NEW YORK STATE BAR EXAMINATION
JULY 1996 QUESTIONS AND ANSWERS

Question-One
ART, BEN AND CINDY, a duly constituted partnership doing business in Albany, New York, as Abco, purchases and sells real property in the partnership name. Abco employed Sue as a sales representative and as manager of the real property owned by the partnership.

Abco purchased a small office building in Albany, prepared plans for a proposed modernization of the building and applied to the Albany Commissioner of Buildings for the necessary permit to begin the work. The application and plans conformed in all respects with the requirements of the pertinent Albany ordinances, but the Commissioner has failed without justification to act in any way on the application. Abco has consulted you and asked if there is anything that can be done to compel the Commissioner to act.

Recently, Abco needed cash to pay the real property taxes on Whiteacre, an apartment building it owned and which was managed by Sue. Sue loaned Abco $ 20,000, and Abco used the money to pay the taxes. Contemporaneously with the loan, Abco agreed in writing to repay the loan by permitting Sue to retain 50 percent of the rents which she collected from the tenants in Whiteacre until the loan was fully paid. Abco also notified the tenants that Sue was authorized to collect the rents in her own name and delivered to Sue the written leases of all the tenants in Whiteacre.

Prior to the loan transaction, Abco had authorized Sue in writing to sell Blackacre, a warehouse which it owned. Sue knew that Abco had purchased Blackacre a year earlier for $ 100,000. Nevertheless, Sue told Buy, a prospective purchaser, that Abco had paid $ 140,000 for Blackacre. Sue further stated to Buy that Abco had just received an offer to purchase Blackacre for $ 150, 000 although, as Sue knew, no such offer had been made. Sue made these statements to Buy without the knowledge of Art, Ben and Cindy.

In reliance on Sue's statements concerning Blackacre, Buy purchased Blackacre for $ 160,000. Shortly after taking title, Buy learned of the falsity of Sue's statements and complained to Abco. Abco immediately discharged Sue and notified the tenants in Whiteacre that Sue's agency to collect the rents was terminated. At that time Abco still owed Sue $ 9,500 on the loan. Cindy learned last week that she is suffering from a serious illness, retired from Abco and, for valuable consideration, assigned in writing all her rights, title and interest in Abco to Bro, Cindy's brother. Bro notified Art and Ben of the assignment and informed them that he intended to be active in Abco's business, but Art and Ben refused to let him participate in the business. Bro then demanded to be allowed to inspect Abco's books, but Art and Ben refused his demand.

(a) What advice would you give Abco with respect to the Commissioner's failure to act?

(b) What are the rights, if any, of Sue, Buy and Bro?

ANSWER TO QUESTION ONE
(a) Abco should bring an Article 78 proceeding against the Commissioner of Buildings. Pursuant to Article 78 of the CPLR, an aggrieved party may bring a "Mandamus to Compel" against a public agency or officer for failure to discharge their duties. The Article 78 proceeding must be brought in the Supreme Court, by filing a Petition and Notice of Petition with the Court Clerk, and serving the same on the Commissioner. Additionally, Abco must keep in mind that there is a four month statute of limitations for all Article 78 proceedings. If Abco seeks to have a quicker resolution to their Article 78 proceedings, they might consider filing an Order to Show Cause, if the Supreme Court judge signs it, will result in a much shorter return date with the Court.

Thus, in the instant case, it is clear that Abco can best respond to the Commissioner's failure to act by filing an Article 78 "Mandamus to Compel" action in the Supreme Court.

(b) Sue should file an action against Abco on three grounds, (1) breach of contract; and (2) on a constructive mortgage/security interest theory; and (3) irrevocable agency, coupled with an interest. First, Sue may file an action against Abco on strict contract theory. In consideration for her loaning Abco $ 20,000, Abco gave Sue, by written agreement in satisfaction of the Statute of Frauds, permission to retain 50 percent of the rents collected on Whiteacre. However, when Abco notified the tenants to discontinue paying the rent to Sue, it may have committed a material breach of the contract. Sue must be aware, however, that Abco may have a valid defense to a contract action on the grounds of the changed circumstances given Sue's discharge.

Sue might also sue Abco on the theory that by loaning Abco $ 20,000 for the payment of real estate taxes, that she effectively received a mortgage on the property to the extent of the $ 20, 000. Since NY is a lien theory state, Sue's security interest/mortgage is treated as a lien on the property, rather than a transfer of title. Thus, Sue may seek an action against Abco on the grounds that she held a mortgage on the property, and that Abco is in default on the mortgage, and that she should therefore be entitled to seek a foreclosure on the property, and receive the proceeds (if any) of sale of Whiteacre.

Third, Sue may have rights against Abco on the grounds that Abco had no right to terminate her right to receive rent money under the theory of irrevocable agency. Sue should take the position that she had an irrevocable agency with respect to retaining 50 percent of the rents on Whiteacre because her agency was coupled with an interest (specifically, the $ 20,000 indebtedness of Abco to Sue). As such, Sue should argue that her agency was irrevocable, and as such she has a right to continue collecting and keeping 50 percent of the rents until the debt is satisfied.

Bro is the assignee of Cindy's interest in the partnership. He is entitled to collect any profit due Sue. However, Bro is not a partner. Rather, Cindy's assignment of her partnership interest to Bro worked a dissolution of the partnership, and did not confer partnership status on Bro. Bro has no right to be active in the partnership business, until such time as Art and Ben agree to confer "partner" status upon him. Further, Bro is not entitled to review the books of the partnership, as he is not a partner.

Buy may have an action against Sue, and the partners (Art, Ben and Cindy). Buy may seek rescission of the contract on the grounds that there was a unilateral mistake of fact, and that the non-mistaken party (Sue and the partnership) knew and/or had reason to know of the mistake. In this case, Sue clearly had knowledge of the mistake, since she affirmatively misrepresented material information to Buy. Further, Art/Ben/Cindy may be liable because of the agency relationship between Sue and them. Although Sue may not have had actual authority to make the false statements, Sue most likely had apparent authority. Apparent authority is defined by "holding someone out as an agent, and reasonable reliance by the third party." In this case, Sue was an agent of the partnership, and was held out as such. Further, it appears that Buy reasonably relied on Sue's apparent authority to make the statements. As such, the partners (Art/Ben/Cindy) may be held liable, not merely as partners of the partnership, but personally, since partners are personally liable for the debts of the partnership.

As such, it appears that Buy may have a cause of action against Sue, Art, Ben and Cindy, and may seek either rescission of the contract, or reimbursement. However, a court may also find that Sue's statements constituted mere puffery, and that no cause of action will lie.

Question-Two
UPON APPLICATION by the District Attorney of New York County, based upon an affidavit by Jon, a New York City police officer, a Supreme Court Justice in New York County issued a video surveillance warrant authorizing the installation of a hidden video camera and microphone in the

wall of an office in a Manhattan building to enable the police to see, hear and videotape what went on in the office.

Jon's affidavit stated in pertinent part that he had been watching the office entrance for several weeks and that a number of men he knew to be drug addicts had entered and later emerged carrying small packages which Jon believed contained cocaine. Jon's affidavit further stated that there appeared to be no legitimate business conducted from the office, and that there was no name on the door and no listing in the building directory or in the Manhattan telephone directory. Jon's affidavit further stated that he believed the office was being used to sell drugs.

In accordance with the warrant, Jon and Ned, another police officer, installed a hidden video camera and microphone in the office. While watching and listening in the next room, they observed and heard Bob and Mac discussing an impending drug sale. They saw Pam walk in, give Bob $ 500, and receive from him a glassine envelope containing a white powder which looked like cocaine. Mac watched but did not participate in the sale.

As soon as Pam left, Jon and Ned, both in uniform, burst into the office and told Bob and Mac they were under arrest. Mac pulled a handgun out of his pocket and shot and killed Jon. Ned disarmed Mac and arrested both men.

Thereafter, Bob was indicted on charges of criminal sale of a controlled substance in the second degree for conspiracy in the second degree for conspiring with Mac to sell the cocaine to Pam.

In a separate indictment, Mac was charged with murder in the second degree for killing Jon, and with conspiracy in the second degree for conspiring with Bob to sell the cocaine to Pam.

The indictments were to be tried separately. Before either trial began, the District Attorney disclosed the existence of the videotape and that she proposed to offer it in evidence at both trials. Bob and Mac each moved to suppress the use of the videotape as evidence on the ground that the surveillance warrant had been issued unlawfully. The court (1) denied both motions. After a trial, Bob was convicted of the criminal sale charge but acquitted of the conspiracy charge.

