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MPT 1
FEBRUARY 2015

In re Harrison (MPT-1)

In this performance test item, examinees are associates at a law firm representing Daniel Harrison, who has purchased a tract of land in the City of Abbeville, Franklin. Although the land is currently zoned “R-1” (single-family residential), it had been used for over 35 years as a National Guard armory and vehicle storage facility; when he purchased the land, Harrison assumed that it was “grandfathered in” and not subject to the residential zoning ordinance because the National Guard’s use of the property predated the R-1 zoning change. Harrison wants to have the land rezoned so that it can be used as a commercial truck-driving school, but the City Council denied his rezoning application. Harrison seeks the firm’s advice as to whether he can successfully pursue an inverse condemnation action against the City. Examinees’ task is to draft an objective memorandum identifying each of the inverse condemnation theories available under Franklin and federal law and analyzing whether Harrison might succeed against the City under each of those theories. The File contains the instructional memorandum from the supervising attorney, a summary of the client interview, a recent appraisal of the tract, and an email exchange between Harrison and a real estate agent. The Library contains the Franklin and federal constitutional “takings” clauses and two Franklin cases that discuss various regulatory takings theories.

**MINNESOTA BAR EXAMINATION
FEBRUARY 2015
REPRESENTATIVE GOOD ANSWER
MPT 1**

To: Esther Barbour

From: Examinee

Re: Daniel Harrison Date: 2/24/15

Memorandum

You have asked me to identify the inverse condemnation theories available under Franklin and federal law, and whether our client, Mr. Daniel Harrison, might succeed in an inverse condemnation action against the city of Abbeville (City) under each of the theories. The issue for determination is whether the City's actions amount to a taking in zoning the property that Mr. Harrison bought to single-family residential development and denying his application to rezone the property.

Inverse Condemnation occurs when the government takes private property for public use without paying the property owner, and the property owner sues the government to recover compensation for the taking (Newpark Ltd. v. City of Plymouth). It is called inverse condemnation because the property owner here is the plaintiff, contrary to a direct condemnation action where the government is the plaintiff in an action seeking to take the landowner's property. There is both a federal constitutional provision, and a provision of the Franklin state constitution, that give rights to a person for an inverse condemnation action. The U.S. Constitutional provision is the Takings Clause of the 5th Amendment as applied to the state through the 14th Amendment. Franklin's state prohibition against taking without just compensation is in Article 1, Section 13 of the Franklin constitution. The Franklin provision is comparable to the takings clause of the U.S. Constitution, despite minor differences in wording. Therefore, the Franklin courts will use federal cases for guidance in applying the state takings clause (Franklin Sup. Ct. 2006).

There are 4 theories that could potentially be used by Mr. Harrison excluding physical takings, and I will discuss each below, along with an analysis of his potential success under these theories. However, it should be noted that if a plaintiff prevails in an inverse condemnation action, the remedy is that the city must pay you adequate compensation, but then the city will own the property (Newpark). So if Mr. Harrison is seeking to keep the property, an inverse condemnation action would not be appropriate, because it would not allow him to keep the property.

The takings clause of the 5th Amendment to the U.S. Constitution as applied to the states through the 14th Amendment, prohibits the government from taking private property for public use without just compensation. This includes regulatory takings. A taking can be regulatory, for example, where the regulation is so onerous that it makes the regulated property unusable by its owner (See Soundpool Inv. v. Town of Avon.) A regulatory taking has been divided into different categories by the U. S. Supreme Court. This includes a total regulatory taking, a partial regulatory taking, and a land-use exaction. In addition, under Franklin law, there may be a fourth type of regulatory taking where a regulation does not "substantially advance" a legitimate governmental interest. This type has been rejected by the U.S. Supreme Court, but its validity has not been resolved under Franklin law.

1. Total Regulatory Taking

A total regulatory taking occurs when a property owner must sacrifice all economically beneficial uses in the name of the common good (Lucas v. South Carolina Coastal Council.) It is essentially a loss of all economic value. This is limited to extraordinary circumstances when no productive or economically beneficial use of the land is permitted and the owner is left with only a token interest (Lucas.) Lost profits are a relevant factor, but they alone will not be enough to show a taking. A taking does not require the land be able to be profitably developed, but simply whether value remains in the property after governmental action (Sheffield.) The value must essentially be eliminated completely, such that it would be essentially depriving the owner of the land itself for there to be a taking (Sheffield.) There is also no taking when you are deprived of the most economically viable use, but there are still other uses available. For example, there was no taking when zoning left an owner with only recreational and horticultural uses (Wynn v. Drake.)

Mr. Harrison does not have a good case for a total regulatory taking because there is still some economic value left in the property. Although the most valuable use (and the only one that would probably result in a gain to Harrison) is to use it as an industrial training facility, the government is not responsible for guaranteeing that real estate investments are profitable. They will only be obligated to pay you for a taking if they have essentially taken all the value. Mr. Harrison's real estate agent friend noted that turning the lots into ones suitable for residential use, per the zoning requirement, would cost about \$15,000-\$20,000 per lot and Harrison would likely see at most \$5,000 per lot if he could sell it. And to simply tear down the buildings and clear the property it would cost about \$75,000. But, the real estate agent mentions that it is still worth a few hundred dollars per acre in its current condition. This is clear evidence that there is still economic value in the property. In addition, at the council meeting some council members indicated that a special use permit might be available if the use he sought was a church, medical or dental clinic, business office, or day-care center. Although Harrison believes it cannot be used for certain commercial purposes because it is remote, there is little traffic and no growth, and it would be expensive to renovate the existing structures that may be filled with asbestos or other environmental hazards to

use them for non-industrial uses, there may still be some economic use there given the Council's suggestion that they might approve a conditional use.

Mr. Harrison's case is very similar to one in which the Franklin Court held there was not a total regulatory taking. In Newport Ltd. v. City of Plymouth, a developer contended that a city's denial of its rezoning application was an unconstitutional regulatory taking of property. The court here said it was not. The property purchased was used primarily for pasture land when purchased, and was zoned for single-family residential development, and was zoned for one-acre-minimum lots. The developer asked for a zoning change to allow lots to be smaller than one acre, and was denied by city. The developer's argument was that there was a total regulatory taking because the only economic use of the property is to allow single-family development of some type. This argument did not succeed because single-family residential development was permitted, it just had to be on one-acre lots. Doing it this way would cause the cost to be greater than the revenue, so it would not be profitable, but absence of profit does not equal impossibility of development. The court noted that you take risks when you make a real estate investment, and the government has no duty to ensure you are profitable. The court found the property still has value if there are other things you could do on it (ex: picnic, camp, or live in mobile home). Thus, given the factual similarity to Newport, a case on point, Mr. Harrison is likely to lose this claim because although there is not a profitable use left in his property, there is some economic value remaining.

