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PENNSYLVANIA BAR EXAMINATION

Sample Answers

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Performance Test: Sample Answer

Issue 1

Memorandum of Law

TO: Fredda Jones, Managing Partner

FROM: Applicant

RE: Assignment to Draft Legal Memorandum (Tater Products, Inc.)

DATE: February, 26 2019

The purpose of this Memorandum is to address the following two issues 1. whether the non-compete agreements are enforceable against Mr. Anderson and Mr. Benedict; and 2. whether obtaining a preliminary injunction will be successful after notice and a hearing against either Mr. Anderson or Mr. Benedict or both.

1. Whether the non-compete agreement are enforceable against Mr. Anderson and Mr. Benedict.

Mr. Anderson's covenant is most likely not enforceable due to lack of consideration. Mr. Benedict covenant is most likely enforceable.

For a covenant in restraint of trade to be enforceable the covenant must 1) be a contract for a sale of goods 2) be supported by adequate consideration 3) reasonably limited both in time and territory. (Kistler v O'Brien). Evidence of assent to employ or be employed which contains all the elements of a contract may be construed as a binding contract of employment even though not reduced to writing. Id. If a restrictive covenant is agreed upon at some later time than the original employment agreement, it must be supported by a new consideration. Id. Continuation of an employment relationship is not sufficient consideration for the non-compete covenant to be enforceable. Id. Further, to be enforceable, the restrictions imposed by the non-compete must be reasonably limited in geographic scope and duration. O'Brien.

Here, the contract signed by both, Mr. Anderson and Mr. Benedict is reasonable in scope and duration. The agreement provides that the employees will only be restricted for one year from being employed with another food manufacturing company and within radius of 30 miles. Non-compete agreement. The court in Boyds did not find a one year restriction and 50 miles radius restriction in a non-compete agreement to be unreasonable.

Thus, the question is if the parties received the adequate consideration for non-compete to be enforceable.

Mr. Anderson was working with Tater Products (**Tater**) for 25 years and the affidavit does not mention that he had a written employment agreement, however we might assume under the facts there was an oral employment agreement between Anderson and Tater. Between 1993 and 2019 Anderson was a production manager responsible for crucial Tater activities under the control of Tater management. Thus, there was a valid employment contract.

Mr. Anderson started his employment with Tater in 1993 and signed the non-compete agreement in 2018. Thus, there was an oral employment contract in place for 25 years prior to the signing the non-compete. However, there is no mention that Mr. Anderson received any additional consideration or change of his employment conditions in non-compete agreement. Thus, the non-compete was signed without additional consideration. The court in O'Brien stated that the mere continuation of employment is not considered a sufficient new consideration to make the non-compete enforceable. Thus, similar to the court's finding in O'Brien, Mr. Anderson's 2018 non-compete agreement is not enforceable due to lack of consideration.

Mr. Benedict signed his non-compete concurrently with signing an employment agreement with Tater. His employment was contingent on his signing the agreement. Thus, Benedict's non-compete was part of his employment contract, part of a bargained for exchange, and the consideration for the agreement was his employment. Thus, Mr. Benedict is bound by the non-compete agreement and it is enforceable.

2. Whether obtaining a preliminary injunction will be successful under the facts after notice and hearing against Mr. Anderson and Mr. Benedict.

Tater will most likely be successful in obtaining an injunction against Mr. Benedict but not against Mr. Anderson. Tater does not have an enforceable covenant not to compete against Mr. Anderson, and thus will not be able to satisfy one of the grounds for granting a preliminary injunction, i.e. the likelihood of succeeding on the merits.

Under PA laws a court might issue a preliminary injunction only after written notice and hearing. (Pa. R.C.P. 1531). The court may act on the basis of the averments of the pleadings or petition and may consider affidavits of parties or third persons or any other proof which the court may require. Id. To be awarded a preliminary injunction the party must prove the following elements: 1) immediate irreparable harm to the party seeking injunction 2) the requesting party's injury would be greater from refusing to grant the injunction than granting it 3) the injunction will restore parties to the status quo as it was before wrongful act 4) the likelihood of success on the merits 5) the injunction is reasonably designed to prevent the wrongful conduct and 6) the injunction will not adversely affect the public interest. (Boyds v. Tobox)

Tater will suffer irreparable harm if the preliminary injunction will not be granted. Maters is the only manufacturer that competes with Tater. If the secret of recipes are reveal, it will have immediate negative impact on Tater's sales. One it is revealed it cannot be taken back or revised. Maters has been trying to copy Tater's recipes for years, and thus there is a high likelihood that it will be pressuring the employees to give away Taters secrets. Mr. Anderson admitted that Maters is pressuring him to give away Tater's secret recipes. Once the secret is out, it cannot be made secret again. Thus, the harm will be irreparable.

Tater will suffer greater injury than Mr. Anderson and Mr. Benedict if the court refuses to grant injunction. Tater injury will be greater than its employees, because the employee can find a job anywhere after one year, while for Tater, if secret revealed, it will be lost forever.

The injunction will keep the status quo, which is the ownership of the secret recipe. If the employees are stopped from telling the secret recipe, the Tater will keep its sales and its secret recipe.

Likelihood of success on the merits. A plaintiff must demonstrate that the behavior it seeks to restrain is actionable and the right to relief is clear. Boyds. There are substantial legal questions that the trial court must resolve. Id. As shown in issue 1, the non-compete with Mr. Anderson will be most likely not enforceable. Thus, Tater will not be able to succeed on the merits regarding Mr. Anderson, because the covenant not to compete is not enforceable against him. However, the non-compete agreement is enforceable as to Mr. Benedict, and thus Tater may succeed on merits against Mr. Benedict.

