

Butler v. Hill (February 2011, MPT 1)

Examinees' law firm represents Jennifer Butler in a divorce action against Robert Hill. Jennifer was 17 and pregnant when the marriage ceremony was performed in 2003, and Robert forged the required signatures on the parental consent form. Jennifer and Robert lived together as a married couple for over six years, and they have two children. When Jennifer learned that Robert had been having an affair, she decided to end the marriage. Shortly thereafter, she discovered that Robert had been married before, and that he and his first wife were divorced in 2008—that is, several years after Jennifer and Robert's marriage ceremony. Examinees' task is twofold. First, they are asked to draft a brief objective memorandum for the supervising partner analyzing whether the parties' marriage ceremony in September 2003 had any legal effect under the Franklin Family Code. Second, examinees are to prepare a closing argument in which they persuasively set forth the case for why the court should conclude that Jennifer and Robert are married under Franklin law and that Jennifer should be awarded more than 50 percent of the marital property. The File consists of the task memorandum, the partner's memorandum to the file, a transcript of an interview with a neighbor, the couple's marriage certificate, the divorce judgment for Robert's first marriage, the deed for the parties' residence, and an invitation to their anniversary party. The Library contains the relevant sections of the Franklin Family Code and three cases relating to void marriages, common law marriages, and the division of marital property.

**MINNESOTA BAR EXAMINATION
FEBRUARY 2011
REPRESENTATIVE GOOD ANSWER
QUESTION 1**

TO: Sophia Wiggins
FROM: Applicant
DATE: February 22, 2011
RE: Butler v. Hill

The main issue in this case is whether the marriage of Robert and Jennifer is legally recognizable under Franklin Family Law, and how Robert's previous marriage to Sophia affects that recognizability. When Robert and Jennifer were civilly wed on September 1, 2003, there were several problems. First, Jennifer was underage. This issue could have been avoided by having her parents sign a consent form and present it to the officer of the court, or by providing certification from a medical professional that Jennifer was pregnant at the time of the marriage. According to Jennifer, she was pregnant with her first child when she and Robert were wed, so this would have been possible. However, Jennifer obtained neither parental consent nor the certificate from a physician. Instead, Robert forged the consent form with a parent's signature. This would make the marriage voidable, and the fact that Jennifer and Robert continued to hold themselves out as married, filed joint tax returns, and shared a bank account would tend to indicate that the marriage could be ratified on those grounds. However, an additional factor is Robert's previous marriage to Serena. Robert and Serena were not divorced until April of 2008.

The Franklin Court of Appeals in *Hager v. Hager* declared that, because a bigamous marriage is void *ab initio*, it cannot be ratified despite one spouse's good faith belief that the other spouse is not married. The question remaining to us, then, in regards to whether Jennifer and Robert were legally wed, is whether they have a common law marriage. A common law marriage is defined in *Owen v. Watts* as "an agreement by parties legally capable of entering into a valid marriage that they have a marriage relationship." According to Franklin Family Code Section 309, a common law marriage cannot be considered unless, at the time the common law marriage is entered into, each party is of legal age, and there is no Section 310 prohibitions against the marriage itself. As there was a Section 310 prohibition against Robert's marriage at the time he and Jennifer went before the Court in 2003, no common law marriage could be instated at that time. Therefore, we must consider whether a common law marriage was entered into after Robert's divorce from Serena in April of 2008. The court, in *Owen v.*

Watts, provides the guideline that “cohabitation continued after the removal of a legal impediment cannot ripen into a common law marriage unless it was pursuant to a mutual consent or agreement to be married made after the removal of the barrier,” and noted that the question before the court in deciding whether a common law marriage existed is “whether any impartial trier of fact could reasonably find by the preponderance of the evidence” that the two people fulfill the guidelines of common law marriage – that is, “A manifestation of mutual agreement, by parties able to enter into a valid marriage, that they are presently married, followed by cohabitation, including holding themselves out to the community as being husband and wife.” The burden, they also conclude, is on the proponent, in this case Jennifer.

Therefore, we must go through all the guidelines to common law marriage and show that the relationship between Jennifer and Robert fulfilled all of the requirements. First, both parties must be able to enter into a valid marriage. After Robert’s divorce in 2008, Jennifer was of age and Robert had no legal impediment to marriage, so this criteria is fulfilled. Second, there must be a manifestation that the parties are presently married. We have several pieces of evidence to offer here. First, there is the invitation to the ‘wedding anniversary’ in 2009, showing that both parties considered themselves married (although the anniversary bit is legally untrue). Second, we have the testimony of Louisa Milligan that Robert and Jennifer considered themselves married. We can show that Robert and Jennifer were cohabitating, since Jennifer is still in residence at the house, they filed joint tax returns listing the house as their address, they shared a banking account, and we can probably find census information listing them as both residing at that address. The anniversary announcement and the testimony of Louisa Milligan, including that regarding Robert’s verbal acknowledgement of his marriage to Jennifer, as well as the fact that both Robert and Jennifer referred to themselves as married in the multiple social gatherings that they attended, can be used to prove that Jennifer and Robert were holding themselves out to the community as husband and wife.

The closing argument is as follows:

Jennifer Butler thought that she was married in a civil ceremony on September 1, 2003, to Robert Hill. Several years later, after having two children and contributing financially to the household despite years of verbal and emotional abuse, and after having put their joint income tax refund towards the down payment of the home they had been renting, Jennifer decided to end their marriage. Robert moved out. At that point, Jennifer found amongst Robert’s personal items a copy of a divorce decree to a Serena Hill, whom she had never heard of. The decree was dated in 2008. When Jennifer confronted Robert, he told her that he thought he was divorced before he had married Jennifer.

