

NEW YORK STATE BAR EXAMINATION
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QUESTION-ONE

In 1986, Ann, recently divorced and the mother of two preschool age children, met Poe, a poet. A few months later, Poe moved into Ann's apartment in New York City. While Ann worked as a chef in a nearby restaurant, Poe stayed in the apartment, caring for Ann's children and writing poetry. Poe earned little income, but Ann's salary was sufficient to support them.

In late 1989, Ann decided to open a restaurant in Albany. After finding Black Acre, a suitable building, Ann signed a lease with Sal, the owner of Black Acre, for a term of five years commencing January 1, 1990, and ending December 31, 1994, with an option to purchase Black Acre at the end of the lease term. The lease provided for a monthly rental of \$2,000 and required Ann to reimburse Sal at the end of each year for oil used to heat Black Acre. In pertinent part, the purchase option provided:

Tenant may purchase Black Acre at the end of the lease term by giving written notice thereof to the Landlord not later than December 31, 1994. The purchase price is \$500,000, payable \$100,000 in cash, and \$400,000 by a purchase money mortgage. The duration of the mortgage and the interest rate shall be agreed upon by the parties during the last three months of the lease term. If the parties cannot agree, the duration and interest rate shall be fixed by arbitration as provided for by the Civil Practice Law and Rules of the State of New York. The arbitrator, in addition to all other authority conferred by law, shall be authorized to impose punitive damages if either party fails to negotiate terms in good faith.

After signing the lease, Ann asked Poe to move to Albany with her. Although Poe was initially reluctant to move because his poetry was beginning to sell, Ann promised Poe that if he moved, he would be a partner in the restaurant. Poe therefore agreed to move with Ann. During the next five years, Ann rented an apartment in Albany in which Ann, Poe, and Ann's children lived. Ann devoted her time to the restaurant, and Poe continued to care for Ann's children, write poetry, and help Ann in the restaurant.

Three months before the lease ended, Ann sought Sal's agreement on the terms of the purchase money mortgage. Sal, who knew that Ann's restaurant was successful, demanded that the mortgage be paid off in three years and bear annual interest of 18 percent. Despite continuous negotiations, Ann could not persuade Sal to change his position.

In December 1994, Sal billed Ann \$6,000 for heating oil for the preceding year. Ann argued that the bill far exceeded her actual usage, but offered to pay \$3,750, the amount she had paid in each of the four preceding years. When Sal refused, Ann sent Sal a check for \$3,750 and wrote on the check "heating oil, payment in full." Sal endorsed the check in blank and cashed it. On December 31, 1994, Ann duly exercised the purchase option and demanded that the mortgage terms be resolved by arbitration.

In early 1995, Ann, whose relationship with Poe had deteriorated, made Poe move out of their apartment and refused Poe's demands to be compensated for his years of caring for Ann's children and working with her at the restaurant.

Poe commenced an action against Ann in Supreme Court, Albany County, reciting the foregoing pertinent facts. As a first cause of action, Poe alleged an implied agreement by Ann to compensate him for taking care of her children and helping her in the restaurant. As a second cause of action, he asserted an express partnership in the restaurant and demanded an accounting. Ann timely moved to dismiss the complaint on the ground that it failed to state a cause of action for breach of an implied or an express contract. The court (1) granted Ann's motion and dismissed Poe's complaint.

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In a separate action, Sal sued Ann for \$2,250, the balance allegedly due for the 1994 oil bill. Ann denied the allegations of Sal's complaint, and pleaded an accord and satisfaction as an affirmative defense. On papers alleging the foregoing pertinent facts, Ann duly moved for summary judgment dismissing Sal's action on the ground that his cashing of her check for \$3,750 precludes his recovery. The court (2) granted Ann's motion for summary judgment.

Ann then duly commenced a special proceeding demanding the appointment of an arbitrator to determine the terms of the purchase money mortgage. Sal moved to dismiss Ann's proceeding on the ground that the provision regarding the mortgage constitutes an unenforceable "agreement to agree." Sal also contended that the clause giving the arbitrator the right to impose punitive damages is void. The court (3) granted Ann's application to compel arbitration, and (4) held that the provision granting the arbitrator the authority to impose punitive damages is enforceable.

Were the numbered rulings correct?

ANSWER TO QUESTION ONE

(1) The court erred in dismissing Poe's complaint. The issue is whether contracts between persons living together are enforceable and if Poe and Ann's agreements are enforceable contracts.

New York allows married people and people living together to enter into contracts provided that the sole consideration is no sexual services. Here, Poe is caring for Ann's children and helping out in the restaurant; therefore it is clear that his sexual services are not the sole consideration for the agreement.

Agreements require an offer, acceptance, and consideration in order to be enforceable as a contract. Consideration is defined as a bargained for legal benefit or detriment in New York. Because Ann promised Poe he would be a partner in the business if he moved with her, when he was initially reluctant to go, Ann bargained for Poe to leave New York City (a benefit to her and a detriment to Poe). This more than satisfies the requirement of consideration at the time of making the contract.

A court must deny a preanswer motion to dismiss (3211) if taking all the allegations as true, Poe has stated a claim upon which relief may be granted.

Partnerships do not have to be in writing to be enforceable. Nor do partners have to provide services to the partnership. Sharing of profits is prima facie evidence of a partnership. The UPA, absent a written agreement to the contrary, governs the rights and duties of the partners.

New York will not imply an agreement between persons living together for care and services absent an express intention to enter into a legally enforceable agreement. Because Poe's first allegation is grounded in an "implied agreement to compensate" for care of Ann's children and helping in her business, the court properly dismissed. This is because New York does not recognize common law marriages and to permit this implied contract here would violate that policy.

The express contract, however, is enforceable and the court wrongfully dismissed. A statute of frauds defense will not work because although the contract did last five years it was an at will contract (since no time was stated) which could have been completed within one year. Because contract was supported by bargained for consideration, it is enforceable.

(2) The court was correct. The issue is whether summary judgment can be granted on these facts.

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Summary judgment is the appropriate motion to make when there are no factual issues to be decided by the trier of fact. If the court determines that there are no material fact disputes, it must grant summary judgment as a matter of law. If the court determines there are disputed issues of material fact, the court must deny the motion.

Because the complaint alleges a sum due on account and because Ann and Poe do not dispute what actually occurred, as set out in the facts, this issue is ripe for summary judgment. Had the parties disputed some material issue, they would have had to attach affidavits saying so to the motion or in defense.

Generally, forgiveness of debt must be supported by consideration to be enforceable. Because Ann agreed to pay Sal for heating oil at the end of each year, that bill is a debt from Ann to Sal.

However, New York recognizes that when a debt is due and disputed, the taking of less than the amount in full satisfaction of the debt is valid consideration (or if the parties agreed in writing). Because the debt was due and disputed, Sal's taking less than what was owed may be considered sufficient to extinguish the whole debt.

Here, although Sal did not agree expressly to take less when Ann offered it to him, he impliedly consented by cashing Ann's check which provided "payment in full" without noting "with reserve" on his endorsement.

Accord is an executory agreement to modify an existing agreement (Ann's writing the check constituted an accord) and the accord was satisfied by Sal's endorsement. Because there was an effective accord and satisfaction, court correctly granted Ann's motion.

(3) Court's ruling (3) was correct but (4) was incorrect. The issue is whether the absence of an interest rate and duration of mortgage will cause the contract to fail because it is illusory. The issue is also whether arbitrators may award punitive damages.

Contracts for the sale of land (including option contracts) must be in writing to be enforceable. Because the lease is written and signed by Sal, it will be enforceable if the other requirements are met.

Contracts for the sale of land must have the price delineated to be enforceable. The consideration for this option contract is the lease itself since it was a bargained for term at the time of lease execution. The option will not fail for the extraneous issues of interest rate and duration.

Ordinarily an agreement to agree is not enforceable nor is an illusory contract to agree on an interest rate later enforceable.

However, New York favors arbitration and the material terms (the amount payable at the purchase date) and the amount to be included in the mortgage are present in the contract.

Because only collateral terms need to be agreed to later and the parties agreed to the METHOD of determining those collateral terms, it is fully enforceable and the court was correct in granting Ann's motion to compel arbitration.

