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PENNSYLVANIA BAR EXAMINATION

Sample Answers

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Performance Test – Sample Answer

Issue 1 – See Entire Paper for Formatting

Legal Memorandum

To: Luke Benjamin, Managing Partner

From: Applicant

Re: Legal Memorandum Regarding Lilly "Visitation" Petition

Date: February 22, 2022

This memorandum analyzes the viability of the "Petition for Visitation" filed by Esther Townsley seeking certain "visitation" rights with respect to her grandson, Rees Lilly, who is the son of our client, Ethan Lilly. Esther, in particular, seeks an order allowing her to drive Rees places and to have him visit her overnight at her home. This memorandum proceeds in four parts. First, it addresses grandparent standing in custody disputes, concluding that Esther likely has standing. Second, it addresses the burden of proof, which lies with Esther. Third, it addresses the distinction between visitation and physical custody, concluding that Esther is in fact seeking partial physical custody of Rees. Finally, it offers an analysis of Esther's petition, concluding that a court will likely side with Ethan, who would like the court to deny Esther's petition.

Issue 2

Grandparent Standing

Does Esther have standing to bring her petition? Esther likely has standing to seek partial physical custody.

Under Pennsylvania law, grandparents may seek partial physical custody or supervised physical custody where they meet the following criteria: (1) where the parent of the child is deceased; (2) where the relationship with the child began either with the consent of the parent and the parent of the child has filed a custody petition and does not agree as to whether the grandparent should have custody; or (3) where the child has resided with the grandparent for at least 12 consecutive months, was removed by the parents, and an action is filed within 6 months of the child's removal from the grandparent's home. See section 5325.

Esther has standing under the first prong of section 5325. Under that prong, if the parent of a child is deceased, the parent or grandparent of the decedent may bring a custody action. See id. That is the case here: Maria, Rees's mother, passed away in March 2021. Therefore, Esther, as Maria's mother, has standing to file a custody petition seeking partial physical custody (or supervised physical custody).

It should be noted that Esther would not otherwise qualify for standing under the section. First, the second prong deals with circumstances where the parent of the child filed a custody petition, which is not the case here. Second, there is no indication that Rees resided with Esther for a continuous 12-month period, let alone that Rees was removed from the home.

In short, Esther has standing to bring her custody petition.

Issue 3

Burden of Proof

Which party bears the burden of proof in Ethan and Esther's custody dispute? Esther bears the burden of proof.

In cases where a grandparent is seeking visitation or partial custody, the grandparent bears the burden of proof, and must show that visitation or partial custody is in the best interest of the child and will not interfere with the parent-child relationship. In partial custody and visitation cases, "[t]he paramount concern . . . including those in which grandparents are seeking rights is the best interests of the child." K.B. (quoting D.R.L.). The burden of proof rest with the grandparent seeking partial custody or visitation and they must therefore "demonstrate that partial custody or visitation in their favor is in the child's best interest and will not interfere with the parent-child relationship." K.B. (quoting D.R.L.). To carry this burden, Esther will need to address numerous factors, discussed in a later section.

Issue 4

Visitation

The issue here is whether Esther is in fact seeking "visitation." Although Esther's petition is denominated one for "visitation," she is in fact seeking partial physical custody.

Prior iterations of Pennsylvania's Custody Act distinguished between visitation and custody, but those provisions were replaced in 2010. See K.B. As the court observed in K.B., "the current version of the Custody Act no longer contains a provision for the award of visitation." K.B. (quoting S.T.). Instead, the Act now provides that the court may award: "(1) shared physical custody, (2) Primary physical custody, (3) partial physical custody, (4) sole physical custody, (5) supervised physical custody, (6) shared legal custody, (7) sole legal custody." K.B. (quoting section 5323(a)). The Act acknowledges the prior and continued use of "visitation" in other contexts, stating that in such circumstances "the term may be construed to mean: (1) partial physical custody, (2) shared physical custody, (3) supervised physical custody." K.B. (quoting section 5322(b)).

Here, because the Custody Act no longer includes a provision for visitation, the court will likely interpret Esther's petition as one for partial physical custody. The court did something similar in K.B., interpreting a "visitation" petition as one for "supervised physical custody," which it found to most closely resemble what the petitioner sought in that custody dispute. See K.B. Here, the closest form of relief to what Esther seeks is partial physical custody, which is defined as "the right to assume physical custody of the child for less than a majority of the time." See section 5322(a). That fits what Esther is seeking because she wants to be able to take Rees away from Ethan's home for brief periods of time by car and resume having him overnight "some nights."

Esther does not seek shared physical custody, primary physical custody, or sole physical custody because she does not seek physical custody over Rees for a "significant" period of time or a "majority" of the time. See id. Nor does she appear to seek supervised physical custody, "[c]ustodial time during which an agency or an adult designated by the court or agreed upon by the parties monitors the interaction between the child and the individual." See id. That resembles the arrangement that Esther already has with Ethan, who allows her to come over and see Rees whenever Ethan is home; Esther appears to be seeking unsupervised time with Rees, albeit for a limited time.

In short, Esther's petition is for partial physical custody, not visitation.

Issue 5

Analysis

The issue here is whether Esther will be able to establish that her petition is in Rees's best interests. Esther is unlikely to establish that her petition for partial physical custody is in Rees's best interest. To determine whether custody is in the best interest of the child, the court must consider each of the 16 factors set forth in section 5328(a), giving particular weight to those factors that concern the child's safety. See section 5328(a). In addition, where the petitioner is the child's grandparent seeking partial physical custody or supervised physical custody, the court must further consider 3 factors: "(i) the amount of personal contact between the child and the party prior to filing the action; (ii) whether the award interferes with any parent-child relationship; and (iii) whether the award is in the best interest of the child." See section 5328(c). Each factor is discussed in turn below.

Likelihood of continuing contact.

The first factor listed in section 5328 is which party is more likely to encourage continued and frequent contact with the child. This factor is unlikely to be significant. Ethan has already indicated that he is willing to allow Esther to visit Rees whenever Ethan is home, even allowing her to stay overnight. However, nothing suggests Esther would not be amenable to allowing Ethan frequent and continuous contact with Rees.