Unfortunately, for Jennifer, that makes her 2003 marriage to Robert void. However, the invalidity of that marriage and ceremony does not mean that she

and Robert were never married, and it does not mean that she is not entitled to her share of the marital property. It simply means that they had a common law marriage that began after Robert and Serena were legally divorced. Now, what is involved in a common law marriage? Well, for starters, both parties have to be of legal age. That is true. In 2008, both Robert and Jennifer were over the age of 18. Both parties also have to be legally able to be married – and that means that neither of them can already be married to someone else. That is also true. After Robert and Serena divorced, Robert was legally eligible to wed. Both parties have to show that they consider themselves to be married. Well, we have an invitation to a party based entirely on the premise that they were married – a party for the married couple that takes place while they were both of legal age and legally able to wed. Obviously, they thought of themselves as a married couple – at the party, Robert made a toast to his wife, Jennifer, referring to marrying her as “the smartest thing he’d ever done.” We have to show that they cohabitated – that they lived together as husband and wife. Robert and Jennifer lived in the same house with their two children. They shared a bank account. They filed taxes as a married couple. They clearly cohabitated. Lastly, we have to show that Jennifer and Robert held themselves out to the community as husband and wife. Here I reiterate some of the facts. They filed taxes as a married couple. They lived together. They referred to each other as husband and wife. They told friends they were married. They had a party for their friends and relatives celebrating their marriage, where Robert toasted his wife and celebrated his marriage to her.

Robert will argue that they were never married. To a certain extent, he is right – their marriage ceremony was not valid. However, the fact that the legal ceremony was invalid does not mean that their common law marriage never existed, and in fact, his continued cohabitation and the way he continued to present himself after that ‘invalid’ marriage, and the fact that he continued to act as Jennifer’s husband even after he became aware that their initial marriage was invalid indicates that he himself still considered himself married to Jennifer. The fact that he held himself out to his community and family as married; the way he filed his tax returns as a married person; the way they held parties to celebrate their marriage: all these point to the fact that Robert considered himself married to Jennifer. He may argue that his sexual relations with another woman show that he did not consider himself married; however, the fact that he left the family home when Jennifer told him that she wanted a divorce and let her and the children stay there show that he considered Jennifer and the children proper residents of the home, and his family. Robert may also argue that the fact that Jennifer had listed the children as beneficiaries on her life insurance, rather than him, is evidence that she did not consider herself married. He may argue that her separate savings account is evidence that she did not consider herself married. He may argue that the fact that Jennifer never changed her last name to his indicated that she did not consider herself married. However, Jennifer contributed her earnings towards the joint checking account, she contributed financially to the support of the family. She and Robert filed joint tax returns.

She agreed to use their refund from those taxes to buy a family home. She took care of their two children; as their primary caregiver, she wanted to insure that they would continue to be taken care of after her death. All that indicates that she considered herself married. The fact that she did not take Robert's last name does not mean she did not consider herself married; it is a common practice nowadays.

Having shown you that, despite an invalid civil ceremony, Robert and Jennifer were in fact married, it remains only to be proven that the home Jennifer and the children live in is marital property, and that Jennifer is entitled to her share of marital property when this common law marriage is dissolved – and that share is larger than simply half. Franklin Family Court Rules state that each party in a divorce shall get their sole and separate property acquired prior to the marriage, and anything that they received by gift or inheritance. Neither party is disputing this part of the rules. Robert will argue that the house is his, because he is the person named on the title to the house. What Robert objects to is the rule that all property and debt accumulated during the marriage – regardless of whether title is held individually or by both parties - is split in a manner that is equitable, after considering several factors. Robert and Jennifer purchased the house in the summer of 2008, after they were part of a common law marriage. The down payment came from their joint tax return. The house should be considered part of the marital assets. So now we must decide – how to divide the property in a way that is equitable, just, and reasonable? Robert will argue that the law says he deserves half of the marital property. However, when circumstances call for an uneven distribution, the law gives us several factors to consider. Look at the age, health, occupation, employability, sources of income, and needs of each of the parties. Both Jennifer and Robert have been employed throughout their marriage. However, Robert makes twice as much money as Jennifer. When they separated, Robert moved out of the family home. Jennifer stayed there – and the children stayed with her. Jennifer contributed to the marriage as the homemaker as well as with her job earnings. And finally, of course, we come to the reason why Jennifer and Robert separated. Robert had an affair. Robert had an affair after emotionally and verbally abusing Jennifer for years. And not only did he have an affair, he gave that other woman ten thousand dollars of the money that Robert and Jennifer had earned together. In another case, *Charles v. Charles*, the same thing happened. An affair. The court said there that “an extramarital affair can be an added burden sufficient to justify a disproportionate division of marital property provided that the evidence establishes the specific added burdens that the non-offending spouse suffered as a result of such misconduct.” Robert placed additional burdens on the marriage. He gave ten thousand dollars of money from their joint bank account to his mistress as Jennifer both worked and served as the family's homemaker, all while suffering Robert's verbal and emotional abuse. This is a substantial amount of money that their family will have to do without because of an event solely attributable to Robert. For the burdens Robert's conduct have placed upon the marriage, Jennifer deserves a fair distribution – a distribution of more than half of the

property. Robert has no instances of Jennifer's misconduct to sway the balance back to an "even" 50%. Jennifer deserves more than half of these assets.

QUESTION #2

Driver is employed by Door 2 Door (D2D), a local package delivery business. As Driver was leaving the D2D parking lot with a load of packages, Plaintiff was walking her dog along the sidewalk in front of D2D's building. Just as Plaintiff crossed the driveway, Driver, driving the D2D vehicle, struck and injured Plaintiff.

Plaintiff has sued Driver on a negligence theory and D2D on a *respondeat superior* theory, alleging that D2D is liable for Driver's negligence. Driver and D2D both claim the following:

1. Driver saw Plaintiff.
2. Driver's brakes failed when he tried to stop the vehicle.

D2D's delivery vehicles are maintained by TruckMaintCo, which is not a party to this action.