Granting an injunction would be reasonable, as it would ensure the status quo and the parties will not be impair their activities. Tater could keep on distributing its products, while the employees could work for other food producers in the radius more than 30 miles, without giving away Tater's secrets.

Issue 2

ENFORCEABILITY OF NON-COMPETE AGREEMENTS

The non-compete agreement against Ben Anderson will not be enforceable as it is not supported by consideration and postdated the yearly discussion regarding wages, duties, and benefits. The non-compete agreement against Billy Benedict will be enforceable because it was an agreement that was signed and supported by consideration at the outset of his employment. In order for a non-compete agreement to be enforceable in PA, it must "relate to ... a contract for the sale of the good will of a business or to a contract of employment ... be supported by adequate consideration, and ... be reasonably limited in both time and territory." (Kistler, 8).

To determine whether there is valid consideration, a court must evaluate the time and circumstances of when a non-compete agreement is signed. If the agreement is signed after employment has commenced and is not supported by new consideration, then a court will likely find there is not a valid enforceable agreement because of the lack of consideration for the additional promise. (Kistler 8-9). Mere continuation of the employment agreement is not "sufficient consideration" for the covenant even if the employment is at will. (Id.) Where a contract is signed contemporaneously with an employment offer, the court will typically find that there is valid consideration. (Id.) In certain circumstances, parties may bind themselves to an oral contract through mutual manifestations of assent. (Kistler, 8). Evidence of such assent is usually found if the parties, prior to a written agreement, discuss all aspects of the employment relationship, including wages, duties, and benefits. (Kistler, 8).

Jerry Idaho's affidavit states that Ben Anderson has worked for the company for over 25 years. At no point prior to last summer did Tater ask/require him to sign a non-compete or any other written agreement. Mr. Idaho indicates the yearly discussion regarding Anderson's wages, responsibilities, and benefits occurs at the beginning of the year. The non-compete was signed on June 24, 2018. Anderson's non-compete was not executed in contemplation of his employment because he had already worked at the company for 25 years, nor was it contemplated at his yearly review where his job responsibilities and wages were outlined. Thus, Anderson had an existing employment agreement based on mutual manifestations of assent covering all aspects of the employment relationship like wages, duties and benefits. As such, in order to enforce the agreement against Anderson, Tater would have had to offer additional consideration to make the non-compete agreement binding and enforceable. Therefore, Tater would not be able to enforce the non-compete agreement against Anderson.

In contrast, Benedict was hired in July and his hiring was contingent on his agreement to sign the non-compete. He signed the document on his first day of employment at the same time he signed the employment contract describing his duties, wages, and benefits. Benedict's non-compete, thus, would be enforceable because it related to his contract of employment (his job at Tater's), and was supported by adequate consideration (his being hired), and was reasonable in time and territory (1 year and 30 mile radius).

Tater would be to enforce the non-compete against Benedict, but would not be able to enforce it against Anderson.

Issue 3

II. Can We Successfully Obtain a Preliminary Injunction after Notice and a Hearing?

A court shall issue a preliminary injunction only after written notice and hearing unless it appears to the satisfaction of the court that immediate and irreparable injury will be sustained before notice can be given or a hearing held, in which case a court may issue a preliminary injunction without hearing or notice. Pa. R.C.P. 1531. Further, in that instance, the court may act on the basis of averments of pleadings or petition and may consider affidavits. ***Id.***

Any preliminary injunction is an extraordinary, interim remedy that should not be issued unless the moving party's right to relief is clear and the wrong to be remedied is manifest. ***Boyds.*** The party seeking a preliminary injunction must show (1) the injunction is necessary to prevent immediate and irreparable harm; (2) greater injury will occur from refusing to grant the injunction than granting it; (3) the injunction will restore the parties to the status quo as it existed before the alleged wrongful conduct; (4) the likelihood of success on the merits; (5) the injunction is reasonably designed to prevent the wrongful conduct; and (6) the injunction will not adversely affect the public interest. ***Boyds.*** As to the likelihood of success on the merits, the plaintiff must demonstrate the behavior it seeks to restrain is actionable, the wrong is manifest, and the right to relief is clear. ***Id.*** He is not required to prove he will prevail on his theory of liability, only that there are substantial legal questions that the trial court must answer. ***Id.***

Here, it is likely that we can successfully obtain a preliminary injunction as to Mr. Benedict, but not as to Mr. Anderson.

First, Mr. Idaho can show that the injunction will prevent immediate and irreparable harm. If there is not an injunction, Mr. Benedict will disclose secret cooking techniques to Maters, a rival corporation. Specifically, Mr. Idaho stated he may disclose the temperature at which to cook and the time for addition of ingredients. ***Compare Boyds*** (finding Appellant failed to provide any support for how it has suffered irreparable harm). Anderson has the secret recipe and could disclose that. Thus, once these secrets are known, it's almost impossible to "put the lid back on the container" and prevent the use of the secrets by Maters.

Second, greater injury will occur because Maters has been attempting to create a dish to challenge Tater's signature dish, and the disclosure of these secrets by Benedict and Anderson will allow Maters to get closer to creating the dish that does not only challenge, but is almost identical to Taters signature dish.

Third, if there is an injunction, it would allow the status quo to remain the same. Maters has been trying unsuccessfully to copy Tater's recipes, and cannot without the secret recipes. Accordingly, the injunction would prevent Maters from obtaining the secrets, and maintain the status quo.

Fourth, Mr. Idaho can show that the action to be restrained is actionable regarding Mr. Benedict, but not Mr. Anderson, (see above analysis regarding the enforceability of the non-compete agreements against Anderson and Benedict), and the right to relief is clear: preventing the distribution of their trade secrets.

