, and that was the amount provided for in the executed fee agreement. Also, while the attorney should do some amount of work in order to receive a share of the contingency, the initial work done by Angela and then the referral to Barry, as long as the attorney's agree, is sufficient to give an amount to Angela. While half of the fee is not in proportion to the amount of work Angela did, it does not matter, as long as the attorneys agreed, and they notified the client, and the client did not object. Here, the client was told that "some share" of the potential fee would go to Angela, and the client had no objection. There is no requirement in PA to tell the client the exact percentages of splitting, as long as they are told and do not object to it. Therefore, "some share" is sufficient. Also, the 1/3 contingency fee is the amount which the client expected to pay to Angela if Angela had stayed on the case, therefore, there is no issue of it being a higher fee amount.

Finally, the contingency fee arrangement is permissible as it is a personal injury claim. If it had been a criminal case or a family law case, a contingency fee would not be permissible, as against public policy. Therefore, the ultimate arrangement of fee-sharing of the contingency fee did not violate any of the PA Rules of Professional Conduct.

4. Angela's estate would be required to report the \$30,000 referral fee received by Angela's estate and the \$1,000 check received by Angela prior to her death, in the 2010 tax year and 2009 tax year, respectively.

Under federal law, a cash basis filer is one who reports income (and deductions) in the year in which the income is received (and when the expenses are paid.) A taxpayer is not permitted to hold on to checks, or to otherwise prevent receipt of assets, in order to alter his or her tax liability. Rather, a taxpayer must report the income when it is available to her.

Here, Angela received a \$1,000 check in October 2009 that she did not cash. She died in December 2009 and it is unclear from the facts whether the estate cashed the check in December, 2009, or whether the estate waited until 2010 to cash the check. If the estate cashed the check in 2009, then the income must be reported in 2009 because it was received in 2009, and was cashed in 2009. If the estate waited until 2010 to cash the check, it must still include the income in the 2009 tax return because the check was received in 2009 and was available to cash in 2009. The \$30,000 referral fee was not received until 2010. For this reason, under federal law, the income need not be reported until 2010.

Angela's estate would be required to report the \$30,000 referral fee received by Angela's estate and the \$1,000 check received by Angela prior to her death, in the 2010 tax year and 2009 tax year, respectively.

## Question No. 2: Sample Answer

1. When a couple seeks to divorce, PA provides for an equitable division of marital property. This does not mean that the marital property will be divided equally but the court will use multiple factors to determine the division. Property between a husband and wife can be divided into 3 categories: the wife's separate property, the husband's separate property and marital property. Separate property includes all property acquired before the marriage with the exception that the increase in value of such property during the marriage is considered marital property, all property acquired after final separation and all property gifted to or inherited by the husband or wife in their sole name. Property acquired during the marriage is generally considered marital property subject to a few exceptions.

Sue had 3 pieces of property: the A City House, the Florida real estate and the Maine vacation house, and she is wondering, which, if any is marital property.

First, the A City house was acquired by Sue shortly before her marriage to Tom. This real estate remained in her name and increased in value from the time of their marriage from \$200,000 to \$280,000 on the date of their separation. Even though the property was acquired shortly before the marriage, this is not an issue. As long as the property is acquired sometime before the marriage it is considered separate property. However, when property increases in value during the marriage, the spouse is entitled to share in that wealth since it was accumulated during the marriage. Therefore, \$80,000 of the value of the A City house will be considered marital property.

Next, the Florida real estate was purchased by Sue before the marriage. This property remained solely in Sue's name and decreased in value by \$60,000, since it was worth \$300,000 on the date of the marriage but worth \$240,000 on the date of separation. Tom not only gets to share in the increase, but also gets to share in losses acquired during the marriage. Therefore, the \$60,000 loss is considered marital loss and would be considered in the equitable division of the property.

