



July 2012 MEE Questions and Analyses



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National Conference of Bar Examiners
302 South Bedford Street | Madison, WI 53703-3622
Phone: 608-280-8550 | Fax: 608-280-8552 | TDD: 608-661-1275
e-mail: contact@ncbex.org

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* Used as one of the six questions on the July 2012 Uniform Bar Examination in Alabama, Arizona, Colorado, Idaho, Missouri, and North Dakota.

Preface

The Multistate Essay Examination (MEE) is developed by the National Conference of Bar Examiners (NCBE). This publication includes the questions and analyses from the July 2012 MEE. Each test includes nine 30-minute questions; user jurisdictions may elect which of the nine questions they wish to use. (Jurisdictions that administer the Uniform Bar Examination [UBE] use a common set of six MEE questions as part of their bar examinations.) In the actual test, the questions are simply numbered rather than being identified by area of law. The instructions for the test appear on page iii. For more information, see the *MEE Information Booklet*, available on the NCBE website at www.ncbex.org.

The model analyses for the MEE are illustrative of the discussions that might appear in excellent answers to the questions. They are provided to the user jurisdictions to assist graders in grading the examination. They address all the legal and factual issues the drafters intended to raise in the questions.

The subjects covered by each question are listed on the first page of its accompanying analysis, followed by roman numerals that refer to the MEE subject matter outline for that subject. For example, the Federal Civil Procedure question on the July 2012 MEE tested the following areas from the Federal Civil Procedure outline: IV.A., Pretrial procedures—pleadings and motions, and VI.B., Verdicts and judgments—judicial findings and conclusions. Subject matter outlines are included in the *MEE Information Booklet*.

Description of the MEE

The MEE consists of nine 30-minute essay questions, any of which a jurisdiction may select to include as part of its bar examination. (UBE jurisdictions use a common set of six MEE questions as part of their bar examinations.) It is administered by participating jurisdictions on the Tuesday before the last Wednesday in February and July of each year. The areas of law that may be covered by the questions on any MEE are Business Associations (Agency and Partnership; Corporations and Limited Liability Companies), Conflict of Laws, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Family Law, Federal Civil Procedure, Real Property, Torts, Trusts and Estates (Decedents' Estates; Trusts and Future Interests), and Uniform Commercial Code (Negotiable Instruments and Bank Deposits and Collections; Secured Transactions). Some questions may include issues in more than one area of law. The particular areas covered vary from exam to exam.

The purpose of the MEE is to test the examinee's ability to (1) identify legal issues raised by a hypothetical factual situation; (2) separate material which is relevant from that which is not; (3) present a reasoned analysis of the relevant issues in a clear, concise, and well-organized composition; and (4) demonstrate an understanding of the fundamental legal principles relevant to the probable solution of the issues raised by the factual situation. The primary distinction between the MEE and the Multistate Bar Examination (MBE) is that the MEE requires the examinee to demonstrate an ability to communicate effectively in writing.

Instructions

The back cover of each test booklet contains the following instructions:

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin.

You may answer the questions in any order you wish. Do not answer more than one question in each answer booklet. If you make a mistake or wish to revise your answer, simply draw a line through the material you wish to delete.

If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions.

Read each fact situation very carefully and do not assume facts that are not given in the question. Do not assume that each question covers only a single area of the law; some of the questions may cover more than one of the areas you are responsible for knowing.

Demonstrate your ability to reason and analyze. Each of your answers should show an understanding of the facts, a recognition of the issues included, a knowledge of the applicable principles of law, and the reasoning by which you arrive at your conclusion. The value of your answer depends not as much upon your conclusions as upon the presence and quality of the elements mentioned above.

Clarity and conciseness are important, but make your answer complete. Do not volunteer irrelevant or immaterial information.

Answer all questions according to generally accepted fundamental legal principles unless your jurisdiction has instructed you to answer according to local case or statutory law. (UBE instructions: Answer all questions according to generally accepted fundamental legal principles rather than local case or statutory law.)

July 2012 MEE

▶ *QUESTIONS*

Trusts and Future Interests

Criminal Law and Procedure

Constitutional Law

Family Law

Secured Transactions

Torts

Federal Civil Procedure

Corporations and Limited Liability Companies

Decedents' Estates/Conflict of Laws

TRUSTS AND FUTURE INTERESTS QUESTION

Thirty years ago, Settlor entered into an irrevocable trust agreement with Trustee. Pursuant to the terms of this trust, all trust income was payable to Settlor's Husband, and upon Husband's death, all trust assets were to be distributed to "Settlor's children." The trust also provided that Husband's income interest would terminate if Husband remarried after Settlor's death.

When the trust was created, Settlor and Husband had three children. Five years later, Settlor and Husband had a fourth child.

Ten years later, Settlor died.

This year, when the trust principal was worth \$750,000, Husband wrote to his four children. Husband noted that he was about to retire and wanted cash to buy a retirement home. He asked the children to agree to terminate the trust and to direct Trustee to distribute \$250,000 of trust principal to Husband and the remaining \$500,000, in equal shares, to the four children. All four children agreed to Husband's proposal. Husband and the four children then wrote Trustee the following letter:

We, the only beneficiaries of the trust, direct you to terminate the trust and distribute \$250,000 of trust assets to Husband and the remainder, in equal shares, to Settlor's four children.

Trustee's response stated:

I cannot make the requested distribution to you for the following reasons:

- (1) The trust is irrevocable and cannot be terminated.
- (2) Even if the trust were terminable, termination would require the consent of all beneficiaries. This is not obtainable because, if a child of Settlor predeceases Husband, one or more of Settlor's future grandchildren might be entitled to trust assets at Husband's death.
- (3) Even if the trust were terminable, only the three children living when the trust was created have a beneficial interest in the trust; therefore no distribution of trust principal can be made to Settlor's youngest child.
- (4) The actuarial value of Husband's interest is only \$150,000. Therefore, even if the trust were terminable, any distribution of trust principal to Husband in excess of that amount would be a breach of trust.

Is Trustee correct? Explain.

CRIMINAL LAW AND PROCEDURE QUESTION

At 9:00 p.m. on a Sunday evening, Adam, age 18, proposed to his friend Bob, also age 18, that they dump Adam's collection of 2,000 marbles at a nearby intersection. "It'll be funny," Adam said. "When cars come by, they'll slip on the marbles and they won't be able to stop at the stop sign. The drivers won't know what happened, and they'll get really mad. We can hide nearby and watch." "That's a stupid idea," Bob said. "In the first place, this town is deserted on Sunday night. Nobody will even drive through the intersection. In the second place, I'll bet the cars just drive right over the marbles without any trouble at all. It'll be a total non-event." "Oh, I'll bet someone will come," Adam replied. "And I'll bet they'll have trouble; maybe there will even be a crash. But if you're not interested, fine. You don't have to do anything. Just give me a ride to the intersection—these bags of marbles are heavy."

At 10:00 p.m. that same night, Bob drove Adam and his bags of marbles to the intersection. Adam dumped several hundred marbles in front of each of the two stop signs at the intersection. Adam and Bob stayed for 20 minutes, waiting to see if anything happened. No one drove through the intersection, and Adam and Bob went home.

At 2:00 a.m., a woman drove through the intersection. Because of the marbles, she was unable to stop at the stop sign. Coincidentally, a man was driving through the intersection at the same time. The woman crashed into the side of the man's car. The man's eight-year-old child was sitting in the front seat without a seat belt, in violation of state law. The child was thrown from the car and killed. If the child had been properly secured with a seat belt, as required by state law, he would likely not have died.

Adam has been charged with involuntary manslaughter as defined at common law, and Bob has been charged with the same crime as an accomplice. State law does not recognize so-called "unlawful-act" involuntary manslaughter.

1. Could a jury properly find that Adam is guilty of involuntary manslaughter? Explain.
2. If a jury did find Adam guilty of involuntary manslaughter, could the jury properly find that Bob is guilty of involuntary manslaughter as an accomplice? Explain.

CONSTITUTIONAL LAW QUESTION

Congress recently enacted the Violence at Work Act (the Act).

Title I of the Act provides that an employee who has been injured in the workplace by the violent act of a coworker has a cause of action for damages against that coworker.

Title II of the Act imposes several duties on employers subject to the Act and creates a cause of action against employers who do not fulfill those duties. Section 201 provides that all employers, “including all States, their agencies and subdivisions,” who have more than 50 employees are subject to the Act. Section 202 requires employers subject to the Act to (i) train employees on certain methods of preventing and responding to workplace violence, (ii) conduct criminal background checks on job applicants, and (iii) establish a hotline to report workplace violence. Section 203 provides that if an employer subject to the Act does not fulfill the duties imposed by Section 202, an employee who has been injured by the violent act of a fellow employee may recover damages from the employer for the harm resulting from that violent act. Section 204 provides that any action brought pursuant to Section 203 may be brought in federal or state court and that “if brought in federal court against a State, its agencies or subdivisions, any defense of immunity under the Eleventh Amendment to the United States Constitution is abrogated.”

The House and Senate committee reports on the Act note that Congress passed the Act under its power to regulate interstate commerce. To support its use of that power, Congress found that acts of workplace violence directly interfere with economic activity by causing damage to business property, injury to workers, and lost work time due to the violent acts and their aftermath. The House report estimated that total interstate economic activity is diminished by \$5 to \$10 billion per year as a result of losses associated with workplace violence.

After the Act’s effective date, an employee of a state agency was injured in the workplace by the violent act of a disgruntled coworker. The state agency, which has over 100 employees, conceded that it had not implemented the measures required by Section 202 of the Act. Accordingly, the employee has sued the state agency in United States District Court to recover damages for the harm caused by the act of workplace violence. The state agency has moved to dismiss the lawsuit on three grounds: (1) Congress did not have the power to enact the Act, (2) Congress did not have the power to apply the Act to state agencies, and (3) the Eleventh Amendment bars the employee’s lawsuit.

1. Is the Act a valid exercise of Congress’s power to regulate interstate commerce? Explain.
2. Assuming that the Act is a valid exercise of Congress’s power, may the Act constitutionally be applied to state agencies as employers? Explain.
3. Does the Eleventh Amendment bar the employee’s lawsuit in federal court against the state agency? Explain.

FAMILY LAW QUESTION

Fifteen years ago, Mom and Dad were married in State A, where both were domiciled.

Fourteen years ago, Mom gave birth to Daughter in State A. Dad is Daughter's biological father.

Four years ago, Dad died in State A. After Dad's death, Mom relied heavily on Dad's parents, Grandparents. Mom and Daughter moved to an apartment near Grandparents in State A. Thereafter, Grandparents visited Mom's home at least once a week. Daughter was also a frequent visitor at Grandparents' home. Grandparents also helped Mom to support Daughter financially.

Four months ago, Mom married Stepdad and moved with Daughter to Stepdad's home in State B, 500 miles from Mom's former residence in State A. Stepdad believes that Grandparents discouraged Mom's marriage to him, and he asked Mom not to invite Grandparents to visit. Mom agreed to Stepdad's request. However, she allowed Daughter to visit Grandparents in State A during a school vacation.

One week ago, Grandparents sent Daughter a bus ticket. Without revealing her plans to Mom, Daughter used the ticket to go to Grandparents' home in State A. When she arrived at Grandparents' home, Daughter telephoned Mom and said, "I hate State B, I dislike Stepdad, and I want to live with Grandparents in State A until you leave Stepdad and return to State A, too."

On the same day that Mom received this telephone call, she was served with a summons to appear in a State A court proceeding, brought by Grandparents, in which Grandparents seek custody of Daughter. Grandparents' petition was brought pursuant to a State A statute that authorizes the award of child custody to a grandparent when the court finds that (1) the "child has been abandoned or one of the child's parents has died" and (2) an award of custody to the petitioner grandparent "serves the child's best interests."

Both State A and State B have enacted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).

Mom has sought advice from your law firm. She asks the following questions:

1. Does State A have jurisdiction to award custody of Daughter to Grandparents? Explain.
2. On the merits, may a court deny Grandparents' custody petition if Daughter testifies that she wants to live with Grandparents? Explain.
3. Is the State A statute authorizing the award of custody to grandparents constitutional? Explain.