At trial, Plaintiff intends to call the following witnesses to establish her theory of the case:

- Wanda, Driver's ex-wife. Wanda and Driver were married at the time of the accident, but divorced several months before trial. If permitted, Wanda will testify that on the evening of the accident, while they were watching television, Driver told her that he had caused a bad accident at work.
- William, a friend of Clerk. Clerk worked in the payroll department at D2D. Clerk's office had a window which had a good view of the area where the accident took place. Not long after the accident, D2D transferred Clerk to the company's office in Australia, where Clerk remained at the time of trial. Plaintiff was unable to obtain an order requiring Clerk to appear at the trial. If permitted, William will testify that a day after the accident:
 - a. Clerk told William that he saw the accident take place;
 - b. Clerk told William that Clerk noticed that Driver was driving very fast through the parking lot just before the collision; and,
 - c. Clerk told William that Driver did not slow down before colliding with Plaintiff.

In their defense, defendants Driver and D2D intend to call the following two witnesses to establish their theory of the case:

- Driver. If permitted, Driver will testify that the mechanic for TruckMaintCo (the company that services the delivery vehicles) who last serviced the vehicle Driver was driving when the collision occurred, is a lazy and incompetent mechanic.
- Office Manager, who worked for TruckMaintCo (the company that services D2D's delivery vehicles.) If permitted, Office Manager will testify that approximately five weeks ago she reviewed the service records that TruckMaintCo maintains and that she noted that the records show that the brakes on the vehicle involved in the accident had not been inspected or serviced during the three years immediately preceding the accident. If Office Manager gives this testimony, plaintiffs plan to ask her on cross-examination to acknowledge that she was fired from TruckMaintCo a month before the trial.

Analyze and fully discuss the evidentiary issues that will arise at trial from the planned testimony of each of the four witnesses.

**MINNESOTA BAR EXAMINATION
FEBRUARY 2011
REPRESENTATIVE GOOD ANSWER
QUESTION 2**

I will address each statement as they are presented in the question: All relevant evidence is admissible unless the court in its discretion excludes it based on policy concerns or for pragmatic reasons. Relevant evidence is evidence, which has any tendency to prove a material fact more or less probable than would be the case without the evidence.

Wanda: Wanda's testimony concerns privileged marital communications. Confidential marital communications are intimate communications that take place during a marriage and are inadmissible in court if objected to by either spouse. The privilege generally survives divorce. In this case, Driver will be able to object to the proposed testimony concerning his statements because they happened during the marriage. The privilege of confidential marital communications will prevent Wanda's testimony from being admitted in court since no exception to the privilege exists such as a non-essential third party destroying the confidentiality.

William: William wishes to testify as to something an unavailable witness saw and said, which constitutes hearsay that is inadmissible unless it is excluded from the definition or has an exception applied. Hearsay is an out of court statement by a declarant offered to prove the matter asserted. William's testimony would be to state what Clerk told William he had witnessed while working for D2D. Employee's statements can be vicariously attached to the employer, defendant, and constitute a party admission. Party admissions are not hearsay. William will be permitted to testify as to what Clerk stated because applying the rule above, his statement concerned as a matter within the scope of his employment and occurred during the employment relationship. William's statement that the driver drove very fast and did not slow down could also possibly be admitted under the present sense impression. Present sense impression is a statement regarding a person's description of an event occurring right as it occurs. The statement occurred the next day and not immediately thereafter. This is concerning because present sense impressions usually are close in time. Excited utterance could also be argued as an exception to hearsay. It was a startling event and if the statement was made under the stress of witnessing the event, as Clerk did, it may come in. A witness' testimony is permitted if it is relevant and helps the jury in making a finding of fact. Here the statements concern speed, something Clerk would be competent to testify as to. Because the statement is a party admission or possibly permitted as an exception to the hearsay rule, it'll likely be admitted. Lastly, if it appears the defendant transferred Clerk to another country to avoid him being called to

testify, the court could permit Clerk's statement in under the exception allowing information intentionally withheld by a party wrongdoer.

Driver: The admissibility of Driver's testimony is questionable. It appears to be nothing more than character evidence (ones general disposition) which is inadmissible in court unless in a civil case it pertains to the elements of the cause of action. Here the cause of action, besides personal injury and negligence, is negligent entrustment. Driver may be permitted to testify to the negligency of the mechanic because it rebuts the assertion that the defendant's negligence is the actual and proximate cause of the injury. He is offering character evidence of another and as long as it is helpful to the trier of fact, the jury, it will be permitted since the statements concern the cause of action. Driver can testify to this opinion of the mechanic that he is lazy, but whether or not he is competent to state the mechanic is incompetent remains unclear because he may not have the background to make such an assertion.

Officer Manager: Office Manager wishes to testify as to service records. Business records are admissible if made during the regular course of business. In order to testify to matters now known first hand, but subsequent to reading a document, the document itself must be presented. Officer Manager wishes to testify to matters known to her simply by having read them. This violates the best evidence rule, which requires the actual document to be produced. There's no reason why the documents could not be produced as Office Manager, she could be the custodian of the record to authenticate the document, and it would come in under the business record exception to the hearsay rule. Business records of companies who create such documents in the ordinary course of business and observe and write down matters regularly pursuant to a duty, within a reasonable period of time from when they occur can admit such documents. The statements therein are admissible and trustworthy because they were written down by the business to regulate its business efficiently. It may also be non-hearsay because it shows knowledge of the existence of a dangerous condition. The testimony shows despite the knowledge that the breaks weren't inspected or serviced, they continued to allow the truck to be driven. This information does not prove the truck was defective, just that they were aware of the condition. The information contained in the service records is admissible. Office Manager can also testify to matters she shows first hand. These matters are not hearsay since she never spoke them before. Plaintiff's can cross exam her about her employment status, but the matters Office Manager wishes to discuss took place before she was fired, so unless they wish to make it appear that she has some interest or bias, it's pointless to mention this fact.

QUESTION #3

On September 1, Adam, Baker, and Clark formed a shoe manufacturing business called Delta Incorporated (Delta). Each was to be a shareholder. Adam was named president of Delta.