Present and past abuse

The next factor is whether there is a history or present indication of abuse or a continued risk of harm to the child by the abuser. This factor is irrelevant because there is no evidence that Rees has been abused.

Parental duties

The next factor is the parental duties performed by each party on behalf of the child. This factor favors Ethan slightly because he performs all of the parental duties for Rees. However, it is unlikely to be significant because the minimal "visitation" sought by Esther would not interfere with Ethan's parenting.

Need for stability

The next factor is the need for stability and continuity in the child's education, community, and family life. This factor favors Ethan. Esther wants to take Rees for car trips, but the facts indicate that this triggers Rees's trauma from the car accident where he witnessed the death of his mother. Ethan has indicated that he avoids taking Rees by car because it triggers panic attacks and nightmares that inevitably prevent him from going to school the next day. Thus, it is in Rees's educational best interest to avoid the car trips that Esther wants to impose. Significantly, denying Esther's petition does not meaningfully interfere with family life because Esther remains invited to come over to Ethan's home and spend time with Rees.

Availability of extended family.

The next factor is the availability of extended family. This factor is unlikley to be significant. On the one hand, Esther would argue that granting her petition would allow Rees to spend more time

with her, his grandmother. On the other hand, Esther is already allowed to visit Rees at Ethan's home while he is there (which appears to be a lot since he works from home).

Sibling relationships.

Although the court will consider sibling relationships, this factor is irrelevant because Rees does not have siblings.

Child's preference.

The next factor is Rees's well-reasoned preference, considering his maturity and judgment. Ethan has not directly indicated Rees's preference, but it would seem to be to avoid overnight stays and car trips with Esther because these activities trigger his trauma and panic attacks, with sleeping with Ethan the only thing to calm him down. However, given Rees's age (6.5) the court would likely not give this factor significant weight.

Attempts to turn child against parent.

The court will also consider whether one party is likely to try to turn the child against his or her parent, but this factor is apparently insignificant because there is no indication that Esther would attempt to do so.

Party's ability to provide for child's needs.

The court will consider which party is more likely to provide a loving environment and provide for the child's needs. This factor favors Ethan who provides for all of Rees's needs, but is relatively insignificant because Esther's proposed arrangement would not be a significant impact on that and she appears to provide Ethan with a loving environment. Further, there is some doubt that Esther can provide for Rees's needs since Maria questioned her driving and Esther has had a number of accidents.

Physical, Educational, and Emotional Development

The court will consider which party is better able to tend to the child's physical, emotional, and educational development. As discussed above, Esther's proposed arrangement would be detrimental to Rees's education. Further, because the arrangement would trigger his trauma, this factor favors Ethan.

Proximity

The court will consider the proximity of the parties. Here, Esther is just 20 miles away, which ordinarily would favor her "visitation" petition since it would not meaningfully disrupt Rees's life. However, that drive is significant in Rees's case because of his aversion to driving. The bike does not appear to be an adequate arrangement because it is used only within 5 miles. Thus, this factor favors Ethan.

Childcare arrangements

The court will consider each parties' ability to arrange childcare, but this factor is insignificant because there is no indication that either party here could not do so.

Conflict and coordination

The court will consider any conflict between the parties and their willingness to compromise. This factor favors Ethan, who has allowed Esther to come over whenever Ethan is home and

even stay overnight. Esther has not explained her refusal to stay overnight despite wishing to see Rees and her desire to take Rees on car trips is unreasonable in light of his trauma. Despite being told by Rees's therapist that these trips would be harmful to Rees's emotional health, Esther still insists upon them.

History of alcohol abuse / mental illness

The final two enumerated factors for the court's consideration are substance abuse and mental illness but these are irrelevant because there is no indication of either for Esther or Ethan.

Other factors

The court may consider other factors it deems relevant and these would favor Ethan. Ethan would argue persuasively that Esther's proposed arrangement is not in Rees's best interests because it will continue his trauma, panic attacks, and mental health issues stemming from witnessing the death of Maria.

Grandparent factors

With respect to the factors specific to grandparents, the first two will favor Esther slightly but not the third. First, Esther is seeking to renew the regular type of contact that she had with Rees before Maria's death. Second, the award would strengthen the grandparent-grandchild relationship not harm it. But third, the arrangement is not in Rees's best interest for all the reasons given above. Ethan's allowing Esther to visit Rees regularly is reasonable and allows regular contact between Esther and Rees while avoiding re-traumatizing Rees.

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Taken together, the factors favor Ethan, who is likely to succeed in having the court deny Esther’s custody petition.

Question 1: Sample Answer

Issue 1

Yes, Alisha and Ben will be able to establish a prima facie case for undue influence under Pennsylvania law.

Under the PEF code, the burden is upon the contestant to show by a preponderance of evidence that undue influence was placed upon the testator by showing that (a) there was a close confidential relationship between the beneficiary and the testator; (b) that the testator was in a weakened state of intellect when the will was executed; and (c) that the beneficiary received a substantial benefit under the will.

(a) Here, a confidential relationship existed between Deanna, the beneficiary, and Henry, the testator. Henry hired Deanna in early 2019 to assist him with activities such as shopping and maintaining his house. Then, Deanna's responsibilities gradually increased and by January 2020 she had moved into his home and was assisting Henry with every part of his life including eating, bathing, and medical care. In fact, Henry stated to Alisha and Ben that "without Deanna, I don't know what I'd do." Given that Deanna not only moved in with Henry, but assisted him with every aspect of his life including being designated as his POA, and Henry's voiced an appreciation for Deanna, a court will find that a close confidential relationship existed between the Henry, the testator, and Deanna, the beneficiary.

(b) Additionally, in 2020 Alisha and Ben began noticing that Henry was often disoriented and forgetful. Furthermore, Henry's medical records demonstrated that he had been diagnosed with severe dementia in June of 2020 and, importantly, that his cognitive abilities had been declining since 2020. The will at issue was dated March 5, 2021 - almost a year after Henry had been diagnosed with severe dementia. A court will find that given Alisha and Ben's observations of Henry's disorientation, coupled with the medical records evidencing severe dementia almost a year before the will was executed, that Henry, the testator, was in a weakened state of intellect when the will was executed.