SECURED TRANSACTIONS QUESTION

On March 1, Recycled, a business that sells new and used bicycles and bicycle equipment, borrowed \$100,000 from Bank. To secure its obligation to repay the loan, Recycled signed an agreement granting Bank a security interest in “all the inventory of Recycled, whether now owned or hereafter acquired.”

On March 5, Bank filed a financing statement in the appropriate state office. The financing statement listed Recycled as debtor and “inventory” as collateral.

Over the next month, Recycled entered into the following transactions:

(a) On March 10, Recycled sold a new bicycle to Consumer for \$1,500. The sale was made in accordance with the usual business practices of Recycled. Both parties acted honestly and in accordance with reasonable commercial standards of fair dealing, and Consumer was unaware of the financial relationship between Recycled and Bank.

(b) On March 15, Recycled traded a used bicycle to Student for a used computer that Student no longer needed. Recycled immediately began using the computer in its business.

(c) On March 31, Recycled bought 100 new bicycle helmets from Manufacturer. The sale was on credit, with payment due in 15 days. The written sales agreement, signed by Recycled, states that Manufacturer retains title to the helmets until Recycled pays their purchase price to Manufacturer. No financing statement was filed. None of the helmets has been sold by Recycled.

Recycled has not paid its utility bills for several months. On April 29, Utility obtained a judgment in the amount of \$2,500 against Recycled and, pursuant to state law, obtained a judgment lien against all the personal property of Recycled.

Recycled is in default on its repayment obligation to Bank, and it has not paid the amount it owes to Manufacturer.

Bank claims a security interest in all the bicycles and bicycle helmets owned by Recycled, the bicycle bought by Consumer, and the computer obtained by Recycled in the transaction with Student. Manufacturer claims an interest in the bicycle helmets, and Utility seeks to enforce its lien against all the personal property of Recycled.

1. As between Bank and Consumer, which has a superior claim to the bicycle sold to Consumer? Explain.
2. As between Bank and Utility, which has a superior claim to the used computer? Explain.
3. As among Bank, Manufacturer, and Utility, which has a superior claim to the 100 bicycle helmets? Explain.

TORTS QUESTION

Susan, a student at University, lived in a University dormitory. Access to Susan's dormitory was restricted to dormitory residents and guests who entered the dormitory with a resident. Entry to the dormitory was controlled by key cards. Dormitory key cards opened all doors except for a rear entrance, used only for deliveries, that was secured with a deadbolt lock.

On November 30, at 2:00 a.m., Ann, a University graduate, entered the dormitory through the rear entrance. Ann was able to enter because the deadbolt lock had broken during a delivery four days before Ann's entry and had not been repaired. Ann attacked Susan, who was studying alone in the dormitory's library.

Jim, another resident of Susan's dormitory, passed the library shortly after Ann had attacked Susan. The door was open, and Jim saw Susan lying on the floor, groaning. Jim told Susan, "I'll go for help right now." Jim then closed the library door and went to the University security office. However, the security office was closed, and Jim took no other steps to help Susan. About half an hour after Jim closed the library door, Susan got up and walked to the University hospital, where she received immediate treatment for minor physical injuries.

One day after Ann's attack, Susan began to experience mental and physical symptoms (e.g., insomnia, anxiety, rapid breathing, nausea, muscle tension, and sweating). Susan's doctor has concluded that these symptoms are due to post-traumatic stress disorder (PTSD). According to the doctor, Susan's PTSD was caused by trauma she suffered one month before Ann's attack when Susan was robbed at gunpoint. In the doctor's opinion, although Susan had no symptoms of PTSD until after Ann's attack, Ann's attack triggered PTSD symptoms because Susan was suffering from PTSD caused by the earlier robbery. The symptoms became so severe that Susan had to withdraw from school. She now sees a psychologist weekly.

Since the attack, Susan has learned that Ann suffers from schizophrenia, a serious mental illness. From August through November, Ann had been receiving weekly outpatient psychiatric treatment from her Psychiatrist. Her Psychiatrist's records show that on November 20, Ann told her Psychiatrist that she "was going to make sure" that former University classmates who were "cheaters" got "what was coming to them for getting the good grades I should have received." Ann's Psychiatrist did not report these threats to anyone because Ann had no history of violent behavior. Ann's Psychiatrist also did not believe that Ann would take any action based on her statements.

At the time of the attack, Susan knew Ann only slightly because they had been in one class together the previous semester. Susan received an A in that class.

Susan is seeking damages for the injuries she suffered as a result of Ann's attack and has sued University, Jim, and Ann's Psychiatrist.

1. May Susan recover damages for physical injuries she suffered in Ann's attack from
 - (a) University? Explain.
 - (b) Jim? Explain.
 - (c) Ann's Psychiatrist? Explain.
2. Assuming that any party is found liable to Susan, may she also recover damages from that party for the PTSD symptoms she is experiencing? Explain.

FEDERAL CIVIL PROCEDURE QUESTION

Plaintiff, a female employee of Defendant, a large manufacturing firm, sued Defendant in federal district court for violating a federal statute that creates a right to be free of sex discrimination in the workplace.

Plaintiff alleged the following: (1) Plaintiff worked for Defendant in a position for which females had seldom been hired in the past. (2) Shortly after Plaintiff was hired, male coworkers began to make sexually charged remarks to Plaintiff. (3) Plaintiff's male supervisor asked her out on dates and became angry each time she refused. (4) There were occasional incidents in which the supervisor or another male worker "accidentally" made contact with various parts of Plaintiff's body. (5) No one from company management ever took steps to monitor or limit behavior of this sort. (6) As a result of this behavior, Plaintiff began to suffer from various physical ailments that were related to stress. (7) Plaintiff made no complaint to management about the situation because the job paid very well and there were, to her knowledge, no comparable opportunities that would be available to her if she lost this particular job.

Defendant's answer to the complaint admitted that Plaintiff was an employee and that the individual named as her supervisor was her supervisor. Defendant denied all allegations relating to the alleged sex discrimination.

A well-established affirmative defense is available in cases of this sort if the defendant employer proves that (a) the plaintiff employee was not subject to any adverse job action (firing, demotion, loss of promotion opportunity, etc.), (b) the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (c) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

In a pretrial deposition, Plaintiff admitted that she had suffered no loss of pay or promotion opportunity. Plaintiff also admitted that she was aware of company policies forbidding sex discrimination and sexual harassment, as well as the procedures that employees could use to complain about perceived discrimination. Plaintiff stated that although she was aware of those policies and procedures, she had not seen any effort on the part of Defendant to enforce the policies and was afraid that she would suffer retaliation if she made use of the procedures available to complain of sex discrimination.

After the close of discovery, Defendant moved to amend its answer to add the affirmative defense set forth above. It also moved for summary judgment, claiming that Plaintiff's deposition testimony sufficiently established the elements of the affirmative defense to warrant a judgment in Defendant's favor.

Plaintiff opposed both motions. The trial judge ruled in Defendant's favor, allowing the amendment and granting summary judgment.

Did the judge err? Explain.

CORPORATIONS AND LIMITED LIABILITY COMPANIES QUESTION

Acme Inc. manufactures building materials, including concrete, for sale to construction companies. To create a market for its building materials, Acme enters into agreements with construction companies under which Acme and the construction company agree to form a member-managed limited liability company (LLC). The LLC builds the project, purchasing building materials from Acme and contracting for construction services with the construction company.

The operating agreements for these LLCs always provide that Acme has a 55% voting interest, that Acme and the construction company contribute equally to the capital of the venture, and that the parties share in profits at a negotiated rate. The agreements are silent as to the allocation of losses.

Acme entered into such a relationship with Brown Construction Co. LLC (Brown), forming Acme-Brown LLC (A-B LLC) to build 50 homes. The operating agreement for A-B LLC gives Acme a 55% voting interest and provides for a 20%/80% division of profits in favor of Brown.

A-B LLC built all 50 homes and sold them to homeowners. The members received a distribution of profits from the sales, split between them according to their agreement on the division of profits. However, all the concrete manufactured by Acme and sold to A-B LLC for the foundations of the homes proved to be defective. After a year, the concrete dissolved, collapsing the homes and rendering them worthless. In a class action by the homeowners against A-B LLC, the plaintiffs were awarded a \$15 million judgment. The LLC has no assets with which to pay the judgment.

Although Acme would be liable to A-B LLC for the loss caused by the defective concrete, A-B LLC has not brought a claim against Acme. Acme has the financial resources to pay damages equal to the amount of the \$15 million judgment in the homeowners' lawsuit and to fully cover A-B LLC's liability.

Brown has sent a letter to A-B LLC demanding that A-B LLC bring a claim against Acme to recover those damages and pay the judgment to the plaintiffs, after which A-B LLC would be dissolved. But Acme, as the manager of A-B LLC, has refused to do so.

Acme's lawyer has sent a letter to Brown stating the following:

- (1) Acme has no fiduciary obligations to either A-B LLC or Brown that require it to have A-B LLC bring the concrete claim against Acme.
- (2) Brown cannot bring a claim against Acme.
- (3) Brown does not have sufficient grounds to seek the judicial dissolution of A-B LLC.
- (4) Because the A-B LLC agreement provides for a 20%/80% division of profits, the losses arising from the judgment obtained by the plaintiffs against the LLC should also be allocated 20% to Acme and 80% to Brown.

Is Acme's lawyer correct? Explain.

DECEDENTS' ESTATES/CONFLICT OF LAWS QUESTION

Zach died a domiciliary of State A. At Zach's death, he owned a house located in State A. Zach also owned a farm located in State B and had a savings account at a bank in State B.

Zach left a handwritten document containing instructions for the disposition of his assets. The only words on this document were the following:

I, Zach, being of sound and disposing mind, leave my entire estate to my alma mater, University. I appoint Bank as executor of my estate.

Zach's wife predeceased him. Zach was survived by three children, Alex, Brian, and Carrie. Alex was the biological child of Zach and his deceased wife. Brian was the biological child of Zach's deceased wife and her first husband, but Zach adopted Brian when Brian was 12. Carrie was the biological child of Zach and a woman whom Zach never married. Zach's paternity of Carrie was adjudicated during Zach's lifetime.

State A law provides that a holographic will "entirely handwritten and signed at the end by the testator" is valid. State A law also provides that if a decedent dies intestate and leaves no surviving spouse, the decedent's estate passes in equal shares to the decedent's "surviving children." The phrase "surviving children" is defined to exclude "nonmarital children." There are no other relevant statutes in State A.

State B law provides that (1) the will of a nonresident that bequeaths real property located in State B must comply with the law of State B; (2) a will is invalid unless it was signed by the testator and two witnesses; and (3) the estate of an intestate decedent who leaves no surviving spouse passes to the decedent's "biological and adopted children, in equal shares." There are no other relevant statutes in State B.

How should Zach's three assets be distributed? Explain.

July 2012 MEE

▶ *ANALYSES*

Trusts and Future Interests
Criminal Law and Procedure
Constitutional Law
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Decedents' Estates/Conflict of Laws

TRUSTS AND FUTURE INTERESTS ANALYSIS

(Trusts and Future Interests I.C.2., H., I.; III.B., E.)

ANALYSIS

Legal Problems

- (1) Is there a material purpose of the trust yet to be performed?
- (2) Do Settlor's children have the only remainder interest in the trust?
- (3) Was the class gift in favor of Settlor's children open to admit Settlor's fourth child?
- (4) Would Trustee breach any fiduciary duties by terminating the trust as requested?

DISCUSSION

Summary

Husband and Settlor's four children may terminate the irrevocable trust if a court finds that they are the only trust beneficiaries and there is no material purpose of the trust yet to be performed. It is unclear whether Settlor's desire to terminate Husband's interest if Husband remarries would be viewed as a material purpose of the trust yet to be performed.