Lastly, the Maine vacation home purchased six months before the separation would not be considered marital property. Although this property was acquired during the marriage, Sue purchased the home using funds she just inherited from her Uncle Joe. It appears that this was a gift solely in her name and she acquired the property solely in her name. Since the property also did not increase in value during the six months prior to the final separation, this is considered Sue's separate property.

2. This question deals with the marital privilege. The issue is whether or not Sue can testify at Tom's preliminary hearing.

There are two privileges for married persons. First, there is Spousal Immunity which protects married persons from being forced to testify against a spouse. In PA, the spousal immunity privilege extends to criminal cases. The testifying spouse is the holder of this privilege and can waive it if they so choose. The second is the Marital Privilege which protects confidential communications made between spouses during the course of marriage. Both

spouses hold this privilege and the privilege is waivable only by the spouse asserting the privilege.

The spousal immunity privilege protects spouses from being forced to testify, but the testifying spouse is the holder of the privilege. Sue can waive the spousal immunity privilege and testify against Tom if she so chooses. Tom was arrested and charged in A City. In PA the spousal immunity privilege will apply. Whether or not Sue will testify against Tom is her choice.

What Sue can testify about will depend on whether the communications were confidential. Under the marital privilege, Sue cannot disclose anything Tom said to her in confidence during their marriage. Tom's statements about the robbery to Sue were confidential. No third parties were present to overhear. Additionally, the marital privilege survives the marriage. Tom and Sue's recent divorce will not preclude Tom from raising his objection. Since both spouses hold this privilege, Tom can assert the privilege to prevent Sue from testifying about his statements to her made in confidence.

3. There is sufficient evidence to support the filing of the terroristic threats charge against Tom. Terroristic threats are defined as threats of violence or harm made for the purpose of placing another person or group of persons in fear of harm or to create terror. Here, the facts make clear that Tom calmly told Sue that if he went to jail because of the robbery, he would burn their house down upon his release with her inside of it. This is clearly a threat, but there is a question of whether it was made to create terror due to the fact that it was stated in a calm manner. It is unclear whether Tom meant it to terrorize, but an average person in Sue's shoes would likely have a good reason to feel fearful. Tom therefore made a terroristic threat to Sue, even though it would not occur until after his release from jail.

4. This question deals with a person's Constitutional right under the 4th Amendment. The issue is whether the marijuana the police found should be suppressed.

The 4th Amendment protects a person from unreasonable searches and seizures by government officials. Police must have reasonable suspicion to stop a person briefly. Police must have probable cause to search a person and seize any items in which they have a reasonable expectation of privacy. Here, the police were going to stop Tom merely because he was walking alone at night on the street. Persons walking on a public street do not have as much of a reasonable expectation of privacy as they do in their home, but that doesn't mean police can stop them whenever to feel like it. Here, the police had no reasonable suspicion that Tom was engaging in criminal activity at the moment they approached him.

Under Federal Law, when a person throws something from their person during a police pursuit, the item is considered abandoned. Police confiscating the bag wouldn't violate any rights of the person fleeing because the property is not in their possession. No seizure occurs. Under federal law, Tom's rights were not violated. The marijuana would not be suppressed.

Under PA law, what encompasses a search and seizure is more broadly defined? Thus, people are given more protection than the floor provided by federal law. In PA, the minute police begin the pursuit (chasing of) a person, the pursuit constitutes a seizure. The moment police began chasing Tom, a seizure under PA law occurred. The police did not have reasonable

suspicion to stop Tom on the street. Thus, the subsequent chase/pursuit constituting a seizure would have violated Tom's right as being unreasonable. The seizure of the bag pursuant to an unlawful seizure, would render the evidence inadmissible as fruit of the poisonous tree.

