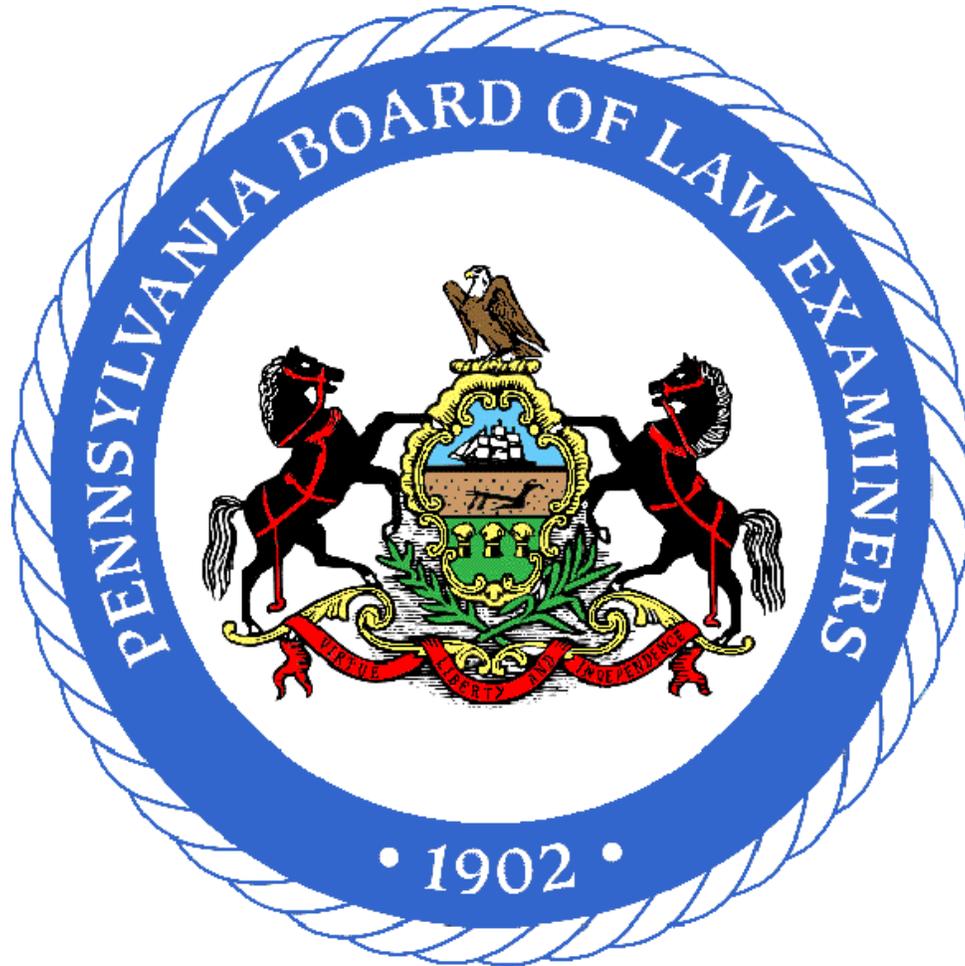


# JULY 2018

# PENNSYLVANIA BAR EXAMINATION

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## Sample Answers



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## **Performance Test: Sample Answer**

1. Plaintiff filed his complaint in the Court of Common Pleas of Luke County, Pennsylvania, alleging that Plaintiff is holds title to a 40' by 50' tract of land on Lot 6 of Lake Ann Subdivision, which is titled to Defendant. See Plaintiff's Complaint attached hereto as "Exhibit A."
2. Plaintiff's complaint admits Defendant is the titled owner of Lot 6 in Lake Anne Subdivision. See Exhibit A at paragraph 5.
3. Plaintiff's complaint avers Plaintiff is the titled owner of Lot 3 in Lake Anne Subdivision. See Exhibit A at paragraph 3.
4. A map of Lake Anne Subdivision highlighting the disputed 40' by 50' tract of land in question on Lot 6 is attached hereto as "Exhibit B."

### **Preliminary Objection One Based Upon Legal Insufficiency of Plaintiff's Pleading For Failure to Meet Elements of Adverse Possession**

5. Defendant incorporates all averments of these preliminary objections herein by reference as if more fully set forth at length.
6. Count I of Plaintiff's complaint seeks to claim Plaintiff has adversely possessed the 40' by 50' tract of land on Defendant's lot.
7. To acquire title by adverse possession, one must prove he had "actual, continuous, exclusive, visible, notorious, distinct, and hostile possession of the land for twenty-one years." Wolfe v. Porter.
8. Plaintiff has been in possession of the disputed tract of land for ten years.
9. Successive occupants may tack possession in the disputed land only when there is privity between them. Id.
10. Privity cannot be established where each predecessor of the Plaintiff's land did not claim title to the land and purport to include it in the deed granted to Plaintiff.
11. Plaintiff's deed does not include any reference to the disputed tract of land on Defendant's lot.
12. Therefore, there is not privity between Plaintiff and his grantor of the land and Plaintiff may not tack his period of possession with that of his predecessors to meet the 21 year requirement for his claim of adverse possession.

WHEREFORE, Defendant respectfully requests that the complaint be dismissed for legal insufficiency of a pleading for failure to state a claim for which relief can be granted pursuant to Pennsylvania Rule of Civil Procedure 1028(a)(4).

