July 2013

New York State
Bar Examination

Essay Questions

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QUESTION 1

In May 2006, Alice gave birth out of wedlock to a daughter, Jan. Alice and Jan lived with Fred, Jan's biological father. Fred financially supported Jan until December 2006, when Fred ended his relationship with Alice. Pursuant to a court order, Fred thereafter paid Alice weekly child support, and Fred exercised regular visitation with Jan on alternating weekends.

In October 2008, Alice married Rob. Fred then stopped paying child support and stopped his regular visits with Jan. Alice did not attempt to enforce the support order, hoping that Fred would lose interest in Jan.

Between October 2008 and May 2010, Fred visited with Jan three times, most recently on her birthday in May 2010. During this same time period, Fred called Jan two or three times a year and sent a gift each year on her birthday and Christmas.

Following his marriage to Alice, Rob spent much of his free time with Jan and treated her as his own daughter. Rob also financially supported Jan, and the two developed a close filial bond.

In June 2010, Alice and Rob commenced a proceeding in family court seeking to have Rob adopt Jan. Fred, who was recorded as Jan's father on her birth certificate, was given notice of the proceeding. He appeared and refused to consent to the proposed adoption. At a hearing where all of the foregoing facts were established, the court determined that Fred's consent to the proposed adoption was not required, and it granted the request for adoption.

During his marriage to Alice, Rob inherited $500,000 from his aunt. He deposited the funds into a self-directed investment account which he opened in his name alone. Rob actively managed the investment account, extensively researching companies, tracking their income and profit performance, and charting when to buy and sell. Alice lacked any financial experience and was not involved with Rob's management of the account. However, Alice exclusively managed their home, coordinated Rob's social schedule, and was the primary caretaker of Jan, allowing Rob the time to manage his investments.

In 2011, Rob and Alice began having marital problems. Rob then lost his job, and in order to pay their bills, and not wanting to invade his investment account, he secretly obtained a personal loan from B Bank. The loan was secured by a mortgage on Blackacre, which he and Alice owned as tenants by the entirety. Rob defaulted after making only six payments to B Bank, and B Bank commenced an action to foreclose the mortgage on Blackacre naming both Rob and Alice as defendants. Alice moved to dismiss the action on the ground that the mortgage to B Bank was invalid because she was not a party to the mortgage. The court (a) denied the motion.

B Bank subsequently obtained a judgment of foreclosure against Blackacre, acquired Rob's interest at the foreclosure sale and commenced an action to partition Blackacre. Alice moved to dismiss the partition action on the ground that B Bank's complaint failed to state a cause of action. The court (b) granted the motion.

Thereafter, Alice commenced an action against Rob for divorce. Rob and Alice resolved all of their financial issues, except with regard to the investment account in Rob's name, which by the time of the commencement of the divorce action had increased to $700,000, primarily due to Rob's investment strategy. Last month, Rob filed a motion seeking a determination from the court that the investment account is his separate property not subject to equitable distribution. Based on the foregoing relevant facts, the court held that both (a) Rob's original deposit into the investment account and (b) the appreciation in the account are his separate property.

(1) Did the court properly determine that Fred's consent was not required in the adoption proceeding?

(2) Did the court correctly (a) deny Alice's motion as to the foreclosure action and (b) grant Alice's motion as to the partition action?

(3) Was the court correct in its rulings that both (a) Rob's original deposit into the investment account and (b) the appreciation in the account are his separate property not subject to equitable distribution?

QUESTION 2

Al told Bill he had stolen five diamond rings from a jewelry store where he formerly worked. He offered to sell the rings to Bill for $1,500. Bill agreed to pay Al $1,500 for the five diamond rings, and they agreed to meet later that day to consummate the deal. In fact, Al had never stolen any diamond rings, and the rings he was planning to sell to Bill were fake.

When Al and Bill met at a prearranged location for the payment to take place, Al showed Bill a jewelry case containing the five fake diamond rings. Bill said the rings looked fake and refused to pay Al the $1,500. Al pulled out a knife and said, "Give me the money." Bill gave Al the $1,500, and Al started walking away.

Bill ran to his car which was parked nearby. He got into his car, took a revolver from the glove compartment, ran after Al and fired the gun, seriously wounding Al. Bill then took the $1,500 back from Al, got in his car and drove off.

(1) (a) Did Bill commit the crime of attempted possession of stolen property?

(b) Before Al pulled out the knife, was Al's conduct sufficient to constitute the crime of attempted larceny?

(2) Was the crime of robbery committed by (a) Al and/or (b) Bill?

(3) Assuming Bill is charged with assault, will he be able to successfully assert the defense of justification?

QUESTION 3

Dave is a skilled carpenter who specializes in designing and installing kitchen cabinetry in Albany County. Three years ago he engaged Lawyer, who had represented Dave individually for several years, to incorporate his kitchen cabinetry business as a means of obtaining additional capital to expand his operation. Lawyer formed Kitchen Corp. and since then has represented Kitchen Corp. in all of its business dealings.

Initially, Dave was the sole shareholder, director and officer of Kitchen Corp. Dave owned 50 shares, and shortly after Kitchen Corp. was formed, it issued 10 shares to each of Stu and Mac at a price of $1,000 per share. No shareholders meetings were held, and neither Stu nor Mac was elected as an officer or director.

Last year, Contractor approached Dave and asked him to design and install kitchen cabinetry in all houses built by Contractor in a new, large development in Albany County. For that purpose, Dave formed Cabinet LLC, a New York limited liability company with Dave as its sole member. Since then, Cabinet LLC has been designing and installing kitchen cabinetry in Contractor's development.

Stu and Mac recently learned about Cabinet LLC and have commenced an action on behalf of Kitchen Corp. against Dave, alleging that he diverted profits from Kitchen Corp. and seeking to compel Dave to account for those profits. The complaint set forth the foregoing relevant facts. Dave retained Lawyer to represent him in the action. Lawyer has moved to dismiss the complaint on the ground that Stu and Mac, before bringing their action, failed to make a demand on Dave, as the sole director of Kitchen Corp., that Kitchen Corp. commence an action against Dave to recover the profits of Cabinet LLC.

Last month, Kitchen Corp. ordered 500 cabinet hinges from Supplier to be delivered on July 29, 2013. Kitchen Corp. had not previously done business with Supplier. On July 29, Supplier delivered 300 hinges to Kitchen Corp. and notified Kitchen Corp. that it could make delivery of the remaining 200 hinges in 30 days. In the business, hinges are sold in packages of 100. Kitchen Corp. does not need any of the hinges immediately and has learned that it can obtain comparable hinges within 30 days from another source at a lower price.

(1) Is it proper for Lawyer to represent Dave in the action brought on behalf of Kitchen Corp. by Stu and Mac?

(2) Should the action be dismissed because Stu and Mac failed to demand that Kitchen Corp. commence the action?

(3) Assuming the action is not dismissed, are Stu and Mac likely to be successful in the action against Dave?

(4) What options does Kitchen Corp. have with respect to the 300 hinges received from Supplier?

QUESTION 4

Jake was employed by Stone Inc. ("Stone") for many years as a machine operator in a factory that made granite countertops. Jake's job was to operate a circular saw to cut slabs of granite to required specifications.

Granite, like other stone, contains silica, and cutting it releases dust containing fine particles of silica that, if inhaled, could lodge in the lungs, causing silicosis, an incurable and often fatal respiratory disease. When cutting granite, efforts must be made to control the release of dust. This may be done by various means, including the use of ventilation systems to collect and exhaust the dust. Where the release of dust cannot be controlled, exposure can be prevented by wearing appropriate respiratory protection. The dangers associated with exposure to silica dust have been well-known for many years.

The saw Jake used was manufactured by Cutter Inc. ("Cutter") specifically for stone-cutting operations, and it was widely used in the industry. There was a guard over the blade to protect the operator from coming into contact with the blade. While the guard was in place, a ventilation system installed on the saw controlled the release of dust. The guard could be removed without shutting off the saw, but removal of the guard would disable the ventilation system. The saw could have been manufactured, at

minimal cost, with an electrical interlock that would shut the saw off if the guard were removed.

In operating the saw, Jake regularly removed the guard because it obstructed his view of the piece of granite he was cutting. Removing the guard caused Jake to be exposed to dust containing silica. Stone was aware that Jake operated the saw without the guard in place and that doing so disabled the ventilation system. Stone did not provide Jake with any respiratory protection. Warning labels, however, had been affixed to the saw by Cutter, alerting the user to the danger of exposure to silica dust.

Jake retired in 2007. Shortly after he retired, Jake developed a cough that got progressively worse. By June 2008, Jake was suffering from shortness of breath, causing him to become breathless after only modest exercise. By February 2009, he was generally confined to home due to his respiratory condition. Jake first saw a doctor for his condition in August 2009. The doctor diagnosed Jake with silicosis caused by his workplace exposure to silica dust.

In June 2012, Jake commenced an action against Stone and Cutter. The complaint alleged that Stone, his employer, was negligent in failing to adopt appropriate methods to control Jake's exposure to dust or to provide him with appropriate respiratory protection. The complaint alleged a cause of action against Cutter in strict products liability, alleging that the design of the saw was defective.

Cutter served an answer, alleging as an affirmative defense that the statute of limitations bars the action. Cutter also asserted a cross-claim against Stone for contribution.

Stone has now moved to dismiss both the complaint and the cross-claim for failure to state a cause of action.

(1) How should the court rule on Stone's motion to dismiss:
   (a) Jake's complaint against Stone?
   (b) Cutter's cross-claim against Stone?

(2) Is Cutter likely to succeed on its affirmative defense of the statute of limitations?

(3) Assuming the action is not dismissed, is Jake likely to succeed on his cause of action against Cutter?

QUESTION 5

Tom, a widower, had three adult children: Aaron, Brad and Clara. In 2010, he duly executed a will that provided in pertinent part:

1. I give to my son, Aaron, my 2009 Porsche automobile.

2. I give to my children, Aaron, Brad, and Clara, the rest and residue of my estate.

In 2011, Brad died leaving two children, and Clara died leaving three children. In 2012, Tom traded in his 2009 Porsche automobile for a 2012 Porsche of the same model. He also opened a joint bank account with Aaron, informing the bank officer that the purpose of the account was that Aaron could take care of Tom's needs in the event that Tom became disabled. The bank signature card contained language indicating a right of survivorship in the joint account, but Tom kept control of the checkbook and received all of the bank statements, and Aaron made no withdrawals from the account during Tom's lifetime.

Tom died on January 31, 2013, survived by Aaron, the two children of his deceased son, Brad, and the three children of his deceased daughter, Clara. Tom's will has been admitted to probate.

Shortly after the will was admitted to probate, a woman named Zelda made an application in the probate proceeding as the legal guardian of her one-year old daughter, Wanda. Zelda claimed that Wanda was the illegitimate child of Tom and asserted that Wanda was entitled to share equally in the residuary estate. She submitted in support of her application a duly executed and filed written acknowledgement of paternity signed by Tom. Tom never had any contact or communication with Wanda nor had he paid child support for Wanda, and no genetic marker test was taken.

Last week, Tom's estate received a substantial insurance payment for his 2012 Porsche, which had been destroyed in a fire several weeks before Tom's death.

(1) Is Wanda entitled to share in the residuary estate?

(2) (a) Is Aaron entitled to the insurance payment received by the estate for the Porsche?
(b) Is Aaron entitled to the proceeds of the joint bank account?

(3) Assuming Wanda is not entitled to share in the residuary estate, and that the final amount of the residuary estate is $150,000, how should the residuary estate be distributed?

MPT – Palindrome Recording Contract

Examinees' law firm represents the four members of the rock band Palindrome, who have retained it to negotiate a recording contract with Polyphon, an independent recording label. Polyphon has presented the band with a detailed contract, and examinees are asked to redraft certain provisions of that contract to comport with the band's contractual demands and objectives. In particular, the band is concerned about artistic control of its recordings, licensing of the band's trademark, and use of the band's images and trademark for marketing purposes. Examinees are asked not only to redraft those contract provisions but also to explain why changes are being made to each, and to analyze legal aspects or complications involved with each provision, if there are any. The File contains the instructional memorandum, a transcript of an interview by the assigning partner with the leader of the band, an agreement among the band members concerning the division of income, and selected provisions of the recording contract. The Library contains a Franklin statute concerning contracts for personal services and two cases discussing the assignment and licensing of trademarks.