Court was wrong in permitting arbitrator to impose punitive damages. The issue is whether arbitrator may impose punitive damages when contract so permits.

Arbitrators are given broad powers but New York does not permit arbitrators to award punitive damages absent gross misconduct by fiduciaries.

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Because no gross misconduct (shocking the conscience) is presented on these facts, no punitive damages can be awarded despite agreement. Therefore, court was wrong.

Also note that because Ann had been previously billed \$3,750 in each of the four preceding years, her belief that the \$6,000 was in error was both reasonable and in good faith. This reasonableness and good faith entitles her to write the check for the lower amount since not only was debt due and disputed but Ann also had reasonable belief in disputing the charge.

ANSWER TO QUESTION ONE

(1) The court's ruling was correct as to the implied agreement, but incorrect as to the express agreement. The first issue is whether implied agreements between unmarried cohabitants are enforceable.

New York courts will enforce express agreements between unmarried cohabitants so long as they are not based on consideration of sexual services. However, New York courts will not enforce implied agreements between unmarried cohabitants.

Poe's first cause of action alleges an implied agreement for compensation for homemaking services. Because New York does not recognize the validity of implied agreements between unmarried cohabitants, as Poe and Ann are, the complaint fails to state a cause upon which relief can be granted. Thus, the court properly dismissed Poe's cause of action for breach of an implied contract.

The second issue is whether an oral partnership agreement between unmarried cohabitants is enforceable.

New York courts will enforce a valid express partnership agreement between unmarried cohabitants. A partnership is a agreement between two or more persons to carry on, as co-owners, business for profit. A partnership agreement need not be in writing to be enforceable, but an oral partnership agreement will be treated as creating a partnership at will.

The oral agreement between Ann and Poe created an express contract to act as partners in the restaurant, a business for profit. Moreover, this agreement is supported by consideration, and is thus enforceable. Consideration is a bargained-for legal benefit or detriment. Here, Ann bargained with Poe to make him a partner in exchange for her receiving the benefit of having Poe relocate to Albany. Thus, the oral partnership agreement is enforceable as an express contract to form an at will partnership, and the court improperly dismissed Poe's cause of action for failure to state a claim.

(2) The court properly granted Ann's motion for summary judgment. The issue is whether Sal's cashing of Ann's check constituted an accord and satisfaction, thus discharging Ann of any further obligations under the contract.

An order of summary judgment is proper where there is no issue of material fact requiring trial, thus enabling the court to make a judgment as a matter of law. Thus, in this case, an order of summary judgment in favor of Ann is proper if she has established proof of her affirmative defense of accord and satisfaction such that reasonable persons could not disagree as to a finding in her favor.

A party is excused from obligations under a contract where there has been an accord and satisfaction of the accord. An accord is an executory contract between parties to a contract promising to relieve a contracting party of her obligation under the contract in return for a

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specific act. Upon satisfaction of that act, that person is excused from further performance under the contract.

In this case, Sal's acceptance, by cashing the check, of Ann's offer to pay \$3750 as "payment in full" constituted an accord and satisfaction. Moreover, this accord was supported by consideration because part payment of a disputed debt constitutes valid consideration for a release. Thus, Sal's cashing of the check constituted acceptance of an accord, supported by consideration, and therefore Ann is released from all other obligations arising from the heating oil provision in the lease. Summary judgment, therefore, was properly awarded in Ann's favor.

(3) The court properly granted Ann's application to compel arbitration. The issue is whether the purchase option is enforceable in light of the missing terms regarding the duration and interest rate of the mortgage.

An offer is not valid if it is vague or ambiguous as to any material terms. However, a term is not vague or ambiguous if it sets forth a formula or method by which it can be determined.

The mortgage term in the purchase option is not vague or ambiguous because the option gives a mechanism by which its terms can be exactly determined. The arbitration provision allows the parties to submit their dispute over the duration and interest rate of the mortgage to be absolutely determined by a neutral decision maker. Thus, the option is a valid offer. Furthermore, because of the strong New York policy of recognizing arbitration agreements, the New York court properly declined to hear the case on the merits and submit the dispute to arbitration.

(4) The ruling as to punitive damages is incorrect. The issue is whether arbitrators have the authority to award punitive damages.

An arbitrator's scope of authority is very broad, and arbitrators are not bound by substantive law or evidence rules in making their decisions. However, arbitrators do not have the authority to award punitive damages, regardless of a contract provision to the contrary. Thus, the court in this case improperly held that the arbitrator has the authority to award punitive damages.

QUESTION-TWO

ON JANUARY 13, 1995, while Dave, Wit and Carrie were having a drink at Boo's Bar, Fitts, another patron at Boo's, began to insult Dave. Wit and Dave knew Fitts had a reputation for being quarrelsome and violent. Wit had warned Dave that Fitts frequently got into fights at Boo's and had told Dave that, last month, Wit had seen Fitts cut a bar patron with a broken bottle. Dave responded to Fitts' insults by insulting Fitts, and Fitts charged at Dave with a bottle raised over his head. Dave stepped backward and, pressed against the bar, grabbed an ice pick from the bar and stabbed Fitts.

Dave and Carrie ran from the bar and Carrie offered Dave a ride home. After riding for several minutes, Dave noticed the car was a new model and had a shattered window on the driver's side. Dave then realized that Carrie had stolen the car.

Carrie drove to Dave's home and parked the car. Officer Kopp and his partner, while on routine patrol, saw Carrie and Dave sitting in the car, noticed the shattered window, and radioed the police station to check the license plate. As a report came back indicating that the car was stolen, Kopp saw Dave leave the car and enter Dave's house. As Kopp approached the car, Carrie jumped from the car and ran away. Kopp then knocked on the front door of Dave's house while his partner guarded the back door. When there was no reply, Kopp kicked in the front door, entered the house, and arrested Dave on a charge of possession of stolen property, the car. Kopp searched Dave and found a bloody ice pick in Dave's coat pocket.

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On the advice of his attorney, Abby, Dave appeared before a grand jury investigating the incident at Boo's and the theft of the car. After testifying to the foregoing pertinent facts, Dave stated that he had stabbed Fitts in self-defense. Abby then timely requested that the prosecutor instruct the grand jury on the defense of justification. The prosecutor refused to do so, and the grand jury thereafter indicted Dave for assault with a dangerous instrument and criminal possession of the stolen car, both felonies.

Abby timely moved (a) to dismiss the assault charge on the ground that the prosecutor's refusal to instruct the grand jury as to justification was improper and (b) to suppress the ice pick. Conceding that Kopp had probable cause to arrest Dave, Abby nonetheless argued that the warrantless entry of Dave's home and the subsequent arrest, search and seizure of the ice pick had been unlawful. The court (1) denied the motion to dismiss and, following the suppression hearing, (2) granted the motion to suppress the ice pick.

Upon proof at Dave's trial of the foregoing pertinent facts, and testimony by the owner of the car that it was worth \$30,000 and that he had not given Dave or anyone else permission to use it, the prosecution rested. Abby timely moved to dismiss the charge of criminal possession of stolen property, arguing that the People had failed to establish a prima facie case. The court (3) granted the motion to dismiss the criminal possession charge.

At the opening of the defense case on the assault charge, Abby made an offer of proof in connection with Dave's justification defense. She stated that Wit would testify (a) that he and Dave had discussed Fitts' reputation for violence on several occasions before Fitts threatened Dave, and (b) that Wit had observed Fitts' December 1994 fight and had told Dave about it before Fitts' altercation with Dave. The prosecution objected to the testimony as immaterial to the justification defense, and the court (4) sustained the objection.

Were the numbered rulings correct?

ANSWER TO QUESTION TWO

(1) The court was correct in denying the motion to dismiss based on failure to instruct the grand jury on justification. The issue is the duty of the prosecutor to inform a grand jury about possible defenses.