Adam agreed to prepare and file articles of incorporation and bylaws for Delta, in accordance with the state's corporation statute, which is identical to the Model Business Corporation Act (1984, with 2000 amendments). Adam, Baker, and Clark agreed to include a provision in Delta's articles of incorporation stating that the corporation's existence would begin on September 1.

On October 1, Adam, acting on behalf of Delta, entered into a contract with Mega Stores Corporation (Mega) pursuant to which Mega was to purchase shoes from Delta for \$3,000. Following delivery of the shoes and after Mega had paid in full, Mega discovered that the shoes did not conform to the contract specifications and returned the shoes to Delta. It is undisputed that Delta owes Mega the \$3,000 purchase price.

On October 15, Baker learned that Delta's articles of incorporation had not been filed.

On November 1, Adam, acting on behalf of Delta, entered into a contract with Sole Source, Inc. (Sole), a supplier of shoe soles, pursuant to which Delta purchased shoe soles from Sole for \$100,000. The soles were delivered to Delta, and it is uncontested that Delta owes Sole the \$100,000 purchase price. Adam learned of the opportunity to contract with Sole from Baker, who had worked with Sole in the past. Baker helped Adam negotiate the contract with Sole.

On November 15, Adam filed Delta's articles of incorporation with the appropriate state official.

When Delta did not pay either Mega or Sole the amounts it owed them, each company sued Delta, Adam, Baker, and Clark for the amounts owed.

At all times, Clark believed that Delta's articles of incorporation had been filed.

1. When did Delta's corporate existence begin? Explain.
2. Is Adam, Baker, or Clark personally liable on the Mega contract? Explain as to each.
3. Is Adam, Baker, or Clark personally liable on the Sole contract? Explain as to each.

**MINNESOTA BAR EXAMINATION
FEBRUARY 2011
REPRESENTATIVE GOOD ANSWER
QUESTION 3**

1. When did Delta's corporate existence begin?

De Jure Corporation: A corporation is a de jure (legal) corporation when the corporation has completely fulfilled the statutory formalities imposed by the state, such as filing the corporation's articles of incorporation with the appropriate state official. Here, Delta did not come into legal existence until its articles of incorporation were filed with the state, which was on November 15. Since there are no facts that indicate that there was any issue with the filing of Delta's articles, I assume that the articles were properly filed and Delta was legally formed on November 15. However, a corporation may be deemed to be treated as a corporation prior to its legal formation under de facto corporation or corporation by estoppel.

De Facto corporation: A corporation is deemed to be a de facto corporation when the incorporator in good faith attempts to comply with the appropriate formation requirements of the state (e.g., filing of articles of incorporation) but fails to comply with a technical requirement (e.g., incorporator thought he filed the articles with the state, but for some reason the state does not have record of the articles being filed). Here, Adam did not attempt to file Delta's articles with the state until November 15. There are no facts that there were any errors or problems with the filing of Delta's articles. Therefore, Delta was not a de facto corporation prior to November 15 because no attempt was made to file the articles until November 15. Also, since there are no facts that there was not complete compliance with the formation requirements, Delta was not a de facto corporation on or after November 15.

Corporation by Estoppel: When a party transacts with what it reasonably believes is a validly formed corporation and such party detrimentally relies on such fact, the corporation will be estopped from disregarding a contract or obligation on the basis that it was not validly formed. The promoter who acted on behalf of the purported corporation (knowing the corporation has not yet been formed) will also be liable to the other party for such contracts and obligations. Corporation by estoppel was formed on October 1 and November 1 as to Mega and Sole, respectively, as long as such companies did not know or have reason to know that Delta was not a validly formed, legal entity.

2. Liability re: Mega Contract

Adam: Adam negotiated and contracted with Mega and held himself out to be acting on behalf of Delta. Delta was not a legal entity at this time, so Adam will be deemed to be a promoter of Delta when he entered into the contract with Delta. Adam is personally liable on the Mega contract because a promoter is liable on pre-incorporation/promoter contracts unless the corporation later expressly assumes the contract and expressly assumes Adam's liability as a promoter thereunder. Here, there are no facts that Delta expressly assumed the Mega contract or that Delta expressly assumed Adam's promoter liability under such contract. Accordingly, Adam is personally liable for the entire amount (\$3,000) of the Mega contract as a promoter of Delta.

Baker and Clark: Baker and Clark believed that Delta was a validly formed corporation when Adam acted on behalf of Delta in negotiating and entering into the contract with Mega. Under the facts, Baker and Clark did not have any contract with Mega during the negotiations and they may not have even known about the contract with Mega. Baker and Clark did not negotiate with Mega or enter into the contract/sign the contract on behalf of Delta, so they will not be deemed promoters and will not be personally liable to Mega as such. However, if Baker and Clark purchased stock in Delta and Delta is held liable for damages to Delta, Clark and Baker may lose their capital contribution to Delta since that amount would be capital available to Delta to satisfy the judgment. So, while not personally liable on the Mega contract, they would be liable to the extent of their capital contributions to Delta.

3. Liability re: Sole Contract

Adam and Baker: On October 15, Baker learned that Delta's articles had never been filed and that Delta was not yet a valid, legal entity. Baker and Adam negotiated and contracted with Sole. The facts specifically state that Adam held himself out to be acting on behalf of Delta, but it is not clear whether Baker held himself out to be acting on behalf of Delta. Because Baker helped Adam negotiate with Sole, we can assume that Baker held himself out as acting on behalf of Delta (and it would be reasonable under these circumstances that Sole believed Baker to be acting on behalf of Delta). Delta was not a legal entity at this time and both Adam and Baker knew this fact. So Adam and Baker will be deemed to be a promoter of Delta when they negotiated and then Adam entered into the contract with Delta. As promoters, Adam and Baker are liable to Sole for the contract. Adam and Baker are personally liable on the Sole contract because a promoter is liable on pre-incorporation/promoter contracts unless the corporation later expressly assumes the contract and expressly assumes Adam's and Baker's liability as promoters thereunder. Here, there are no facts that Delta expressly assumed the Sole contract or that Delta expressly assumed Adam's and Baker's promoter liability under such contract. Accordingly, Adam and Baker are jointly and severally personally liable for the entire amount (\$100,000) of the Sole contract as a promoter of Delta.

