NEW YORK STATE BAR EXAMINATION
FEBRUARY 1997QUESTIONS AND ANSWERS

Question-One
IN JUNE 1990, Tom, Dick, Mary and Rob incorporated as Photo Corp, the commercial photography business they had founded as a partnership in 1985, in Albany, and to which they had each devoted their full time as photographers. Photo Corp was authorized to issue 200 no par shares of common stock, of which 100 shares were issued as follows: Tom, 25; Dick, 25; Mary, 20; and Rob, 30. No other shares were ever issued. On July 1, 1990, they entered into a shareholders' agreement, the relevant provisions of which read as follows:

"1. No shareholder shall sell, transfer, encumber or otherwise dispose of his shares for a period of ten years from the date of this agreement. Notwithstanding the foregoing, if a shareholder desires to sell his shares, the other shareholders shall purchase the shares at a price which shall be one-half of the price established under paragraph "2" below.

"2. If a shareholder dies, the corporation shall redeem his shares at a price per share of $4,000 a share. The shareholders may, by unanimous agreement, change the price by signing a certificate. The last price so established shall control until a new price is established.

"3. Upon a sale of shares under this Agreement, the selling shareholder shall not engage in the commercial photography business for a period of three years within a fifty mile radius of Albany. "

The value per share was never changed by the shareholders. In 1995, a dispute arose between Rob and the other shareholders, and Rob offered to purchase the interest of the other three shareholders at a price of $5,000 per share. They refused the offer and terminated Rob's employment with Photo Corp. Prior to 1995 at the end of each year Photo Corp had paid substantial bonuses to the four shareholders in proportion to their share ownership. At the end of 1995, substantial bonuses were paid to Tom, Dick and Mary, but no bonus or other payment was made to Rob.

In early 1996, Rob commenced a proceeding to compel judicial dissolution of Photo Corp. Rob's petition alleged that the other shareholders had excluded him from all management decisions and had prevented him from actively participating in Photo Corp's business and from receiving a fair return on his investment. Ten days later, Photo Corp sent Rob a notice that it was electing to purchase Rob's shares at fair value and upon such terms and conditions as the court in its discretion may allow. Photo Corp timely answered the petition, denying all wrongdoing by Tom, Dick and Mary, counterclaiming for damages caused by Rob's alleged wrongdoing, seeking a declaration that Rob was bound by the price set for his shares in the agreement at $2,000 a share, and seeking enforcement of the restrictive covenant. Photo Corp also moved to dismiss the petition on the ground that Rob was the real wrongdoer and that the dissolution proceeding was an attempt to circumvent the buy out provision in the shareholders' agreement as the exclusive method by which Rob could dispose of his shares. Photo Corp's motion papers included affidavits detailing Rob's wrongdoing, including actively engaging in his own local photography business and his inattention to the business of PhotoCorp. Rob timely cross-moved for a stay of the dissolution proceeding and a determination of the fair value of Rob's shares.

Based on the motion papers, the court:

1) Dismissed the petition for dissolution;

2) Ordered that Rob was bound to sell his shares at a price of $2,000 per share pursuant to the shareholders' agreement;

3) Enjoined Rob from engaging in the commercial photography business for three years within a fifty mile radius of Albany.

Were the numbered rulings correct?

4) Rob appealed the orders of the trial court to the Appellate Division, which affirmed with one justice dissenting. How should Rob's lawyer respond to an inquiry from Rob about the possibility of further appeal?

ANSWER TO QUESTION ONE
In judging the merit of a motion to dismiss a petition for dissolution, the court must view the evidence in the light most favorable to the party which is being moved against.

Ruling 1. The court erred in dismissing the petition

The issue is whether a petition for dissolution should be denied if there has been minority shareholder oppression. In a closely held corporation, a corporation with few shareholders where the shareholders are bound to a fiduciary relationship to one another (where reciprocal duties of good faith and fair dealing are owed to one another, a shareholder which owns more than 20 percent of the outstanding shares of a corporation may petition a court to compel dissolution of the corporation if there has been a showing of significant minority shareholder oppression. Here, Rob owns a 30 percent share of Photo Corp and therefore may compel dissolution. Rob is being oppressed because the other shareholders joined together to terminate Rob's employment and he was not paid a bonus where the other shareholders had been. Therefore, Rob may properly move to petition for dissolution.

(2) Rob is not bound to sell his share at $2,000. The issue is whether a right of first refusal may be entertained by shareholders where a minority shareholder is compelled to sell his share. Ordinarily, a right of first refusal, which is a right to repurchase the shares of a selling shareholder before he sells to a third party, is held to be enforceable if it is reasonable as to the amount offered for the shares by the corporation that retains the right. That is, if the corporation offers reasonable value for the shares, by being equal to other offers for the seller's shares or reasonable on its face on the date of sale. In this case, Rob is being forced to sell his shares. Shareholders may not be compelled to sell their shares in a corporation. Therefore, the right of first refusal should not apply to this case. Since Rob has not "decided to sell his shares," but rather has been compelled to do so he shall not be bound by the agreement.

Alternatively, if Rob is found to be a "wrong doer" the shareholders may sue for corporate waste or breach of fiduciary duty. However, on these facts this contention is unsupported.

Photo Corp alleges, as its only basis that Rob is a wrong doer, that he has breached the covenant not to compete. For reasons to be discussed in the next Ruling, this contention is invalid.

(3) Rob should not be enjoined from engaging in the commercial photography business because the covenant not to compete is unduly burdensome and should be considered void. The issue is whether an onerous covenant not to compete is enforceable. As a general rule, a covenant not to compete which is an agreement with shareholders or other parties which have a relationship with an entity (as shareholders, employees) are not permitted to compete with the corporations interest in the future. Such an agreement will be held to be valid if (1) it does not place an unreasonable burden on the covenanting party, (2) it is reasonable as to geography, (3) it is reasonable as to time, (4) it is not unduly burdensome to the public at large. In this case the covenant not to compete is unduly burdensome because it places and undue burden on Rob because he can't work

in his line of work for an onerous period of time (three years). It is unreasonable as to geography, because 50 miles is excessive, it is unreasonable as to time because three years is excessive, and for this reason it should be void and unenforceable.

(4) Rob may be able to petition the Court of Appeals to review the rulings by certiorari -- but is not guaranteed review because only one justice at the Appellate Division dissented. The issue is whether a ruling where one justice of the Appellate Division dissents is directly appealable as a matter of right. A ruling from the Appellate Division is appealable as a matter of right, where it is guaranteed review by the Court of Appeals where two Appellate Division Justices dissent. However, the Court of Appeals may still hear the appeal on certiorari, where the court decides in its own discretion whether it chooses to hear the matter. Here, Rob is not entitled to a guaranty of review because only one justice dissented. However, the Court of Appeals may still hear the case on its own discretion under certiorairi. In conclusion, it should be duly noted the right of redemption by the Corporation is otherwise valid as to the provision regarding the death of a shareholder because it gives fair value for the value of the shares.

The right to change the price is valid as requiring a majority share vote because a majority (51 percent) vote may change a valid shareholders agreement.

ANSWER TO QUESTION ONE

(1) The court was wrong to dismiss the dissolution proceeding because Rob owned more than 20 percent of the outstanding stock, and based on the facts, the other shareholders'/directors' behavior was oppressive to Rob. At issue is whether a 30 percent shareholder is entitled to petition for dissolution based on the oppressive behavior of the remaining directors/shareholders.

Under the BCL in New York, dissolution of a corporation can be brought about in one of three ways. One of those ways is a shareholder who owns more than 20 percent of the outstanding shares in a class of the corporation's stock, and whose interests are being oppressed by the controlling members, to file a petition for dissolution in a court of competent jurisdiction (such as a New York Supreme Court as was done here).

In the present case, the facts indicate that a dispute arose between Rob and the other three people involved in the corporation, the culmination of which was Rob offering to buy the remaining shares of the others. After the others refused to sell, they proceeded to leave Rob out of the customary "bonus" practices. Moreover, in Rob's petition it was alleged that he was being entirely excluded from management decisions. These grounds constitute oppressive behavior against Rob's interests, and Rob's 30 percent interest gives him standing to bring the petition. Accordingly, the petition was on solid ground and should not have been dismissed.