(c) Finally, under the terms of the original will, Alisha and Ben were to have equal shares of the estate, with a specific grant of the watch to be given to Ben. However, under the terms of the 2021 will Deanna, Alisha, and Ben were each to receive one-third of the estate. Given the difference between the distribution under the original will, and the fact that one third of the estate is a substantial portion of the entire estate, a court will find that Deanna, the beneficiary, received a substantial benefit under the will.

Therefore, since a close confidential relationship existed between Deanna and Henry, and Henry was under a weakened state of intellect when the will was executed, and that Deanna received a substantial benefit under the will, the court will find that Alisha and Ben established a prima facie case for undue influence under Pennsylvania law.

Issue 2

As an executor, Alisha will determine that this gift has been adeemed and should deny Ben's request, because the watch is a specific devise.

Under Pennsylvania testacy law, a specific devise is a particular item or gift that the testator leaves to a beneficiary. If at the time of the decedent's death, that specific named object is no longer in the testator or testator estate's possession, the gift is considered to be adeemed and no longer in existence for the purposes of inheritance. The original language of the will always control in executing the document. The intended beneficiary will ultimately take nothing for that specific devise if it is no longer in the estate's possession.

Here, Henry specifically wrote in his 2017 will that he was leaving his vintage watch to Ben, thus creating a specific devise of property. However, after executing his will, he later sold the watch. After selling his watch, he never updated his will to include the provision that Ben will take the proceeds from the sale of the watch. Because the watch was sold and no longer belongs to the estate, the gift is adeemed, and Ben will not receive the value of the watch.

Thus, Alisha will determine that Ben's specific devise has adeemed and deny Ben's request for the value of the vintage watch.

Issue 3

Although cancellation of debt is normally gross income, Henry does not need to report it because the cancellation of the debt was a gift.

Gross income is all income from whatever source derived. Cash basis taxpayers report income in the year in which they receive it.

Cancellation of debt is normally considered income because the debtor receives an accession to wealth when he no longer has to pay back the debt.

A gift made with detached and disinterested generosity given for reasons such as admiration or fondness are not includable in gross income and not subject to tax.

Hugh cancelled Henry's $100,000 debt which, normally, would be included in Henry's gross income for the tax year 2021, the year in which the debt was cancelled. However, Hugh stated that he was cancelling Henry's debt for a specific reason - as a gift to his favorite brother. This indicates that Hugh likely gifted the cancellation of debt based detached and disinterested generosity because Henry was his favorite brother. There is nothing in the facts to suggest that he had another motive.

Therefore, Henry does not have to report the cancellation of debt in his 2021 tax return because it was given to him as a gift and he will not have to pay taxes on the cancelled debt.

Issue 4

Lynn violated the rules of professional responsibility by taking the representation of Jeff. Lawyers may not take on a representation in which they would breach the professional rules. Among those rules is the attorney's duty of competence, which requires that they undertake the representation with the legal skill, knowledge, experience, and training required. An attorney that would otherwise be incompetent may cure the issue by study or association with a competent attorney.

Here, Lynn's representation of Jeff is in breach of her duty of competence to him. The facts say that Lynn is exclusively a wills and estates lawyer and that Jeff's case is a complex securities matter an area where Lynn has no experience. Thus, she could not take on the representation and comply with her obligation to provide representation with the requisite knowledge, skill, experience, or training. Her attempt to cure the issue is insufficient. First, she has not associated with a more experienced attorney even though she considered doing so. Second, the single, two-hour training does not appear to be enough to cure her incompetence. This is particularly so given that the facts reiterate that Jeff's case is complex and he has significant potential liability, therefore, it is extremely unlikely that this single training would be enough to allow her to proceed.

In short, Lynn's representation of Jeff likely violated the Pennsylvania Rules of Professional Responsibility.

Question 2: Sample Answer

Issue 1

Dee is a director of LA, Inc. Directors of a corporation owe the corporation fiduciary duties. These duties include the duty to act fairly and in good faith, a duty of care (to act as a reasonable director). She has an interest in the transaction at issue and while she may be permitted to benefit from the transaction, she must take certain steps first. An interested director must disclose her interest to the board and cannot vote on the matter at hand. Furthermore, the Board may still approve a proposal if, after informing all disinterested members of the board about all material aspects of the transactions, those disinterested board members vote in favor of the proposal whether or not the interested director attends the board meeting. Furthermore, if the transaction is fair, no violation of the duty of loyalty will have occurred (fairness is the ultimate determinative factor).

Here, Dee is an interested director. She is an equity owner in her son-in-law's business and she proposes that this company build the new pavilions for LA. Because Dee would personally benefit from this contract, Dee has an interest in the transaction.

However, Dee can still propose the contract to the board. If Dee informs all members of the board about her involvement with the company (which she did) and all material aspects of the transactions, then the disinterested members of the board could still vote on the proposal and accept it. Dee could be present during the vote of the disinterested members under PA law. Furthermore, if the proposal is fair (i.e. fair market terms), Dee will not have violated her duty because fairness of a transaction is the ultimate determinative factor.

Accordingly, Dee can still present her proposal if she follows the above guidelines on how to do it.

Issue 2

LA would not be successful in a breach of implied warranty of merchantability action under the UCC.

A merchant is one who ordinarily sells this type of good in their store. Goods are all things movable at the time of contract. A merchant implicitly warrants that the goods sold are fit for their ordinary purposes. This is called the implied warranty of merchantability. However, this warranty can be disclaimed. A seller can disclaim the warranty of merchantability in writing, the writing has to explicitly use the term "merchantability" and be conspicuous. However, when a buyer refuses to inspect a good, especially so when the seller demands that they do, the buyer waives any claims against the seller for defects that would have been discovered upon inspection.