Under the common law, only Husband and Settlor's children have an interest in the trust, as the children's interest is not subject to any conditions. The children's interest is both vested and transmissible. However, if the jurisdiction has adopted a survivorship statute like Uniform Probate Code (UPC) § 2-707, then the children and Husband would not be the only trust beneficiaries. Under that statute, if a child dies before Husband leaving surviving issue, the issue would also have an interest in the trust.

Because Settlor's class gift to "Settlor's children" remained open until Settlor's death, all four children are entitled to share in the trust remainder.

The proposed distribution of principal, which would give Husband more than the actuarial value of Husband's interest, would not breach any fiduciary duty because it would be made at the request of all trust beneficiaries.

Thus, unless UPC § 2-707 or a like statute applies or there is a material purpose of the trust yet to be performed, Trustee's assertions are incorrect.

Point One (35%)

Husband and Settlor's four children may terminate the irrevocable trust if a court finds that there is no material purpose of the trust yet to be performed. However, if a court were to find that the limitation on remarriage was a material purpose, the trust could not be terminated merely with the consent of Husband and the four children.

Generally, even an irrevocable trust can be terminated prior to the death of all income beneficiaries if both the income beneficiaries and the remaindermen unanimously consent. *See generally* RESTATEMENT (THIRD) OF TRUSTS § 65(1) (2003). *See also* Point Two. However, if there is a material purpose of the trust yet to be performed, the beneficiaries alone may not terminate the trust. *Id.* § 65(2).

Here, it is unclear whether there is a material purpose yet to be performed. According to the Restatement, a material purpose should not be inferred from “[t]he mere fact that the settlor . . . created a trust for successive beneficiaries. . . . In the absence of additional circumstances indicating a further purpose, the inference is that the trust was intended merely to allow one or more persons to enjoy the benefits of the property during the period of the trust and to allow the . . . other beneficiaries to receive the property thereafter.” *Id.* at cmt. However, the trust provision specifying that Husband’s interest terminates upon his remarriage arguably demonstrates that a material purpose of Settlor was ensuring that trust assets did not benefit Husband’s second wife. If Settlor did have such a material purpose, the proposed distribution of \$250,000 to Husband could defeat that purpose should Husband remarry.

If the court were to find that Settlor had a material purpose that would be defeated by trust termination, it is unclear whether a court would permit termination of the trust. Under the First and Second Restatements of Trusts, “if the continuance of the trust is necessary to carry out a material purpose of the trust, the beneficiaries cannot compel its termination.” RESTATEMENT (FIRST) OF TRUSTS § 337(2); RESTATEMENT (SECOND) OF TRUSTS § 337(2). Similarly, the Uniform Trust Code § 411(b) provides that “[a] noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries [only] if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust.”

However, under the Third Restatement of Trusts, which no court to date has followed, even if the court finds that the settlor had a material purpose that trust termination might defeat, it may nonetheless approve trust termination if “the reason for termination or modification outweighs the material purpose.” RESTATEMENT (THIRD) OF TRUSTS § 65(2).

If the court were to employ the balancing approach approved by the Third Restatement, it is unclear what decision it would reach on the available facts. The reason for trust termination is to provide Husband with cash for his impending retirement. Without knowing more about Husband’s finances and the income available from the trust, it is impossible to assess how Husband’s goal compares to Settlor’s goal of ensuring that no future spouse of Husband receives benefits traceable to trust assets.

[NOTE: While conditioning the continuation of a child’s income interest on the child’s marriage or divorce is void on public policy grounds, a similar marriage restriction tied to the surviving spouse’s interest is not.]

[NOTE: The Uniform Trust Code has been adopted in Alabama, Arizona, Arkansas, the District of Columbia, Florida, Kansas, Maine, Massachusetts, Michigan, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wyoming.]

Point Two (30%)

Under the common law, Settlor's children are the only trust remaindermen. Because each child's interest is vested and transmissible, it would pass to the child's estate, not the child's issue, should the child predecease Husband. Thus, the four children and Husband are the only beneficiaries of the trust and could consent to terminate the trust. However, under UPC § 2-707 alternative remainder interests are created in the issue of any of Settlor's children who predecease Husband.

A class gift is a gift to a group of persons described collectively, typically by their relationship to a common ancestor. *See* RESTATEMENT OF PROPERTY (WILLS AND DONATIVE TRANSFERS) § 13.1 (2004). Here, the gift to "Settlor's children" is a class gift.

Under the common law, when a class gift is made to a group who are equally related to a common ancestor *and* the gift is not expressly subject to a condition of survivorship, the gift is *not* impliedly subject to such a condition. *See id.* § 15.4 (incorporating the common law rule). If a member of such a class fails to survive until the time of distribution (here, Husband's death), that member's share passes to his or her estate, not to his or her issue. *Id.*

Here, the remainder interest in the trust is limited to a class of "Settlor's children." All class members are equally related to a common ancestor, Settlor, and the trust imposes no express condition of survivorship. Therefore, each child has a vested and transmissible interest that would pass to his or her estate should the child die before the distribution date. If the common law applies, then only Husband and the four children are the beneficiaries of the trust and, if there is no material purpose to be performed (*see* Point One), they could consent to a termination of the trust.

Critics of the common law approach have argued that it fails to carry out the intentions of the typical trust settlor, permits a deceased beneficiary to transmit her share of trust assets to persons who are "strangers" to the settlor, and increases administrative costs by requiring the reopening of deceased beneficiaries' estates and possibly successive estates. In response to these criticisms, some modern statutes do not follow the common law approach. For example, UPC § 2-707 provides that when a beneficiary does not survive to the distribution date, the beneficiary's interest passes to his or her issue unless the trust instrument specifies an alternate disposition. Here, under the Uniform Probate Code approach, issue of a deceased child would have beneficial interest in the trust and would have to be part of any termination effort unless their interest could be represented by another.

Section 304 of the Uniform Trust Code provides: "Unless otherwise represented, a minor, incapacitated, or unborn individual, . . . may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented." This statute permits one group of remaindermen to represent another group of remaindermen in the absence of a conflict of interest. Here, the four children and their issue would have a conflict in light of the proposed distribution that would exclude the issue from potentially sharing in any trust assets. Thus, under UPC § 2-707 or a like statute, the trust could not be terminated merely with the consent of Husband and the four children.

[NOTE: Section 2-707 of the Uniform Probate Code has been adopted in Alaska, Arizona, Colorado, Hawaii, Michigan, Montana, New Mexico, North Dakota, and Utah.]

Point Three (25%)

Settlor's youngest child is entitled to a share of the trust because that child was born and became a class member before the class closed.

As noted under Point Two, the gift to "Settlor's children" was a class gift. When a class gift is made to a group of individuals, such as the children of a named person, the class does not "close" (that is, additional individuals may join the class by satisfying the class eligibility requirements) until the named person dies or the gift becomes possessory. *See* WILLIAM M. MCGOVERN AND SHELDON F. KURTZ, *WILLS, TRUSTS AND ESTATES* 429 (3d ed. 2004); *RESTATEMENT (THIRD) OF PROPERTY (WILLS AND OTHER DONATIVE TRANSFERS)* § 15.1 cmt. e.

Here, Settlor's fourth child was born prior to Settlor's death and therefore joined the class before it closed. Thus, this child is entitled to a share of the trust property.

Point Four (10%)

While Trustee has a duty to carry out the terms of the trust, when the trust beneficiaries properly terminate the trust, they can direct that the trust property be distributed in a manner of their own choosing, and a distribution consistent with the beneficiaries' direction is not a breach of trust.

If trust beneficiaries properly terminate a trust, trust assets vest in them. After termination, the beneficiaries may themselves distribute trust assets in any manner they choose. They may also direct a trustee to distribute trust assets as their agent. A trustee who complies with such directions does not violate any fiduciary duty. *See* UNIF. TRUST CODE § 411.

Here, assuming that the trust beneficiaries may terminate the trust, Trustee may comply with their distribution instructions. The fact that Husband would receive more than the actuarial value of his life estate does not, under these circumstances, constitute a breach of trust. Moreover, even if Trustee were breaching a fiduciary obligation in complying with the children's directions, they would be deemed to waive any claims against Trustee because they ordered the distribution. *See, e.g., id.* § 1009.

CRIMINAL LAW AND PROCEDURE ANALYSIS

(Criminal Law and Procedure I.B.1. & 2.; III.B.; IV.B.1., D.)

ANALYSIS

Legal Problems

- (1)(a) What are the elements of involuntary manslaughter?
- (1)(b) Did Adam act with mens rea required to be guilty of involuntary manslaughter?
- (1)(c) Were Adam's actions the legal cause of the child's death?
- (2) Can Bob be liable as an accomplice for the child's death?

DISCUSSION

Summary

A jury could find Adam guilty of involuntary manslaughter both in a jurisdiction that requires recklessness and in one that requires only gross negligence (sometimes referred to as criminal or culpable negligence). In a jurisdiction that requires recklessness, Adam's statements indicate that he was aware that his conduct created an unreasonable (or high and unreasonable) risk of death or serious bodily injury and that he consciously disregarded that risk. In a jurisdiction that requires gross negligence, a jury could find Adam guilty because a reasonable person under similar circumstances would have been aware that his conduct created an unreasonable (or unreasonable and high) risk of death or serious bodily injury.

Adam's conduct was the cause of the child's death. Adam's conduct was the but-for cause of the child's death because if Adam had not placed the marbles on the road, the child would not have died. The fact that the child was not properly secured in the vehicle does not break the chain of causation because this outcome was foreseeable.

Bob did not commit an act that resulted in the death of the child, nor did he have a duty to stop Adam from committing that act. However, a jury could find Bob liable as an accomplice to Adam's involuntary manslaughter if he assisted in the act with the required mental state. Here, Bob intentionally assisted Adam in the act by driving him to the scene of the crime. In a jurisdiction that requires recklessness, Bob's statements indicate that he was not aware that his assistance created an unreasonable (or high and unreasonable) risk of death or serious bodily injury. Bob is more likely to be found guilty as an accomplice in a state that requires gross/criminal/culpable negligence, if a reasonable person under similar circumstances would have been aware of this risk.

Point One(a) (25%)

To be guilty of involuntary manslaughter, a person must cause the death of another human being by conduct that creates an unreasonable (or high and unreasonable) risk of death or serious bodily injury. The precise mens rea requirement will vary from jurisdiction to jurisdiction.

In most jurisdictions, a defendant is guilty of involuntary manslaughter when the defendant causes the death of another human being by engaging in conduct that creates an unreasonable (or high and unreasonable) risk of death or serious bodily injury. WAYNE R. LAFAVE, CRIMINAL LAW § 15.4(a) (5th ed. 2010).

The modern and majority view is that the defendant must have acted “recklessly” to be convicted of involuntary manslaughter (i.e., the defendant must have been aware of the unreasonable (or unreasonable and high) risk of death or serious bodily injury that his conduct created). Recklessness is typically defined as conscious disregard of a known risk, *see, e.g.*, MODEL PENAL CODE § 2.02(c).

In other jurisdictions it is enough if the defendant acted with greater than ordinary negligence, which some states call “gross,” “criminal,” or “culpable” negligence. *See* C.T. Foster, Annotation, *Test or Criterion of Term “Culpable Negligence,” “Criminal Negligence,” or “Gross Negligence,” Appearing in Statute Defining or Governing Manslaughter*, 161 A.L.R. 10 (1946). In these states, even if the defendant was unaware of the risk, the defendant could be found guilty if an ordinary person in the defendant’s situation would have been aware that her conduct created an unreasonable (or unreasonable and high) risk of death or serious bodily injury.

Adam will be guilty of involuntary manslaughter only if he acted with the requisite degree of culpability and his conduct was the legal cause of the child’s death.

Point One(b) (25%)

A jury could conclude from Adam’s statements and actions that he acted with a mens rea of recklessness or gross negligence.

In order to determine whether Adam has committed involuntary manslaughter, his mens rea with regard to the result must be assessed.