2. Partial regulatory taking

A partial regulatory taking occurs when the challenged regulation goes too far, causing an unreasonable interference with the landowner's right to use and enjoy the property (Penn Central Transp. Co. v. New York City.) At minimum, the government regulation must diminish the value of an owner's property, but not every regulation that diminishes value is a taking (Venture Homes, Ltd. v. City of Red Bluff.) The test requires weighing the following factors: 1) the economic impact of the regulation, 2) the extent to which the regulation interferes with the property owner's reasonable investment-backed expectations, and 3) the character of the governmental action (Sheffield Dev. Co. v. City of Hill Heights). In balancing the factors, the goal is to determine whether a regulatory action is the equivalent of a classic taking where the government directly appropriates private property. As to factor one, a small reduction in value (when you look at the percentage lost) will weigh heavily against a claim. The second factor evaluates interference with investment-backed expectations that are reasonable. In determining this, the existing and permitted uses of the property constitute the "primary expectation" of an affected landowner for purposes of determining whether a regulation interferes with the landowner's reasonable expectations (Sheffield.) The third factor carries the least weight. The question here is whether a regulation disproportionately harms a particular property. An action that was general will weigh against the claimant, but if the claimants' property was impacted disproportionately harshly, that will weigh in their favor that a taking did occur (Venture Homes.)

Here, Mr. Harrison likely has a good claim for a partial regulatory taking. The economic impact of the regulation here is somewhat substantial. We know that the property was appraised at \$200,000 if it could be used as a training facility or industrial facility, which is the type of use Mr. Harrison seeks to use it for. We know from the real estate agent that if Mr. Harrison uses the property for residential development, at best he would be able to receive \$5,000 per lot and there would be 30 lots, which is a value of \$150,000. However, converting the property to that use would cost about 3 times that much, so the value of the property would be negative. In addition, if Mr. Harrison does nothing with it, the real estate agent has indicated that the property would likely be worth about a few hundred dollars per acre, which would be between \$1,000 and \$2,000. Thus, the city's denial does result in a substantial economic impact to Mr. Harrison. Mr. Harrison's reasonable expectations would be what the existing and permitted uses of the property are. Here, the permitted use is as single-family development, but the existing use was as a National Guard Armory and vehicle storage area. Thus, Mr. Harrison likely does have a reasonable investment-backed expectation that he could continue to use the area for an industrial purpose with some vehicle traffic similar to the armory use without that being a problem. Finally, as to whether the regulation disproportionately harms his property, it appears that the regulation is generally applicable and simply disproportionately harms Mr. Harrison because he is the only one trying to make an economically viable use of this property. The regulation isn't actually one that is affecting Mr. Harrison uniquely, so this factor does not weigh in his favor. However, given that the third factor is the one given the least weight and the other two factors (investment-backed expectations and impact to economic value) strongly weigh in Mr. Harrison's favor, he has a good chance at raising a partial regulatory taking as to the government's denial of his request for a rezone.

3. Land-Use Exaction

A land-use exaction occurs when governmental approval is conditioned upon a requirement that the property owner take some action that is not proportionate to the projected impact of the proposed development (i.e.: developer required to build a road that wasn't necessary for traffic to the proposed development) (*Lingle v. Chevron.*)

Mr. Harrison has a weak case, if any, here. The only indication that the government tried to do a land-use exaction was at the council meeting when the council members suggested that a special use permit could be granted if Harrison was interested in using the property for a church, medical or dental clinic, business office, or day-care center. However, the council did not indicate that they would absolutely grant him a specific use permit for these purposes, or were requiring him to implement one of these uses, they merely offered a suggestion that this was another way he might be able to find a viable use for his land. Thus, there really is no evidence of the government conditioning their approval on a particular action by Mr. Harrison.

4. Substantially Advance a Legitimate Interest

This test is not equivalent to the rational basis test of constitutional analysis. The government action must substantially advance the legitimate state interest sought to be achieved in order to justify a government taking. The court does not need to consider the government's actual purpose. They simply must look for a nexus between the effect of the ordinance and the legitimate state interest it is supposed to advance (*Venture Homes*.)

Mr. Harrison may have a case here if the cause is still recognized by Franklin courts. As indicated above, this cause has been rejected by the U.S. Supreme Court, but may still be available under the Franklin State constitution. Here, it is questionable whether the government has a legitimate interest in restricting land that is rural (indeed almost 45 minutes southeast of the business district) to single-family development, especially when there is nothing of that type in the area. (Mr. Harrison's land is only bordered by a City park and a baseball field and is near the municipal airport.) We do not know why the city enacted this zoning ordinance in 1994, but we do know the city's rationale for denying Mr. Harrison's request for a re-zone was the city's concern about the proximity of the tract to the park. Restricting this land to single-use development could be seen as substantially advancing a legitimate interest in preserving the park for recreational purposes, preserving the sanctity of the park, and preserving safety and health in the park, but it is questionable.

Thus, Mr. Harrison's best option would be to challenge the city's denial of his petition to rezone as a partial regulatory taking, but even this may not serve Mr. Harrison's purposes if his goal is to keep the property.

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MPT 2
FEBRUARY 2015

In re Community General Hospital (MPT-2)

Examinees' law firm represents Community General Hospital, which has received a letter from the Office of Civil Rights (OCR) of the U.S. Department of Health and Human Services. The letter from the OCR states that it has learned of three cases in which Community General disclosed protected health information without a written patient authorization as required by the federal Health Insurance Portability and Accountability Act (HIPAA) regulations. If Community General cannot justify the disclosures, the OCR will pursue an enforcement action against the hospital. Examinees' task is to draft a letter responding to the OCR, parsing the HIPAA regulations and setting forth the argument that the disclosures fit specific exceptions to the general rule requiring a written authorization from a patient (or someone authorized to act on the patient's behalf), and that therefore there has been no HIPAA violation by hospital personnel. The File contains the instructional memorandum, the letter from the OCR, a memorandum from the hospital's medical records director discussing the three patients' cases, a letter from a treating physician, a pathology report, and a memorandum from the supervising partner outlining the purpose and structure of the HIPAA regulations. The Library contains a Franklin state statute requiring health care professionals to report gunshot and stabbing wounds to law enforcement and excerpts from the HIPAA regulations [found at 45 C.F.R. §§ 164.502 and 164.512].

**MINNESOTA BAR EXAMINATION
FEBRUARY 2015
REPRESENTATIVE GOOD ANSWER
MPT 2**

To Whom It May Concern,

This is a letter for the purpose of respectfully informing you, Office of Civil Rights (OCR), that no enforcement action under Health Insurance Portability and Accounting Act (HIPAA) is warranted against Community General Hospital. Your office provided notice to Community General Hospital concerning three potential HIPAA violations. I have discussed each concern below.

