

February 2013

New York State  
Bar Examination

Essay Questions

## **QUESTION 1**

Owner, the owner of Blackacre, a single-family home, told Friend that he wanted to sell Blackacre for \$300,000. Friend said to Owner that he would try to find a purchaser if Owner would agree to pay him a commission of 6%, and Owner orally agreed. Friend is neither a lawyer nor a licensed real estate broker or sales person.

Thereafter, without Friend's knowledge, Owner and Al entered into negotiations for the sale of Blackacre. Al faxed to Owner a signed letter stating that he offered to buy Blackacre for \$250,000 in cash to be paid at the closing to take place in 90 days. The letter described Blackacre by street address and dimensions. Owner responded by mailing a signed letter to Al stating that he was refusing Al's offer but would agree to sell Blackacre to him for \$275,000 on the same terms. Al immediately responded by mailing a signed letter to Owner stating that he agreed to the higher price.

Before Owner received that letter from Al, Friend presented Owner with a proposed contract for the sale of Blackacre to another prospective buyer for \$300,000. Owner immediately sent a letter by fax to Al stating that he was no longer willing to sell him Blackacre. Al received this letter before Owner received Al's letter agreeing to the higher price. Al then called Owner to confirm his willingness to buy Blackacre for \$275,000, but Owner said he was now unwilling to sell Blackacre to him.

After receiving Owner's last letter, Al consulted Lawyer. Lawyer telephoned Owner to discuss the matter. Lawyer explained that he was representing Al and would like to try to settle Al's claim against Owner. Owner said he was willing to tell Lawyer anything Lawyer wanted to know, but that Owner would have to discuss any possible settlement with his own attorney. Lawyer and Owner then discussed the issues. When Lawyer terminated the call, he said he would contact Owner's attorney if Al wanted to propose a settlement.

Subsequently, Al duly commenced an action against Owner for specific performance. The complaint alleged the foregoing pertinent facts. Owner has moved to dismiss the complaint on the grounds that (a) a cause of action was not stated because no contract was formed between Al and Owner, and (b) even if a contract was formed, it was not enforceable because the statute of frauds was not satisfied.

Friend has demanded Owner pay his commission, but Owner has refused.

- (1) Was a contract formed between Owner and Al?
- (2) Assuming a contract was formed, was the statute of frauds satisfied?
- (3) Was it ethical for Lawyer to talk to Owner about Al's claim?
- (4) May Friend successfully maintain an action to recover his commission?

## QUESTION 2

David was indicted for the crime of attempted murder in the second degree in connection with the shooting of Vicki, his former wife. David retained Lawyer to represent him on the charge. David told Lawyer that he was with his girlfriend, Ginger, at the time of the shooting. Lawyer spoke to Ginger who confirmed that David had been at the movies with her at the time of the shooting. Thereafter, pursuant to a demand served by the prosecution, Lawyer served a notice of alibi on the prosecution, naming Ginger as an alibi witness and providing details of David's alibi defense. In investigating the crime, Lawyer also spoke to David's brother, Ben, who stated that Vicki told him immediately after the shooting that her boyfriend, Jerry, shot her.

At trial, Vicki's sister, who had witnessed the shooting, identified David as the person who shot Vicki. Vicki, who was in a coma due to her injuries, was unable to testify.

After the prosecution rested, Lawyer called Ginger to testify. Ginger testified that David was with her at the movies at the time of the shooting. On cross-examination, Ginger was unable to recall either the name or the plot of the movie they had seen, the names of the actors who starred in the movie, the time of the movie, the theater they had attended or other details of the day.

Lawyer then called Ben to testify. Over the prosecution's objection, the court allowed Ben to testify that he was down the block when he heard the gunshot; that he ran to the scene arriving seconds later and found Vicki lying on the ground and bleeding from her abdomen; and that Vicki screamed several times that Jerry shot her.

That evening, after Ben testified, David told Lawyer in a confidential conversation that he knew that Ben was out of town on the day of the shooting and that he was lying in his testimony to help David. Lawyer was able to confirm that Ben was away on vacation at the time of the shooting. Lawyer did not reveal David's confidential statement to anyone or take any other action.

David did not testify in his own defense, and the defense thereafter rested. After the close of the proof, the judge instructed the jury as to David's alibi defense as follows: "David has asserted an alibi defense, supported by the testimony of Ginger. To establish his defense, David has the burden of proving that he was elsewhere at the time of the crime charged. If you find that David has established he was not at the scene of the crime, you should return a verdict of not guilty."

David was convicted of attempted second degree murder and sentenced to prison. Shortly thereafter, Vicki died of the injuries she suffered in the shooting, and David was then indicted for the crime of murder in the second degree. Lawyer has moved to dismiss the indictment on double jeopardy grounds.

- (1) Was the court's ruling admitting the testimony of Ben as to Vicki's statement correct?
- (2) What, if any, ethical obligation did Lawyer have with regard to David's communication to him as to Ben's testimony?
- (3) Was the judge's instruction to the jury on David's alibi defense correct?
- (4) Should the motion to dismiss the indictment for murder in the second degree be granted?

### **QUESTION 3**

Henry and Wilma were married over 20 years ago and had two children, Andy and Eva, who are now adults. Several years ago, Henry became involved in a relationship with Sally.

Two years ago, Henry opened a Totten Trust bank account in his own name in trust for Sally and deposited funds into the account. The trust account does not contain language dealing with simultaneous deaths or deaths resulting from a common disaster. Henry also purchased a life insurance policy naming Andy and Eva as the beneficiaries.

Last year, Henry duly executed a will containing the following relevant provisions:

**FIRST:** I direct that all my just debts, funeral expenses and administration expenses be paid.

**SECOND:** I give and bequeath the sum of \$2,000,000 to my Trustee, hereinafter named, to be held in trust, to pay the income to my children, Andy and Eva, in equal shares, during their lives, or to the survivor of them, and upon the death of the later of them to die, to pay the income to the children of Andy and Eva in equal shares, with the principal to be paid to such children in equal shares, when the youngest of them reaches the age of 25.

**THIRD:** I give the rest, residue and remainder of my estate to my wife, Wilma.

Two months ago, Henry and Sally were driving when their car veered out of its lane directly into an oncoming car. Henry was killed instantly, and Sally died from her injuries the following day.

Henry is survived by Wilma and by Andy and Eva, neither of whom had any children at the time of Henry's death. Henry's will was admitted to probate, and Wilma has been appointed executor of his estate.

Wilma has filed a proceeding in surrogate's court seeking a determination that the \$2,000,000 bequest to the trust was invalid because it violates the rule against perpetuities and that the \$2,000,000 should pass to her outright under the residuary clause.

Both Henry's estate and Sally's estate are seeking recovery of the balance in the bank account.

Wilma has duly filed a right of election against Henry's estate. At the time of Henry's death, the balance in the bank account was \$100,000, the death benefit on Henry's life insurance policy was \$1,000,000, and the net value of Henry's other assets (after payment of all debts, funeral expenses and administration expenses) was \$2,000,000.

- (1) (a) Does the bequest to the trust violate the rule against perpetuities?  
  
(b) Assuming the rule is violated, how should the assets bequeathed to the trust be distributed?
- (2) Which estate is entitled to the balance in the bank account?
- (3) What is the value of Wilma's elective share and how is it calculated?

#### **QUESTION 4**

Liz was shopping at a retail outlet owned by Apex when the escalator she was riding suddenly stopped, causing her to fall and break her leg. She was taken to a nearby hospital where she was treated by Doctor, an orthopedic surgeon. Following surgery, and while Liz remained under Doctor's care in the hospital, she developed swelling and blistering in her leg. Several days later, her leg became severely infected and gangrenous, and Doctor performed an above-the-knee amputation.

Liz duly commenced an action against Apex and Doctor. In her sole cause of action against Apex, Liz alleged that her injuries were the result of Apex's negligent operation and maintenance of the escalator. In her first cause of action against Doctor, Liz alleged that Doctor's negligence during surgery and his misdiagnosis and subsequent delay in properly diagnosing and treating her condition aggravated her original injury. Liz asserted a second cause of action against Doctor alleging that Doctor's acts and omissions constituted gross negligence and seeking punitive damages. In their answers, Apex and Doctor asserted cross-claims against each other for contribution.

Prior to trial, Doctor moved to strike Liz's demand for punitive damages, on the ground that, as a matter of law, punitive damages are not recoverable absent an allegation of intentional conduct. The court granted Doctor's motion.

At trial, Liz established that she was standing on an escalator step holding a handrail when the escalator abruptly stopped. An expert testifying on Liz's behalf gave his opinion that the stoppage could not have occurred if the escalator had been properly maintained. Apex established at trial that: (1) it had not received any prior complaints about the escalator; (2) it performed regular weekly preventative maintenance and no problems were indicated in the service records; and (3) it tested the escalator immediately after the accident and it was working properly. Apex's operations manager testified that the escalator was subject to extensive public usage on a daily basis and that sudden stoppages can occur if debris becomes wedged between the escalator steps. Over Apex's objection, the court charged the jury on the doctrine of *res ipsa loquitor*.

After trial, the jury returned a verdict in favor of Liz in the amount of \$3,000,000 for her pain and suffering. The jury determined that 30% of Liz's damages were attributable to the negligence of Apex and that 70% of her damages were attributable to the negligence of Doctor.

- (1) Was the court correct in granting Doctor's motion to strike Liz's demand for punitive damages?
- (2) Was the court correct in charging the jury on the doctrine of *res ipsa loquitor*?
- (3) Are Apex and Doctor jointly and severally liable for Liz's damages?
- (4) What rights, if any, do Apex and Doctor have against each other for contribution?

## **QUESTION 5**

Meg was employed as Vice President of Marketing for Men's Style, Inc. (MSI), a New York business corporation and the owner of a chain of stores selling clothing for young men. Meg had a track record of selecting styles and brands that produced substantial profits for MSI, and her purchasing and marketing skills were well-regarded within the corporation.