However, the corporation denied all of the allegations in the petition and included affidavits detailing Rob's breach of his fiduciary duties. As a 30 percent shareholder, Rob was obligated to show loyalty to the corporation; and by engaging in a competing business on the side, he breached his duty of loyalty.

If Rob did not file countering affidavits denying his competitive practices, then it is not as clear if the court was wrong in dismissing the petition. However, there does seem to be issues of fact that need to be resolved and dismissing the petition appeared to be in error.

(2) Rob is not bound to sell his shares at $2,000/share. At issue is whether a buyout provision in a shareholder agreement is controlling when one of the shareholders is dismissed.

Under New York Law, restrictions on the sale of stock are construed strictly and are not favored due to the alienation it places on transferring property. However, they will be enforced where there is an agreement specifying the details and the restrictions are noted on the face of the shares.

Clause 1 of the shareholders agreement specifically restricts the sale of shares for a period of 10 years from the date of the agreement (i.e., July 1, 1990 -- July 1, 2000). If a shareholder desires to sell his shares, the agreement states that the other shareholders must buy them at a price of $2, 000/share.

In this case, the facts tell us that Rob was not trying to sell his share, but rather buy the others' shares. Thus, reading the agreement strictly, Rob's situation falls outside the scope of the agreement, and he should, therefore, not be bound to its terms.

Under the BCL, where a shareholder is unhappy with a corporate change, he has a right to be bought out for a reasonable price, and if one cannot be agreed upon, then the court should fix the price. Here, the court should fix the price of Rob's shares if the parties cannot mutually agree to a fair price.

(3) The court properly enjoined Rob from engaging in photography. At issue is whether a restrictive covenant not to compete should be enforced against a dismissed employee.

In New York, restrictive covenants do not exist (i.e., will not be implied) but may exist in an agreement. Here, we have an agreement to the contrary that details the specifics of a not to compete agreement. Covenants not to compete must have (1) a reasonable business purpose; (2) must not be too broad in geographical scope; and (3) must be for only a reasonable time.

Here, the agreement is for only a 50 mile radius for a period of three years, and restricting competition is a legitimate business reason. Accordingly, the terms are not unreasonable, and the agreement should be enforced.

(4) The lawyer should tell Rob that he has the option of appealing to the New York Court of Appeals. At issue is what appellate remedies exist for Rob after the trial court's decision was affirmed at the Appellate Division.

In New York we have a three tiered court system with the Court of Appeals being the court of last resort. They do not have to hear all appeals as of right, but will hear some on certiorari.

Here, Rob has the option of appealing, but will probably not succeed Because there was one dissenting justice, he does have a legitimate ground to base his appeal. However, the Court of Appeals does not have to hear it because it is not an appeal that must be heard as a matter of right.

Moreover, appeal to the U.S. Supreme Court is not available and would fail anyway because of an adequate and independent state ground, and because he hasn't gone to the New York court of last resort.

Question-Two
ON NOVEMBER 10, 1996, Shop, the owner of a retail contractors supply business, sold six sticks of dynamite to Thug. Shop sold Thug the dynamite knowing that Thug, on many previous occasions, had threatened the owners of local businesses by offering them a choice between paying for his "protection" and having Thug destroy their property with dynamite. Later that night, Thug used the dynamite to blow up a truck owned by Cab, an independent trucker who had refused Thug's offer of "protection." Cab's truck, which he used in his trucking business, was

unoccupied and was parked on a public street. Vic, who had just gotten off a public bus at a well lighted and designated bus stop adjacent to where Cab's truck had been parked, was killed in the explosion.

On November 13, shortly after dark, Thug was walking on the public sidewalk in the theater district of the city, an area frequented by drug peddlers. There was nothing in Thug's appearance or in his actions to suggest that he might be engaged in criminal activity. Gum, a rookie detective investigating drug trafficking in the area stopped Thug and, after identifying himself as a police officer, questioned Thug concerning Thug's presence in the area. As they were talking, a plain, sealed envelope which Thug had been carrying in a folded newspaper under his arm, fell to the ground. Before Thug could retrieve the envelope, Gum picked it up, opened it and found that it contained two packets of heroin. Gum then placed Thug under arrest on a charge of criminal possession of a controlled substance and took Thug to the police station. At the time of Thug's arrest, Gum had no knowledge of the dynamiting of Cab's truck or of Vic's death.

On November 12, Shop, who was unaware of the dynamiting, came to a nearby police station and informed Dick, a detective, of the sale of the dynamite to Thug. Dick, who was investigating the dynamiting and Vic's death, had been attempting to locate Thug in order to question him. In the evening of November 13, Dick learned of Thug's arrest by Gum and immediately went to the police station where Thug was being held awaiting arraignment on the drug charge.

Dick informed Thug that he was investigating the dynamiting which had resulted in Vic's death and he then duly advised Thug of all of Thug's legal rights, including his right to counsel. Thug told Dick that he fully understood his rights and was willing to answer any questions. In response to Dick's questions, Thug gave and signed a written confession admitting the dynamiting of Cab's truck, but stating that he had not been aware of anyone in the vicinity and that he had not intended to injure or kill anyone.

(a) What crimes, if any, were committed by:

i) Thug in threatening Cab, and in dynamiting Cab's truck?

ii) Shop?

(b) On motion duly made, is Thug entitled to an order suppressing the use in evidence of:

i) the two packets of heroin contained in the envelope picked up and opened by Gum?

ii) the written confession which Thug gave to Dick?

ANSWER TO QUESTION TWO
(a)(i) In threatening Cab, Thug has committed the crime of extortion.

In dynamiting Cab's truck, Thug has committed the crimes of Arson and Felony Murder of Vic.

(ii) Shop has committed the crime of facilitation.

(b)(i) The two packets of heroin contained in the envelop should be suppressed.

(ii) The written confession to Dick should not be suppressed.

(a)(i) The crime of extortion.

Extortion involves the threatening of an individual with future violence or threat of violence to property if the individual does not pay a certain amount of money.

Here, Thug wanted Cab to pay for "protection" from Thug. If the money was not paid, Thug threatened to destroy Cab's property, i.e., the Cab's truck. Therefore, Thug has committed extortion.

Thug has committed Arson.

At common law, arson was the malicious burning of the dwelling place of another. Dwelling was defined as a place for "overnight" lodging. However, New York State Penal Code has expanded the crime of arson to include automobiles and motor homes. New York no longer defines arson as the burning of a "dwelling." Under New York State Penal Code arson is the burning of property.

Here, Thug intentionally burned Cab's truck (i.e., a motor vehicle). This burning constitutes arson pursuant to New York State Penal Code. Therefore, Thug has committed the crime of arson.

(iii) Thug has committed the crime of felony murder.

Pursuant to New York State penal statute causing the death of a person during one of several enumerated felonies constitutes felony murder. The enumerated felonies are burglary, robbery, arson, kidnapping, escaping confinement, rate or sodomy first degree.

In the instant case, Vic was killed when the dynamite placed in Cab's truck exploded. Here, Thug committed the crime of arson and Vic, an innocent bystander, was killed. Therefore, Thug has committed felony murder.

If a person dies during the commission of a felony, the intent of the perpetrator of the felony is irrelevant. All that is necessary is that an innocent was killed during the commission of the felony and the perpetrator intended to commit the felony.

In the present case, Thug intended to destroy Cab's truck with dynamite and Vic, an innocent person was killed. Therefore, regardless of whether Thug knew that anyone was in the vicinity or that he intended to kill anyone, he did kill Vic during the commission of a felony crime, arson. Subsequently, Thug committed felony murder.

Pursuant to the 4th and 14th amendment of the U.S. constitution and New York State law, a warrant is needed for a search and seizure when a person has a reasonable expectation of privacy in the area. However, there are circumstances wherein a warrant is not necessary. These circumstances are searches at the border, an automobile search consent, hot pursuit, search incident to a lawful arrest, plain view and an emergency situation.

A law enforcement officer may also stop a person and make inquires if there is "founded suspicion that criminality was afoot." However, the stop must not be arbitrary and capricious.

Here, because of the nature of the neighborhood, Gum may stop Thug just to inquire without an unreasonable delay. Therefore, the stop was lawful.

As stated previously, when a person has a reasonable expectation of privacy in an area or item the police need a warrant before they can search that area unless anyone of the exceptions mentioned before exist. Such as plain view, search incident to a lawful arrest, automobile search, consent, etc.