Community General Hospital recognizes the importance of the HIPAA provisions. Community General Hospital understands that its staff cannot disclose protected health information (PHI), except either as permitted or required by the Privacy Rule or as authorized by the identified individual or their personal representative in writing. The PHI includes: an individual's past, present, or future physical or mental health or condition; the provision of health care to the individual; or the past, present or future payment for the provision of health care to the individual. However, in all three instances discussed below, the hospital staff had an exception to the general HIPAA rules that allowed them to disclose the information to law enforcement personnel out of public concern, safety, or greater public purpose.

Patient one potential violation:

This patient suffered a gunshot wound to his right calf, which he declared to be from a gang dispute.

Community General Hospital understands that, as a general rule, under 45 C.F.R. Sec. 164.502, its staff may not use or disclose protected health information, except as permitted or required by either the individual or 45 C.F.R. Sec. 164.512. In this case, there is an exception provided for the conduct of Community General Hospital's staff under 45 C.F.R. Sec.164.512.

First, there is an additional Franklin statute involved in this patient's situation that serves the purpose of enforcing the public's safety. This statute is listed as Franklin Chapter 607, and states:

the physician, nurse, or other person licensed to practice a health care profession treating the victim of a gunshot wound or stabbing shall make a report to the chief of police of the city or the sheriff of the country in which treatment is rendered by the fastest possible means. In addition, within 24 hours after initial treatment or first observation of the wound, a written report shall be submitted, including a brief description of the wound and

the name and address of the victim, if known, and shall be sent by first-class U.S. mail to the chief of police of the city or the sheriff of the county in which treatment was rendered.

In summary, this is a law requiring physicians to notify law enforcement if they treat any gunshot wounds or stabbings. The patient in this matter had suffered a gunshot wound requiring the treating physician to notify law enforcement. The physician in this case followed the statute by providing the written statement within the specified time period. This is the statement that resulted in the official complaint from the patient to your office.

In addition, the physician acted within his duty and obligations under, 45 C.F.R. Sec. 164.512, which is an exception to the general HIPAA policy listed above and in 45 C.F.R. Sec. 164.502. Under 45 C.F.R. Sec. 164.51, a physician may disclose protected health information to law enforcement to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. This regulation continues to state disclosure is permitted when the law requires the reporting of certain types of wounds or other physical injuries. This federal regulation further enforced the physician's obligation to report the gunshot wound in this case to law enforcement.

Patient two potential violation:

The patient was admitted for severe headaches and diarrhea, confusion, and drowsiness. The patient's situation deteriorated to vomiting and stomach pain and the patient experienced severe convulsions. The patient passed away and an autopsy was performed. The autopsy subsequently declared the cause of death to be organ failure caused by arsenic poisoning.

45 C.F.R. Sec. 164.512 permits the disclosure of protected health information to law enforcement to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. This regulation goes on to state, in 45 C.F.R. Sec. 164.512 (4), an entity may disclose protected health information about an individual who has died to a law enforcement official for the purpose of alerting law enforcement of the death of the individual if the covered entity has a suspicion that such death may have resulted from criminal conduct. In other words, if hospital staff believes that a person died as a result of a criminal violation they may report the matter to law enforcement. In this case, hospital staff reported the death reported as arsenic poisoning to the police.

The means of reporting is not addressed in the regulation. The hospital staff member's personal knowledge of a potential motive to harm the patient is irrelevant. The regulation only addresses that a death as a result of a "suspected" crime should be reported to law enforcement; arsenic poisoning is obviously a death resulting from a potential crime taking place.

Furthermore, under 45 C.F.R. Sec. 164.512 (3) absent the ability to gain individual consent for disclosure, the information may be disclosed if a law enforcement official represents that such information is needed, the law enforcement official represents that immediate law enforcement activity that depends upon the disclosure would be materially and adversely affected by waiting until the individual is able to agree to disclosure, and the disclosure is in the best interest of the individual as determined by the hospital staff. The magnitude of the potential crime in this case makes all three of the requirements easily satisfied. A potential murder is clearly assisted by giving police the proper information including prior hospital visits leading to the death, autopsy reports, etc. The magnitude of the crime also justifies the immediate nature of the disclosure. Furthermore, it is reasonable for the hospital staff to believe that disclosing to police that the patient was potentially poisoned would be in the best interest of the victim/patient in this case.

In addition, in the instant matter there is no minimum information standard per 45 C.F.R. Sec. 164.502. In other words, the hospital had authority under 45 C.F.R. Sec. 164.502 to give all applicable information to law enforcement under the law enforcement exception to providing the minimum information in regards to the patients PHI.

Patient three potential violation:

This patient admitted to taking PCP, a drug commonly known as angel dust, together with alcohol. The patient acted belligerent and began stating that the patient hated the patient's boss and hated what she's done, followed by accusations that she was "going to get her..." The patient then stormed out of the hospital and the accompanying family member stated that the family member believed the patient had a gun at home.

Under 45 C.F.R. Sec 164.512 (4)(j), a covered entity may, consistent with applicable law and standards of ethical conduct, use or disclose protected health information, if the covered entity, in good faith, believes the use or disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and is to a person or persons reasonably able to prevent or lessen the threat including the target of the threat. In other words, absent any bad intentions or motivation, healthcare providers may notify law enforcement if they believe a person is in danger. In this instance, the patient declared that she hated her boss and that she was "going to get her..." This statement was made shortly before the patient ran out of the hospital, and the family member escorting the patient to the hospital told the hospital staff that the patient had a gun at home. This coupled with the previous and immediate belligerent behavior of the patient made the hospital staffs' belief that the patient was going to harm her boss reasonable. Under the federal regulation, the hospital staff had authority to react by sharing PHI with law enforcement.

In conclusion, the hospital staff only disclosed PHI in situations that called for an exception to the HIPPA rules. Our health providers provide a valuable service to the public community and are frequently subjected to these stressful situations. As such, 45

C.F.R. Sec. 164.512 protects their acts on occasions such as those discussed above by providing statutory language that grants the healthcare provider a general presumption of good faith in their conduct. In other words, if the court or even our community was to question the healthcare providers, we would start by assuming their actions were performed in good faith, or under good intentions. In order for this presumption to apply, the healthcare provider must have actual knowledge or be acting in reliance on a credible representation by a person with apparent knowledge or authority. In all three cases, the healthcare provider had actual knowledge of the public concern, safety, or greater public purpose. As such, the presumption of good faith should be applied in all three of the above cases. In addition, in all three instances mentioned above, there is no minimum information standard per 45 C.F.R. Sec. 164.502. In other words, the hospital had authority under 45 C.F.R. Sec. 164.502 to give all applicable information to law enforcement under the law enforcement exception to providing the minimum information in regards to the patients PHI.

We hope that this letter has better informed you as to the situations that lead to the potential HIPAA violations and we subsequently request that you refrain in your discretion from enforcement action under Health Insurance Portability and Accounting Act (HIPAA) against Community General Hospital.