Here, Marina is a watercraft retailer, who ordinarily sells watercrafts, which are movable objects and thus goods. Accordingly, when Marina sells a watercraft to a buyer, Marina implicitly warrants that the watercraft is fit for is ordinary purpose. However, this warranty will be deemed to have been disclaimed by the conduct of the parties. Marina's owner advised Brenda that the watercraft were second hand and heavily used. Furthermore, the seller made multiple demands that Brenda inspect the used watercraft, but Brenda refused to do so and executed the valid contract for the sale of the watercraft for $6,000.

Here, Brenda refused to inspect the watercraft despite Marina's owner's demands prior to purchasing and only discovered that the watercraft was unsafe, required repairs and was unusable after delivery. Because these defects would have been discovered had Brenda inspected the craft, any claim against the seller was waived when Brenda refused to inspect the goods.

Accordingly, LA would not be successful in asserting a breach of implied warranty of merchantability against Marina because Brenda refused to inspect the goods prior to the sale and thus waived any claim against the seller for those discoverable defects.

Issue 3

Brenda's son can successfully assert an express warranty claim against FireSafe.

A seller of goods is bound by an express warranty made to a buyer. An express warranty can be in the form of a statement about the good, or by showing a model or sample to a seller (seller in so doing expressly warrants that the goods sold will be the same as the shown model or sample). When a seller makes an express statement, and the buyer relies on that statement in buying the good, third parties would also be able to rely on that statement, such as the buyer's family members and any other person who may reasonably be anticipated to use the sold good.

Here, Brenda loves to deep-fry whole turkeys in a turkey fryer and was looking for safety gloves to do so without being burned by the splashing oil. She explained her desired purpose to FireSafe's owner, who proceeded to hand her a pair of gloves guaranteeing her that the selected gloves would protect users from injury and burns from splashing hot oil.

Accordingly, FireSafe's owner made an express warranty guaranteeing that the user of these gloves would be protected from splashing hot oil. When Brenda's son used the gloves (while he himself was exercising reasonable care), the express warranty turned out to be false as he was seriously injured and burned by splashing hot oil.

As stated above, not only the buyer, but also the buyer's family or a reasonably foreseeable user can rely upon an express warranty made by the seller. Here, Brenda's son - i.e. Brenda's family member - was using the gloves and was seriously injured by splashing hot oil contrary to the owner's warranty. Therefore, as a third party beneficiary, he will have a direct cause of action against FireSafe for breach of express warranty.

Issue 4

If Fred defaults with Bank, and Bank subsequently exercises its rights under Fred's share pledge, LA will be unable to successfully defend against a transfer of the shares based upon the shareholder's agreement restricting transfer of the shares.

A shareholder agreement that restrict the transfer of shares is valid under PA law. Furthermore, any restrictions on the sale of shares has be conspicuously listed on the share certificates. While the parties to the share restriction agreement are bound by it, a third party who does not have notice of such restriction (actual notice or notice because the restriction is listed on the certificates) is not bound by it.

Here, all shareholders executed the share transfer restriction by unanimous vote, but LA failed to list that restriction upon the certificates of their shares.

Here, Fred provided the bank with the corporation's bylaws, articles of incorporation and the share certificates, but no document provided notice to the bank of the transfer restriction as the transfer restriction was agreed to in a separate document without noting the restriction on the share certificates. Accordingly, the Bank is not bound by the restriction on transfer.

As such, when Fred defaults, the Bank is entitled to the pledged shares because it had no notice of the share transfer restriction, despite all shareholders unanimously agreeing to the transfer restriction. Accordingly, LA will not be able to defend against a forced transfer based upon Fred's pledge.

Question 3: Sample Answer

Issue 1

The DA should respond that there was no Miranda violation and the court would likely agree. The Fifth Amendment (applicable to the states through the Fourteenth) protects an accused's right against self-incrimination, requiring that the accused be given warnings that convey the substance of the following prior to a custodial interrogation: (1) the accused has the right to remain silent; (2) the accused has a right to an attorney; (3) if the accused cannot afford an attorney, they will be provided with one; (4) anything that they say or do can be used against them in court. To implicate Miranda an individual must be both in police custody and being interrogated. An individual is in custody if a reasonable person would not feel free to leave under the circumstances. An interrogation is words or conduct by an officer that they know or should have known were likely to illicit an incriminating response. Volunteered statements are not protected under Miranda. If the accused invokes their right to remain silent, the police must scrupulously adhere to the invocation and, if they invoke the right to an attorney, may not conduct interrogations without the attorney present.

Here, Rich was apparently given no Miranda warnings, thus the question is whether the duty to provide a warning was triggered by a custodial interrogation. Rich is unlikely to be able to make that showing. First, Rich was in custody once he was handcuffed and placed in the squad car because a reasonable person in those circumstances would not feel free to leave. Second, however, there was no interrogation when Rich told Officer Jones, "I didn't mean to hurt him, [etc.]" The facts do not indicate that Officer Jones asked any question of Rich to prompt the statement, nor was the act of handcuffing him and placing him in the squad car something that Officer Jones should have known would likely elicit an incriminating response. Because there was no interrogation, there was no requirement to give a Miranda warning, regarding Rich's second statement and suppression would not be ordered. Rich's voluntary, spontaneous statement does not qualify for Fifth Amendment protection.

To the extent that Rich's challenge also implicates Officer Jones's question about whether Rich owns the Porsche, that would likely also not involve a violation. Here, that would because Rich was not in custody. Rather, Rich was on his front porch and Officer Jones had not placed him under arrest or indicated that Rich would be arrested. Under the circumstances, a reasonable person would feel free to cease the interaction and thus there was no custody, which is needed to trigger Miranda requirements regarding Rich's admission that he owned the Porsche.

Issue 2

The DA should respond that Rich's statement is not protected by the clergy-communicant privilege because the statement was not in any formal clergy-communicant capacity nor did Rich seek Father Mike in that capacity. The court will likely agree that it is not protected and will likely admit the statement.