In most jurisdictions, Adam can only be convicted of involuntary manslaughter if the fact finder concludes that he acted “recklessly” by consciously disregarding the unreasonable (or high and unreasonable) risk of death or serious bodily injury that his conduct created. In these jurisdictions, the prosecution will argue that Adam’s statements indicating that he knew that the marbles could cause an accident, including his statements that “When cars come by, they’ll slip on the marbles and they won’t be able to stop,” and that “They’ll have trouble; maybe there will even be a crash,” demonstrate that Adam was aware of the risk. The prosecution will also argue that Adam (like everyone else) knows that serious bodily injury and death are frequent outcomes of car crashes.

Adam will likely respond in several ways. First, he will contend that he was not reckless because he did not consciously disregard an unreasonable (or unreasonable and high) risk of death or serious bodily injury resulting from the accident. His statements indicated, he will argue, that he believed that drivers would lose control of their vehicles and would get mad and that there might be a crash, but did not suggest any awareness of the risk that someone would die or suffer serious bodily injury. He could also argue that no crash occurred while he watched the intersection, that traffic at the intersection was usually light, and that he was not aware of the risk that two cars would crash into each other, particularly at 2 a.m.

On the whole, a jury could conclude that Adam's statements indicate that he was clearly aware that his actions could cause a car crash and every reasonable person knows that car crashes can cause death or serious bodily injury. Adam's statement "I'll bet someone will come" specifically suggests that he believed that cars would drive through the intersection that evening.

To prove that Adam had a mens rea of recklessness, the prosecution does not need to prove that Adam knew the precise time or circumstances of the resulting crash. If, however, the fact finder accepts that Adam did not consciously disregard an unreasonable (or unreasonable and high) risk of death or serious bodily injury from the resulting crash, he would not be guilty of involuntary manslaughter in a jurisdiction that requires recklessness for the crime.

In some jurisdictions, Adam can be convicted of involuntary manslaughter if the fact finder concludes that he acted with "gross," "criminal," or "culpable" negligence. In these jurisdictions, Adam can be convicted if a reasonable person in his situation would have been aware that his conduct created an unreasonable (or unreasonable and high) risk of death or serious bodily injury. It is highly likely that a fact finder would conclude that a reasonable person would be aware that conduct likely to cause vehicles to slip at an intersection creates an unreasonable (or unreasonable and high) risk of car crashes and death or serious bodily injury as a result of the crashes.

Point One(c) (25%)

Adam's conduct was the but-for cause of the child's death. His conduct was also the legal cause because no intervening event occurred that would be sufficient to break the chain of causation.

The state will need to prove that Adam caused the child's death in order for Adam to be found guilty of involuntary manslaughter. Causation requires a showing of both causation in fact—otherwise known as but-for causation—and proximate causation. "[A] defendant's conduct is a cause-in-fact of the prohibited result if the said result would *not* have occurred 'but for' the defendant's conduct." *Velazquez v. State*, 561 So. 2d 347, 350 (Fla. Dist. Ct. App. 1990) (emphasis in original). Adam was plainly the but-for cause of the child's death. If Adam had not dumped the marbles at the intersection, the child would not have died.

The next question is whether Adam's conduct was also the "proximate" cause of the child's death. Proximate cause under the criminal law is complex to define (Prof. Joshua Dressler, in his hornbook *UNDERSTANDING CRIMINAL LAW* § 14.03[A] (5th ed. 2009), calls it "obscure"), but its core is foreseeability. *Kibbe v. Henderson*, 534 F.2d 493, 499 (2d Cir. 1976). Adam may argue that the child would not have died but for the fact that the man did not have his child properly secured in the vehicle. He may argue that this failure was an unforeseeable intervening cause—another but-for cause of the child's death—and that in this case it should be treated as a superseding cause that should cut off his liability for the result. He may bolster this argument by noting that seat belts are required under state law. This argument should fail. It is true that the man's failure to properly secure the child was an intervening cause of the child's death. However, this intervening cause was not unforeseeable. Adam should have anticipated that some people, including children, who ride in cars are not properly secured by seat belts or child restraints.

Adam might also argue that the resulting car crash was such an extraordinary consequence of his action of dumping the marbles at the intersection that it would be unfair to hold him

accountable. This argument should also fail because in these circumstances a car crash resulting in the death of a child who was not wearing a seat belt is not such an unusual or extraordinary consequence of Adam's act as to justify relieving him of liability. *See State v. Hallett*, 619 P.2d 335, 339 (Utah 1980) (“[W]here a party by his wrongful conduct creates a condition of peril, his action can properly be found to be the proximate cause of a resulting injury, even though later events which combined to cause the injury may also be classified as negligent, so long as the later act is something which can reasonably be expected to follow in the natural sequence of events.”).

Point Two (25%)

Bob intentionally assisted Adam in his act of dumping the marbles on the road, but Bob may not have acted with the mens rea required to be held liable as an accomplice to involuntary manslaughter.

Two elements are necessary for Bob to be found guilty of involuntary manslaughter on a theory of accomplice liability. First, Bob must have assisted Adam in the commission of the crime. DRESSLER, *supra*, § 30.04[A][1]. Second, Bob must have acted with dual intentions: (1) “the intent to assist the primary party” and (2) “the intent that the primary party commit the offense charged.” *Id.* § 30.05[A]. In cases where the primary party's crime is one involving recklessness or negligence, most jurisdictions hold that the second intent element is satisfied if the defendant intended to assist the primary party and otherwise acted with the mens rea required for the underlying offense (i.e., recklessness or negligence, as the jurisdiction requires). *Id.* § 30.05[B][3].

Here, Bob assisted Adam by driving him to the intersection. Even a small amount of assistance can suffice to create accomplice liability.

[NOTE: An examinee might also argue that Bob assisted Adam by staying with him and watching, on the theory that he provided some kind of encouragement to Adam. However, mere presence at a crime scene is not sufficient to constitute assistance, so accompanying Adam is probably not enough. *See State v. Noriega*, 928 P.2d 706, 708 (Ariz. Ct. App. 1996).]

Bob also appears to have acted with the intent of assisting Adam. When Bob drove Adam to the intersection, he knew that it was for the purpose of bringing Adam to that place so that Adam could dump the marbles in the intersection. Bob had no other purpose.

The next question is whether Bob's mens rea with regard to the child's death was sufficient for involuntary manslaughter. Bob will argue that he had no mens rea at all with regard to the child's death and therefore can be guilty of no offense. He will also argue that his statements to Adam suggest that he believed (1) that no one was likely to drive through the intersection and (2) that the marbles would not cause any danger to any drivers who would simply drive over them. Accordingly, Bob will argue that he did not act with the culpability required to be held liable as an accomplice to involuntary manslaughter.

In most jurisdictions, Bob must have acted “recklessly” to be convicted as an accomplice to involuntary manslaughter (i.e., he must have been aware of the unreasonable (or unreasonable and high) risk of death or serious bodily injury that his conduct created). Based on Bob's statements, he does not appear to have been reckless. The prosecution's best argument would be that Bob knew

about the risk because Adam told him that cars might crash. In response, Bob can argue that his statements demonstrate that he thought Adam was wrong about the risks of dumping the marbles.

In some jurisdictions, Bob can be convicted if he demonstrated “gross,” “criminal,” or “culpable” negligence (i.e., if an ordinary person in his situation would have been aware that his conduct created an unreasonable (or unreasonable and high) risk of death or serious bodily injury). In these states, Bob could be found guilty of involuntary manslaughter on a theory of accomplice liability if the fact finder believes that an ordinary person would have realized that placing 2,000 marbles on a road would interfere with the ability of cars to stop when they drove over the marbles, thereby creating an unreasonable (or unreasonable and high) risk of death or serious bodily injury.

In a few jurisdictions, Bob cannot have accomplice liability for involuntary manslaughter as a matter of law. In these jurisdictions, the courts adhere strictly to the requirement that an “accomplice must want the crime to be committed by the other party,” and they reason that it is “logically impossible” for a person to be an accomplice to a crime of recklessness or negligence because one cannot “intend” a negligent or reckless killing. DRESSLER, *supra*, § 30.05[B][3]. In most jurisdictions, however, courts hold an accomplice responsible for a crime like manslaughter if the accomplice intentionally provided assistance to the principal and acted with recklessness or negligence, as the case may be, with respect to the risk that the principal’s behavior would cause death.

[NOTE: With respect to the “dual intent” issue, the key is whether examinees recognize that accomplice liability requires two levels of culpability. It is less important which approach examinees adopt than that they see the problem—Bob cannot be guilty as an accomplice unless he was culpable with respect to the underlying crime, and Bob, in fact, not only did not intend any car crash or resulting death, he actually did not believe that such an event would occur.]

CONSTITUTIONAL LAW ANALYSIS

(Constitutional Law I.B.3.; II.A.1.; III.A.2.)

ANALYSIS

Legal Problems

- (1) Does Congress have authority under the Commerce Clause to regulate employer precautions against workplace violence?
- (2) Do federalism principles bar Congress from applying the Act to state agencies as employers?
- (3) Does the Eleventh Amendment bar the employee's suit against the state?

DISCUSSION

Summary

Under the Commerce Clause, Congress has power to regulate economic activities that substantially affect interstate commerce. Here, the Act regulates a non-economic aspect of an economic activity (i.e., the employment relationship) that has a substantial effect (\$5 to \$10 billion per year) on interstate commerce. This regulation probably falls within the scope of the Commerce Clause, although at least one case can be read to suggest the opposite possibility. The Act does not violate federalism principles embodied in the Tenth Amendment to the Constitution by improperly commandeering states or by regulating state employers differently than private employers. However, the employee's federal court lawsuit is barred by the state agency's Eleventh Amendment immunity, and the Act cannot abrogate that immunity.

Point One (50%)

Congress has power under the Commerce Clause to regulate workplace violence only if the court concludes that the Act regulates an economic activity with a substantial aggregate effect on interstate commerce.

In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court of the United States clarified that Congress may enact three types of regulations under the Commerce Clause. First, Congress may regulate the channels of interstate commerce, which are the pathways through which interstate travel and communications pass. Examples of the channels include interstate highways and phone lines. Second, Congress may regulate the people and instrumentalities that work and travel in the channels of interstate commerce. Examples include people such as airline pilots and flight attendants, as well as the airplanes on which they travel. Third, Congress may regulate activities that substantially affect interstate commerce.

The Act does not fit within either of the first two *Lopez* categories. First, the statute applies to any workplace, regardless of its location, and so it does not narrowly regulate the channels of interstate commerce. Second, the Act applies to all employees and not only those people or

instrumentalities in the channels of interstate commerce. Consequently, the Act will be valid only if it regulates an activity that substantially affects interstate commerce.

The key to satisfying the substantial effects requirement is the threshold determination of whether the regulated activity is economic or commercial in nature. When Congress regulates an economic or commercial activity, the Court will uphold the regulation if Congress had a rational basis for concluding that the class of activities subject to regulation, in the aggregate, has a substantial effect on interstate commerce. Aggregation on a national scale typically makes this an easy standard to meet. On the other hand, if the regulated activity is not economic or commercial in nature, the Court will not aggregate to find a substantial effect, and the standard becomes extremely difficult to meet. See *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Morrison*, 529 U.S. 598 (2000); *Lopez*, *supra*.

Therefore, the key question is whether violence in the workplace is an economic or commercial activity. In *Morrison*, the Court held that Congress exceeded its commerce power by enacting a statute giving a cause of action to the victims of gender-motivated violence. It therefore can be argued here, as *Morrison* held, that acts of violence are not economic or commercial in nature, and thus in applying the substantial effects test, the court may only measure the effect of the particular act of violence at issue in the suit and not the aggregate effect of all acts of violence in the workplace.

One could argue that *Morrison* is distinguishable because the statute at issue here is limited to violence in the workplace. The workplace is an economic environment, and workplace violence directly impedes productivity of the workplace. The court therefore should conclude that the statute at issue here is an economic regulation and thus is within the commerce power of Congress because, based on the facts given in the problem, Congress had a rational basis for concluding that workplace violence, in the aggregate, has a substantial effect on interstate commerce.