Fifth, the injunction is designed to prevent a specific wrongful conduct: the telling of the secret recipes and cooking techniques to Maters, the only other food manufacturer that makes dishes similar to Taters.

Sixth, the public interest would not be adversely affected because they can still buy the products from the respective manufacturer, as they currently do.

Accordingly, it is likely that a preliminary injunction will be granted against Mr. Benedict, but not Mr. Anderson.

Question 1: Sample Answer

Issue 1

Under the PEF Code, the $250,000 will go to Stacy as the contingent beneficiary, because Jimmy will be treated as a "slayer" and thus as having predeceased Kim for purposes of the life insurance policy.

As a general rule, under the PEF code, life insurance and bequests under a Will will go to the named beneficiaries or donees of the policy or bequest, as applicable, unless an exception within the PEF Code applies. One such exception under the PEF Code is that a slayer, or one who willfully and unlawfully murders the donor, will be deemed to have predeceased the donor of the gift and the gift will pass through the residuary under the will or contingent takers under a life insurance policy.

In this case, we are told Kim obtained a life insurance policy with a death benefit of $250,000, which named Jimmy as the primary beneficiary of 100% of the death benefit, and Stacy as the contingent beneficiary. However, we're also told that Jimmy, after hearing Kim tell Stacy he was a terrible chef and may be fired, the next day he physically attacked and killed Kim. We are also told he was arrested and promptly convicted of first degree murder, making him a slayer, or one who committed an unlawful and willful killing, under the PEF Code. As such, Jimmy will be treated as having predeceased Kim for purposes of the PEF Code, and the gift will go to the contingent beneficiary, which is Stacy.

Issue 2

Kim's estate is obligated to pay the big bank debt because the executor of the will is responsible for paying the debts of the deceased and the proceeds must be taken from the estate.

Under Pennsylvania Law, the estate is obligated to pay a valid debt of the testator. The executor is responsible for paying the debt out of the probate estate.

Here, Kim's estate contained a home appraised at $300,000 at the time of death and $100,000 worth of stock. Big Bank has a valid debt against Kim for the $50,000 balance on the credit card. Since Kim’s estate has sufficient funds to pay Big Bank to satisfy the debt, Stacey, the executor of the estate, is obligated to pay the Big Bank debt.

Therefore, Kim's estates estate is obligated to pay the Big Bank debt.

Issue 3

a. Stacey should not report the receipt of Kim's house and stock as income because probate transfers are not considered income.

Under federal income tax law, a cash basis taxpayer is responsible for reporting income when they receive it and deductions as they are incurred. Money received from inheritance, life insurance, and wills are excluded from income.

Here, Kim has a home appraised at $300,000 and $100,000 worth of stock on the date of her death. Stacey is designated as the sole beneficiary under the will. She received the house and stock through probate. The house and stock are excluded from income because they are probate transfers.

Therefore, Stacey should not report the receipt of Kim's house and stock as income.

b. Stacey must report $10,000 as income on her 2018 federal income tax filing because the stock was sold for $10,000 more than the fair market value of the stock upon the date of Kim's death, which reflects the basis of the stock.

The basis of a stock that an heir received from probate is the fair market value of the stock at the time of death. Income is defined as income from whatever source derived, unless excluded. Selling a stock for gain is income. The amount reported as income is the increase from the basis of the stock. A cash basis taxpayer is responsible for reporting income when they receive it and deductions as they are incurred

Here, Stacey received the stock through probate in October 2018. The stock was worth $100,000 on the New York Stock Exchange at the time of Kim's, the testator's, death. Because Stacey received the stock upon the testator's death, that is Stacey's basis in the stock for tax purposes. Stacey sold the stock for $110,000 in November. That is a $10,000 more than Stacey's basis in the stock. Stacey must report this gain in her 2018 tax filing when she received the income.

Therefore, Stacey must report $10,000 as income on her 2018 federal income tax filing.

Issue 4

Chuck will be found to have violated the PA Rules of Professional Conduct (the RPC) with respect to his duties to prospective clients in his discussion with Big Bank.

Under the RPC, a lawyer owes a duty to prospective clients similar to that of former clients, in that a lawyer is not permitted to use the confidential information of a prospective client where the use of that confidential information would be to the detriment of the prospective client. A lawyer is permitted to represent a party in a matter adverse to a prospective client so long as the lawyer obtains the prospective client's informed consent.

Here, Stacy scheduled a consultation with Chuck, a lawyer, to discuss Kim's estate, of which Stacy was the representative. At the meeting, Stacy provided detailed information to Chuck about the estate, including the credit card debt owed to big bank that she did not want to

pay for emotional reasons, as well as the assets of the estate. The sharing of this level of detail with Chuck made Stacy a prospective client, and the only reason she did not become a client of Chuck's is that the facts indicate that she decided to continue the estate administration on her own; Chuck even asked her to sign an engagement letter. By becoming a prospective client of Chuck's, Chuck had a duty to protect the confidential information Stacy disclosed and to not use it to her detriment. Following the meeting, when Big Bank called, Chuck correctly stated to Big Bank that he couldn't take the case, because he learned confidential information regarding the very estate Big Bank was attempting to collect from, but he did state that "I can tell you Kim's estate has plenty of assets." This was a violation of the rules because, by indicating the amount of assets, which was confidential information of the estate, to Big Bank, Big Bank was able to assess the likelihood of collecting its debt from the estate. Thus, the information was clearly detrimental to the estate because Stacy made known she would rather not pay Big Bank and because Big Bank was not sure whether to proceed as it did not know if the estate had the money to pay. Therefore, Chuck will be found to have violated the RPC.