Under the Pennsylvania Rules of Evidence, statements made between clergyman and a communicant can be protected by the clergy-communicant privilege, subject to certain conditions. The statement must be made when there is a formal clergy-communicant relationship, even if just formed, and the statement must be made with the intention that it remain confidential and must be made in furtherance of seeking spiritual guidance.

Here, Rich belonged to Father Mike's church youth group a long time in the past, 15 years earlier, and he hadn't seen Father Mike since then. Thus, Rich and Father Mike did not have a clergy-communicant relationship. Moreover, Rich did not seek Father Mike out, rather Father Mike approached Rich and simply relayed a greeting asking him how he was doing. Then Rich immediately replied, "Not so great, Father, I think I just hurt, um, someone. I really screwed up." This statement was not made during a continued/maintained established relationship with Father Mike, and he did not seek out Father Mike in any way. Instead, Father Mike ran into him by happenstance and simply asked how he was doing, as he could have to any other person with no intent to engage in a spiritual conversation.

When Father Mike asked Rich if he wanted to talk about what was bothering him, Rich specifically said no. This shows that Rich's intent was in no way to have a confidential conversation with Father Mike about what happened and he was not seeking any spiritual guidance from him. This was further shown by his abrupt departure upon stating that he didn't want to talk about what happened. As such, the court will likely not allow Rich to hide behind the cloak of clergy-communicant privilege simply because he was speaking to a priest he knew 15 years ago, and the court will likely admit Father Mike's statement.

Issue 3

a. Rich is not likely to be convicted of aggravated assault because, although Ted suffered serious bodily injury as a result of Rich's actions, Rich did not intend for Ted to be injured or to place him in a circumstance to be injured.

Under Pennsylvania law, a defendant is guilty of aggravated assault when he intentionally places another in danger of serious bodily injury, they are the cause of the harm, and the person suffers bodily injury as a result of the defendant's actions.

Here, although Rich convinced Ted to hold onto the back of Rich's Porsche while Ted rode his skateboard, Rich did not intend for Ted to suffer serious bodily injury.

In conclusion, Rich should not be found guilty of aggravated assault because although he placed Ted in harms way and Ted was suffered as a result of that, Rich did not intend to cause Ted to be injured.

b. Rich is likely to be convicted of recklessly endangering another person because he recklessly placed Ted in a position to be seriously injured by having him hang on to the back of his vehicle while he drove up to speeds of 25 miles per hour. Moreover, he acknowledged that the idea sounded dangerous when Ted said it sounded dangerous. This showed his recklessness.

Under PA law, a defendant is guilty of recklessly endangering another person if they know or have reason to know that their actions are likely to place another in danger of serious bodily injury and they act recklessly.

Here, Rich asked Ted if he wanted to try skitching, which he claims he saw on YouTube. After hearing what it entailed, Ted exclaimed that it sounded dangerous and Rich responded, "but it will be fun!" Rich acknowledged that the act of skitching was dangerous and by asking Ted to participate in it, he recklessly placed him in danger of serious bodily injury.

In conclusion, because Rich knew that skitching was dangerous but asked Ted to participate anyway, he recklessly placed Ted in danger of serious bodily injury and should be found guilty of recklessly endangering another Ted.

Issue 4

Amy's attorney should advise Amy that she is bound to the terms of the prenuptial agreement unless there is fraud, misrepresentation, or duress. Because the facts indicate no such wrongdoing exists in her case, the document she signed will not be set aside.

A prenuptial agreement is an agreement about how finances will be divided upon divorce. A valid prenuptial agreement must be: (1) voluntarily entered; (2) in writing; (3) signed by the parties to be charged; and (4) contain an accurate disclosure of the parties's financial standing. As long as a party has the opportunity to consult a lawyer, there is not duress. Once parties sign the agreement they are bound by the terms and the court is unlikely to invalidate the prenup unless there is a showing of fraud, misrepresentation, or duress.

Here, the facts show that Amy voluntarily entered into the agreement, it was in writing, and signed by her and Rich. She now argues that it was entered under duress. The facts simply do not support that. Amy received a prenup from Rich, studied the terms, understood it and signed knowing that she would forfeit any interest she would have in the stock's value. Amy understood that it would have been good practice to have a lawyer review the document but decided against it in order to focus on the wedding. Just because the wedding was coming up is not sufficient to show duress. Despite her knowledge, Amy voluntarily signed the documents on her own free will. Thus, Amy was not under duress, she will be bound to the terms of the prenup and the stock will not be part of the marital property and Amy will not receive any share of it or its increase in value.

Question 4: Sample Answer

Issue 1

The court will analyze this claim under the Dormant Commerce Clause and will find that State A's restriction does not advance a legitimate local purpose that State A could not do in a nondiscriminatory way. Therefore, it will be struck down.

The Commerce Clause allows states to impose regulations regarding interstate commerce where Congress has not regulated. In doing so, states are not permitted to discriminate against out-of-state interests in favor of in-state interests. Further, the regulations must not place an undue burden on out-of-state entities and the state who created the law must carry it out in a way where there are least restrictive means.

In this case, State A is clearly discriminating against State B candy makers because the Sweet Law imposes a burden on out-of-state candy makers regarding shipping their candy directly to consumers. On the other hand, the Sweet Law allows direct shipping for state A candy makers directly to consumers. Allowing state A candy sellers to engage in direct sales at retail prices while stopping out-of-state candy makers from doing the same is discriminatory on its face. State A's reason for enacting Sweet Law is to protect state A's children from the health risks associated with consuming excessive sweets. While this law might have a legitimate purpose, it places an undue burden on interstate commerce for JDK. This is shown because JDK's retail sales by shipping to State A consumers accounted for 25% of its revenue and this would decline due to the new Sweet Law. There is arguably a less discriminatory way to ensure children in state A's health associated with consuming excessive sweets. State A could prohibit all from shipping directly to State A consumers for example. Imposing this burden on interstate commerce cannot even show that it would be a way to help the children. The court would likely find that state A's Sweet Law doesn't advance a legitimate government interest, and that it places a substantial undue burden on out-of-state retailers.

Issue 2

Susan can state a prima facie case for individual disparate treatment under the ADEA.