### **Preliminary Objection Two Based Upon Legal Insufficiency of Defendant's Pleading Under Consentable/Acquiescence in a Boundary.**

13. Defendant incorporates all averments of these preliminary objections herin by reference as if more fully set forth in length.

14. According Pennsylvania Courts, an occupation up to a fence on each side by a party or two parties for more than 21 years, each party claiming the land on his side as his own, gives to each an incontestable right up to the fence, whether the fence is precisely on the right line or not; and this is so although the parties may not have consented specifically to the fence in question. *Zeglin v Gahagen*.

15. Pennsylvania courts distinguish acquiescence in a boundary by applying the less rigorous requirement of privity of possession to claims predicated on such theory. *Id.* (adopting the view that succeeding owners of property are bound by the fences that were accepted and recognized by former owners even without any other privity or formal transfer of the area possessed adversely.)

16. In Pennsylvania, the establishment of a boundary line by acquiescence for the statutory period of 21 years requires that 1) each party must have claimed and occupied the land on his side of the line as his own; and 2) such occupation must have continued for the statutory period of 21 years. *Id.*

17. A prospective purchaser will see the fence or similar marking, and is therefore put on notice to inquire about its origin, history and function, given its "obvious presence as apparent boundary." *Id.*

18. Also, "after 21 years of occupancy up to a fence on each side as a line fence, it is not material to inquire whether the fence is on the right line or not." *Reiter*.

19. A boundary line may be proved by a long-standing fence, without proof of a dispute and its settlement or compromise. *Id.*

20. Acquiescence denotes passive conduct on the part of the lawful owner consisting of failure on his part to assert his paramount rights or interests against the hostile claims of the adverse user. *Id.*

21. "Color of title is not necessary to provide continuity of possession of land, provided the land in question is contiguous to that described in a deed, and that lands both titled and untitled were part of a close apparent by reason of physical boundaries such as fences or hedges." *Id.*

22. Plaintiff cannot satisfy element 2 of statutory acquiescence because he possessed the tract in question for only 10 years, which is 11 years less than the required statutory period for a claim of an incontestable right to land.

23. No fence or other marking exist to establish the boundary line.

24. Defendant has not passively consented to the Plaintiff's use because his use is not obvious.

25. Plaintiff has not occupied the land as his own for 21 years. Plaintiff will be unable to establish a claim for consentable/acquiescence in a boundary.

WHEREFORE, Defendant respectfully requests that the Court grant Defendant's Preliminary Objection to Count II because Plaintiff will be unable to establish a claim for consentable/acquiescence in a boundary.

## Legal Argument

### I. Adverse Possession

Where preliminary objections in the form of a demurrer are filed, the court must accept as true all well-pleaded material facts set forth in the complaint and determine all reasonable inferences and resolve all doubts in favor of the Plaintiff. *Wolfe v. Porter*. Where the court

determines the Plaintiff has failed to state a claim for which relief may be granted, it should grant Defendant's preliminary objection.

A claim of adverse possession requires the party claiming title has had: (1) actual; (2) continuous; (3) visible; (4) notorious; (5) distinct; and hostile possession of the land for a period of twenty-one years. *Id.* The "continuous" prong of the test may be met where the current possessor is able to tack his period of possession onto a previous occupant's possession of the tract. *Id.* However, for possession of successive occupants to be tacked, there must be privity between them. *Id.* Privity refers to a succession of relationship to the same thing, whether by deed, other acts, or operation of law. *Id.* A deed itself, however, between the grantor and grantee to land creates no privity to land outside its calls. *Id.* Thus, for one to successfully tack a previous occupant's possession of a tract of land for purposes of establishing adverse possession, the deed from the previous occupant must have included in it the tract of land in dispute. *Id.*

Here, Plaintiff received deeded title to Lot 3 ten years ago. For the past ten years, Plaintiff alleges he has met each element of adverse possession. Plaintiff claims his possession period of ten years should be tacked onto his grantor's possession of the disputed tract of land on Defendant's lot. However, Plaintiff's deed from his grantor does not include the 40' by 50' tract of land on Lot 6. See Plaintiff's Deed to Lot 3 attached hereto as "Exhibit C." Thus, because Plaintiff's predecessor did not claim title to the land in question and did not include or intend to include it in the deed to Lot 3, there is no privity between Plaintiff and his grantor and Plaintiff may not tack his period of possessing the disputed tract on Lot 6 with his predecessor's occupation of the land.

Thus, because Plaintiff's complaint does not establish each element of adverse possession, even when all reasonable inferences are drawn in Plaintiff's favor, the court should dismiss the complaint for legal insufficiency of a pleading for failure to state a claim for which relief can be granted.