Meg prepared a report to the Board of Directors recommending that it purchase \$3 million of inventory from XUMA, a start-up company that was manufacturing a line of innovative clothing for young men. Meg presented her recommendation at a duly called meeting of the Board, attended by 12 of the 15 directors of MSI. Based on Meg's recommendation, and without further research or analysis, seven directors of the Board present at the meeting voted in favor of a resolution approving the purchase from XUMA. The remaining five directors who were present at the meeting dissented from the vote. The certificate of incorporation of MSI is silent regarding voting and quorum requirements. MSI thereafter purchased the inventory from XUMA.

The purchase proved disastrous for MSI. The quality of the clothing produced by XUMA was poor, and the styles were unpopular and did not sell. Meg was thereafter fired from her job at MSI.

After an unsuccessful demand on the Board, a group of shareholders of MSI duly commenced a derivative action, in the right of the corporation against the directors, claiming that the purchase was unauthorized because a majority of the Board did not vote in favor of the purchase from XUMA, and alleging waste and neglect in making the purchase. The action remains pending.

Meg and her husband, Ken, were divorced while she was still employed by MSI. Under the terms of the separation agreement they entered into in 2011, which was incorporated but not merged into their judgment of divorce, Meg was awarded custody of their son, Brad. At the time of the divorce, Meg and Ken, who both graduated from exclusive private colleges, were each earning in excess of \$100,000 per year. Their separation agreement provided that Ken would pay child support in an amount in accordance with the Child Support Standards Act. After the divorce, Ken moved to another state to accept a job that is now paying him 30% more than he was earning at the time of the divorce.

Brad, who had always been a well-behaved child and a good student, had difficulty adjusting to his father's absence. After the divorce, Brad's grades fell significantly and he began to have disciplinary problems at home and school. At a counselor's recommendation, Meg enrolled Brad in a private school. Brad thrived at the

school, achieving better grades than he had ever received at the public school he attended prior to the divorce, and his disciplinary problems disappeared.

The separation agreement between Meg and Ken, which was fair and equitable when made, provides a formula for the payment of private college tuition for Brad, but provides that Brad will attend a public high school, without cost to either parent, and is silent regarding modification. Since she lost her job, Meg has not looked for work, deciding instead to take some time off and consider a career change. Meg is no longer able to afford private school tuition for Brad, now age 15. Meg applied for an order modifying Ken's child support obligation so as to require that he contribute to the expense of Brad's private secondary school tuition. Ken opposed the application on the ground that the separation agreement does not require such a payment and is binding on the parties; and, in any event, he cannot be required to pay private secondary school educational expenses as part of his child support obligation. The court denied Meg's motion, ruling that (a) while the separation agreement could be modified, (b) Ken could not be required to contribute to Brad's private secondary school educational expenses.

- (1) Was the resolution authorizing the purchase from XUMA properly adopted by vote of the Board of MSI?
- (2) Assuming the resolution was properly adopted, may the directors of MSI be found personally liable for waste and neglect for the losses associated with the purchase from XUMA?
- (3) Was the court correct in its rulings that (a) the separation agreement could be modified, and (b) Ken could not be required to contribute to Brad's private secondary school educational expenses?

### **MPT - In re Guardianship of Will Fox**

Examinees' law firm represents Betty Fox, a member of the Blackhawk Tribe, who has petitioned for guardianship of her minor grandson, Will. Will's mother died when he was born and his father, Betty's son, has been in a coma for several months as a result of a car accident. Betty is petitioning for guardianship in the Blackhawk Tribal Court in response to a petition for guardianship in Franklin state court filed by Will's maternal grandparents, the Lodens, who are not members of the tribe. In addition, the law firm has filed on Betty's behalf a motion to transfer the Lodens' state court action to the tribal court. Examinees are asked to prepare a brief in support of the motion to transfer, following the firm's format for persuasive briefs, and anticipating those arguments likely

to be raised by the Lodens against the transfer. The File includes the instructional memo from the supervising attorney, a format memo for persuasive briefs, the competing petitions for guardianship filed in state and tribal court, a letter from the tribal court, the motion to transfer, an email from Betty's son, and an excerpt from the Journal of Native American Law. The Library contains excerpts from the Indian Child Welfare Act of 1978, guidelines from the Bureau of Indian Affairs for Indian child custody proceedings, and a case from the Franklin Supreme Court bearing on the subject.

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February 2013

New York State  
Bar Examination

Sample Essay Answers

## **FEBRUARY 2013 NEW YORK STATE BAR EXAMINATION**

### **SAMPLE CANDIDATE ANSWERS**

The following are sample candidate answers that received scores superior to the average scale score awarded for the relevant essay. They have been reprinted without change, except for minor editing. These essays should not be viewed as "model" answers, and they do not, in all respects, accurately reflect New York State law and/or its application to the facts. These answers are intended to demonstrate the general length and quality of responses that earned above average scores on the indicated administration of the bar examination. These answers are not intended to be used as a means of learning the law tested on the examination, and their use for such a purpose is strongly discouraged.

## ANSWER TO QUESTION 1

1. Was a contract formed between Owner and Al?

A valid contract requires: (1) offer and acceptance (i.e., a "meeting of the minds"), (2) consideration and (3) no defenses to enforceability. A bilateral contract is a contract in which one party's promises to do (or not do) something in exchange for the other's promise to do (or not do) something. Consideration is a bargained-for exchange in which there is a benefit or determinant to one or more of the contracting parties. The mailbox rule provides that acceptance to an offer (sent by mail) is deemed accepted once it is in the mail. Absent a signed, written agreement to keep an offer open for a certain time period, an offer may be revoked at any time prior to acceptance.

Al's initial letter to Owner was an offer to purchase Blackacre for \$250,000; and Owner's responsive letter was a rejection and counteroffer to Al's initial offer. Al accepted Owner's counter-offer to purchase Blackacre at \$275,000 and a valid, enforceable contract was formed when he placed his letter of acceptance in the mail. It is irrelevant to the contract's enforceability that Owner sent a fax to Al (prior to his receipt of Al's acceptance letter at \$275,000) or that Owner had not yet received the acceptance letter because a contract was formed when Al placed it in the mail.

Accordingly, a valid, enforceable contract for the sale and purchase of Blackacre for \$275,000 was formed between Owner and Al.

2. Assuming a contract was formed, was the Statute of Frauds satisfied?

Pursuant to the Statute of Frauds, certain contracts formed between parties must be in writing and signed by the party to be charged. One such category of contracts includes contracts for the purchase and sale of land. In addition, the contract must adequately describe the real property to be sold and bought. A sufficient description for real property may be accomplished by describing it in metes and bounds; however, a street address will suffice as well. There must also be included a price. Furthermore, and pursuant to the Statute of Frauds, there is no requirement that the contract be confined to one writing; it may consist of more than one writing, so long as the chronology and events of the writing clearly indicate that there was an offer, acceptance, and consideration by and between the contracting parties.

Here, Al's initial offer letter included a description of Blackacre "by street address and dimensions." Thereafter, Owner rejects and counters in a letter to Al, which Al then accepts in a third letter correspondence to Owner. Owner's rejection and counter-offer letter was in writing and signed, Al's acceptance was in writing and signed, and contained an the agreed-to price.

Accordingly, the statute of frauds for this contract was satisfied as all material terms to the sale of Blackacre were defined and agreed-to and evidenced by Owner and Al's back-and-forth signed, written correspondence evidencing the valid formation of the contract.

3. Was it ethical for Lawyer to talk to Owner about Al's claim?

An attorney representing his client may contact and discuss the matter(s) in dispute with the opposing party who is not represented by counsel. When an attorney does so, he must make clear to the unrepresented opposing party that he is NOT that person's attorney. (In fact it is good practice to inform the non-represented opposing party to seek counsel.) The lawyer must also not give the appearance that he is neutral or looking out for the other party's interest, and clear up any thought by said party to the contrary. However, when a lawyer discovers that an opposing party has counsel representing him, he must refrain from continuing the conversation or refrain from further discussions with the opposing party, unless he has permission from his attorney to do so.

Here, Al's lawyer learned that Owner had an attorney during their conversation; however, instead of ending the conversation, Lawyer continued and "then discussed the issues." Lawyer should have immediately informed Owner that he must refrain from further discussion on the matter until he first spoke with Owner's attorney.

Accordingly, Lawyer's actions in continuing the discussion with Owner were probably unethical.

4. May Friend successfully maintain an action to recover his commission?

As previously stated, the Statute of Frauds requires that certain types of contracts must be reduced to a writing and signed by the party to be charged. In New York, promises to pay a party a commission for the negotiation of a loan or the purchase of real property or a business must be in writing and signed by the party to be charged, UNLESS that party is a lawyer, a licensed real estate agent, or an auctioneer.

Here, Owner orally agreed to pay Friend a 6% commission for the sale of Blackacre. However, the agreement was never reduced a writing and signed by Owner. Moreover, Friend was not a lawyer or licensed real estate agent.

Accordingly, Friend will not be able to maintain a successful action against Owner to recover his commission because the agreement between them is barred by the Statute of Frauds.

## ANSWER TO QUESTION 1

1. The issue is does the receipt of a revocation of a contract, after acceptance is mailed, revoke a valid contract?

Under New York contract law, a valid contract is formed where there is 1) an offer stating the quantity of the contract, 2) acceptance of the offer which is the mirror image of the offer and 3) consideration which is bargained for exchange plus legal detriment or benefit. Acceptance is effective when mailed and revocation is effective when received. Once a contract is accepted revocation is no longer possible by one party.

Here, there was a contract formed between Owner and Al. Al made a valid offer to buy Blackacre when he faxed Owner a letter describing the dimensions and address of Blackacre and the amount he was willing to pay. Owner responded with a valid counteroffer when he mailed back an alternative price of \$275,000 on the same terms. Al accepted Owner's counteroffer when he sent back his acceptance. There was consideration for this contract because \$275,000 was promised to be paid by Al at a later date and the parties bargained for this amount. The fact that Owner tried to revoke the contract after Al's acceptance was not effective. It does not matter that Owner had not yet received Al's acceptance because acceptance is effective when mailed. As soon as Al put his acceptance in the mail, Owner could no longer revoke the valid contract.