The ADEA applies to employers with 20 or more employees who discriminate based on an employees age. An employee can be a current or prospective employee. To be successful in a prima facie ADEA claim, the plaintiff must be at least 40 years old, be qualified for a position, suffer adverse employment action, and be replaced with someone significantly younger. An individual disparate treatment claim is available under the ADEA where an employer discriminates against an individual employee based on her membership in a protected class-- under the ADEA, age. A prima facie case for individual disparate treatment can be shown if the plaintiff shows that the plaintiff is a member of a protected class, the plaintiff suffered adverse employment action when qualified for the position, and the adverse employment action was likely because of her membership in that protected class.

Here, JDK is an employer under the ADEA because it employs 75 people. Susan can show that she is protected under the ADEA because she is 56 (must be at least 40). Susan was a full time worker in the shipping department for 15 years. She had excellent performance reviews and no disciplinary issues. This shows that Susan was qualified for her employment and position. Susan

suffered an adverse employment action by being involuntarily transferred to the mailroom, which is less flexible. She also had a decrease in wages. She was also replaced in the shipping department by a 27 year old-- this satisfies the ADEA requirement that the employee be replaced with someone significantly younger, and also raises the inference under an individual disparate treatment action that the adverse employment action was based on Susan's protected status under the ADEA. Under these facts, Susan can state a prima facie case for individual disparate treatment.

Issue 3

JDK should raise the affirmative defense of Reasonable Factor Other Than Age to defend the fitness test and will likely be successful.

An employer can assert the affirmative defense of Reasonable Factor Other Than Age to defend an employment policy that seems discriminatory on its face but has a reasonable purpose otherwise. A fitness test can be used as a qualification for employment. JDK needs to show that their fitness test wasn't adopted to discriminate against employees over 40 but rather implemented for a legitimate employment purpose. In the case at hand, JDK implemented a fitness test when considering applicants for shipping department jobs. This test accurately assesses a candidate's risk of injury and JDK has seen a significant decrease in worker's compensation claims since implementing the fitness test. JDK has an interest in decreasing employee injury on the job. Between 2016-2018 they paid over $250,000 in workers comp claims 90% of which were a result of injury of shipping department employees over the age of 55. JDK has a legitimate interest in reducing the risk of injury and the amount paid in WC claims. In conclusion, even though the Fitness test statistically discriminates against shipping department employees over the age of 40 JDK has a Reasonable Factor Other Than Age to defend the test and will likely be successful in asserting this defense.

Issue 4

JDK's attorney should make a motion for judgment as a matter of law (JMOL) and it will likely be successful.

In order to succeed at trial, all elements of a claim or defense must be proven. A motion for JMOL is normally presented at the close of the plaintiff's case and states that the plaintiff cannot prove all the required elements of their claim. Here, we know that expert testimony is required for 2 of the 4 elements of Juan’s state law claim, but his attorney failed to present evidence of two of those elements because the expert witness died before trial. This makes it impossible for Juan to win or for his claim to move forward. Therefore, JDK's attorney should file a motion for JMOL at the close of Juan’s case at trial, and the motion should be granted because no evidence was offered on two of the four elements of the state law claim, so the claim must fail.

Question 5: Sample Answer

Issue 1

Joes should file an action for adverse possession for title to Property C. He will likely be successful.

Under PA property law, to establish adverse possession, a plaintiff must demonstrate continuous, open/notorious, adverse/hostile, and exclusive possession for the statutory period. In Pennsylvania, the statutory period is 21 years. Tacking is permitted, so long as the two parties are in privity with each other.

Continuous

Joe took possession of the land from his father Al, which is allowed to establish adverse possession via tacking. Tacking or adding on time to meet the statutory period requirement is permitted if the possession succeeds the original adverse possessor and they are in privity with one another. Joe and Al are in privity with each other because Al granted the parcel to his son through a valid deed. Joe continued to use the land as his father did and they are in a grantor/grantee relationship, establishing privity for tacking. There is no indication he left for an extended period of time or that Al or Joe was forcibly removed from the land.

Thus, the requirement of continuous possession is present.

Open/Notorious

For an adverse possession to be open and notorious, it must be demonstrated and asserted outwardly that the possessor is using/on the property. The facts stated that Al openly and continually used the parcel as if he owned it. Al put up a sign claiming Parcel C as his ("Al's land -- keep out"), planted crops on the land, and built a large barn on Parcel C. He also placed a fence around Parcel B and C, showing that the land was being used and protected.

Thus, the open requirement for adverse possession has been met.

Adverse/Hostile

To establish hostility, the possessor of the land cannot have permission from the actual title holder to be on and use the land. His use is hostile to the owner. The facts indicate that Al used Parcel C as if he owned it without permission or protest from Bob. Because he does not have affirmative permission to be on the land, he is possessing it with hostility.

Exclusive

To establish exclusivity, no one other than the possessor can use/claim the land as their own simultaneously. Here, the facts indicate that only Al, and then later Joe who took his place, are using Parcel C. Thus, there is exclusivity.

Statutory period

The statutory period for adverse possession in Pennsylvania is 21 years.

In 1998, Al planted crops on Parcel C which started the clock on the statutory period. He, and then through tacking, his son Joe continued to use the land in the same manner as his father until

February 2022 when Bob made his claim against Joe. From the time Al took possession to Bob's claim, 24 years have passed. Because Joe's possession is valid tacking, Joe has met the statutory requirement for adverse possession and can assert it to claim title to the land and will likely be successful.

Issue 2

Kate has no claim against Al because she took under a quitclaim deed. PA recognizes various types of deed: (1) general warranty; (2) special warranty; (3) quitclaim. Although general and special warranty deeds include warranties that the seller in fact owns (has title to) the interest they purport to convey and will take reasonable steps to defend the title if imperfections are later discovered and defend against legal claims of title (or at least claims of title through the grantor in the case of a special warranty deed), a quitclaim deed does not. A quitclaim deed, rather, simply conveys whatever interest that grantor has in the land. In effect, the grantee takes the risk that the grantor's interest is not what they believe it to be.