Before Mac's trial, he moved to dismiss the conspiracy charge on the ground that there could be no conspiracy if the only alleged co-conspirator had been acquitted. The court (2) denied the motion.

Mac also moved to dismiss the conspiracy charge on the ground that the verdict in Bob's case precluded the District Attorney from proving that there was an agreement between Bob and Mac to sell cocaine. The court (3) denied the motion.

Upon trial, Mac, in response to the murder charge and pursuant to advance notice to the prosecution, introduced psychiatric evidence of a long history of mental illness, claiming he lacked criminal responsibility by reason of mental disease or defect.

The judge's charge to the jury at the conclusion of the trial included the following instructions:

Charge (1). "The defendant having offered evidence of his mental condition, the burden is on the prosecution to prove every element of the crime, including mental capacity to commit the crime, beyond a reasonable doubt."

Charge (2). "If you find that the defendant, by reason of mental disease or defect, was unable to resist doing wrong or did not know his conduct would cause harm to the police officer, you must acquit him."

(a) Were the court's rulings (1), (2), and (3) correct? (b) Discuss whether the two charges were correct.

ANSWER TO QUESTION TWO

(a)(1). The warrant for video surveillance was issued without sufficient basis and even the officers' good faith reliance on a defective warrant does not permit it to be admitted.

The issue is whether the search warrant was properly issued for video surveillance. Generally, a search warrant must be issued by a neutral and detached magistrate, on the basis of information giving rise to probable cause. The affidavit on which it is based must establish the reliability and veracity of the person and the basis for his information. A warrant for video surveillance, wiretaps, or eavesdropping, however, has a heightened requirement. There must be a compelling need for this most intrusive method of surveillance. In this case the warrant was issued by a neutral and detached magistrate, as required, because a Supreme Court Justice issued the warrant. The information in the warrant was from an affidavit of a police officer on the basis of his own stated personal knowledge. That is a proper basis because an officer is presumed to have the requisite veracity/reliability and the basis of his information is stated in the affidavit.

The observation of the office and other investigation could have properly been found to constitute probable cause to search the premises. However, there is no showing that a search other than video eavesdropping would be inadequate. Therefore, the warrant is invalid for permitting this intrusion on defendants' reasonable expectation of privacy.

Furthermore, in New York (unlike the majority) the officers' good faith reliance on a warrant that is defective is not a basis for allowing admission of the results of the search.

Finally, on this point, the prosecution was required to provide a copy of the videotapes to the defendants before trial, because it is Rosario material -- a tape of the defendant.

The court incorrectly denied the defendant's motion to exclude the tape because it was based on an illegally issued warrant.

(a)(2). The court correctly denied Mac's motion to dismiss the conspiracy charge. The issue is whether acquittal of all co-conspirators precludes another's conviction.

Conspiracy requires an agreement to commit an illegal act, and an over act in furtherance of the conspiracy. In New York, unilateral conspiracy is recognized, so that the other party's acquittal (just as if he were an undercover officer with no true intent to agree) does not preclude a conviction for conspiracy.

In this case, a jury could find Bob and Mac did agree to commit the illegal act of selling drugs to Pam. Furthermore, the sale constitutes an overt act in furtherance of the conspiracy. The completed sale does not preclude an indictment and conviction on conspiracy because conspiracy does not merge.

Bob's acquittal, assuming he is the only alleged co-conspirator, is not a basis for granting Mac's motion to dismiss because it may still be found beyond a reasonable doubt that he agreed to the illegal purpose and act and committed conspiracy.

(a)(3). The court correctly denied Mac's motion to dismiss on the basis of preclusion (issue or claim).

The question is whether the acquittal in Bob's case effectively precludes the D.A. from proving the agreement, because of Res Judicata (claim preclusion) or collateral estoppel (issue preclusion) .

Claim preclusion bars a party that lost in a case against another party from re-asserting the same claim in a subsequent proceeding against the same party. It is only applicable where the two parties are the same in both actions. Issue preclusion/collateral estoppel precludes a party from asserting the same issue if it has lost on that issue in a previous case. A non-party to the first action may assert issue preclusion. But, the other party is only estopped if it lost that identical issue, and the party had a full and fair opportunity to litigate the issue, and if that issue was necessarily part of the decision of the earlier case.

In this scenario, Mac may not assert claim preclusion because he was not a party to the earlier case. Mac also may not assert issue preclusion because the issue of whether Mac entered into a conspiracy was not necessarily decided in Bob's case. There could have been other reasons for Bob's acquittal that do not go to the elements of Mac's alleged crime of conspiracy.

Mac's motion to dismiss under a theory of preclusion was correctly denied.

(b) -- Charge (1)

The first charge incorrectly stated the prosecution's burden in the face of an insanity defense. The defendant has the burden of proving he lacked criminal responsibility due to mental disease or defect. The prosecutor need only prove the elements of the case, including intent.

The issue is where the burden lies when defendant asserts an insanity defense.

Defendant must give the prosecution advance notice of his plans to claim an insanity defense. As an affirmative defense, defendant has burden of proof on the issue of his mental disease or defect. Prosecution must prove each element, including intent, beyond a reasonable doubt. But, they are not required to prove mental capacity of the defendant.

In this case the charge incorrectly stated that the defendant's claim of insanity shifted an additional burden to the prosecution. The judge should have charged the jury that prosecution must only prove the elements beyond a reasonable doubt, and that defendant had the burden of proof on his mental incapacity.

(b) -- Charge (2)

The judge incorrectly stated New York's test for the insanity defense. In New York, a defendant may be found not guilty by reason of mental disease or defect if he shows (1) that he could not discern right from wrong, i.e., understand the wrongfulness of his actions; or (2) that he did not understand the harmfulness of his conduct.

The "irresistible impulse" test -- that defendant was unable to resist his impulse to do wrong -- is not the test in New York.

The charge neglected to mention one part of New York's test and mistakenly included the irresistible impulse test.

The judge's first point -- "unable to resist . . . " -- is not the New York test. The second point -- unable to know the harmfulness of his conduct due to mental disease or defect -- is part of the New York test. The other part which the judge did not state is that defendant is also not guilty if by reason of mental disease or defect he did not understand the wrongfulness of his conduct.

The second charge incorrectly stated the law of New York.

ANSWER TO QUESTION TWO
(a) The court's rulings (1), (2), and (3) were all correct.

(b) The court's two charges to the jury were erroneous.

(a)(1)

The court properly dismissed the defendants' motions to suppress the use of the videotape.

The issue is whether the warrant for the electronic surveillance was properly issued. The answer is yes.

The Fourth Amendment guarantees to the people of the United States the right to be free from unreasonable searches and seizures of their person, property and effects. Searches and seizures must be made pursuant to a valid search warrant obtained from a neutral and detached magistrate upon a showing of probable cause. The need for a warrant arises in any situation wherein the individual has an objectively reasonable expectation of privacy, and it is the government that seeks to invade the privacy.

Here, there can be no doubt that there was a need for a warrant. The government was seeking to eavesdrop and view private conversations and action between private individuals, conducted behind closed doors.

Thus, the question is whether the search warrant was properly issued. In New York State there are two requirements for the probable cause requirement of a warrant. The proponent of the warrant must demonstrate both the (1) reliability of the source of the information and (2) some basis for the reliability of the information itself.

Jon satisfied both prongs of the test. As a police officer, he is presumed to be a reliable source. He stated that his probable cause derived from his own personal knowledge. He had watched the building and saw men he "knew to be drug addicts" coming and going and he could not, despite diligent efforts, come up with a legitimate business reason for their presence. Jon clearly satisfied the probable cause requirement for the issuance of the warrant.

A warrant must be specific regarding the place, person and activities to be conducted. The facts are not detailed on this point, but there is a strong enough concurrence between the facts alleged for probable cause and the surveillance activity set up, that we can assume that Jon and Ned acted in accordance with the specifications of the warrant.

Thus, the videotape was lawfully attained, in compliance with the warrant requirement of the 4th Amendment, and is NOT subject to suppression.

(a)(2)

The court properly denied Mac's motion to dismiss the conspiracy charge. The issue is whether one co-conspirator can be charged with, or found guilty of, conspiracy when the other co-conspirator has been acquitted. The answer is yes for two reasons.