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July 2013

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Bar Examination

Sample Essay Answers

JULY 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. The issue is whether a biological father, who has maintained only minimal contact with his child and has not expressed a willingness to take custody of his child, must consent to the child's adoption by a step-parent.

This issue is governed by New York's Domestic Relations Law (DRL) and Surrogates Court Procedure Act (SCPA). Under New York law, the consent of both biological parents is generally required before a child can be adopted. When the child is a non-marital child, however, only the consent of the custodial mother is required. The consent of the non-custodial father may be required under limited circumstances. A non-custodial father of a non-marital child need only consent if the father has, in the surrogate court's opinion, played an active role in the child's life and expressed a willingness to take custody of the child since the time of the child's birth.

Furthermore, the court will always consider what is in the best interests of the child.

Here, Jan is a non-marital child because she was born out of wedlock and her birth was never subsequently legitimized by the marriage of her mother (Alice) and father (Fred). During the first seven months of Jan's life, she lived with both parents and was financially supported by her father. In December 2006, Jan ceased to live with her father and resided solely with her mother. At that time, up until October 2008, Fred would regularly visit with Jan and paid weekly child support. In October 2008, however, Fred stopped paying child support and stopped regularly visiting with Jan. Between October 2008 and May 2010, Fred only visited with Jan three times, and rarely contacted her via the telephone.

Additionally, at no time prior to the commencement of adoption proceedings did Fred express a willingness to be a custodial parent. Furthermore, when Fred objected to Jan's adoption, he did not express a willingness to be a custodial parent. Because Jan is a non-marital child, and because Fred has not played an active role in her life or expressed a willingness to take custody of her, Fred's consent to her adoption was not required. Only the consent of her mother, Alice, was required. Additionally, it should be noted that Jan's close relationship with her step-father Rob, and the fact that Rob financially supports Jan, indicate that it would be in Jan's best interest to be adopted by Rob. It should also be noted that under New York's EPTL, Jan's adoption by Rob, who is the current spouse of her biological mother, does not sever her right to inherit from and through her biological father.

In conclusion, the court properly determined that Fred's consent was not required in the adoption proceeding.

2. (a) The issue is what is the effect when only one spouse agrees to a mortgage secured by property held by both spouses as tenants by the entirety.

New York courts are very protective of property held as tenants by the entirety. Tenancy by the entirety results when two spouses are co-tenants of property, acquired post-marriage, and do not expressly state that they are holding the property in some other form of tenancy. In other words, tenancy by the entirety is the default form of co-tenancy among marital couples in New York. When a married couple owns property as tenants by the entirety, they each have a right to possess the whole and they each have survivorship rights, meaning a deceased spouse's share will pass automatically to the surviving spouse by operation of law. A spouse, acting alone, may secure a loan with a mortgage on his share of the tenancy by the entirety.

However, the execution of a mortgage on the property by only one spouse does not sever the tenancy by the entirety.

Furthermore, the execution of a mortgage on the property by only one spouse cannot result in the loss of the other spouse's right of survivorship. A creditor of only one spouse, as opposed to a joint creditor, may only foreclose as to the debtor-spouse's share. Furthermore, any foreclosure will be subject to the non-debtor spouse's right of survivorship.

Here, Rob and Alice expressly owned Blackacre as tenants by the entirety. Rob granted B Bank ("B") a mortgage on Blackacre in exchange for a personal loan.

Alice did not know about, nor consent to, Rob's mortgage. Because B is only a creditor of Rob, and not a joint creditor of Rob and Alice, B may only foreclose as to Rob's 1/2 share of Blackacre. In doing so, B becomes a tenant in common with Alice and remains subject to Alice's right of Survivorship.

In other words, until Rob's death, B and Alice will be tenants in common, and at Rob's death Alice will become the sole owner of Blackacre by operation of law.

Because one spouse can validly execute a mortgage on his share of property held as tenants by the entirety, the court was correct to deny Alice's motion to dismiss the action on the ground that B's mortgage was invalid. The mortgage was valid, and B and Alice are tenants in common subject to Alice's right of survivorship when Rob dies.

(b) The issue is under what circumstances a tenant may in common seek court-ordered partition.

Tenants in common in New York own an undivided interest in property that is freely devisable, descendible, and alienable. Normally, a co-tenant who wishes to sever the tenancy in common may seek a court-ordered partition. The court can then either order a partition in-kind, by physically dividing the property amongst the tenants, or can order a sale of the property and have the proceeds distributed accordingly. Partition in-kind is most beneficial when the property is sprawling lands.

As explained above in Section 2(a), B Bank was entitled to foreclosure against Rob's interest in Blackacre. In doing so, B Bank became a tenant in common with Alice. However, because Blackacre was original held by Rob and Alice as tenants by the entirety, B Bank was not able to destroy Alice's interest and right of survivorship. Because Alice still has a right of survivorship, B bank will not be allowed to obtain a court order to partition Blackacre. Thus, the court was correct when it granted Alice's motion to dismiss the partition action on the ground that B Bank's complaint failed to state a cause of action.

3. (a) The issue is whether an inheritance is considered separate property in New York.

Under New York DRL, courts classify property as marital property or separate property. Marital property belongs to both spouses and is subject to equitable distribution at divorce. Separate property belongs only to one spouse and is not subject to equitable distribution at divorce. Separate property includes (1) property owned by one spouse prior to marriage; (2) gifts given only two one spouse during the marriage; (3) property acquired by operation of law, including inheritance, by one spouse during the marriage; and (4) passive appreciation in value of separate property during marriage.

Here, Rob inherited $500,000 from his aunt during his marriage to Alice. He deposited that property into an investment account. That $500,000 is Rob's separate property because he acquired it by operation of law (inheritance) during his marriage to Alice. As such, the court was correct to rule that the original $500,000 deposited into the investment account was Rob's separate property.

(b) The issue is whether the active appreciation in value of separate property is also considered to be separate property.

As stated above, under New York DRL property acquired by operation of law, and the passive appreciation in value of that property, are both considered to be separate property and not subject to equitable distribution at divorce. Active appreciation in value of separate property, however, is considered to be marital property and is thus subject to equitable distribution at divorce. Here, Rob's initial $500,000 of separate property appreciated by $200,000 during his marriage to Alice. That appreciation was

"active," as it was a direct result of Rob's active management and research. Rob was allowed time to actively manage and research the account because Alice exclusively managed their home, coordinated Rob's social schedule, and was the primary caretaker of Jan. In doing so, Alice contributed to the active appreciation. As such, the court was incorrect when it ruled that the $200,000 appreciation in the account was Rob's separate property. That $200,000 active appreciation is marital property and subject to equitable distribution.

ANSWER TO QUESTION 1

1. The issue is whether Jan's biological fathers consent was necessary for her adoption when Jan and Fred did not have a close filial bond.

Under the New York Domestic Relations Law, when a couple wants to give a child up for adoption the consent of both parents is necessary. A biological father who is present in the child's life and has established a fatherly role with the child has, even though the child is out of wedlock, the right to approve or disapprove of the adoption. This is also applicable when a man is not the biological father but has played a substantial part in the life of the child, might it be through financial support, establishing a parent/child relationship or portraying himself as the father to the community. When the father is present and the child is under 6 months old the consent of the father is necessary. However, if after that time the father is not an active figure in the child's life then the consent of the father is not necessary.

Here, Jan was born in May 2006. Fred, as her biological father, financially supported Jan up until December 2006 which would make it 7months after her birth. He started paying child support but ceased once Alice married Rob. Under these dates Fred's consent would be necessary. However, the petition for adoption did not take place up until June 2010. Additionally, Fred stopped paying child support and regularly visiting Jan in October of 2008. Child support payments, unlike spousal maintenance, cannot be stopped from being paid when the wife re-marries. Consequently, Fred breached his duty of supporting his own child. Moreover, his very limited visits and only two to three phone calls a year would make it hard to argue that Fred kept a close relationship with the his daughter Jan. Rob instead started actively participating in Jan's life, by not only paying financial support, that Fred was slacking on, but he developed a close relationship with Jan by spending most of his free time with her. The court would have to take under consideration the best interest of the child and when doing so it would be necessary to take under consideration the role of the father and his active participation with his daughter. Under this reasoning, it would be best established that Fred's consent would not be necessary since he was not actively participating nor trying to establish a

father- daughter relationship while Rob was. It would be in the best interest of the child to have a present father in her life and therefore, the court properly ruled on not requiring Fred's consent for the adoption.

2. (a) The issue is whether Bank B could bring a foreclosure action naming both Rob and Alice when the mortgage was in Rob's name and the land owned as tenant by the entirety.

Under Real Property law, a concurrent estate is property that is owned by two or more people at the same time. There are three types of concurrent estates, (1) joint tenancies, (2) tenancy by the entirety, (3) tenancy in common. A tenancy by the entirety is land that is owned by a married couple and similar to a joint tenancy it has the right of survivorship, meaning that when one spouse dies the surviving spouse has the legal right to the land. For there to be a valid tenancy by the entirety, the couple had to be married at the time title was transferred and it has to have meet the four unities of time, title, possession and ownership. Additionally, a person can get a mortgage on the property however, the mortgage cannot affect the interest of the other spouse and the Bank will only be able to close on the mortgage only if the spouse who took out the mortgage survives the other spouse. Therefore, the interest of the land can only be transferred if both spouses consent and the tenancy by the entirety is severed when either the spouses divorce, when one dies or if both consent to it.

Here, the Ron and Alice have a valid tenancy by the entirety since no issues arose as to the title and execution of the tenancy. Rob had the right to get a mortgage on the property even without Alice's consent. However, B Bank cannot foreclose on the property until either Alice dies first, or the couple gets divorced which would then sever the tenancy by the entirety and turn it into a tenancy in common or if the parties decide to partition the land. None of the following situations took place in this instance. Therefore, the court was incorrect in denying Alice's motion. Alice commenced an action against Rob for divorce after the foreclosure proceeding was granted. If the Bank wants to collect on the defaulted mortgage they should wait until the divorce is finalized and they would be able to collect from Rob since at that point the land is owned in common and it would not affect Alice's interest of survivorship.

2. (b) The issue is whether Alice's motion for dismissal to state a cause of action is valid when the Bank moves to partition the land held in tenancy by the entirety when both spouse do not consent.

As state above, a tenancy by the entirety is a concurrent estate and for the partition of land the consent of both spouses is required.

Here, Alice did not consent to the partition of the land. Rob is the spouse that got

a mortgage on the land and therefore, the bank will be able to foreclose only if the spouses divorce, or if Rob dies last or if they decide to partition the land.

Under New York's CPLR, a party can file a motion to dismiss for failure to state a cause of action prior to the answer being served. If the defendant files a motion to dismiss for failure to state a cause of action, the court will look at all the non-moving party's allegations as true and determine whether there are any other causes for relief. If the court finds that there can still be issues and claims to be litigated that can result in damages or judgment for the plaintiff then the court will deny the motion and continue with the case.

However, if the pleadings have no issues left for litigation then the court will uphold and the cause of action dismissed. If the motion is denied the defendant has then 10 days to file his answer with the plaintiff.

Here, B Bank commenced an action to partition Blackacre after they obtained a judgment of foreclosure against Blackacre. Alice will file evidence demonstrating that the land is owned as tenants by the entirety and that she does not consent to the partition of the land. Once the court takes those facts and that evidence in consideration and sees that it should be in her favor B Bank has no other claims against her and therefore, no other causes of relief. For this reason, the court was right in granting Alice's motion to dismiss for failure to state a cause of action.

3. (a) The issue is whether Rob should be granted the value of his original deposit in the investment account when the money used to start the account was an inheritance.