Adam and Baker could be deemed to have formed a partnership with respect to the Sole contract if they intended on transacting business together as a partnership. If this is the case, then Adam and Baker as partners in a general partnership, would be jointly and severally liable to Sole for the contract amount.

Clark: Clark believed that Delta was a validly formed corporation when Adam and Baker acted on behalf of Delta in negotiating and entering into the contract with Sole. Under the facts, Clark did not have any contact with Sole during the negotiations and he may not have even known about the contract with Sole. Clark did not negotiate with Sole or enter into the contract/sign the contract on behalf of Delta, so he will not be deemed a promoter and will not be personally liable to Sole as such. However, if Clark purchased stock in Delta and Delta is held liable for damages to either Sole or Delta, Clark may lose his contribution to Delta since that amount would be capital available to Delta to satisfy the judgment. So, while not personally liable on the contracts, he would be liable to the extent of this capital contribution to Delta.

QUESTION #4

Jane is the owner of an apartment building in State A. Jane has a sincere belief that it would violate her religious principles if she were to rent an apartment to an unmarried couple who may be engaging in sexual intercourse while living in her apartment building.

Assume that State A has a law barring marital status discrimination in housing.

Jane has refused to rent to an unmarried couple. She is fined for having engaged in discrimination and is enjoined from engaging in it in the future. She appeals and bases her appeal on the U.S. Constitution, specifically the religion clauses of the First Amendment.

As a law clerk for one of the appellate judges who will hear the case, write a memorandum for the judge in which you analyze and fully discuss the legal issues under the U.S. Constitution that are raised in this case.

**MINNESOTA BAR EXAMINATION
FEBRUARY 2011
REPRESENTATIVE GOOD ANSWER
QUESTION 4**

TO: Judge

FROM: Clerk

RE: Constitutionality of law banning marital status discrimination in housing

In order to challenge a law under the U.S. Constitution (or any law for that matter), the person bringing the action must have standing, i.e., must suffer personal harm and the court must be able to afford a remedy. Jane has standing. She suffered a financial harm in the form of a fine and is enjoined from continuing her current practice of discrimination. She is looking to the court presumably to have the fine/conviction overturned and for the court to overturn her enjoinder by declaring the law unconstitutional. Additionally, the courts can only hear cases and controversies (i.e. no advisory opinions) – as stated earlier, this is a case in controversy thus meets the requirement.

Jane is challenging the constitutionality of the law under the 1st amendment's freedom of religion. When considering such a claim, the court cannot question the truth or validity of the individual's belief. It may only look to the sincerity of those beliefs. Here, the facts state Jane sincerely believes premarital sex is against her religious beliefs, so the court must accept it.

The freedom to practice one's religion is a fundamental right and as such, any state or federal law that discriminates against a person's act, speech, etc. on the basis of religion must pass strict scrutiny (i.e. compelling state interest that's necessary to achieve that interest in the least restrictive means). However, when the law is one which is facially neutral and generally applicable (i.e. not aimed at any religion, non-religion, or other group), the standard shifts to rational basis (i.e. law is rationally related to a legitimate state interest) and the burden is on the Plaintiff (Jane) to show the law fails the test. In the present case, the law generally applies to any discrimination in housing based on marital status. Providing housing for its citizens is a legitimate state interest. Furthermore, the rights of consenting adults to engage in sexual intercourse has been deemed by the U.S. Supreme Court to be a fundamental privacy right, thus the law serves to further protect that right. Ultimately, Jane is likely to lose on a freedom of exercise of religion challenge to this generally applicable law that incidentally burdens her free exercise of religion because the state has a legitimate interest that is rationally related to the law.

Jane may also attempt to challenge the law under the establishment clause of the 1st amendment. In analyzing claims under the establishment clause, a court governmental program will be valid if it: 1) has a secular purpose, 2) has a primary effect that neither promotes nor inhibits religion, and 3) does not foster excessive entanglement between the government and religion. This law has the secular purpose of protecting from housing discrimination and its primary effect bears no relation to religion (primary effect = protect house rights) and it does not create excessive entanglement with religion (e.g. no funding or other decisions made based on religion). Thus, Jane will likely lose on establishment challenge.

Jane may also attempt a challenge to the law under the contracts clause, but will likely lose because the law is not interfering with a pre-existing contract.

QUESTION #5

After recent terrorist threats, Metro Opera (Metro) decided to place metal detectors in its lobby. Metro also marked off an area just beyond the metal detectors in which to search patrons who failed the metal-detector test. Metro posted a sign near the entrance that read: "Warning! No metal objects allowed inside. All entrants are screened and may be searched."

Claimant and Friend saw the warning sign as they entered Metro. After entering, they observed several patrons being frisked. Claimant said to Friend, "I'm certainly not going to allow anyone to touch me!"

Claimant then walked through the metal detector, which buzzed. Without asking Claimant's permission, Inspector, a Metro employee, approached Claimant from behind and began to frisk Claimant. Claimant leaped away from Inspector and snarled, "Leave me alone!" Guard, another Metro employee, then used a stun device, which administers a painful electric shock, to subdue Claimant.

Unfortunately, the stun device, manufactured by Alertco, malfunctioned and produced a shock considerably more severe than that described in Alertco's product specifications. The shock caused minor physical injuries and triggered a severe depressive reaction that necessitated Claimant's hospitalization. Claimant had a history of depression but was in good mental health at the time of the shock. Claimant was the first person who had ever experienced a depressive reaction to the Alertco device.

The Alertco device malfunctioned because it was incorrectly assembled at the factory and therefore did not meet Alertco's specifications. Alertco's assembly-inspection system exceeds industry standards, and it is widely recognized as the best in the industry. Nonetheless, it did not detect the assembly mistake in the device that injured Claimant.