First, when co-conspirators are tried together, one may not be found guilty if the other is acquitted. When tried together, it's an all or nothing proposition. Either both are acquitted or both are convicted.

However, when the defendants have separate trials, as they do here, their guilt or innocence is determined totally independently. It is possible for one to be acquitted while the other is found guilty.

Secondly, New York State has adopted the Model Penal Code approach to conspiracy known as the unilateral theory of conspiracy. Under this theory, it takes only one guilty mind to conspire. Thus, Mac could be found guilty even if Bob never acquiesced to the conspiracy, or even if Bob was really an undercover cop.

Mac can be found guilty of conspiracy if he (1) sought an agreement with another to (2) work together, with intent to carry out a crime and (3) made some overt act in furtherance of the plan or agreement.

Thus, Mac can be charged with conspiracy even though Bob was acquitted and the court ruling was proper.

(a)(3)

The court properly denied Mac's motion to dismiss the conspiracy charge on the ground that the verdict in Bob's case precluded the finding of an agreement between him and Bob.

The issue is twofold: (i) what is the evidentiary significance of a verdict of "not guilty" and (ii) is there a question of claim preclusion (collateral estoppel).

(i) While a conviction may, under certain circumstances be used as substantive evidence of the underlying facts necessary to the conviction, the obverse is not true. The failure to prove that a defendant is guilty beyond a reasonable doubt does not provide any substantive evidence about the underlying facts. It is only proof that the prosecution did not prove guilt beyond a reasonable doubt.

Thus an acquittal is not evidence that an element of the crime did not occur.

(ii) The prosecution is not collaterally estopped from raising the conspiracy issue. Collateral estoppel (claim preclusion) in New York State requires identity of the parties. Further, since Mac and Bob may have done different things regarding their respective roles in the conspiracy, there is no identity of the claim either.

Thus, the court properly denied Mac's second motion to dismiss the conspiracy charge.

(b) The charges to the jury were both improper and erroneous. Charge 1 -- The issue is whether, when a defendant raised the insanity defense, the burden is on the prosecution to prove sanity beyond a reasonable doubt.

The answer is no. The prosecution must prove all of the elements of the crime beyond a reasonable doubt. With murder, the prosecution must prove that 1) there was a volitional act (actus reus), with 2) malice and 3) that it resulted in the death of a live human being and that 4) there are no valid defenses.

However, the proof of legal insanity has been held to be an affirmative defense such that the burden of proof, by a preponderance of the evidence rests with the defendant.

Charge 2 -- Charge 2 is essentially a statement of the irresistible impulse theory of insanity which is not followed in New York.

The issue is whether it is a correct statement of New York law and the answer is no.

New York follows a modified version of the McNaughten Rule which requires that, at the time the crime was committed, the defendant lacked substantial capacity to understand or appreciate the nature or consequences of his act or that it was wrong.

New York does not recognize the irresistible impulse prong. Therefore, the jury instruction was erroneous.

Question-Three
IN 1988, shortly before their marriage in New York, Hal Smith and Dot Green duly executed a prenuptial agreement which provided, among other things, that in the event of a matrimonial action between them, each waived the right to receive maintenance from the other.

In 1989, Hal and Dot purchased Whiteacre, a residence in upstate New York. Hal provided 60 percent and Dot provided 40 percent of the purchase price. Title to Whiteacre was taken in the names "Hal Smith and Dot Green." The deed did not recite anything further about the nature of their tenancy in Whiteacre.

Hal and Dot continued to live together at Whiteacre until 1991 when, after two years of marital discord, Hal consulted his attorney, who advised Hal that he did not have valid grounds for seeking a divorce from Dot in New York. Hal then left Whiteacre and relocated to State X, where divorce on the ground of "irreconcilable differences" was permitted, and where the law governing equitable distribution was identical to the law of New York. After renting an apartment in State X, Hal sued Dot for a divorce in State X on the ground of "irreconcilable differences" and asked the State X court to, among other things, equitably distribute Whiteacre. Dot, who was personally served in New York with the State X summons and complaint, did not answer the complaint or otherwise appear in the State X action. The State X court expressly found that Hal had properly established a residence in State X, and granted Hal a judgment of divorce which included a direction that Whiteacre be sold and the proceeds of sale be distributed 60 percent to Hal and 40 percent to Dot. Dot, after having been personally served with a copy of the State X judgment, did nothing.

Immediately after his State X judgment was granted, Hal returned to New York, where he duly commenced a plenary action demanding that the State X judgment be converted to a New York judgment and that Whiteacre be sold and the proceeds of the sale be distributed pursuant to the judgment. Dot's answer to Hal's complaint in the New York action asserted, as affirmative defenses, that Hal had never validly established a State X residence and that the State X judgment of divorce, including the direction for the sale of Whiteacre and the distribution of the sale proceeds, was invalid in its entirety. In addition, Dot asserted two counterclaims, one for judgment declaring void the provision for waiver of maintenance in her prenuptial agreement with Hal on the ground that it violated New York law, and the second for a separation from Hal based upon cruel and inhuman treatment, including a request for maintenance.

After Hal replied by denying the essential allegations of Dot's counterclaims, Dot duly moved to dismiss Hal's complaint and for a judgment declaring void the waiver of maintenance contained in her prenuptial agreement with Hal. In her affidavit in support of her motion, Dot admitted that she had been personally served in New York with the State X summons and complaint, but asserted that she had never been in State X and that she had not answered the complaint or

otherwise appeared in the State X action. In Hal's answering affidavit, he admitted the assertions set forth in Dot's affidavit but claimed, in accordance with the express finding in the State X judgment, that Hal had fully satisfied the residence requirements of State X. The court granted Dot's motion in its entirety, holding that (1) the State X judgment was void as to both the decree of divorce and the direction for the sale of Whiteacre, and (2) the maintenance waiver contained in the prenuptial agreement between the parties violated the law of New York and was therefore unenforceable.

On the trial of Dot's counterclaim for a separation, Dot's only proof of cruel and inhuman treatment was her testimony that, shortly before Hal left Whiteacre, he told her that he had been involved in an adulterous relationship with Sue and that he intended to marry Sue after he divorced Dot. On objection by Hal on the ground that New York law prohibits a spouse from testifying to the other spouse's adultery, the court (3) directed that Dot's testimony regarding Hal's admission of adultery be stricken from the record. Hal rested without offering any proof and, on Hal's motion, the court dismissed Dot's counterclaim.

In 1994, Hal and Dot duly executed a separation agreement in which each waived the right to inherit from the other. The agreement further provided that Dot would retain exclusive possession of Whiteacre for three years, at the end of which period Whiteacre would be sold and the proceeds of sale would be divided between them equally. Hal died in 1996, before Whiteacre was sold. Hal was survived by his brother, Bill, and by Dot.

(a) Were the court's rulings (1), (2) and (3) correct?

(b) What are the rights of Bill and Dot with respect to Whiteacre?

ANSWER TO QUESTION THREE
(a)(1)

The court's ruling with respect to the validity of the State X divorce was incorrect, but the ruling was correct with regard to the distribution of property. The first issue is whether New York is required to give full faith and credit to the State X divorce. New York will recognize out of state divorces if they are validly obtained. If the state had jurisdiction over the divorce, New York will recognize it, but if it was obtained unilaterally by one party only, it will be open to collateral attack in New York. A state has jurisdiction over a divorce when one of the parties is domiciled there. The marriage is considered res or property and the state obtains in rem jurisdiction by the presence of the party. To be domiciled in a state, one must reside there with the intent to remain.

Here, Hal moved to State X and rented an apartment there. Even though his purpose was to obtain a divorce, he still meets the domiciliary requirements for jurisdiction. Thus, New York owes the judgment full faith and credit.

The court properly found that the distribution of property made by the State X judgment was void. The issue is whether State X had personal jurisdiction over Dot. In order to obtain economic relief in a matrimonial action, a state must have jurisdiction over the persons affected by the judgment. Here, it appears from the facts that State X had no grounds on which to base jurisdiction over Dot because she had never been there, nor made an appearance. Thus, the judgment is open to collateral attack, and the court properly voided the distribution for lack of jurisdiction. (2) The court's ruling regarding the prenuptial agreement was proper. The issue is whether the maintenance provision was unconscionable. Generally, prenuptial agreements will be upheld if they are consistent with public policy. However, where maintenance provisions therein

are unconscionable as to leave one party in danger of becoming a public charge, the court will not uphold the provision.