Here, although the stop of Thug was within the guidelines of New York State penal law statute, an unreasonable search occurred. A plain, sealed envelop fell from Thug's person to the ground. Since the envelope was sealed, Thug had a reasonable expectation of privacy in the envelope and its content. Therefore, Gum should not have opened the envelope without Thug's consent.

Therefore, Gum violated Thug's 4th and 14th Amendment Right against unreasonable search and seizure.

If property is abandoned then the police may search it without a warrant because the owner of the property has relinquished ownership of the property and thereby has no reasonable expectation of privacy in the abandoned property. Here, there is no evidence that Thug abandoned the sealed envelope. The facts stated that the envelope fell from under Thug's arm. Therefore, the search by Gum was unreasonable.

Once formal judicial proceedings have started, and individual is entitled to counsel. In New York when an arrest warrant has been issued, the right to counsel attaches.

If a defendant is represented by counsel in a case and the police are aware of that fact, the defendant cannot waive his right to counsel unless counsel is present. However, if the defendant is represented by counsel in an unrelated case, the police may question the defendant once they have informed him of his Miranda rights.

Miranda rights are guaranteed before custodial interrogation begins. A defendant must voluntarily waive his/her right to counsel and voluntarily speak with the police.

Here, Thug was given his Miranda rights and Thug acknowledged that he understood his rights. Thug's confession was voluntary.

Therefore, the confession should not be suppressed.

Thug's confession was separate from the illegal arrest, therefore, it is not the fruit from a poisonous tree.

ANSWER TO QUESTION TWO
(a)(i) Thug is guilty of extortion in threatening Cab.

The issue is what constitutes extortion. Extortion consists of (1) intent to take property from another, and (2) with the threat of future harm.

Because Thug intended to take protection money from Cab, and because he threatened to destroy Cab's property if Cab didn't comply, Thug is guilty of extortion.

Thug is guilty of arson in the first degree with respect to blowing up Cab's truck and is also guilty of murder in the second degree.

Arson in the first degree consists of (1) the intentional burning of property, (2) with knowledge someone was inside and would be harmed or knowledge one should have had of such person, and (3) using an incendiary device.

Thug intentionally blew up Cab's truck next to a bus stop where people were likely to congregate and used an incendiary device, and thus is guilty of first degree arson.

Murder in the second degree consists of (1) killing, (2) intentionally, or with a reckless and depraved heart, or during the commission of an enumerated felony.

Because Thug killed Vic during arson, an enumerated felony, Thug is guilty of second degree murder.

(a)(ii) Shop is guilty of criminal facilitation.

The issue is what constitutes criminal facilitation.

Criminal facilitation is the (1) aiding, abetting of a crime, (2) with knowledge of, but not intent, to commit the crime. Withdrawal is permissible if the defendant (accused of facilitation) both withdraws and makes a substantial effort to stop the crime.

Here, because Shop aided Thug by selling him dynamite with knowledge of what Thug intended to do with it, Shop is guilty of criminal facilitation. Whether or not he could be deemed to have withdrawn, because he told the police the next day, is a close question, but probably his withdrawal was insufficient, since he had already sold the dynamite, and he waited a day to inform the authorities.

(b)(i) Thug should be allowed to suppress the packets of heroin.

The issues are where on the scale of police authority fell Gum's questioning of Thug, and what may be used as evidence pursuant to a "stop and frisk."

Police may make a "request for information" anytime except on "whim or caprice," and a "stop and inquire" if they have a "founded suspicion that criminal activity is afoot," and a "stop and frisk" if they have "reasonable suspicion" the defendant has or is committing a crime.

Because Thug had done nothing to give Gum "reasonable suspicion" that Thug had or was committing a crime, at most he was allowed to make a "stop and inquire," in which case Gum had no authority to search anything on Thug's person, such as the envelopes containing the heroin. A "stop and inquire" allows only a "brief detention" for questioning, after which the suspect must be released.

Even assuming that Gum had grounds for a search incident to a "stop and frisk," only weapons or objects that could have appeared to be weapons are admissible as evidence; the envelopes don't fit that description and thus Gum had no authority to seize them.

(b)(ii) Thug's confession is admissible.

May a confession be admitted where the suspect has properly waived his Miranda rights and confesses to a crime other than the one for which he is in custodial interrogation. Yes.

Thug, because he was not represented, or known to be represented, by an attorney, made a valid waiver of his Miranda rights.

Because his confession concerned a different crime than the one for which he had been arrested, his confession was admissible. If it had involved the same crime as the one for which he had been unlawfully detained (the heroin) then his confession would have been inadmissible as fruit of the poisonous tree, stemming directly from the unlawful arrest.

Question-Three

NEW YORK STATE BAR EXAMINATION
FEBRUARY 1997QUESTIONS AND ANSWERS

Hal and Win, after five years of marriage, agreed to separate. As long-time friends of yours, they have asked you to prepare a separation agreement. They have not consulted or retained other counsel. Hal and Win have agreed on most of the terms to be embodied in the separation agreement, including maintenance payable to Win at the rate of $2,000 per month. They have agreed that Win is to have custody of their only child, Peg, age 4, but they have not been able to agree on the amount of child support.

Hal's annual income is $60,000, but he believes that as a result of his employer's downsizing, his income may be substantially reduced in the future. Because Hal suffers from a rare kidney ailment, he has large ongoing medical expenses not covered by his health insurance. Such expenses approximate $7,000 annually. Win is not presently employed, but she is qualified as a secondary school teacher and could probably earn at least $30,000 annually.

Hal and Win have asked you the following questions:

a) Can you represent both of them in preparing the separation agreement without jeopardizing the validity of the agreement?

b) How should the appropriate amount of child support for Peg be determined?

c) If the agreement contains a clause requiring arbitration of disputes with respect to

i) maintenance, and

ii) child custody and support, will the court enforce the clause with respect to those matters?

d) With respect to maintenance and child support, what will be the consequences of having the agreement provide either that it

i) merges into the judgment of divorce, or that it

ii) survives the judgment of divorce.

ANSWER TO QUESTION THREE
(a) Joint Representation.

Likely, I can jointly represent both parties assuming that they can agree to the material terms of the agreement. A separation agreement is valid if, among other things not relevant here, it is freely made. The fact of joint representation, in the absence of other facts indicating my bias or any concealment or wrongdoing, should not, standing alone, deprive the agreement of enforceability. The fact of joint representation means that, so long as I can represent them both (discussed below) parties will receive legal advice. Thus, the agreement should be enforceable.

If the parties agree on all material terms, or come to such an agreement on a relatively amicable basis, I should be able to prepare the agreement. The issue is whether a lawyer can represent clients jointly in light of a potential conflict. A lawyer cannot represent parties in a potential conflict without full disclosure. Assuming they consented after such disclosure and the conflict was not actual, likely, I could represent them.

(b) Child Support.

Child support is determined by the best interests of the child according to factors now embodied in a chart referenced in the statutes. The chart considers income of the parties, including ability to produce income in the future, sickness and other expenses also would be considered. Thus, the exact amount of child support could be determined with reference to the income of the parties (60,000 and 30,000). Also, the facts that Hal may have a diminished income and has medical expenses also should be considered.

(c) Arbitration.

The arbitration provision would be enforced with respect to the maintenance payments. The issue is the enforceability of arbitration provisions in the domestic relations area. Arbitration is favored in New York. The provision generally is enforced in the context of matrimonial law so long as no fraud was involved in its procurement. Here, the provision likely would be freely entered into by both parties and thus, it should be enforced.

The arbitration provision may not be enforced with regard to child custody and support. Although New York favors arbitration, matters respecting children may not be enforced because the child is not a party to the separation agreement and matters concerning the welfare of children likely should be determined by the court.

(d)(i) Merger

The aggrieved spouse only can sue to enforce the decree assuming that the agreement merges into the decree. New York law assumes that a separation decree will not merge. If it does, then the contract rights are no longer present and the terms of the agreement likely will be incorporated in the decree. Importantly, the decree can be modified by showing a substantial change in circumstances. Hal will appreciate this lesser standard in light of the future uncertainty regarding his employment.

(ii) Survival

The effect of survival is that an aggrieved party can sue on either the decree or the agreement. This gives the party two sets of rights. The agreement cannot be modified, however, absent severe hardship to one party. This makes it more difficult to modify.