Therefore, a contract was formed between Owner and Al.

2. The issue is is the Statute of Frauds satisfied where multiple writings make up the contract.

Under the Statute of Frauds, contracts for the sale of land must be in writing and signed by the party to be charged. The writing must include the material terms of the contract. Multiple writings may make up the contract in order to satisfy the Statute of Frauds.

Here the contract between Al and Owner does satisfy the Statute of Frauds. Since this is a contract for the sale of real property namely Blackacre, the statute must be satisfied. The initial offer by Al, the counteroffer by Owner, and the acceptance by Al combined satisfy the Statute of Frauds because all material terms are in writing including the price of the sale and the description of the property (street address and dimensions). Finally, Owner's signature on his counteroffer and Al's signature on his acceptance evidence a signature by the party to be charge.

Therefore, the contract between Al and Owner satisfied the Statute of Frauds.

3. The issue is can a lawyer talk to the opposing party in a potential lawsuit outside the presence of their attorney.

Under New York Professional Responsibility Code of Conduct, a lawyer should only speak with the opposing party in the presence of their attorney about matters regarding a lawsuit or potential lawsuit. A client's consent to speak with the opposing counsel is unlikely to be enough to repair this breach of the code of ethics.

Here, Lawyer contacted Owner, who was the potential opposing party, and spoke with him outside the presence of Owner's attorney. Although Owner consented to the communication, this is a reach of the code of ethics because Lawyer knew Owner had an attorney yet continued to speak with him alone.

Therefore, it was not ethical for Lawyer to talk to Owner about Al's claim.

4. The issue is must a promise to pay a commission to someone other than a lawyer or licensed real estate broker be in writing.

Under New York contract law and the Statute of Frauds, a promise to pay a commission to someone other than a lawyer or licensed real estate broker must be in writing and signed by the party to be charged.

Here, Owner's promise to pay Friend a commission of 6% on the sale of Blackacre is unenforceable because it was made orally and was not in writing. Because Friend is not a lawyer or licensed real estate broker, this contract had to be in writing in order to be legally enforceable.

Therefore, Friend may not successfully maintain an action to recover his commission against Owner.

## **ANSWER TO QUESTION 2**

1. Issue: Whether Ben's testimony as to Vicki's statement is admissible as an exception to the hearsay rule.

Rule: Hearsay is the out of court statement of a declarant offered for the truth of the matter asserted. There are several exceptions to the hearsay rule. One exception is that of an excited utterance. This statement must be made while still under the influence of the startling event and must pertain to some relevant issue in the case. The declarant of the statement need not be unavailable. The reliability of the excited utterance is that it

is made under the stress of a startling event and little opportunity for the declarant to reflect, thus giving the statement some guarantees of reliability.

Application: Ben testified that he heard the gunshot and immediately went over to Vicki's. This satisfies the requirement that the excited utterance be made immediately after the startling event. Ben testified that Vicki told him over and over that it was Jerry who shot her. This satisfies the second requirement that the excited utterance concern a relevant matter in the case and in the situation where the excited utterance concerns the declarant's injury or cause of her injury. The excited utterance here concerned the identity of the individual who caused Vicki's injury. The testimony of Ben would therefore qualify as an excited utterance.

Note: Vicki does not need to be unavailable since this hearsay exception does not require unavailability.

Note: This does not qualify as a dying declaration since this is not a homicide case and Vicki was still alive at the time of Ben's testimony.

2. Issue: Whether Lawyer having learned of the untruthful testimony after the testimony had already been given requires Lawyer to do anything to neutralize the situation.

Rule: Under New York's Rule of Professional Conduct, an attorney cannot ethically question or examine a witness about a matter when the attorney knows that the witness is lying. Engaging in such behavior would mean that the attorney were promoting and furthering the dishonesty and this is a violation of the Rules. When the Lawyer learns of the dishonest testimony after the testimony has already been given, the attorney is not deemed to have violated the rules at the time the testimony was given but he has an affirmative duty to bring this to the attention of the court so that the court may determine whether the violation so prejudiced the case so as to declare a mistrial.

Application: Under the facts, Lawyer discovered the dishonesty of Ben's testimony after Ben had already testified. The lawyer did not violate any rules of ethics at the time Ben gave his testimony since Lawyer did not know Ben was lying at the time. But now that it has come to the Lawyer's attention he must neutralize the impact of Ben's dishonest testimony and inform the court so that the court may determine whether the matter necessitates declaring a mistrial or any other remedies the court deems appropriate.

Conclusion: Lawyer must inform the court of Ben's dishonest testimony.

3. Issue: Whether the Judge's jury instructions violated David's due process rights by inappropriately placing the burden of proof on David as to the alibi defense.

Rule: Due Process requires that in a criminal case the prosecution prove each element of the offense beyond a reasonable doubt. The court cannot shift this burden to the defendant. Only if the defendant asserts an affirmative defense (i.e. insanity) will the defendant have the burden of proving his affirmative defense by a preponderance. An alibi is not an affirmative defense. The prosecution has the burden of proving the absence of an alibi beyond a reasonable doubt.

Application: Under the facts, the judge inappropriately instructed the jury that David had the burden of proving his alibi defense. The judge's instructions effectively shifted the burden of proof to David by requiring David to prove he was elsewhere when the crime against Vicki occurred. This shifting of the burden of proof to David, the criminal defendant, is error and violates David's Due Process rights.

Conclusion: The Judge's instruction incorrectly shifted the burden of proof to David and therefore was a violation of David's due process rights.

4. Issue: Whether jeopardy has attached so as to dismiss the indictment for murder in the second degree

Rule: Jeopardy attaches for purposes of the Double Jeopardy clause when the jury is sworn. Double Jeopardy, with regard to subsequent indictment arising from the same transaction/facts, is determined according to the Blockburger test. Under this test, a person is not "twice put in jeopardy" if each crime requires an element that the other does not. Attempted murder requires that the defendant, with the specific intent to kill the victim, goes beyond mere preparation and gets "dangerously close" to achieving the desired result. Murder in the second degree requires that the defendant have intended to kill, seriously injure the victim with the result that the victim is killed through the defendant's act. Therefore, attempted murder and murder in the second degree are two different crimes under the Blockburger test since murder in the second degree requires proof that the victim died and attempted murder does not require this element.

Application: Under the facts, David was convicted of attempted murder of Vicki. At the time of the trial, Vicki was still alive. After David's conviction, Vicki died from her original injuries. David has now been indicted for second degree murder in Vicki's death. Since second degree murder requires proof of the element of death and attempted murder does not, David would not be put in jeopardy twice for the same crime. Note, if Vicki died during the first action, the result would have been different since the state would have had to bring the murder charges as the attempt would have merged into the second degree murder.

Since Vicki died after the first conviction for attempt and since attempted murder and second degree murder are different crimes under the Blockburger test, David would not be twice put in jeopardy if the state indicts him for second degree murder.

Conclusion: The court should deny Lawyer's motion to dismiss the indictment on double jeopardy grounds.

## **ANSWER TO QUESTION 2**

1. The issue is whether the court correctly admitted witness's testimony regarding the victim's statements immediately after the incident.

Under New York law and the Federal Rules of Evidence, evidence will be admissible if it is relevant, meaning that it has a tendency to prove or disprove a material issue, and does not fall within an exclusionary rule, and its probative value is not outweighed by the risk of prejudice. Hearsay is defined as an out-of-court statement offered to prove the matter asserted. Hearsay is generally inadmissible, since the opposing party lacks the opportunity to cross-examine the hearsay declarant at the time and place the statement was made. However, there are several exceptions when hearsay will be admissible, including "dying declarations" and "excited utterances." I will address the applicability of each exception in turn.

Vicki's statement is clearly relevant, since it goes to the perpetrator of the shooting. However, the statement is clearly hearsay, since Ben is testifying as to Vicki's statement for the purpose of proving that Jerry, not David, shot Vicki.

A hearsay statement is admissible as a "dying declaration" where the declarant expresses a certainty of imminent death and speaks to the circumstances and causes of her death. Here, Ben expressed that Vicki was lying on the ground shortly after the shooting, bleeding from the abdomen. Although her injuries were serious, and Vicki did ultimately die from them, nothing Vicki did or said (in Ben's account) leads to the assumption that she thought she would certainly and imminently die. Thus, Vicki's statements do not fall into the dying declaration exception.

A hearsay statement is admissible as an "excited utterance" if it took place proximate in time and place to a startling incident such that a reasonable person would still be under the shock of the incident, and the declarant is in fact still in an excited state from the shock of the incident. The theory is that, in such a situation, the declarant likely lacks the capacity to lie. Here, Vicki made the statement only moments after being shot based on when Ben said he heard the gunshot and his proximity to Vicki. A reasonable person would be thrown into a state of shock after being shot and while bleeding profusely. Moreover, Vicki was "screaming," which shows that she was in an excited state.

Thus, the court properly admitted Ben's hearsay testimony as to Vicki's statement under the "excited utterance" exception to hearsay.

2. The issue is what a lawyer must do when he learns that defense witness testimony presented in a criminal matter is false.

Under the Rules of Professional Conduct, a lawyer has a duty of candor to the tribunal. This duty requires the lawyer to take steps to rectify any testimony offered that the lawyer knows is false. Such steps are mandatory under the rules, and "steps to rectify" may even require disclosure of the perjury to the Court. In addition, the lawyer may disclose (permissive) testimony that she reasonably believes is false, except in the case of a criminal defendant. A criminal defendant has the right to take the stand in his own defense, and the lawyer may not disclose her reasonable belief that such testimony is false (but still must disclose if she knows it's false). Note that this duty may even trump the lawyer's duty of confidentiality to his client. Here, Ben, a witness for the defense, testified as to his recollections of Vicki's shooting.