Here, the facts are not clear as to either party's economic situation. However, if it is even possible that a lack of maintenance could result in one party becoming a public charge, then the provision must be voided because it is inconsistent with public policy.

(3) The court erred in striking Dot's testimony from the record. The issue here is whether testimony about the other spouse's adultery is permitted in an action for separation on the grounds of cruel and inhuman treatment. Pursuant to New York Domestic Relations law, cruel and inhuman treatment consists of physical or mental abuse which is injurious to the spouse's health, mental well being or general welfare. Moreover, the Domestic Relations law also provides that in actions grounded on adultery, the only testimony permitted is to prove the existence of the marriage and to disprove adultery or raise affirmative defenses.

Here, Dot alleges cruel and inhuman treatment as grounds for separation. Deliberately admitting to an affair could constitute behavior injurious to a spouse's mental well-being. Thus, the evidence is relevant. Moreover, the evidentiary rule excluding testimony as to the other spouse's adultery only applies to actions grounded in adultery. Accordingly, because Dot's action is grounded upon cruel and inhuman treatment, the testimony should have been allowed.

(b) Dot is entitled to all of Whiteacre. The issue is whether the separation agreement could sever the tenancy by the entirety. In New York, a conveyance to husband and wife is presumed to be a tenancy by the entirety. A tenancy by the entirety includes the right of survivorship, and precludes either spouse from unilaterally severing the right of survivorship.

Here, it appears from the facts that although Hal and Dot used different names on the deed, they purchased it in 1989, after being married. Thus, it must be presumed to be a tenancy by the entirety, despite the fact that they did not pay equal amounts for the property. Moreover, although the two of them could have severed the tenancy by sale before Hal died, the agreement to do so is now ineffective because one tenant by the entirety may not sever. Accordingly, Dot takes Whiteacre because she has the right of survivorship. It should be noted that the divorce decree obtained in State X did not sever the tenancy because New York did not recognize the decree. Thus, the tenancy remained intact.

ANSWER TO QUESTION THREE

(1) The court was correct in voiding State X's decree of divorce and equitable distribution of Whiteacre.

The first issue is State X's power to grant a divorce. Marriage is considered a res, and generally any state where one spouse is residing has the power to issue a divorce or annual a marriage because it has in rem jurisdiction. The marriage res follows each spouse. However, in New York, an out of state divorce entered into by only one spouse is subject to collateral attack.

In this case State X would have power to issue a divorce. It found that Hal had satisfied the residency requirements of State X and Dot was personally served in the action. State X had valid in rem jurisdiction over the marriage. However, Dot did not appear or participate in the divorce. It was unilaterally entered into by Hal. Therefore, Dot can collaterally attack the divorce itself. In this case Dot alleges that Hal never validly established a State X residence.

Residence or domicile requires both physical presence and an intent to remain for the foreseeable future. In this case the facts show that Hal was physically present in State X, because he moved

there and rented an apartment. A court could find, however, that Hal lacked any intent to remain in State X and only moved there to fraudulently obtain a divorce. Hal moved to State X only after his lawyer told him he had no valid grounds for divorce in New York. In addition, Hal immediately returned to New York after State X granted the divorce. A New York court with the power to inquire into the validity of the divorce in State X could find that Hal was never a resident of State X and the divorce was therefore invalid. A New York court would want to prevent fraudulently obtained out-of-state divorces.

The second issue is whether, assuming Hal was validly a resident of State X, State X had the jurisdiction to equitably distribute Whiteacre. A New York resident can be subject to a valid out-of-state divorce. However, for State X to order the sale of equitable property or issue judgments regarding alimony, it must have personal jurisdiction over the defendant spouse. Property rights are personal and do not travel with each spouse like the marriage. In addition, if a party does not appear in an action, she retains the right to collaterally attack the judgment in another state based on lack of personal jurisdiction.

Here, because Dot did not appear in State X she can attack the judgment based on lack of personal jurisdiction. Because Dot has never been in State X, because Hal and Dot were married in New York, and because the matrimonial domicile was New York State, State X has no valid grounds to exercise personal jurisdiction over Dot. Indeed, it would violate Dot's Constitutional due process rights for State X to exercise jurisdiction over her without required minimum contacts with State X.

Because State X has no personal jurisdiction over Dot it has no power to rule on property rights personal to Dot including equitable distribution or maintenance. Thus the court correctly granted Dot's motion. (2) The court incorrectly granted Dot's motion concerning the maintenance waiver in Dot and Hal's prenuptial agreement. The issue is the validity and enforceability of the maintenance waiver.

Prenuptial agreements are valid in New York. They must be signed and in writing. The only limitations are that the agreement cannot agree on a future divorce, and the agreement cannot unconscionably limit support. The right of support is a right growing out of and incident to marriage. Spouses, while married, have a duty to support their spouse. Maintenance, on the other hand, is post-marriage payments meant to insure that each spouse (the needy spouse) is capable of becoming an independent economic actor. Maintenance is akin to marital rehabilitation.

A prenuptial agreement can, therefore, limit post-marriage maintenance. A prenuptial is a contract and a court will enforce it barring fraud, duress or unconscionability. As long as neither Hal nor Dot is likely to become a public charge, in which case a court may require maintenance notwithstanding a valid prenuptial agreement, the prenuptial agreement will be enforced.

(3) The court invalidly directed that Dot's testimony of adultery be stricken from the record. The issue is when a spouse is disqualified from testifying as to adultery.

In New York divorce can be obtained based upon cruel and inhuman treatment. That ground for divorce requires physical or mental abuse that a spouse cannot tolerate. Divorce can also be obtained based on adultery. In an adultery action each spouse may only testify as to the validity of the marriage, to deny adultery or as to any defenses. A spouse is not permitted to testify as to the adultery itself. Proof of adultery must be established by circumstantial evidence. Because Dot's suit is based on cruel and inhuman treatment, she is not precluded from testifying as to Hal's statement. Dot probably won't be able to prove cruel and inhuman treatment based on one comment from her husband since the cause of action requires ongoing abuse. Nevertheless, Dot is competent to testify as to the statement. In addition, note that because it is an admission of a party

opponent the statement by Hal is an exception to the hearsay rule and can be admitted for the truth of the matter asserted.

(b) Dot owns Whiteacre in fee simple. The issue is the effect of a separation agreement on a tenancy by the entirety.

A tenancy by the entirety is an estate in land which arises between a husband and a wife which has a right of survivorship. In New York a tenancy by the entirety is presumed whenever property is taken by spouses during marriage.

In this case because Hal and Dot bought Whiteacre while they were married and took title in both of their names, a tenancy by the entirety is presumed to have arisen. The fact that Hal put up more of the purchase money doesn't matter. The husband and wife are presumed to own a tenancy by the entirety as a fictitious single person.

A tenancy by the entirety has an automatic right of survivorship. This estate cannot be unilaterally destroyed by either party. Divorce will cut off a tenancy by the entirety and convert it into a tenancy in common. A separation agreement does not eliminate a tenancy by the entirety nor eliminate a right of survivorship, however.

Here, because Hal and Dot were not divorced, Whiteacre was still held in tenancy by the entirety. Despite their agreement, at the moment of Hal's death title vested in Dot. Tenancies by the entirety pass outside of probate and are not considered an inheritance. The agreement between Hal and Dot that they would not inherit from one another does not affect the right of survivorship. Note as well that a valid waiver of inheritance requires a signed, acknowledged writing and an affidavit of no consideration.

Finally, note that Bill may have the right to have a constructive trust imposed on one-half the value of Whiteacre. A constructive trust requires wrongful conduct and unjust enrichment. Here, Dot promised to sell Whiteacre in three years and divide the proceeds with Hal. She also agreed to waive her inheritance. If the events occurred as promised, Bill would take one-half the proceeds of Whiteacre through Hal as intestate heir. If at the time she made her promise, Dot did not intend to keep it and she is allowed to keep Whiteacre both the wrongful conduct and unjust enrichment elements of a constructive trust would be established. If a constructive trust is imposed on Whiteacre, Dot would be required to convey to Bill.

Question-Four
ON JUNE 1, 1995, May, a resident of New York County, and Sam, an authorized agent of BeachCo, a corporation domiciled in State X, signed a lease at BeachCo's branch office in New York County. The lease provided for May's two-week rental, commencing July 15, 1995, of a vacation cottage at Rezorts, a Suffolk County waterfront community owned and operated by BeachCo. The lease included the following provision: "Any claim for personal injuries arising out of the use and occupancy of Rezorts' facilities shall be determined under the laws of State X."