As for the child support issue, likely the court could alter the obligations of the parties based on a change of circumstances/best interests of the child standard. The child is not a party to the agreement and the court could alter obligations regardless.

ANSWER TO QUESTION THREE
(a) I could represent both if I divulged the possible conflict of interest.

(b) Child support should be calculated based on the Uniform Child Support Act.

(c) Court will enforce the clause with respect to maintenance but not custody.

(d) Party has a greater "modification" burden if the agreement "survives" the divorce.

(a) The issue is whether a conflict of interest is present in representing both parties in a matrimonial affair. Generally, it is not proper to represent both sides of litigation "unless" both parties are given notice of the conflict of interest, they both agree to be represented by the same attorney, and the attorney's judgment will not be compromised in any way by the representation

of both parties. Because of the extreme delicate nature of a matrimonial cause of action, an attorney, as a basic rule, should never represent both sides. Where the representation only involves an execution of a separation agreement and the parties have agreed to most of the terms of the agreement then dual representation is allowed. Thus, as an attorney, I could represent both parties without jeopardizing the validity of the agreement, but if a conflict should arise in the future, I should immediately advise both clients of the conflict and ask them to seek separate counsel.

(b) The issue is how child support is determined in New York. New York follows the Uniform Child Support Act, in which the parties combined income is multiplied by a percentage (17 percent for one child, 25 percent for two children, 29 percent for three children, 31 percent for four children, and 35 percent for five or more children) and applied to each parties income proportionately. New York used to set a limit of $80,000 as the amount that could be multiplied by the percentage but now a court must give "explicit reasons" why it did not apply the formula to income over $80,000 or the appellate court will over turn the award. Here, because the parties have only one child then their combined anticipated income ($90,000) should be multiplied by the 17 percent figure and each party would contribute proportionately to that amount based on his proportionate amount of the entire income. The parties could also "opt out" of this formula but if they do so they must state the amount that would be awarded under the statutory formula and give reasons why they chose not to abide by the formula. Also, Hal may not be able to reduce his child support amount by the amount of his medical expenses because such awards are only reduced by social security taxes, child support or alimony from a previous marriage, or certain income taxes.

(c) The issue is whether matrimonial matters can be decided by arbitration. An arbitration clause which entitles parties to a speedy resolution of their dispute in an inexpensive manner by a non-judicial expert is strongly favored by New York courts and the courts won't generally interfere with such matters. A court will only involve itself, in matters submitted to arbitration, with issues of (1) statute of limitations, (2) whether there was an enforceable agreement to arbitrate and the scope of that agreement, (3) intervening if the arbitration tries to award punitive damages or attorney fees, setting aside an arbitration award on the grounds of: (a) fraud of the arbitrator, (b) arbitration procedures were not properly followed, (c) bias of the arbitrator, (d) the arbitration award lacked rationality, (e) the arbitrator exceeded his authority, or (f) service of the demand to arbitrate was not properly made (it can't be made by ordinary mail). New York courts will also intervene on grounds of public policy and prevent certain disputes from being submitted to arbitration regardless of whether an arbitration clause exists. Such matters that a court will not allow an arbitrator to hear are illegality, capacity, probate of wills and matrimonial matters. In the area of matrimonial matters, however, a court will allow an arbitrator to hear issues of maintenance and support but "will not" submit child custody and visitation matters to an arbitrator because of the delicate nature of such matters and the need for judicial inquiry into the "best interests" of the child including: the child's wishes, whether a previous custody award was based on a full hearing, a reluctance to split up siblings, lifestyles of the parents, and incidents of domestic violence. No single factor is controlling in the area of child custody and a court will weight all of these factors in determining the "best interests" of the child. Thus, in this case, the court would enforce the clause with respect to arbitration of maintenance but would not enforce it with respect to child custody.

(d) The issue is whether the standard imposed for modification of support or maintenance is increased if the agreement "merges" or "survives."

If an agreement merges into a divorce degree then it ceases to exist and the party can then only look to the divorce judgment itself for enforcement. When a separation agreement survives the agreement, however, then a party can enforce the terms of that agreement even after a judgment of divorce. There are certain procedural advantages with regard to enforcement of a divorce judgment as opposed to a separation agreement. In enforcing a judgment, a party is allowed to

get: (1) a wage deduction up to 60 percent of the other's income for arrears in maintenance and support, (2) a contempt order issued for a willful violation if the party had the means to support, (3) a bond posted for future payment of alimony and support, and (4) a suspension of the other party's professional or trade license. If an agreement survives the divorce judgment, however, then these enforcement remedies would also be available to a former spouse.

The other major consequence that a merger or survival determination will have is in the area of "modification" of maintenance and arrears. If the agreement merges into the divorce judgment and does not survive then in order to obtain a later modification of child support the party must show a "change in circumstances" but if the agreement "survived" then the burden on the party seeking modification would increase and he/she would have to show a "substantial" change in circumstances. Likewise, in the area of maintenance, if the agreement merged then a former spouse would have to show a "substantial change in circumstances" of the parties incomes and lifestyles. But if the agreement survived then on any post 1980 (equitable distribution inception) separation agreement, the party seeking modification must show "extreme hardship" which is a greater showing than a "substantial change in circumstances" but not as high as the pre-1980 showing of "in danger of becoming a public charge."

Question-Four

IN NOVEMBER 1993, Jane, the owner of a stationery store, entered into a written contract with Paul, a greeting card manufacturer. The contract provided that, commencing January 1, 1994, Paul would be the exclusive supplier of greeting cards for Jane's store for the years 1994, 1995 and 1996, and that Jane would pay Paul 60 per cent of the established retail price for each card ordered by Jane. The contract also gave Jane an option to extend the contract for two additional years on the same terms and conditions.

In 1994 and 1995, Jane's orders for greeting cards resulted in $2,000 per month in profit to Paul. In November 1995, Dan, a competing greeting card manufacturer, visited Jane and attempted to convince her to order all her greeting cards from him. Dan had previously sold cards to Jane under an exclusive supply contract from 1991 to 1993. Jane disclosed to Dan all the terms of her contract with Paul, including her right to extend for two years, and stated that she was satisfied with her contract with Paul. Thereafter, Dan began to visit Jane on a regular basis and, at each meeting, Dan offered Jane successively lower and lower prices on greeting cards. At a meeting on December 2, 1995, Dan offered to sell cards to Jane at 50 per cent of the established retail price if she would cancel her contract with Paul and enter into a contract with Dan for a term of two years commencing January 1, 1996. At this meeting Dan also said, "Paul is crooked, he cheats his customers and will probably be indicted before the end of the year."

At the end of this meeting, Jane agreed to cancel her contract with Paul and to sign a contract with Dan for the years 1996 and 1997. On December 9, 1995, Jane and Dan entered into a written contract containing all of the terms which Dan had offered. On December 13, 1995, Jane wrote to Paul stating that she was terminating her contract with him as of December 31, 1995.

In January 1996, having learned of Dan's actions, Paul duly commenced an action against Dan by service of a summons and complaint, setting forth causes of action for (1) tortious interference with contractual relations between Paul and Jane for the year 1996, (2) tortious interference with prospective contractual relations, relating to Jane's option for the years 1997 and 1998, (3) defamation of Paul by Dan, and (4) prima facie tort against Paul by Dan. Dan timely served an answer which denied the allegations of the complaint and asserted two affirmative defenses. With regard to Paul's cause of action for tortious interference with contract, Dan asserted the defense of economic justification based on his status as one of Paul's competitors. With regard to Paul's cause of action for defamation, Dan asserted a qualified privilege arising out of his business relationship with Jane.

Upon affidavits establishing the foregoing facts, Paul moved for summary judgment against Dan: (1) on his cause of action for tortious interference with contractual relations, seeking damages of $24,000; (2) on his cause of action for tortious interference with prospective contractual relations, seeking damages of $48,000; (3) on his cause of action for defamation, seeking damages of $1, 000,000; and (4) on his cause of action for prima facie tort, seeking damages of $1,000,000. Dan thereafter duly cross-moved for summary judgment against Paul seeking to dismiss the complaint in its entirety as insufficient as a matter of law.