Here, Al's cottage deed is a quitclaim deed because it does not purport to convey a specific interest in the cottage but instead states Al quitclaims whatever interest he has in the land. Thus, the deed does not provide Kate with a remedy against Al; she took the risk that Al's interest in the cottage was less than she expected.

Issue 3

Joe can establish a valid and enforceable implied-in-fact contract. A contract is a legally binding agreement. A contract requires mutual assent and consideration. Consideration is a bargained for legal benefit or detriment. Ordinarily, mutual assent requires an offer and acceptance. An offer is the offeror's objective manifestation of their intent to be bound by the terms of the offer. The offer must be sufficiently definite and include the material terms. Acceptance is the offeree's objective manifestation of intent to be bound by the offer's terms. The test for each is whether a reasonable person in the shoes of the offeror or offeree would understand that the other was accepting or making an offer. However, a contract can also be implied-in-fact even where there is not a clearly identifiable offer and acceptance. A contract is implied-in-fact where the parties' objective actions indicate their intent to be bound by the terms of the agreement.

Here, there is not a clear offer and acceptance. Although Sam handed Joe $100, and said that he didn't have anyone to cut his grass, this would not be an objective manifestation of intent to be bound in the future since it does not indicate how frequently Joe should cut the grass, if at all, and does not necessarily imply that the same payment would be made. The terms are too indefinite to be an offer. Likewise, Joe telling Sam that Joe cuts his own lawn every 10 days is insufficient to be an offer of future services because a reasonable person in Sam's shoes would not understand this to say anything about Joe's willingness to cut Sam's lawn at the same time. Even if it were, Sam never accepted the offer.

However, the contract could be implied by fact. Consistent with Joe's statement, he cut Sam's lawn every 10 days and Sam continued to pay $100 each time. This conduct sufficiently establishes that parties' intent to be bound by a contract under which Joe would cut Sam's lawn every 10 days in exchange for $100. The contract is supported by consideration because Joe gave

up his right not to cut Sam's lawn and Sam gave up his right not to pay Joe $100 for cutting the lawn.

Issue 4

Kate (a) will be able to recover her unpaid salary, (b) is unlikely to recover the bonus, and (c) cannot recover punitive damages. Contract damages aim to put the plaintiff into the position that they would have been in had the contract been performed. This includes compensatory/expectation damages, incidental damages, and in certain circumstances lost profits/circumstantial damages. Lost profits/circumstantial damages are available only where they were contemplated by the parties, and can be proven to a reasonable degree of certainty. Punitive damages are not available in a breach of contract action.

(a) First, Kate is likely to be able to recover her unpaid salary by showing that it was her compensation under the contract and that she was unable to mitigate her damages. Had Buzz performed under the contract, Kate would have been paid $100,000 per year for the remaining two years on her contract. This represents her expectation damages. Generally, a plaintiff must show that they made reasonable efforts to mitigate damages and the damages will be reduced by the amount that the plaintiff was able to mitigate (or how much they should have mitigated). Here, Kate will show that she could not mitigate, and thus she is entitled to the full $100,000 per year or a total of $200,000.

(b) Second, whether Kate is entitled to the bonus is a closer question, but likely to favor Buzz. Even if Kate performed, she may not have earned the bonus; indeed, in the first year she did not because she did not hit the 10% benchmark. Thus, it is unlikely Kate could show these as expected damages. She would have difficulty showing that these damages would have occurred with reasonable certainty. Kate would argue that she got so close in the first year that she certainly would have met the 10% benchmark in the second or third year. However, that is not reasonably certain and Buzz would suggest not only that Kate's failure to meet the benchmark in the first year suggests she would not have made it in the second or third year either, but also that no one had ever hit the benchmark before either. On balance, Buzz has the better of the argument and Kate will not be awarded the bonus.

(c) Third, Kate would not be able to recover punitive damages because they are unavailable in PA for breach of contract.

In sum, Kate is likely to recover her unpaid salary, unlikely to recover the bonuses, and will not recover punitive damages.

Question 6: Sample Answer

Issue 1

The court is likely to conclude that Portia's negligence action is time-barred. Under PA law, the statute of limitations for tort actions is two years. PA follows the discovery rule, meaning that the statute of limitations for a claim begins to run once the plaintiff knew or should have known that they were injured and that the defendant was the cause of the injury. Under PA's civil rules, an action is commenced by filing either a complaint or a praecipe for writ. Where a praecipe is filed to initiate the action, the limitations period is tolled for a period equivalent to the statute of limitations so long as the party attempts in good faith to serve the defendant.

Here, Portia and Jim had their accident on July 8, 2019. Portia knew that she was injured at that time because she had pain in her neck and back and knew that it was caused by Jim because he rear ended her. Therefore, the 2-year limitations period for negligence, a tort, began on July 8, 2019, and was set to expire on July 8, 2021. Dexter filed a praecipe for wit on or about June 2, 2021, within the statute of limitations. Ordinarily, this would have tolled the limitations period, and Dexter's filing of the complaint in December 2021 would have been timely. However, the facts say that Dexter deliberately sought not to effectuate service in order to continue settlement negotiations. Therefore, Dexter did not make a good faith effort required to avail Portia of the tolling that she would otherwise enjoy based on the filing of the praecipe for writ. Without tolling, Dexter's filing and service of process in December 2021, some 6 months after the limitations period expired in July 2021, was untimely. Therefore, Jim's limitations defense is likely to succeed.

Issue 2

Portia should assert a professional malpractice claim against Dexter. Malpractice is a form of negligence and thus requires a showing of duty, breach, causation, and damages. Professionals owe their clients a duty to act as an average member of the profession would under the same circumstances. The duty is breached where the professional fails to perform as well as an average member of the profession would. Causation requires a showing of but-for and proximate causation. But for causation is shown where the damages would not have occurred in the absence of the breach. Proximate cause is shown where the damages are among the foreseeable risks created by the defendants' conduct. Damages include pecuniary damages.