However, David told Lawyer that he knew Ben was out of town that day and thus was lying on the stand. Lawyer independently verified that Ben was in fact away at the time of the shooting. Thus, Lawyer knew at that moment that Ben's testimony was false and was under a mandatory obligation to rectify the fraud. Lawyer could have called Ben back to the stand to impeach his testimony, or he could have disclosed the fraud to the judge. David's communications to the Lawyer about Ben's whereabouts are protected under confidentiality, but Lawyer may break confidentiality if, and to the extent, necessary to rectify the fraud against the tribunal. In this case, Lawyer would probably not need to break confidentiality because Lawyer was able to confirm Ben's whereabouts. It would be sufficient to bring up outside evidence about Ben's vacation-- travel confirmations, etc., without disclosing confidential information.

3. The issue is whether judge's instruction placing the burden of proving an alibi on the defendant is proper.

The prosecution's obligation in criminal cases is to prove each element of the offense beyond a reasonable doubt, and defendant must prove any affirmative defenses, such as insanity or duress, by a preponderance of the evidence. Any other defenses (e.g., justification) must be raised by the defendant, but it remains the prosecution's burden to prove that they do not rebut the prosecution's case.

Here, the prosecution must prove that David committed attempted murder of the second degree beyond a reasonable doubt. This includes all elements of the offense, including that David had the requisite intent, and committed the required acts. An alibi "defense" is actually not an affirmative defense like insanity or duress. Rather, it is just a rebuttal of the prosecution's case. David must raise a reasonable doubt that he was present

at the scene of the crime. If the prosecution fails to establish that David was present at the scene of the crime beyond a reasonable doubt, the jury should return a verdict of not guilty.

Thus, the court incorrectly located the burden of proof on the "alibi" defense on the defendant, and David may attack the verdict on this ground.

4. The issue is whether double jeopardy prevents the government from prosecuting a defendant for murder, after the defendant has already been convicted for attempted murder, when the victim dies.

Double jeopardy prevents a defendant from being prosecuted twice for the same or similar offenses. It is fine if the defendant is indicted for both offenses in the same proceeding. In order for double jeopardy to attach in a jury proceeding, the jury must have been charged in the first proceeding. However, if there is a mistrial, double jeopardy does not attach. The offenses underlying the charges must have arisen from the same transaction or occurrence, and one must be a lesser included offense of the other. If each crime requires the prosecution to prove an element that the other does not, then double jeopardy will not apply.

Here, David has been convicted of attempted murder for the shooting of Vicki. Now that Vicki has died, the government wants to prosecute David for murder. While this offense (murder) arose from the same transaction or occurrence as the other (attempted murder), the crime of murder will require the government to prove elements that it did not have to prove in the first proceeding -- namely, Vicki's death and causation. Attempted murder also required the prosecution to prove elements that it will not have to prove in murder: that the defendant came "dangerously close" to the commission of the crime.

Therefore, the prosecution may indict David for murder, even though the two crimes arise out of the same transaction or occurrence.

### **ANSWER TO QUESTION 3**

1. a) Yes the bequest to the trust violates the Rule against Perpetuities (RAP).  
b) The trust should be paid as stated in the will with a slight modification.
2. The bank account will go to the residuary of the estate.
3. The value of Wilma's elective share is \$700,000.

1. a. Yes the bequest to the trust violates the RAP but it will survive due to the second look doctrine.

Under the estates, powers, and trusts law (EPTL) a will is a duly executed document, signed by the testator, which becomes binding upon death and states what to do with the testator's property, how to handle the testator's body, and what to do with the residuary of the testator's estate. A trust is an instrument which allows a property owner to transfer that property to a third party to manage on the behalf of a beneficiary. The EPTL provides that a trust is created when a settlor delivers legal title to a property to manage on behalf of a beneficiary who has equitable title to the proceeds of the trust. A pourover gift is a bequest in a will to trust. In order to be valid a pour over gift must be to an existing trust or a trust created contemporaneously with the execution of the will.

The RAP provides that a right must vest within a life in being plus 21 years. This prevents a deceased party from interfering with the beneficiaries right for an indefinite period of time. Any power or bequest given through a will that violates RAP will be void. The second look doctrine holds that any right where the period for which it is stated to vest is over 21 years will be reduced to 21 years in order to prevent the RAP from voiding part of the bequest. The RAP begins to rule at the creation of the will and not at the testator's death. When an aspect of the bequest violates RAP that part will be removed.

In this case the will states that the trust will be paid out to Andy and Eva in equal shares, to one of them upon the death of the other, and then to the children of Andy and Eva with the principal to be paid out to the children upon the youngest reaching 25. Andy and Eva are the measuring life in this situation. Therefore the trust to Andy and Eva does not violate RAP. The bequest to their children does violate RAP because Andy and Eva could have a child and the trust would take longer than a life in being plus 21 years to vest in the children. Therefore the courts will apply the second look doctrine. This doctrine will reduce the age restriction in the will from 25 years to 21 years. This will prevent the bequest from violating RAP.

In conclusion the bequest in the will violates RAP but is saved by the second look doctrine.

b. The trust will be paid out according to the will but the principal of the trust will be paid out to Andy and Eva's children upon the youngest reaching the age of 21.

Andy and Eva will be paid the income of the trust in equal shares during their lives and then to the survivor of them. Upon the death of the later of them to die the trust income will be paid out in equal shares to their children and then the principal will be paid to such children in equal shares when the youngest attains the age of 21. This does not violate RAP since it is within a life in being plus 21 years.

2. According to the Revised Simultaneous Death Act (RSDA), the proceeds of the totten trust will go to the residuary.

A totten trust is a revocable, amendable, trust where a settlor gives legal title to a monetary amount to a trustee and the proceeds of the totten trust will be paid out upon the settlor's death. The totten trust is revoked upon the death of beneficiary. Every will should have a provision for what happens when there is a simultaneous death of the testator and the beneficiary. However, NY has adopted the RSDA that applies when a will does not contain a simultaneous death provision. Under the RSDA, if both parties die within 120 hours of each other than both parties are treated as predeceased in the other's will. The anti-lapse statute protects a bequest when the intended beneficiary dies and the beneficiary is issue or a sibling of the testator.

In this case, Sally and Henry died within 120 hours of each other and Henry's will did not contain a provision for simultaneous death. While Henry was killed instantly in the car accident, Sally was killed 24 hours later. This falls under the RSDA and both will be treated as predeceasing the other. So under the RSDA Sally died within 120 hours of Henry and will be treated as predeceasing Henry in his will. Therefore the trust proceeds will go to the residuary estate due to the RSDA and the fact that Sally is not protected by the anti-lapse statute.

In conclusion the proceeds of the trust will go to the residuary estate due to the RSDA.

3. The value of Wilma's elective share is \$700,000.

Under the EPTL a testator cannot disinherit their spouse. A spouse can only be disinherited after a valid divorce, annulment, or separation decree. A spouse must claim their right to an elective share. An elective share is 1/3 of the net estate or \$50,000 whichever is greater. The net estate is calculated by taking the base value of the estate and adding all testamentary substitutes. Testamentary substitutes include totten trust bank accounts, joint bank accounts, but not life insurance proceeds since the testator does not own the life insurance payments upon his death. When testamentary substitutes are jointly held by the beneficiary and the testator you add in 1/2 of the testamentary substitute since the spouse must contribute to their own elective share. The spouse must give notice to the court of their right to election within 90 days of the spouse's death.

In this case we take the full \$2,000,000 of the trust since none of it is going to Wilma and add the testamentary substitutes of \$100,000 from the account that was put into the residuary. We do not add the 1,000,000 life insurance policy since it is not property owned by the testator. The total net estate is now \$2,100,000. We then divide that number by 3 since we will take 1/3 of the net estate to satisfy the elective share. The final total for the elective share is \$700,000 which will be paid out of every beneficiary's bequest proportionately.

In conclusion, Wilma will receive \$700,000 as her elective share.

### ANSWER TO QUESTION 3

1. a. The issue is whether the bequest violates the Rule Against Perpetuities.

Under NY law, the Rule Against Perpetuities states that no interest is valid if it cannot vest within lives in being from the time the interest was created, plus 21 years. A trust established with income distributed is protected by the automatic NY Spendthrift rule.

Here, Henry created a trust for \$2,000,000 with income to Andy and Eva for their lives, or their survivors. The bequest to Andy and Eva are valid because they are lives in being at the time the trust is created and RAP is satisfied. When Henry died neither Andy nor Eva had children, but the interest in income created for their children upon the death of the later of them will be known within their lives because all of their children will be born, and as a class, able to take, upon the death of the later of them. In other words, 21 years after the life of either Andy or Eva the interest will vest. The final distribution, the interest of the principal to such children, when the youngest of them reaches the age of 25 violates RAP. Therefore, the bequest violates RAP

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- b. The issue is how assets that violate RAP should be bequeathed.

New York has a reform RAP, such that any contingency (amount of time) over 21 that violates RAP is automatically reduced to 21 years. Thus, assets that violate RAP may still satisfy the intent of the testator/settlor.

Here, the bequest will automatically be altered to 21 years in order to satisfy RAP. Wilma will not receive bequest because it has been saved by reform RAP.

2. The issue is which estate is entitled to the balance in the Totten trust.

A totten trust is an account established for the benefit of a beneficiary when the settlor opens a bank account "in trust for" the beneficiary. The amount is held until the settlor dies, and the balance is returned to the estate to be distributed to the beneficiary. A settlor may revoke the trust at any time by express writing. Under Revised Uniform Simultaneous Death Act (RUSDA), when a beneficiary cannot be proved to have died 5 days after the testator, the beneficiary is treated as having predeceased the testator for purposes of distribution. If a beneficiary to a totten trust predeceases the settlor, the trust is revoked and the amount returns to his estate.

Here, Sally and Henry were in a car accident in which Henry was killed instantly and Sally died one day later, thus RUSDA applies because Henry and Sally died within 5 days of each other. Sally is treated as having predeceased Henry, so the totten trust is revoked and Henry's estate receives the \$100,000 balance.