## II. Acquiescence in a Boundary

The Court should find that Defendant has not acquiesced to Plaintiff's use of the land. In Pennsylvania, the establishment of a boundary line by acquiescence for the statutory period of 21 years requires that 1) each party must have claimed and occupied the land on his side of the line as his own; and 2) such occupation must have continued for the statutory period of 21 years. *Id.* According Pennsylvania Courts, an occupation up to a fence on each side by a party or two parties for more than 21 years, each party claiming the land on his side as his own, gives to each an incontestable right up to the fence, whether the fence is precisely on the right line or not; and this is so although the parties may not have consented specifically to the fence in question." *Zeglin v Gahagen*. Pennsylvania courts distinguish acquiescence in a boundary by applying the less rigorous requirement of privity of possession to claims predicated on such theory." *Id.* (adopting the view that succeeding owners of property are bound by the fences that were accepted and recognized by former owners even without any other privity or formal transfer of the area possessed adversely.") A prospective purchaser will see the fence or similar marking, and is therefore put on notice to inquire about its origin, history and function, given its "obvious presence as apparent boundary" *Id.* Even more, a boundary line may be proved by a long-

standing fence, without proof of a dispute and its settlement or compromise. *Id.* Also, color of title is not necessary to provide continuity of possession of land, provided the land in question is contiguous to that described in a deed, and that lands both titled and untitled were part of a close apparent by reason of physical boundaries such as fences or hedges. *Id.*

Plaintiff cannot satisfy element 2 of statutory acquiescence because he alleges possession of the tract in question for only 10 years, which is 11 years less than the required statutory period for a claim of an incontestable right to land. Also, Defendant has not passively consented to the Plaintiff's use because his use is not obvious. That is, no fence or other marking exists or existed to establish the boundary line. Because Plaintiff has not occupied the land as his own for 21 years, Plaintiff will be unable to establish a claim for consentable/acquiescence in a boundary. Because Plaintiff has not set forth well-pleaded claims to aver the elements of acquiescence to a boundary (Count II), Defendant respectfully requests that this Court grant the preliminary objections in the nature of a demurrer.

## Question 1: Sample Answer

### Issue 1

The court is likely to rule against Joe on his undue influence claim because Mike was not of weakened intellect when he revoked his old will and created a new one.

Undue influence requires the testator to be of (1) weakened intellect, (2) in a close relationship with the person that has the control or power over the testator, and (3) that the person with the undue influence receives a benefit as a result of the relationship and control over the party. Weakened intellect requires the person making the will to not have the capacity to enter into a valid will and old age or a sickness will probably not be enough. It has been found in a case where the testator had a case of Alzheimer's and could not understand the situation. A close relationship for this context includes a relationship such as attorney-client or power of attorney.

In the claim for undue influence, Joe would need to show that Mike was of weakened intellect, the relationship between Mike and Robin was close for these purposes, and Robin benefitted from Mike's will. Mike was 65, had past drinking habits that no longer existed once he started attending church, had cancer, and was told he was going to die, but he never showed the level necessary for weakened intellect similar to Alzheimer's disease that makes you lose your memory. It was even said that Mike remained cheerful and organized and went to counseling twice a week, which shows he was not of weakened intellect. Mike's relationship with Robin would be considered close for the undue influence purposes because Robin was given a durable power of attorney. Robin also benefitted from the provisions of the new will because she would receive half of Mike's estate. Although the second and third prongs are met, because there was no weakened intellect the claim by Joe for undue influence will fail.

### Issue 2

Assuming the will is held to be valid, the court will not likely grant the Church's petition to divest Joe of his share in Mike's estate. Under PA law, language in a will that expresses the mere desire or wishes of the testator, as opposed to clear direction on the distribution of the estate, is generally considered mere precatory language without binding legal effect. It is generally presumed that had the testator truly wanted a wish or desire to be binding on a devisee he would phrase it in a more certain manner and leave no doubt as to his intent that the direction be followed. Here, Mike's will starts off by expressly leaving one half of his estate to Joe, "to be used as Joe chooses." It is only after this provision that Mike states that he wishes that Joe would stop drinking, start attending church instead of football games, and start living a holy life. The unequivocal language at the beginning of Mike's will leaving half of his estate to Joe with no strings attached will be hard for the Church to overcome. It is highly unlikely that Mike intended the Church to divest his only son of all of his share of Mike's estate, especially after he expressly provided that Joe could use his share as he chooses.

The use of the word “wish” also leads to the conclusion that the language expresses only Mike’s desire and not a condition on Joe taking his share. Absent stronger language than this in the will, it certainly seems that the Church does not have a valid basis for divesting Joe of his share in the estate. Thus, the provision expressing Mike’s wishes is no more than mere precatory language that has no legal effect on Joe's share of Mike's estate. Therefore, the court will most likely not grant the Church's petition to divest Joe of his share in Mike’s estate.

### **Issue 3**

Mike's \$10,000 loss from his gambling in February can be deducted from his \$40,000 net gain received in January 2018. Gross income is defined as income from whatever source derived. This income includes gambling winnings. Although certain losses can be deducted, for gambling debt, the loss can only be offset by the amount of gambling winnings. Mike can deduct \$10,000 from his overall gross income for 2018, and he must include \$40,000 gambling winnings as a part of his taxable income for 2018. Resulting in an overall gain of \$30,000.

### **Issue 4**

Lisa most likely did not violate the Pennsylvania (PA) Rules of Professional Conduct (RPCs) governing communications with represented persons in her interactions with Joe. Under the PA RPCs, an attorney generally may not communicate with an individual the attorney knows is represented by counsel about anything concerning the representation unless the attorney (not the client) consents to such communication. This rule is designed to prevent attorneys from unduly influencing opposing parties, witnesses, etc. to their client's advantage (and to that individual's disadvantage). Part of this protection of clients' interests is that only the client's attorney, not the client themselves, can consent to such a communication. Here, it appears that Lisa followed the PA RPCs because when Joe approached her at a social gathering and brought up the case, she told him right away that she could not talk with him about the case. After that, they only discussed other topics. Thus, it appears that Lisa satisfied her duties under the RPCs here because she did not communicate with a represented person about the representation. It also helps her case that Joe approached her, not the other way around, and that she immediately warned him not to discuss the case because he was represented by counsel.