Under the Domestic Relations law, a marriage is considered an economic partnership so when married couple divorces they are entitled to their fair share of their economic contributions. The court will divide the property and interests and profits made throughout the marriage through equitable distribution. This is done by separating the property into separate and marital property. Separate property is property and assets acquired before the marriage, any gifts or bequests given to an individual spouse during the marriage and any property that the spouses agree to be separate property. Marital property is any property that is acquired during the marriage including professional and educational degrees. Additionally, the court the court will take under consideration the appreciation of value of property during the marriage. Passive appreciation is when the value of property increases by just the passage of time. Active appreciation is the result of the increase of value of property due to spousal effort during the marriage. Active appreciation is divided among spouses equally while passive appreciation will be divided among spouses on marital property but not on separate property. The court will look at the parties efforts, work, career, but not fault in the marriage when deciding how to equitably distribute the property.

Here, Rob inherited 500,000 dollars from his aunt which would make it separate property. This is the same money that he then used to start up the investment account. Therefore, Rob is entitled to the same dollar value that he put in to fund the investment account since it was separate property and it belonged to Rob.

(b) The issue is whether the appreciation in value of the investment account should be equally distributed to Alice when she actively took care of the family so that Rob could manage his investment. Please see the above rule paragraph.

Here, Rob used his inheritance money to fund the investment fund. However, the appreciation of value should be equally distributed because even though Rob used his money if it was not for Alice's effort, dedication and work to take care of Jan and manage the home and coordinate Rob's social schedule then Rob would not have had the opportunity to work on his investments, which would not have led to an increase of value. Therefore, Rob should be entitled to the 500,000 dollars of the original fund but the increase in value of over 200,000 dollars should be equitably distributed. This was due to active appreciation and therefore it should be equally divided, for this reason the court was wrong in not granting Alice the increase of value.

ANSWER TO QUESTION 2

l. (a) The issue is whether Bill committed the crime of attempted possession of stolen property by agreeing to pay Al $1500 for rings he believed were stolen and by coming "dangerously near" to completing the crime by meeting Al at a prearranged location.

The crime of attempt in criminal law requires that the defendant (D) have the mens rea of intent to commit the crime and that he must come "dangerously near" or be "on the verge" of committing that crime. A mistake of fact is not a defense to the crime of attempt where if the circumstances were as the defendant believed them to be he would indeed have been guilty of the crime he is charged with attempting to complete. In order to renounce the crime of attempt, the defendant must notify any accomplices of his withdrawal and must actually thwart the commission of the crime by notifying the police or the intended victim.

The crime of possessing of stolen property is committed when the D knowingly possesses stolen property with knowledge that it is stolen when he receives it and with the intent to deprive the true owner of the use or possession of that property.

In this case, Al had told Bill that he had 5 stolen diamond rings and Al believed that they were stolen. It does not matter that they were not actually stolen or that they were fake, because mistake of fact is not a defense to the crime of attempt. When Bill met Al at a prearranged location for payment, he was "dangerously near" to committing the crime of possession of stolen property. He only changed his mind because he thought that the rings looked fake. If the rings had not looked fake, then Bill presumably would have purchased them.

Thus, Bill did commit the crime of attempted possession of stolen property.

(b) The issue is whether before Al pulled out the knife, Al's conduct was sufficient to constitute the crime of attempted larceny.

Common law distinguished amongst different types of larceny as larceny, larceny by trick (fraudulently taking possession of personal property through a material misrepresentation), larceny by false pretenses (fraudulently taking title to personal property thru a material misrepresentation), larceny by embezzlement (fraudulently converting after taking possession), and larceny by extortion (future threats, blackmail). NY simply defines larceny as the wrongful taking of possession of the personal property of another with the intent to deprive the true owner of its use, possession, or value.

A fraudulent misrepresentation requires that the defendant (1) act with scienter (knowledge) of the falsity of his statement or material omission, (2) that the D intend to induce the P and defraud him, (3) that the plaintiff reasonably relied on the D's false representation, i.e. that the P could not have uncovered the fraud thru the exercise of due diligence, and (5) that the fraud was a material misrepresentation.

In this case, Al made a material misrepresentation to Bill when he lied and told him that he had 5 real diamond rings to sell them. This representation that these were real diamond rings was a material misrepresentation on which Bill relied in agreeing to the transaction. Al knew these were fake diamond rings and that his statement that they were real was a material inducement to Bill in entering into the transaction. It is debatable whether Bill's reliance was reasonable since he thought they were stolen property and thus an argument could be made that he had inquiry notice that he was dealing with a dishonest individual, but that alone is probably not enough to defeat the reliance element.

When Al met Bill at the prearranged location his conduct came dangerously near to constitute the crime of attempt.

Thus, Al's conduct was sufficient to constitute the crime of attempted larceny.

2. The issue is whether the crime of robbery was committed by Al and/or Bill.

Robbery consists of the crime of larceny (wrongful taking of personal property of another with the intent to deprive the true owner of its use) plus the taking must be accomplished by the use of force or the threat of immediate force. In New York, robbery in the first degree is robbery plus aggravating circumstances of: (1) displaying a deadly weapon, (2) being armed with a deadly weapon or dangerous instrument, (3) menacing another through the use of the deadly weapon, or (4) causing serious physical injury to a non-participant. If the D committed larceny through the threat of immediate force or use of force and one of these aggravating circumstances are not present, then the D is still guilty of a lesser degree of robbery.

(a) When Al pulled out his knife and demanded that Bill give him the money, he wrongfully took the personal property of Bill (his $1500) by the threat of immediate force (pulling out his knife). When Al took this money from Bill, he intended to permanently deprive Bill of its use and possession. A knife is an inherently dangerous instrument and thus when Al displayed it his behavior fell within one of the aggravating circumstances for robbery 1st degree.

Thus, Al committed the crime of robbery in the first degree.

(b) A party has a good faith claim of right to personal property when he honestly and subjectively believes that the property belongs to him. The use of force is not privileged to take back personal property unless done in immediate hot pursuit of the D and only after a demand has been made for the return of the property. Even so, the use of the force must be reasonable under the circumstances.

In this case, Al had just stolen Bill's money, and thus Bill had a good faith claim of right to that property. However, Al had started walking away after stealing the money, and Bill went all the way back to his car to get his revolver. This is not hot pursuit, which would have been if Bill had immediately started running after Al when he took his money. In addition, Bill never made a demand for his money back and the use of a revolver was not reasonable under the circumstances, so the good faith claim of right defense would not be available to him.

However, because the crime of robbery is larceny plus the use of force or threat of immediate force, Bill would not be guilty of robbery because he subjectively believed the property belonged to him.

3. The issue is whether if Bill is charged with assault, he will be able to successfully assert the ordinary defense of justification (aka self-defense).

The crime of assault in New York is committed when the D intentionally physically harms the victim and such act causes either impairment of the victim's physical condition or substantial pain. Substantial pain is determined by the jury and the jury will consider the D's motive for causing the injury, the victim's description of the pain, and any medical treatment received by the victim.

In NY, most defenses are affirmative defenses which the D is required to prove by a preponderance of the evidence. However, the defense of justification is an ordinary defense in NY, and the People are required to disprove it beyond a reasonable doubt on their direct case. To successfully assert the defense of justification, the D must have been met with a threat of violence which he did not initiate (the D cannot be the initial aggressor), and the D's use of force must have been reasonable under the circumstances. The reasonableness is judged by an objective reasonably prudent person standard. In NY, there is a duty to retreat before using deadly force if one can do so safely and without risk of injury to himself or a 3rd person. The only exception to this rule is when the D is in his home. There is no duty to retreat when faced with a firearm because it is assumed that one cannot safely retreat from that situation. The use of deadly force is never reasonable solely to get one's personal property back, but rather is only reasonable when used to protect one's own life or the life of a 3rd person.

In this case, although Al pulled a knife first and thus was the initial aggressor, after Bill gave him the money, Al was walking away and the threat had ceased to exist. The use of a revolver is deadly force, and Bill could have retreated with complete safety at the time. Instead, Bill went to his car, got his revolver, and then ran after Bill. Thus Bill became the aggressor because the initial altercation had ceased and then Bill reinitiated it and escalated it thru the use of his firearm. Bill's use of deadly force was not reasonable because he was not faced with deadly force at the time and did not shoot at Al to protect his own life but rather to get his money back.

Thus, Bill would not be able to successfully assert the ordinary defense of justification if he is charged with assault, because his use of deadly force was not reasonable under the circumstances.

ANSWER TO QUESTION 2

1. (a) The issue is whether factual impossibility is a valid defense to attempted possession of stolen property.

Under the New York Penal Law, a person is guilty of attempted possession of stolen property if he: (1) receives possession of stolen property; (2) with knowledge that

it is stolen and; (3) with intent to permanently deprive the owner of their property. Under New York Law, the property must actually be stolen for this crime to be complete. Under the New York Penal Law, a person is guilty of attempt when he intends to commit a crime, and comes dangerously close to committed the target offense. In NY, it is not a defense to an attempt offense that it was factually impossible to commit the crime---that the facts were not as you believed them and thus no crime was committed.

Here, Bill intended to receive possession of stolen property because Al told him he stole 5 diamond rings from a jewelry store where he used to work and Bill agreed to pay Al $1,500 for the five rings. Bill intended to permanently deprive the rightful owner of his possession because this element can be presumed based on facts to the contrary. However, even if Bill were to have gone through with the deal, he could not be guilty of possession of stolen property because the diamonds were not in fact stolen. Bill can however be guilty of attempted possession of stolen property because, he believed the diamonds to be stolen and came dangerously close to purchasing them from Al when he met Bill at the prearranged location after agreeing to purchase them. Since Bill would have purchased them if they did not "look fake" Bill came dangerously close to committing the crime of receiving stolen property and because factual impossibility is not a defense to attempt, Bill committed the crime of attempted possession of stolen property.

Thus, Bill committed the crime of attempted possession of stolen property when he came dangerously close to purchasing the diamonds that he believes to be stolen from Al.

(b) The issue is whether Al came dangerously close to committing larceny by false pretenses.

Under New York Penal Law, the crime of larceny encompasses the common law crime of false pretenses. A Person commits larceny by false pretenses when he: (1) obtains title to another's property by (2) asserting false statements; (3) with intent to defraud the owner of the property (permanently deprive him of it). Since this crime requires intent, a person can commit the crime of attempted larceny if he comes dangerously close to fulfilling the aforementioned elements. Under New York Penal Law, when the property taking exceed $1,000 but is less than $3,000 the offense constitutes larceny in the 4th degree, a felony.

Here, Al attempted to obtain title to Bill's property because he offered to sell Bill five diamond rings in exchange for $1,500. Al attempted to obtain custody by asserting intentional misstatements of fact when he told Al that he stole the diamonds from a jewelry store--leading him to believe they were real, when in fact he never stole any diamond rings and was planning on selling Bill fake rings all along. Al intended to defraud Bill because the facts do not indicate that he intended on ever returning the

money to Bill. Al came dangerously close to committing Larceny by Trick when he showed up at the prearranged location, took out the five fake rings and was prepared to sell them to Bill for $1,500 until Bill backed out, saying they looked fake.

Thus, before Al pulled the knife, he came dangerously close to obtaining title to Bill's money, by asserting false statements with intent to defraud.

2. Only Al committed the crime of robbery.

Under New York Penal Law, a person commits robbery when they: (1) commit larceny (2) by taking another's property from their person or presence (3) by use of force or threat of imminent force. Under the New York Penal Law, larceny is the trespassory taking and carrying away of another's property with intent to permanently deprive them.

Here, the first element is met because Al took Bill's property and wrongfully carried it away with intent to deprive him when he took the $1,500 from Al, without Bill's consent, and started to walk away with intent to permanently deprive Bill of the 1,500. Element two is met because Al took the 1,500 from Bill's person when Al demanded that Bill give him the money that Al had on his person and was planning on using for the diamond transaction. The third element is met because Al obtained this property by threatening the use of imminent force when he pulled out a knife and said "give me the money." Bill only gave Al the money so as to avoid being injured by Al's knife.