After Paul's motion and Dan's cross-motion were argued before the court, the court (1) granted summary judgment to Paul on his cause of action for tortious interference with contractual relations and awarded him damages of $24,000; (2) granted summary judgment to Dan dismissing Paul's cause of action for tortious interference with prospective contractual relations; (3) granted partial summary judgment to Paul on his cause of action for defamation, scheduling a hearing to determine damages; and (4) dismissed Paul's cause of action for prima facie tort.

Were the court's rulings correct?

ANSWER TO QUESTION FOUR
(1) The court was correct in granting Paul's motion for summary judgment on his cause of action for tortious interference with contractual relations and awarding him $24,000. The issue is whether Paul's case presents no triable issue of fact requiring a trial.

A court may grant summary judgments when based on all the evidence, there is no triable or genuine issue of fact requiring a trial. If there is a genuine issue in dispute, a trial is warranted.

The issue is whether Paul has stated a cause of action to which there are defenses. The answer is yes.

To state a prima facie case for intentional inference with contractual relations, Paul must show (1) there was a contract, (2) Defendant knows about the contract, (3) Defendant induces another party to breach the contract, and (4) a breach occurs.

(1) Here, there was a valid contract because Paul and Jane entered into a written agreement wherein Paul agreed to be an exclusive distributor and Jane agreed to pay Paul 60 percent of the established retail price of each card. This was their consideration (bargained for legal detriment). Since there was a valid contract containing offer, acceptance and consideration, there was a valid contract.

(2) Dan knew about Jane's contract with Paul because she disclosed all the terms to him.

(3) Dan induced her to breach the contract because he kept visiting her on a regular basis and kept offering her a better deal.

(4) The inducement caused her to breach because Jane finally accepted Dan's lower offer and breached her contract with Paul on December 31, 1995.

Defendant has no defenses. The issue is whether defendant has a valid defense which would allow him to defeat a summary judgment motion.

New York does recognize a defense to interference with contractual relations, but it does not apply to competitors. Specifically, the cause of action is designed purposely to prevent

competitors from inducing a breach of contract. Therefore, defendant has no valid economic justification defense.

The court can properly award Paul $24,000 in damages. The issue is whether there is a genuine issue of fact requiring a trial on the issue of damages.

Here, the contract was breached exactly one year early, on December 31, 1995. For the prior two years, Paul was earning a profit of $2,000 a month. The damages are easily ascertainable (2,000 per month x 12 remaining months = $24,000). Since there is no issue on damages requiring a trial, the court properly granted summary judgment and awarded damages.

(2) The court was correct in dismissing Paul's cause of action for tortious interference with prospective contractual relations and granting defendant summary judgment.

The issue is whether interference with "prospective" contractual relations is a recognized cause of action.

New York does recognize such a tort. Even though Paul was potentially injured because the breach deprived him of having Jane exercise her option for an additional two years, there is no certainty that she would have exercised the option and therefore, damages would be too speculative. Therefore, the court correctly dismissed the action.

(3) The court correctly granted partial summary judgment and correctly ordered a hearing on damages. The issue is whether Paul has stated a cause of action for defamation, which defendant has no defenses to, so it need not proceed on a full trial. The summary judgment standard from previous answer applies here. There is no genuine issue of material fact warranting a trial on the defamation claim, but there is on the issue of damages.

Defamation requires Paul prove: (1) a defamatory statement (untruth about Paul), (2) published to another person, and (3) damages. Since Paul is a private figure, he need only prove negligence on the part of defendant.

Here, defendant made a defamatory statement because he called P a crook and said he cheated his customers. This was published by telling Jane. Damages are presumed when it falls into a slander per se category. Slander is spoken defamation and here it is per se because the defamatory statement adversely affects Paul's business reputation. Paul has made out a prima facie case of defamation.

Defendant has no defense to the defamation. The next issue is whether defendant's statement was made for a socially useful purpose as to be a qualified privilege.

A person has a qualified privilege to make non-negligent statements about someone if for a socially useful purpose, such as providing information to a bank or an employer. However, the privilege does not extend to malicious statements.

Here, defendant has no qualified privilege because his statement was made for his own advantage, to induce Jane to employ his services rather than Paul's and thus served no socially useful purpose other than to harm Paul. The facts do not show any basis he had for making the remarks, so he seems to have acted in reckless disregard for the truth -- maliciously. Therefore, the qualified privilege is no defense.

The court will have to order a hearing on damages because while Paul did not have to plead them to state a prima facie case, evidence must be presented to the jury for them to determine the extent of Paul's damages.

(4) The court was correct in dismissing the cause of action for prima facie tort. The issue is when that cause of action can be raised.

A prima facie tort can only proceed if there is no other tort can only proceed if there is no other tort on which to base a claim. Since Paul has already sued for intentional interference with contractual relations, he has already stated a cause of action for relief. Thus, the court properly dismissed the prima facie tort claim.

ANSWER TO QUESTION FOUR
(1) The court correctly granted Paul's motion for summary judgment on his cause of action for tortious interference with contractual relations.

When considering a motion for summary judgment, the court looks to the evidence as a whole to determine whether there exists a triable issue of fact. If the court determines that there is not a factual issue in question, the court may grant summary judgment.

Paul's motion for summary judgment was properly granted here because he has proven his case by establishing the existence of the necessary elements of the tort of inference with contractual relations and because Dan has no defense.

Tortious interference with business relations requires (a) a valid contract between the plaintiff and a third party, (b) knowledge of the contractual relations by the defendant, (c) intent on the part of the defendant to induce the third party to breach its contract with the plaintiff, (d) breach of that contract, (e) as a result of the defendant's efforts.

(a) Paul and Jane had a valid contract. The nature of that contract was a three year requirements contract whereby Jane was to purchase all of her required stock of cards from Paul.

(b) Dan was aware of the existing contract between Jane and Paul because Jane had told him.

(c) Dan made repeated visits to Jane in order to convince her to purchase all her greeting cards from Dan. If Jane were to purchase any cards from Dan, she would be in breach of contract with Paul. Therefore, Dan clearly had the intent to cause a breach.

(d) Jane breached her contract by her repudiation of it in writing sent to Paul in December 1995 when there was still one year remaining on the requirements contract.

(e) Jane breached her contract because Dan offered her a lower price per card if she breached her contract with Paul and entered into an exclusive requirements contract with Dan. The defamatory statements made by Paul probably also induced Jane to breach.

Since all five requirements for the tort are met, the only consideration left to be made is whether Dan has a valid defense.

Dan properly moved for summary judgment. When a motion for summary judgment is made, it can be responded to do by a cross-motion, a pleading asserting that the motion should be denied, or silence. Dan chose to move for summary judgment.

Dan has no defense. In his answer Dan asserted an affirmative defense to this cause of action, that economic justification existed because he was Paul's competitor. An action for tortious interference with contractual relations has only one affirmative defense, and that is privilege. A

person who is in a privileged relationship with the third party (the breaching party) is privileged to make statements to induce breach. Examples of privileged persons are a parent or a spouse or an attorney. An economic competitor is not one of the privilege group. Therefore, Dan has no defense.

The court properly granted $24,000 in damages. The remedy for tortious breach is the amount of economic loss caused by the breach. In a requirements contract, previous amounts ordered and payments made are an appropriate measure of future performance. For the first two years of their contract, Jane ordered cards in quantity that consistently provided Paul $2,000 per month profit. It is reasonable to assume that had Dan not induced Jane to breach, she would have continued in this manner for the year remaining on the contract. Therefore, the award of $24,000 adequately represents Paul's loss ($2,000/month x 12 months= $24,000).

(2) The court properly granted Dan's motion for summary judgment dismissing Paul's cause of action for tortious interference with prospective contractual relations.

When considering motion for summary judgment, the court determines whether there is a triable issue of fact. If a plaintiff cannot make his prima facie case, summary judgment is properly awarded to the defendant

Paul has no identifiable future relationship with Jane because his contractual relationship was to terminate at the end of 1996. While Jane had an option to renew the contract, Paul had no reasonable ground to believe renewal to be a certainty. Jane was satisfied with her contract but that does not prove a future intent to continue as such. In fact prior to the contract with Paul, Jane had had a three year contract with Dan, she might not have desired to continue her contractual relationship with Paul after the end of the three year contract. If the original contract had stated that Jane would renew as long as she was satisfied, Paul might have had an interest because then Jane would not be able to renew or terminate the relationship at will. However, that is not the case so Paul cannot prove his prima facie case and his motion for summary judgment should be denied and Dan's motion for summary judgment should be granted and the cause of action dismissed. It should be noted that had Dan remained silent on Paul's motion, the trial court would still have had the power to grant summary judgment in favor of Dan. In fact, the court may make a summary judgment without motions by either party.