The second time Joe and Lisa spoke also was not likely a violation of the RPCs. Joe approached Lisa at a restaurant and brought up the case. This time Lisa did communicate with Joe about the representation, saying that she believed Mike's will expressed what Mike wanted and asked if they could work it out. However, this is not a violation of the RPCs, because before the second encounter, Lisa spoke with Andy, Joe's attorney, and obtained his consent for Lisa to talk about the case with Joe in the hopes that the case could be settled. Here, Lisa specifically mentioned that she wanted to try to settle the case ("work this out"), so it appears that she totally complied with Andy's wishes and did not exceed the scope of his consent. Therefore, Lisa most likely complied with the RPCs in both situations - in the first because she did not communicate about the case to a person represented by counsel, and in the second because she only communicated about the case with a represented person after obtaining the consent of that person's attorney.

## Question 2: Sample Answer

### Issue 1

If Photos ceases operations, Realty can first advance that Diane is personally liable to them for her pre-incorporation activities as a promoter. Second, Realty can advance and argue that the court should hold Diane personally liable, despite Photos incorporation in April 2018, and despite the fact that shareholders are not usually held personally liable, by having the court pierce the corporate veil.

Once a corporation is formed, the Corporation is liable for its actions because it is a separate legal entity, thus the shareholders and officer generally cannot be held personally liable for what the corporation does. However, before a corporation is incorporated, an individual may act as a promoter working to make contracts and do work for the proposed corporation before it is officially formed. The person who acts as promoter is liable for these contracts until the corporation both becomes a fully incorporated corporation and a novation occurs. This means the corporation officially replaces the promoter as the party in the contract and all parties agree to this novation. Both the promoter and corporation can remain liable unless and until the novation occurs.

Here, Diane acted as the promoter before Photos was incorporated. She decided to form a corporation in January 2018, but did not incorporate Photos until April 2018. Before then, in January 2018, Diane negotiated a lease for commercial space in Pennsylvania with Realty. She told Realty she was acting on behalf of Photos and the lease had Photos name on it, however, Diane had not yet incorporated Photos. Thus, as promoter she was liable for the contract, and Realty can advance this theory against Diane personally to collect its past due rent.

Second, as noted, a corporation usually protects its shareholders/directors/officers from personal liability. However, even after the corporation is formed the court can pierce the corporate veil (PCV) and hold the shareholders and others liable.

Here, Diane is Photo's sole shareholder. Photos has no bylaws, minutes, issued stock certificates, letterhead, or business cards to establish it as a separate entity from Diane. Further, Diane used her personal camera for Photo's business and the corporate checking account to pay both corporation and personal expenses. She comingled her personal and Photos assets. Therefore, the court could pierce the corporate veil and hold Diane personally liable for Photo's obligations.

### Issue 2

Yes, per the Uniform Commercial Code (UCC), Printers was within its rights when it refused Diane's request to replace the printer and instead proceeded with steps to repair and replace. Under the UCC when the contract is for the sale of goods, a merchant (one who deals in goods of that kind, such as a manufacturer) can limit remedies in its contract with another, such as to limit remedies to replacements parts-- so long as the limitation is clearly expressed. A limitation also cannot be unconscionable. If the limit was fair, it can be upheld. Limits are per se invalid if they fail of their essential purpose. For example, a limit of repair and replace may

not be upheld if the parts are replaced multiple times and that does not resolve the issue.

Here, Printers is a manufacturer and seller of printers. The merchant included in its contract with Diane (for Photos) explicit language that limited the remedy to repair and replacement of defective parts. The merchant included clear language in the part where Diane signed, indicating her agreement and understanding. This language was not hidden or not obvious- it was right above where Diane signed. The facts also tell us that the printer stopped working once- and that Printers immediately sent out a technician to figure out what the issue was and to resolve it, and once he did, Printers installed a new part and the printer worked fine again. There were not multiple failures to fix the printer such that this could be considered a failure of the remedies' essential purpose. Further, the facts do not indicate that Printers and Diane agreed to disclaim the implied warranty of merchantability, but Printers did not break that. Thus, Printers was within its rights to proceed with repairing and replacing.

### Issue 3

No, Photos cannot successfully recover its lost profits from Printers under the Code (UCC), even if it asserts and proves that its failure to meet the deadline was due to failure of the laser printer.

A manufacturer is within its rights to limit remedies to a sale of goods contract so long as the limitation is not unconscionable. The limitation in the contract between Diane/Photos and Printers excluded all other types of damages, including consequential damages. Consequential damages are those special damages a buyer may have such as lost profits. Another party is only held liable for them under the Code if he was aware of the possibility at the time of contract. Printers and Photos are both commercial parties and so free to limit remedies.