Lawyers are professionals and therefore Dexter owed Portia, his client, a duty to act as an average attorney would in carrying out the representation. Dexter breached this duty in at least two ways, causing her damages.

First, he failed to accept the settlement offer despite Portia's instruction to do so. An average attorney would have accepted the settlement at Portia's instruction because they are under an ethical obligation to do so. Under widely accepted rules (including in PA), the client retains decision making authority for the goals of the representation and the attorney is responsible for strategic decisions. As applied to settlements, attorneys must communicate the settlement offer and the client has final say-so as to whether to accept it. Here, an average attorney would have accepted the settlement offer of $100,000 because they would be under an ethical obligation to do so. Causation is shown because but for Dexter's failure to accept the settlement on Portia's behalf, she would have recovered $100,000 instead of nothing and the risk of a lesser recovery is

precisely the foreseeable risk created by Dexter's failure to accept the settlement. Portia's $100,000 loss is plainly damages.

Second, Dexter breached his duty of care by failing to timely file the complaint. An average attorney would make absolutely sure to file the complaint within the requisite limitations period, knowing that dismissal would have dire consequences for the client who could no longer recover. Dexter might argue that he acted with due care because Jim had limited assets and a settlement was the only way Portia was likely to recover. However, bringing the action in a timely fashion does not prevent continued settlement negotiations, and Portia still could have recovered at least something from Jim, even if it were less. Indeed, Jim's insurance would likely have to pay the judgment if one was entered against Jim.

Dexter's second breach was also likely to have caused Portia harm. In legal malpractice cases, the plaintiff must show that they were likely to succeed in the underlying action to establish but-for causation. Portia would do so by showing that she could have succeeded on at least a theory of negligence per se. Negligence per se allows the plaintiff to show duty and breach through the violation of a law providing for criminal penalties (including motor vehicle laws) where they (1) are part of the class protected by the law; and (2) suffered the sort of harm that the statute protected against. The defendant can avoid a finding of negligence per se where it was impossible to comply with the relevant statute or doing so was more dangerous than noncompliance. Here, Portia could establish negligence per se because (1) section 3361 is designed to protect other drivers like Portia from dangerous driving and (2) Portia suffered the sort of harm that the statute protects against when Jim rear-ended her. Nothing indicates that Jim's compliance would be impossible or that noncompliance was safer than compliance. Portia would be able to establish causation and damages because but for Jim's violation of the statute he would not have hit her, which resulted in her physical injuries (which are a foreseeable risk caused by driving too fast without giving enough room to stop) and at least $40,000 in damages representing her medical costs. As stated above, Portia could have recovered at least these costs from Jim's insurer despite Jim's apparent insolvency.

Further still, Portia could argue that she would have recovered even in the absence of a negligence per se theory. Even absent negliegnce per se, defendants owe a general duty of care to the foreseeable victims of their actions (sometimes stated in terms of whether the victim was within the zone of danger created by the defendant's conduct) and breach that duty where they fail to act as a reasonably prudent person would under the circumstances. Portia could argue and would likely succeed in arguing that she could have recovered from Jim under a general negligence theory because (1) she was the foreseeable victim of Jim's apparently drunk driving and failure to brake in time to avoid hitting Portia's car and (2) a reasonably prudent person does not drive drunk and brakes with enough time to avoid rear-ending the cars in front of them. Causation would perhaps be more difficult to prove and the facts given are relatively limited in this regard, but it seems as though she could show that in the absence of the drunk driving / failure to brake in time, she would not have been hit and would not have suffered her at least $40,000 in damages.

Thus, Portia would be able to assert a successful malpractice action against Dexter under a number of different theories. First, she could show that Dexter committed malpractice by failing to accept the settlement offer. Second, she could show that Dexter committed malpractice by failing to timely file the complaint since she could have likely recovered against Jim for negligence under various theories.

Issue 3a

Dexter is likely to establish the weather on July 8, 2019, by asking the court to take judicial notice of the weather.

Judicial Notice. Judicial notice allows a party in a civil action to meet their burden of proof on a fact by showing that the fact is not subject to reasonable dispute either because (1) it is generally known in the relevant community or (2) it is capable of confirmation by reference to an easily accessible source whose accuracy cannot reasonably be questioned. Where judicial notice is appropriate, the proponent need not call a witness to establish it or admit any documents to establish it.

Here, it is unlikely that Dexter can establish that the weather on July 8, 2019, was clear and dry by community knowledge since the trial would presumably be taking place at least a few years after the accident and the community would not be expected to remember the weather on a particular day. However, Dexter would likely succeed in arguing that the weather on that date is appropriate for judicial notice by reference to the online reports of the National Weather Service stating the weather on July 8, 2019, was clear and dry. The National Weather Service would likely be an accurate source to show the weather on a particular day. Thus, the court would likely permit Dexter to establish that the weather on July 8, 2019, was clear and dry by taking judicial notice of that fact.

Issue 3b

The court is likely to overrule the objection and hold that Walt may testify to Jim's apparent intoxication.

Apparent intoxication. Although lay opinion testimony is generally not admissible, opinion testimony by a lay witness is allowed where (1) the opinion is reasonably based on the witness's perceptions; (2) the opinion would be helpful to the jury; and (3) the opinion does not require specialized knowledge. Intoxication is a quintessential example of the appropriate subject matter for a lay witness. Where the opinion does not require specialized knowledge, experience or education, certification of the witness as an expert is not required.

Here, Walt's testimony would be appropriate lay opinion testimony. First he personally observed Jim immediately after the accident and smelled alcohol on his breath, heard him slurring words, and saw that his eyes were bloodshot and he was unsteady on his feet. From this observation Walt would reasonably conclude that Jim was drunk. Second, the opinion would be helpful to the jury because it is difficult to precisely express all of the factors that go into determining whether someone is drunk, and Walt's firsthand opinion would help the jury make sense of his individual perceptions about Jim's conduct. Finally, no specialized knowledge is required to determine someone is drunk since that is something ordinary persons are generally capable of perceiving. Accordingly, Walt would not need to be qualified as an expert to testify that his opinion was that Jim was intoxicated at the time of the accident.