Claimant has filed two tort actions seeking damages for her physical and psychological injuries: (1) Claimant sued Metro, claiming that both the frisk and the use of the stun device were actionable batteries, and (2) Claimant brought a strict products liability action against Alertco.

Metro has conceded that the actions of Inspector and Guard were within the scope of their employment. Metro had instructed its employees to ask permission before frisking patrons, but on the day Claimant was frisked, a supervisor told employees to frisk without asking permission in order to speed up the entrance process.

1. Can Claimant establish a prima facie case of battery against Metro for (a) the use of the stun device and (b) the frisk? Explain.

2. Does Metro have a viable defense to either battery claim? Explain.
3. Can Claimant establish the elements of a strict products liability claim against Alertco based on the malfunction of the device? Explain.
4. Assuming that Claimant establishes either Metro's or Alertco's liability, can Claimant recover for her depressive reaction to the stun device? Explain.

**MINNESOTA BAR EXAMINATION
FEBRUARY 2011
REPRESENTATIVE GOOD ANSWER
QUESTION 5**

Claimant v. Metro: Can Claimant establish a battery case against Metro?

Battery is the harmful or offensive touching of the person of another with intent. Causing any physical harm or injury could constitute battery, but actual injury isn't required. In addition, conduct that is offensive or insulting to the victim may constitute battery. Plaintiff's perception of what is reasonable or unreasonable is not necessarily determinative. It is determined by what a reasonable person would find harmful or offensive. Normally an employer is vicariously liable for the actions of its employees if those are within the scope of employment. However, an employer may not be liable for the intentional criminal or tortious conduct of its employees. Nonetheless, because the facts stipulate that the employees' actions were within the scope of their employment, Metro will be vicariously liable for its employees' torts, even if they are intentional. The employees had authority to make frisks and were given the stun devices for use.

- a. Use of Stun Device. Metro may argue, however, that the use of a stun device was beyond the scope of the employees' authority and thus Metro should not be vicariously liable for that employee's actions. This may be difficult to establish, however, especially because it has been stipulated that they were acting within the scope of their employment. When the employee used the stun device against her, he intentionally made an offensive touching. The use of a stun gun in such a circumstance would be offensive to a reasonable person. This is especially true because the stun gun was used only after Claimant told them to "leave [her] alone." Although said with a snarl, this was not enough to constitute use of the stun gun, which was unreasonable.
- b. Frisk. The frisk was also unreasonable given the facts. Without asking her permission, the employee approached her from behind and began to frisk her. Although frisks are quite common in today's traveling and unstable world, the fact that the employee approached her without opportunity to anticipate the frisk, this would be deemed unreasonable to a reasonable person.

Metro's Defenses.

Metro will argue that Claimant impliedly consented to the battery. In doing so, it will argue that proper warning signs were posted that gave notice of screenings and searches. By proceeding ahead after viewing and reading the sign, Claimant impliedly consented to the searches. This is similar to the O'Brien immigration case, in which the court held that an immigrant who was vaccinated

impliedly consented to the vaccination (and underlying battery) by her actions. She, like Claimant, proceeded through the line knowing what was taking place in front of her. This may be an easy argument as to the frisk, in light of the warning. However, Claimant will argue again that the frisk was done without notice (from behind) and further, that the use of the stun device went beyond her implied consent and thus Metro should not be able to use consent as a defense. Moreover, Claimant will argue that it was a third employee, the Supervisor, who ordered the use of frisks without seeking consent in order to speed up the entrance process and thus Metro should be held liable for its employees' actions, even if those actions went beyond the authority given by the employer.

Claimant v. Alertco is Strict Liability.

In order to establish a claim against Alertco in strict liability, Claimant will need to establish that Alertco had 1) manufactured or supplied the product; 2) that the product possesses a defect in manufacturing; 3) the manufacturing defect was the cause of the injury; 4) the defect in manufacturing existed when the product left the defendant's possession; and 5) plaintiff's injury resulted from a use of the product that was reasonably foreseeable. Generally, manufacturers of devices that are defective when they leave the factory are held strictly liable for the injuries they cause.

Here, Alertco had a strict duty to ship safe products. Alertco will argue that it did not breach its duty because its assembly-inspection system exceeds industry standards, and is highly recognized as the best in the industry. However, Claimant will assert that because this product left Alertco's hands and was shipped into the stream of commerce in a defective state, Alertco breached that strict duty. A manufacturer can still be held liable for that "one in a million" defective product that leaves the assembly line.

Next, Claimant will have to establish that the breach was a cause in fact and proximate cause of her harm. Here, the device was defective when it left Alertco's control, (i.e., no one else modified the product that resulted in it being unsafe). Thus, Alertco's actions are the factual cause of Claimant's harm. Proximate cause focuses more on the foreseeability of the harm suffered. Was it foreseeable that a person in Plaintiff's position would be burned by a defective stun device? Yes. Alertco may argue, however, (albeit in vain) that the employee's improper use was a superceding and intervening force that should exculpate Alertco from liability. This is not a winning argument; however, as it was the *malfunction* of the machine that produced a shock considerably more severe than described in its specifications that caused her injuries.

Finally, because Claimant suffered physical injuries and parasitic severe depression, she should be able to recover on a strict liability claim against Alertco.

Recovery for Depressive Reaction.

Normally, depressive reactions, when standing alone, are generally not recoverable in a tort claim. However, when these depressive reactions are coupled with physical injuries, even if slight, Claimant should be able to recover for both the physical and emotional harm suffered. Moreover, in tort law, a defendant "takes his plaintiff as he finds her." Thus, even if the Plaintiff suffers injuries because of her highly sensitive state, she is still able to recover for her injuries. She will argue that her past mental health issues should not preclude her from recovering. Nor will the fact that she was the first person who ever experienced a depressive reaction.

For the foregoing reasons, she should be allowed recovery for her depressive reaction.