Diane and Printers agreed for Printers to provide her with a printer for her commercial operation. Further, Printers knew that Photos was using the printers commercially to print posters and so knew lost profits could be an issue. If Diane tried to argue that Printers still bore as the risk lost profits, Printers could argue that the remedy was limited to repair and replacement. Both parties are commercial so it is likely Diane would lose because she agreed to limit her remedy to repair and replace.

## Question 3: Sample Answer

### Issue 1

In Pennsylvania, a person is liable for their own crimes or the crimes of another when they act with the requisite state of mind for an offense. Involuntary Manslaughter under Pennsylvania law is engaging in reckless or grossly negligent conduct that causes the death of another, regardless of one's intent to kill.

The facts support a finding of guilty for Kayla regarding the charge of involuntary manslaughter. Reckless conduct is that which ignores a substantial and unjustifiable risk of death. Here, Kayla was engaging in reckless conduct. Kayla knew that Frank was intoxicated before he left as he was visibly intoxicated before he left and Kayla spoke to him before he left. Furthermore, Kayla provided the circumstances under which the minors like Frank could drink alcohol. Kayla created a substantial and unjustifiable risk of death or serious bodily harm by giving alcohol to minors who may drive home, and then consciously ignored that risk by allowing a visibly intoxicated Frank to drive multiple individuals home while under the influence.

### Issue 2

The Commonwealth should argue that the evidence of Kayla's past parties is not being introduced for inadmissible character evidence but rather for one of the permissible exceptions under the Pennsylvania Rules of Evidence and its probative value is not outweighed by its prejudicial effect.

Under the Pennsylvania Rules of Evidence, evidence of prior bad acts are not admissible to prove that a defendant acted in accordance with the previous bad acts on the occasion in question. This is commonly referred to as propensity evidence. However, evidence of prior bad acts are admissible for another purpose such as motive, intent, lack of mistake, identity, or knowledge. The list is not exhaustive.

Here, the Commonwealth intends to admit into evidence that Kayla hosted several underage drinking parties prior to June 17, 2017 in order to establish that she knew there was underage drinking taking place at her home. Such evidence is admissible under the exception for knowledge. The defense is correct that the information should not be permitted to prove Kayla's character or in order to show that she acted in accordance with her past behavior. However, evidence that is not admissible for one purpose may nevertheless be admissible for another purpose. Here, that purpose is to show she had knowledge that underage drinking occurred at her home

Furthermore, the Commonwealth should argue that evidence is admissible as its probative value is not outweighed by its prejudicial effect. Unlike the Federal Rules of Evidence, Pennsylvania does not require that the probative value substantially outweigh its prejudicial effect. Pennsylvania merely requires that its probative value is more than its prejudicial effect. Here, the Commonwealth will likely be able to show that the probative value outweighs its prejudicial effect.

### **Issue 3**

The Commonwealth should respond that the search was an inventory search upon booking, and as such does not require a warrant.

The 4th Amendment to the United States Constitution, as well as article 1 section 8 of the Pennsylvania Constitution, prohibit the government from performing "unreasonable" searches and seizures of citizens. Generally, this means that police cannot search a person or place without a warrant from a neutral and detached arbiter based on probable cause. The warrant has to note the places to be searched and items to be seized with sufficient particularity. There are exceptions to the warrant requirement, however. One of these exceptions is for inventory searches as part of established booking procedures. In order to protect police and to allow smoothly functioning prisons and jails, people who have been arrested and brought to a police station or jail can be subjected to an inventory search. This entails searching the person's body and clothes to check for contraband and other items.

Here, Kayla has been brought to the police station after she was lawfully arrested and charged with furnishing alcohol to minors and involuntary manslaughter. The facts indicate that her clothing was searched as part of an established booking process, which led to the recovery of the receipt for the beer purchase. While the police did not have a warrant to search Kayla's clothing, they did not have to because the search was a routine inventory search necessary to the smooth functioning of the police station. As a result, the court will likely rule that the beer purchase receipt is admissible evidence.

### **Issue 4**

On July 7, 2018, Ted would have grounds to divorce Kayla based on imprisonment. In Pennsylvania, spouses are entitled to divorce based on fault and no fault grounds. Under the fault grounds, spouse will be granted a divorce when their spouse has been convicted of a crime and sentenced to two or more years of imprisonment. The divorce will be granted regardless of whether the incarcerated spouse consents to it. Here, Kayla was convicted of crimes and sentenced to a minimum of three years imprisonment. Thus, the requirements for the fault based divorce based on imprisonment are satisfied and Ted would be entitled to divorce Kayla without her consent.

In addition, Ted would be entitled to a divorce under PA's no fault divorce statute, citing irretrievable breakdown of the marriage. No fault divorces are available 90 days after a complaint is filed if both spouses are consenting. However, that is not the case here. Because Kayla has indicated that she will not consent to the divorce, Ted would have to show that they have been living separate and apart for one year or more. The facts indicate that Ted moved out of the house when he found out about Kayla's arrest (June 17, 2017). Thus, on July 7, 2018, more than a year had passed of Ted and Kayla living separate and apart. Accordingly, Ted could alternatively obtain a no fault divorce without Kayla consenting.