### Question No. 3: Sample Answer

1. (a) Sally is likely to be found guilty of battery in a civil suit brought against her by Mark. Under Pennsylvania tort law, a claim for battery exists where there is: an intentional act by the defendant, which causes a harmful or offensive touching of the plaintiff. This includes actions by the defendant which cause the plaintiff to be offensively touched, even where the defendant has not physically touched the plaintiff himself. Harmful or offensive touching is established where the defendant has put into motion the actions that resulted in the touching. Further, “harmful or offensive touching” is considered anything that results in bodily harm to the plaintiff, or conduct that a reasonable person would find offensive.

Here, the facts show us that Sally sold her home to Mark with the specific knowledge that the drinking water would cause anyone who drank it to become violently ill because she needed the money from the sale. She didn’t care if the buyer became sick. Intent can be established where there is specific intent to cause the harmful contact, or where the defendant acts with a belief that the consequences are substantially certain to result from it. Sally may not have specifically intended to harm Mark here, but she was reckless with Mark’s welfare in selling him the home with the contaminated well. Further, Sally knew specifically that Mark was planning to drink the water.

Mark eventually drank the water and became very sick. Moreover, the facts tell us that Mark’s doctor confirmed that he had become very ill because he ingested the contaminated water. Thus, Sally’s intentional act caused bodily harm to Mark. Sally is thus liable in a civil suit for battery to Mark.

(b) In addition to battery, civil conspiracy, and intentional infliction of emotional distress, Mark should also bring an action for fraudulent misrepresentation against Sally. It is likely that Mark will be successful.

Fraudulent misrepresentation exists when: (1) A party makes a false representation of fact; (2) she knows the representation is false; (3) the party intended the victim to rely on the representation; (4) the victim relied on the representation; and (5) damages. In this particular case, Sally conspired with Charlie and Alvin to make false representations with respect to the quality of the water located in the well for the purpose of selling the property at a higher value. Sally personally informed Mark that the water was recently tested and assured Mark that the water was fine for drinking, which was false. In addition, as part of their conspiracy, the written sales agreement prepared by Charlie contained further representations as to the quality of the water and Alvin provided a false report that stated the water was fit for human consumption. All of these representations of fact were false at the time the parties made them. The false representations were material, as they relate to an important part of the purchase, since the property has no drinking water within twenty miles and Mark specifically requested that the water be fit for human consumption as a condition of purchase. In addition, Sally, Charlie and Alvin knew that the statements were false when made, as Alvin made a test that showed that the well was contaminated and all of the parties knew that the statement was false, including Sally. Third, they all made the misrepresentations with the intent that Mark would purchase the property at the \$225,000 sale price when in fact the property was valued at 55,000 without access

to good drinking water. Fourth, Mark relied in the representations of Sally, Charlie and Alvin, specifically when he agreed to purchase the property subject to receiving the test results and later relying on those false test results when he decided to purchase the property. Finally, Mark suffered damages as a result of the material misrepresentation when he drank the water and was severely ill, incurring medical bills of \$15,000 and when he lost approximately \$200,000 from the purchase as the property was not worth that much without the well. Therefore, Mark will be successful in a cause of action for fraudulent misrepresentation against Sally.

2. Sally should implead Charlie and Alvin in order to join them as defendants in the civil proceeding. The issue is how Sally can hold Charlie and Alvin legally responsible for any claims asserted by Mark.

Impleader is a device that can be used by the defendant to join additional defendants to a lawsuit. Impleader can be used provided that the defendants share in the responsibility for the plaintiff's claims. The defendant would use impleader so that the other tortfeasors could be also held liable for the tortious conduct that is in question, which would be battery and misrepresentation in this case. The requirement that is necessary to use impleader is that the case must involve the same transaction or occurrence. In this case, Sally can use impleader because Alvin and Charlie were also responsible for the harms that the plaintiff suffered.

I would conclude that Sally should use the civil device of impleader to join Alvin and Charlie as defendants so she can hold Alvin and Charlie partly responsible for the plaintiff's harms.