MEE Question 1

Agency and Partnership/ Torts Question

For many years, a furniture store employed drivers to deliver furniture to its customers in vans it owned.

Several months ago, however, the store decided to terminate the employment of all its drivers. At the same time, the store offered each driver the opportunity to enter into a contract to deliver furniture for the store as an independent contractor. The proposed contract, labeled “Independent-Contractor Agreement,” provided that each driver would

- (1) provide a van for making deliveries;
- (2) use the van only to deliver furniture for the store during normal business hours and according to the store’s delivery schedule; and
- (3) receive a flat hourly payment based upon 40 work hours per week, without employee benefits.

The proposed Independent-Contractor Agreement also specified that the store would not withhold income taxes or Social Security contributions from payments to the driver.

The store also offered each driver the opportunity to lease a delivery van from the store at a below-market rate. The proposed lease required the driver to procure vehicle liability insurance. It also specified that the store would reimburse the driver for fuel and liability insurance and that the lease would terminate immediately upon termination of the driver’s contract to deliver furniture for the store.

All the drivers who had been employed by the store agreed to continue their relationships with the store and executed both an Independent-Contractor Agreement and a lease agreement for a van.

Three months ago, a driver delivered furniture to a longtime customer of the store during normal business hours. The customer asked the driver to take a television to her sister’s home, located six blocks from the driver’s next delivery, and offered him a \$10 tip to do so. The driver agreed, anticipating that this delivery would add no more than half an hour to his workday.

In violation of a local traffic ordinance, the driver double-parked the delivery van in front of the sister’s house to unload the television. A few minutes later, while the driver was in the sister’s house, a car swerved to avoid the delivery van and skidded into oncoming traffic. The car was struck by a garbage truck, and a passenger in the car was seriously injured.

The passenger has brought a tort action against the store to recover damages for injuries resulting from the driver’s conduct. Pretrial discovery has revealed that delivery vans routinely double-park; survey evidence suggests that, in urban areas like this one, 80% of deliveries are made while the delivery van is double-parked.

In this jurisdiction, there is no law that imposes liability on a vehicle owner for the tortious acts of a driver of that vehicle solely on the basis of vehicle ownership.

The store argues that it is not liable for the passenger's injuries because (a) the driver is an independent contractor; (b) even if the driver is not an independent contractor, the driver was not making a delivery for the store when the accident occurred; and (c) the driver himself could not be found liable for the passenger's injuries.

1. Evaluate each of the store's three arguments against liability.
2. Assuming that the store is liable to the passenger for the passenger's injuries, what rights, if any, does the store have against the driver? Explain.

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1A. The first issue is whether an employer is liable for injuries from an accident that involves an independent contractor. The rule for employer liability when it comes to independent contractors is that an employer is not liable for an independent contractor's actions unless the task of the independent contractor is abnormally dangerous or outside the scope of duties. Here, we have a driver who drives for a furniture store. The driver delivered furniture to a longtime customer of the store during normal business hours. The customer asked the driver to take a television to her sister's home, located six blocks from the driver's next delivery. The driver double-parked the delivery van in front of the sister's house to unload the television. This was in violation of a local traffic ordinance, but discovery shows that delivery vans in this jurisdiction routinely double-park. Evidence also suggests that 80% of deliveries are made while the delivery van is double-parked.

This evidence would go to show common usage and behaviors for a delivery driver. While it may be illegal for a delivery driver to double-park in this jurisdiction, it is common and normal behavior. That would mean that the driver was not partaking in abnormally dangerous or uncommon behavior by double-parking. The driver followed normal operating procedures for a delivery driver in the area, which means as an independent contractor, the driver may be liable for the injuries to the passenger for double-parking and causing the car the passenger was in to swerve into oncoming traffic, but the employer would not be liable because the driver is an independent contractor.

The second issue is whether the driver actually is an independent contractor. To be considered an independent contractor, you cannot be an employee of a company and the company cannot treat you as one. Under agency theory, if you are treated as an agent of the company and the company does not correct that, you would not be considered an independent contractor but instead an employee. There are several theories of agent employer relationship. One is express intent that an agent is an agent of a company. To have express intent, the employer has to make it known to the employee that the employee is an agent of the company and that the employee is allowed to make decisions on behalf of the company. Another theory would be implied intent where it is implied that the agent is an actual agent of the company and the employer does nothing to correct this assumption by another person.

Here, you had a situation where drivers used to be standard employees of a furniture store. Then several months ago the store decided to terminate the employment of all its drivers. It offered to hire them back in a contract to drive capacity as independent contractors, provided that each driver provide their own van to make deliveries, use the van only to deliver furniture for the store during normal business hours and according to

the store's delivery schedule, and receive a flat hourly payment based upon 40 work hours per week, without employee benefits. An argument could be made that because the truck driver is being forced to use the van only to deliver furniture during normal business hours and following a strict schedule that they are being treated as an agent of the company despite the use of the agent's own vehicle. The agent is not allowed to drive for anyone else or do anything else during the workweek other than drive for the furniture store. On top of that, the furniture store is basically holding out to the public that the delivery driver is still an agent of the store because the agent delivers the furniture for the store and on the store's behalf and doesn't make it known that the drivers are independent contractors. The longtime customer of the store had no idea that the delivery driver was an independent contractor. She seemed to have figured that it was just a normal delivery driver like in days past. This would constitute an implied consent for the delivery driver to be an agent of the furniture store.

The furniture store is going to have a hard time making an argument that the delivery driver truly is an independent contractor. This means that the store could be vicariously liable for the driver's actions if the driver is found liable. If the delivery driver is found to be liable for the injuries, then the passenger can make the argument that the delivery driver was not outside the normal course of business and the driver made a slight detour by going to the customer's sisters' house so any actions the driver was taking would still be on behalf of the employer and would make the employer liable for the injuries sustained to the passenger. The delivery was only six blocks away from the customer's house, so the company would have a hard time arguing that it was a frolic by the driver and make him completely liable by himself for his actions. The court would most likely find the company liable for the driver's actions and liable for the injuries to the passenger because the driver is probably considered an agent of the company and not an independent contractor.

1B. The issue here is whether the driver was making a detour during normal business duties or a was on a frolic which would eliminate employer liability. The rule states that if an agent or employee makes a slight deviation from the employee's normal path while conducting company business, it is considered a detour and will still be considered part of the company business and the company will be liable. If the employee takes a large deviation from the normal intended path, then this would be considered a frolic and outside the scope of the employee's duties, which would release the employer from liability.

Here, you had the delivery driver deliver furniture to a longtime customer during normal business hours. This would constitute a normal regular business activity because that is exactly what the driver does: deliver furniture to customers' houses. After delivering the furniture, he was asked by the customer to deliver a TV to the customer's sister's home, which was six blocks away from the driver's next delivery. The customer offered him a \$10 tip to make the delivery. This would mean that the driver had another delivery after the current customer. While on his way there, he was going to drop off a TV that was six blocks away from his intended destination. This would most likely constitute a small

detour from his intended route and activities. He is making a trip only six blocks from the intended location to deliver a TV. He is not driving all the way across town or in the opposite direction of his intended delivery or even several miles past. Six blocks is a rather short distance.