Therefore, Henry's estate is entitled to the balance.

3. The issue is the value of Wilma's elective share and how it is calculated.

Under the EPTL, a spouse has a right to an elective share, which is the greater of either \$50,000 or 1/3 of the net estate. The net estate includes Testamentary substitutes, such as Totten Trusts. The

Here, Wilma's elective share will include the probate estate and testamentary substitutes. Life insurance policies are not testamentary substitutes, and will not be included, so \$1,000,000 is removed. The totten trust (\$10,000) will be included, so it will be added to the \$2,000,000 value of the other assets. The elective share estate is then \$2,100,000, and the testamentary distributions are then subtracted. The \$2,100,000 net estate will then be divided by 3, and thus, \$700,000 will constitute Wilma's elective share estate.

Wilma's elective share is \$700,000, because it is greater than \$50,000.

#### **ANSWER TO QUESTION 4**

1. Was the court correct in granting Doctor's motion to strike Liz's demand for punitive damages?

The issue is whether punitive damages are an available remedy to a plaintiff when the plaintiff's claim does not allege any intentional misconduct, but merely claims gross negligence.

Generally, under the CPLR, punitive damages are available to a plaintiff. Punitive damages are damages that compensate the victim above and beyond the harm suffered. Unlike expectation damages (which are designed to place the plaintiff in the position they would have been had the injury not occurred), punitive damages punish the defendant for their conduct as a punishment. Punitive damages aim at discouraging activities the court system deems reprehensible and requires the threat of heavy damages to deter this type of conduct in the future. While it is true that under New York law, punitive damages can be awarded in the case of intentional conduct, it can also be an available remedy in the case of gross negligence. While regular negligence implies the breach of a duty owed to foreseeable plaintiffs, gross negligence is a much higher standard to meet. It requires a showing that defendant acted in a reckless, wanton manner as to liken such conduct to intent crimes. Therefore, punitive damages are available in a case for gross negligence.

In any case of negligence, the plaintiff must show (1) there was a duty, (2) that defendant breached that duty, (3) that defendant's breach was both the actual or factual cause and the proximate cause of plaintiff's injury, and (4) damages.

Here, Liz suffered a broken leg which was later treated by Doctor. Doctor breached a duty to his patient because all doctors are held to a professional standard of conduct to not treat their patients negligently, as measured on a scale of doctors in similar communities. Doctor also breached that duty because Liz was harmed by his negligence--while she went to the doctor to seek treatment for a broken leg, his negligent treatment caused Liz's leg to be amputated. It was doctor's negligence that actually caused Liz's leg to be amputated, and it is reasonably foreseeable that the doctor's negligence could lead to Liz's leg needing to be amputated. Finally, Liz can clearly establish damages from the loss of her leg. It may be inferred from Doctor's conduct that he was grossly negligent in causing Liz's leg to be amputated.

Therefore, the court was incorrect when it held as a matter of law that punitive damages are not recoverable absent an allegation of intentional misconduct.

2. Was the court correct in charging the jury on the doctrine of *res ipsa loquitur*?

The issue is whether *res ipsa loquitur* can be properly charged where the element of control is not clearly established.

Generally, under the common law and the CPLR, the doctrine of *res ipsa loquitur* (translated to "the thing speaks for itself") is invoked when it can be established that while it's uncertain how the injury occurred, it is presumed impossible "but for" the negligence of another. Establishing *res ipsa loquitur* does not win the plaintiff's case, but merely allows an inference of negligence to be made so that the case may be heard by a jury. However, a core element of establishing *res ipsa loquitur* in New York is not only the "but for" element, but also that the defendant has complete control over the instrumentality that caused the injury.

Here, it is clear that the escalator was the property of Apex and was reasonably maintained. It had not previously received complaints about the escalator, so it was not on notice of any dangerous condition. In addition, it exerted some control over the escalator by performing weekly preventative maintenance, which uncovered no problems, and immediately thereafter the escalator resumed normal operations following Liz's accident. However, in a mall where there is a high level of foot traffic where many people constantly use the escalator and may bring with them trash and other debris that can temporarily disrupt the function of the escalator, the "control" element of the *res ipsa loquitur* doctrine cannot be proven.

Therefore, as Apex did not demonstrate absolute control over the escalator due to the amount of customers that use the escalator every day, the court was incorrect in charging the jury on the doctrine of *res ipsa loquitur*.

3. Are Apex and Doctor jointly and severally liable for Liz's damages?

The issue is whether joint tortfeasors can be held jointly and severally liable for a plaintiff's injuries when injuries caused by a previous tortfeasor are later exacerbated by a second tortfeasor.

Generally, under the CPLR, a negligent tortfeasor is liable for the injuries he causes to a plaintiff in addition to any further injuries the plaintiff sustains that are a reasonable, natural, and foreseeable result of the tortfeasor's actions. The New York courts have held that medical malpractice following treatment of plaintiff's injuries is one such reasonable, natural and foreseeable occurrence. Also, generally under New York law, two joint tortfeasors will be jointly and severally liable to a plaintiff for the injuries she sustains from the acts of both. "Joint and several liability" means that the injured party may recover all of her damages from one party, regardless of their relative share of the fault. Plaintiff is generally not limited in what she can recover from either party for economic damages. However, Article 16 of the CPLR can limit the amounts the plaintiff can recover from a defendant who is 50% or less at fault for noneconomic damages. With some very limited exceptions, any defendant who is 50% or less at fault need only contribute his fair share of damages.

Here, plaintiff/Liz obtained a verdict in her favor in the amount of \$3,000,000 for her pain and suffering. Because pain and suffering are noneconomic damages and none of the exceptions to Article 16 apply here, Liz can obtain the whole \$3,000,000 judgment from Doctor because he was attributed 70% at fault, thus making Doctor liable for the whole award amount. However, if Liz were to seek damages from Apex, she would only be able to recover 30% of that award, which is equal to Apex's share of the fault.

Therefore, the defendants are jointly and severally liable for Liz's economic damages. However, because of Article 16's limitations, they are not jointly and severally liable for Liz's noneconomic damages and, if their fault is equal to or less than 50%, need only pay their share.

4. What rights, if any, do Apex and Doctor have against each other for contribution?

The issue is whether two joint tortfeasors have a right for contribution against one another.

Generally, under the CPLR, joint tortfeasors have a right of contribution against each other for the amount paid over their share of liability. The right of contribution only

springs once payment has been made, and from that point the party who paid more than their fair share has 6 years to institute an action for contribution.

Here, because the parties are jointly and severally liable, they may have a right to contribution against one another. As discussed above, Article 16 limits the amount of damages that Liz may collect from Apex because Apex's fault was less than 50%. Therefore, Apex will not have a claim of contribution against Doctor because based on this judgment, he will not be liable for more than his fair share. Doctor, however, may have a claim of contribution against Apex if Liz collects the entirety of her judgment from him, which is her right to do so. Both parties may have claims of contribution against each other if there are other economic damages attached to this judgment, which Liz may collect from either party in full.

Therefore, Apex and Doctor may both have rights to contribution against one another for Liz's economic damages. However, only Doctor may have a claim of contribution against Apex if Doctor pays Liz the full amount of the judgment.

#### **ANSWER TO QUESTION 4**

1. The issue is whether a motion to strike punitive damages when the defendant pleaded that punitive damages can only be awarded in allegations of intentional conduct.

Under NY Law punitive damages may be awarded in order to punish the defendant for his wrongful! conduct as well as prevent others from committing the same misconduct. Punitive damages may be awarded under claims of gross negligence.

Here, the doctor moved to strike Liz's demand because the Doctor claimed that punitive damages were only recoverable on a showing of intentional conduct. However, Punitive damages can also be awarded if the Doctor acted grossly negligent. The court was not correct in granting Doctors motion.

2. The issue is whether the court should charge the jury on the doctrine of res ipsa loquitur.

Under NY Law, a plaintiff in a claim for negligence must plead and prove that the defendant owed the plaintiff a duty of care, that the plaintiff breached that duty of care, that the breach actually and proximately caused the injuries, and that damages resulted. Res Ipsa Loquitur may be used to show a breach in the duty of care where (1) absent negligence the injury would not have occurred, (2) that the defendant was in exclusive control of the instrumentality causing the injury, and (3) there is a probability that the Plaintiff was not contributory negligent.

Res Ipsa Loquitur may be used to determine whether the duty was breached where absent negligence the injury would not have occurred. An expert testifying on Liz's behalf gave his opinion that the stoppage could not have occurred if the escalator had been properly maintained. However, Apex established at trial that it performed regular weekly preventative maintenance and no problems were indicated in the service records. The escalator was tested and working correctly after the accident and it was working correctly and lastly that it had not received any prior complaints. Further, that sudden stoppage can occur if debris becomes wedged between the escalator and steps. Due to the very nature an escalator is used constantly by shoppers in a retail outlet and that this escalator was subject to extensive public usage on a daily basis there is evidence the defendant was not in exclusive control of the escalator and that it was consistently being used by the public. Because there was doubt as to whether the defendant was in exclusive control of the instrumentality the court was not correct in charging the jury with res ipsa loquitur however the defendant may still be liable for negligence.

3. The issue is whether Apex and Doctor are jointly and severally liable.

Under NY Law, a plaintiff in a claim for negligence must plead and prove that the defendant owed the plaintiff a duty of care, that the plaintiff breached that duty of care, that the breach actually and proximately caused the injuries, and that damages resulted. Where another's negligence is a foreseeable consequence then the defendants will be jointly and severally liable. However, if the act is not foreseeable then the defendants will only be responsible for their equitable share of the damages. It has been proven by case law that a doctor furthering injuries from an accident is a natural and probable consequence of the negligence and that the defendant will be jointly and severally liable. This means that each is liable and each is 100% liable for the damages.

Here, the doctor's negligence was foreseeable. Applying the above rule Apex will be jointly and severely liable and will have to pay the entire amount of damages if found liable. The doctor because his negligence occurred after will only be responsible for his share of the damages however Apex will be jointly and severally liable for the entire amount.