3. The court should rule that Sally's objection is overruled, as Sally's conversation does not fall within the pastor-penitent privilege. For the pastoral privilege to apply, a person needs to go to the pastor in confidence and seek spiritual counseling or for religious reasons in a place which will allow the conversation to be confidential and not overheard. Here, Sally is at a church picnic, not in a private place for confidential pastor communication. Also, Sally and the pastor were engaged in regular small talk, and then Sally asked if he knew a good lawyer after telling him what she did. Sally clearly is not seeking spiritual advice, and therefore, the objection will be overruled, as the conversation will not be considered privileged.

## Question No. 4: Sample Answer

1. Congress has the power to regulate interstate commerce. States may regulate so long as the regulations do not burden interstate commerce. A regulation that burdens interstate commerce and that discriminates between those regulated on the basis of citizenship must be necessary to achieve an important government purpose. An exception to this arises where the state is acting as a market participant. In such instances, the state may discriminate between entities on the basis of citizenship because the state is acting as a consumer, not as a governing body.

State S' regulation burdens interstate commerce. It requires that S' agencies only purchase furniture from manufacturers in State S if public funds are used for the purchase. Thus, manufacturers from out of state do not have the opportunity to sell their furniture to State S' agencies. Thus, the flow of interstate commerce into State S is disturbed. Further, the regulation discriminates on the basis of citizenship, as it clearly prohibits State S from purchasing furniture from any manufacturer but those located in S.

In this instance, however, State S is not acting as a governing body. Rather, it is acting as a market participant. Namely, it is acting as the consumer of furniture. In such a role, it is free to choose to purchase from or sell to whomever it wishes, and it is permissible for it to favor its own citizens. Therefore, State S is free to favor manufacturers who are located within State S, even if it is to the exclusion of those manufacturers located outside of State S. Because State S is acting as a market participant, it is not bound by the requirement, with respect to this regulation, that the regulation be the least discriminatory means possible to achieve a legitimate government purpose. Thus, the regulation is constitutional under the Commerce Clause of the US Constitution.

2. There is enough information for a fact-finder to conclude that each party has satisfied its burdens pursuant to the McDonnell Douglas burden shifting analysis of prima facie case, legitimate, non-discriminatory reason and pretext.

Title VII cases are governed by the McDonnell Douglas burden shifting analysis. In a Title VII national origin discrimination suit, the burden is first on the plaintiff to establish a prima facie case for discrimination. First, the plaintiff must show that he is protected under the statute. Second, he must show that the employer is covered by Title VII—must have at least 15 employees. Next, the plaintiff must show that he suffered an adverse employment action, such as termination, under circumstances providing an inference of discrimination.

Here, Juan has met his initial prima facie burden. His national origin is Mexican. Annabelle's employs more than 100 people. Juan has suffered an adverse employment action by being terminated. Juan has met his initial burden, so the burden shifts to the employer, Annabelle's.

Annabelle's must now show a legitimate, non-discriminatory reason for the adverse employment action. Such a reason must have existed at the time of termination. Here, Annabelle's has shown a reason by the sales manager's testimony that Juan was directed to visit

customers on a particular day, which Juan failed to do. Failure to follow a manager's order is generally a legitimate, non-discriminatory reason for termination (adverse employment action). Therefore Annabelle's has satisfied its burden and the burden shifts back to Juan.

In order to get the case to the jury, Juan must show that the legitimate, non-discriminatory reason was a pretext for termination. Juan has presented such evidence by showing that other sales employees, who were not terminated, testified that they had made similar scheduling changes because of personal commitments and no disciplinary action was taken. Further, Juan has presented evidence regarding his work history, sales volume, performance reviews. etc. Additionally, Juan was the only employee of Mexican descent, and he was also the only employee terminated.

Therefore, all parties have fulfilled their burdens such that the case may be submitted to the jury to decide the outcome.

3 It is unlikely that Annabelle's will prevail in an action to enforce the non-compete clause because the overbreadth of the clause is an unreasonable restraint on the employees and is more restrictive than it need be.