A grand jury is not really a proceeding governed by rules of trial. It simply is convened to determine whether there is sufficient probable cause to go forward with the case. Since it is not a final determination of guilt or innocence, the rules are more lax than at trial. While at trial, a judge must inform the jury of all requested defenses, at a grand jury the prosecutor is not bound in the same way. In failing to inform the grand jury of the justification defense, the prosecutor did not abuse his role as he is not obligated to discuss all possible defenses. Additionally, this action, even if defective, would not be sufficient to cause the dismissal of the assault charge. Therefore, the court was correct.

(2) The court properly granted the motion to suppress the ice pick. The issue is whether the pick was obtained legally or illegally. Any illegally obtained evidence is excluded. Since the pick was obtained in the course of an illegal arrest, the pick should be suppressed as the fruit of the poisonous tree.

To arrest someone in the home, police need a warrant, based on probable cause, signed by a neutral magistrate or judge. This can be avoided if there is an emergency, the police are in hot pursuit or fear the loss of evanescent evidence. None of these were available here.

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Although the police had probable cause to arrest Dave, they could not do so in his house without a warrant. They were not truly in hot pursuit, there was no threat of emergency or disappearing evidence, nor was there a threat that Dave would escape. The police had guards at the front and the back door and so escape was impossible. Therefore, the police should have waited for a warrant or waited until Dave left his house. Note that had the arrest been proper, the search of Dave would have been legal as incident to a lawful arrest, however that is not the case here.

Because the police did not follow this procedure and instead made an illegal entry into Dave's house, all evidence recovered as a result of this illegal arrest must be kept out under the exclusionary rule. It should be noted that the police cannot claim that they would have inevitably discovered the evidence, because there is no proof that Dave would have kept the ice pick in his possession.

Therefore, since the arrest was illegal, the evidence found on Dave must be excluded under the New York exclusionary rule as the fruit of the poisonous tree. The court was therefore correct in suppressing the ice pick.

(3) The court was correct in granting Dave's motion to dismiss the criminal possession charge. The issue is whether the prosecution proved beyond a reasonable doubt all the elements of criminal possession. Here the burden of proof is on the prosecution.

They did not meet their burden. Although the prosecution did prove that the car was stolen, they did not prove sufficient knowledge or possession by Dave to satisfy the burden. Firstly, it is important to note that as the passenger, Dave did not have the same level of knowledge as the driver. Dave did not know that the car was stolen and he may have been reckless with regard to the status of the car. However, possession of stolen property is not a strict liability crime. The prosecution has not met its burden of proving that Dave knew the car was stolen.

Additionally, the police saw Dave leave the passenger side of the car. Therefore, absent more proof, he was but a licensee, invitee or guest of the owner, who may be presumed to be the driver. At no point did Dave actually possess the car, he simply went along with Carrie. Absent more proof of both knowledge and possession, Dave could not be found guilty. Thus the prosecution hasn't met its burden and the court properly dismissed the criminal possession charge.

(4) The court was incorrect in sustaining the immateriality objection. The issue for immateriality is whether the proposed evidence will make any issue more or less likely.

In connection with a justification defense, the defendant must prove that he was justified. This is based on both the defendant's knowledge and the situation with the attacker. In New York reputation evidence is allowed. Here it certainly is material as to whether Dave knew of Fitts' violent nature. That is the key to a justification defense. In this type of self defense justification defense, the character of the victim is important. That is properly proved by showing Fitts' reputation for violence. Additionally, the defendant must prove that he knew of this character trait and so the evidence of Wit and Dave's conversation is relevant.

Normally, the fact that Fitts had gotten into a fight previously would be immaterial. However, the fact that Fitts had previously done the exact same thing in a bar fight raises the stakes here. Now it seems that Fitts has a signature crime, that is taking a beer bottle, raising it over his head and hitting someone with it. As such the fact that Dave knew this goes beyond mere bad acts evidence, which would normally be inadmissible. Here it is a signature crime and Dave's knowledge can be proven.

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Additionally note that when a defendant is not allowed to raise issues in his defense it always presents a constitutional due process question. Nevertheless, the court need not raise the constitutional issue as there is adequate ground to allow in the evidence anyway.

Thus the court was incorrect in sustaining the prosecution's objection.

ANSWER TO QUESTION TWO

(1) The court incorrectly denied the motion. The issue is whether the prosecutor is required to instruct the grand jury as to the complete defense of justification and whether the error is cause for dismissal.

Under the CPLR a prosecutor is required to instruct the grand jury as to all elements of the charged offense and as to complete but not mitigating defenses under CPLR. Failure to do so is grounds for dismissal of the indictment. Self-defense is a complete defense to assault and justification by reason of self-defense would negate the essential elements which the prosecution is required to prove by legally sufficient evidence. The issue is whether Dave can raise self-defense as justification for using deadly force.

Dave's testimony raised self-defense as justification. A person is privileged to use deadly force against another when he reasonably believes that deadly force is about to be used on him. This defense is not available to an initial aggressor and a person responding with deadly force must first retreat if it is safe to do so unless exceptions which do not apply here dispense with the requirement of retreat. Dave has established the defense of "self-defense." Dave knew of Fitts' reputation for violence because Wit had told him that he had seen Fitts cut a bar patron. Thus Dave "reasonably believed" that deadly force was about to be used on him.

Dave was not the initial aggressor because mere insults are not sufficient aggression to preclude a jury's finding that Dave was not the initial aggressor, even though his knowledge of Wit's reputation might be a basis for finding provocation. Whether Dave can sufficiently establish 'retreat' is also a question for the jury because the facts state that Dave stepped back and was pressed against the bar. Although Dave's knowledge of Fitts' reputation undermine any claim that he did not provoke the attack and that his self-defense was justified, he has raised facts sufficient for requiring that the charge on self-defense be given to the grand jury. Thus failure to do so was error and a legally sufficient basis for dismissing the indictment. (Ann's motion was timely made.)

(2) The court correctly granted the motion to suppress. The issue is whether evidence was seized in violation of the defendant's fourth amendment rights and thus required to be excluded as a remedy for the violation.

The fourth amendment prohibits unwarranted searches and seizures by the government. Dave has standing to assert a violation of his fourth amendment rights because he was in his own home and the police entered without a warrant.

A warrant issued by a neutral magistrate, precise on its face finding probable cause is required before the police can enter a private home unless an applicable exception to the requirement of a warrant applies. Because the police entered without a valid warrant, evidence seized in the house must be suppressed unless an exception exists.

The police under limited circumstances may enter a home without a warrant where they are in hot pursuit of a felon or an emergency such that the police reasonably believe that the defendant has committed a felony. Pursuit is necessary to prevent danger to person or property, not motivated

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by the desire to find evidence if the police reasonably believe that the premises search will yield the particular felon.

The facts clearly make the "hot pursuit" or "in plain view" where lawfully present exception inapplicable. The police suspicion was the result of a routine check, Dave was the passenger not the driver and was entering his home. The police clearly had time to get a warrant.

Suppression is the appropriate remedy where evidence is seized as a result of an unconstitutional search of an individual's home.

(3) The court was correct. The issue is whether the People can establish criminal possession of stolen property without proof of control or possession.

The elements of criminal possession are knowingly possessing stolen property, with the intent to use it for the benefit of oneself or persons other than the owner. While Dave realized that the car was stolen and so it could be argued that he intended to use it for his benefit, Dave did not have the requisite intent on entering the car because we are told he noticed after he was in it; he was a passenger and so did not control the car.

Accomplice liability does not apply, because there is no evidence that links Dave to the underlying crime of stealing the car.

(4) The court was wrong. The issue is whether a defendant may have a witness testify as to the character of the victim and as to specific acts.

The defendant who raises a defense of justification is entitled to present evidence as to the victim's reputation for violence. The evidence goes to the reasonableness of Dave's belief that deadly force was justified and thus is relevant to establish the defendant's state of mind, a material issue in the defense.

Character evidence is generally not admissible to prove an individual acted in conformity on a particular occasion. However, under the CPLR it may be offered by a defendant who raises self-defense in order to prove his own belief. The evidence is not hearsay because there is no particular statement and it is offered to prove belief not the fact of the victim's character. Because there is a specific exception, Wit should be allowed to testify as to discussions of violence in general. Reputation evidence is permissible on direct, the witness is competent.