Question 2: Sample Answer

Issue 1

The other warranties that could arise under the Code are the implied warranty of merchantability, the implied warranty of fitness for a particular purpose and the implied warranty of title.

Implied Warranty of Merchantability

Under the Code, the implied warranty of merchantability arises when a "merchant", a party who regularly deals in goods of the kind sold, sells products to a third party. The warranty provides that the goods will be able to be used by the buyer for their ordinary and usual use.

Here, we are told that Big's members have agreed to proceed with a retail store to sell the used construction equipment and tools utilized in Big's general construction activities. By opening a retail store for the sale of the used goods, Big will be deemed to be a merchant of the used construction items it sells (a seller who regularly deals in goods of the type sold); it is immaterial for purposes of the Code that Big will have just opened the retail store, as the retail store itself and the selling of the used construction goods in that store will make Big a merchant for purposes of the Code. It is also immaterial that the items are used and not newly manufactured, as the implied warranty of merchantability applies to all goods sold by a merchant who regularly deals in goods of that the type sold. As such, without more, Big will be deemed a merchant of the used construction goods it sells and will be deemed to have warranted that the goods sold are fit for the ordinary and usual use.

Implied Warranty of Fitness for Particular Purpose

Under the Code, the implied warranty of fitness for a particular purpose arises when any seller of goods, not just a merchant, knows or has reason to know of the use for which a buyer of goods intends to use the items and the buyer is relying on the seller's expertise or knowledge, and the seller knows this, with respect to those goods in order to acquire good(s) that will accomplish the buyer's particular purpose. This warranty provides that the goods acquired by the buyer will be able to be used for the buyer's particular purpose.

Here, although Big would be deemed a "merchant" under the Code with respect to the used construction equipment, this is irrelevant for purposes of the implied warranty of fitness for particular purpose, because the warranty attaches to products sold by non-merchants as well. This warranty could arise if a buyer came into Big's retail store (or called the retail store) and provided Big with specifications for a product and stated the purposes or manner in which the goods were to be used, and/or the objective the buyer was attempting to accomplish by acquiring certain goods. Such information likely would give Big knowledge (or would be deemed that Big should know) the specific purpose for which a buyer planned to use the products, and if the buyer was relying on Big's construction and construction equipment knowledge and expertise in acquiring the products, these facts would cause the implied warranty of fitness for particular purpose to attach to the products sold by Big.

Implied Warranty of Title

Under the Code, a seller warrants that the seller actually owns valid title to the products sold and has the right to sell the products to the buyer, free of any rights of a third party. This warranty attaches to every sale by a seller unless the circumstances indicate or the buyer has reason to believe that the goods are not actually owned or may not actually be owned by the seller.

Here, Big will likely be deemed to provide this warranty on every good it sells, unless it expressly indicates that it did not actually own or was unsure if it owned certain of the equipment it used in its business, which is unlikely. Thus, used construction goods sold by Big will be subject to a warranty of title that Big actually owns the item and has a right to convey the item to the buyer free and clear.

Issue 2

Under the Code, Big could prevent the implied warranty of merchantability and the implied warranty of fitness for particular purpose (together, the implied Warranties) from attaching by including clear disclaimers of all such warranties in the information it provides to buyers to which it sells each product. To disclaim the warranty of title, the seller can exclude this only by specific language or circumstances which tell the buyer the seller does not claim title or is selling only the title the seller has.

Under the Code, sellers of goods can disclaim implied (but not express) warranties if they (1) include clear and conspicuous language disclaiming all implied warranties, which such disclaimers are unambiguous, can be clearly seen and read and expressly reference disclaiming the "implied warranties of fitness for particular purpose, merchantability and title" or (2) include clear and conspicuous language that states "AS IS" or "WITH ALL FAULTS," which will indicate that the products being sold are sold without the Warranties.

If Big were to include in the information on its goods clear and conspicuous disclaimers that expressly disclaim the making of the implied Warranties (and expressly mention the warranties of "fitness for particular purpose and merchantability" in the disclaimer itself), the Code will consider each of such warranties disclaimed. Additionally, if Big included clear and conspicuous "AS IS" or "WITH ALL FAULTS" language in the materials with which it sells the goods, this will be deemed to waive the implied Warranties. With respect to the warranty of title, Big should also clearly state that it is not making any warranty with respect to record title of the equipment and does not represent that it owns the equipment free and clear, although unless Big is selling used equipment that it leases, this warranty should not present an issue.

Issue 3

Assuming the members did not engage in fraud, intentional misrepresentation or other act with respect to the items sold, the members would not have personal liability for breach of an implied warranty under the PA Uniform Limited Liability Company Act of 2016 (the LLC Act).

Under the LLC Act, a Pennsylvania (PA) limited liability company (LLC) is a creature of statute that, similar to a PA corporation, is a legal entity separate and apart from its members and provides liability protection for its members. As a general rule, members of a PA LLC are not personally liable to third parties with respect to liabilities and obligations of the LLC incurred in the ordinary course of the LLC's business, absent some fraud, intentional misrepresentation or other bad act by a member. Assuming the PA LLC was duly formed and is in good standing under the laws of the State of PA, members are liable only as far as their investment (or capital contribution) into the LLC, and are not personally liable beyond that for obligations and liabilities of the LLC incurred by the LLC in the ordinary course.