Under Pennsylvania law, non-compete clauses, although often upheld, are not favored because they present a restriction on a citizen's right to contract. Non-compete clauses that are upheld are generally upheld because they are narrow in scope, and limited in time, thereby creating only a reasonable restriction on the employee. Narrowly drafted clauses generally include restrictions on specific employment positions, at specifically defined types of companies, in a specifically defined region, for a limited period of time, and with an intent only to minimize the negative impact that an employee who leaves might have if he takes industry secrets to competitors. Non-compete clauses that exceed what is "reasonable" are not often upheld.

Here, Annabelle's seeks to enforce non-compete clauses that are unnecessarily broad in scope, as well as in time. Annabelle's seeks to prevent employees who leave Annabelle's employ for any reason, to accept employment, seemingly in any position, with any other furniture manufacturer, located within 250 miles of Annabelle's, for a period 7 years. It is unlikely that a court would sustain such a non-compete clause. Annabelle's significant business decline resulted in the termination of the sales staff. Since business is already in decline, it is unreasonable that an employee terminated for lack of availability of work should be prevented from obtaining any other work in the industry in which he has experience, or that his obtaining such work would severely and negatively impact business at Annabelle's. The non-compete clause does not specify that the terminated employee cannot accept another sales position, but simply prevents the employee from accepting *any* position in the furniture industry, at any company operating in a very large geographic region (250 miles). Finally, Annabelle's seeks to enforce this prohibition for a period of 7 years, far exceeding any reasonable number of years approved by the court. Annabelle's non-compete clause seems to be more retaliative in nature, and is overbroad.

For these reasons, it is unlikely that Annabelle's will prevail in an action to enforce the non-compete clause.

## Question No. 5: Sample Answer

1. Sarah does not have a legal remedy against Jack and Katie based on the language of the deed. At common law, one who obtains property by a quit claim deed has no greater rights in the property than the grantor. Furthermore, no legal remedy is available because the quitclaim deed has no warranties – it only claims to provide to grantee the rights that grantor had.

The deed from Jack and Katie to Sarah stated that “grantors do remise, release, and forever quitclaim, unto grantee....” This language is enough to allow us to determine that Sarah obtained the property from Jack and Katie by quitclaim deed. A quitclaim deed, as stated above, transfers to grantee only those interests grantor had in the property. There are no warranties associated with a quitclaim deed. Jack and Katie, the grantor, had not received valid title to Whiteacre. Therefore, Sarah has no more than Jack and Katie. Because the transfer occurred by quitclaim deed and there were no warranties regarding title, Sarah has no legal remedy against Jack and Katie.

2. Jack and Katie’s defense will not be successful. The issue is whether Jack and Katie are merely liable for the face value of the tickets or if they can be held liable for the \$6,000 that is owed to Bob.

Accord and satisfaction is a type of contract modification that occurs when the parties agree to a different performance in order to satisfy a debt. Generally, contracts entered into under the common law cannot be modified due to the pre-existing duty rule. In order to modify a contract under the common law, new consideration is required. In an accord and satisfaction scenario, the alternative performance that is tendered is considered the new consideration in the agreement when a debt is disputed. In this case, there is a dispute over the work performed because Jack and Katie claim that Bob failed to paint the interior and install marble tiles.

In this case, Bob agreed with Jack and Katie to build an addition to their home. After a dispute over the work done arose, the parties then agreed that Bob would accept two Super Bowl tickets in lieu of the \$6,000 payment that he was owed. An accord is a substitute performance. Instead of accepting \$6,000 under the contract, Bob agreed to accept two Super Bowl tickets to extinguish the debt. A satisfaction occurs when the accord is performed. The accord in this case was delivery of the two Super Bowl tickets. In order to complete the satisfaction, the accord must be performed. Satisfaction has not occurred in this case because Jack and Katie refused to perform the accord. They refused to tender the two Super Bowl tickets. When a party fails to perform the accord, the party that is owed the debt has the option to either enforce the accord or the original obligation. This would mean that Bob could force Jack and Katie to tender the Super Bowl tickets or Bob could sue on the underlying agreement, for which he was still owed \$6,000. Additionally, Bob has the option of which remedy to enforce, but he cannot receive both.