## Question 4: Sample Answer

### Issue 1

Plaintiffs should assert a claim under Title VII based on the theory of disparate impact liability, and if they do so, they will most likely succeed. First, Title VII applies to MP because it meets the statutory definition of "employer" since it employs 15 or more employees and none of the exceptions to coverage apply. Unlike disparate treatment theories, disparate impact theory under Title VII does not require the plaintiffs to prove discriminatory intent by the employer. Rather, disparate impact theory can be used to hold an employer liable when their policies, even without any discriminatory intent, have a disproportionate impact on a protected class of employees, applicants, etc. and cannot be adequately justified as required for the job. To make out a prima facie case of disparate impact discrimination against MP, Plaintiffs would have to show, based on statistical data, that a particular employment policy of MP causes a disparate impact on women, a protected class. Even if Plaintiffs cannot point to a specific policy, they could use the bottom-line exception to show that MP's policies as a whole cause such a result. But here, they should be able to easily identify the particular policy that causes the disparate impact - the FitnessTest. Causation is clear here, because if applicants pass the test, they are guaranteed an offer of employment, but if they do not, they are not hired. Thus, women who make it through the interviews and background check but do not pass the Fitness Test will not be hired.

As for the disproportionate impact on women, Plaintiffs should be able to prove this quite easily since there is such great disparity in the pass rates of men and women of the Fitness Test. Although there is no specific requirement in Title VII itself, the EEOC has articulated the 4/5 rule for cases like this - if the pass rate of the protected class is 80% or less that of others outside the protected class, sufficient disparate impact has been shown. Here, Plaintiffs can easily meet this burden, because women pass the Fitness Test at a dramatically lower rate than men - only 5% of female applicants pass compared with 90% of male applicants. Thus, Plaintiffs can most likely make out a prima facie case of disparate impact under Title VII on the basis of sex.

But MP would be able to defend itself by showing that its Fitness Test is job-related and consistent with business necessity. It could try to show that the Fitness Test reliably predicts how well employees perform on the job and that the attributes it tests are ones that are necessary to perform the job. However, based on the facts here, it seems like MP most likely cannot do so. Although MP event personnel do work at concerts, sporting events, and political rallies where attendees may become rowdy or violent, the MP employees themselves are prohibited from pursuing or detaining anyone and must contact law enforcement and allow them to do so. Thus, it appears that none of the physical attributes such as strength, speed, and endurance tested by the Fitness Test are actually necessary to the job itself. Indeed, MP employees are forbidden from even pursuing anyone, let alone detaining them. Therefore, it would be very difficult for MP to successfully argue that its Fitness Test is job-related and consistent with business necessity. Even if it can do so, though, Plaintiffs would then have the opportunity to show that an alternative policy exists that both meets MP's goals without additional cost and does not have a disparate impact on female applicants. And if they can do so, they would succeed even if MP could somehow successfully assert the defense of business necessity. In the end, Plaintiffs will most likely succeed in their disparate impact claim against MP under Title VII.

## **Issue 2**

In order to obtain class certification under the Federal Rules of Civil Procedure, the plaintiff's will have to meet several requirements. Class certification requires that the class be so numerous so that class certification is appropriate, that there are common questions of law and/or fact, that the interests of the named parties are typical of the class, and that the named parties will adequately represent the entire class. Additionally, the plaintiff's must show that there is either a risk of inconsistent results, that the common questions of law or fact make class certification appropriate compared to alternative methods of adjudication, or that defendant acted on grounds that apply to the whole class.

In this case, there are common questions of law and fact. The plaintiffs are all women who were denied employment by MP because of the results of their fitness test. This potential class consists of 200 female applicants, which again would justify class certification. The interests of the named parties would be typical of the class and they would adequately represent the entire class. Lastly, the test used by MP applied to all the women in the class and resulted in refusal to employ those women class members who failed the test.

Therefore, because the plaintiff's will satisfy all of the requirements of class certification, they will be successful in their request for class certification.

## **Issue 3**

MP should raise the constitutional doctrine of mootness but it is not likely to succeed. Under the constitution, federal courts can only hear real cases and controversies -- potential plaintiffs must have standing, the claim must be ripe, and the claim cannot be moot. To have standing, the plaintiff(s) must have an actual injury in fact, caused by the defendant, additionally, the claim must be ripe and not brought too early. Finally, the claim cannot be moot, meaning that the claim cannot be brought after the harm has already subsided or the threat of harm has been terminated.

Here, the facts suggest that MP has been litigating the case for 16 months but has decided to stop using the fitness test and seek dismissal of the case because MP is no longer using the test (thus essentially making the claim moot). Normally, cessation of harm is enough to render a claim moot and thus would prevent a federal court from hearing the case. However, there is an exception to the mootness rule when defendant's voluntary cease the harm but are legally able to resume it at any time (because there has not been a legal determination that the conduct is unlawful and there are no other facts preventing them from resuming the conduct in the future). This case would fall into the exception. Without a court order preventing MP from using the fitness test, they would be free to resume it at any time after dismissal of the case. Thus, the case is not moot, MP's argument would fail, and the case would not be dismissed for mootness.