Point Two (20%)

The Act does not violate federalism principles because it regulates both public and private employers on the same terms.

In *Garcia v. San Antonio Metropolitan Transportation Authority*, 469 U.S. 528 (1985), the Supreme Court held that Congress may regulate the states on the same terms as private actors. For example, *Garcia* upheld application of the federal minimum wage and maximum hour law to both public and private employers. In *New York v. United States*, 505 U.S. 144 (1992), however, the Court held that Congress may not “commandeer” the states to regulate private conduct. In *New York v. United States*, the Court struck down a federal statute that commandeered states to regulate private disposal of low-level hazardous waste.

The Act does not commandeer the state to regulate private conduct. Instead, the Act merely requires both public and private employers to obey the same federal requirement—to address workplace violence under the threat of civil liability. It is true that the state, as an employer, must adopt policies and regulations to implement the Act’s mandates. But *Reno v. Condon*, 528 U.S. 141 (2000), clarifies that a federal mandate requiring state personnel to alter their own activities is not unconstitutional commandeering.

Point Three (30%)

The Eleventh Amendment bars the employee's federal court lawsuit against the state, and the Act does not validly abrogate that immunity.

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Despite the text of the Eleventh Amendment, the Supreme Court has interpreted it to bar lawsuits between a state and one of its own citizens, as well as lawsuits that arise under federal law. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Further, this immunity extends to state agencies. Consequently, the Eleventh Amendment would bar the employee's lawsuit against the state agency in federal court, unless the Act validly abrogates the state's immunity.

A federal statute abrogates Eleventh Amendment immunity if, first, the statute unambiguously asserts that it does so, and second, Congress enacted the statute under a power that may abrogate Eleventh Amendment state immunity. Here, the Act satisfies the first requirement because Section 204 unequivocally attempts to abrogate state Eleventh Amendment immunity. The Act fails the second requirement, however, because Congress did not pass the Act under a grant of power that may abrogate state immunity. In *Seminole Tribe*, the Court held that Article 1, section 8 of the Constitution does not grant Congress power to abrogate state sovereign immunity. (The Supreme Court has held that Congress can abrogate state immunity when it exercises its powers under amendments that postdate the Eleventh Amendment. By way of contrast, Section 5 of the Fourteenth Amendment does grant Congress that power. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Fourteenth Amendment)). Because the Act does not validly abrogate the state's Eleventh Amendment immunity, the District Court should dismiss the employee's lawsuit.

FAMILY LAW ANALYSIS

(Family Law IV.A., B., E.; VI.F.)

ANALYSIS

Legal Problems

- (1) When a child has no “home state,” what state has jurisdiction to issue a valid child-custody decree?
- (2) Must a court defer to the preference of an older child when awarding custody?
- (3) Under the U.S. Constitution, may a state statute authorize a court to grant a grandparent custody of a child without giving any special weight to the best-interests determination of a fit and available parent?

DISCUSSION

Summary

Under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), when a child has no “home state,” i.e., a state in which the child has resided for the prior six months, a state may exercise jurisdiction based on (1) “significant connections” with the child and at least one parent and (2) the existence of “substantial evidence” relating to child custody in the forum jurisdiction. Here, State A has significant connections with Daughter and Mom; substantial evidence related to child custody exists in State A, where Daughter and Grandparents are currently located and where Daughter was domiciled until very recently. Thus, State A has jurisdiction to make a custody award.

On the merits, a court may deny Grandparents’ custody petition even though Daughter strongly prefers to live with them. In all states, the preferences of a child are relevant to a determination of the child’s best interests in a custody proceeding, but they are not determinative.

However, the State A statute under which Grandparents have brought a custody petition is probably unconstitutional. In *Troxel v. Granville*, 530 U.S. 57 (2000), a plurality of the Supreme Court ruled that a state statute which authorized a court to grant visitation to “[a]ny person” based on a finding that such visitation was in “the best interest of the child” unconstitutionally interfered with the fundamental right of parents to rear their children. Although State A’s statute authorizing the award of custody to a nonparent based on the best interest of the child is limited to grandparents, it similarly grants “no special weight” to a parent’s determination of her child’s best interest and thus does not comport with the standards set forth in *Troxel*.

Point One (40%)

State A has jurisdiction because no state is Daughter’s “home state,” Daughter and Mom both have significant connections with State A, and substantial evidence is available in State A regarding Daughter’s care.

Under the Uniform Child Custody Jurisdiction and Enforcement Act, which has been widely adopted, a state has jurisdiction to make an initial child-custody determination if “this State is the home state of the child on the date of the commencement of the proceeding, or was the home State of the child within six months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State” and no other state’s courts would have jurisdiction under the above standard or other courts having jurisdiction have declined to exercise it. UCCJEA § 201(a)(1) & (2).

Neither State A nor State B can claim jurisdiction under § 201(a)(1). A “home state” is the state in which the child “lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding.” *Id.* § 102(7). Here, Daughter and Mom moved to State B only four months before the State A custody petition was filed in State A, so State B is not Daughter’s home state. State A was the home state of Daughter within six months of the proceeding commenced in State A. However, State A does not have home-state jurisdiction because neither statutory condition has been met: a parent (Mom) does not continue to live in State A, and the child is not absent from State A.

Under the UCCJEA, when—and only when—“a court of another state does not have jurisdiction under paragraph 1” (i.e., the home-state rule), a court may exercise jurisdiction over a child-custody determination if

(2)(A) the child . . . and at least one parent . . . have a significant connection with this State other than mere physical presence; and

(B) substantial evidence is available in this State concerning the child’s care, protection, training, and personal relationships. *Id.* § 201(a)(2).

Here, a State A court would have jurisdiction under § 201(a)(2) because Daughter and Mom both have a significant connection with State A and substantial evidence relating to Daughter’s care is available in State A: Mom was married in State A, gave birth to Daughter there, and lived there with Daughter from the time of her birth until four months ago. Daughter is currently in State A, and so are Grandparents. Other evidence related to Daughter’s schooling, friendships, and other personal relationships is also available in State A.

[NOTE: State B would also have jurisdiction under § 201(a)(2): Daughter and Mom both have a significant connection with State B as it is where they both lived until Daughter’s recent return to State A and substantial evidence from Mom, Stepdad, Daughter’s school, etc., is available in State B. However, under UCCJEA § 206(a), a court “may not exercise its jurisdiction . . . if . . . a proceeding concerning the custody of the child has been commenced in a court of another State having jurisdiction substantially in conformity with this [Act]” Thus, State B could not exercise jurisdiction under § 201(a)(2) because a petition has been filed in State A.]

The federal Parental Kidnapping Prevention Act (PKPA) sets out child-custody jurisdictional standards much like those contained in the UCCJEA. Under the PKPA, a State A court would have jurisdiction because no state is Daughter’s home state, “the child and at least one contestant[] have a significant connection with . . . State [A] other than mere physical presence . . . and there is available in such State substantial evidence concerning the child’s present or future care. . . .” 28 U.S.C. § 1738A(c)(2)(B). Like the UCCJEA, the PKPA provides that where a court of another

state is exercising jurisdiction that complies with the federal standard, another court shall not exercise jurisdiction. *Id.* § 1738A(g).

Thus, State A has jurisdiction over the custody action initiated by Grandparents.

[NOTE: In 2012, the UCCJEA had been adopted in all states except Massachusetts.]

Point Two (25%)

Although the wishes of an older child are relevant to a custody determination and are typically given great weight, they are not determinative; a court may thus deny Grandparents' custody petition over the express opposition of Daughter.

In all states, the views of a child who is mature enough to form and express a preference are relevant to a custody determination. The wishes of older children like Daughter are typically given substantial weight. *See* D.W. O'Neill, Annotation, *Child's Wishes as Factor in Awarding Custody*, 4 A.L.R. 3d 1396 (1965). However, the child's wishes "are not treated equally in every case":

Sometimes the child's wishes are given controlling effect, while at other times the wishes are disregarded altogether. The circumstances determining what effect, between these two extremes, should be given to a child's wishes in a particular case are, in addition to the comparative effect of objective factors affecting its welfare generally, . . . and in addition to the natural right of the child's parent to have its custody (frequently invoked successfully, at least in the absence of the parent's long-term abandonment of the child to another's custody): the child's age and judgment capacity; the basis for and strength of its preference, generally; the treatment extended to the child by the contestants for its custody; and the wrongful inducement of the child's wishes.

Id. § 2(a). *See also* Wanda Ellen Wakefield, Annotation, *Desire of Child as to Geographic Location of Residence or Domicile as Factor in Awarding Custody or Terminating Parental Rights*, 10 A.L.R. 4th 827 (1981).

Although there are a handful of states in which, by statute, the court must defer to the wishes of an older child when choosing between fit parents (*see* 10 A.L.R. 4th § 4), even if State A has such a statute it would not be applicable here, as the custody contest is between a fit parent and a nonparent.

Thus, although the wishes of Daughter are relevant in an action regarding her custody, a court may disregard those wishes and deny Grandparents' custody petition.

Point Three (35%)

Because the State A statute gives "no special weight" to a parent's determination of her child's best interests, under the Supreme Court's plurality opinion in *Troxel v. Granville*, the statute is unconstitutional.

In *Troxel v. Granville*, 530 U.S. 57 (2000), the Supreme Court addressed the constitutionality of a state statute under which "[a]ny person" could petition for visitation rights "at any time" and

authorized a court to grant such visitation whenever it concluded that “visitation may serve the best interest of the child.” A plurality of the Court found that the statute provided inadequate protection for a parent’s constitutionally protected liberty interest in the care, custody, and control of her child. The statute at issue was, in the Court’s view, “breathtakingly broad,” and it required the court to give “no special weight at all to [a parent’s] . . . determination of her daughter’s best interests.” 530 U.S. at 67, 69. Moreover, the court that awarded visitation pursuant to the statute used a decision-making framework that “gave no weight” to the parent’s having “assented to visitation” on a schedule different from that preferred by the grandparent petitioners and that “contravened the traditional presumption that a fit parent will act in the best interest of his or her child.” *Id.* at 69.

Under *Troxel*, the State A grandparent-custody statute is almost certainly unconstitutional. Like the statute struck down in *Troxel*, the State A statute does not require the court to give any special weight to a parent’s determination of her child’s best interest; in fact, it does not appear to require the court to give *any* weight to a parent’s determination of a child’s best interest. Moreover, the State A statute permits a much larger intrusion upon parental prerogatives than did the statute considered in *Troxel*; that statute permitted a court to grant a nonparent *visitation*, while the State A statute authorizes a court to award a nonparent *custody*.

Although the State A statute does restrict nonparent custody petitions to grandparents and additionally requires that the child have been abandoned or have a parent who has died, this should not alter the constitutional analysis. These facts are not relevant to the Supreme Court’s reasoning in *Troxel*. Moreover, *Troxel* itself involved a visitation petition brought by grandparents whose son had died.

SECURED TRANSACTIONS ANALYSIS

(Secured Transactions I.B.; II.E.; IV.A., B., C., F.)

ANALYSIS

Legal Problems

- (1) What are the relative rights of a creditor with a perfected security interest in a debtor's inventory and a buyer who bought an item of the inventory in ordinary course of business?
- (2) What are the relative rights of a creditor with a perfected security interest in a debtor's inventory and a lien creditor of the debtor with respect to an item of equipment that the debtor received in exchange for an item of inventory?
- (3) What are the relative rights of a creditor with a perfected security interest in a debtor's inventory, a lien creditor of the debtor, and a supplier who has sold items of inventory to the debtor on credit, retaining title to the items, but has not filed a financing statement?

DISCUSSION

Summary

Bank has a perfected security interest in the present and future inventory of Recycled. That security interest covers both the bicycles in the inventory of Recycled and the bicycle helmets bought from Manufacturer. Although, as a general rule, a security interest continues in collateral notwithstanding its sale by the debtor, Bank does not have a claim to Consumer's bicycle. As a buyer in ordinary course of business from Recycled, Consumer took the bicycle free of the security interest in it that Recycled gave to Bank.