Since this is most likely going to be considered a detour during normal business activities, the employer would be held liable for the passenger's injuries. If the driver is only making a detour and not a frolic, it is still considered covered work activity for liability purposes. As discussed, six blocks is not enough to constitute a frolic so the delivery driver would be within his normal duties and the employer would hence be liable.

1C. The issue here is whether the driver is liable for the passenger's injuries. The rule here would be that of negligence. To have negligence you need a duty, breach, cause, and damages. The first thing we are concerned with is whether the delivery driver had a duty to the passenger of the vehicle. While delivering furniture, a delivery driver is going to have a duty to be safe and not cause any accidents. He also has a duty to maintain his truck in a safe manner so the truck does not cause any injuries. The delivery driver definitely had a duty here to the passenger to make sure his truck was not going to harm her in any way. The passenger of the vehicle could argue that the delivery driver breached his duty by double-parking it in front of the customer's house. Though this may be considered custom in the delivery industry and may happen 80% of the time, it would still be a breach of the driver's duty because he is making his truck more likely to cause an accident and hurt someone by double-parking and making it harder to get around. Accordingly, there is a duty and a breach of that duty by double-parking the delivery truck.

To have cause in fact, the cause needs to be the actual cause of the negligent action that breached a duty. Here, the delivery driver purposely double-parked his vehicle and the passenger vehicle swerved around it to avoid it and went into oncoming traffic and hit a garbage truck. Without the delivery truck double-parking, the passenger vehicle would not have had to swerve around it into oncoming traffic. This means it's the actual cause of the injuries to the passenger. You also would have proximate cause because without the delivery truck being there, there would have been no accident and no injury. There was no other cause for the driver to swerve into oncoming traffic because the driver was only trying to avoid the double-parked delivery truck.

The driver most likely could be found liable for injuries to the passenger under a negligence theory. He had a duty that he breached by not keeping his truck parked in a safe manner. That breach caused the accident resulting in injury to the passenger.

2. The issue here is what rights the employer has against the driver for liability to the passenger. The rule here is that if an employer is liable under a tort theory for damages to a plaintiff and they are liable because of the actions of the employee, the employer

can go after the employee for indemnification. Indemnification means that an employer may seek payment from the driver for any damages the employer had to pay out to the passenger.

The employer has this right because the employer is in essence covering for the driver when it comes to liability. The employer is being sued by the passenger of the vehicle and if the employer is found liable, the employer deserves to have the damages payout offset by the person that actually caused the damage. In this instance, that would be the delivery driver. The employer would be able to go to the delivery driver and tell him the employer expects him to pay back the damages paid to the passenger. In this instance, the employer would be within its rights for seeking indemnification because the driver has a duty to drive safely when on the road and the employee's failure to uphold that duty resulted in the injury to the passenger. The employer could come after the employee to reimburse for the payment.

MEE Question 2

Constitutional Law Question

State A, suffering from declining tax revenues, sought ways to save money by reducing expenses and performing services more efficiently. Accordingly, various legislative committees undertook examinations of the services performed by the state. One service provided by State A is firefighting. The legislative committee with jurisdiction over firefighting held extensive hearings and determined that older firefighters, because of seniority, earn substantially more than younger firefighters but are unlikely to perform as well as their younger colleagues. In particular, exercise physiologists testified at the committee's hearings that, in general, a person's physical conditioning and ability to work safely and effectively as a firefighter decline with age (with the most rapid declines occurring after age 50) and that, as a result, firefighting would be safer and more efficient if the age of the workforce was lowered.

State A subsequently enacted the Fire Safety in Employment Act (the Act). The Act provides that no one may be employed by the state as a firefighter after reaching the age of 50.

A firefighter, age 49, is employed by State A. He is in excellent physical condition and wants to remain a firefighter. His work history has been exemplary for the last two decades. Nonetheless, he has been told that, as a result of the Act, his employment as a firefighter will be terminated when he turns 50 next month.

The firefighter is considering (a) challenging the Act on the basis that it violates his rights under the Fourteenth Amendment's Equal Protection Clause, and (b) lobbying for the enactment of a federal statute barring states from setting mandatory age limitations for firefighters.

1. Does the Act violate the Equal Protection Clause of the Fourteenth Amendment? Explain.
2. Would Congress have authority under Section Five of the Fourteenth Amendment to enact a statute barring states from establishing a maximum age for firefighters? Explain.

**MINNESOTA BAR EXAMINATION
FEBRUARY 2015
REPRESENTATIVE GOOD ANSWER
MEE 2**

I. The Act does not violate the Equal Protection Clause of the Fourteenth Amendment.

A Does this constitute state action?

Equal protection claims may only challenge state actions, not private discrimination. Here, the state of A has acted by passing a statute. This is unquestionably state action sufficient to bring a claim under the XIV Amendment.

B What form of review applies to this Act?

The firefighter claims he is being discriminated against because of his upcoming membership in a class of people, firefighters 50 or over. Discrimination based on membership in a class of people supports an equal protection claim. The characterization of the class determines the level of scrutiny courts will apply in weighing the permissibility of the state action. Age does not constitute a suspect or quasi-suspect class, like race or gender. Therefore, rational basis review will apply.

C Does the Act pass rational basis review?

Under rational basis review, the firefighter carries the burden of showing that there is no rational basis under which the statute could be said to advance a legitimate state interest. The legislative history of the Act indicates that it was passed in order to a) save money on firefighters' salaries, and b) increase safety for firefighters themselves and the people they rescue. The state has a legitimate interest in both fiscal health and public safety, and the statute itself is reasonably related to both. This actually goes beyond the minimum rational basis standard, because the state interests here are the ones that actually motivated the bill's passage; rational basis review only requires some justification of the statute. It does not matter whether the statute, in practice, actually saves the state money or increases safety: what matters under rational basis review is merely that the legislators could have thought that saving money or increasing safety justified the Act.

II. Does Congress have Section Five authority to pass a statute barring this sort of legislation at the state level?

No. Congress does have authority to pass legislation preventing or remedying past state discrimination that violated the Fourteenth Amendment, if such legislation is necessary and proper to those ends. However, to do so, Congress must show first that such Fourteenth Amendment violations exist, and also that they are widespread and systematic. Since the state Act at issue survives rational basis review, it is not the sort of harm that the Fourteenth Amendment can address. It is thus unlike the Voting Rights Act, enacted as a response to historical, state-sponsored or -condoned disenfranchisement of people based on race (a suspect class).