Here, Bill did not commit the crime of robbery because the $1,500 he stole back from Al did not belong to Al, but instead belonged to Bill. Thus, there can be no larceny because Al did not even have rightful possession or custody to the $1,500 he had just stolen from Bill.

Thus, Al committed the crime of robbery and Bill did not.

3. The issue is whether deadly force can ever be justified to prevent property loss.

Under New York Penal Law, a person is guilty of assault when he (1) intentionally causes (2) physical injury to another. Physical injury is defined as (a) substantial pain or (b) physical impairment. Under New York law, a person can assert a justification if used force to defend themselves, others or property. However, a person cannot use deadly force without first retreating and cannot ever use deadly force unless faced with a reasonable belief that such force is necessary to avoid imminent threat of death of serious bodily injury. Deadly force is never justified when used merely to prevent property theft. A person uses deadly force when they use a weapon in matter likely to cause death or substantial bodily injury.

Here, Bill intentionally caused physical injury to Al because he took a revolver from his car's glove compartment, pointed it at Al, and fired it. Al was physically injured because the gun shot seriously wounded Al. Thus, Al committed crime of assault. Al will not be able to assert self-defense as a justification to the crime of assault because Al used deadly force when he shot Bill with a gun and seriously wounded him and deadly force is never permitted solely to protect property. The facts indicate that Bill could have retreated because he had time to go to his car, take out a gun from the glove compartment and shoot Al as Al was walking away. Justification will not be a defense because Bill used deadly force to protect property, and on top of it, he had a duty to retreat and could have done so safely.

Thus, Bill will not be able to assert justification as an affirmative defense assault if he is charged.

ANSWER TO QUESTION 3

1. The issue is whether a lawyer must refuse to undertake a representation based on a conflict of interest.

Under the New York Rules of Professional Conduct, a lawyer must refuse to undertake representation in circumstances where a reasonable lawyer would determine that the representation would either lead to a substantial likelihood of the lawyer representing adverse interests, or would create circumstances where the lawyer's professional judgment would be compromised by personal interests. If a conflict is apparent, the lawyer may proceed in the representation if four requirements are satisfied: (1) The lawyer reasonably believes he can undertake the representation competently and adequately represent all interests; (2) the representation is not prohibited by law; (3) the representation will not require the lawyer to represent two parties who are directly opposing one another in litigation and (4) all parties give informed consent. In addition, when a lawyer represents an organization, he must make clear to all interested parties that he represents the organization and not the individual members.

In this case, Dave is asking Lawyer to defend him against a derivative action brought by shareholders of Kitchen Corp. In a derivative action, the shareholders are suing on behalf of the corporation. Here, Lawyer represents the corporation, having represented Kitchen Corp. in all of its business dealings since the Corporation was formed. Dave is being charged with diverting profits, a serious allegation of breach of Dave's fiduciary duty. On these facts, for Lawyer to represent Dave would probably be improper, because Lawyer would be essentially representing both sides of the lawsuit. Lawyer cannot represent Dave and the Corporation at the same time. For Lawyer to defend Dave individually, he would have to resign from representing the corporation,

which could pose further issues because Lawyer likely would have learned confidential information regarding the corporation during his representation, and would be barred from using any of that information in defending Dave against the corporation.

For these reasons, it is not proper for Lawyer to represent Dave in this action.

2. The issue is whether the requirements for a valid derivative suit have been satisfied.

The controlling statute here is the New York Business Corporation Law ("BCL"). Under the BCL, a shareholder can bring an action for accounting on behalf of the corporation when the shareholder alleges that a director of the corporation has breached his fiduciary duty of loyalty. These are known as "derivative" actions because the shareholder is suing to enforce a right that belongs not to the shareholder as an individual, but to the corporation itself. To validly bring a derivative suit, the shareholder must show (1) that he had record ownership of stock at all relevant times; (2) That he will fairly and adequately represent the interests of the corporation; (3) posting of a bond for the defendant's costs; (4) make a demand on the board of directors that the board bring an action on behalf of the corporation or, in the alternative, show that making a demand on the board would be futile, in which case the shareholder must plead with particularity the reasons why such a demand would be futile. In so pleading, a shareholder can satisfy his demand of showing that a demand would be futile by pleading that the board is so completely and totally under the control of the alleged breaching parties that a demand would be a worthless gesture.

Here, Stu and Mac are bringing a derivative action alleging breach of a fiduciary duty by a director, Dave. The facts indicate that they did indeed own stock at all relevant times, since they owned 10 shares each at the time of the alleged breach. They will fairly and adequately represent the interests of the corporation (indeed, they are the only two shareholders other than the alleged breaching director). The facts do not indicate whether a bond has been posted. As to the particularity requirement, Stu and Mac will likely be excused from making a demand on the board, because the board is comprised of exactly one individual, Dave, who is the very person that Stu and Mac are alleging breached his duty to the corporation. Any demand to sue would be pointless, because Stu and Mac would essentially be asking Dave to sue himself.

Therefore, assuming the other requirements are met and pled with particularity, Stu and Mac's failure to demand that Kitchen Corp. commence the action will not constitute grounds for dismissal.

3. The issue is whether Dave has breached his fiduciary duty of loyalty.

Under the BCL, a corporate director must discharge his duties in good faith and with that degree of honesty, trustworthiness, and conscientiousness that New York law demands of fiduciaries. The shareholders of a corporation entrust the directors to maximize the value of their shares by doing what is best for the corporation at all times. One of the ways in which a corporate director will breach his duty of loyalty is by competing with the corporation by engaging in a competing venture. When a director personally engages in a business that is directly in competition with the corporation's business, the duty of loyalty is breached and the director must be held accountable. The proper remedy for a breach of this duty is for the breaching director to disgorge any profits made by the competing venture. The director may also be removable for cause by the shareholders in accordance with the Certificate of Incorporation and bylaws, if any.

Here, Dave is a director of Kitchen Corp. which, according to the facts, is a kitchen cabinetry business. Dave has then formed his own LLC, "Cabinet LLC" for the purpose of making kitchen cabinets, and Dave is the only member of the LLC. On these facts, Dave has almost certainly breached his fiduciary duty. Dave cannot serve as a director of a corporation whose primary purpose is making kitchen cabinets, while simultaneously running his own kitchen-cabinetry business on the side. Since both businesses are located in Albany County, it is highly likely that these two businesses will be competing for jobs in the area.

Therefore, Dave probably breached his fiduciary duty of loyalty to Kitchen Corp and therefore Stu and Mac have a good chance of succeeding in their action.

4. The issue is what options are available to a buyer when the seller breaches a contract.

Contracts for the sale of goods are governed by Article 2 of the Uniform Commercial Code (UCC). The UCC uses the "perfect tender" rule. This rule states that in any contract for the sale of goods, the seller must deliver according to the precise terms of the contract. Failure to do so results in a breach. When a contract calls for delivery of a certain quantity of goods to be delivered by a certain date, and the seller fails to perform perfectly, the buyer can do three things. He can (1) Accept the goods and pay the contract price; (2) Refuse to accept any of the goods and immediately notify the seller of the refusal, or (3) accept some of the goods and reject any non-conforming goods. Importantly, no matter which option the buyer elects to pursue, he can still sue the seller for the breach in order to recover any damages caused by the breach.

In this case, this is a contract for the sale of hinges, and so is governed by the UCC. Supplier promised to deliver 500 hinges on July 29th. Supplier only delivered 300

hinges. Supplier violated the "perfect tender" rule and is thus in breach of Contract. In a case such as this, Kitchen Corp. can accept all 300 hinges and sue Supplier for the breach, or reject all 300 hinges and sue Supplier for breach. In either case, Kitchen Corps damages would be the difference between the contract price of the hinges from Supplier and the price Kitchen Corp must pay to obtain replacement hinges. Since Kitchen Corp can obtain comparable hinges from another source at a lower price, the best option for Kitchen Corp would be to refuse to accept any of Supplier's Hinges, sue to recover its full contract price based on Supplier's breach of the contract, and buy comparable hinges elsewhere for cheaper.

ANSWER TO QUESTION 3

1. The issue is whether a lawyer may represent a sole officer and director of a corporation in a derivative suit brought by shareholders of that corporation.

Under the New York Rules of Professional Conduct RPC) a lawyer may not represent two parties if there is a current conflict of interest. A conflict of interest exists where the lawyer is required to represent (1) differing interests or (2) the representation would be limited by the interest of the lawyer and duties owed to third parties. Conflicts of interest can be waived by the informed consent of the client if (1) the lawyer reasonably believed he can represent all parties diligently (2) informed consent confirmed in writing (3) the claim is not one asserted by one client against the other in litigation and (4) the representation is not one prohibited by law. Additionally under the RPC a lawyer for a corporation represents the entity itself, not any of the constituent parties. A lawyer for a corporation does not represent any individual stakeholder- he instead must represent the corporation as an entity. When dealing with individual constituents he must inform them that he represents the entity and not any individual.

Here, Lawyer should not represent Dave in an action brought on behalf of Kitchen Corp. On these facts, Lawyer has been acting as the lawyer for Kitchen Corp as an entity. He incorporated the business and has represented Kitchen corp. in all of its business dealings. As such, the corporation is a current client and the lawyer owes a duty of loyalty to the corporation. A derivative action like that brought by Stu and Mac is an action by the shareholders representing the interests of the corporation itself. Thus, representing would not be proper because Lawyer is also currently retained by Kitchen Corp - Lawyer would be on both sides of the litigation because Dave is the defendant in this case.

Thus, Lawyer should not represent Dave because he is a lawyer for the Kitchen Corp. entity, not any individual officer or director and a conflict would arise in this case.

2. The issue is whether demand on the board of directors in a derivative suit may be excused where the board is comprised only interested members.

Under the New York Business Corporations Law (BCL), shareholders may bring a derivative suit when (1) they held stock in the company at the time of the alleged wrongdoing (2) they continue to hold stock through the conclusion of the action (3) the individual can adequately represent the interests of the corporation and shareholders (4) bond is posted if required (5) demand is made on the board of directors or demand excused (6) the individual pleads compliance with the demand requirement with particularity (7) the corporation is joined as a defendant in the action. Demand on the board of directors is required under the BCL unless it is excused. Demand may be excused when it would be futile. Demand is futile when: (1) the transaction is so egregious on its face that it could not have been the result of sound business judgment or (2) all directors are interested and demand is certain to be refused.

Here, the action should not be dismissed because demand would be futile under these circumstances. Demand is not required here because Dave is the sole officer and director of the corporation. As the sole director, demand would be served on him. He would be certain to refuse and would not pursue a claim against his own corporation diligently and he is an interested director in this situation. Because demand would be futile, so long as Stu and Mac plead with particularity why demand would be futile the action should not be dismissed on this basis.

Therefore, the action should not be dismissed because demand would be futile.

3. The issue is whether forming a competing venture is a breach of fiduciary duties owed to a corporation.

Under the BCL, officers and directors owe fiduciary duties to the corporation. These include the duty of care and the duty of loyalty. The duty of care requires that the officers and directors engage in their duties with the diligence, care and skill required of a reasonably prudent individual acting under similar circumstances. The duty of loyalty requires that officers and directors carry out their duties with the conscientiousness, fairness, morality and honesty that the law requires of fiduciaries. A director breaches the duty of loyalty when he enters into a competing venture with his own corporation.

When a director is found to have competed with the corporation impermissibly, the shareholders may obtain an accounting for the profits and seek disgorgement of any gains obtained in breach of fiduciary duty. Additionally, the corporate opportunity doctrine is applicable when a fiduciary take an opportunity for himself that is naturally within the expectancy of the corporation. This is known as usurping a corporate opportunity.