The court correctly sustained objection to specific act.

b). Testimony as to the specific incident is not admissible on direct testimony, but may be admitted on cross-examination. Witness is competent and has personal knowledge because he observed, but specific acts not permitted under CPLR where witness is testifying to the victim's reputation for violence.

QUESTION-THREE

ART OWNED WHITE ACRE, a 10-acre parcel in Essex County, which he acquired in 1980. White Acre was bounded by a public highway on the south, but construction of an access road from the highway to White Acre was impossible because of a rock cliff along the road frontage.

In 1981, Bill, the owner of Green Acre, an adjacent parcel, conveyed to Art by quitclaim deed "a 50-foot wide right of way along the westerly boundary of Green Acre for the purpose of access to and from White Acre." Art never recorded the deed from Bill, but did grade and pave a road

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within the 50-foot wide strip, which he thereafter used regularly to reach White Acre from the public highway.

In 1983, Bill sold Green Acre to Cate, conveying title by a warranty deed which contained no reference to the right of way conveyed to Art. Cate promptly recorded the deed.

In 1990, Art sold White Acre, the only real property he owned in the vicinity, to Del. Art conveyed title by a warranty deed which contained the following provision, "The premises conveyed may be used for residential purposes only and may not be subdivided." Del recorded the deed. Thereafter Del made regular use of the road over Green Acre to reach White Acre. In January 1995, Del sold White Acre to Eve, a developer, conveying title by a warranty deed which recited no restrictions. Eve then recorded the deed and has continued to regularly use the road over Green Acre to reach White Acre.

On July 1, 1995, Eve filed an application with the local authorities for approval of a four-parcel subdivision, each parcel to consist of more than two acres, with access from the public highway over the road on Green Acre. The applicable provisions of the local zoning ordinance place White Acre in a zone restricted to single-family residences on parcels of not less than two acres.

After receiving notice of Eve's application, Cate promptly erected a barricade blocking use of the road leading to White Acre and filed objections to Eve's subdivision application. Cate has also written to Eve threatening to bring an action to enforce the restriction recited in the deed from Art to Del.

You are a lawyer practicing in Essex County and Eve has consulted you. She asks that you answer the following questions:

- (1) Does Eve have an easement over Green Acre to reach White Acre?
- (2) If so, is Eve entitled to obtain an injunction requiring Cate to remove the barricade?
- (3) May Cate enforce the restriction prohibiting the subdividing of White Acre contained in the deed from Art to Del?

ANSWER TO QUESTION THREE

- (1) Eve does have an easement over Green Acre to get to White Acre.

An easement is the right to use the land of another for a particular purpose. An easement appurtenant is an easement that creates a dominant and a servient estate. Here, we have an easement appurtenant since Green Acre is the servient to White Acre. An easement appurtenant is truly assignable since it runs with the land. Therefore, if there is a valid easement it would have passed with ownership of White Acre.

An easement can be created by any one of four ways: 1) by prescription, 2) by necessity, 3) by implication, and 4) by grant. In this case we are dealing with an easement by grant which is a writing conveying an easement. Here, there was a writing between Art and Del creating the easement.

In order to enforce an easement against subsequent grantors of the servient estate they must be on notice of its existence. There are three ways to provide a grantor with notice of an interest: 1) constructive under the recording statutes, 2) if the grantor has actual notice, or 3) inquiry notice. Here, the easement was never recorded in the chain of title of Green Acre. Therefore Eve did not

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have actual notice. But since the easement was paved and was regularly used, this put Cate on "inquiry notice" of someone's interest on the land. Therefore a valid easement was created and is enforceable against Cate.

Further, it could be argued that an easement by prescription was created which is akin to adverse possession. A court could conclude that there was an open and notorious use that lasted longer than 10 years and that there was "taking" of possession here among Art, Del and Eve.

(2) Eve is entitled to obtain an injunction requiring Cate to remove the barricade.

A preliminary injunction is proper in two situations: 1) when a party is seeking a permanent injunction and 2) when the subject matter of the suit is unique and money damages are inadequate. Here, Eve is seeking a permanent injunction. Therefore a preliminary injunction would be proper. Further, the standards of proof required are the same for both a permanent and preliminary injunction.

In order to obtain an injunction the plaintiff must show by "clear and convincing" evidence that:

1. There is a likelihood of success.
2. That if an injunction is not granted there would be irreparable injury; that is, money damages would be an inadequate remedy.
3. And in balancing the equities the court must determine that the plaintiff's injuries would clearly outweigh the defendant's harms. That is, the balance of equities must clearly be in the plaintiff's favor.

Here, there is a strong argument to be made that money damages would be inadequate. The facts state that construction to the highway is impossible because of a rock cliff. Without the easement over Green Acre, Eve would not have an access to her parcel of land. Further, as mentioned above, the easement is valid and has been in use for many years so it would be very difficult for Cate to show any harm in allowing Eve to continue to use the easement.

Therefore, since money damages are not adequate and there is no harm in continuing the easement to Cate along with a great harm on Eve, the court will probably grant an injunction.

(3) Cate may not enforce the restriction prohibiting the subdivision of White Acre contained in the deed from Art to Del. The issue is whether someone who was not in privity can enforce covenant running with the land.

In order to create a real covenant running with the land the law allows an injunction (as opposed to an equitable servitude that allows a party to sue for money damages). The following element must be proven:

- Privity of estate
- An intent to create a covenant running with the land
- Notice
- The covenant must touch and concern the land
- And the covenant must satisfy the Statute of Frauds.

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Here, arguably, there was a covenant running with the land Art and Del. A court would probably conclude that it was a persona covenant since Art retained no interest in the land or the surrounding interest. However, this covenant would not be enforce by Cate or her grantee, Bill, since there was no privity between either of them and Art, Del or Eve. Therefore, Cate would lack standing to enforce that provision.

Cate would not be able to argue that she was a third part beneficiary to the covenant between Art and Del because there was no intention to benefit Cate. She was merely an incidental beneficiary.

It should be noted that while Cate cannot enforce the subdivision provision, she can, however, prevent the subdivide parcels from using the easement if she can show that the burden o the servient estate by the subdivided dominant estate is unreasonable and beyond the scope of what was contemplated when the easement was created.

ANSWER TO QUESTION THREE

(1) Eve does have an easement over Green Acre to reach White Acre.

The first issue is whether an express easement was created. A express easement requires intent and a writing. Bill's deed to Art satisfies this requirement.

The next issue is whether Cate is bound by the right of way Bill conveyed to Art. New York is a "race-notice" state; thus, an interest in property is void against a subsequent purchaser for value without notice who first records. Cate recorded first and she was a purchaser for value. However, Cate was on inquiry notice o the right of way, because the regularly used, graded and pave access road should have made her inquire as to the existence of right of way over Green Acre.

Thus, Eve has an express easement enforceable against Cate.

The second issue is whether Eve has an easement by prescription The use of the right of way satisfies the requirements for prescription because it was continuous, open and notorious, actual under a claim of right, and (if there were no express easement hostile for the statutory period of ten years. Eve can tack he period of possession onto those of Art and Del, because Eve was in privity with Del and Del was in privity with Art.

Thus, if Eve didn't have an express easement she would have on by prescription.

(2) Eve is entitled to an injunction.

The first issue is whether the easement runs with the land such that Eve can enforce it against Cate. The express easement fro Bill to Art was in writing; it touched and concerned the land because it benefited Art in his use of White Acre and burdened Bill in his use of Green Acre. Horizontal privity and vertical privity are not necessary here because Eve is seeking to enforce the easement in equity rather than law. It is likely that Art and Bill intended the easement to run with the land. Cate had inquiry notice of the easement as discussed above. Thus, Eve can get an injunction against Cate's barricade, if the following standard for equitable relief is met.

The next issue is whether Eve can justify the issuance of a injunction. She must satisfy these five requirements:

1) Inadequate remedy at law: Eve has an inadequate remedy at la because she may not be entitled to money damages for violation o the easement and even if she got money damages, they could hardly compensate for the denial of all practical access to White Acre.