(3) The court correctly granted partial summary judgment to Paul on the charge of defamation.

Paul has proven a prima facie case for defamation. The elements required are (a) a defamatory statement made by the defendant, (b) publication by the defendant to a third party, (c) damages. Dan has made a slanderous statement about Dan. (Slander is an oral defamatory statement). The statement made by Dan falls within one of the four slander part categories: (1) impugning the business integrity or skill of the plaintiff, (2) statement of unchastity of an unmarried woman, (3) statement that plaintiff had a loathsome social disease, or (4) attributing to the plaintiff a crime of moral turpitude. Because the statement was about the honesty or rather dishonesty of Paul in his business dealings it is slander per se and special damages need not be proved. Therefore, Paul has made his prima facie case.

The next issue when considering summary judgment is the availability of any defense. Dan has raised the defense of qualified privilege arising from his business relationship with Jane. Dan does not quality for this privilege. the privilege only exists when it is a relationship that requires the defamatory statement to be uttered for the benefit of the plaintiff, i.e. when an employer asked for a reference makes representations about the plaintiff, former employee, or when a credit bureau releases information relating to the plaintiff's credit worthiness. Here, Dan is not within a qualified privileged relationship so his defense fails and summary judgment should be entered against him.

Note, Dan would have been able to litigate the issue of truth of the statement which would have avoided summary judgment. However, truth is an affirmative defense to defamation and as it was not raised, is considered waived.

The court properly reserved the issue of damages for the jury. Even though the defamation is slander per se and special damages (economic loss) need not be proved, and damage is presumed, the amount remains an issue and should be determined by a jury.

(4) The court properly dismissed Paul's cause of action for prima facie tort.

New York recognizes a special tort of prima facie torts. The elements are (1) tortious conduct (2) resulting in economic loss (3) that does not fall within a traditional tort category. The prima facie tort is a fall back position and can be plead as an alternative to a traditional tort (except when the conduct does fall under a traditional category but is time barred). However, once a case has been made out for another tort, the cause of action for prima facie tort must be dismissed. Therefore, since the court not only found the applicability of a traditional tort -- interference with contractual relations -- but has awarded summary judgment in favor of the plaintiff on that tort, the court properly dismissed the action for prima facie tort.

Question-Five
In June 1994, Tess, a widow residing in Suffolk County, duly executed her will. The will, which had been prepared by Tess's attorney, Laura, included the following provisions:

"1. I revoke all wills previously made by me.

2. I give to my sons, Andy and Bud, the sum of $10,000 each.

3. I give to my daughter, Carol, the rest and residue of my estate, in trust for her until she reaches the age of 21 years, at which time the entire proceeds of the trust shall be paid over to her.

4. I nominate my good friend, Ellen, as Executor of this will and Trustee of the trust created in paragraph 3 above.

5. My Executor/Trustee shall not be held liable for any failure on her part to exercise reasonable care, diligence and prudence in the administration of my estate or the residuary trust created herein.

6. Anyone who shall contest this will for any reason whatsoever shall forfeit any right that may have accrued to him or her under the provisions of this will."

Under Laura's supervision, Tess signed the will in the presence of Laura's secretary, Sally, and her partner, Pat. Sally and Pat also signed the will as subscribing witnesses.

Tess died in July 1996, survived by Andy, age 25, Bud, age 17, and Carol, who was then 20 years of age. Tess's net distributable estate consisted of $50,000 worth of readily marketable equity securities and a bank account with a balance of $100,000. Ellen promptly offered Tess's will for probate. Andy, and Greg as guardian for Bud, timely filed objections to probate, contending that Tess had lacked testamentary capacity at the time the will was executed. At the October 1996 trial of Andy and Bud's objections to probate, Sally testified that Tess had acted strangely and irrationally at the time the will was executed. Andy's attorney then asked Sally whether, in her opinion, Tess was mentally competent when she executed the will. Laura objected to the

question, and the court (1) sustained the objection. Pat later testified that Tess had acted rationally at the time the will was executed.

Bud's attorney then sought to examine Ellen with respect to her observations of Tess's behavior during the few weeks immediately before the will was executed. Laura objected on the ground that Ellen was not a subscribing witness to the will and therefore not competent to testify at the proceeding. The court (2) sustained the objection.

At the conclusion of the trial, the court found that Tess had been mentally competent when she executed the will and admitted Tess's June 1994 will to probate. The court further ruled (3) that, because Andy and Bud had contested the probate proceeding, paragraph 4 of Tess's will validly precluded any distribution from Tess's estate to Andy and Bud.

In November 1996, Ellen asked her friend, Fred, how she could earn a quick profit for the estate in the six months remaining before Carol's 21st birthday by investing the cash from the bank account. Fred, a math teacher who had successfully invested a small amount of his own money in the stock market, told Carol he was sure that Q Co's stock would double within the next six months and advised her to invest in Q Co stock. Based upon Fred's advice, Ellen withdrew $100, 000 from the bank account and used it to purchase Q Co stock.

One month later, when Carol learned of Ellen's actions, Carol investigated and found that Q Co's stock had become almost worthless. Carol consulted you, her attorney, to ask whether Ellen could be held personally liable for the estate's losses on the Q Co investment.

Were the numbered rulings (1), (2) and (3) correct?

What advice will you give Carol in response to her inquiry?

ANSWER TO QUESTION FIVE
Ruling 1, that Sally could not give her opinion as to whether Tess was competent or not, was incorrect.

Sally was a witness to Tess's signing her will, thus, she is competent to testify as to the Testator's acts and behavior related to the signing. Her statements that Tess acted strangely and irrationally both are permissible opinions of a lay person, as is her statement as to whether Tess seemed competent. A lay person may testify as to their personal knowledge and it was within Sally's personal knowledge whether Tess seemed competent. (It is similar to a statement: he seemed angry and then describing the person as red faced and yelling). It is often misstated that one may not testify to an ultimate issue, but that is incorrect, and the fact that Sally is a nonexpert is also irrelevant. She is not giving an expert opinion, but relating whether, based on her personal knowledge, Tess was competent. Andy's attorney should lay a foundation for the statement with questions going to Tess's understanding of what she was signing and the like.

Objection 2 should have been overruled. Ellen and Tess were apparently close friends. In seeking testimony as to Tess's competence, anyone with personal knowledge may testify including Ellen the executor. Ellen may relate incidents of behavior or even statements not offered for their truth to explore Tess' competence (for example, Tess said she was Queen Elizabeth or Tess hopped on one leg for a week saying she was a stork). Ellen's subscribing witness status is irrelevant as to her competence to testify as to Tess's mental competence. The objection was improperly sustained.

Objection 3, ruling that Andy and Bud improperly contested the will is partially incorrect. Will contest clauses are valid in New York. However, contests in the following situations are not held against the contestors: (1) where filed and then voluntarily withdrawn, (2) where there was probable cause to contest, (3) where action is brought on behalf of a minor or incompetent, (4) where the contents of the will itself is not contested, but the formalities are contested.

Andy falls into the category of not contesting with probable cause. If the court finds probable cause, his gift would not be void. Here, however, the court did not apparently find that he had probable cause to contest. Therefore, the ruling to Andy is correct, but Bud's remains incorrect. Bud, at 7, is a minor. Greg, his guardian, brought the action on Bud's behalf. When a will is contested by the guardian, representative, or committee on behalf of an infant or incompetent, that contest will not be held against the infant or incompetent because presumably they had no say in deciding to contest. This is really a public policy exception -- such that these categories of persons are deemed incompetent to make such decisions themselves and so won't be held responsible if their guardians determine to contest.

Bud will receive his 10,000. Andy's gift will lapse, and fall into the residues to Carol.

As to Ellen, I'd suggest she hire an attorney. Ellen will be liable for the loss to the estate. As executor, Ellen owes a fiduciary duty to the beneficiary of the trust, Carol.

A valid trust was created. There was a settlor with capacity (as determined by the court) and intent, a trust res, the residue, a lawful purpose, an ascertained beneficiary, named trustee.