QUESTION #6

Arnie and Barb Smith, brother and sister, have come to you for legal advice concerning the estate of their father, Ted, who died last month. They ask who will inherit what from the estate. They provide the following documents, all signed by Ted:

- A formal, typed 1976 will. The dispositive language reads, "I give 10% of my estate to First Church and all the rest of my property to my wife, Donna, if she survives me, and if not to my maternal grandmother, Grams." Pastor Paula (pastor of First Church) and William Friendly (a family friend) signed as witnesses in each other's presence, as well as in Ted's presence.
- A paper in Ted's handwriting dated March 17, 1982, reading "I think my rare and valuable print of the clown should go to Arnie when I die. Ted Smith."
- A letter Ted wrote to his grandmother (Grams) in 1983 that included the language "Grams, Arnie sure loves that old clown print. I hope he'll appreciate how rare it is when he inherits it."

You learn the following additional facts:

- Ted and Donna were married in 1975. Arnie was born in 1980. Barb was born in 1984. Neither Ted nor Donna had other children. Ted and Donna divorced in 2006.
- Ted's mother was an only child. Ted's parents died in an accident in 1972. Grams died in 1985. Ted's only siblings, Sissy and Bro, live nearby.
- The clown print is worth \$15,000.
- The rest of the estate consists of stock valued at \$500,000.

Fully analyze and discuss the advice that you should offer Arnie and Barb regarding the estate.

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In order for a will to be valid, the testator must have capacity (be over the age of 18) and have testamentary intent (meaning testator must intend for the instrument to be a will). The will must be signed by two witnesses, and by the testator. If a witness is a beneficiary, then in some jurisdictions, he will take the lesser of the gift under the will or what his share would be had the testator died intestate. Under the Uniform Probate Code, an interested witness will take the gift.

1976 Will

The 1976 is valid because it was signed by two witnesses and by Ted. The will gives a devise of 10% of Ted's estate to First Church, the rest to Donna (Ted's then wife) if she had survived him and if she did not survive him, then to his maternal grandmother, Grams. Under initial analysis, First Church will take 10% of the estate because the devise to it was valid. The will was created one year after Ted married Donna. But Donna and Ted divorced in 2006. Because the will was not republished by codicil after the divorce, it is likely that Ted would not want Donna to have the remainder, or any, of his estate. Therefore, Donna will take nothing. Grams is next in line to take according to the will, but she died in 1985. Her gift would therefore lapse, unless there is an anti-lapse statute in effect. Anti-lapse statutes allow a gift to be taken by the descendant of a deceased person who would have taken under the will if the descendant is closely related to the testator. Here, Grams is closely related to the testator, Ted. The gift that would have gone to Grams will go to her descendants because she is closely related to Ted. Grams is the maternal grandma of Ted and because Ted's mother, who died in 1972, was an only child, the gift would be split between Sissy and Bro, Ted's siblings.

Paper dated March 17, 1982

Arnie and Barb are pretermitted children because their father's will was executed before they were born. Pretermitted children can take an elective share if 1) the testator does not express a desire to disinherit them (the gift is not against the express will of the testator), 2) the kids are not provided for elsewhere, and 3) the will was not republished after the children were born. Because the will was not republished, Ted did not express a desire to disinherit Arnie and Barb, and because they are not provided for elsewhere, Arnie and Barb can take an elective share as pretermitted children. Although the print of the clown would be a specific devise, Ted did not manifest a present intent to convey that gift as an inheritance. Arnie could argue that the letter was a holographic will because it is in Ted's handwriting.

Specific devises are the first to be conveyed. If a specific devise of property is sold, the money earned from the sale would pass as personal property through the residuary estate. If the property was sold by a guardian, then the would-be taker of the specific real property would get the proceeds of the sale. If the real property is sold, then replacement property is purchased with the money, the would-be taker would be entitled to the replacement property. A specific devise of real property is not at issue here, though.

Letter of 1983

After the letter of 1983, Arnie has a much better chance of arguing that the clown print should go to him. The letter of 1983 is evidence that the paper dated 1982 was a codicil. However, Arnie will have to choose between the \$15,000 clown print and taking as a pretermitted child. Taking as a pretermitted child is by far the better option. If Arnie argues that the 1982 paper constitutes a codicil, then Arnie cannot take as a pretermitted child because he will have been accounted for. He would only be entitled to the \$15,000 clown print. This would not affect Barb though because she was born in 1984, after the paper was written. If Arnie unreasonably chooses the clown print, and therefore argues that the 1982 paper is a codicil, he will get only \$15,000. But his elective share as a pretermitted child (where the entire estate is worth \$515,000) surely is greater than \$15,000. So he should not argue that it was a codicil and instead he should argue it does not qualify as a codicil so that he may take as a pretermitted child. If the 1982 paper is determined not to be a codicil, the property under the will, would be divided as follows:

\$515,000 – (elective share as pretermitted child to Arnie + elective share as pretermitted child to Barb) = residue

10% of residue to First Church, 90% of residue to Sissy and Bro

However, if Arnie is successful in arguing that the 1982 paper was a codicil (and if it did not republish Ted's will in 1976) then Arnie would just take the \$15,000 clown print and Barb would get the remainder as a pretermitted child. This would be in her best interest. (In this case, Arnie would no longer be pretermitted, but Barb would be).

Note, if the 1982 letter was a codicil with a specific devise of the clown print to Arnie and republished, the will of 1976 (although the facts do not suggest this) then takers would be:

Clown print to Arnie

Pretermitted share to Barb

10% of residue to First Church, 90% of residue to Sissy and Bro

Arnie and Barb should also know that inheritances are separate property. Therefore, if either divorces their spouse, the spouse would not be entitled to the inheritance. For tax purposes, a devisee takes the fair market value of the property as their basis. Basis is important when property is sold, because the higher the basis, the smaller the gain and therefore the less tax liability.

QUESTION #7

Plaintiff, a citizen of State B, was vacationing in State A, where he visited the O.K. Bar. While he was at the bar, Plaintiff was attacked and seriously beaten by Dave, a regular bar patron and a citizen of State A. Bartender, a citizen of State A, attempted to stop the attack and was also injured by Dave.