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- 2) Property right: Eve has a property right in the easement.
 - 3) Feasibility: The court can easily enforce an injunction requiring Cate to take the barrier down.
 - 4) Balancing of hardships: The denial of all use of Whiteacre outweighs the burden to Cate of increased use of the access road. Besides, even if four families' use of the access road is later found to be excessive in light of the original easement, Cate's remedy is to enjoin the excessive use, not to block the access road.
 - 5) Defenses: If Eve acts promptly, Cate will not be able to assert laches. Eve does not have unclean hands regarding this transaction, despite her disregard of the restrictive covenant in Art's deed to Del, because that covenant does not concern the easement and is unenforceable by Cate. (See below.) Thus, Eve is entitled to an injunction requiring Cate to remove the barricade.
- (3) Cate may not enforce the restriction prohibiting subdivision.

The issue is whether a party not in horizontal or vertical privity with the parties to a restrictive covenant may enforce it.

To enforce the covenant as a restrictive covenant, Cate must show writing, intent, touch and concern for the land, horizontal and vertical privity, and notice. Horizontal privity and vertical privity are lacking here because Cate did not acquire a parcel benefited by the covenant. Thus, Cate may not enforce the covenant at law.

The next issue is whether Cate can enforce the restriction as an equitable servitude. Art owned no other property in the area. Enforcement of an equitable servitude requires intent, touching and concern for the land and notice. Eve had record notice of the restriction, but intent is lacking here. Because Art owned no land in the area, there is no evidence that he intended the restriction to benefit Cate's land; besides, Cate could lose at equity if the court found that her blockade gave her unclean hands.

Thus, Cate is not entitled to enforce the restriction as an equitable servitude.

The restriction is thus unenforceable by Cate. And because Eve is in compliance with local zoning, Cate may not oppose the subdivision on that ground either.

QUESTION-FOUR

ON MARCH 10, 1990, Dan, the owner and operator of a heavy equipment rental business in Albany, New York, rented and delivered a new crane to Con, a general contractor who was building Riverview, a high rise apartment building in Albany. Dan also provided the services of Dan's employee, Op, to operate the crane. Dan had purchased the crane new from Man, the manufacturer, and had not used it before renting it to Con.

On June 10, 1990, Pete, a mason employed by Con, was seriously injured while working on a lower floor of Riverview when he was struck by a steel beam which had fallen out of the load locking device which was part of Dan's crane.

On May 15, 1993, Pete commenced an action against Dan in Supreme Court, Albany County, to recover damages for his injuries. Pete's complaint alleged that his injuries had been caused by a defect in the load locking device of the crane or, in the alternative, that his injuries were caused by Op's negligent operation of the crane. Dan's answer consisted of a general denial.

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On July 1, 1994, Dan commenced a third party action against Man. Dan's third party complaint alleged that the accident had been caused solely by a defect in the load locking device of the crane and demanded judgment over against Man for the full amount of an judgment which Pete might recover against Dan. Man's answer consisted of a general denial and an affirmative defense that Dan's action was barred by the statute of limitations.

Pete's cause of action against Dan and Dan's third party action against Man were tried together in June 1995 before the court and jury. At the trial, Pete offered proof of his injuries, medical expenses and lost wages. The only other proof offered by Pete was that, while working at Riverview, he was injured when he was struck by a steel beam which hit him after it fell from a crane owned by Dan and operated by Dan's employee, Op.

The evidence offered by Dan on his case consisted of uncontroverted proof of Dan's purchase of the new crane from Ma and the uncontroverted testimony of Op that he was a qualified crane operator thoroughly familiar with the cranes manufactured by Man. Op further testified that that he was operating the crane in accordance with the manufacturer's operating manual and that the steel beam fell from the load locking device for no apparent reason. After Dan rested, Man rested without offering any evidence.

Dan duly moved for judgment dismissing Pete's complaint on the ground that Pete had failed to prove a prima facie case against Dan. Man duly moved for judgment dismissing Dan's third party complaint on the grounds that (i) Dan's third party action was barred by the statute of limitations, and (ii) the evidence offered at trial was insufficient to establish a prima facie case against Man. The court (1) denied Dan's motion and (2) denied both branches of Man's motion.

Before the case was submitted to the jury, Pete agreed on the record to settle his case against Dan for \$250,000, and Pete discontinued his action against Dan on the merits. Thereupon Ma moved for judgment dismissing Dan's third party complaint against Man on the ground that the settlement terminated all of Dan's rights against Man. The court (3) granted Man's motion.

Were the numbered rulings correct?

ANSWER TO QUESTION FOUR

(1) The court correctly denied Dan's motion to dismiss Pete's complaint. The issue is whether Pete has presented enough evidence to prove a prima facie case of strict liability in tort and of negligence.

A merchant in the Chain of Commerce is strictly liable in tort for defects in a product if the defect existed in the product at the time it left the merchant's control and if that defect is the cause of the plaintiff's injury. A plaintiff may get to the jury on a negligence claim under the doctrine of *res ipsa loquitur* if he proves that he was injured by an instrumentality in the exclusive control of the defendant and that the injury is not one that ordinarily occurs in the absence of negligent conduct.

Pete presented evidence from which the jury could find that the crane was defective. He was hit by a falling beam. Evidence was presented to the jury (by Dan) that the beam fell due to a defect in the locking device. Thus, the jury could find that the crane was defective. The crane was still in Dan's control. It was rented to Dan by Con and operated by Dan's employee. If there was a defect it cannot be said that it occurred after the crane left Dan's control.

Pete has also satisfied the requirements of *res ipsa loquitur* listed above. Pete's injury was caused by the falling beam. The beam fell from the crane. As noted above, the crane was in the exclusive control of Dan's employee.

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Dan is liable in negligence if he owed a duty to Pete, breached that duty, Pete was injured, and the breach was the proximate cause of the injury. Pete's injury is not the kind of injury (being hit with a falling beam) that ordinarily occurs in the absence of negligence. Pete has also proven that Dan's employee had exclusive control of the beam. While this technically means that Op is the one who could be liable in negligence, because Op was acting within the scope of his employment, Dan is vicariously liable. Therefore *res ipsa loquitur* gets Pete to the jury on his negligence claim against Dan. Even though the negligence and strict liability claim are incompatible, Pete can present alternative theories of liability. Therefore, the court correctly denied Dan's motion.

(2) The court also correctly denied both branches of Man's motion. The issues are whether Dan's claim against Man for indemnity is barred by the statute of limitations, and whether Dan has established a *prima facie* case against Man for strict liability in tort.

When a person who is not named as a defendant may be alternately liable, that person (or entity) can be impleaded as a third party defendant or separately sued for indemnification after entry of judgment against the original defendant. Under either approach, the action is one for indemnification. Under the CPLR, the statute of limitations for an action for indemnification is six (6) years from the date judgment is entered against the original defendant.

In this case, Dan seeks indemnification from Man. No judgment has yet been entered. Therefore, the statute of limitations has not yet begun to run.

If Dan is entitled to indemnification from Man, it is because Man is also strictly liable in tort because the crane was defective. As noted above, a manufacturer is strictly liable in tort for injuries caused by a defective product if the defect was present when the product left the manufacturer's control. Dan presented evidence that no negligence occurred. Op testified that he followed the operating manual. Dan also showed that he purchased the crane new from Man. Man did not present any evidence that the defect occurred after the crane left Man's control. Therefore, Dan made out a *prima facie* case.

It should be noted that Man may have believed Dan was suing on straight strict liability theory and not for indemnification. If that was the case, the statute of limitations would have barred the action.

(3) The court erred in granting Man's motion. The issue is whether a settlement by a defendant bars an action by that defendant against a third party defendant for indemnification. Settlement of an action bars the settling defendant from seeking or being sued for contribution. Contribution is the amount of defendant's assessed fault that is paid to the plaintiff by another defendant, usually in a joint and several liability situation. Settlement by one defendant also reduces a co-defendant's liability by the amount of the settlement or the percentage of the settling defendant's fault.

As noted above, this is an action for indemnification, not contribution. Actions for indemnification are not barred by settlement. Therefore, the court erred in granting Man's motion.

ANSWER TO QUESTION FOUR

(1) The court was correct in denying Dan's motion for summary judgment against Pete.