The parties attempted an accord and satisfaction, but since Jack and Katie refused to perform the accord, Bob has the option of enforcing the accord or Bob may sue under the original obligation. Jack and Katie’s defense that they only owe the face value of the Super Bowl tickets will not succeed.

3. Bob will be able to avoid liability under the contract due to frustration of purpose. The issue is whether Bob has any contract defenses due to the Super Bowl being cancelled.

In order to have the defense of frustration of purpose, the purpose of the contract must be substantially frustrated because of an unforeseen event that at the time of creating the contract neither party assumed the risk. The defense of impossibility, impracticability, and frustration of purpose are generally looked at together. In this case, the defense of impossibility would not apply since both parties are able to perform. However, Bob's tailgate party would occur at an empty stadium, which frustrates the purpose of the contract since both parties made the agreement under the assumption that the tailgate party was for the purpose of a Super Bowl tailgate. Bob must prove that the underlying purpose of the contract cannot be fulfilled, that the purpose of the contract was assumed by both parties to the agreement at the time the agreement was made, and that neither party assumed the risk. The underlying purpose surrounding the contract is evident: Bob wanted to have a tailgate party for the Super Bowl. Ted was aware of this purpose at the time the contract was made. The Super Bowl was then cancelled due to the strike. This was an unforeseeable event that neither party anticipated or could have foreseen. Additionally, neither party assumed the risk that the Super Bowl would be cancelled. Therefore, the elements of frustration of purpose have been established and Bob can avoid contract liability.

4. (a) Prior to divorce, Jack and Katie held Blackacre as tenants by the entirety. PA presumes that a tenancy by the entirety is created when property is devised to a husband and wife in both their names as husband and wife. Property held in tenancy by the entirety remains as such until the end of the marriage or a spouse's death. Here, Jack and Katie were married at the time they purchased Blackacre. Further, the deed conveying the property granted title to them "as husband and wife." Therefore, because Blackacre was transferred to Jack and Katie, spouses, as husband and wife, they held the property as tenants by the entirety. Their interests are not devisable, inheritable, and may not be alienated or encumbered without both spouse's consent.

(b) A tenancy by the entirety is destroyed by the divorce of the marriage partners. Upon divorce, the former tenants by the entirety become tenants in common, with each holding a 50% interest in the property, and equal rights of possession of the whole. Each party is free to alienate his or her interest, and each interest is descendible and devisable. Upon the sale of property held by tenancy in common, the proceeds are to be divided among tenants in common according to their interest in the land. Upon their divorce, Jack and Katie became tenants in common in Blackacre. Each held a 50% interest in the land, with equal rights of possession in the whole. When Blackacre is sold, therefore, Jack and Katie are each entitled to half of the proceeds, corresponding with each of their 50% interest in Blackacre.

## Question No. 6: Model Answer

1. The issue is which state law should the PA Orphan's Court apply, State Y or PA.

When considering a conflicts of laws analysis PA courts use a combination of the "governmental interest" and "substantial connections" tests. This hybrid determines which state's law is applicable based on which state has the greatest interest considering each state's policies, contacts, and interests. Each state's interests are compared to determine whether there are true conflicts or false conflicts. A true conflict exists if PA's law directly opposes the second state's law. The state with the greatest interests will have its law applied in a case.