Bank also has a perfected security interest in the used computer. Although the computer is not inventory, it was received in exchange for an item of inventory and constitutes proceeds of that inventory to which Bank's security interest extends. Bank's security interest in the computer is superior to Utility's judgment lien, which was created after Bank had obtained its perfected security interest in the computer.

Manufacturer has a security interest in the helmets it sold to Recycled, but its unperfected security interest is subordinate to the perfected security interest of Bank and to Utility's judgment lien.

Point One (34%)

Because Consumer was a buyer in ordinary course of business with respect to the bicycle, Consumer took the bicycle free of Bank's security interest.

While a security interest in collateral generally continues in that collateral even after the collateral has been sold (*see* UCC § 9-315), that principle is subject to important exceptions. In particular, a buyer in ordinary course of business “takes free of a security interest” created by its seller “even if the security interest is perfected and the buyer knows of its existence.” UCC § 9-320(a).

Here, Recycled sold the bicycle to Consumer. Consumer took free of Bank’s security interest—which was created by Recycled, its seller—if Consumer was a “buyer in ordinary course of business.” A buyer in ordinary course of business is “a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person . . . in the business of selling goods of that kind.” UCC § 1-201(b)(9).

On these facts, Consumer is a buyer in ordinary course of business. First, Consumer bought the bicycle from Recycled, which is in the business of selling goods of the kind that Consumer bought—bicycles. Second, the sale occurred “in the ordinary course,” i.e., in the seller’s usual way. Third, Consumer acted honestly and in a manner consistent with reasonable commercial standards of fair dealing. Thus, Consumer acted in “good faith.” UCC § 1-201(b)(20). Finally, there are no facts to suggest that Consumer knew that the sale was in violation of Bank’s rights.

As a buyer in ordinary course of business, Consumer took the bicycle free of Bank’s security interest, and Bank’s security interest is extinguished.

Point Two (33%)

Although Bank’s security agreement does not cover the equipment of Recycled, the used computer, which is equipment, constitutes proceeds of the inventory of Recycled, and Bank’s security interest in the inventory extends to proceeds of the inventory. Because Bank’s interest was perfected before Utility became a lien creditor, Bank has a prior claim to the used computer.

The security agreement pursuant to which Bank obtained its perfected security interest covers only inventory. The used computer was not held by Recycled for sale or lease, so it is not inventory. UCC § 9-102(a)(48). Rather, it is equipment. UCC § 9-102(a)(33). Thus, it is not included in the description of collateral in the security agreement.

However, Recycled obtained the computer in exchange for a bicycle that was inventory (and, thus, collateral). Because the computer was “acquired upon the . . . exchange . . . of collateral,” the computer is “proceeds” of that collateral. UCC § 9-102(a)(64). A security interest in collateral extends to identifiable proceeds of that collateral. UCC § 9-315(a)(2). Thus, Bank has a security interest in the computer. In addition, the security interest in the computer as proceeds is perfected because the security interest in the original collateral (the bicycle) was perfected by the filing of a financing statement in the same office in which a financing statement would be filed in order to perfect a security interest in the computer. UCC §§ 9-315(c)–(d).

Because Bank has a perfected security interest in the used computer as proceeds, it has priority over Utility’s later judgment lien. UCC § 9-317(a)(2).

Point Three (33%)

Bank's perfected security interest in the bicycle helmets is superior to Manufacturer's unperfected security interest and to Utility's later judgment lien. Manufacturer's security interest is subordinate to Utility's judgment lien.

While the contract with Manufacturer provides that Manufacturer retains title to the helmets until Recycled pays for them, the purported retention of "title" is limited in effect to retention of a "security interest." *See* UCC § 1-201(b)(35) (§ 1-201(37) in states that have not enacted the Revised Article 1). Manufacturer's security interest is not perfected because Manufacturer has not filed a financing statement, and there is no other basis for it to claim perfection of its security interest. *See* UCC §§ 9-308, 9-310.

Bank has a security interest in the inventory of Recycled. Bank perfected that interest by filing a financing statement. *See* UCC § 9-310(a). Because the bicycle helmets are held for sale by Recycled, they are inventory and are subject to Bank's security interest. *See* UCC § 9-102(a)(48) (definition of inventory).

Bank's security interest has priority over Manufacturer's security interest because a perfected security interest has priority over an unperfected security interest. *See* UCC § 9-322(a)(2).

Because Bank has a perfected security interest in the bicycle helmets, it has priority over Utility's later judgment lien. UCC § 9-317(a)(2). However, Utility's judgment lien has priority over Manufacturer's security interest in the bicycle helmets because Manufacturer's interest is unperfected. *Id.*

[NOTE: An examinee might correctly note that Manufacturer's security interest is a "purchase-money security interest." That point is irrelevant to the answer, however. A *perfected* purchase-money security interest can, under proper circumstances, have priority over other security interests, but Manufacturer's security interest was not perfected because no financing statement was filed and no other criterion for perfection has been satisfied. Thus, the general rule of UCC § 9-322(a)(2)—a perfected security interest has priority over an unperfected security interest—determines the priority of the competing security interests in this case. An examinee might erroneously state that Manufacturer's purchase-money security interest is automatically perfected without the need for filing pursuant to UCC § 9-309(1). This is incorrect, because only a purchase-money security interest *in consumer goods* qualifies for this special rule, and the helmets are "inventory" rather than "consumer goods." *See* definitions in UCC §§ 9-102(a)(23) and 9-102(a)(48).]

TORTS ANALYSIS

(Torts II.A., B., D., E.1. & 2., F.)

ANALYSIS

Legal Problems

- (1)(a) Could a jury find that University had a duty of care to Susan and that its breach of that duty was the cause in fact and proximate cause of Susan's injuries?
- (1)(b) Could a jury find that Jim owed a duty of care to Susan and that his breach of that duty was the cause in fact and proximate cause of Susan's injuries?
- (1)(c) Could a jury find that Ann's Psychiatrist owed a duty of care to Susan and that Psychiatrist's breach of that duty was the cause in fact and proximate cause of Susan's injuries?
- (2) If any party is liable for Susan's injuries, may Susan also obtain damages for PTSD symptoms?

DISCUSSION

Summary

A jury could find that University is liable to Susan for failing to take reasonable precautions to protect Susan from foreseeable criminal activity resulting from unauthorized entrance into the dorm. University owed a duty of care to Susan, a resident of a dormitory controlled and maintained by University. University's failure to fix the broken lock or take other steps to prevent entry by an intruder violated that duty; it was also the cause in fact and proximate cause of Susan's physical injuries.

A jury could not find that Jim is liable to Susan unless Susan relied to her detriment on Jim's promise to obtain assistance or unless Jim increased the risk that Susan would suffer harm. Here, there is no evidence of reliance or increased risk as a result of Jim's failure to obtain assistance.

A jury could not find that Ann's Psychiatrist is liable to Susan. Although a therapist may be liable for failing to warn a patient's intended victim of credible threats of violence when that victim is reasonably identifiable, in virtually all jurisdictions, a therapist may not be found liable for failing to warn a victim who is a member of an indeterminate group.

If University is found liable to Susan, it will be responsible for damages related to Susan's PTSD injuries because a tort defendant takes his victim as he finds him.

Point One(a) (30%)

University owed a duty of care to Susan, a resident of a dormitory controlled and maintained by University, to take reasonable precautions to protect Susan from foreseeable criminal activity.

University's failure to fix the broken lock or take other precautions against unauthorized entry into Susan's dorm violated that duty. It was also the cause in fact and proximate cause of Susan's physical injuries.

A college does not stand in a *parens patriae* relationship with its students. See *Hegel v. Langsam*, Ohio Misc. 2d (Comp. Pl. 1971). However, although the common law imposed almost no duties on landlords to provide safe premises to tenants, modern courts have found that landlords, including landlords like University, have a duty to take reasonable precautions to protect tenants against foreseeable attacks. See *Kline v. 1500 Massachusetts Avenue Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970). See also RESTATEMENT (SECOND) OF TORTS §§ 360, 361.

[NOTE: An examinee might also conclude that University owed a duty of care to Susan because she was an invitee. See DAN B. DOBBS, THE LAW OF TORTS § 235, at 605 (2000) (describing tenant in common areas of building as an example of an invitee encountering obvious dangers).]

Criminal activity of the sort that occurred here was foreseeable. Apartment buildings and college dormitories almost invariably have locked entrances to protect against intrusion by criminals. Indeed, recognizing this risk, University had taken steps to ensure that nonresidents could not enter the dormitory.

A jury could find that University's failure to repair the broken lock or to take other steps to secure the door through which Ann entered the dormitory represented a breach of its duty of care. The lock had broken four days before Ann's entry. Therefore, University employees had ample time to discover the break. Even if repairs were impossible within the relevant time period, University could have taken other steps to prevent the door from being opened from the outside. Such precautions were warranted given the foreseeability that unauthorized persons could enter the dormitory to engage in criminal acts. It is this risk that prompted University to issue key cards to the dormitory residents. See *Brauer v. New York Central & H.R.R. Co.*, 103 A. 166 (N.J. 1918) (finding railroad liable for theft resulting from failure to guard plaintiff's goods when theft foreseeable).

Because Ann's entrance into Susan's dorm was made possible by University's failure to secure the damaged door, a jury could find that University's failure to repair the lock was the cause in fact and proximate cause of Susan's physical injuries.

Point One(b) (25%)

There is no general duty to come to the aid of another. Jim assumed a duty to Susan only if Susan relied to her detriment on Jim's promise to obtain assistance or if Jim left Susan in a worse position. Here, the evidence does not show that Susan relied to her detriment or that Susan was in a worse position after Jim took charge.

Susan and Jim did not have a special relationship that created a duty to come to the aid of another. See DAN B. DOBBS, THE LAW OF TORTS §§ 314–319. However, when an actor “takes charge of another who is helpless adequately to aid or protect himself,” he is subject to liability to the other for bodily harm caused by

a) “the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor’s charge, or

b) the actor’s discontinuing aid or protection, if by doing so he leaves the other in a worse position than when the actor took charge of him.”

RESTATEMENT (SECOND) OF TORTS § 324. *See also* RESTATEMENT OF TORTS § 323 (“One who undertakes, gratuitously or for consideration, to render services to another . . . [is liable] for physical harm resulting from his failure to exercise reasonable care . . . if (a) his failure to exercise such care increases the risk of such harm; or (b) the harm is suffered because of the other’s reliance upon the undertaking.”).

Here, Jim’s failure to follow up his unsuccessful attempt to report Susan’s injuries to the University security office with any other action was arguably negligent. Moreover, Jim’s closing the library door made it less likely that anyone else would come to Susan’s aid. However, there is no evidence that Susan actually suffered any harm as a result of Jim’s conduct. Susan obtained medical assistance herself only half an hour after Jim left her, and there is no evidence that her minor physical injuries or PTSD symptoms were aggravated by delayed treatment.

Thus, because there is no evidence that Jim caused or exacerbated Susan’s injuries, Susan cannot recover damages from Jim.

Point One(c) (30%)

A psychotherapist has a duty to warn a reasonably identifiable individual against whom her patient has made credible threats but has no duty to warn any individual who is a member of an indeterminate class against whom the patient has made threats.

In *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976), the California Supreme Court held that the special relationship between a psychotherapist and patient justified the imposition of a duty to warn “persons threatened by the patient.” Both the holding and reasoning of the *Tarasoff* court have been widely adopted. Today, in most states, a psychotherapist who fails to warn an intended victim against whom her patient has made credible threats of physical violence may be found liable for that victim’s injuries. Many courts have also followed *Tarasoff* in permitting recovery either (1) when the therapist believed that the patient posed a real risk to the specified victim or (2) when the therapist negligently failed to take the threat seriously.