Here, Stu and Mac are likely to succeed on their action because Dave was an officer and director of Kitchen Corp. He set up a competing venture - Cabinet LLC that competed with the corporation in the same geographic area - Albany County and in the same line of work - installing kitchen cabinetry. Moreover, this is usurping a corporate opportunity that would be expected to fall to Kitchen Corp. This competition is therefore, a breach of the duty of loyalty because Dave did not act with properly as a fiduciary for Kitchen Corp.

As damages, Stu and Mac will prevail on their action for an accounting and to disgorge any profits obtained by Dave on the deal. This recovery would generally go to the corporation because this is a derivative suit; although a court might structure relief in this case to that any profits are not obtained by Dave because he was the wrongdoing party.

Therefore, Stu and Mac are likely to be successful in their action.

4. The issue is what options does a purchaser of goods have under Article 2 of the U.C.C. with respect to an improper shipment of materials.

Under New York Law, Article 2 of the U.C.C. governs the sale of goods. An order placed for a supply of goods when the parties have not previously done business is properly construed as an offer. The subsequent sending of goods without another form of acceptance is acceptance of that offer, forming a contract. Under the U.C.C. the perfect tender rule applies - if a shipment of goods is not perfect in every way, the buyer has the right to accept all goods, reject all goods or reject some and keep others. The only exception to this rule is if the supplier specifies that the goods were shipped only as an accommodation. Where a supplier sends a shipment of goods without noting that they are an accommodation, this constitutes simultaneous acceptance and breach of the contract.

Here, Kitchen Corp's order of 500 hinges constitutes an offer. Supplier accepted this offer when it delivered the 300 hinges. While it notified Kitchen Corp. that it would make delivery of 200 more in 30 days, there was no language of accommodation here.

Therefore, Supplier simultaneously accepted the offer and was in breach thereof. Because of the perfect tender rule, Kitchen Corp has several options. It may accept the 300 hinges, or reject the hinges. Because it can obtain comparable hinges at a lower price, it may choose to reject all of the hinges because of the lack of perfect tender. If it chooses to accept the non-conforming order, it may also sue for damages, if there are any in this case.

Therefore, because Supplier did not state that these goods were send only as an accommodation, it accepted the offer and breached. Because of the perfect tender rule Kitchen Corp has a range of options, including accepting all goods or rejecting all goods and seeking the lower price on the open market.

ANSWER TO QUESTION 4

l. (a) The issue was whether or not Stone was negligent in failing to provide Jake with protection or control Jake's exposure to dust or whether it should have been dismissed because it should have been brought under worker's compensation laws.

A CPLR 3211(a) motion to dismiss involves numerated issues which, if decided in favor of the movant, supports and early dismissal of the nonmovant's complaint. It is a mechanical device used to expedite civil litigation. Only one CPLR 3211(a) motion may be made, and it may be made at any time, even prior to issue being joined. A CPLR 3211(a)(7) motion is made by the defendant for failure to state a cognizable cause of action. The court will look to the sufficiency of the pleading and, if the plaintiff has not stated a cognizable cause of action, the court will dismiss the action.

Under New York's tort law, negligence is defined as the defendant's failure to adequately provide a duty of care, his inattentiveness, and his thoughtlessness. To prove a negligence claim, the plaintiff must show that the defendant owed a specific duty to him, not just a general duty, that the defendant breached such duty, that the plaintiff suffered a physical injury to person or property, and that the defendant's breach proximately caused him damages. The plaintiff must show a direct causal connection between the defendant's negligent conduct and his injuries. Likewise, he must prove factual causation, which is simply but-for the defendant's breach or inattentiveness, he would not have been injured; but factual cause is not enough generally, as the plaintiff must prove that the defendant's breach was a substantial factor in his injuries. Likewise, to be regarded as the proximate cause, along with proving that the defendant's breach was a substantial factor, the plaintiff must prove that his injury was a natural and probable consequence of the defendant's conduct.

Here, Stone had a reasonable duty of care because Stone's workers were engaged in activities that they knew exposed them to fine particles of silica which could cause substantial injuries; namely, respiratory problems, just as the ones that Jake is suffering from. Likewise, Stone breached this reasonable duty because it knew that Jake operated the saw without the saw guard and never impeded him from doing so without it. Also, Stone breached their duty because they never provided Jake with any respiratory protection because exposure could have been prevented by wearing appropriate

protection, which Stone never gave to Jake. Thus, Stone could not even assert the recalcitrant worker defense, where if they would have gave Jake protection and he chose not to wear it, they may be able to assert this defense, but they never gave him such protection. Likewise, Stone breached the duty because but-for them not saying anything to Jake and not providing him with protections, his respiratory problems wouldn't have happened, or at least, they would have been mitigated. Likewise, Jake's suffered injuries which are the natural and probable consequence of Stone's acts: a progressively worse cough, shortness of breath, and a serious respiratory condition, all flowing from the exposure to silica. And, Stone's breach were the proximate cause because such respiratory disease is a natural and probable consequence, along with a substantial factor in not providing Jake with protection from the exposure to the silica.

However, worker's compensation would be Jake's exclusive remedy, since the injury happened on the job. Worker's compensation laws prohibit suits by employees against employers for injuries resulting on the job; it is a form of strict tort liability for the employer's negligence, or even the employees own negligence or the negligence of a co-worker. The worker's compensations laws preclude the imputation of even the worker's comparative negligence. Here, the injuries resulted on the job from cutting the stone and being exposed to silica that could cause respiratory injuries, which occurred from multiple years from exposure to such silica. The fact that Jake does not work for Stone anymore is irrelevant because the injuries are directly attributed to his job at Stone from cutting the granite. Strict liability from worker's compensation laws do not even require proof of the defendant's intentional or negligent conduct, but again, is a form of strict tort liability. Thus, the court should dismiss the cause of action, because it should have been filed with worker's compensation.

(b) The issue is whether or not Cutter could cross-claim against Stone under the Worker's compensation laws.

Under New York's tort law, a claim for contribution arises when two or more active joint- tortfeasors contribute to the plaintiff's injuries. Under New York's worker's compensation laws, generally it prohibits suits against employers from employees, but, when an injured worker sues a third party, New York is the only state that allows the third party to implead the employer or assert a claim against the employer if the worker has suffered a "grave injury." If he has, the third party can assert a claim against the employer for contribution. Grave injury is defined as: loss of an ear or nose, loss of multiple fingers or toes, death, deafness or blindness, quadriplegia or paraplegia, permanent facial disfigurement, permanent brain damage rendering him unemployable elsewhere, or loss of an index finger. Here, in this case, Jake has not suffered a grave injury because of his constant exposure to silica, and the subsequent diagnosis of silicosis by the doctor, but which does not fall into the category of a grave injury. This injury is not grave because the disease of silicosis is incurable and a fatal respiratory disease, but

Jake does not have any brain damage. Moreover, it is not a grave injury because Jake has been confined to his home due to the condition, which does not fall in the ambit of grave injury, because New York requires strict adherence to "grave injury" and strictly construes "grave injury." Although unfortunate, New York courts strictly construe "grave injury," and nowhere in the statute does it say "injuries resulting from exposure or inhalation of silica causing respiratory failure."

Thus, because Jake has not suffered a grave injury, Cutter cannot successfully cross-claim against Stone. If however, Jake had died from such injuries, since death is one of the "grave injuries" listed in the statute, his estate could have asserted a wrongful death cause of action if Jake had not commenced the action. His estate would be barred from commencing such an action though because Jake's action would have and will be dismissed.

2. The issue is whether or not Jake's claim against Cutter is barred by the statute of limitations for strict products liability.

Under the CPLR, the statute of limitations purpose is to bar stalled litigation and stalled claims because frequently, witnesses disappear or die, evidence is destroyed, and witness's memories fade. CPLR 201 prohibits courts from extending statutes of limitations, but the legislature may, not must, revive a time barred claim. The statute of limitations can be pleaded in the defendant's answer as an affirmative defense or, in the alternative; he may make a CPLR 3211(a)(S) motion to dismiss. The CPLR contains a myriad of periods for the statute of limitations, and, for strict products liability, the statute of limitations is three years from the date of the injury, absent an exception or tolling provision. However, under CPLR 214-c, when the defendant alleges a personal injury to person or property, based upon exposure to a latent injury, the statute of limitations starts to run from the date when the injuries first became apparent; exposure means inhalation and injection.

The statute of limitation is measured in between the days that the plaintiff's action accrues and the later date of when his claim is interposed; that is, purchasing an index number for $210 and filing process with the Clerk of the Court, which is the Clerk of the County and Supreme Court.

Here, the initial date of Jake's injury is unclear, because it simply says he had worked for cutter for many years. However, the statute of limitations here is measured from when the symptoms first readily became apparent, which would be in February 2009, when Jake was confined to his home, not when he went to see the doctor in August, because the symptoms were readily apparent when one must be confined to one's home; thus, Jakes claim accrued in February 2009. Just because he went to the doctor for the symptoms in August of 2009 does not mean that this is when the symptoms became

apparent; it was in February, when he was confined. Jake did not interpose his claim against Cutter until June of 2012, which is passed the three year period for strict products liability.

Thus, his action would be barred by the statute of limitations.

3. The issue is whether or not Cutter is liable for Jake's injuries in strict products liability for a design defect.

Under New York's tort law, in a claim for strict product's liability, the person asserting the cause of action must demonstrate that a product was defective and unreasonably dangerous for its intended use, that the manufacturer had a duty to produce a safe product, and that the defect proximately caused physical injury to person or property, not merely just an injury to the product. The three strict products claims are a design defect, inadequate warning, and manufacturing flaw. A design defect claim arises when a manufacturer of a product adopts a design that has a defect which rendered the product unreasonably dangerous and created an unreasonably dangerous condition that outweighed its utility and benefits. Here, the court looks to whether or not another design could have been adopted without a sufficient sacrifice in functionality and cost. A claim in design defect arises when there was an alternative design available, for about the same cost, and the manufacturer did not adopt the design, and its failure to do so rendered the product unreasonably dangerous. The court looks to the functionality of the product at the time it was adopted and not the subsequent improvements made thereafter. Some products are so inherently dangerous that the utility and benefit outweigh its risks (i.e., a knife).

Here, the design chosen by Cutter was defective and unreasonably dangerous because the saw that Jake used, manufactured by Cutter, was specifically designed for stone-cutting operations, and Jake used it to cut stone, which released particles of silica. Moreover, the design was unreasonably dangerous because the guard could be removed and it disabled the ventilation system on the saw, used specifically to repel the harmful silica products that that could causes and did cause Jake's respiratory condition. Further, the design chosen was unreasonably dangerous because the saw could have been operated with an electrical interlock system that would shut the saw off whenever it was used. The design was defective and unreasonably dangerous because it could be foreseen that worker's would remove the guard, especially if removal did not cause the saw to be shut off, as was the case with the saw manufactured by Cutter; a simple alternative, not sacrificing in functionality or price, would have been to install the guard that shut the saw off.

Thus, Jake would be successful in a claim against Cutter for strict products liability in defective design.

ANSWER TO QUESTION 4

l. (a) The issue is whether an employee can bring a lawsuit against his employer for injuries the employee suffered on the job.

Under New York law, when deciding a motion to dismiss, a court must assume that all allegations in the plaintiff's complaint are true and grant the motion if the complaint on its face fails to state a claim for which there is any basis for legal relief. The court should view the facts in the light most favorable to the plaintiff and deny the motion if there is any ground for relief under the law.

New York has a worker's compensation statute that gives employees who are injured on the job a guaranteed and expedited form of recovery. Under the worker's compensation statute, employees can recover their medical expense and two-thirds of their lost wages. In return for this recovery, workers are denied the right to sue their employers or co-workers for injuries suffered on the job.

Here, Jake was employed by Stone Inc. as a machine operator on a factory making granite countertops. He developed silicosis after working for years operating a saw that exposed him to high amounts of silica dust. Because Jake's silicosis was an injury that he suffered on the job, he is entitled to a guaranteed reimbursement from worker's compensation insurance. However, Jake cannot sue Stone Inc. because Stone Inc. is his employer.