Here, Big would be selling used construction goods out of a retail store to third party buyers (along with the general construction activities it has previously engaged in). Thus, once the retail store is opened, part of Big's ordinary course of business would be selling used construction goods from its retail location. As part of those ordinary course business activities, we are told that all warranties that might arise (other than express warranties) will apply to the goods sold. As such, because the construction goods will be sold in the ordinary course of business, and warranties will apply to such goods being sold in the ordinary course of business, any claim for breach of warranty will be levied against Big itself as a separate legal entity (an LLC). Absent any fraud, intentional misrepresentation or other bad act by a member, breach of warranty claims arising with respect to the construction goods sold will be against the LLC itself and the members will not be personally liable for any such claims.

Issue 4

Under the LLC Act, the members will not be permitted to proceed by having Big acquire Al's membership interest, because doing so would cause Big’s liabilities to be greater than its assets, it would fail what is known as the balance sheet test. Big should instead have Ben and Carl acquire Al's membership interests.

Under the LLC Act, a PA LLC is generally free to operate as its managers, managing members or members (whichever body controls the LLC in question) see fit. However, the governing body of the LLC is not permitted to take an actions that would cause, or permit any distributions in respect of their LLC interests to members that would cause the LLC (1) to be unable to pay its debts as they become due, or (2) if the total liabilities of the LLC would exceed to the total assets of the LLC immediately following the transaction in question.

Here, we are told that Al would like to retire and that one option for him is to sell his membership interests back to Big and have Big give him a note for an aggregate face amount of $200,000, payable over five years with interest. The note would sit on Big's balance sheet as a liability. We are also told that Big's accountant advised that if Big purchased Al's shares in exchange for the note, Big would be able to pay its debts as they become due, but adding the face value of the note to Big's total liabilities would cause Big's total liabilities to exceed its total assets by more than $100,000 immediately following the transaction. Thus, Big would be unable to meet the balance sheet test following the transaction with Al. As such, Ben and Carl should acquire Al's membership interests, instead of Big.

Question 3: Sample Answer

Issue 1

Other than criminal trespass and receiving stolen property, Thad should be charged with burglary and theft by unlawful taking.

Burglary

Burglary is the entering into a building or occupied structure with the intent to commit a crime. The defendant can defend against a crime of burglary if the building was abandoned, it was open to the public, or he had permission to be on the property.

Thad entered Mark and Donna's house by way of a window. He entered the home to steal anything of value that he could use support his habit. Therefore, he entered an occupied building (house) with the intent to commit the crime of theft (see below). There is no indication Thad had permission to be on the property, particularly because he entered through a window rather than the front door. Further, there is no indication that the house was open to the public. Rather, Mark had inadvertently left the latch open before they left of their trip - suggesting it was not intentional. Finally, the home was not abandoned simply because the family had gone on a vacation. And in fact, they intended to return to the home the next day, and thus, there certainly was no intent for abandonment.

Thus, Thad can be charged with burglary.

Theft

Theft by unlawful taking is the unlawful taking of movable property of another with the intent to permanently deprive the owner. As noted above, there is no indication that Thad was lawfully in the family's home, and thereby, inferring that he did not have permission to take anything therein. Further, he took a computer, which is a movable personal item. Finally, Thad openly admits that he took the property so he could support his "habit" and needed money. This implies that he intended to permanently deprive the family of the computer by exchanging it for money to pay for his habit and/or simply give it in exchange for supporting his habit. Either way, he intended to permanently deprive the family of their computer.

Thus, Thad can also be charged with theft by unlawful taking.

Issue 2

Donna has agreed to have primary physical custody of the girls, Mark has agreed to partial physical custody, and both have shared legal custody. There are a number of custody relationships that can be created when a married couple with children get divorced. Physical custody is when a parent (or some similar party acting in loco parentis) have actual physical control over the everyday care of a child. This includes where the child stays, food, and medical

care. Such custody can be sole (in control of one party), primary (which party the child stays with the majority of time), joint (split 50/50), or partial (physical custody over a smaller period of time). There is also legal custody, which means that a party had the authority to decide things like education, some medical decisions, religious upbringing, etc. This can also be sole or joint. When there is joint legal custody, the parties both have legal custody so can both have authority when making major decisions for the child.

Generally a court will use the standard of what is in the best interest for the child to determine a custody arrangement. This standard requires a court to analyze, inter alia, the relationship between the child and parents, the time a parent spends at work, any abuse issues between child and parent, and substance abuse issues of the parent. Generally a child's opinion on who they want to stay with is not determinative, but the older the child gets, the more weight the opinion will have. A court will also consider an agreement reached by the parents.

Issue 3

The Court will likely allow Kristen's to testify because she is a reliable witness, despite her tender age.

Typically, in order to be a competent witness, she must have the ability to perceive the event, have memory of the event, and be able to communicate the observation. Importantly, in PA, all witnesses are reliable to testify unless there is a defect in their ability to communicate, defect in their obligation to understand the need to be truthful, a defect in their memory or a defect in their perception of the event. In addition, under the tender age exception, a young witness can testify provided she has the ability to perceive the event, has a memory of the event and is able to communicate about the event. She must also be able distinguish fact from fantasy and be able to tell the truth. Mere age is not a disqualification for being a witness, provided the foregoing is met.

Kristen, an excellent student and athlete, who is mature for her age, observed Thad go through a window, and later come out with a computer. She was able to give a detailed description of the computer, ID-ed the person as Thad, and gave a description of what he was wearing. Kristen woke her parents up to tell them what she saw. They called the police, and provided a fit description, which was later verified by police as being accurate when they apprehended Thad at or near his home. Under these circumstances, there is no indication that Kristen's memory was faulty, that she lacked the ability to perceive or communicate her observations. And moreover, it appears that she told the truth and did not make it up.

Accordingly, the court should allow Kristen to testify because she is a reliable witness, despite her tender age.

Question 4: Sample Answer

Issue 1

The Court will analyze Tom's Equal Protection Claim under an intermediate scrutiny standard, and Tom will most likely be successful.