On July 15, 1995, May arrived at the Rezorts cottage with her three year old son, Scott, and her mother-in-law, Gran, whom May had invited for a visit. They entered the cottage through the front door, not noticing an unlocked back door in the kitchen. After putting Scott to bed for a nap, May left him in Gran's care while she went for a swim. Tired from the trip, Gran also fell asleep. While Gran was asleep, Scott awoke and wandered out of the back door into a nearby section of Rezorts that was still under construction. BeachCo had erected a fence around the construction area and had posted "No Trespassing" signs, but the gate to the fenced area was open. Scott entered the fenced area through the open gate and then fell into a foundation hole and broke his leg.

Thereafter May, individually and on Scott's behalf as his mother and natural guardian, duly commenced an action in Supreme Court, New York County, against BeachCo. and Gran. May's complaint set forth the foregoing pertinent facts, alleged negligent maintenance of the Rezorts premises by BeachCo and negligent supervision of Scott by Gran, and demanded judgment for Scott's medical expenses plus $ 250,000 in damages for Scott's pain and suffering. BeachCo timely filed an answer consisting of a general denial and a counterclaim against May for contribution based on May's alleged negligent supervision of Scott. May then moved to dismiss BeachCo's counterclaim for failure to state a cause of action, arguing that such a claim cannot be maintained against a parent. The court (1) granted May's motion.

Gran timely moved to dismiss May's complaint as against her for failure to state a cause of action, arguing that such a claim cannot be maintained against a grandparent. The court (2) granted Gran's motion.

At the subsequent bench trial of the action against BeachCo, the foregoing pertinent facts were proved. In addition, another Rezorts tenant testified that, during the two weeks preceding May's arrival at Rezorts, he had often told BeachCo's construction superintendent that the gate to the construction area had often been left open and that he had had to chase children away from the area on several occasions. At the conclusion of plaintiff's case, BeachCo moved to dismiss the action for failure to prove a prima facie case. The court (3) denied BeachCo's motion.

State X law limits the recovery of damages for pain and suffering in any negligence action to $ 10,000, but is in all other relevant respects the same as New York law. At the conclusion of the trial of the action against BeachCo, the court found that BeachCo had been negligent but (4) found the choice of law provision in May's lease valid and held that Scott's recovery for pain and suffering was therefore limited to $ 10,000.

Were the court's rulings (1), (2), (3), and (4) correct?

ANSWER TO QUESTION FOUR
(1) The court was correct as to ruling #1.

The issue is whether a Defendant sued by a parent individually and on a child's behalf for injury caused to the child, can counterclaim against the parent for negligent supervision.

In New York there is no longer immunity for family members from being sued by other family members. Inter-familial immunity has been abolished. However, a child cannot sue a parent for negligent supervision. If a Defendant is sued by a parent individually and on behalf of a child, that Defendant can counterclaim for anything unless the party that is represented in the action may not bring a claim. In the present case, May has moved to dismiss BeachCo's counterclaim of negligent supervision for failure to state a cause of action under the CPLR. The court, in deciding such a motion, must accept all the allegations of the non-moving party's complaint as being true.

Here, BeachCo cannot counterclaim for negligent supervision because Scott can not bring an action against his parents for negligent supervision.

Thus, the court correctly granted May's motion to dismiss.

(2) Ruling #2 -- The court was incorrect in granting ruling #2.

The issue is whether an action for negligent supervision can be brought against a grandparent.

The rule, as was already stated, is that there is no longer interfamily immunity for being sued in New York. The exception for negligent supervision prevents parents from being sued for that tort. Only parents and legal guardians are immune from suit for negligent supervision. Thus, a babysitter would not be immune for the tort if not in the relationship of parent or guardian. In this case, Gran is Scott's grandmother. She was not his legal guardian but was only babysitting Scott at the time. Thus, she can be sued for negligent supervision by Scott.

Therefore, the court was incorrect in granting Gran's motion to dismiss and it should have been denied even if every obligation in the complaint is taken as being true as is required by the CPLR.

(3) The court was correct in denying BeachCo's motion.

The issue is whether Plaintiff has established a prima facie case for negligence against BeachCo.

To establish a prima facie case, the Plaintiff must sufficiently allege evidence which establishes lack of the elements or factors of the underlying action. The requirements for establishing an action for negligence are a showing of a duty owed by the Defendant, that the Defendant breached his duty, that such breach was the factual and legal cause of Plaintiff's injuries and that the Plaintiff suffered some damages.

A duty is owed by a Defendant to all foreseeable Plaintiff's which include all Plaintiffs a Defendant could reasonably foresee as being injured by his action. That duty is breached if the Defendant acted in a way that was not in accordance with what the reasonably prudent person would have done under like circumstances. The Defendant will be held to be the factual cause of injury if but for Defendant's actions the Plaintiff would not have been injured or if the Defendant was a substantial factor in bringing about Plaintiff's injury, when dealing with multiple tortfeasor. To be the legal cause it must be fair (i.e. foreseeable to Defendant that injury would be caused to this Plaintiff) to hold this Defendant liable.

In applying this rule we see that Defendant had a duty to this child. The reason is it was foreseeable that a child would enter the open fence and could possibly be injured by falling in a foundation. A witness testified that he was a tenant there and had told BeachCo's superintendent that he had to chase children out in the past. This testimony is admissible. Although it at first appears to be learning which is an out of court statement offered to prove the truth of the matter asserted, we see that the testimony is not being offered to prove its truth. The testimony is not offered to prove that the declarant actually had chased children out or that there had been children in the construction site. Rather, it is being offered to show that BeachCo., through its agent (the super) was put on notice of the danger. Once on notice, the child's presence was foreseeable.

BeachCo clearly breached its duty. Placing a no trespassing sign up is not enough since children continued to enter and BeachCo was aware of that. BeachCo's actions were the cause in fact of Scott's injuries since but for their failure to close the gate, Scott would not have been injured. Finally, BeachCo is the legal cause. Although it could argue that Gran's negligent supervision was a intervening cause, it was foreseeable that any child in the area could walk through and be injured. Finally, Scott suffered damages -- as is shown by his broken leg.

Thus, the court properly denied BeachCo's motion in that all the elements of a negligence cause of action were established.

(4) Ruling #4 -- The court was incorrect in finding the choice of law provision in the contract to be valid.

The issue is whether the choice of law provision in the contract was proper.

Parties to a contract can choose to apply any state's law as to the validity of the contract. As to enforcing a contract or the applicable law for the contract, the parties can only choose the law of a state which has some connection with something or some terms in the contract. Also, the contract must not have been entered into under duress. Finally, no other state can have a substantial policy interest be violated if that state has more significant interest. In applying these laws we see that the contract has some relation to State X in that BeachCo is located in State X. The contract was not entered into under duress. Although an argument can be made that since this language may have been boilerplate or on a form contract that it was a contract of adhesion, there are not enough facts to establish such an argument.

New York seems to have a significant interest in this case, since the Plaintiff is a New York resident and the contract was to be preformed in New York. The law of New York allows greater recovery for pain and suffering then does State X. The policy may be that New York does not want to see its people denied rightful recoveries. Thus, the court could follow the strong policy interest outweighs State X's interest in limiting liability of people. After all, if a person suffers, he should be able to recover.

Thus, New York law would be more correctly applied.

Thus, the court was incorrect in finding the choice of law provisions to be valid.

ANSWER TO QUESTION FOUR
(1) The court correctly granted May's motion to dismiss BeachCo's counterclaim for failure to state a cause of action. The issue is whether a third party may seek contribution from the parent of a minor plaintiff for negligent supervision.

Negligent supervision cannot be a valid claim in a suit brought by a child against his parent. A third party's claim for negligent supervision would arise from or flow out of a duty of care the parent owed the child. Thus, a third party cannot assert negligent supervision as a counterclaim against the parent of an injured minor. This is so even though New York has generally abolished intrafamily tort immunity.

Here, BeachCo's counterclaim is that May negligently supervised Scott, thus contributing to Scott's injuries. Scott could not assert this claim directly against May, and so, BeachCo's attempt to assert it derivatively will fail. Thus, BeachCo's counterclaim for contribution based on negligent supervision cannot be maintained, and the court correctly granted May's motion to dismiss it.