4. The issue is whether Apex and Doctor have rights against each other to recover by way of contribution.

Where a joint tortfeasor pays more than his equitable share in a judgment he may recover the amount paid above his equitable share by way of contribution. Under Article 16 of the CPLR if a tortfeasor is less than 50% liable he will only be liable for his equitable share of the plaintiffs non-economic damages (pain and suffering) but will be 100% liable for the plaintiffs economic damages. However, there are exceptions to this rule where the defendants will not have the protection of article 16. An example of this where the defendant acts with extreme recklessness.

Applying this rule, the jury determined the Liz's damages totaled 3,000,000 for pain and suffering. 30% were attributable to apex and 70% to the doctor's negligence. The doctor would be able to recover the 30% from Apex if he paid 100% of the damages. Apex because he is less than 50% liable would only have to pay pain and suffering for his equitable share the 30%.

However, Apex would remain 100% liable for any economic damages.

### **ANSWER TO QUESTION 5**

1. The issue is when a resolution of a corporate board of directors is properly adopted by a vote of the board.

Under the BCL, a proper quorum is required for the proper adoption of a resolution by the board at a duly called meeting. A quorum is a majority of the duly constituted board (i.e., the entire board as it would be constituted with no vacancies), in the absence of a contrary provision in the certificate or bylaws reducing the quorum (but to no less than 1/3 of the entire board) or a contrary provision in the certificate increasing the quorum above a majority of the entire board. Here, because the certificate is silent, a majority of the entire board constitutes a quorum, which is met on these facts because 12 of the 15 board members attended the meeting.

A resolution is properly adopted at a duly called meeting with a quorum where the resolution is approved by a majority of those present, in the absence of a contrary provision in the certificate increasing the voting requirement to a supermajority. Because the certificate is silent in this case, only the approval of a majority of those present is required to adopt the resolution, and that is met, with 7 of 12 members present voting for the resolution.

2. The issue is when corporate directors may be held personally liable for unsuccessful business decisions.

Under the business judgment rule (BJR), courts generally will not second-guess or hold directors liable for business decisions that were made in good faith, in an informed manner, and on a rational basis. Directors are expected to reasonably inform themselves and otherwise "do their homework" about their decisions but are also permitted to rely in good faith on the information that they receive from the corporation's officers and employees whom the directors reasonably believe to be acting within their competence. To the extent that the directors act in good faith, are informed, and have a rational basis for their decision, courts will not hold directors personally liable for waste or neglect if the business decision results in a financial loss or other negative outcome for the

corporation. To hold the directors liable, there would need to be a showing of bad faith, illegality, or breach of duty of loyalty (e.g., self-dealing, competing with the corporation, or usurping a corporate opportunity).

On these facts, the MSI directors appeared to act in good faith (e.g., there was no suggestion that any directors were interested in the transaction and did not disclose such interest) and on a rational basis because Meg had an excellent track record of success within the company on matters that were central to the operation of the business (i.e., selecting and marketing men's clothes). Moreover, her recommendation likely had the imprimatur of higher-level corporate officers (e.g., the President or CEO) because the recommendation was presented to the board. With the backing of a subject-matter expert (Meg) and her supervisors (higher corporate officers), the directors could reasonably rely in good faith on the recommendation and be considered well-informed based on the efforts of Meg and her supervisors. Thus, further research or analysis by the directors themselves would not be required for the decision to be made on an informed and rational basis. Consequently, in applying the BJR, a court is not likely to hold the directors personally liable on theories of waste and neglect for the losses associated with the XUMA transaction. Further, there is no indication that the MSI directors acted in bad faith, in breach of their duty of loyalty to the corporation, or illegally in approving the transaction.

3. a. The issue is whether a separation agreement that has been incorporated but not merged into a divorce judgment may be modified.

Under the DRL, a separation agreement will be treated under basic contract principles, including defenses that may make the agreement void or voidable and breach of contract that can lead to enforcement of the contract or repudiation of it and assertion of statutory rights. However, the court has discretion to modify the separation agreement if there has been a substantial change in circumstances. Here, there are no facts to indicate that the contract is void or voidable based on regular contract defenses, such as duress, mutual mistake, fraud, etc. The separation agreement appears to have been entered into freely, without duress or any other problematic conditions. There arguably could be a question of whether Meg has breached the contract by taking time off from work rather than looking for employment, since the agreement was likely entered into by Ken with the reliance that Meg would continue working in some respect. If this is considered a breach, Ken could require enforcement of the agreement on its terms or could deem the agreement to have been repudiated by Meg and assert his statutory rights, which would allow the court to diverge from the terms of the prior agreement.

However, under the DRL, either parent may petition for a change in child support if there has been a substantial change in circumstances, such as that either parent's income has increased or decreased by 15%, or if it has been three years since the last judicial review of the child support. On these facts, both Meg and Ken have seen a

change in their income of greater than 15% and so the court would have discretion to revisit the amount of child support. Thus, the court was correct in its ruling that the agreement with regard to child support could be modified.

3. b. The issue is whether a specific item such as private school education is properly excluded from child support amount.

In deciding child support, the court will look to various factors regarding the circumstances of the parents and the best interests of the child. Parents are required to support their children until at least age 21, or through college if they are financially able. There is no presumption that private secondary school expenses are automatically excluded as part of the child support obligation or indeed that any particular items are or are not part of the child support obligation. Here, in revisiting the child support decision, the court will consider a variety of factors related to the parents' earning potential, job skills, current and future financial circumstances, age and health, custody of the child, etc. and will consider the best interests of the child as well. A court is within its discretion to decide to modify the child support amount such that some of the money provided by Ken will go to the private school education (whether it is an increased amount of support or if the amount remains stable under the current agreement).

### **ANSWER TO QUESTION 5**

1. The issue is whether a resolution was properly adopted by the board of directors of a New York corporation where a majority of the directors attended a duly called meeting of the board, a majority of the directors in attendance voted in favor of the resolution, but the number of directors voting in favor of the resolution -- although a majority of those in attendance -- does not constitute a majority of the full board.

New York's Business Corporation Law (BCL) establishes a set of default rules regarding the governance of corporations chartered in the state. Under certain circumstances, a corporation may amend these default rules through provisions in its certificate of incorporation or bylaws, although in the absence of any provisions in the certificate or bylaws on the subject, the default rules apply. The default rule is that the board of directors of a corporation can only take action (1) by unanimous written consent of the directors or (2) at a duly called meeting that satisfies the quorum requirement. The quorum requirement (in the absence of any provision of the certificate of incorporation or bylaws to the contrary) is a majority of the number of directors. At a duly called meeting where the quorum requirement is satisfied, the board can validly adopt a resolution if the majority of directors in attendance vote in favor. Once a quorum is established, a quorum is not lost due to directors leaving the meeting (in contrast to the rules for shareholders'

meetings, where a quorum will be lost due to shareholders leaving the meeting if the result is that less than a majority of shares entitled to cast a vote are represented).

Under the BCL, shareholder approval is required for amendments to the certificate of incorporation, mergers, and sales of substantially all of a corporation's assets; shareholders also elect the directors of the corporation. Corporate actions of lesser significance may be authorized by a resolution validly adopted by the board of directors.

Here, MSI is a corporation organized under the laws of New York State, and thus the BCL applies. Since MSI has no directly applicable provisions in its certificate of incorporation or bylaws, it is governed according to the BCL's default rules. The purchase of \$3,000,000 of inventory from XUMA was not an extraordinary action requiring shareholder approval, and thus it could be properly approved by a valid resolution adopted by the corporation's board of directors. Since 12 of the 15 directors of MSI attended the meeting at which the resolution recommending the purchase of inventory from XUMA was approved, the quorum requirement was satisfied, as 12 out of 15 constitutes a majority. Since 7 of the 12 directors in attendance voted in favor of the resolution, the resolution was validly adopted, since 7 constitutes a majority of 12. Thus, the resolution authorizing the purchase of inventory from XUMA was validly adopted.

2. The issue is whether directors of a corporation can be found personally liable for waste and neglect due to losses associated with a purchase of inventory from another company.

Under New York law, directors of a corporation owe duties of care and loyalty to the corporation and its shareholders. The duty of care requires that directors act competently and diligently, using the skill and judgment expected of a reasonable person under the circumstances. New York follows the business judgment rule, under which directors are not personally liable for breaches of the duty of care when the directors act in good faith based on the advice of an officer or employee, committee of the board, or outside attorney or public accountant. The duty of loyalty requires that directors not place their own interests above the corporation's. A director violates the duty of loyalty when he engages in self-dealing and when he usurps an opportunity that rightly belongs to the corporation.

New York allows shareholders to bring derivative actions on behalf of a corporation when (1) the shareholders owned shares of the corporation at the time the cause of action accrued in the corporation's favor; (2) the shareholders bringing the derivative action are representative of the best interests of the corporation's shareholders as a whole; (3) the shareholders first demand that the corporation's board files suit on the corporation's behalf (or the shareholders demonstrate that demand would be futile); and (4) the shareholders allege with particularity in their complaint either (a) why demand was futile or (b) was the directors improperly rejected the shareholders' demand. To meet

this last requirement, the shareholders must show either that a majority of the board of directors was not disinterested or that the board failed to follow proper procedures in investigating and evaluating the merits of the shareholders' complaint.

Here, the directors of MSI relied on the advice of Meg, an employee of the corporation, in deciding whether to purchase inventory from XUMA. Meg had an excellent track record of recommending purchases that produced substantial profits for MSI. Thus, it appears that the directors who voted in favor of the purchase made a good-faith business judgment, and there is no allegation of self-dealing or any other duty-of-loyalty breach. The directors therefore cannot be held personally liable for MSI's losses on the transaction.

Moreover, the shareholders bringing a derivative action have not satisfied the requirements for a derivative suit under the BCL. Only seven of the 15 directors of MSI voted in favor of the resolution, and if only these directors are being sued, then a majority of the board (eight of 15) may be sufficiently disinterested that demand would not be futile. Even if the shareholders believed that demand were futile, they would have to allege that with particularity in their complaint, and there is no indication that they have done so. Therefore, the shareholders cannot proceed with their derivative action against MSI's directors.