Here, State Y's interests are based on the fact that Tim (the testator) was a longtime resident of State Y. The will was also probated in State Y. State Y's law specifies that "void" written on a will, if directed by the testator affects a valid revocation (which would result in any gift falling into the residuary estate). PA's interests are based on the facts that the land (Greenacre) is situated in PA and Nick (the will beneficiary) is a resident of PA. PA's law dictates that writing "void" on a will is ineffective unless two competent witnesses are present to witness the revocation. In effect, Greenacre would go to Nick, rather than the residuary estate.

The laws present true conflicts because both state's laws are directly opposed to one another effecting two diverse results. A court will most likely determine that PA has the greater interest because the land is situated in this state and not in state Y. Also, the beneficiary of the will (Nick) is the party who will be most affected by whichever law applies and he is a PA resident. PA has a great interest in protecting its residents. Thus, a court would rule that PA law applies and the result will be that the revocation made by Sam is ineffective.

2. (a.) Wind can validly accept Nick's lease offer if notice is given to all of the directors and a disinterested majority approve the decision.

A director owes a fiduciary duty to its corporation, its board of directors and its shareholders. Each owes a duty of care, duty of loyalty and a duty to act in good faith. An interested director will not breach any of these duties if he discloses all relevant and material information regarding his interest in the transaction and asks the board or shareholders for their approval. The decision must be with the best interests of the company at heart and the transaction must be beneficial to the company. (meaning fair price) Because Nick has disclosed his interest in this transaction, the company may validly decide (if in the best interests of Wind) to accept the lease.

- (b.) The board of directors will be held to a prudent director standard.

The BOD is held to a higher standard than a reasonable and prudent person because they owe fiduciary duties to each other and each shareholder. Each director owes a duty of good faith, loyalty and care in their actions. They are held to a standard of care that they would use in their own business judgment when making decisions for themselves. Under the business judgment rule, a court will not set aside a decision made by a board if the decision was made based upon reliable information (provided by credible sources), there was a due diligence in gathering information and the decision was made for the best interests of the company. Hindsight is always 20/20 and a court will not interfere without proof of director malfeasance or nonfeasance.

(c) Nick may be present to create the quorum but should not participate in the vote to avoid any inference of disloyalty.

In PA a majority of the quorum is all that is needed to pass a resolution by the board. The quorum will be based on the number of outstanding directors. Because Nick is essential to satisfying the quorum necessary to pass the resolution, he may attend the meeting, but it would be in his and the company's best interests if he refrained from participating in the vote. It will alleviate any implications of impropriety and is good business practice.

3. Wind should assert a breach of express warranty claim against Kurt's. On this, Wind is likely to be successful. In Pennsylvania, the UCC is the controlling authority in a sale of goods between merchants. Goods are considered any tangible, movable objects. Merchants are considered brokers who deal in goods. Here, the computer is a good and Kurt's is a merchant. Therefore, the UCC applies.

Under the UCC, where a seller of a product makes an express warranty about the fitness or use of the product, and the product does not conform to that use, the seller has breached an express warranty and is liable to the buyer for any damages that might have been caused as a result. An express warranty is more than mere sales "puffing." An express warranty is an affirmation of a material fact in the contract on which the buyer relies in making the purchase. Express warranties can be written or oral, so long as it was an affirmation material to induce the buyer's assent.

Here, the facts tell us that Wind's purchasing agent told Kurt what kind of computer he needed, and that Kurt agreed to build him one that would be suitable. The facts also tell us that Wind properly and validly waived all implied warranties in the purchase, so warranties of merchantability and fitness will not apply. Express warranties cannot be waived in this manner.

When Wind's purchasing agent went to pick up the computer, he asked Kurt if it would work the way he needed it to work. Kurt responded "without question!" This is an affirmation of material fact. Although this affirmation was not made until the contract had already been consented to by Wind, performance had not been rendered by Kurt. Therefore, it can be said that this statement of Kurt, when Wind's agent went to pick up the computer, was a material affirmation that induced Wind's agent to continue with the contract. As such, Wind is likely to be successful in its claim.