Pete's claim alleges that Op was negligent. The first issue is whether Dan can be held liable for Op's negligence. In New York, a master will be held liable for his servant's negligence if performed in the course of employment. Here, Op was Dan's employee and when Dan provided Op's

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services to Con that is still within the scope of his employment for Dan. Thus Dan will be liable on respondeat superior theory.

As for Pete's negligence claim against Dan, he has made out prima facie case of negligence. The elements of negligence that must be shown are that the plaintiff (here Pete) was foreseeable. Here, Op was working with Pete at the same construction site. The other elements that must be shown are that the defendant breached duty of care owed to the foreseeable plaintiff. Op had a duty to operate the crane as a reasonably prudent person under the same or similar circumstances. Although Pete cannot point to specific conduct by Op that breached this duty, he can use the doctrine of res ipsa loquitur. Res ipsa loquitur will save a plaintiff from directed verdict when he is unable to show a specific breach. He must show that the act that occurred is not the type of act that ordinarily occurs unless someone is negligent and he must show the instrumentality causing the act was in the exclusive control of the defendant. Here Pete has shown this because steel beams do not usually fall without negligence and the crane was in the exclusive possession of Op. Additionally, the plaintiff must show damages. Here Pete has shown a personal injury.

Although in that Dan may be able to show that Pete was negligent as well and under a comparative negligence theory, his award would be reduced, Dan will be unable to obtain summary judgment.

Pete is also suing Dan on a strict liability theory. Pete claims that there was a defect in the load locking device in the crane which caused his injury.

In order to state a claim for strict liability for products, the plaintiff need not be in privity with the leaser. Lessors, like manufacturers, can be held strictly liable in New York for defective products. Here Dan, as a leaser, can be liable to Pete. Additionally the plaintiff must show that he was a foreseeable user making a foreseeable use of the product. In this case, Pete would assert that Op was making a foreseeable use of the crane by lifting objects at a construction site. Additionally, Pete must show that there was not a substantial change in the crane (product) since it left the defendant's possession. Additionally, the plaintiff must show that there was either a manufacturing defect (a defective product that comes off the assembly line with "normal" products - no requirement of negligence) or a design defect (that the product can be made safer at a small cost and will be just as efficient with the proposed changes). Here, Pete needs to present evidence of some defect. This could be proved during trial by Dan's evidence that the crane was new and the instructions were properly followed in operating it. Thus the court was correct in denying Dan's motion to dismiss.

Additionally, it must be noted that Pete's claims for negligence and products liability were commenced within the statutory three year period. Also, Pete is not limited in his remedy to workers compensation because he is suing a third party. Even though Op was working with him, Op is not a co-employee.

(2) The court was correct in denying Man's two motions.

i) Man claims that Dan's third party action was barred by the statute of limitations. Dan impliedly Man after the three year statute of limitations had run if Pete was to sue Man on product liability. However, Dan wants to be indemnified, or at the very least receive contribution from Man if Dan is held liable to Pete. The statute of limitations on a contribution or indemnification action is six years from the date payment is sought. Here it would be six years after Dan were forced to pay Pete. Although if Man was to be sued on warranty liability, the statute of limitations of four years would have commenced at the time Man delivered the crane to Dan. Here, Dan wants Man to indemnify him.

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In order to implead a third party the moving party may implead after the answer is served. Although some impleaders are allowed a of right, if the moving party delays then the other party can try to show it is prejudicial to them. Here though, all Dan wants fro Man is to be indemnified, which will not hurt Pete's claim against Dan.

ii) The evidence offered at trial against Man did not warrant dismissal.

A manufacturer can be held strictly liable for a product defect even though someone else may have been negligent in operating their product. Thus, even if Op was negligent, if the product were defective then Man could still be held liable.

Dan bought the crane from the manufacturer and then leased it t a third party. Thus Dan and Man were in privity (even though no required) and Dan made a foreseeable use of the crane. At trial Dan's evidence shows that the crane was new when he purchased it from Man and Op testified he followed the instructions despite the fact that the accident occurred three years after Dan purchased the crane from Man. Provided that Dan shows the crane was no substantially changed in those three years, the facts of the case lead one to infer that the product was defective due to a design o manufacturing defect. However, this is not specified. Man should have offered evidence to rebut the inference that the accident occurred due to a non-products defect.

Thus the court did not err in denying both of Man's motions. I it turns out Op was negligent, this can serve to reduce the award but will not bar it completely.

(3) The court incorrectly granted Man's motion.

The big issue is after one party settles, can the settling part seek indemnification or contribution against a non-settling party.

In New York, a settling party may later pursue money from non-settling party and vice versa if the claim is one o indemnification, but not contribution. If Man is found liable t Dan on the basis of the court action, an indemnification claim still exists and Dan could potentially recover his entire \$250,00 settlement from Man.

Thus, the court was incorrect in granting Man's motion.

QUESTION-FIVE

ON JANUARY 5, 1985, when Tes duly executed her will, the member of Tes's family were: her husband, Hal; her father, Dad; he sisters, Lil and Ann; her brothers, Tom, Don and Leo; and Tom' sons, Cal and Joe.

Tes died on January 10, 1995, leaving an estate of \$3,000,000 and her will has been duly admitted to probate. Tes was survived by all the family members named above except Tom, who died in 1994 Tom's will, executed in 1986 and now duly admitted to probate designated Tom's son, Cal, as the sole beneficiary of Tom's estate. Tes's will contained the following provisions:

1. I devise my home in Albany, New York, to my sister, Lil.

2. I bequeath \$100,000 to Ed as trustee of the trust created by my father, Dad, by a trust instrument dated January 5, 1982. The principal and income of this bequest shall be held by the trustee and distributed in accordance with such trust instrument, as it ma be amended before or after my death.

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3. I bequeath \$200,000 to my brother, Tom or, if he predecease me, to those of his children who are named in his will a beneficiaries.
4. I bequeath \$300,000 to my nephew, Joe, if at the time of m death he is divorced from his present wife, Rea. If he is not s divorced, this legacy shall be void.
5. I devise and bequeath the remainder of my estate to m husband, Hal.

Tes's Albany home had been taken in condemnation two year before her death, and the \$250,000 proceeds had been used t purchase another home in Troy, where she lived until her death.

The trust instrument creating Dad's trust had been executed an acknowledged in the manner required for recording real property transfers and initially named Tes's sister, Ann, as income beneficiary. After Tes executed her will and before Tes's death Dad exercised his right to amend the designation of the income beneficiary, naming Tes's brother, Don, in place of Ann. After Tes's death, and before any income distributions were scheduled Dad amended the trust again to name Tes's brother, Leo, as income beneficiary in place of Don. The amendments were made in accordance with the provisions of the instrument creating the trust and the signatures were acknowledged before a notary public, but they were not executed in the manner required by the Statute of Wills. Hal as remainder man, and Ann, Don and Leo, each claim the right t receive the income from the trust.

At the time of Tes's death, Joe was still married to Rea and was unaware of the provisions of paragraph 4 of Tes's will. (1) To what, if anything, is Lil entitled under the will?

(2) Who is entitled to the income from the amount bequeathed in paragraph 2 of the will?

(3) Who is entitled to the amount bequeathed:

(a) In paragraph 3 of the will?

(b) In paragraph 4 of the will?

ANSWER TO QUESTION FIVE

(1) Lil is entitled to nothing under the will.

The issue is whether a specific bequest is adeemed b condemnation. A testamentary bequest of a unique item is a specific bequest. If the item is not in the testator's estate at her death the gift is adeemed. There are three exceptions (insurance proceed paid after death; transfer subject to a contract that remain executory at death; and disposition by a conservator, where the funds are traceable), none of which applies here. Therefore, when the home was condemned, this caused the gift to Lil to adeem, an Lil is not entitled to the \$250 ,000 proceeds, or the home in Troy If the new home was in Albany, the result might be different. (2) Don is entitled to the income interest in the trust.

The issue is whether subsequent amendments to a "pourover" trust are effective as against the will that "pours over" into it. Although New York does not recognize incorporation by reference of unattested instruments, a bequest to a trust that is in writing and acknowledged and created before or contemporaneously with the will are valid, even if the trust is subsequently amended.