The issue in this case is whether Section 123 was enacted and substantially relates to an important government interest. Under the Equal Protection Clause of the 14th amendment, a State actor may not enact laws or otherwise discriminate against one group or class over another. If a person of a certain race, nationality, or other suspect classification is involved and is discriminated against then strict scrutiny applies. If a quasi-suspect class is involved, like gender, then the Court will use intermediate scrutiny to evaluate the claim. If there is no suspect or quasi-suspect class involved, then the Court will analyze the statute under a rational basis test. The burden is on the State in strict scrutiny and intermediate scrutiny cases, but the burden is on the Plaintiff in rational basis analysis.

In this case, the Court will utilize the intermediate scrutiny standard because the statute discriminates on the basis of gender - a quasi-suspect class. Under intermediate scrutiny, the State must show that the discrimination is substantially related to an important government interest. In gender discrimination cases, the reasons for regulations discriminating against men in favor of women must be very persuasive.

Tom will most likely be able to win this constitutional challenge because the government's reasons for discrimination are not substantially related to furthering an important government interest. First, the government did not have any legislative or other history explaining why Section 123 only require locating the mothers. Secondly, there is no explanation as to how the costs of locating the father are any different than the costs to locate the mother, or why the mother deserves the preference over the father. Seemingly, the cost to find both of them is the same, and there is no reason why a father would be more expensive than finding the mother. There is no cost related basis for why mothers were categorically chosen over the fathers. To keep costs down, the rule could state that only one of the parents needed to be notified. This keeps the statute gender neutral while also cutting down costs. Additionally, Tom will argue that while the government certainly has an interest in keeping their costs down, a father's right to know that his child is being given up for adoption outweighs that right.

Lastly, the State argues that the bond between a mother and child needs to be protected, but fails to state why that bond needs to be protected over the bond between a father and a child. Tom would argue that no data or other evidence shows why the bond between a mother and a child needs to be protected, and why the State would consider this an important interest. The State offers no analysis or data to show that a bond between a mother and a child needs to be protected at all, let alone why it needs to be protected over the bond of the father and the child.

The State has failed to assert or provide an explanation for why they have an important interest in protecting the bond between a mother and a child, let alone why this bond is needed over the bond between a father and a child, and therefore, has failed to meet the intermediate

scrutiny standard. Section 123 should be held unconstitutional, and Tom should be successful in his challenge.

Issue 2

a. Angie can successfully make out a claim for hostile work environment because she experienced unwelcome and offensive comments due to being pregnant and suffered adverse employment action.

Under Title VII of the Civil Rights Act, an employer who employs at least 15 employees is subject to Title VII. Title VII protects individuals for discrimination based on sex, race, ethnicity, and nationality. Included in Title VII is an employment discrimination provision against creation of a hostile work environment. A hostile work environment occurs when an employee experiences unwelcome and offensive sexual advances or unwelcome and offensive conduct based upon their status in a protected class and the behavior is so severe and pervasive that it alters the terms of employment and creates an abusive work environment. The conduct must be objectively offensive and subjectively offensive to the employee. To bring a claim under Title VII, the employee must prove (1) she is a member of a protected class, (2) experienced objectively and subjectively unwelcome and offensive conduct (3) the frequency of the conduct and (4) that the harassment unreasonably interfered with her work performance.

Here, Angie would need to prove she is a member of a protected class who experienced sexual advances or conduct due to her protected class, the conduct was frequent and it interfered with her work performance. Dundmiff Co. (DM) is subject to Title VII because it employs more than 15 people - it employs over 400. Angie is a member of a protected class, as a woman. Next, both Angie and Sue were told by their supervisor, Mitch Scott, how "not to get fat" and about loose women getting "knocked up." This behavior occurred frequently, on a daily basis. Additionally, Mitch told Angie "Well, I can still get in line for you after you lose the baby weight." Angie found this to be subjectively offensive because she repeatedly would leave in tears, produced less work and complained to friends, thus, it affected her work performance. Before she left for maternity leave, Angie was a staff accountant. After she returned from maternity leave, Angie was demoted to a bookkeeper position, which resulted in a pay cut and more minimal duties. To add to the comments, Mitch told Angie "Don't worry, I'm sure you will do anything to get your old job back. Be more careful this time - I'm not ready to be a daddy." As a result of Mitch's comments, Angie immediately quit. This frequent conduct would be found to be objectively and subjectively offensive as to alter the terms of employment.

b. DM is unable to claim the affirmative defense because Angie suffered adverse employment action by being demoted after she returned from maternity leave.

An employer can raise an affirmative defense if (1) the corporation has a policy in place to address harassment in the workplace and (2) the employee unreasonably fails to avail herself of the procedure and policy. If, however, the employee has already suffered adverse employment action, the employer is unable to use this affirmative defense.

Here, Dundmiff has an anti-harassment policy that directs employees to report harassment to DM's human resources department. However, neither Sue nor Angie ever availed themselves of this process. So it would look like the affirmative defense applies. Ultimately, however, the affirmative defense is unavailable to DM because Mitch demoted Angie to bookkeeper after she returned from maternity leave. He took an adverse employment action against Angie. Therefore, while DM could have successfully raised the affirmative defense, because Angie was demoted, DM is unable to successfully raise the affirmative defense.

Issue 3

The court should analyze whether Sue has a common question of law or fact to the current hostile work environment litigation between DM for Mitch's conduct to Angie.