Ellen holds legal title to the properties and Carol has a beneficial interest. Ellen's duties as trustee include a duty of loyalty, prudent investment, no self-dealing. Here, the prudent investment duty was breached. Outcome or results are not determinant. A trustee that seeks investment advice must however do so prudently. Taking investment advice of a math teacher/friend is not prudent, not what a reasonable investor would do. As trustee, Ellen will be held personally liable for her torts and breaches of trust. While a trust document can waive a trustee's liability for ordinary negligence, here Ellen's conduct will likely rise to the level of gross negligence. She did no research on the stock, with only 6 months left, safety was an important factor to consider, and she sought no other advice. While risky purchases may be permitted considering the overall investment scheme, the amount invested in securities was small, the bank account was the larger and more stable balance. The court will look to the overall investment strategy and likely find Ellen grossly negligent, thus, personally liable to Carol.

ANSWER TO QUESTION FIVE
1. The court correctly sustained Laura's objection to the attorney's inquiry of Sally (Laura's secretary) about Tess' mental competency.

The issue is whether a lay witness who was subscribing witness to a will may properly testify as to a testator's mental capacity. The EPTL requires that a person be an adult and be mentally competent at the time of executing her will. One indication which the court will use as a rebuttable presumption of a testator's mental capacity is whether she knew the extent of her estate (wealth/assets) and her bounty (issue/distributees). The facts do not indicate that testator was confused about either. She did not convey things she did not own, and she mentioned all of her intestate distributees (those who would take if she died without a will) as beneficiaries in the will. However, the problem with the question arises not with respect to testator's capacity, but whether a secretary may properly be asked to make an ultimate determination as to a person's mental competency. The answer is clearly no. The attorney could have properly asked Sally if Tess knew

her children's names and how many children she had without prodding, but she could not properly determine mental capacity.

2. The court improperly sustained Laura's objection asserting that Ellen was not competent to testify at the proceeding.

The NY EPTL provides that an executor is a proper party to a probate proceeding and as such, she is competent to testify. At issue is whether a party may properly testify about specific conversations or statements of a decedent at trial (Dead Man's statute).

The EPTL provides that a person may not properly testify about statements of the decedent with respect to the will, unless they were the res gestae (spontaneous utterances) of the person while executing the will. If Ellen were present during the execution, she could properly testify as to such statements.

3. The court's ruling #3 is correct as to Andy, improper as to Bud.

At issue is whether a beneficiary who breaches a no-contest clause is barred from inheriting under the will.

Paragraph 6 of the will is a no-contest clause (in-terrorem clause) which indicates that the testator wants to discourage needless litigation regarding the validity of the will's execution or the testator's capacity.

The general rule is that a no-contest clause is breached by such litigation, and if the party instigating the litigation loses, he forfeits his share under the will and under intestacy (e.g. if there were no residuary clause). If the party wins, the will is not probated and the NCC is declared invalid.

The NCC provision of the EPTL has several exceptions under which a beneficiary may unsuccessfully challenge the will and collect. They include:

(1) An infant may always contest a will's validity as may one judicially declared incompetent;

(2) To demand an accounting or question a fiduciary;

(3) To determine testator's intent through construction of a provision;

(4) A surviving spouse's right of election;

(5) A challenge to surrogate court's subject matter jurisdiction;

(6) Pre-trial discovery; or

(7) If based on probable cause, a trial to determine if the will was forged, or revoked by a subsequent will.

Because Andy, (age 25) was unsuccessful in his challenge of his mother's will does not, according to the facts fit into any of the above exceptions, his challenge of his mom’ s will means he forfeits his share, and he will be treated as immediately predeceasing testator. However, because Bud is a minor he will not forfeit his share and will take $10,000. Carol will take the remaining $140,000 under the will's residuary clause (paragraph 3).

4. Carol has a valid right of action against Ellen for her failure to exercise reasonable care as trustee of Carol's testamentary trust.

A clause which seeks to erase liability for a breach of a trustee's or executor's fiduciary duty with respect to a trust is void as against public policy in New York. Thus, testator could not before her death relieve Ellen of her duty to exercise reasonable care in handling trust assets.

The EPTL provides that a trustee must manage trust assets and invest them prudently so as not to endanger the trust's corpus. The trustee is to manage the trust in a way that build's income (interest) and does not unreasonably jeopardize principal. A trustee may seek investment advice from a professional, but then they are both liable for any mismanagement and imprudent investments. The EPTL does not want to place a chilling effect on a trustee's efforts to build the trust, and the statute thus does not require that the trust grow. However, upon looking at the investment strategy, it must be reasonable.

Here, Ellen invested over 2/3 of Carol's money (which Carol would receive outright in less than one year) into one single investment on the advice of a math teacher. Thus, Ellen's investment strategy was unsound and Carol should sue Ellen for mismanagement. It should be noted that in addition to the prudence of the investment strategy, the EPTL also looks for diversification of investments as proof of a good faith effort at good management; however, here Ellen only invested in Q Co. stock.

Question-Six
In 1992, Deal, a dealer in plastic materials, entered into a written contract with Make, a manufacturer of "XYZ," a plastic compound. The contract provided:

” For a period of 10 years beginning January 1, 1993, Deal will buy and Make will sell all of the output of XYZ produced by Make's plant in Troy, New York. The price is $400 a ton, and the average output of the Troy plant is expected to be 500 tons per week. The price per ton will be adjusted annually.”

In 1993 and 1994, the plant produced an average of 400 tons of XYZ a week, which Deal accepted and paid for. In late 1994, Make became concerned about the efficiency of the plant and made improvements to the plant which increased its production to an average of 550 tons a week in 1995 and 1996.

Deal continued to purchase the full output of the plant until October 1, 1996, when the market price of XYZ dropped sharply. Deal then wrote Make, "You are producing 10 percent more XYZ than our agreement requires us to purchase. Hereafter we will only purchase a maximum of 500 tons per week." Make responded, demanding that Deal purchase the full output of the plant "pursuant to our written contract."

After efforts to negotiate a settlement failed, Deal and Make agreed to submit their dispute to the courts for resolution. On November 4, 1996, the parties duly filed with the Supreme Court a submission of controversy, including a statement of the foregoing facts. Make sought judgment specifically directing Deal to purchase the total output of the Troy plant. Deal sought judgment dismissing Make's claim.

On November 12, 1996, the court (1) granted a preliminary injunction requiring Deal to purchase all of Make's Troy plant output up to 550 tons per week. On February 3, 1997, the court (2) entered a permanent injunction granting the same relief until December 31, 2002.

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On December 1, 1996, Pipes, a manufacturer of plastic pipes, sent a letter to Deal: "Confirming our telephone conversation of today, we offer to buy 500 tons of XYZ at $450 a ton. Please advise us when you can ship." Upon receipt of Pipe's letter, Deal wrote to Pipes confirming the order and stating, "Shipment will be on or before January 10, 1997 with payment to be by letter of credit issued by Banco. We offer to sell you another 500 tons on the same terms."

On December 22, Pipes wrote to Deal, enclosing the letter of credit in the amount of $225,000, the agreed price for 500 tons. Pipes also authorized shipment of the second 500 tons of XYZ.

On January 5, 1997 the first shipment of 500 tons arrived and was accepted by Pipes. The same day, Deal made presentment to Banco for payment pursuant to the terms of the letter of credit, but, on instructions from Pipes, Banco rejected the presentment. On January 6, Deal wrote to Pipes demanding immediate payment for the 500 tons which had been delivered. Pipes wrote in reply, "Payment is not due until you deliver the 1,000 tons we agreed to buy under our amended contract. When we have the second shipment, you will get your money." Deal then wrote Pipes that the second shipment would not be made until the first had been paid for and satisfactory arrangements made for payment for the second shipment.

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

(b) What are the rights and obligations, if any, of Deal and Pipes arising out of their dealings on and after December 1, 1996?

ANSWER TO QUESTION SIX
(1) The court was incorrect in granting a preliminary injunction. The issue is whether the grounds for a preliminary injunction have been met.

To be granted a preliminary injunction in New York, a plaintiff must submit to the court (either by motion on notice or by order to show cause) affidavits which establish (1) likelihood of immediate and irreparable harm if the injunction is not issued; (2) inadequacy of remedies at law; (3) balance of hardships in plaintiff's favor (including "clean hands" by plaintiff); and (4) probability of success on the merits.