MEE Question 3

Secured Transactions Question

Acme Violins LLC (Acme) is in the business of buying, restoring, and selling rare violins. Acme frequently sells violins for prices well in excess of \$100,000. In addition to restoring violins for resale, Acme also repairs and restores violins for their owners. In most repair transactions, Acme requires payment in cash when the violin is picked up by the customer. It does, however, allow some of its repeat customers to obtain repairs on credit, with full payment due 30 days after completion of the repair. In those cases, the payment obligation is not secured by any collateral and the payment terms are handwritten on the receipt.

Acme maintains a stock of rare and valuable wood that it uses in violin restoration. Acme also owns a variety of tools used in restoration work, including a machine called a “Gambretti plane,” which is used to shape the body of a violin precisely.

Six months ago, Acme borrowed \$1 million from Bank. The loan agreement, which was signed by Acme, grants Bank a security interest in all of Acme’s “inventory and accounts, as those terms are defined in the Uniform Commercial Code.” On the same day, Bank filed a properly completed financing statement in the appropriate state filing office. The financing statement indicated the collateral as “inventory” and “accounts.”

Last week, Acme sold the most valuable violin in its inventory, the famed “Red Rosa,” to a violinist for \$200,000 (the appraised value of the instrument), which the violinist paid in cash. The sale was made by Acme in accordance with its usual practices. The violinist, who has done business with Acme for many years, was aware that Acme regularly borrows money from Bank and that Bank had a security interest in Acme’s entire inventory. The violinist did not, however, know anything about the terms of Acme’s agreement with Bank.

Acme is 15 days late in making the payment currently due on its loan from Bank. Bank’s loan officer, who is worried about Bank’s possible inability to collect the debt owed by Acme, has asked whether the following items of property are collateral that can be reached by Bank as possible sources of payment:

- (1) Acme’s rights to payment from customers for repair services obtained on credit
- (2) Used violins for sale in Acme’s store
- (3) Violins in Acme’s possession that Acme is repairing for their owners
- (4) Wood in Acme’s repair room that Acme uses in repairing violins
- (5) The Gambretti plane, used by Acme in violin restoration
- (6) The Red Rosa violin that was sold to the violinist

Yesterday, a creditor of Acme obtained a judicial lien on all of Acme’s personal property.

1. In which, if any, of the items listed above does Bank have an enforceable security interest? Explain.
2. For the items in which Bank has an enforceable security interest, is Bank’s claim superior to that of the judicial lien creditor? Explain.

**MINNESOTA BAR EXAMINATION
FEBRUARY 2015
REPRESENTATIVE GOOD ANSWER
MEE 3**

1. The bank has an interest in three of the six items of property. A secured creditor has an enforceable security interest against the debtor in any collateral where there has been proper attachment. Proper attachment requires an authenticated agreement where the creditor has given value and the debtor has rights in the collateral. Here, the facts state that Acme and Bank entered into a signed agreement in which the bank loaned Acme \$1 million (value) in exchange for an interest in Acme's inventory and accounts (rights in property). To determine whether any of the six items are at issue, we must first determine the classification of goods the secured party has an interest in and whether those items fall within those classifications. The security agreement gives Bank a security interest in all of Acme's inventory and accounts. Inventory is any collateral the debtor holds for sale in the normal course of business or those items considered short term consumables. Accounts is a classification whereby the debtor himself is considered a creditor in that there are outstanding accounts receivables owed to the debtor.

- Acme's rights to payment from customers for repair services obtained on credit are considered "accounts" under the UCC and are therefore subject to Bank's security interest. These accounts are expectation payments, and although there doesn't appear to be any formalized agreements with the customers, there is minimum documentation and a revolving payment due date (every 30 days) that is sufficient to qualify the payments as accounts receivables.
- The used violins for sale in Acme's store are considered inventory, items held for sale in the normal course of business, and are therefore subject to Bank's security interest in inventory pursuant to the security agreement.
- The violins in Acme's possession that Acme repairs for its customers are not subject to Bank's security interest. Here, Acme's possession in these particular violins is considered a bailee/bailor relationship. The owners of the violins are bailors, who retain a right in the violins and are merely giving Acme a bailee right, in that no actual title has been passed. These are therefore outside of Bank's security interest.
- The wood in Acme's repair shop is subject to Bank's security interest. As stated above, inventory includes those items used as "short term consumables." Here, part of Acme's business is repairing and restoring violins and is therefore storing this wood for short amounts of time to be used in its repair work. The wood is therefore subject to Bank's security interest as inventory.

- The Gambretti plane used by Acme in its restoration work is considered equipment, and therefore not subject to Bank's security interest. Equipment are items used by the debtor during the normal course of business, usually over longer periods of time. There is nothing in the facts to suggest that the Gambretti plane is only used for short durations and is in fact referenced as a "machine" used in restoration work. This equipment is therefore not subject to the security interest.
- The Red Rosa violin is not subject to the Bank's security interest. Although a buyer typically takes the same interest in the collateral that the seller has, there is an exception made for a buyer in the ordinary course. A buyer in the ordinary course buys from someone in the business of selling goods of the kind and takes free of a security interest absent explicit knowledge that the sale violates the security interest. Here, the Red Rosa violin was sold to someone who was purchasing the violin from Acme, a seller in goods of the kind. Although the facts suggest that the violinist knew Acme borrowed money from Bank, there are no facts to suggest that the violinist knew the sale violated any security agreement and the violin is therefore not subject to the security interest.

2. The Bank's interest in Acme's rights to payments, the used violins, and the wood is superior to that of the judicial lien. The issue is whether the Bank perfected its interest in the collateral before the judicial lien attached. While attachment gives the secured party a right against the debtor, perfection determines the rights of the secured party against other creditors with competing interest. There are five methods of perfection: Filing a financing statement, control, possession, automatic perfection, and temporary perfection. The appropriate method of perfection depends on the collateral. Here, the Bank's properly completed financing statement perfected its interest in the inventory and accounts. The facts here state that the competing creditor's judicial lien was entered after the financing statement had been filed. Bank therefore has priority over the judicial lien creditor.

MEE Question 4

Real Property Question

Seventeen years ago, a property owner granted a sewer-line easement to a private sewer company. The easement allowed the company to build, maintain, and use an underground sewer line in a designated sector of the owner's three-acre tract. The easement was properly recorded with the local registrar of deeds.

Fifteen years ago, a man having no title or other interest in the owner's three-acre tract wrongfully entered the tract, built a cabin, and planted a vegetable garden. The garden was directly over the sewer line constructed pursuant to the easement the owner had granted to the sewer company. The cabin and garden occupied half an acre of the three-acre tract. The man moved into the cabin immediately after its completion and remained in continuous and exclusive possession of the cabin and garden until his death. However, he did not use the remaining two and one-half acres of the three-acre tract in any way.