## Question 5: Sample Answer

### Issue 1

A valid contract was formed between KBL and Mess. Under Pennsylvania common law, a valid contract requires valid offer, acceptance, and consideration in order to be formed. The party that makes an offer is the offeror, and the party that receives the offer is the offeree. An offer is the expression of a willingness to be bound, which creates the power of acceptance in the offeree, such that the offer merely requires the offeree to say something to the effect of "I accept" for a reasonable person to consider the agreement to be concluded. An acceptance is the expression of assent to an offer, such that the offeree intends to bind himself or herself to the terms contained in the offer. A counteroffer is a return of another offer, instead of an acceptance or express rejection, to a previous offer. At common law, normally counteroffers serve to destroy offers, such that the original offer can no longer be accepted by the offeree. However, there is an exception when the offeree clearly intends to keep the original offer open.

Here, Mess would be promising to remodel the KBL studios. Mess made an original offer to KBL for \$200,000 in exchange for remodeling the studios. This was an offer because it was stated in definite terms ("I'll do the job") and explicitly granted KBL the power of acceptance within 30 days. However, KBL then responded with some trepidation ("budget is a little tight") followed by a statement that they would agree to be bound to a deal immediately if Mess agreed to a price of \$125,000. Since the terms of KBL's statement were just as definite as the terms of Mess's original offer and was made in response to Mess's original offer, KBL's statement could be construed as a counteroffer. However, KBL said it was taking Mess's offer under advisement while proposing an alternate plan. Thus, KBL clearly expressed intent to keep the offer open. Thus, KBL's subsequent assertion that they were accepting Mess's original offer, which was within the 30 days, would be a valid acceptance.

Therefore, KBL and Mess had a valid contract.

### Issue 2

- a. Following Chuck's death, Blackacre is owned by Dave and Human Fund, each having equal shares.

Joint ownership to property is seen in three varieties: tenancy in common, joint tenancy, and tenancy by the entirety. Tenancy by the entirety is applicable only to married couples, and so would not be applicable to the concurrent estate relationship that existed between Chuck and Dave.

Joint tenancy requires the four unities of title, time, interest, and possession, plus a right of survivorship. Joint tenancies must be expressly created, and in the granting document it must be clearly stated that a joint tenancy is being created with a right of survivorship. The right of survivorship is the right of the surviving cotenant to take upon the other's death. Here, although the deed that conveyed Blackacre to Chuck and Dave stated that it was being conveyed to them "jointly" the deed did not contain any language suggesting that a right to survivorship was created. Therefore, Chuck and Dave owned the property as tenants in common, which is the

default concurrent estate. Tenants in common may freely sell and devise their interest. Thus, when Chuck died leaving his entire estate to Human Fund, that charity obtained his 50% ownership interest in Blackacre. Accordingly, following Chuck's death, Blackacre is owned by Dave and Human Fund, each having one half.

b. Big Bank will not succeed in forcing a sale of Whiteacre.

A tenancy by the entirety is presumed in Pennsylvania when spouses purchase a piece of real property together. Pennsylvania does not require there to be language in the deed indicating that the parties are spouses or that the property is being taken pursuant to a tenancy by the entirety, even though this would be preferred. One spouse cannot encumber property that is subject to a tenancy by the entirety, and a creditor may not reach such a property unless both spouses have encumbered it or unless the creditor has a judgment against both spouses.

Here, a tenancy by the entirety was presumed to be created when Al and Brenda purchased Whiteacre, because they were married at the time they made the purchase. Big Bank will not be able to force a sale of Whiteacre because the judgment obtained was only against Al. Big Bank would have had to obtain a judgment against both spouses in order to be able to force a sale of Whiteacre to satisfy the debt. As such, Big Bank will not succeed in forcing a sale of Whiteacre to satisfy Al's credit card debt.

### **Issue 3**

KBL should argue that Al's damages should be reduced because of his failure to mitigate damages, but if it does so, it will not likely succeed. Contract law remedies are designed to compensate the non-breaching party by putting them in the same position they would have been in had the other party performed and not breached the contract. In an employment contract situation, where the employer breaches by terminating the employee in violation of the employment agreement, the employee can generally recover what they would have earned under the contract, minus actual earnings. However, even an innocent party in a breach of contract case has a duty to take reasonable steps to mitigate their damages. Contract law allows a breaching party to reduce a plaintiff's recovery by proving that he unreasonably failed to mitigate his damages after the breach of contract.

Here, KBL can argue that Al's damages should be reduced based on his failure to take another broadcasting job after his termination. It could point to the fact that Al turned down an offer from a Blueberry Hill radio station to do play-by-play for local high school football games and argue that his damages should be reduced by what he could have earned working that job. It could also argue that the fact that he has spent much of his time playing Fantasy Football shows that Al has failed to make reasonably diligent efforts to seek reemployment elsewhere. However, KBL will not likely succeed in this argument, at least not to the degree it would hope. Although Al turned down the job with the local radio station, that job would have paid him only \$25,000, which is a severe downgrade from his \$750,000 per year with KBL. Plaintiffs are not required to accept any replacement employment available or have their damages reduced. They are only required to make reasonable efforts to obtain reemployment in substantially similar jobs. Such a massive pay cut would not constitute substantially similar employment for Al, so KBL's

argument will most likely fail. Although it appears that Al has not been especially diligent in finding another job given his Fantasy Football habit, he has still made great efforts via Brenda to do so, and it seems like there are simply not any equivalent jobs available.