Under the Federal Rules of Civil Procedure, a plaintiff may request to intervene in an ongoing claim. There are two types of intervention, intervention as of right and permissive intervention. Under intervention as of right the intervening party must show that he or she has an interest in the current litigation that is not adequately represented by the current parties. Under permissive intervention the intervening party must have a common question of law or fact in order to intervene. The court is permitted, but not required, to allow a party to intervene if it would cause undue delay or unfairly prejudice to a current party to the action. Additionally, the court has discretion to determine if intervention should be allowed.

Here, Sue exhausted her administrative remedies and filed a timely motion to intervene. Therefore, it is unlikely that Sue could not file her own suit. Also Angie's suit probably wouldn't dispose of issues relating to Sue.

Sue would argue that she is entitled to permissive intervention give the commonality between the two Title VII hostile work environment claims. Specifically, there are numerous common factors: both women were pregnant at the same time, both women were told by Mitch about "loose women getting knocked up" and were told their breasts were getting large, and comments on how not to get fat. Additionally, neither Sue nor Angie submitted a complaint to the human resources director or filed a formal complaint in the hopes that the comments would cease. The court, however, will also look at the fact that Sue married her baby daddy's father during pregnancy and was not demoted after returning from maternity. These factual differences should be factors the court considers. Also the court would look at whether Sue's intervention would cause Angie's claims to be unduly delayed or if Angie would suffer prejudice from the intervention.

Question 5: Sample Answer

Issue 1

Adam's deed to Unit A created a fee simple subject to an executory limitation in Zoe, and a shifting executory interest in Sam.

Under PA law, a fee simple subject to an executory limitation is created when a grantor conveys a fee simple interest in a property, but that interest is subject to an executory limitation that will divest the initial grantee of the fee simple granted to it and vest fee simple in a third party if the event set forth in the grant happens. A shifting executory interest is created when a grantor conveys an interest in land to an initial grantee but, upon the happening of some event set forth in the grant, the initial grantee's grant is cut short and the property is automatically transferred from the third party to the holder of the executory interest.

Here, we are told that Adam conveyed Unit A to his sister Zoe, but if his brother Sam retires from his oversees post and returns to Big City, then to Sam. Per the express language of the grant, Zoe was granted a fee simple subject to Sam's executory limitation because Zoe's fee simple interest in Unit A will be cut short and vested automatically in Sam if he retires from his overseas post and returns to Big City. In addition, Sam has a shifting executory interest in Unit A because, if he retires from the U.S. Foreign Service and returns to Big City, the condition set forth in the grant to Zoe will be triggered and Zoe will be automatically divested of her fee simple in Unit A, and Unit A will automatically transfer to Sam in fee simple. Thus, Zoe holds Unit A in fee simple subject to Sam's shifting executory interest.

Issue 2

The $80,000 dollar award would be proper in this case because it reflects the liquidated damages clause in the contract between Barb and Disaster. A liquidated damages clause in a contract will be upheld where the damages at the time of the contract formation were difficult to assess and the clause is reasonably related to what the parties think the loss would be. The clause also cannot act as a penalty. This is important because punitive damages are generally disfavored in contracts cases, therefore, it is against public policy to allow parties to agree to punitive damages in the event of a breach.

In this case, the facts indicate that there is an absence of reliable data to determine Chez B's profits since it was only in operation for two months. Furthermore, the facts state that Chez B's accountant conducted extensive research to determine that profits would be approximately $2,000 per day. Therefore, based on these facts, it is reasonable that the damages in the event of a breach by Disaster would be difficult to ascertain. Next, the clause does not act as a penalty because it is related to a reasonable computation of damages and does not serve a punitive purpose. Here, the agreed to damages are set at $2,000/day fixed costs plus $2,000/day profit totaling $4,000 in damages per day. Even though the contract uses the term "penalty" the liquidated damages do not serve a punitive purpose because the $4,000 "penalty" is rationally related to a reasonable computation of damages.

Therefore, the damages of $80,000 would be appropriate under the liquidated damages clause of the contract because the damages reflect the daily fixed costs and daily profits that are lost as a result of Disaster's breach.

Issue 3

a. Barb can use anticipatory repudiation as the basis for asserting a breach of contract occurred.

Under Pennsylvania law, a party to a valid contract can sue before performance is due on the basis of anticipatory repudiation. A party can sue on the basis of anticipatory repudiation when the other party makes a clear and unequivocal statement that it will not perform.

Here, Anthony showed his clear intent to not perform when he said "I'm not going to be your head chef ... I have accepted EAT's offer." Anthony accepted another job in conflict with being a head chef. Because Anthony clearly and unequivocally said he was not going to perform and took another job in conflict, Barb can sue Anthony immediately for his refusal to perform.

Barb can use anticipatory repudiation as the basis for asserting a breach of contract occurred.

b. Anthony's willingness to now perform the contract has no effect on Barb's suit against Anthony because Barb acted in reliance to his refusal to perform.

Under Pennsylvania law, a party can revoke their future refusal to perform if the other party did not change performance in reliance on the refusal or if the other party did not consider the refusal to perform final.

Here, Anthony calling Barb hoping to revoke his refusal to perform. However, Barb already acted in reliance on Anthony's refusal to perform. Barb hired a new head chef at a salary more than the salary she had paid Anthony. Anthony cannot now rescind his refusal to perform.

Anthony's willingness to now perform the contract has no effect on Barb's suit against Anthony.

Issue 4

Ed owns a 1/3 interest in Unit B as a tenant in common with Charlie and Dave who each own 1/3 of Unit B as joint tenants with the right of survivorship.

Under real property law, when the unities of a joint tenancy are severed the interest that is then created is no longer a part of the joint tenancy. Where the unities still exist among other owners the joint tenancy will survive among them.