Eight years ago, the man died. Under the man's duly probated will, he bequeathed to his sister "all real property in which I have or may have an interest at the time of my death." The man's sister took possession of the cabin and garden immediately after the man's death and remained in exclusive and continuous possession of them for one year, but she, too, did not use the remaining two and one-half acres of the tract.

Seven years ago, the man's sister executed and delivered to a buyer a general warranty deed stating that it conveyed the entire three-acre tract to the buyer. The deed contained all six title covenants. Since this transaction, the buyer has continuously occupied the cabin and garden but has not used the remaining two and one-half acres.

A state statute provides that "any action to recover the possession of real property must be brought within 10 years after the cause of action accrues."

Last month, the property owner sued the buyer to recover possession of the three-acre tract.

1. Did the buyer acquire title to the three-acre tract or any portion of it? Explain.
2. Assuming that the buyer did not acquire title to the entire three-acre tract, can the buyer recover damages from the sister who sold him the three-acre tract? Explain.
3. Assuming that the buyer acquired title to the entire three-acre tract or the portion above the sewer-line easement, can the buyer compel the sewer company to remove the sewer line under the garden? Explain.

**MINNESOTA BAR EXAMINATION
FEBRUARY 2015
REPRESENTATIVE GOOD ANSWER
MEE 4**

1. The buyer acquired title to the land through adverse possession. The issue here is whether the buyer could obtain possession to the land through adverse possession.

Under the law of adverse possession, a person can acquire title to property if the person fulfills the elements of adverse possession. The elements are continuous possession for the statutory period that is actual, hostile, exclusive, and open. Within adverse possession, the years of possession of one occupier can be tacked on the years of another occupier if there was continuous possession for all those years. According to the statute of the state, the action must be brought within 10 years after the cause of action accrues, making the statutory period for adverse possession ten years.

In this case the original owner had possession of 1/2 of an acre for 7 years. The sister took possession immediately and remained there for 1 year. She then sold it to buyer, who moved in and was in possession for 7 years. Because possession was continuous, the years can be tacked together to get 15 years, which is within the statutory period. Additionally, the possession was hostile because the original possessor wrongfully entered, so the title that the sister and the buyer got was not valid, making them hostile as well. All parties took actual, exclusive, an open possession of the property because they lived in the house and used the vegetable garden. All the elements of adverse possession were fulfilled. The three possessors only took possession of the 1/2 acre of land because they did not live and possess the entire three acres. The remaining 2 1/2 acres will be the property owner's.

Therefore, the buyer acquired title to the land through adverse possession.

2. The issue is whether the buyer can recover damages from the sister for the breach of the warranty deed.

Under a warranty deed, the seller of the property makes 6 covenants of title to the buyer. There are three present covenants (covenant of seisin, covenant against encumbrances, and covenant of the right to convey) and three future covenants (covenant of quite enjoyment, covenant of further assurances, and covenant of warranty). If one of these covenants is breached, then the buyer can recover damages. The covenant of seisin states the buyer actually owned the property.

In this case, the buyer did not own the property. She had not yet acquired the property through adverse possession. It had not been 10 years yet and she was not adjudicated the owner by a judge yet.

Therefore, the buyer can recover damages because she violated the covenant of seisin.

3. The issue is whether the easement will run with the land.

An easement is an interest in land. An appurtenant easement is an easement involving 2 properties, dominant tenement and a servient tenement. For the easement to run with the land, the burdened tenement has to have a writing, intent, it has to touch and concern the land, there needs to be horizontal and vertical privity, and notice. For the benefited tenement to run with the land, there needs to be a writing, intent, it has to touch and concern the land, and there has to be vertical privity.

Here the burden will run with the land, there was a grant (express grants are usually written) of an easement that was properly recorded, so there was a writing, and there was vertical and horizontal privity. The benefit will run with the land because there was a grant (writing and vertical privity), and there was intent that it would run, and it touches and concerns land.

Therefore, the buyer will not be able to compel the sewer company to remove because it runs with the land.

MEE Question 5

Federal Civil Procedure Question

MedForms Inc. processes claims for medical insurers. Last year, MedForms contracted with a data entry company (“the company”) to enter information from claims into MedForms’s database. MedForms hired a woman to manage the contract with the company.

A few months after entering into the contract with the company, MedForms began receiving complaints from insurers regarding data-entry errors. On behalf of MedForms, the woman conducted a limited audit of the company’s work and discovered that its employees had been making errors in transferring data from insurance claims forms to the MedForms database.

The woman immediately reported her findings to her MedForms supervisor and told him that fixing the problems caused by the company’s errors would require a review of millions of forms and would cost millions of dollars. In response to her report, the supervisor said, “I knew we never should have hired a woman to oversee this contract,” and he fired her on the spot.

The woman properly initiated suit against MedForms in the United States District Court for the District of State A. Her complaint alleged that she had been subjected to repeated sexual harassment by her supervisor throughout her employment at MedForms and that he had fired her because of his bias against women. Her complaint sought \$100,000 in damages from MedForms for sexual harassment and sex discrimination in violation of federal civil rights law.

After receiving the summons and complaint in the action, MedForms filed a third-party complaint against the company, seeking to join it as a third-party defendant in the action. MedForms alleged that the company’s data-entry errors constituted a breach of contract. MedForms sought \$500,000 in damages from the company. MedForms served the company with process by hiring a process server who personally delivered a copy of the summons and complaint to the company’s chief executive officer at its headquarters.

MedForms is incorporated in State A, where it also has its headquarters and document processing facilities. The woman is a citizen of State A. The company’s only document processing facility is located in State A, but its headquarters are located in State B, where it is incorporated and where its chief executive officer was served with process.

State A and State B each authorize service of process on corporations only by personal delivery of a summons and complaint to the corporation’s secretary.

The company has moved to dismiss MedForms’s third-party complaint for (a) insufficient service of process, (b) lack of subject-matter jurisdiction, and (c) improper joinder.

How should the District Court rule on each of the grounds asserted in the company’s motion to dismiss? Explain.

**MINNESOTA BAR EXAMINATION
FEBRUARY 2015
REPRESENTATIVE GOOD ANSWER
MEE 5**

1. How should the district court rule on the motion to dismiss MedForm's third-party complaint for insufficient service of process?

Under the Federal Rules of Civil Procedure, service of process may be personally delivered to the individual, substituted service on an agent or individual of a reasonable age at the individual's regular address, or service may be mailed to the individual, and if the individual responds to that service it is considered a waiver of service of process. A corporation may be served process by personally delivering the process to an agent of the corporation at the corporation's headquarters. In this instance, the service of process was proper because the service was personally delivered to the chief executive officer (CEO) at the corporate headquarters. This properly gave the company notice of MedForm's third-party complaint and claims against it. The court should deny the company's motion to dismiss for insufficient service of process.

2. How should the district court rule on the motion to dismiss MedForm's third-party complaint for lack of subject matter jurisdiction?