(2) The court incorrectly granted Gran's motion to dismiss May's cause of action for negligent supervision. The issue is whether a cause of action for negligent supervision can be maintained against an injured child's grandmother.

While parents cannot be held liable for negligent supervision of their children, all others who are not the primary caregivers and supervisors of a child can be held liable for negligently failing to properly supervise a child that is temporarily entrusted to their care. This rule includes teachers, aunts and uncles, and grandparents, assuming the adult does not have primary supervisory responsibilities (for example, as a foster parent or guardian).

May entrusted Scott's care to Gran while she went for swim. There are no facts to indicate Gran was a foster parent, guardian or had a similar relationship to Scott. Gran owed Scott that duty of

care that a reasonable person would have exercised under the circumstances. Gran breached that duty by failing to supervise Scott (by taking a nap) without at least checking to see that the doors were locked and that he could not get out, or would not otherwise be subjected to an unreasonable risk of danger. Gran's breach was the proximate and actual cause (substantial factor) of Scott's injuries.

Thus, the court incorrectly granted Gran's motion to dismiss May's complaint. (3) The court correctly denied BeachCo's motion to dismiss for failure to state a prima facie case. The issue is whether May has presented sufficient evidence to establish a prima facie case against BeachCo for negligent maintenance.

A prima facie case for negligence consists of a duty owed the plaintiff and breach of that duty, which actually and proximately caused plaintiff's injuries.

BeachCo is a landowner (of Rezorts) and under New York law BeachCo owes persons injured on its premises a duty to reasonably take precautions against injurious conditions. While New York has abolished the distinctions between the duty landowners owe trespassers, licensees and invitees, respectively, invariably what is reasonable will bear some relationship to the injured party's connection to the land. Here, BeachCo invited May, Gran and Scott into its property and likely owed a significant duty to make the property safe. Although BeachCo undertook some efforts to make the construction area on it property safe (through fencing it off and posting "No Trespassing" signs), BeachCo had notice that these efforts were insufficient. BeachCo had notice because a Rezorts tenant told BeachCo that the gate to the site was often left open and that children tended to play in the area. BeachCo's failure to remedy this dangerous situation constituted a breach of its duty to reasonably maintain its property.

BeachCo's breach was the proximate and actual (substantial factor) cause of Scott's injuries. [Where two or more tort-feasors combine to cause plaintiffs injury, and each one's action are a "substantial factor" in those injuries, each will be held liable].

Thus, the court properly denied BeachCo's motion as May has satisfactorily established a prima facie case for negligent maintenance.

(4) The court incorrectly upheld the choice of law provision in the May-BeachCo contract. The issue is whether New York's public policy interest with regard to allowing sizable punitive damage awards outweighs the freedom private parties have to contract.

Generally, private parties are free to adopt choice of law provisions to govern the substantive interpretation of their contracts. However, when the choice of law provision governs only one clause of the agreement, to the substantial detriment of the nondrafting party, and New York has a significant governmental interest (Neumeier) in seeing its policies upheld, then the choice of law provision may be struck. This is especially so where New York has substantial contacts to the facts giving rise to the dispute, while the chosen state had few.

Here, the facts giving rise to the dispute all occurred in New York. New York has an interest in deterring foreign (and domestic) tortfeasors by allowing punitive damages, especially for the protection of plaintiffs who are New York residents (as here). State X has an interest in protecting its domiciliary corporations (like BeachCo) from excessive jury awards. However, since this is a bench trial (nonjury), and since New York is the place where the grievance arose, and since New York has a strong governmental interest in deterring tortfeasors (and preventing foreign tortfeasors from hiding behind their jurisdictions laws), the choice of law provision should be struck.

NEW YORK STATE BAR EXAMINATION
JULY 1996 QUESTIONS AND ANSWERS

Question-Five
ON JANUARY 10, 1986, Alf duly executed a will, prepared by his attorney, Fred, which included the following provisions:

"FIRST: I revoke all Wills previously made by me.

SECOND: I give to my wife, Bev, if she survives me, one-third of my net estate.

THIRD: I give to my children, Cal and Deb, the residue of my estate.

FOURTH: I nominate my trusted secretary, Eve, as Executor of this Will."

The execution of the will was duly witnessed by Fred and by Gert, Fred's partner. Alf kept the original of the will in a safe in his office. Fred kept a photocopy of the will in his office safe.

In 1994, Alf and Bev separated, and Alf directed Fred to prepare a new will. On January 10, 1995, Alf duly executed a will, prepared by Fred which included the following provisions:

"FIRST: I revoke all Wills previously made by me.

SECOND: I give to my Trustee, if my wife, Bev, survives me, that share of my estate to which my wife would be entitled if she were to exercise her right of election, in trust, with the income to be paid quarterly to my wife during her life. Upon the death of my wife, Bev, I give the principal and unexpended income of the trust to Save The Birds, Inc., a New York Not-For-Profit Corporation.

THIRD: I give the residue of my estate to Save The Birds, Inc.

FOURTH: I make no provision for my children, Cal and Deb, for good and sufficient reasons.

FIFTH: I nominate my trusted secretary, Eve, as Executor of this Will, and as Trustee of the trust created in paragraph SECOND above."

The execution of Alf's new will was duly witnessed by Fred and Gert. At Alf's direction the original of the will was kept in Fred's office safe. Fred gave Alf a receipt for the will, together with a photocopy of the will. Alf placed both in his office safe with the 1986 will.

On July 10, 1996, Alf died in Warren County, New York, where he was domiciled, leaving a substantial estate. Surviving him are Bev, from whom he remained separated without having executed a separation agreement, and Cal and Deb, his two adult children, all of whom are domiciled in Warren County.

When Eve opened Alf's office safe she found the original of the 1986 will, the receipt for the 1995 will, and the photocopy of the 1995 will. Eve then contacted Fred regarding probate of the 1995 will. After making a thorough search of his office, Fred informed Eve that he was unable to find the 1995 will. Fred told Eve that he concluded that the 1995 will had been lost when Fred had moved his office to a new location in the summer of 1995.

(a) Should the 1995 will be admitted to probate?

(b) If the 1995 will is admitted to probate, what are the rights, if any, of Bev, Cal, Deb and Save The Birds, Inc.?

(c) If the 1995 will is denied probate, what are the rights, if any, of Bev, Cal and Deb?

NEW YORK STATE BAR EXAMINATION
JULY 1996 QUESTIONS AND ANSWERS

ANSWER TO QUESTION FIVE
(a) Will Probate

The 1995 will should be admitted to probate. The issue is whether the 1995 will can be proven through extrinsic evidence.

If a will known to be made and known to be in the testator's possession is not found at the testator's death, the will is presumed to be revoked. If the lost will was not in the testator's possession, but in the possession of another, the will is presumed not to have been revoked. If the possessor was adversely affected by the will, the presumption is that the will was improperly destroyed. A constructive trust is established for those who would have taken under the will.

A lost will may be probated with sufficient proof of its due execution and its contents. Two witnesses must testify to due execution (signed by the testator, at the end thereof, in the presence of each of two attesting witnesses who realize they are witnessing a will) and to every provision of the will. This must be shown by clear and convincing evidence. A copy of the will is a proper substitute for the witness testimony about the will's provisions.

Alf, the testator, did not have possession of the original will. Therefore, the will will not be considered revoked by presumption. Fred did have last possession of the lost will shown by Alf's receipt. Fred is a non-beneficiary, either under an earlier will or under intestate distribution. Therefore, a constructive trust will not be established for the will's beneficiaries. Instead the will will be presumed lost. If Fred and Gert testify as to the due execution that took place and as to the accurate copy of that will, the 1995 will can be admitted to probate.

(b) Beneficiaries under the 1995 will.

Bev -- Bev may elect to take an elective share of one-third of Alf's estate as an outright disposition. She may also simply take under the will. The first issue is whether Bev is entitled to an elective share.

A surviving spouse is entitled to take the greater of $ 50,000 or one-third of the net estate of the predeceased spouse. This New York statutory right is lost if (1) there has been a final decree of divorce or annulment of the marriage, (2) the surviving spouse procured an invalid divorce against the decedent, (3) the surviving spouse had a separation agreement entered against her, (4) the marriage was void, or (5) the surviving spouse abandoned the decedent. Absent those five situations, the surviving spouse is entitled to an elective share.