#### **Issue 4**

Gatebriar can seek injunctive relief against KBL and prevent the making of a sports bar/ brew pub by declaring that KBL has constructive notice of a restriction against the selling of alcohol. An equitable servitude imposing a restriction may run with the land when such has been put in writing, the restriction was intended to run with the land, the restriction touches upon the land, and the burdened party has a form of notice of the restriction. When a restriction has not been contained in the deed to a party of concern, the party may still have constructive notice when the restriction is recorded in the chain of title. Effectively, a party lacking the restriction in his own deed would be put on notice of the restriction by reason of its being recorded in the subdivision plan. In this case, an equitable servitude exists because the original owner created in writing a restriction against selling alcohol on his premises and recorded such restriction in his "Plan". By recording the plan and repeating it in subsequent deeds, the owner intended it to run with the land. The servitude touches the land because it concerns limits on how the land is used. Lastly, KBL would have constructive notice of the servitude because the servitude is part of a subdivision plan, which was recorded. Thus, KBL has been put on notice of the servitude and may be enjoined from making a business selling alcohol on the property.

## Question 6: Sample Answer

### Issue 1

The Court will find that the Hospital maybe liable for direct negligence or vicarious liability for Stone's negligent conduct. Establishing negligence under the common law requires a showing that 1) Defendant had a duty 2) defendant breached its duty 3) the breach of duty directly or proximately caused harm and the 4) the harm lead to the Plaintiff's damages. For direct negligence, Penny should show breach of duty because doctor wasn't competent or didn't follow proper protocols.

Here, Penny will be able to show the Hospital's negligence by showing the first element that the hospital had a duty to ensure proper medical procedures were being conducted. Penny can establish the second element by showing that the defendant breached its duty by allowing improper medical procedures to go on because the "Hospital did not have any protocols in place requiring inexperienced surgeons to consult with another surgeon before performing brain surgery." Penny can show that the Hospital proximately caused the harm because its lack of protocols for inexperienced surgeons lead to an inexperienced surgeon performing faulty surgery upon Penny. Lastly, Penny can show damages because Penny has suffered memory loss from the continued bleeding in her brain after the first surgery.

In Pennsylvania, an employer may be liable for an employee's negligent conduct, under the doctrine of respondeat superior/vicarious liability if the employer hired an incompetent person or it did not properly control that person. Penny can show that the hospital is vicariously liable for Dr. Stone's conduct by showing Stone breached his duty to Penny. Penny will show that Dr. Stone acted in the scope of his employment and he was negligent in doing the brain surgery in the hospital for one of the hospital's patients. Dr. Stone was negligent after he closed Penny's skull after the first surgery while disregarding the continuous bleeding from one artery. Lastly, Penny can show an injury because Dr. Stone's first surgery lead to her memory loss.

Because Penny will be able to bring a claim of negligent and vicarious liability on the hospital, the court should analyze the claims in the above mentioned manner.

### Issue 2

The court will likely rule that the claim should be dismissed as untimely because the statute of limitations will have expired.

In Pennsylvania, negligence and most other torts have a two year statute of limitations. Generally, for personal injury claims, this statute of limitations begins to run when the injury is discovered or should have been discovered by a reasonable person. Here, Penny was made aware of her injury (viz., permanent memory loss) on 11/16/15 when she was brought out of her medically-induced coma. Even if the court does not view this as the date upon which Penny became aware or should have become aware of the injury, the 11/20/15 medical opinion from the other doctor that spurred Penny to file a lawsuit would have absolutely provided the requisite notice. This means that, at the very latest, Penny's lawsuit should have been filed by 11/20/17.

In short, Penny's claim is untimely and a court should grant the defense's motion to dismiss the claim for that reason.

### **Issue 3**

The court should exclude this evidence, as subsequent remedial measures undertaken by a party cannot be offered to prove negligence.

In Pennsylvania, subsequent remedial measures undertaken by a party cannot be offered to prove negligence. This is grounded in the public policy theory that we want to encourage affirmative acts which prevent injuries. However, if there is a dispute of ownership, control, or feasibility, the future remedial measures will be admissible to prove those items but not as substantive evidence to prove negligence.

In the current case, the remedial measures undertaken by the hospital are inadmissible to prove negligence. As a result, Penny cannot introduce the new protocols to prove her negligence claim. There is no debate over ownership, control, or the feasibility of corrective measures, and as a result, no exception to the rule is applicable. In conclusion, the court should exclude this evidence, as subsequent remedial measures undertaken by a party cannot be offered to prove negligence.

### **Issue 4**

a. Penny will be able to recover because her fault was determined to be less than 50%. However, her amount of recovery will be reduced in proportion to the amount of her fault. Pennsylvania follows a partial comparative negligence form of recovery. Applying partial comparative negligence, a party is still able to recover as long as their amount of fault is not greater than the defendant(s). Although recovery is permitted, the party's amount of recovery will be reduced in proportion to her liability. Here, Stone and the hospital are collectively 60% at fault. Therefore, Penny can still recover from both parties but the overall reward will be reduced by 40% because that is the amount she was determined to be at fault.

b. Applying the partial comparative negligence rules explained above, Penny will not be able to recover at all. Because Pennsylvania is a partial comparative negligence jurisdiction, if a party is over 50% at fault, they cannot recover anything from the defendants even though a portion of the liability was attributed to the defendants. Here, Penny was 60% at fault. Because the fault attributed to Penny was greater than 50% she is not entitled to recover any damages from the hospital or Dr. Stone.