Here, the sheriff's sale of Barb's interest in Unit B severed the unities of time, title, and interest and so severed her interest from the joint tenancy giving Ed a 1/3 interest in Unit B as a tenant in common. Barb's interest was severed by the sheriff's sale and bought by Ed. Ed does not join the joint tenancy as his interest was created later in time. He has a 1/3 interest as a tenant in common. Charlie and Dave still have the unities of time, title, interest, and possession intact so they still have a joint tenancy with the right of survivorship for each of their 1/3 interests. Ed will always have 1/3 unless he sells, devises, or gifts it.

Therefore, Ed has a 1/3 interest in Unit B as a tenant in common with Charlie and Dave, and Charlie and Dave each have a 1/3 interest as joint tenants with the right of survivorship among the two of them.

Question 6: Sample Answer

Issue 1

The intentional tort that could best be asserted against Darby on Paige's behalf is assault, which will likely be successful.

Under PA law, assault occurs when a person intentionally, by conduct, (1) attempts to commit a harmful or offensive contact (i.e., attempts to commit a battery) or places another individual in fear of imminent harmful or offensive contact and (2) the other is placed in imminent apprehension of harmful or offensive contact. Hypersensitivity of the victim is irrelevant; the question is whether a person of ordinary sensitivities would have been in fear of an imminent harmful or offensive contact.

Here, it is highly likely Darby would be found guilty of assault. The facts tell us that as Paige was staring out of the window of her school bus, Darby stood up and aimed a rifle at her. We are also told that Paige froze in fear and was unable to move or speak for several minutes, and began to shake and cry uncontrollably. When questioned about his conduct, Darby made clear that, although he did not intend to shoot anyone, he pointed the rifle at Paige in the hope that "if the bus driver believed he was about to shoot" the school district would be alarmed enough to change the bus schedule back to what it used to be, which would stop the noise near his house. As such, Darby clearly pointed the rifle at Paige with the intent to place her in fear of imminent harmful or offensive contact (being shot). In addition, it is highly likely that a jury would find that Paige's reaction to the gun being pointed at her (fear that she would be shot) would elicit fear of an imminent battery (being shot) by any reasonable person. Darby's subjective intent that he was not going to shoot is irrelevant as to whether Paige believed a harmful or offensive contact was imminent, and a jury will very likely find that a reasonable person of ordinary sensitivity would have reacted in much the same way as Paige. Darby appeared capable of pulling the trigger and inflicting the harmful contact, which is what matters for purposes of the analysis.

Issue 2

Compensatory damages are available to parties who bring an action in tort law. Compensatory damages are aimed to make the victorious party whole again after the tortious conduct of the party who the judgment is against.

a. Paige can assert she is entitled to receive compensatory damages in order to make her whole again after the injuries suffered from the tort committed by Darby. The fact-finder will be tasked with quantifying the amount of damages that can be awarded to Paige to compensate for the harm she suffered. The fact-finder can consider her emotional damage, pain, and suffering that Paige experienced as a result of Darby's actions. She will be compensated for her pain and suffering during the year it took her to recover.

b. Paige's parents can seek compensatory damages for the claims against Darby for any lost wages, increased transportation costs to drive Paige to school, medical expenses, and the cost of her psychologist. Paige's parents are entitled to any costs they incurred as a result of Darby's actions.

Issue 3

Darby must raise his objection as a preliminary objection. His failure to raise this objection at this stage would waive his ability to raise the issue later in the proceedings. It is likely that the court will sustain the objection.

A party can raise preliminary objections based on the allegations made in the plaintiff's complaint. They can request the court to strike certain allegations or portions thereof. The court must look at the content of the allegations and determine if they are relevant to the cause of action or whether they are in some way improper due to their scandalous nature. In regard to the latter concern the court will examine whether the allegation is relevant to the cause of action or whether it serves generally to harass or annoy the opposing party.

Here, the evidence of Darby's past criminal charges serves no real probative value nor does it help to establish Paige's cause of action. The allegations of past crimes are likely to be scandalous and serve to damage the reputation of the defendant in the community while serving to establish plaintiff's case in no substantive way. This is particularly true considering the fact that the charges were dismissed as part of the plea deal agreement. Based on this analysis, the court would likely grant the objection and strike the mention to defendant's past criminal charges from the complaint.

Issue 4

The guilty plea should not be admitted because its prejudicial effect outweighs its probative value.

Evidence is only admitted if it is relevant. Relevant evidence is anything that tends to make any fact at issue more or less true. However, even if evidence is relevant, it will not be admitted if its prejudicial effect outweighs its probative value. This standard is lower than the Federal Standard, and therefore, prejudicial evidence is more likely to not be admitted in Pennsylvania. Evidence is prejudicial if it would tend to lead to a verdict or other disposition for an improper purpose other than the merits of the case.

In this case, the evidence would most likely not be admitted because it is prejudicial. Evidence that a crime was committed is prejudicial because it could cause a jury to believe that the Defendant should lose because he was deemed to be a criminal. While the evidence is relevant, as it does tend to show that Darby did commit some offense, it doesn’t show he is liable for assault. The guilty plea to the summary offense also does not provide much probative value. A plea to disorderly conduct does not tend to show that the Defendant did the offense that is the subject of the suit, assault. Darby would be painted as a criminal, in exchange for an entry a

guilty plea that does not necessarily shed much light on the factual scenario at issue in the civil case. Paige will most likely argue that because the offense is a minor offense, the prejudicial effect will be slight. However, the severity of the offense being minor also decreases the probative value because it most likely did not require a factual scenario close to the allegations in the case at hand. Therefore, prejudice of the guilty plea will most likely outweigh the probative effect of the guilty plea, and the evidence should not be admitted.