Here, the parties are both merchants (dealers in the kind of good) and the Uniform Commercial Code (UCC) will govern in the transaction between them. They entered into a valid output contract; in the UCC, the only material term which must be stated is the quantity and output contracts are deemed valid because the UCC imputes a requirement of good faith in each contract. The contract was not to take 500 tons per week as that language is merely a statement of expectation. Deal, in making a long-term output contract, assumed the risk that the market price of XYZ might drop. Indeed, the purpose of having such a contract is often to set a stable price. Make's efforts to increase productivity show good business judgment, not "unclean hands" and furthermore, Deal continued to accept the full increased output for several years. Therefore, Deal will not be entitled to claim that Make has materially increased the scope of output beyond that which was in good faith expected (see terms of contract), and if he could, his later actions could be deemed a waiver of that action.

However, despite this showing of the balance of hardships, Make has not proved that remedies at law are inadequate. Make could sue on the contract, attempt to cover by selling to others and recover the difference from Deal. Basic contract damages would entitle Deal to be in the same position as he would have been absent breach (minus avoidable and plus consequential and incidental damages). As the contract is for all of Make's output (i.e. he can't sell this and more) lost profits would not be appropriate. In any event, the preliminary injunction should not have

been granted because Make will have an adequate remedy at law. Also, while it may take time to build other clients, there is no showing of irreparable harm.

(2) The standards for a permanent injunction are similar and require a showing of the inadequacy of remedies at law, that the plaintiff has a protectable property interest, that the injunction can be enforced and that the balance of hardships is in the plaintiffs favor. The court was incorrect in granting a preliminary injunction for similar or identical reasons to those discussed in (1). Make does have a protectable interest in the goods as maker of them and in the contract and thus satisfies that element. However, this type of affirmative injunction will require court supervision and may be difficult to enforce. Even if enforceable, the issues regarding the adequacy of remedies at law should bar the issuance of the injunction.

(b) Rights and obligations regarding first shipment.

The issue is whether a complete contract was formed and whether it has been breached by Pipes. The parties entered into a valid contract in writing (as the Statute of Frauds requires for all sales of goods over $500). The parties are merchants (dealers in the kind of goods) and have a binding written contract pursuant to the "confirmatory memorandum" rules of the UCC, which govern in cases between merchants for the sale of goods. Pipe's December 1st memorandum was an offer (as it states) and Pipe's confirmation was an acceptance. The facts do not indicate if Pipe's letter would be a contract on its own. The shipment and payment term are incorporated into the contract as additional terms pursuant to the UCC, as in a contract between merchants, when an acceptance contains additional terms, the terms are incorporated unless the offer is expressly restricted to its terms, the addition is a material change in the contract or the opposing party notifies the accepter of his objection to the term within ten days. The "offer" tacked on is just that, an offer for an additional contract, to be separately accepted or rejected.

When the goods arrived and Pipes accepted them, he became liable to pay the cost ($450 a ton) to Deal. Payment was not effective at the delivery of the letter of credit because a letter of credit requires the additional step of presentment to the letter of credit bank before it is honored. Banco rejected the payment on instruction from Pipes and thus, Deal has no action against Banco. He may, however, sue Pipes for payment of the first contract.

Rights and obligations for second 500 tons.

The parties have a valid contract for the 500 tons. Offer was on December 1 by Deal, acceptance by Pipes on December 22 and it is in writing. Under the UCC, when a seller has a good faith reason to question whether a buyer will be able to pay for goods, the seller may request assurances of the Buyer and if the buyer does not respond within 30 days, seller may treat the buyer as in breach of contract. Here, Pipes' letter refusing payment on the first contract might give Deal adequate concern that Pipes would not perform at all, and thus, his demand for "satisfactory arrangements" for payment of the second is acceptable.

Pipes, in contrast, has already authorized shipment of the goods, an acceptance, and therefore, must pay for them when they arrive (unless, of course, he finds in good faith that they are deficient).

ANSWER TO QUESTION SIX

Before I answer the two sections, (a) and (b), of this question, I want to begin by saying that this question is within the purview of the Uniform Commercial Code. In particular, most of this question will deal with the provisions of Article Two of the Code because these are transactions that deal with the sale of goods. Furthermore, Deal, Make and Pipes are merchants under the code

given their status according to the facts of the question. It is also important to note that good faith and fair dealing pervade the code.

(a)(1) The court properly granted the preliminary injunction.

The issue raised here is whether the court properly ruled that a preliminary injunction was a proper provisional remedy given these facts. A preliminary injunction is an equitable remedy that can prohibit or proscribe certain behavior(s) to preserve the status quo until the court can rule on a motion for a permanent injunction.

One issue that must be raised at this time is whether this is the proper remedy under the Code. Because a preliminary injunction is temporary until the hearing for a permanent one, then this issue will be more important to section (a)(2). In moving for a preliminary injunction, the proponent must show a likelihood of success on the merits, a burden of the harms analysis that shows it would be more of a burden on the proponent to not grant the motion than it would be on the non-proponent to grant it, there must be some sort of irreparable harm to the moving party. Furthermore, in New York, the proponent (moving party) is required to post some sum of money to have the motion heard. Although the parties duly filed their motion to the court, there is no evidence that the proponent met any of this burden.

In analyzing its burden for determining whether or not here should be such an equitable remedy, the court's action raises the issue of whether this is the correct remedy under the U.C.C. First, the court should recognize that the parties had entered into a valid output contract under the Code. In addition, the court should have looked to the past dealing of parties and whether they were acting in good faith. In this case, despite the increase in the output of Make's factory, Deal did not object for almost two years until the price declined 10 percent. This would suggest that Deal violated the good faith and fair dealing provisions that are so central to the Code.

Based on these facts above, the preliminary injunction was the correct remedy but only, in my opinion, because it has a finite lifespan and its purpose is to preserve the status quo until the hearing for the preliminary injunction.

(a)(2) The court erred in entering a permanent injunction.

A permanent injunction is an equitable remedy that will be permanent until a certain date. It is like the preliminary injunction, as discussed above, in all respects except that it does not serve to protect the status quo but is an end in itself. Because of the analysis above, that included that this was a valid output contract under the UCC, the court may have overstepped it bounds and granted a remedy that is outside the Code's available remedies.

As the facts in subpart (a)(1) indicate, there has been a breach of contract. The granting of a permanent injunction seems to be working in the alternative of the basic U.C.C. remedies for buyer and sellers of goods. It is important to note that the goods here are "fungible" goods as opposed to ones that are specifically made. Fungible goods are ones that are easily obtainable and storable in bulk, like most commodities be they plastic compounds or wheat or steel. The Code suggest other remedies upon breach including payment for delivered goods, lost profits and other compensatory damages less mitigation.

But given the earlier standard of injunctions, stated above, it seems an undue hardship to enforce a commodity based requirements contract until 2002 as opposed to seeking lost profits or other damages for sellers in the Code. It is an unnecessary burden to place on the buyer, Deal as well as a remedy outside the remedies of the code. Furthermore, why apply an equitable remedy if a remedy in law exists. In addition where is the irreparable harm, if any when it would be to buyer, Deal.

(b) The following is a summary of Deal and Pipes rights and obligations.

Was there a contract formation under the U.C.C. between Deal and Pipe? Yes, the parties agreed to the contract and Deal offered a subsequent modification which Pipe accepted (additional 500 tons at $450). Thus, Deal has a right to receive payment for two 500 lot shipments at $450 /ton.

Deal is also a payee on a letter of credit on which Pipes is the drawer and Deal is the payee. This is within the purview of Article 3 of the Uniform Commercial Code. Because the drawer essentially told the bank not to pay on the note, the bank is not liable. This is a violation of the good faith dealing of the Code because he submitted this note to Deal and then told the bank not to pay on it.

Pipes is in breach to Deal on the first delivery. He may bring suit to collect for what he is due. In the meantime, he has a security interest in the goods. He can seek a court order to get the goods back but he cannot seek self-help because the goods are in Pipe's possession. He can refuse to deliver the second shipment because Pipes' bad faith and the second shipment was clearly an additional order.

Pipes is liable for payment for the first shipment and he has no right to the second one. Furthermore, he has no property interest in the first shipment.