Generally, trusts are unamendable and irrevocable unless otherwise stated. Since Dad validly amended his trust, it was apparently amendable. Under the rules stated above, Tes's bequest to

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Dad's trust was a valid pourover clause, and the change in income beneficiaries from Ann to Don was valid vis-a-vis Tes's will.

A will becomes legally operative only upon the death of the testator (except with regard to the revocation of prior wills, in which case it takes effect immediately). When Tes died her will and hence the bequest to Dad's trust, took effect. Subsequent amendments to the trust would be ineffective vis-a-vis the testamentary bequest. This is for two reasons: first, the policy that if Tes didn't approve of an amendment during her life, she could change her will, but she couldn't do this regarding subsequent amendments. Also, the rule against perpetuities could be violated if the trust were amended in such a way that an interest in the \$100,000 wouldn't vest or fail within lives in being plus 2 years, or if alienation were suspended for such a period (e.g. if Dad created an income interest in an unborn child).

Don's income interest is inalienable, since all income interest in trusts are presumed spendthrift under New York law. (3)(a) The amount in paragraph 3 goes to Cal.

The issue is whether the anti-lapse statute applies to a gift to a sibling of the testator which is conditional on the sibling's survival. If a bequest is made to the testator's issue or siblings and the beneficiary predeceases the testator, the bequest does not lapse, but passes, under the EPTL, to the beneficiary's issue. However, if the gift is expressly conditional on the beneficiary surviving the testator, the anti-lapse statute does not apply. Because the gift to Tom fails by its own terms if Tom "predeceases" Tes, the anti-lapse statute doesn't apply to it. Thus, the \$200,000 passes, as Tes stated, to "those of his children who are named in his will as beneficiaries." Because Cal was the only child so named, the money passes to Cal (not equally between Cal and Joe, as under the anti-lapse statute).

New York does allow incorporation by reference of other attested instruments. Since Tom's will was valid, and therefore properly attested, its incorporation into Tes's will by reference is valid.

(3)(b) The amount in paragraph 4 passes to Joe.

The issue is whether a bequest on condition of divorce is valid. In general, conditional bequests are valid. However, if the condition itself violates public policy, it is deemed void. Conditions requiring divorce are void as against public policy (whereas conditions requiring marriage, or marriage within particular faith, are not).

Because the bequest to Joe is conditioned on his divorce from Rea, the condition is void. A void condition is treated as though it did not exist. If this condition did not exist, paragraph would contain an outright disposition of \$300,000 to Joe. Thus, the \$300,000 goes to Joe outright.

This disposition, and the other bequests to persons other than Hal, will not be reduced by any Elective Share claimed by Hal since none exists. Tes's estate is \$3,000,000, and Hal's elective share is one-third of this (\$1,000,000). Because the other bequest total was \$600,000, Hal gets \$2,400,000 under the residuary clause, and thus has no right of election.

ANSWER TO QUESTION FIVE

(1) Lil is entitled to nothing under Tes's will. The issue is whether the house in Troy will be considered the same gift as the house in Albany.

Under the EPTL, when a specific bequest to a beneficiary is not in the estate upon the death of the testator then the gift is subject to ademption and the gift fails. It is of no significance why the

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property is not in the testator's estate. A gift will not be adeemed if it can be shown that the change is not one of substance but one of form.

Tes's bequest to Lil was a specific bequest of her home in Albany. Subsequent to the execution of the will the property was removed from the estate through condemnation. The repurchase of the house in Troy was the purchase of an entirely new house and it is not a change in form that will save the bequest.

Since the house in Albany is no longer part of the estate the gift to Lil is adeemed and Lil receives nothing.

(2) Leo is entitled to the income from the trust. The issue is what control does the testator's estate have over a trust to which a testamentary gift was made.

Under the EPTL a pour-over gift can be made to an already existing trust if it is initially identified in the will itself. A will shall not give effect to any other document, instrument or act unless it is one of non-testamentary significance for non-testamentary purpose.

A trustee who sets up a trust for the benefit of another makes an irrevocable gift unless he retains certain rights. One such right is the right to change the beneficiary. Changes in beneficiary need only be valid according to the EPTL and do not have to meet the due execution standard of the Statute of Wills. Once the gift is made to the trust it becomes trust property.

Tes's will left a valid pour-over gift to a previously existing trust. It was her wish that the trust be carried on according to its previously existing terms. It is apparent from these facts that Dad retained the power to change the beneficiary. Tes's death does not change the trust in any way other than to add principal to the trust. Dad's actions are those of no testamentary significance and there is no evidence that any changes were made on account of Tes' will.

Dad has the power to change the beneficiaries to the trust and he has the authority to name Leo as beneficiary. Since the amount bequeathed is now part of the trust, Leo has the right to it.

3;(a) Tom's son Cal takes the amount of \$200,000. The issue is whether the anti-lapse statute applies.

When a bequest is made to one who predeceases the testator the gift lapses to the residuary estate unless the beneficiary is descendant, brother or sister of the testator, in which case the anti-lapse statute applies. However, the anti-lapse statute only applies in the absence of a provision in the will directing the disposition of such assets in the event the beneficiary predeceases the testator. In the absence of such will provision, the gift goes to the issue of the predeceased beneficiary.

Tom predeceased his sister, Tes, and in the absence of a will provision stating otherwise, the gift would be saved under the anti-lapse statute and go to Cal and Joe. However, Tes provided that if Tom should predecease then it should go to the beneficiary named in Tom's will, which is solely Cal.

Since the anti-lapse statute is not applied in the presence of testamentary provisions, the \$200,000 goes to Cal.

3;(b) The \$300,000 goes to Hal. The issue is the validity of the condition precedent requiring Joe to be divorced at the time of Tes's death to collect.

It is against public policy to condition the receiving of a bequest upon the commission of an event affecting total restrictions on marriage. To condition a gift upon the attainment of a divorce

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within a certain time would be against public policy. However, to make the marital status of a beneficiary a condition precedent to receiving a gift is valid.

The bequest by Tes states as a condition precedent that Joe be divorced from his present wife, Rea, in order to collect. This is a valid condition precedent and not a condition void as against public policy. There is no future action of Joe that can be affected by this condition. Even a future divorce will not make Joe eligible to receive the bequest. Additionally, since he didn't know about the condition it could not have affected him during Tes's life. Since the condition precedent is valid, the bequest is valid.

When a gift fails for any reason the property goes to the residuary estate where it goes to the residuary beneficiaries. Since the gift to Joe failed, the \$300,000 goes to the residuary estate where it will go to Hal.

QUESTION-SIX

HOMEICO, INC. was incorporated in 1987 by Ali, Baba and Steve to build homes in Nassau County. Ali and Baba each own ten shares, and Steve owns five shares, of Homeico's stock.

After incorporating Homeico, Ali, Baba, and Steve signed a shareholders agreement which provided that, as shareholders, Ali, Baba and Steve would vote to elect themselves as directors of Homeico. The agreement also provided that Ali and Baba would be employed full-time by Homeico at an annual salary of \$60,000 each, Steve would be employed part-time by Homeico at an annual salary of \$30,000, and none of their salaries would be changed without the consent of all shareholders. Homeico's certificate of incorporation does not authorize any of the provisions of the shareholders agreement.

In 1990, Homeico hired Pat as its construction foreman for an unspecified term at an annual salary of \$50,000. Under Homeico's written employment agreement with Pat, Pat purchased three shares of Homeico's stock, subject to a requirement that upon the termination of his employment before May 1, 1995, Pat would sell his stock back to Homeico at its book value, but that upon his termination of employment after May 1, 1995, Pat would receive a price for his stock based upon Homeico's earnings.

On April 15, 1995, Homeico terminated Pat's employment as a construction foreman, and tendered him \$20,000, the book value of his three shares of stock. If Pat's employment had not been terminated until after May 1, 1995, the buy-back price for his stock, based on Homeico's earnings, would have been in excess of \$100,000.