However, California courts have restricted the duty imposed on psychotherapists in *Tarasoff* to “potential victims . . . specifically known and designated” by the dangerous patient. *Thompson v. County of Alameda*, 614 P.2d 728, 736 (Cal. 1980). For example, in *Thompson*, the court refused to extend *Tarasoff* to a defendant that had released a youth who had a long history of violence and who had “indicated that he would, if released, take the life of a young child residing in the neighborhood.” *Id.* at 730. The court held that, in contrast to *Tarasoff*, “the warnings sought by plaintiffs would of necessity have to be made to a broad segment of the population and would be only general in nature . . . [S]uch generalized warnings . . . would do little as a practical matter to stimulate increased safety measures . . . [and] would be difficult to give.” *Id.* at 736.

Courts and legislatures in other states have also generally confined the *Tarasoff* duty to intended victims who are readily ascertainable and subject to a serious threat of physical violence. *See, e.g.*, KY. REV. STATS. ANN. § 202A.400(1) (requiring “actual threat of physical violence against a clearly identifiable victim”); NEB. REV. STAT. § 38-2137(1) (requiring “serious threat of physical violence” against a “reasonably identifiable victim”); N.H. REV. STAT. § 329:31 (requiring “serious threat of physical violence against a clearly identified or reasonably identifiable victim” or “serious threat of substantial damage to real property”); N.J. STAT. ANN. § 2A:62A-16 (requiring “threat of imminent, serious physical violence against a readily identifiable individual”). Cases in which courts have imposed a broader duty have typically involved defendants who directly facilitated the patient’s attack. *See, e.g., Lundgren v. Fultz*, 354 N.W.2d 25 (Minn. 1984) (imposing duty to victims where psychiatrist helped patient to obtain guns confiscated by police).

Under *Tarasoff* and the case law of most states, the fact that Ann’s Psychiatrist did not find Ann’s threats credible would not be a defense if the evidence showed that a reasonable therapist would have taken Ann’s threats seriously. Here, Ann’s Psychiatrist had a therapeutic relationship with Ann because Ann saw Psychiatrist weekly for several months. That relationship imposed on Psychiatrist a duty to warn Ann’s ascertainable intended victims if Ann made serious threats of physical violence against them. Psychiatrist’s decision not to warn anyone was likely reasonable based on Ann’s lack of any history of violent behavior and the ambiguity of her vague threat to ensure that cheaters “get what is coming to them,” which is not a clear threat of serious injury. More importantly, Ann’s threats were general; she did not specify any ascertainable victims. Thus, in the vast majority of states, a jury could not find that Psychiatrist is liable to Susan.

Point Two (15%)

University is responsible for damages related to Susan’s injuries because a tort defendant takes his victim as he finds him.

A tort defendant takes his victim as he finds him. The victim with an “eggshell skull” who suffers injuries greatly in excess of those that a normal victim would suffer is entitled to recover for the full extent of his injuries. *See* RICHARD A. EPSTEIN AND CATHERINE M. SHAKEY, *CASES AND MATERIALS ON TORTS* 471–74 (10th ed. 2012).

Here, although Susan sustained only minor physical injuries from Ann’s attack, Susan suffered a preexisting condition, PTSD. Susan’s PTSD symptoms that emerged after Ann’s attack were attributable to her preexisting PTSD. Most of the “eggshell skull” cases involve unusual physical consequences of an underlying precondition. However, there is no reason why, with proper proof, the plaintiff should not also recover damages for mental symptoms such as anxiety or insomnia. *See Steinhauser v. Hertz Corp.*, 421 F.2d 1169 (2d Cir. 1970) (permitting recovery for plaintiff’s post-accident schizophrenia when evidence showed that prior concussion created predisposition that was exacerbated by accident for which defendant was liable). Courts have sometimes been reluctant to award tort plaintiffs damages for mental distress unaccompanied by any physical injuries (*see Williamson v. Bennett*, 112 S.E.2d 48 (N.C. 1960) (disallowing mental-disorder damages when plaintiff suffered no physical harm in accident caused by defendant)).

Torts Analysis

However, here Susan did suffer physical injuries during the attack, and the attack also triggered physical symptoms such as nausea, muscle tension, and sweating.

Thus, if Susan recovers damages from University for her physical injuries, she should also be able to recover damages for her PTSD symptoms.

FEDERAL CIVIL PROCEDURE ANALYSIS

(Federal Civil Procedure IV.A.; VI.B.)

ANALYSIS

Legal Problems

- (1) Do the Federal Rules of Civil Procedure permit a defendant to amend its answer after discovery has closed in order to add an affirmative defense that has been suggested by facts revealed in discovery when that defense could have been raised at the outset of the action?
- (2) Should summary judgment be granted when facts revealed in discovery support a defendant's affirmative defense but when there are other facts at issue that would permit a jury to reject the defense?

DISCUSSION

Summary

Under Federal Rule of Civil Procedure 15(a)(2), leave to amend should be freely given when justice requires. Here, the merits of the case are advanced by allowing the amendment adding the affirmative defense, and there are no facts to suggest that Plaintiff would be prejudiced in the preparation and presentation of her case by allowing the amendment. Although Plaintiff will be harmed if Defendant is allowed to prove a valid defense, the harm of being subject to a valid defense is not the kind of "prejudice" that would warrant denying an amendment. On the applicable "abuse of discretion" standard, it is unlikely that the appellate court would reverse the trial court's decision on this issue.

The trial court erred in granting Defendant's motion for summary judgment. Under Rule 56(c), the standard for granting such a motion is that there is no genuine issue of material fact raised. Here, Plaintiff's deposition testimony suggests that there are genuine issues of material fact concerning whether Defendant exercised reasonable care to prevent and correct harassment and whether Plaintiff's failure to complain about the harassment was reasonable.

Point One (50%)

The trial court properly granted Defendant leave to amend its answer to the complaint, given that justice favors allowing Defendant to raise a potentially valid affirmative defense and no facts suggest that Plaintiff was unfairly prejudiced by the amendment.

A defendant has the burden of pleading all affirmative defenses. Federal Rule of Civil Procedure 8(c) is very clear when it states that a party defending a claim "must affirmatively state any avoidance or affirmative defense" Defendant had failed to raise a potentially valid affirmative defense in its answer and later sought to amend.

Under Rule 15(a)(2), a district court “should freely give leave [to amend] when justice so requires.” The Supreme Court has defined this standard “negatively” by indicating that amendments should be allowed unless they result in a form of injustice. *See Foman v. Davis*, 371 U.S. 178 (1962). The categories of injustice the Court describes are undue delay, bad faith or dilatory motive, repeated failure to cure defects by amendment, undue prejudice to the party opposing the amendment, or futility of the amendment. Here, the only possible ground that Plaintiff might use to resist the amendment is “undue prejudice.”

Defendant has a strong argument that it would be unjust to deny the amendment because doing so would deny Defendant an opportunity to have the case decided on its legal merits. Indeed, having cases decided on their merits is one of the key goals of the Federal Rules of Civil Procedure, *see, e.g.*, FED. R. CIV. P. 1 (seeking to achieve a “just, speedy, and inexpensive” determination) and one reason that the Rules direct courts to “freely give leave” to amend. Moreover, allowing a potentially valid defense does not cause “undue prejudice” to Plaintiff. Plaintiff’s legal claim is only as good as its ability to overcome defenses, and it is not unjust to require that she respond to those defenses.

Plaintiff might argue that she is prejudiced by injecting the defense after the close of discovery. But no facts suggest prejudice, and it is difficult to know what the prejudice might be. The defense is supported by testimony of Plaintiff and is based upon matters known to her all along. Moreover, Plaintiff’s counsel knew or should have known about this well-established affirmative defense. Finally, if Plaintiff requires more time for discovery, that is a matter that the court could address by granting more time (if the issue were raised) and is not itself a basis for denying leave to amend. In short, justice seems better served by allowing the amendment to ensure that the case is decided on its merits and not on the basis of Defendant’s failure to plead an affirmative defense in its original answer.

Point Two (50%)

The trial court erred in granting summary judgment. Plaintiff’s deposition answers, which were the basis of Defendant’s summary judgment motion, raise genuine issues of material fact sufficient to preclude entry of judgment as a matter of law.

Federal Rule of Civil Procedure 56(a) allows a summary judgment motion to be granted only if “there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law [JML].” *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). An issue of fact is “genuine” if, based on the evidence presented by the nonmoving party, a reasonable jury could return a verdict for that party. A fact is “material” if it is relevant to an element of a claim or defense and its existence would affect the outcome of the case under the governing law. *Anderson*, 477 U.S. at 248. In determining whether there is a genuine dispute as to material fact, the court should consider the “depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials.” FED. R. CIV. P. 56(c)(1)(A).

Here, Defendant has an affirmative defense to a claim of sex discrimination if Defendant can prove that no adverse job action was taken against Plaintiff, that Defendant exercised reasonable

care to prevent and correct harassing behavior, and that the employee unreasonably failed to take advantage of protective or corrective opportunities. When, as here, a party moves for summary judgment on an issue on which it has the burden of persuasion at trial, it “must support its motion with credible evidence . . . that would entitle it to a directed verdict if not controverted at trial.” *Celotex Corp.*, 477 U.S. at 331 (Brennan, J., dissenting). Defendant sought to establish facts supporting the elements of its affirmative defense by relying on Plaintiff’s deposition testimony. The issue is whether that testimony establishes that there is no “genuine issue as to any material fact” relating to Defendant’s affirmative defense and that, accordingly, Defendant should be granted judgment as a matter of law.

Plaintiff admitted that she suffered no adverse job action, that Defendant had policies against sexual harassment, and that procedures were available to her to complain about harassment. However, by itself this is not enough to warrant summary judgment, because Plaintiff’s testimony also raised genuine issues with respect to two facts that are essential to Defendant’s affirmative defense (as described in the facts of this question): whether Defendant exercised reasonable care to prevent and correct any sexually harassing behavior and whether Plaintiff unreasonably failed to take advantage of corrective opportunities provided by Defendant.

Although part of Plaintiff’s deposition testimony suggests that Defendant did make reasonable efforts to address harassment by providing procedures that Plaintiff did not use, Plaintiff also testified that Defendant made no independent effort to enforce its policies (relying on Plaintiff to report or on supervisors to monitor the situation). In considering this evidence, the court must draw those inferences “most favorable to the party opposing the motion” for summary judgment. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam). A jury could reasonably find that this was not reasonable enforcement action for a workplace that had previously not had any women. Furthermore, Plaintiff testified that she was afraid to report the incidents for fear of retaliation. A jury might find her fear of retaliation to be a reasonable basis for her failure to use available procedures, given that the supervisor was himself one of the alleged harassers.

In short, it appears that there are genuine issues about the reasonableness of the employer’s actions to prevent harassment and the reasonableness of Plaintiff’s failure to report the behavior. Without a resolution of those factual issues, it is not clear whether Defendant’s affirmative defense is valid, and summary judgment should not have been granted.

CORPORATIONS AND LIMITED LIABILITY COMPANIES ANALYSIS

(Corporations and Limited Liability Companies V.D.; VI.B.; IX.)

ANALYSIS

Legal Problems

- (1) Does Acme have fiduciary duties as majority voting member that would require it to have A-B LLC bring the concrete claim against Acme?
- (2) Can Brown bring the concrete claim against Acme?
- (3) Does Brown have sufficient grounds to seek the dissolution of A-B LLC?
- (4) Should A-B LLC's losses be borne by Acme and Brown and allocated between them in the same way as its profits?

DISCUSSION

Summary

Acme's lawyer is wrong in almost every respect. As the member of A-B LLC with management control, Acme has breached its fiduciary duties of loyalty and care by refusing to have the LLC bring the concrete claim. Brown can bring the concrete claim on behalf of the LLC against Acme as a derivative action, though not as a direct action against Acme. Brown may have sufficient grounds to seek judicial dissolution of A-B LLC, because Acme's failure to have the LLC bring the concrete claim likely constitutes oppression. Finally, under the rule of limited liability, the members and managers of an LLC generally are not liable for LLC losses. Thus, the A-B LLC losses arising from the judgment against the LLC are not borne by Acme or Brown, nor are they allocated between them.