Thus, because Jake's injuries are covered under New York's worker's compensation law, there is no basis for his claim against Stone under the law, and the court should dismiss his complaint against Stone.

(b) The issue is whether a manufacturer can bring a contribution claim against the plaintiff's employer when the plaintiff was injured on the job.

Under New York law, a defendant can assert a contribution claim against a co-defendant if that party breached a duty in tort that contributed to or aggravated the damages that the defendant may have to pay to the plaintiff. In New York, a contribution claim generally may not be asserted against a plaintiff's employer, unless the plaintiff suffered a grave injury as defined by statute. Grave injury requires that the plaintiff have died; suffered total loss of a hand, foot, leg, arm, ear, nose, or index finger or total loss of several fingers or toes; suffered brain injury resulting in total disability; paraplegia or quadriplegia; or severe facial disfigurement.

Here, under normal conditions, Cutter would have a claim against Stone for contribution. As Jake's employer, Stone owed a duty of care to Jake to protect him from

dangers inherent to the job. Since the dangers associated with exposure to silica dust have been well-known for years, and Jake's job brought him into contact with the dust, Stone had a duty to guard against this. Stone breached that duty by permitting Jake to operate the saw without the guard in place, despite its knowledge that doing so would disable the ventilation system. Moreover, Stone breached its duty by failing to provide Jake with respiratory protection. Breach of this duty contributed to Jake's injuries because, had these precautions been taken, he might not have developed silicosis. However, the statute's definition of grave injury is interpreted very narrowly. Because Jake's respiratory condition does not fit within any of the categories of grave injury, Cutter cannot bring a contribution claim against Stone. Even though it is potentially fatal, it does not fit within the statutory definition of grave injury as death, since Jake has not yet died from the disease.

Thus, because New York's worker's compensation law bars Cutter from asserting a contribution claim against Jake's employer, the court should grant Stone's motion to dismiss Cutter's cross-claim against Stone.

2. The issue is whether the statute of limitations for a strict liability action based on exposure to toxic substances has run.

Under the CPLR, personal injury claims, whether grounded in strict liability or negligence, have a three-year statute of limitations, which begins running on the date of the injury. However, a discovery rule applies in the case of exposure to toxic substances. A toxic substance is an inherently harmful toxin that has latent or slow-developing effects. When the plaintiff's claim alleges harm from assimilation into his body of a toxic substance, the three-year statute of limitations runs from the earlier of the date on which he discovered the injury or the date on which he should have discovered the injury, had he been exercising due diligence.

Here, Jake's injury was suffered prior to his retirement in 2007, when he was exposed to silica dust that caused his respiratory condition. If the normal statute of limitations for personal injury claims applied, the limitations period would have expired by June 2012, when he finally commenced his action against Stone and Cutter. However, Jake's alleged injury should fit into the category of exposure to toxic substances. The evidence shows that silica dust has slow-developing or latent effects: Jake had worked for Stone as a machine cutter for years but did not begin suffering from the symptoms of a respiratory problem until the year after he finally retired. Moreover, his claim alleges that he was harmed from the assimilation of silica dust into his body. Even applying the discovery rule in this case, the statute of limitations has likely run on Jake's claim. While the shortness of breath he suffered in June 2008 arguably did not alert him to the existence of the problem, the progression of the disease by February 2009 to a point where he was confined to the home probably should have. This is especially true given

that the dangers associated with exposure to silica dust have been well-known for many years, and Jake's job involved direct exposure to the dust. As a result, a court would find that Jake could have discovered the injury by February 2009, had he exercised reasonable diligence. This would mean that the limitations period started running in February 2009, rather than in August 2009, when he finally saw a doctor. Since Jake did not commence the action until June 2012, his claim is not within the three-year statute of limitations period.

Thus, since Jake should have discovered his injury by February 2009, Cutter is likely to succeed on its affirmative defense of the statute of limitations.

3. The issue is whether the plaintiff could recover against a manufacturer in strict liability based on a design defect.

Under New York law, a cause of action for strict products liability requires the plaintiff to prove (1) that the defendant is a commercial supplier who owed an absolute duty to make its products safe; (2) there was a defective product; and (3) that the defect was the actual and proximate cause of (4) the plaintiff's damages. A commercial supplier includes any entity in the chain of distribution, including manufacturers. Privity of contract is not required between the plaintiff and defendant. A defective product can be established through a showing of a design defect. This requires the plaintiff to show that there is an alternative design that is safer, cost-effective, and practical. Actual causation requires that the defect have existed in the product when it left the defendant's hands. Existence of the defect in the defendant's hands is presumed where the product traveled in the normal chain of distribution. Proximate causation requires that the plaintiff was making a foreseeable use of the product.

Here, Cutter, as the manufacturer of the saw, owed a strict duty to make safe to Jake, despite the lack of privity of contract between them. Jake can show that there was a design defect because there was an alternative design of manufacturing the saw with an electrical interlock that would shut the saw off if the guard were removed. This alternative design was practical because it would not alter the performance of the saw, under the facts. It was cost-effective because the manufacturing change would have had a minimal cost. Jake can readily establish actual causation if the product traveled through the normal chain of distribution. He can also establish proximate causation because it was foreseeable that users of the saw would remove the guard because it obstructed their views of the stone they were cutting. Stone might argue that its warning labels regarding the danger of exposure to silica dust made Jake's use unforeseeable. However, while the existence of warning labels might preclude an action for an information defect, they have no bearing on the manufacturer's liability for a design defect. Finally, Jake suffered damages in that he now has silicosis, an incurable and often fatal respiratory disease.

Thus, because Jake can prove the existence of a design defect and the remaining element of a products liability cause of action, he is likely to succeed on his claim against Cutter.

ANSWER TO QUESTION 5

1. The issue is whether a non-marital child can establish paternity by submitting a duly executed and filed written acknowledgment of paternity signed by the biological father before the father's death.

Non-marital children have inheritance rights from their biological father as long as they can establish paternity. Paternity can be established during the father's life by (i) marriage of the biological father with the biological mother or (ii) acknowledgment by the father of the paternity. The acknowledgment must be in writing and filed with the appropriate authority. Paternity can also be established in a filiation proceeding, which usually relies on a genetic marker test.

Here, Zelda submitted a duly executed and filed written acknowledgment of paternity signed by the Tom before his death. This is enough to establish Tom's paternity of Wanda, and it is irrelevant that no genetic marker test was taken. Neither is relevant that Tom had never had any contact or communication with Wanda.

The second issue is whether a non-marital pretermitted child has right to share in the residuary estate together with the other children of the testator.

The New York Estates, Powers, and Trusts Law ("EPTL") protects pretermitted children, i.e., children adopted or borne after the execution of the will by the testator, if they are not provided for by any settlement and they are not either provided for or mentioned in the will. If the testator executed the will at a time when he already had other children and the will contains a disposition in favor of the children of the testator, which is not a limited disposition, the pretermitted child has the right to share in the disposition in favor of such children.

Here, Tom executed a will in 2010. The will left the residuary estate to Tom's then three alive children, Aaron, Brad and Clara. The disposition was therefore not limited. Wanda was born in 2012 because she was one-year old when Zelda made an application in the probate proceeding in 2013. Wanda is, therefore, a pretermitted child because she was borne after the execution of the will. It is irrelevant that she was illegitimate because, as said above, she can establish Tom's paternity on the basis of the duly executed and filed written acknowledgment. She was not provided for by any

settlement and she was not mentioned in the will either. Under the EPTL, she is therefore entitled to share in the residuary estate with Aaron and the issue of Brad and Clara.

2. (a) The issue is whether a bequest that identifies a specie car as subject matter of the gift adeems if the car is subsequently traded in for another car and the new car is destroyed in a fire that entitles the testator's estate to receive insurance proceeds.

Under the EPTL, a bequest of specifically identified property fails (or adeems) if the asset is not found in the testator's estate upon his death or if the testator sold the asset before his death and after the execution of the will. An exception to this rule applies to the proceeds arising from an executory contract whereby the testator transferred the bequeathed property provided that they are paid after the testator's death.

Another exception applies to insurance proceeds paid after the death of the testator if the bequeathed property has been damaged or destroyed.

Here, Aaron is not entitled to the insurance payments received by the estate for the Porsche because the 2012 Porsche, and not the 2009 Porsche, has been destroyed in a fire before Tom's death. Tom specifically identified the property that was the subject matter of the gift because he indicated in the will that he would give his "2009 Porsche automobile" to Aaron. The 2009 Porsche was then traded for a 2012 Porsche of the same model in 2012. Because of such transfer, the property bequeathed to Aaron was no longer in Tom's estate, and Aaron's bequest adeemed. It is irrelevant in this case that the 2012 Porsche was subsequently destroyed by a fire and that Tom's estate received insurance proceeds after Tom's death. The exception to the ademption doctrine does not apply here. A different result would have been reached if Tom had indicated in the will that he would leave to Aaron the car owned by Tom at the time of his death.

(b) The issue is whether a joint bank account indicating a right of survivorship on the bank signature card is necessarily joint property falling outside the probate estate.

Even if a joint bank account was created indicating the existence of a right of survivorship, there is no such right of survivorship if it can be proved by clear and convincing evidence that the right of survivorship was not actually intended by the person opening the bank account and that the account was opened in a joint form only for mere convenience of the client.

Here, Tom did not actually intend to create a joint account with right of survivorship together with Aaron. He informed the bank that the purpose of the account was only that Aaron could take care of Tom's needs in the event he became disabled. Tom kept control of the checkbook and received all bank statements. Finally, Aaron has never made a withdrawal from the account during Tom's lifetime. All these facts,

considered together, can be deemed to represent clear and convincing evidence that Tom did not really intend any right of survivorship in favor of Aaron and that Tom decided to use the joint account device only as a matter of convenience. Thus, the bank account is not joint property passing by operation of law and is part of Tom's estate.

3. The issue is how the residuary estate is distributed when some of the residuary beneficiaries predecease the testator leaving issue who survives the testator.

Under the EPTL, as a general rule, if there are two or more residuary beneficiaries of a will and anyone of them dies before the testator, the others receive equal shares of the residuary estate. This rule is, however, trumped by the New York anti-lapse statute. If a will beneficiary predeceases the testator, the anti-lapse statute applies and saves the gift to the predeceased beneficiary if (i) the beneficiary was either the issue, the brother, or the sister of the testator, and (ii) the predeceased beneficiary left issue surviving the testator.

Here, the anti-lapse statute applies because Tom devised the residuary estate to his issue, i.e., his children Aaron, Clara, and Brad, and both Clara and Brad, who predeceased Tom, left issue who survived Tom.

Because the anti-lapse applies, there is a distribution per capita at each generation level, unless the testator provided otherwise in the will. Tom did not provide for a distribution by stirpes in his will, and, thus, the general rule of a distribution per capita applies. In a distribution per capita, the first step is to identify the first generation level at which there is surviving issue. Here, at the first generation level, there is one surviving issue, i.e., Aaron.

Then, the property to be distributed is divided into as many shares as there are issues at such level and each living issue takes a share. In this case, there are three issues at the first generation level, i.e., Aaron, Brad, and Clara, but only Aaron is still alive. So Aaron takes 1/3 of the residuary estate, which is equal to $50,000 ($150,000 divided by 3). Then, the shares of the predeceased issues are combined and distributed equally to the takers who are alive at the next generation level. Here, there are five issues at the second generation level, i.e., Brad's two children and Clara's three children. Each of these children takes $20,000, i.e., $150,000 minus $50,000 divided by five.

ANSWER TO QUESTION 5

1. WANDA'S CLAIM TO RESIDUARY

The issue is whether a non-marital pretermitted child has a right to share in a Testator's estate.

Under New York law and the EPTL, non-marital children have the same right to inherit through their birth father as marital children, assuming that paternity has been established. (This doctrine is bolstered by the Equal Protection Clause of the 14th

Amendment of the US Constitution which provides for intermediate scrutiny protecting illegitimate children).