3. a. The issue is whether a court may modify a separation agreement that was incorporated but not merged into a judgment of divorce to require that the non-custodial spouse pay additional child support.

Where a separation agreement is incorporated but not merged into a judgment of divorce, the separation agreement survives as a binding contract. The general rule is that the terms of a separation agreement that has been incorporated rather than merged may be modified only upon a showing of extreme hardship by the spouse seeking modification. However, child support is a right of the child rather than either of the ex-spouses, and the divorcing spouses cannot bargain away a child's right to support. A parent's child support obligations generally terminate only after the child reaches the age of 21 (although support obligations may be extended further if the child is disabled and unable to provide for himself). The longstanding rule in New York is that modification of a parent's child support obligations may be based on a substantial change in circumstances. Modification of child support must be based on the best interests of the child.

Under a recently enacted New York law, a court may modify child support obligations limned in a separation agreement--regardless of whether the separation agreement has been incorporated or merged into the divorce judgment--if (a) three years have passed or (b) the income of one parent has risen or fallen by 15% or more. A decline in income of greater than 15% will not justify decreasing a parent's support obligations where the decline is voluntary--i.e., where the parent has freely chosen to

withdraw from the labor force. Only where the separation agreement explicitly states otherwise are the provisions of the new law inapplicable.

Here, the separation agreement between Meg and Ken survives as a binding contract because it was incorporated rather than merged into the judgment of divorce. However, there is no indication that the separation agreement expressly excludes application of the provisions of the new state law regarding modification of child support. The decline in Meg's income would not be grounds for modifying the child-support provisions of the separation agreement, because this decline is voluntary: Meg has chosen not to look for work since she was fired by MSI. However, Ken's income has increased by more than 30% since the time of divorce; this increase in income is grounds for modifying Ken's child support obligations.

Moreover, there has been a substantial change in Brad's circumstances since the entry of the divorce judgment. Brad's educational performance declined precipitously following his parent's divorce, and his guidance counselor now recommends that Brad attend a public high school. This substantial change in the circumstances of the child further justifies modification of Ken's child support obligations, as it is in the best interests of Brad for his father to contribute to private secondary school tuition.

b. The next issue is whether a parent can be required to contribute to a child's private secondary school educational expense when the child-support terms of a separation agreement are modified.

There is no per se rule in New York regarding a parent's obligations to provide for private education of a child. When awarding or modifying child support, courts consider a range of factors--including both parents' income, both parents' level of education, and the needs of the child--when deciding whether a parent should be obligated to cover private tuition costs. Throughout this inquiry, the guiding principle is the best interests of the child.

Here, both Meg and Ken graduated from exclusive private colleges, although there is no indication that either attended private secondary schools.

Nonetheless, it is clear that Brad would benefit from a private secondary school education, as evidenced by the fact that his grades improved dramatically after his transfer from public to private school and his disciplinary problems disappeared. Given Ken's substantial salary and his elite education (which suggests significant earnings capacity), a court could conclude that it would be fair and just for him to contribute to Brad's private school tuition. The court was incorrect in its ruling that Ken could not be required to contribute to Brad's private secondary school educational expenses.

## ANSWER TO MPT

### BRIEF IN SUPPORT OF MOTION TO TRASFER CASE TO BLACKHAWK TRIBAL COURT

#### I. Statement of the Case

Betty Fox, a member of the Blackhawk Tribe living on the Blackhawk Reservation, and paternal grandmother of Will Fox, age 10, is seeking to transfer a case for the Petition of Guardianship and Temporary Custody of Will Fox, filed in Oak County District Court by Will's maternal grandparents Don and Frances Loden (Lodens). The petition by the Lodens were filed on February 1, 2013 and the Motion to Transfer the case to the Tribal Court was immediately filed by Betty Fox on February 11, 2013. A Petition For Guardianship was filed that same day in the Blackhawk Tribal Court. The issue in dispute is whether Ms. Fox is entitled to transfer the case under the requirements set forth in the Indian Child Welfare Act (ICWA) of 1978 (Title 25 USC). Ms. Fox is entitled to the transfer because she meets all the requirements set forth in ICWA Section 1911.

#### II. Argument

##### 1. ICWA and policy behind ICWA

Congress declared its policy behind ICWA in Section 1902, to protect the best interest of Indian children and prevent removal of Indian children from their families and placement of such children in foster or adoptive homes, to reflect the unique values of Indian culture. According to the Journal of Native American Law, almost all Native American tribes have a long-standing custom or practice of caring for their children with extended family. In the Blackhawk tribe, there is an expectation that the Native American grandparents, maternal or paternal, will become the custodians. In our case here, Betty Fox, Will Fox are both members of the Indian Tribe, but the Lodens are not members of any tribe. There is an utmost interest in the courts to place Indian children within the powers of the tribe to preserve the unique aspect of Indian culture.

2. Betty Fox meets the requirements set forth in Section 1911 of ICWA to transfer the proceedings from state court to the tribal court.

Section 1911 of ICWA provides that "in any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent an objection by either parent, upon the petition of either parents or the Indian custodian or the Indian child's tribe: Provided, that such transfer shall be subject to declination by the

tribal court of such tribe." We will take a look at each element of ICWA separately and establish that Betty Fox has met the requirements for transferring the case from the State of Franklin's District court of Oak County, where the Lodens filed their guardianship action to the Tribal Court of the Blackhawk Tribe.

a. The Laden's action seeks custody that falls within the description of "foster care placement" or termination of parental rights.

In *In re Custody of RM* (Franklin Supreme Court (2009)), the court stated that a critical issue in determining whether ICWA applies is what the petition seeks. ICWA 1911 subjects the case to be transferred when it is for "foster care placement of, or termination of parental rights." ICWA section 1903(1)(i) describes foster care placement as any action (1) removing an Indian child from its parent or Indian custodian for (2) temporary placement in a foster home or institution or the home of a guardian or conservator (3) where the parent or Indian custodian cannot have the child return upon demand, but (4) where parental rights have not been terminated. These 4 requirements were further defined by the court in *In Re Custody of RM*, citing to Franklin state law, that defines a guardian as one with "the powers and responsibilities of a parent with sole legal and physical custody to the exclusion of all others," and a conservator as one who has "the power to provide for the needs of the child and the duty to pay the reasonable charges for the support, maintenance and education of the child."

In our case, the Lodens filed a petition for guardianship and temporary custody in a district court in Franklin. Like the case in *re Custody of RM*, the Lodens here is seeking to have legal custody and the ability to decide on the care, including to remove Will from Betty Fox's home. Ms. Fox would not be able to have Will to be returned upon demand. These powers of custodian and guardianship are the very powers that the Lodens seek, and therefore, it qualifies as "foster care placement" and would ICWA would apply.

b. Will is an Indian child not domiciled or residing within reservation of Indian child's tribe.

Under Section 1903(3) and (4) of ICWA, Indian is defined as any person who is a member of an Indian tribe. An Indian child is any unmarried person who is under eighteen and either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

Pursuant to a letter by the ICWA Director Sam Waters dated February 10, 2013, Will is a member of the Blackhawk Tribe, and the Blackhawk tribe is recognized under ICWA. Will is 10 years of age (born January 3, 2003), and unmarried, and a member of an Indian Tribe. Also, Will is not domiciled or residing within the reservation. Since the accident, Betty has moved into her son's house to care for Will. Will lives in Melville, Franklin, approximately 150 miles from the Reservation. Therefore, ICWA applies

c. There is an absence of good cause to the contrary to deny the transfer to the Tribal Court.

The Department of the Interior, Bureau of Indian Affairs, set out guidelines for the State Courts in Indian Child Custody proceedings. Specifically, a relevant provision of these guidelines define the determination of good cause. We will look at each section to see if there is good cause to the contrary that will prohibit the transfer of Will's case to the Tribal Court.

Section (a) states that good cause not to transfer the proceedings exist if the Indian child's tribe does not have a tribal court as defined by 15 USC 1901 of the Indian Child Welfare Act which the case can be transferred. That does not apply here. Ms. Fox has filed her Petition for Guardianship in the Tribal Court of the Blackhawk Tribe and Mr. Sam Waters, ICWA Director verified in his letter dated February 10 that the Blackhawk Tribal Court is a recognized instrumentality of the Tribe, with a family court unit that has power and authority over any family matter. Therefore, Section (a) does not apply.

Section (b) states that there may be good cause not the transfer under any of 4 circumstances. First, if the proceeding is at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice. That is not the case here. Here, the Lodens filed their Petition in state court on February 1, 2013 and merely 10 days later on February 11, 2013, Ms. Fox filed the motion to transfer. The case is not at an advanced stage, as no decisions have yet been rendered by the court nor has the court taken any action as of this date.

Second, there may be good cause not to transfer if the Indian child is over 12 years of age and objects to the transfer. This is not applicable here, as Will is only 10 years old and probably does not object to the transfer, considering that he has been under the care of Ms. Fox since his father's accident and has attended numerous powwows on the reservation before this date.

Third, there may be good cause not to transfer if the evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses. We can look again to *In Re Custody of RM* to further define "undue hardship." The Franklin Supreme Court cited that in that case, the tribal court is located just over an hour's travel, and less than 2 hours travel from the home of RM's parents, and within 1 to two hours of any witnesses likely to testify. Also the tribal court has the power to subpoena witnesses, and therefore it lacks good cause. Like *In Re Custody of RM*, the reservation is within driving distance from Melville, where the Lodens are located. The witnesses that can testify to Will's activities on the reservations would be located in the reservations. Even though it's a long drive, it is still within driving distance, and the court has power to subpoena any witnesses to come to the

reservation. It would not be an undue hardship to have the case adjudicated in the tribal court.