[NOTE: The resolution of the issues in this problem would generally be the same in all jurisdictions. The following MEE jurisdictions have adopted the Uniform Limited Liability Company Act (ULLCA) (2006): the District of Columbia, Idaho, Iowa, Nebraska, and Utah.]

Point One (25%)

Acme owes A-B LLC and Brown fiduciary duties of loyalty and care. Refusing to have the LLC bring the concrete claim violates Acme's fiduciary duties because the refusal is self-interested and not in the LLC's best interests.

A-B LLC is a member-managed limited liability company (LLC). The operating agreement varies the statutory default to give Acme a 55% voting interest, which is permissible under ULLCA § 110. In exercising its management powers, Acme has fiduciary duties under ULLCA § 409 as a member in a member-managed LLC to both A-B LLC and Brown. These fiduciary duties include both a duty of loyalty and a duty of care.

The ULLCA does not specifically address whether the duty of loyalty precludes a majority member from refusing to have the LLC bring a surefire claim against the member. But the ULLCA provides that members have a duty of loyalty to “account to the company and to hold as trustee for [the company] any . . . benefit derived by the member . . . in the conduct . . . of the company’s activities.” ULLCA § 409(a)(1)(A). The benefit that Acme derives by virtue of A-B LLC not bringing a claim against Acme is an improper benefit, and thus keeping the benefit is a breach of Acme’s duty of loyalty.

The ULLCA provides that, subject to the business-judgment rule, the duty of care requires the member to “act with the care that a person in a like position would reasonably exercise under similar circumstances and in a manner the member reasonably believes to be in the best interests of the company.” ULLCA § 409(c). Because refusing to have the LLC bring the concrete claim against Acme is self-interested, the business-judgment rule is inapplicable. Under the facts given, Acme cannot reasonably believe that it is in A-B LLC’s best interest to not bring the surefire concrete claim against Acme.

Point Two (25%)

The claim based on the defective concrete sold by Acme to A-B LLC is a claim of the LLC as an entity, not of the LLC’s members. Thus, Brown can maintain a derivative action on behalf of A-B LLC, in which the LLC brings its concrete claim against Acme. But Brown cannot maintain a claim on Brown’s own behalf directly against Acme.

Brown, as a member of the LLC, may maintain a derivative action under ULLCA § 902 to enforce A-B LLC’s concrete claim against Acme. A derivative action in a member-managed LLC may be brought only if (1) a demand is made on the other member to bring an action and the member fails to do so, or (2) such demand would be futile. Here, Brown has made a demand on Acme and Acme has failed to have the LLC bring an action against Acme. Therefore, Brown may bring a derivative action against Acme.

Under ULLCA § 104, an LLC is an entity distinct from its members. The claim based on the faulty concrete is a claim of A-B LLC as an entity, not a claim of its constituent members. For this reason, Brown cannot advance the concrete claim on its own behalf. This is consistent with the direct action provision, ULLCA § 901, under which Brown would have to “plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited liability company.”

Point Three (25%)

Based on Acme’s unjustified refusal to advance the concrete claim, Brown may have grounds to seek judicial dissolution of A-B LLC.

Brown could apply to the court for an order of involuntary dissolution under ULLCA § 701(a)(5), alleging that Acme, as the member in control of the company, is acting in a manner that is oppressive and directly harmful to Brown.

The comment to ULLCA § 701 states that courts have begun to apply close corporation “oppression” doctrine to LLCs. Courts in the close corporation context have found oppression when actions by controlling shareholders violate the reasonable expectations of non-controlling shareholders. Thus, the question becomes whether Acme’s refusal to have the LLC bring a surefire claim against Acme violates Brown’s reasonable expectations. At a minimum, Brown had reasonable expectations that Acme would not violate its fiduciary duties (*see* Point One). In addition, Acme’s refusal to have the LLC bring the concrete claim violates Brown’s reasonable expectation that Acme would manage the LLC in the best interests of the LLC. Finally, Acme’s refusal directly harms Brown, because unless Acme makes good on the LLC losses, Brown will suffer reputational harm for being involved in a construction project where the customers lost all their money.

Point Four (25%)

Under the rule of limited liability, LLC members and managers are not liable beyond their investment in the LLC for losses incurred by the LLC. There are no facts to support piercing the LLC veil, nor did the homeowners bring direct claims against Acme or Brown.

Although allocation of losses among partners in a partnership follows the allocation of profits, no allocation rule applies in an LLC because of limited liability. Under the rule of limited liability, if the LLC becomes indebted, obligated, or otherwise liable to an outside party, no member or manager becomes liable on that debt, obligation, or liability solely by reason of acting as a member or manager. *See* ULLCA § 304(a)(2). Thus, if A-B LLC lacks the assets to satisfy the judgment awarded to the homeowners, there can be no liability of either Acme or Brown on this judgment—unless a court pierces the LLC veil or finds that one of the members had acted to create direct liability.

Under the facts, there is no indication of fraud or other inequitable conduct in the formation or operation of A-B LLC that would support a piercing claim against Acme or Brown. Although state courts have recognized piercing in the LLC context, there must exist some circumstances that would justify piercing on equitable grounds, such as undercapitalization of the business, failure to follow formalities, commingling of assets, confusion of business affairs, or deception of creditors. None of these factors exists here.

At most, the homeowners may have had a direct claim against Acme for supplying defective concrete, but the homeowners did not bring this claim against Acme. Nor is there any indication that Brown was responsible for losses caused by the defective concrete. Therefore, because no claims were brought against either Acme or Brown, there are no losses for which either of them is liable directly, and there is no basis for allocating losses between them. If A-B LLC lacks the assets to satisfy the judgment awarded against it, any shortfall will be a loss borne by the homeowners.

DECEDENTS' ESTATES/CONFLICT OF LAWS ANALYSIS

(Decedents' Estates I.B.1. & 2.; II.A.1., 2. & 4. / Conflict of Laws III.C.3.)

ANALYSIS

Legal Problems

- (1) Which state's laws govern the disposition of Zach's bank account, Zach's house, and Zach's farm?
- (2) Is Zach's will valid in (a) State A and (b) State B?
- (3) If Zach's will is invalid, which of Zach's children are entitled to a share of his assets in State A and State B?

DISCUSSION

Summary

The postmortem distribution of personal property is governed by the law of the state in which the decedent was domiciled at the time of his death. The postmortem distribution of real property is governed by the law of the situs. Thus, State A law controls the disposition of Zach's bank account and Zach's house, and State B law controls the disposition of Zach's farm. In State A, Zach's will is invalid because Zach did not sign it at the end. In State B, Zach's will is invalid because it was not signed by two witnesses. Thus, Zach died intestate in both states.

Under the laws of both State A and State B, Alex is entitled to a share of Zach's estate. In State A, Brian is entitled to a share if the word "children" in the State A statute is construed to include adopted children.

Although the State A intestate-distribution statute excludes nonmarital children, Carrie is nonetheless entitled to a share because intestate-distribution laws that exclude nonmarital children whose paternity has been established are unconstitutional.

Under State B law, Alex and Carrie are clearly entitled to shares of Zach's assets. Brian also is entitled to a share because the State B statute specifically includes adopted children.

Point One (30%)

Because the disposition of real property is governed by the law of the situs, State A law will govern the disposition of Zach's house and State B law will govern the disposition of Zach's farm. State A law also governs the distribution of the personal property, the bank account, because State A was the decedent's domicile at the time of his death.

The law of the state where the real property is located governs the disposition of real property. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223(1). This approach reflects the situs state's interest in the regularity of titles and the interests of third parties who rely on local land records.

See Baker v. General Motors Corp., 522 U.S. 222 (1998) (dictum); EUGENE F. SCOLES ET AL., CONFLICT OF LAWS (4th ed. 2004). Therefore the law of State A controls the disposition of the house and the law of State B controls the disposition of the farm. Each state's statutes must be consulted to determine the validity of Zach's will and, if the will is invalid, the rules governing intestate succession. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 236.

The law of the state in which the decedent was domiciled at his death governs the disposition of personal property. Because Zach was a domiciliary of State A, State A law governs the disposition of his bank account even though the account was maintained at a bank in State B.

[NOTE: Comments to the Second Restatement suggest that when the situs state (State B) has a statute recognizing the validity of a will properly executed in the state where the testator was domiciled, it may determine the validity of a landowner's will under the law in his state of domicile (State A). Most states have such will-validation statutes, but the facts provide that State B has no such law and instead expressly requires nonresidents to comply with its will-execution requirements. The question is designed, in part, to test the examinee's ability to read and apply a specific statute. Zach's will is invalid under State A law in any event. *See* Point Two.]

Point Two (30%)

Zach's will is invalid under the law of State A because Zach did not sign it at the end. The will also is invalid under the law of State B because it was not signed by two witnesses. Therefore, Zach died intestate under the laws of both states.

Although State A permits holographic (i.e., handwritten and unwitnessed) wills, State A law expressly requires the testator to have "signed" the holograph at the end. Zach's will is shown in its entirety in the facts; Zach did not sign it at the end. Therefore, the will is invalid under the laws of State A and Zach's bank account and his house in State A pass in accordance with State A's laws of intestate succession. *See* Point One.

State B validates signed holographic wills only if they have been signed by two witnesses, and Zach's will was not. Therefore Zach's farm passes in accordance with State B's laws of intestate succession.

Therefore, in both State A and State B, University, the beneficiary under the invalid will, takes nothing.

Point Three(a) (5%)

Alex is entitled to share in the house, the farm, and the bank account under the applicable laws of each state, as Alex is a biological child of Zach and was born in wedlock.

The intestacy laws of both State A and State B provide that the property of an intestate decedent passes to his surviving children. There is no possible argument, under either state's law, that a marital child like Alex would be excluded from the class of surviving children who take.

Point Three(b) (15%)

Brian takes a share of the house and the bank account under State A law if “children” includes adopted children; Brian takes a share of the farm under State B law because adopted children are treated the same as biological children.

Under State A law, an intestate's property passes to his “surviving children,” excluding nonmarital children. The statute is silent on the status of adopted children.

At common law, only blood relations could inherit from an intestate decedent. *See* WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, *WILLS, TRUSTS AND ESTATES* 100 (3d ed. 2001). Although all states today grant adopted children inheritance rights in at least some circumstances, there is typically an explicit statutory command that achieves this result. *See, e.g.*, UNIF. PROBATE CODE § 2-114. State A has no statutory provision expressly altering the common law. In the absence of such a statute, a court might conclude that had the legislature intended to give adopted children the same rights as biological children, it would have said so; alternatively, it might conclude, based on general nondiscrimination goals, that the legislature must have intended to give adopted children the same rights as biological children. *See* THOMAS E. ATKINSON, *WILLS* 87 (2d ed. 1953). There are cases going both ways on this issue. *Id.*

In State B, Brian clearly inherits because the statute says so.

[NOTE: The examinee's conclusion on this point is less important than his or her demonstrated ability to recognize the statutory ambiguity and formulate arguments in support of a position.]

Point Three(c) (20%)

Because State A's law disallowing inheritance by all nonmarital children does not meet constitutional standards, Carrie is entitled to take as a child of Zach.

Under the common law, a nonmarital child could not inherit from either parent. Today, all states grant nonmarital children the right to inherit from their mothers and to inherit from their fathers when at least one statutorily defined method of establishing paternity has been satisfied. *See* MCGOVERN & KURTZ, *supra*, at 93–94. The Supreme Court has held that a statute disallowing inheritance by a nonmarital child from her father when the father's paternity has been adjudicated during his lifetime is unconstitutional. *See Trimble v. Gordon*, 430 U.S. 762 (1977). *See also Reed v. Campbell*, 476 U.S. 852 (1986). Because Zach's paternity of Carrie was adjudicated during his lifetime, Carrie would be entitled to a share of Zach's estate despite the language of the State A statute. Carrie also takes under the laws of State B because she is Zach's biological child.



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National Conference of Bar Examiners

302 South Bedford Street | Madison, WI 53703-3622

Phone: 608-280-8550 | Fax: 608-280-8552 | TDD: 608-661-1275

e-mail: contact@ncbex.org