Here, paternity was established by the Tom (the testator) when he filed a signed, written acknowledgement of paternity. The fact that Tom never had any contact or communication with Wanda nor paid her support does not affect her right to inherit from him. Therefore, Wanda will have the same rights as would a marital child under Tom's will.

The primary issue, then, is the rights of a child to share in a testator's estate when she was born after a duly executed will.

Under the EPTL, children generally are not guaranteed any share of the testator's estate, assuming the testator makes a complete disposition of his estate. However, where (1) an "after-born" child is born after her parent's will is executed, (2) the child is not mentioned or provided for in the will, and (3) the child is not otherwise provided for in a settlement, the child qualifies as a "pretermitted child" in the interest of furthering the testator's likely intent. NY's Pretermission Statute provides that a pretermitted child will take her intestate share either if (a) the testator had no children when the will is executed or (b) the testator had children but provided only de minimus gifts to them. If (c) the testator had children and did not provide for them, the pretermitted child will take nothing. Finally, if (d) the testator had children when the will is executed and provided for them in his will, the pretermitted child will share in the gift to the other children as if it were a class gift.

Here, Wanda is a pretermitted "after-born" child because she was born in 2012, two years after Tom's will was executed and she was not mentioned or provided for either in Tom's will or any settlement. Therefore, Zelda is correct that Wanda is entitled to share equally with Tom's children in the estate. However, she need not claim only the residuary. Since Tom devised his entire estate to his children, Wanda will take 1/4 of his estate (not just the residuary) with each child contributing their pro rata share.

Therefore, because Wanda is a pretermitted child, she may share in any bequest to Tom's children as if it were a class gift.

2. (a) INSURANCE PAYMENTS

The issue is whether a specific bequest is adeemed when it is not in the estate at the testator's death, but insurance proceeds are paid after death.

Under the EPTL, a specific bequest (i.e. the devise of a specific piece of property rather than a sum of money or share of the estate) adeems, or fails, if it is not in the Testator's estate at death. However, where a subject of a specific bequest is destroyed by casaulty and the insurance prococeeds are paid to the estate after the testator's death, the devisee may take those proceeds.

Here, Tom's bequest to Aaron was a specific bequest because the provision gifted "my 2009 Porsche" rather than, for instance "the car that I own." Although when Tom sold the 2009 Porsche he repurchased a similar model, the fact that it was a 2012 Porsche and he specifically described the gift as being to the 2009 Porsche clearly shows that it is a specific bequest. His sale and repurchase can be conceived up as an act of independent significance altering the effect of his will. While Aaron would have been able to take the insurance payment made after death had the 2009 Porsche been destroyed, this payment is not traceable to his bequest.

Therefore, although Aaron would have been able to take post-death insurance payments made for the 2009 car, he will not take these insurance payments because his gift adeemed.

(b) JOINT BANK ACCOUNT PROCEEDS

The issue is who is entitled to the proceeds of a joint bank account with the right of survivorship.

New York law typically presumes that a joint bank account with the right of survivorship is understood as a non-probate testamentary substitute that effectively transfers the entire proceeds of the account to a survivor account holder on death. New York law will presume that the depositor intended the joint account as a gift to the joint account holder. However, if the executor of the estate or someone adversely affected by the disposition can show by clear and convincing evidence that a gift was not intended, but the joint account was merely created for convenience, that presumption may be rebutted.

Here, Tom informed the bank officer that the purpose of the account was merely for convenience. Tom also maintained all control over the account, with Aaron making no withdrawals. While clear and convincing evidence is a cumbersome standard, this evidence, if brought before the court, is sufficient to rebut the presumption.

Therefore, if Aaron's survivorship rights in the account are challenged, clear and convincing evidence exists to hold that the proceeds should go to Tom's estate.

3. DISTRIBUTION OF RESIDUARY

The issue is whether a Testator's gift to his child will lapse if the child predeceases the Testator.

Under New York law, an intended beneficiary under a will must typically survive the testator in order to receive a bequest, otherwise the gift will lapse and fall into the residuary. However, New York has adopted an Anti-Lapse Statute, according to which a gift to an intended beneficiary who predeceases the testator will not fail if (a) the intended beneficiary is the issue or sibling of the testator, AND (b) the predeceased beneficiary is survived by issue. In that case, the Anti-Lapse statute saves the gift which passes to the predeceased beneficiary's issue (rather than under the intended beneficiary's will). Where gifts to multiple predeceased beneficiaries are saved by the anti-lapse statute, New York will apply the per capita at each generation approach when dividing property among intestate distributees or testate beneficiaries taking a class gift.

Here, both Brad and Clara predeceased Tom. However, because they are Tom's children (or "issue") the gift is saved and will pass to their issue. As such per capita distribution requires that the estate be first divided at the first generation in which there are live takers, giving each live takers at this generation their full share. Hence, Aaron, as the only remaining child of 3 children will take 1/3 of the estate (or $50,000). Next, the remaining residuary will be added together and divided equally among surviving issue at the next generation. Thus, the remaining $100,000 will be divided equally among Tom's 5 grandchildren with each taking equal shares of $20,000.

Therefore, the residuary will be divided among all Tom's issue, with Aaron taking $50,000, and each of the 5 grandchildren taking $20,000.

ANSWER TO MPT

To: Levi Morris
From: Examinee
Date: July 30, 2013
Re: Palindrome Recording Contract

This memorandum addresses the proposed contract for our client Palindrome, doing business as Palindrome Partners. The purpose of the memorandum is to identify the provisions in the contract that require revision to satisfy the client's wishes as determined in your recent interview with Otto Smyth. This memorandum identifies four provisions in the proposed contract that need to be redrafted, provides suggested language for the contract, and identifies the legal justifications for the changed provisions. The core areas of concern identified in your interview and also present in the contract language are: 1) duration of the contract and number of albums that must be produced; 2) client's rights to control the artistic production process and release of albums; 3) client's rights to approve marketing in protection of the band's public image, and to retain general control over quality of licensed products bearing that trademark; and 4) retention of the Palindrome trademark.

1) Duration of the Contract:

Section 3.03. This section establishes that Polyphon has the right to hold Palindrome to the contract for at least 8 one year periods. This may in fact be longer if the band does not produce one album per year. The proposed revision follows, and changes have been underlined:

• The initial contract period will begin on the date of this Agreement and will run for one year. You hereby grant Polyphon three (3) separate options, each to extend the term of this agreement for one additional Contract Period of one year per option ("Option period"). In the event that you do not fulfill your Recording Commitment for the initial Contract Period or any Option Period, that period will continue to run and the next option Period will not begin until the recording Commitment in question has been fulfilled. This contract may not be extended by either party beyond four years of the date hereof.

• Mr. Smyth indicated that flexibility was one of the client's most important concerns. He further expressed that the band feels that a duration of three albums or four years is sufficient. As written, the contract could be extended for a period beyond eight years if the band does not produce an album per option period. Under Section 2855(b) of the Franklin Labor Code a recording contract cannot be held over for more than 10 years. Because the client desires a much shorter time frame, this is an area for negotiation. The

law does not provide default terms sufficient to satisfy the client's needs. The terms of this section have been modified to reduce the contract to three or four years at maximum.

2) Artistic Production and Release Rights:

Section 4.01. This section establishes that Polyphon has the exclusive rights and discretion to determine the contents of each album, to assign producers, and to decide which albums and master tracks are released to the public. Mr. Smyth has indicated that the client's preferences are directly to the opposite. The proposed revision follows, and changes have been underlined:

• Polyphon shall consult with the Artist, which shale retain the sole discretion to make final determinations of the Masters to be included in each Album, and shall have the sole authority to select the produces who shall collaborate on production of each Master and each Album.

The client desires complete artistic control. This clause has been redrafted to meet the client's needs. This is a core point for negotiation, but it is a matter of contract to for the parties to decide. The Law on point does not address specific matters of artistic control rights, which appear to be subject to party autonomy.

3) Client's Marketing Approval & Quality Control Rights:

Section 8.02. This section vests Polyphon with the exclusive discretion to manage the client's likeness and name in marketing and promotional efforts. The client has indicated a desire to retain final authorization over marketing materials to ensure that the band's image and feelings concerning drug and alcohol use are properly respected. It should be noted that several of the proposed changes to this section are also intended to impact the client's ability to retain control over the Palindrome trademark, an issue described in further detail in the final section of this memorandum. The proposed revision follows, and changes have been underlined:

• Artist hereby authorizes Polyphon, subject to Artist's final written approval for each new use and for each renewal, to use Artist's, and each member of Artist's, name, image, and likeness in connection with any marketing or promotional efforts, and to use the Masters in conjunction with the advertising, promotion, or sale of any goods or services. Prior to seeking Artist's final written approval, Polyphon warrants that it will only use Artist's trademark, names and likeness, in the production and distribution of goods that meet general quality control standards for merchandise in the rock recording industry. Polyphon further warrants that Artist shall have the right to inspect samples of goods and to review proposals for merchandise manufacturing before any final orders are placed. Nothing in the preceding paragraph shall be construed as giving

Polyphon the right to engage in any marketing activities or use of the Palindrome trademark for goods associated with the use, production, consumption of alcohol, tobacco products, or illicit drugs or drug paraphernalia.

The client wishes to retain control of both the quality of the goods produced bearing its trademarks and the types of marketing with which the trademark is used. The changes proposed in this paragraph create a right of final approval in the Artist, require that Polyphon apply a designated standard of care in producing goods, and restrict--explicitly--Polyphon from using the client's trademark or likeness for promotion of drugs or alcohol.

The quality control provisions stated in this revised term serve two purposes. First, the client has expressed a desire to ensure that fans of the band continue to receive high quality goods. Second, because retaining control of the Palindrome trademark is one of the band's most important wishes in this contract, requiring Polyphon (which will become a licensee of the trademark, not an owner, pursuant to the revised term below) to exercise a certain degree of care and quality assurance in producing goods bearing the mark ensures that Palindrome will not be deemed to have "abandoned" the trademark. In *M & P Sportswear, Inc. v. Tops Clothing Co.*, the Federal Court in the District of Franklin found that a trademark license which did not contain any quality control provisions for the licensee to follow was in fact an abandonment of the trademark. By requiring specific quality control provisions in this contract, not only will Palindrome maintain its stated commitment to providing quality goods, but it ensures that the license granted to Polyphon does not result in a loss of rights in the Palindrome trademark.

In conclusion, these proposed changes will ensure quality goods, restrict use of the band's image in connection with alcohol and drugs, and help maintain the integrity of the trademark.

4) *Retaining Control of the Palindrome Trademark - Licensing Rights:*

Section 8.01. This section currently creates a total transfer of ownership of the Palindrome trademark to Polyphon, creates exclusive rights of use in Polyphon and grants Polyphon the first to all income from the trademark. Mr. Smyth indicates that Palindrome is willing to allow Polyphon to participate in merchandising and to use the Palindrome Trademark for limited purposes. The client desires a revenue sharing scheme for licensed products sold by Polyphon so long as the client retains the independent right to use, market, and profit from the trademark with its own alternative licensing endeavors. This section includes an intentional redundancy on the subject of quality control to ensure that an abandonment of trademark, discussed above, does not result. The proposed revision follows, and changes have been underlined:

• Artist warrants that it owns the federally registered trademark PALINDROME (Reg. No. 5,423,888) and hereby grants Polyphon a non-exclusive license, running concurrently with the duration of this Agreement, including any Option Periods. Polyphon may use the trademark on any products, so long as Polyphon first obtains written approval from the Artist. Polyphon further warrants that it will use this license to produce and distribute goods that meet general quality control standards for merchandise in the rock recording industry. Polyphon shall be entitled to retain twenty-five percent (25°/o) of income derived from authorized uses of the Palindrome trademark; however, the parties may agree in increase this percentage on an item-by-item basis.