Lastly, there is good cause not to transfer if the parents of a child over 5 years are not available and child has little or no contact with the child's tribe or members of the child's tribe. That is not the case here. Here, Will has been to at least three powwows in the last year, and loves spending time on the reservation. Will's father, Joseph, has plans to spend the holidays on the reservation. Since the age of 6, Will has attended the annual powwows on the Reservation with Betty Fox. There is significant contact with the reservation and members of the tribe.

The DOI guidelines also cite that the factors do not include socio-economic conditions or perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial system, and the burden is on the party opposing the transfer, which would be the Lodens in this case.

d. Transfer proceedings are absent objection by either parent upon the petition of either parent or Indian custodian or Indian child's tribe Section 1911 of ICWA provides that the transfer proceedings shall move forward if there are no objections by either parents upon the petition of the Indian custodian. In *Re Custody of RM* cites that the Indian custodians are eligible to petition to transfer (not to object).

Here, neither parents will file an objection as Will's mother died at childbirth and Will's father is in a coma. There is a petition by the Indian child's custodian, namely, Ms. Fox.

## CONCLUSION

In conclusion, assuming there is no declination by the tribal court, the case should be transferred to the tribal court because there is no good cause to the contrary to deny the transfer.

## **ANSWER TO MPT**

### STATEMENT OF THE CASE

The Petitioners, (the "Lodens") have filed a Petition for Guardianship and Temporary Placement of WF, a minor Indian child, due to the incapacity of WF's only living parent, his father. The Movant ("Fox") has filed a motion to transfer the petition to the Blackhawk Tribal Court, under the Indian Child Welfare Act ("ICWA") to determine

guardianship and placement, and has filed her own Petition for Guardianship in the Tribal Court. The Lodens object to the transfer, and ask the Court to deny Fox's motion.

## ARGUMENT

Introduction: Transfer of the Petition for Guardianship and Temporary Custody of WF is appropriate because it has been requested by WF's "Indian custodian" as defined by ICWA, WF is an "Indian child," as defined by ICWA, the Petition pending before the court is for "foster care placement" as defined by ICWA and explained by the Franklin Supreme Court, and the Lodens cannot meet their burden to show "good cause" exists to deny the requested transfer.

I. ICWA applies to Ms. Fox's Motion to Transfer because WF is an "Indian Child", Ms. Fox is an "Indian custodian," and because the Lodens seek a "foster care placement" under the statutory definitions.

Under ICWA, a State court proceeding for the "foster care placement" of an "Indian child" not currently residing or domiciled within the reservation of the child's tribe shall be transferred to the jurisdiction of the Tribe upon petition of the "Indian custodian" and absent objection of either parent, or "good cause" against such transfer, in a "foster care placement" case.

### A. "Indian Child" and "Indian Custodian" Defined

ICWA defines an "Indian child" as any minor person who is, as is relevant here, a member of an Indian tribe. The letter from the ICWA Director states that WF is a member of the tribe, and he is 10 years old. Accordingly, WF is an "Indian child" covered under ICWA.

An "Indian custodian" is defined as "any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child." Like, WF, Ms. Fox is enrolled in the Blackhawk Tribe, and so is "Indian". As described in the excerpt from the Journal of Native American Law (the "Excerpt"), the Blackhawk Tribe has a custom that Native American grandparents, maternal or paternal, will become custodians of a child if the parents are unable to parent. While the Excerpt explains that there is not a particular preference between maternal and paternal grandparents -- unlike other tribes -- it does state that "Native American grandparents" will be custodian for the Indian child, thus evidencing a preference for Indian grandparents over non-Indian grandparents. Accordingly, under Blackhawk custom, Ms. Fox, WF's Native American grandmother, is expected by the Tribe to take custody of WF, and so falls within ICWA's definition of an "Indian custodian".

## B. "Foster Care Placement" Defined

The Lodens seek a "foster care placement" because they seek guardianship of WF, to the exclusion of others. "Foster care placement" is defined by ICWA as an action removing an Indian child from its parent or Indian custodian for temporary placement in, among other places, the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated. (Section 1903).

The Franklin Supreme Court more fully explained this definition in *In Re: RM*. In that case, the Court defined a "foster care placement" as an action in which four requirements are met: 1) the Indian child is removed from the child's parent or Indian custodian, 2) the child is temporarily placed in a "foster home or institution or the home of a guardian or conservator", 3) the parent or Indian custodian cannot have the child returned upon demand, and 4) parental rights have not been terminated.

Here, WF's mother is deceased, and his father is incapacitated, but his parental rights have not been terminated, and so the fourth prong is met. As explained in the section above, WF is an "Indian child" and Ms. Fox is his "Indian custodian." Ms. Fox has been caring for WF since his father's accident in November 2012 -- approximately 4 months, and the Lodens' Petition for Guardianship seeks to "rear, nurture, and educate" WF as "guardians and temporary custodians", demonstrating that the Lodens seek to remove WF from Ms. Fox's care so as to care for him themselves. As such, prong 1 is met.

As to prongs 2 and 3, the Franklin Supreme Court explained in *RM* that Franklin law defines a "guardian" as one who has "the powers and responsibilities of a parent with sole legal and physical custody to the exclusion of all others." By seeking guardianship, the Lodens are therefore seeking control and authority over WF, like a parent would have, to the exclusion of all others, including Ms. Fox. Like in *RM*, where the Petitioner sought sole legal custody of the child, the effect of the Lodens' Petition would be to remove WF from his Indian custodian and place him temporarily in the Lodens' home. If the Lodens' Petition for Guardianship were granted, Ms. Fox -- as Indian custodian -- would not be able to have WF returned to her on demand. Thus prongs 2 and 3 are met as well.

While the Lodens may argue that their Petition is for only "temporary custody," the Franklin Supreme Court has made clear that the caption of an action is not dispositive of the issue, and instead the court will look to what is actually being sought. Here, the Lodens' petition specifically notes that they are capable to "rear, nurture, and educate" WF, and that they seek guardianship. The function of their Petition is to have the same authority as a parent, to the exclusion of others.

Having met all four requirements of In Re: RM, the action currently pending in Franklin State Court is a "foster care placement."

II. The Lodens cannot show good cause against transfer because the distance between the Blackhawk Reservation and Melville is not so great as to cause undue hardship to the parties and witnesses.

The law creates a presumption that an action for foster care placement of an Indian child shall be transferred in the absence of good cause to the contrary, and absent the objection of either parent, on the petition of the parent of the Indian custodian or the Indian child's tribe (Section 1911). The burden to show good cause not to transfer is on the party opposing the transfer (Guidelines). In this case, WF is an "Indian child," Ms. Fox is his "Indian custodian," and the Lodens have filed a "foster care placement" action, and so the presumption applies here.

WF's father is incapacitated, and WF's mother is deceased, and so they cannot object to the transfer.

Under the Guidelines promulgated by the Department of the Interior, "good cause" not to transfer exists in the following circumstances: a) when the proceeding was at an advanced stage when the motion to transfer was filed, and the petitioner did not promptly file the motion to transfer; b) the Indian child is over 12 years of age and objects to the transfer; c) The evidence necessary to decide the case could not be adequately presented in tribal court without undue hardship on the parties and/or witnesses; and d) the parents for the child are not available and the child has had little contact with the tribe or members of the tribe. Good cause is also shown if the tribe does not have a tribal court.

While the Guidelines have not promulgated as binding administrative regulations, the Franklin Supreme Court has followed the Guidelines in In Re: RM, because the Guidelines clarify the congressional intent behind ICWA. (In re: RM). Accordingly, this Court should also apply the Guidelines.

In this case, the Blackhawk Tribe has a Tribal Court, as evidenced by Betty's Petition for Guardianship filed with the Tribal Court on February 11, 2013, and by the letter from Sam Waters that the Tribal Court has a family court unit with power and authority over any family law matter. The Lodens filed their Petition for Guardianship on February 1, 2013, and Betty filed her Motion for Transfer on February 11, 2013, at which point the proceedings were not advanced, and there was no delay in her filing a motion less than two weeks after the initial petition had been filed. Thus the Lodens cannot establish "good cause" to deny transfer for delay, or for a lack of Tribal Court. WF is ten years old, and so he is not able to object to the transfer. Additionally, the email from Joseph to Betty states that WF has participated in three powwows on the Reservation as of summer of 2012, and visits the Reservation on holidays. These trips and contacts with

the Tribe are significant, and accordingly, the Lodens cannot show that WF has had little contact with the Tribe or with members of the Tribe.

Under Section (b)(iii), "good cause" may be shown if the evidence necessary to decide the case could not be presented in Tribal Court adequately without undue hardship to the parties or witnesses. In *In re: RM*, the Supreme Court discussed this section in a similar fact pattern. In *RM*, the Tribal Court was less than two hours from the home of *RM*'s parents, and within one to two hours from the school and medical personnel and other likely witnesses. Here, the Tribal court is farther, at a three to four hour drive from the *WF*'s home in Melville. However, the Court in *RM* found it very important that the Petitioner frequently took trips with the child to the reservation to visit family and friends. In this case, *WF* went to the reservation for three annual powwows, and intends to return for a fourth, as evidenced in the email from Joseph to Betty. Joseph and *WF* also traveled to the Reservation for holidays, and so for the past three years made trips to the Reservation multiple times per year.

While the distance involved in this case is greater than that in *RM*, *WF*'s visits to the Reservation with his father several times per year demonstrate that the approximately three to four hour drive would not be an undue hardship to the witnesses and parties involved, particularly in light of Congress's intent to incorporate the consideration for Tribal culture and heritage through the ICWA legislation.

*WF* has strong ties to the Blackhawk Tribe, the Blackhawk Tribe has a fully-functioning Court with a family law unit, and Congress enacted ICWA so that determinations about the placement of Indian children could be determined by Tribal Courts without good cause for the State to determine it. Under the facts presented here, and in light of the Franklin Supreme Court's decision in *In Re: RM*, the Lodens cannot show that there is good cause to deny Ms. Fox's motion for transfer of the action to the Blackhawk Tribal Court. Accordingly, under the ICWA presumption, the Court should grant Ms. Fox's motion.