Bev does not fit within any of the disqualifying factors. She and Alf are separated but no decree of divorce, valid or otherwise, has been obtained. No separation agreement has been entered against Bev. There is no indication that the marriage was void or that it ended in a non-consensual manner (abandonment). Therefore, Bev is entitled to her statutory elective share.

The second issue is whether the will's disposition adequately provide for Bev so that she is not able to exercise her statutory rights.

Per above, a surviving spouse is entitled to one-third of the estate. If the spouse receives at least that in nonterminable as-not subject to any statutory rights. Therefore, Cal and Deb receive nothing.

Save the Birds -- Per above discussion, Save the Birds receives the residuary estate (which is the entire estate). They must give Bev her elective share and then may take the rest -- not in trust -- not as a remainder.

(c) If 1995 will is denied probate.

Unless the 1995 will was denied probate because the contents could not be proven while due execution was, the 1986 will will be probated. Bev will take one-third of the estate. Cal and Deb will each take one-sixth of the estate.

Lost wills which are denied probate may still be used to prove a will was revoked. The earlier will is revoked and the estate passes intestate.

If the 1995 will cannot be probated but the fact that it duly revoked the earlier will can be proven, Alf's estate passes through intestacy. If not, the 1986 will will be probated. Under the 1986 will Bev is not entitled to an elective share because she was given an outright disposition of one-third. Cal and Deb will take the residuary of one-sixth each.

Note intestacy statute provides that a surviving spouse who is entitled to take an elective share, takes $ 50,000 plus one-half of the intestate share. The remainder is divided per capita to the children.

Under intestate, Deb and Cal receive one-half of the residuary estate while Bev takes $ 50,000 and one-half the net estate.

ANSWER TO QUESTION FIVE
(a) The 1995 will should be admitted to probate because all of the will requirements under NY EPTL are satisfied and the "proof of lost will" rule is satisfied.

A testator must be at least 18 and have mental capacity to make a will. A will should be in writing, signed by the testator at the end, witnessed by two witnesses who had the testator's signature published or acknowledged before them and who also signed within 30 days of each other.

The 1995 will meets all requirements. Alf was over 18 and sane. The will was written, signed and duly witnessed.

The fact that the original will is now lost will not prevent the will from being admitted to probate. The original was not in the testator's hands at the time of death, it was being held by the lawyer, therefore, there is no automatic presumption that the testator revoked the will be physical act. A photocopy of the will was found in Alf's safe. This is adequate to prove the contents of the will. The receipt for the original was also found, further strengthening the case that the will had not been destroyed. Finally, witnesses are available to testify that they duly witnessed the 1995 will. The requirements of the "proof of lost wills" rule are satisfied by clear and convincing evidence and accordingly, the will should be admitted to probate.

(b) Bev's Rights Under 1995 Will.

Bev could choose to take the outright disposition of the trust if she wanted to by waiving her spousal election or Bev could do her spousal election. She is not precluded from her election because Alf died after September 1, 1994, and she never had a separation agreement with Alf.

First, the New York rules on outright dispositions of life estates held in trust for spouses has changed. New York used to make spouses take the trust as outlined in the will. But the law has changed and all testators who die after September 1, 1994 cannot force their spouses to take trusts and life estates. Spouses can now make their spousal election which under a will is sets from the will, the spouse cannot exercise the elective share. Dispositions of terminable interests, while able to satisfy the elective share prior to September 1, 1994, no longer do. If the spouse elects to take a statutory share, all terminable interests are revoked. The surviving spouse is treated as predeceased and the remainder is accelerated. All beneficiaries then contribute pro rata to fulfill the elective share.

Alf made no outright dispositions to Bev. The sole disposition is a life time trust with no powers of appointment. Because this is a terminable interest Bev can take her elective share under the statute. The trust is treated as if Bev predeceased. Since the trust is conditioned on Bev's survival, the trust fails and the corpus goes to the residuary estate. Save the Birds takes the residuary estate and must give Bev one-third of it.

Rights of Cal and Deb -- Cal and Deb take nothing under the 1995 will. The issue is whether the negative bequest is effective.

Children may be disinherited by a will. They have no entitlement to any set amount from their parents. They may challenge such a will because of lack of capacity, fraud, undue influence (beyond mere unusual disposition) but they cannot challenge the appropriateness of its dispositions without more (e.g., simply saying a gift to charity was excessive).

Cal and Deb were not given any disposition under the will. This is effective and $ 50,000 or one-third of the net estate.

Because Alf died after September 1, 1994, the new rule applies and Bev can take her one-third of the net estate free and clear of the trust, which is effectively destroyed.

Further, there are no bars to Bev's spousal election. A divorce decree, or a void marriage, or a separation decree entered against her would effectively bar her from her spousal share. In this case, however, Bev and Alf did not even have a formal separation agreement. There are no facts to indicate that Bev abandoned Alf as well. So in sum, there are no bars to Bev's spousal election.

Save the Birds Rights Under 1995 Will. Once a spousal election is done, the trust is destroyed, and the rest of the estate under the will is accelerated. Save the Birds was named as the beneficiary of the residue in Alf's will. Bev will take her one-third share of the net estate, the trust no longer exists and Save the Birds will get all remaining assets as part of the residue of the estate.

Cal and Deb's Rights Under 1995 Will.

Cal and Deb will receive nothing under the 1995 will for two reasons. First, Save the Birds is the residue holder and after the spousal election and the acceleration, there is nothing left to distribute to Cal and Deb.

Second, New York holds that negative bequests -- clauses that disinherit family members and other beneficiaries -- are valid no matter what circumstances they take place under, even partial intestacy.

The provision in the will for Cal and Deb effectively disinherits them. Even though the rest of the will provisions were not carried out to the letter because Bev took her spousal election and Save the Birds got the accelerated residue, the negative bequest to Cal and Deb will still hold.

(c) 1995 Will Denied Probate.

If the 1995 will is denied probate, the issue becomes: does the 1986 will govern or does the estate pass by intestacy? The estate will pass by intestacy because there is no revival of revoked wills.

A will can be revoked by (1) physical act or (2) execution of a codicil, a subsequent testamentary instrument. If the codicil is inconsistent with only a portion of the prior will, only that portion is revoked. If it is inconsistent with all provisions, all is revoked.

Alf properly executed a codicil, revoking his 1986 will. The codicil is inconsistent with all clauses in the 1986 will. The outright gift to Bev was turned into a trust and the gifts to Cal and Deb were given to Save the Birds. Thus, the 1995 codicil revoked the 1986 will in its entirety.

Since there is no automatic revival of the revoked wills under New York law (they have to be either re-executed or re-published), the 1986 will will not be admitted into probate just because the 1995 will failed for some reason.

It should be noted that even if the testator thought it could be revived, New York does not follow the doctrine of Dependent Relative Revocation.

Since the 1986 will is revoked (and also serves to revoke any other wills prior to it -- see clause 1 of 1986 will), the estate will pass by intestacy.

Under intestacy, Bev can take her spousal share of $ 50,000 plus one-half of the net estate since there is issue and Cal and Deb will take the residue, splitting it equally between them. Save the Birds will get nothing.

Man v. Jack

Man will be able to hold Jack liable on the contract with B Inc as B Inc's surety. The issue is whether Jack's guarantee is enforceable. Generally, a shareholder in a corporation will not be liable for the debts of the corporation. However, if a shareholder guarantees the debt of another as when a shareholder guarantees the debt of the corporation, that individual will be held liable. However, such a promise generally must satisfy the Statute of Frauds by being in writing. Nonetheless, an exception to that is when the guarantor's main object is to benefit himself.

In this case, Jack personally guaranteed payment to Man on the B Inc contract. Generally, such a promise should be in writing, but in this case it was for Jack's benefit. Jack stated it was because of his own reputation and business ideals that he was guaranteeing the B Inc obligation. Thus, Jack will be held liable as surety on B Inc's $ 5,000 obligation to Man.

Question-Six
JACK IS THE president and sole shareholder of B Inc, a New York corporation which has, for more than 30 years, engaged in the retail furniture business in Albany, New York. B Inc operated profitably until 1995, when it incurred severe financial losses.

On January 5, 1996, B Inc entered into a written contract with Man, a furniture manufacturer in Jamestown, New York, to purchase furniture from Man at an agreed price of "$ 5,000 payable four months after shipment." The contract also provided for "Shipment F.O.B. Man's warehouse in Jamestown, N.Y., on or before March 1, 1996."