Plaintiff sued Dave and Bartender in the United States District Court for the District of State A, properly invoking the court's diversity jurisdiction. Plaintiff's complaint states a state law battery claim against Dave, seeking damages from Dave in excess of \$75,000. Plaintiff's complaint also states a claim against Bartender based on Bartender's alleged negligence in serving alcohol to Dave after Dave became visibly intoxicated and belligerent. Plaintiff's complaint seeks damages from Bartender in excess of \$75,000. Plaintiff's damages claims are reasonable in light of the injuries Plaintiff suffered in the attack.

Dave was personally served with the summons and complaint. However, the process server could not find Bartender. He therefore taped the summons and complaint to the front door of the O.K. Bar, where Bartender found them the next day.

Bartender made a timely motion to dismiss Plaintiff's complaint for failure to state a cause of action. When that motion was denied by the district court judge, Bartender filed a second motion to dismiss for insufficiency of service of process. The judge also denied that motion.

Bartender then filed an answer to the complaint, denying liability. The answer also stated a state law claim for battery against Dave, seeking \$20,000 damages for the injuries Bartender suffered when he tried to stop Dave's attack on Plaintiff.

Dave has moved to dismiss Bartender's cross-claim on the grounds of improper joinder and lack of subject-matter jurisdiction.

1. Did the United States District Court for the District of State A properly deny Bartender's motion to dismiss for insufficiency of service of process? Explain.
2. Do the Federal Rules of Civil Procedure permit Bartender to join a claim for battery against Dave in Bartender's answer to Plaintiff's complaint? Explain.
3. Assuming that the Federal Rules of Civil Procedure permit Bartender to join his state law claim against Dave, does the United States District Court for the District of State A have subject-matter jurisdiction over that claim? Explain.

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1. **Service of Process:** The Bartender's motion to dismiss for insufficiency of service of process was properly denied. Service of process requires that the defendant be served with a complaint and a summons by a non-party to the suit who is at least 18 years of age, and that the service be done personally to the defendant, or service done at the defendant's home and left with someone of sufficient age who resides at the home. Further, Federal Rule 12(b) requires certain issues to be addressed at the first opportunity or the issues are forever waived. This 12(b) waiver includes personal jurisdiction, venue, insufficiency of service of process and improper service of process.

Here there was an insufficiency of service of process because Bartender was not served personally, nor was service of process left at his home with someone residing there of sufficient age. Instead, service was done by taping the service to the door of Bartender's place of employment. But insufficiency of service of process is a waivable issue that must be raised in the first opportunity to respond to the court pursuant to Federal Rule 12(b). Here, Bartender had his first opportunity to address insufficiency of service of process when he filed his first motion to dismiss for failure to state a cause of action. Bartender should have raised the issue of insufficiency of service of process at this point in order for the issue to be raised, but because he did not, the issue is forever waived. Because the issue of insufficiency of service of process is forever waived by Bartender's failure to raise the issue in his first opportunity, the District Court was proper in its denial of the motion to dismiss.

2. **Joinder:** Joinder of this battery claim is improper because there is lack of subject matter jurisdiction. A defendant is permitted to raise a claim against another defendant in the form of a cross-claim when the claim arises under the same transaction or occurrence, and the court also has subject matter jurisdiction over the claim. Here, because the claim arises under the same transaction or occurrence, the fight at the bar, the claim meets for first element for joinder, but as will be seen below, the court lacks subject matter jurisdiction, and the claim cannot be joined to the current controversy.
3. **Subject-Matter Jurisdiction:** The court lacks subject-matter jurisdiction over the claim Bartender is asserting against Dave. Subject-matter jurisdiction exists in three forms, diversity jurisdiction, federal question jurisdiction, and supplemental jurisdiction.

Diversity jurisdiction requires that there be complete diversity of citizenship, and that the amount in controversy exceed \$75,000. Citizenship is determined by looking to the individual party's domicile state. The domicile state is determined by looking to where the party currently lives, and where the party intends on living into the future. Further, diversity jurisdiction requires complete diversity which means that no adverse parties can be domiciled in the same state.

Here there is a lack of diversity because Dave and Bartender are domiciled in the same state. The facts state that Dave is a citizen of State A and Bartender is a citizen of State A. Thus, there is a lack of diversity to obtain diversity jurisdiction. Furthermore, the amount in controversy does not exceed \$75,000. The amount in controversy here is only \$20,000, and thus does not meet the requirements for diversity jurisdiction.

Federal question jurisdiction requires that the claim alleged arise under the United States Constitution or a Federal statute. Here there is no federal question jurisdiction because the facts state that Bartender's claim arises under state law claim for battery. This is not a claim that arises under the US Constitution or a Federal statute, thus there is no federal question jurisdiction.

Supplemental jurisdiction does not exist because it cannot be used to supplement a lack of complete diversity. Supplemental jurisdiction permits a court to have jurisdiction that it would normally not have jurisdiction over. This type of jurisdiction is permitted when the claim arises from the same nucleus or operative fact as the claim which the court already has subject matter jurisdiction over, and that the claim relates to the same transaction or occurrence. Furthermore, supplemental jurisdiction cannot be used to subvert the requirement of complete diversity, thus if there is not complete diversity in the suit within the claim then the court cannot invoke supplemental jurisdiction.

Here the claim arose from the same nucleus of operative fact the court already has jurisdiction over because it arises from the suit between Plaintiff, Dave and Bartender. In the original suit, the court has diversity jurisdiction over the parties. Thus, there is subject-matter jurisdiction. Further, the suit arises from the same occurrence as the case already permitting jurisdiction because it arises from the same fight that occurred at the O.K. Bar. But there is a lack of diversity between Dave and Bartender because they are each from the same state, State A. Because supplemental jurisdiction cannot be used to subvert the rule of complete diversity in a claim arising under diversity jurisdiction, the court cannot exercise supplemental jurisdiction.