The changes proposed in this section are significant. First, the primary term in Polyphon's proposal called for an outright transfer of the trademark. This contravened client's wishes. Moreover, under *Panama Hats of Franklin v. Elson Enterprises, LLC,* the Federal Court in Franklin further clarified the rule that an "assignment in gross" or a "naked transaction" may cause a trademark assignor to lose all rights in the trademark. As proposed, the contract affected such a transfer because the transfer was for the trademark alone--it did not also require any of the Palindrome Partner's business assets--not even good will. The provisions of the contract calling for producing new recordings are not the transfer of an asset, but the creation of new work product on Polyphon's behalf. Altering the provision to a non-exclusive license satisfies the client's needs and also ensures that the trademark is not lost due to the creation of a "naked assignment."

The revised provision further approaches the client's wishes by altering the terms of payment. The client has indicated that Palindrome is willing to pay up to a 25°/o commission on goods sold under the license to Polyphon. This provision implements this objective. The "alteration" clause is merely suggested as a good faith measure in contract negotiations.

Lastly, the inclusion of quality control provisions and Palindrome's right of approval further ensure that the trademark cannot be lost on grounds of abandonment as discussed above in Section 3 of this memorandum.

ANSWER TO MPT

TO: Levi Morris
FROM: Examinee
DATE: July 30, 2013
RE: Palindrome Recording Contract

We have been retained to represent the members of the rock band Palindrome. The band has received an offer from Polyphon, an independent record label, which wants to sign the band to a long term contract.

Polyphon has sent the band a complex and voluminous contract for the band to review. The band has asked us to negotiate the contract with the record label. In addition to ensuring the contract complies with the law, the band has asked us to redraft the provisions to meet the band's wishes and concerns. The Band would like the contract to assure the following (1) treat artists well and reasonably, (2) the contract does not extend beyond 3 albums at most and only for 4 years, (3) that the band retains artistic integrity, including the ability to make all the artistic decisions about what songs go into the albums, the recordings, the producers they want, and what gets released, (4) the band keeps control over everything that has to do with merchandise, including ensuring that the merchandise is of high quality, using high quality materials, (5) keep the merchandise deals non-exclusive, (6) the band is willing to give Polyphon a maximum of 1/4 of the revenue of the merchandise that they produce and sell, but, the bank (a) wants to keep trademark rights, (b) be able to use the trademark themselves without giving profits to Polyphon. This memorandum identifies the provisions of the contract presented by Polyphon that need to be redrafted to meet the band's wishes and to comply with the applicable law. Following each redrafted provision, there are the reasons for the redraft, including legal reasons (if any) for changing the provision to help guide you when conducting negotiations with Polyphon over these points.

I. DEFINITIONS

Original Provision: "Album" shall mean a sufficient number of Masters embodying Artist's performances to comprise one (1) or more compact discs, or the equivalent, of not less than forty-five (45) minutes of playing time and containing at least ten (10) different masters.

A. Redrafted provision

"Album" shall mean a sufficient number of Masters embodying Artist's performances to comprise one (1) or more compact discs.

B. Rationale

During the interview with Otto Smyth, a member of the band Palindrome, Smyth indicated that the band wants to retain artistic integrity, including the ability to make all of the artistic decisions about what songs to put on the albums, the recordings, the producers they what, and what gets released. To preserve their autonomy as artists and ability to make decisions about what goes on each album, the provisions requiring a specific length and number of songs to be placed on each album has removed.

II. TERM AND DELIVERY OBLIGATIONS

A. Provision 3.01

Original Provision: 3.01. During each Contract Period, you will deliver to Polyphon commercially satisfactory Masters. Such Masters will embody the featured vocal performances of Artists of contemporary selections that have not been previously recorded by Artist, and each Mater will contain the performances of all members of Artist.

1. Redrafted Provision

During each Contract Period, you will deliver to Polyphon commercially satisfactory Masters.

2. Rationale

As part of retaining its artistic integrity, the band wants to retain the ability to make decisions about its recordings. Presumably, this includes the ability to determine whether there will be a featured vocal performance and whether all the members of the band will perform on each song. Therefore, the provision requiring a featured vocalist and that each member of the band perform on each song has been removed and the provision requiring the albums to include selections that have not previously been recorded has been eliminated.

B. Provision 3.02

Original Provision: 3.02. During each Contract Period, you will perform for the recording of Masters and you will deliver to Polyphon those Masters (the "Recording Commitment") necessary to meet the following schedule: (see excerpts from contract, which states 1 album for the initial Contract Period and 1album for each option period).

1. Redrafted Provision

During the Contract Period, you will deliver to Polyphon at least one, but no more than 3 commercially satisfactory Masters.

2. Rationale

First, as stated above, the band wants to retain its artistic integrity, which includes decisions about what songs to put on the albums and what gets released. Therefore, the part of the provision that requires the band to release at least one album each year has been eliminated.

Second, the band stated that they do not want to be tied with the label for too long, unless the label does a really good job. The band also said that they do not want to be bound to record more than 3 albums and do not want to be tied to the label for more than 4 years. Therefore, the provisions requiring the band to produce an album during each Contract Period (which is for a year, with 8 separate options -- which would require the band to produce 8 albums, 1each year) has been revised.

C. Provision 3.03

Original Provision 3.03. The initial Contract Period will begin on the date of this Agreement and will run for one year. You hereby grant Polyphone eight (8) separate options, each to extend the term of this Agreement for one additional Contract Period of one year per option ("Option Period"). In the event that you do not fulfill your Recording Commitment for the initial Contract Period or any Option Period, that period will continue to run and the next Option Period will not begin until the Recording Commitment in question has been fulfilled

1. Redrafted Provision

3.03 The initial Contract Period will begin on the date of this Agreement and will run for one year. You hereby grant Polyphone three (3) separate options, each to extend the term of this Agreement for one additional Contract Period of one year per option ("Option Period").

2. Rationale

First, the provision requiring the Option Period to continue to run if the band does not fulfill its recording commitment has been removed because it does not comply with the applicable law. Specifically, the provision does not comply with Franklin Labor Code § 2855(a) and (b).

Under Franklin Labor Code § 2855(b), a contract to render personal services in the production of phonorecords in which sounds are first fixed may not be enforced against the person contracting to render the service beyond 10 years from the commencement of service under it. This is a contract to render personal services; specifically the band is contracting to record music. According to the statutory definition, playing songs on an album meets the definition of production of phonorecords, because they are audio-only reproduction manufactured and distributed for home use. In the original provision, there was no end date for the running of the obligation; hence, the obligation to perform personal services in the production of phonorecords could potentially extend beyond 10 years from the commencement of the contract.

Therefore, to avoid violating this temporal limitation in the statute, the provision has been removed.

Under Franklin Labor Code§ 2855(a), a contract to render personal service may not be enforced against the person contracting to render the service beyond five years from the commencement of service under it. As stated above, because the original provision does not contain an end date for the running of the obligation, the original provision implies that Polyphon has the right to enforce the contract for personal services for an indefinite number of years until the band fulfills its Recording Commitment. However, under Franklin Labor Code § 2855(b), an employer cannot enforce a contract to render personal services beyond five years from the commencement of the service under it. Therefore, to avoid violating this temporal limitation on Polyphon's right to enforce the band's obligations under the contract, the provision has been removed.

Second, the provision granting Polyphon eight (8) separate options, each to each to extend the term of this Agreement for one additional Contract Period of one year per option ("Option Period"), has been revised to better meet the band's wishes. The band stated that it does not want to be tied to the record label for more than 4 years. Therefore, the number of Option Periods available to Polyphone has been reduced to 3, so that the initial contract period will be for 1year, with an option to renew for additional one year periods 3 times, creating a maximum of a 4 year contract with Polyphone.

III. APPROVALS

Original Provision: 4.01. Polyphon shall, in its sole discretion, make the final determination of the Masters to be included in each Album, and shall have the sole authority to assign one or more producers who shall collaborate with you on the production of each Master and each Album.

A. Revised Provision

4.01 Palindrome shall, in its sole discretion, make the final determination of the Masters to be included in each Album, and shall have the sole authority to assign one or more producers who shall collaborate with you on the production of each Master and each Album.

B. Rationale

The band stated that it wants to retain artistic integrity. Specifically, the band stated that it wants to retain the ability to make all of the artistic decisions about what songs go into the albums, the recordings, the producers they want, and what gets released. Therefore, the provision has been changed to give Palindrome the authority to make these decisions, rather than Polyphon.

IV. MERCHANDISE, MARKETING, AND OTHER RIGHTS

A. Provision 8.01

Original Provision: 8.01. Artist warrants that it owns the federally registered trademark PALINDROME (Reg. No. 5,423,888) and hereby transfers all right, title, and interest in that trademark to Polyphon. Polyphon may use the trademark on such products as, in its sole discretion, it sees fit to produce or license, and all income from such use shall be Polyphon's alone.

1. Revised Provision

8.01. Artist warrants that it owns the federally registered trademark PALINDROME (Reg. No. 5,423,888) and gives Polyphon the non-exclusive license to use the trademark. Polyphon use of the trademark is subject to Palindrome's approval to assure the quality of the merchandise. Polyphon will receive 1/4 of the income from all of the goods produced with the trademark, with the remainder of the income going to Palindrome. Polyphon is not entitled to income from the use of the trademark on products that it does not make or sell.

2. Rationale

First, the bank wants to keep its merchandise deals non-exclusive.

Therefore, a provision providing that Polyphon's license to use the trademark is non-exclusive is added to the provision.

Second, the band want to keep control over everything that has to do with merchandise b/c that is a real source of income for them. In addition, the band feels that it is important to give fans good value for money by using top-quality materials and making sure the merchandise is of high quality. Therefore, information was added to ensure that the band, not Polyphon has the ability to approve the use of their trademark on products to ensure that the product is up to their standard of quality for their fans.

Third, the band is willing to give Polyphon a 1/4 of the revenue for the stuff that they produce and sell; however, the band (1) want to keep trademark, and (2) have to be able to use the trademark ourselves without giving Polyphon a share of the money from the products that it doesn't make or sell. As a consequence, the language transferring all right, title, and interest in the trademark has been removed. And the language that gives Polyphon all income from the use of the trademark has been revised.

Fourth, the provision needed to be adjusted to comply with the law of Franklin. According to *M&P Sportswear, Inc. v. Top Clothing Co.*, a licensee will lose its right to the trademark by failing to assure the public of any standard of quality of the goods and services manufactured and sold under the mark. In M&P Sportswear, M&P designed T-shirts and other apparel and is the owner of a registered trademark, which it uses as the brand name of its shirts. M&P licensed the use of its trademark to Top Clothing. Top Clothing began making clothing using the trademark, but the clothing was of low quality. The court found that it is a basic tenet of the trademark law that any trademark proprietor who licenses the trademark to another must assure, in the license agreement, that the goods or services offered by the licensee meet the standards of quality of the trademarked goods established by the trademark proprietor. Here, Palindrome has a high standard of quality for the merchandise that it produces for its fans. Therefore, the licensee here, Polyphon must meet the standards established by the trademark proprietor, Palindrome. As a consequence, a clause allowing Palindrome's approval to assure the quality of the merchandise was added.

B. Provision 8.02

Original Provision: 8.02. Artist hereby authorizes Polyphon, in its sole discretion, to use Artist's, and each member of Artist's name, image, and likeness in connection with any marketing or promotional efforts and to use the Masters in conjunction with the advertising, promotion, or sale of any goods or services.

1. Revised Provision

8.02. Subject to Artist’s approval, Artist hereby authorizes Polyphon to use Artist's, and each member of Artist's name, image, and likeness in connection with marketing or promotional efforts and to use the Masters in conjunction with the

advertising, promotion, or sale of goods or services, excluding the sale of goods or services relating to alcoholic beverages or consumption.

2. Rationale

One of the band members, AI, almost died because he was hit by a drunk driver. As a result, the band has become fanatic about drugs and booze, swearing off their use. Because of Al's accident, the band wants to get the message out about drunk driving and do not want to be associated with drinking and doing drugs. They specifically told us that they do not want their songs used in commercials promoting the sale of alcohol or their images used in advertisements promoting the sale of alcohol. As a result, the provision was revised so that the band has approval rights and so their name, music, or image will not be used to promote the sale or consumption of alcohol.