NEW YORK STATE BAR EXAMINATION
JULY 1996 QUESTIONS AND ANSWERS

On January 29, Man was about to ship the furniture to B Inc when, upon receiving a weekly credit report to which he subscribed, he noticed that the report stated that B Inc had been refused credit by Fern, another furniture manufacturer. Man sent B Inc a letter stating that he was withholding shipment pending a satisfactory explanation of the credit report, which Man enclosed.

Upon receipt of Man's letter and the credit report, Jack immediately telephoned Man and told Man that B Inc had never even applied to Fern for credit. Jack also said, "I've been in the business for more than 30 years and I'm proud of my reputation as an honest person. If you will go through with our contract as we agreed I will personally see to it that you are paid." Man was reassured and agreed to ship the furniture.

On February 8, Man delivered the furniture to Truk, a common carrier of goods by truck, and consigned the shipment to his own order under a negotiable bill of lading. Man endorsed the bill of lading and mailed it to B Inc together with an invoice billing B Inc $ 5,000 payable June 8, 1996. On February 13, Man learned that B Inc had become insolvent and had that day defaulted on several business debts which had become due, including a debt of $ 10,000 owed to Zack. Man immediately instructed Truk not to deliver the furniture to B Inc, but Truk refused to stop the shipment. On February 16, B Inc received the bill of lading which Man had mailed to him, surrendered the bill of lading to Truk's Albany representative, and took delivery of the furniture.

On February 20, Man demanded that B Inc return the furniture, but B Inc refused. Two days later, in an action by Zack against B Inc in Supreme Court, Albany County, to recover the $ 10,000 debt, the court duly issued a valid order of attachment. On March 1, the sheriff levied on the furniture which Man had shipped to B Inc and removed the furniture from B Inc's warehouse.

What rights, if any, does Man have:

(a) To recover the furniture seized by the sheriff?

(b) To recover damages from B Inc, Truk and Jack?

ANSWER TO QUESTION SIX
(a) Man will be able to recover the property from the sheriff. The issue is whether Man properly demanded replevin of the furniture.

A seller of goods can repossess the goods he/she sent to a buyer upon being informed that the buyer is insolvent so long as the seller acts promptly. If the seller discovers that the buyer was insolvent when seller delivered the goods and, furthermore, that seller, within ten days of delivery demands in writing the return of those goods, the seller will be able to repossess the goods before attachment by another creditor will be good.

Under an FOB seller's place of business contract, risk of loss passes to the buyer when the seller delivers conforming goods to the carrier. For purposes of this particular transaction, such occurred when Man on February 8 delivered the goods to the carrier. However, under the replevin action delivery is not considered made until buyer actually takes delivery of the goods, at which point they are subject to attachment by others. Thus, delivery was made on February 16 when B Inc took delivery from Truk carrier. Man was notified of B Inc's insolvency on February 13; thus B Inc was insolvent when it took delivery on February 16. Lastly, Man notified B Inc of its demand for recovery of the furniture.

Thus Man can proceed in an action against the sheriff to retake possession of the furniture.

(b) Man v. B Inc.

Man will succeed in an action against B Inc for breach of contract. The issue is whether Man may do so prior to B Inc's actual payment date under the contract.

Generally, a party must wait for the other to breach before proceeding against the other for an action to demand performance or damages. However, when one party has sought assurances of the other's financial health, and thereafter received assurances of such from an authorized agent, subsequent reliance and performance by the one and insolvency by the other will result in breach by the insolvent party. Essentially, a condition precedent to pay is based on that party's good faith effort and ability to do so. If the "breaching" party lacks the ability to pay due to insolvency, the aggrieved party may treat such as a breach/anticipatory repudiation (clear intent not to act) and sue for breach of contract.

In this instance, Man was made aware of B Inc's financial ill-health on January 29 when it noticed the credit report. Upon seeking adequate assurances, Man was provided with such by Jack, B Inc's president. Thereafter, Man relied on this and delivered to B Inc the furniture. B Inc's subsequent insolvency will be deemed a breach by B Inc, and Man will be able to proceed against them.

Since the goods are in B Inc's possession, Man is entitled to the contract price of $ 5,000.

Man v. Truk

Man will not be able to recover from Truk. The issue is Truk's agency rights and obligations.

When a party consigns a shipment to his own order under a negotiable bill of lading and thereafter endorses and mails such to a buyer, upon endorsement and mailing, title passes to the buyer and seller cannot prevent delivery.

In this instance, Man endorsed and mailed the bill on February 8. He did not become aware of B Inc's insolvency until February 13. B Inc was the title holder to the furniture on February 8 when Man endorsed and delivered. As such, Truk was B Inc's agent since B Inc had title and the risk of loss. Truk was under no duty to stop shipment after it had begun simply on Man's demand.

Thus, Truk breached no duty nor breached any contract with Man and is therefore not liable.

ANSWER TO QUESTION SIX

(a) Man may not recover the furniture seized by the sheriff. At issue is the point at which a seller of goods loses a right to a good-based remedy for breach of a contract of sale.

Since Man and B Inc's contract dealt with furniture, Article 2 of the U.C.C. governs the rights of the parties.

Under 2-702, a seller of goods may demand that the buyer return the goods if the seller learns of buyer's insolvency within 10 days of delivery of the goods. This is very important, because absent an Article 9 security interest, a seller of goods is merely a general, unsecured creditor of the buyer and has no specific property interest in the goods sold. Therefore, Man will have no property claim against the furniture held by the sheriff if he has failed to reclaim in a timely manner.

Man learned of B Inc.'s insolvency on February 13 and demanded a return on February 20. However, Man delivered the furniture to the carrier, Truk, on February 8.

Normally, in a contract between merchants, a contract term "F.O.B. Sellersville" indicates that delivery takes place when the seller delivers the goods to a common carrier. At that point the risk of loss shifts to the buyer. All indications are that Man and B Inc. are merchants because they are both in the business of buying and selling furniture. Therefore, Man delivered the furniture on February 8, twelve (12) days before he asserted his right to reclaim. As a result, he has no property interest in the furniture, and it may be levied upon by buyer's creditors.

Truk's failure to obey Man's instructions not to deliver the furniture does not change the result. A seller may stop the shipment of goods in transit upon learning of the buyer's insolvency, but the carrier's failure to obey these instructions does not affect the passage of title.

In addition, Jack's representations of solvency to Man will not extend the reclamation period. Under 2-702, if the buyer makes a written misrepresentation of solvency, the seller may reclaim after 10 days. Here, Jack's representations were oral, and Man must have acted within 10 days.

(b) B Inc. -- Man may sue B Inc. for breach of contract. At issue is whether Man must wait four months from delivery before filing suit.

A party to a contract may suspend his performance and sue for damages when the counter-party has materially breached his performance obligations. A party need not await for the performance of the counter-party at the agreed upon time, if the counter-party has indicated he will not perform by actions or communications. This is anticipatory repudiation.

By the terms of the contract, B Inc.'s performance (payment) is due four months after shipment. That would mean Man would have to wait until June 8 before he could sue.

In this case, Man requested adequate assurances of B Inc.'s performance upon learning of its financial troubles. These were given in the form of Jack's promises to see Man was paid. After shipping the goods, Man learned that B Inc. was insolvent and that it had defaulted on debts. At this point, Man may treat the contract as repudiated by B Inc. because of B Inc.'s obvious inability to perform it duties.

Jack -- Man may sue Jack for B Inc.'s debt. At issue is the enforceability of an oral guarantee agreement.

Promises to answer for the obligations of others generally fall within the Statute of Frauds., i.e., to be enforced, there must be a writing memorializing the agreement signed by the party to be charged. Here, Jack's promise to answer for B Inc.'s debt was oral.

However, there is an exception to the rule when the guarantor will also receive a pecuniary benefit from the counter-party's performance. Since Jack is the sole shareholder of B Inc., he has a sufficient interest in Man's performance to justify enforcing the promise without a signed writing. Jack benefited from Man's delivery to B Inc.

Truk -- Truk will have no liability to Man. At issue is the power of a shipper to direct the carriers actions after the bill of lading has been negotiated.

Generally, after a carrier has issued a negotiable bill of lading, only a holder by due negotiation has the right to direct the delivery of the underlying goods. By endorsing the bill of lading and delivering it to B Inc., Man negotiated the bill to B Inc. Therefore, Truk was bound to follow B Inc.'s instructions or deliver the goods as originally directed.

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