Pat is also owed his salary for the preceding two months and is threatening to sue Ali, Baba and Steve personally for his unpaid salary. In addition, Pat contends that he was terminated on April 15, 1995 solely to deprive him of the price he would have received for his stock after May 1, 1995, and that the termination violates the fiduciary duty owed to him as a minority stockholder in Homeico.

On July 1, 1995, after a disagreement over company policy, Ali and Baba advised Steve that they would no longer vote to elect Steve as a director, and that Ali and Baba would vote to increase their own salaries to \$80,000 each.

Can Steve enforce the agreement among Ali, Baba and Steve to elect each other as directors of Homeico?

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ANSWER TO QUESTION SIX

(1) Can Steve enforce agreement as to directorship?

Steve can enforce the shareholders agreement as to director voting. The issue is whether shareholder agreements may by law bind parties as to legitimate issues of shareholder voting. Shareholder agreements are valid and enforceable in New York as to matters of shareholder voting, but voting agreements as to issues brought before the board of directors are void. Thus, since this written agreement provides a contract by which Ali, Baba, and Steve will elect each other as directors, and because electing directors is a matter within the rights of the shareholders as shareholders, the voting agreement will be enforced like an ordinary contract. Thus Steve may enforce the agreement as to director election.

(2) Can Steve enforce agreement as to salaries?

Steve cannot enforce the agreement as to salaries. The issue is whether the issue of salaries is a matter for the board of directors or the shareholders, since voting agreements as to director voting are not allowed.

As stated above, voting agreements are permissible as to business within the shareholders' rights; however, directors cannot enter into voting agreements as to carrying out their duties as directors.

Management of a company is the responsibility of the board of directors, unless, pursuant to a provision in the certificate of incorporation shareholder management is permitted, the shareholders unanimously approve shareholder management, and that fact is noted on the shares. Because the certificate of Homeco does not allow for shareholder management, the directors must manage Homeco.

Issues of hiring of officers and employees and the setting of salaries is part of the management of a corporation, thus does not fall to the shareholders.

Because it does not fall to the shareholders, it is not a legitimate subject matter for coverage in a voting agreement. Thus the voting agreement is not enforceable as to employee compensation.

It should be noted that Steve may have a derivative cause of action as to the salaries, pursuant to Ali's and Baba's duties of care and loyalty, but no cause of action based on the agreement. (3) Cause of action by Pat against Ali, Baba and Steve personally.

Pat does have a cause of action. The issue is whether, as a closely held corporation, there is a special statutory cause of action by employees.

Generally, the shareholders of a corporation will not be personally liable for the debts of the corporation beyond their capital investment; however, New York courts will pierce the corporate veil to prevent fraud or achieve equity. Because there are no facts to suggest that Ali, Baba, and Steve have ignored the corporate formalities, or otherwise fit within the alter ego theory of recovery, Pat cannot pierce the corporate veil on these facts to reach the shareholders personally.

However, the BCL provides a special cause of action in favor of employees against the shareholders of closely held corporations. If I recall correctly, if the corporation is not publicly traded and has fewer than ten shareholders, the shareholders may be held personally liable for employees' salaries. Here, because there are only four shareholders, the shareholders may be held personally liable for employees' salaries.

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Accordingly, Pat has a cause of action against Ali, Baba and Steve for his salary.

(4) Breach of Fiduciary Duty by Minority Shareholder?

Pat does not have a claim for breach of fiduciary duty. The issue is whether the majority shareholders in a closely held corporation owe a fiduciary duty to minority shareholders.

Generally, only officers and directors owe duties of care and loyalty to the corporation. A shareholder will not normally be held to owe a fellow shareholder any fiduciary duty. Courts have found that shareholders in closely held corporations owe other shareholders such a duty. Likewise, majority shareholders have been found to owe such a duty to minority shareholders in fact specific cases, such as when knowingly selling a corporation to looters.

The presence of the shareholder agreement and the tight knit nature of Ali, Baba and Steve might argue in favor of a fiduciary duty, but because none of the three holds such complete control this argues against finding the fiduciary duty.

Because these shareholders also manage the corporation, this case approximates cases where managing shareholders owe such duties.

The best argument for Pat is that he was terminated solely to deprive him of a higher stock valuation, and that the duty arises from the majority shareholders attempting to manipulate his stock value.

However, these facts are insufficient to find a fiduciary duty owed to Pat as a minority shareholder.

ANSWER TO QUESTION SIX

(1) Shareholders' Agreement

Shareholders are free to enter into a written agreement to vote in a particular manner. The agreement will be enforced if it is in writing. The agreement between Ali, Baba and Steve was in writing. Thus, Steve may sue to enforce it.

(2) Agreement Concerning Salary Increases.

Unless the contrary is stated in the Articles of Incorporation salaries of officers and employees are set by the board of directors -- not by the shareholders. Of course, here, these two sets have been identical. Nonetheless, as shareholders the three cannot enter into a valid agreement as to salaries.

While shareholders may agree to vote in a certain manner directors may not enter into agreements concerning their vote. Rather, directors owe a fiduciary duty to act in the best interest of the corporation, not of individual shareholders.

Thus, as directors, Ali, Baba and Steve could not enter into an agreement subjecting salary increases to a unanimous vote. For this reason, Steve cannot enforce the agreement as to salaries.

Steve might have a derivative cause of action against the corporation for waste if the salaries are excessively high. A recovery would go to the corporation, not to him, except for reasonable attorneys' fees.

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However, he would be unlikely to prevail in such an action. The salary increase of 25 percent over an eight year period when the company appears to be prospering (based on the valuation \$33,333/share) would probably not constitute waste.

(3) Pat's Action for Unpaid Salary.

The principal advantages of incorporation are that corporation's existence is perpetual and its shareholders liability is generally limited to the amount of their capita contributions. Thus, ordinarily, any action against shareholder for a debt of the corporation will fail.

There are some exceptions to this otherwise harsh rule. A court will pierce the corporate veil and impose liability upon the shareholders if the corporation is deliberately under funded (that is if distributions are made which render the corporation unable to satisfy its obligations) or if there has been such a disregard of corporate formalities as to render the protection of incorporation unjust, for example, if no shareholder meetings or director meetings were conducted and the officers of the corporation treated it as a personal piggy bank. There is no information which would suggest that either of these situations exist with respect to Homeco.

In addition, New York BCL provides that the ten largest shareholders of a corporation which is not publicly traded will be personally liable for the salaries of the corporation's employee if the corporation fails to pay them. Ali, Baba and Steve fall within this description, and thus Pat will be able to maintain cause of action against them for his wages.

(4) Pat's Action for Breach of Fiduciary Duty.

The controlling shareholders owe a fiduciary duty to minority shareholders not to engage in oppressive conduct.

Pat would allege that, by terminating his employment two week short of the date after which he would be entitled to a higher repurchase price for his shares, the shareholders engaged in such oppressive behavior.

As a starting point in the analysis, Pat was employed pursuant to a written contract for an unspecified term. A contract of employment for an unspecified term is at-will. "At will" mean that an employee may be terminated at any time, for good reason bad reason, or no reason, all subject to a few limitations imposed by state and federal civil rights statutes and public policy.

Thus, even if Pat's discharge was motivated by a desire not to pay him the increased earnings-based sum when it did terminate him it was within Homeco's rights and was not wrongful. Thus, there can be no cause of action against the corporation.

Pat may have a slightly better argument against the directors/controllers/shareholders of Homeco, and probably would be able to withstand a motion to dismiss if he sued.

The fact remains, however, that Pat was treated in accordance with the agreement he entered into. There was no limitation on when or for what reasons he could be terminated in the agreement.

Further, Pat's contention presupposes that, but for the intent to deprive him of the higher buyout price, he would have been terminated shortly after May 1, 1995. (If he were not terminated he would not have been entitled to any buyout, and the price would have been immaterial.) Thus, in effect, Pat contends that he was going to be let go either way, but that he should have been let go later, rather than sooner. If Homeco had retained him beyond May 1, 1995 solely in order that his right to a higher buyout would vest, the directors conceivably might have been acting in breach of

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their fiduciary duty to Homeco by allowing it to be subject to a \$100,000, rather than a \$20,000, liability.