In order for a court to properly preside over a case, it must have personal jurisdiction over the parties and subject matter jurisdiction over the issue. A federal court has subject matter jurisdiction over a claim if either: (1) the parties are diverse and the amount in controversy exceeds \$75,000; or (2) the claim involves a federal law question. In this instance, the woman's original claim was based on sexual harassment and sex discrimination in violation of federal civil rights law. Thus, the court had subject matter jurisdiction on the basis of a federal question. However, MedForm's third-party complaint against company is based on a breach of contract claim alleging \$500,000 in damages. Because a breach of contract claim is a state law claim, the parties must be diverse and the amount in controversy requirement must be met in order for the State A district court to have subject matter jurisdiction.

The parties' residence for purposes of determining whether they are diverse is based on their domicile and the intent to remain at that domicile. The woman is a resident of State A. A corporation's domicile is determined by where the company is incorporated or where the headquarter is located (where the executive officers work). A corporation's headquarters is based on where the nucleus of the corporation is located. In this instance, MedForm is a State A resident because they are incorporated there and it is where their headquarters and document processing facilities are located. The company is a resident of State B because that is where the company is incorporated and where the headquarters is located. It does not matter that the company's only processing facility is located in State A.

Finally, the amount in controversy requirement is met because MedForm has made a good faith damages claim of \$500,000 which exceeds the \$75,000 requirement. Because the parties are diverse, and the amount in controversy requirement is met, the district court does have subject matter jurisdiction over MedForm's third-party claim. Thus, the court should deny the company's motion to dismiss for lack of subject matter jurisdiction.

3. How should the district court rule on the motion to dismiss MedForm's third-party complaint for improper joinder?

Under the Federal Rules of Civil Procedure, a joinder of parties is permissive when it involves the same transaction or occurrence and the dispute involves a common question of law. A joinder of parties is mandatory where one party's claims will not be able to be fully adjudicated without the joinder of the other party; and the other party's rights may be impacted if they are not part of the ongoing action. In this instance the joinder of the parties is not appropriate and the court should grant the company's motion to dismiss for improper joinder. Here, the claim from MedForm involves a breach of contract issue that is not related to the woman's claim of sexual harassment and sex discrimination. Additionally, it does not involve a common question because the claims are so different. The woman's claim is in no way related to MedForm's claim for breach of contract. The woman was a MedForm employee and merely managed the contract with the company. Finally, the joinder is not mandatory because the rights of the parties can be properly adjudicated without the company as a party. Thus, the motion to dismiss for improper joinder should be granted.

MEE Question 6

Decedents' Estates Question

A husband and wife were married in 2005.

In 2009, the husband transferred \$600,000 of his money to a revocable trust. Under the terms of the properly executed trust instrument, upon the husband's death all trust assets would pass to his alma mater, University.

In 2012, the husband properly executed a will, prepared by his attorney based on the husband's oral instructions. Under the will, the husband bequeathed \$5,000 to his best friend and the balance of his estate "to my wife, regardless of whether we have children." The husband failed to mention the revocable trust to his attorney during the preparation of this will, and the attorney did not ask the husband whether he had made any significant transfers in prior years.

In 2013, the husband and wife had a daughter.

In 2014, the husband was killed in an automobile accident. After his death, the wife found the husband's will and the revocable trust instrument on his desk. On the first page of the will, beginning in the left-hand margin and extending over the words setting forth the bequests to the husband's best friend and his wife, were the following words: "This will makes no sense, as most of my assets are in the trust for University and neither my wife nor my daughter seems adequately provided for. Estate plan should be changed. Call lawyer to fix." The statement was indisputably in the husband's handwriting. The wife also found a voice message on the phone from the husband's lawyer, which said, "Calling back. I understand you have concerns about your will."

The husband is survived by his wife, their daughter, and the husband's best friend. The assets in the revocable trust are now worth \$900,000. The husband's probate estate is worth \$300,000. He owed no debts at his death.

All the foregoing events occurred in State A, which is not a community property state. State A has enacted all of the customary probate statutes, but of particular relevance to the wife are the following:

- (i) If a decedent dies intestate survived by a spouse and issue, the decedent's surviving spouse takes one-half of the estate and the decedent's surviving issue take the other half.
 - (ii) A revocable trust created by a decedent during the decedent's marriage is deemed illusory and the decedent's surviving spouse is entitled to receive one-half of the trust's assets.
1. How should the assets of the husband's probate estate be distributed? Explain.
 2. How should the assets of the revocable trust be distributed? Explain.

**MINNESOTA BAR EXAMINATION
FEBRUARY 2015
REPRESENTATIVE GOOD ANSWER
MEE 6**

The question in this case is whether the will executed by the husband is valid or was revoked, and what the disposition of the trust assets will be once the statute is applied.

A properly executed will is binding on the estate. According to the facts, the will was properly executed and presumably valid. The question, then, is if the husband revoked all or a portion of the will prior to his death. Under these facts, the will does not appear to have been revoked in whole or in part.

Revoking a will or a provision of a will requires two steps. Decedent must intend to revoke all or a part of the will and then must make a volitional act of physical destruction of the will itself. Only when both intent and action combine is all or a part of a will revoked. Under the facts provided, it certainly appears that the husband was uncertain about the provisions of the will, but that uncertainty does not seem to rise to the level of intent. The husband clearly wanted to reform the will, but had not yet taken steps to do so. Since he had not taken the steps necessary to correct the uncertainty, a court would be hard-pressed to infer intent in his words.

Similarly, while it is possible to revoke all or part of a will by using a pen to alter the document, it still must be an overt act of destruction. The act taken by the husband in this case does not appear to rise to the level of destruction. Had he scribbled out, lined out, or blacked out a provision of the will, that overt act would be sufficient. In these facts, however, the husband wrote a question that covered some of the language of the will, but does not expressly destroy it.

The court should not revoke all or part of the will because there is not sufficient evidence of testamentary intent to do so. This will should still be valid and the entire probate balance should be controlled by the will.

The husband is not dying intestate, and as such his will controls the distribution of his estate. Under the facts, his best friend will receive the \$5000, bequeathed in the will, the daughter will receive nothing, and the wife will receive whatever the remainder amount is. The daughter would not have a separate claim to a portion of the funds because his provision of assets to the mother is sufficient with the presumption that the mother will provide for the daughter.

The final question remains; how much is the wife entitled to receive? Under the provided statute, a revocable trust created by a decedent during the decedent's marriage is deemed illusory and the spouse is entitled to receive one half of the trust's assets. The wife will definitely receive \$450,000 of the trust assets under the statute. It appears, however, that she will actually receive the full balance. If the trust is deemed

illusory, it is not valid and the remaining assets should be returned to the husband's estate. Since the husband's will controls, the wife should receive the full balance of the husband's probate estate, plus the full balance of the revocable trust, minus the \$5000 to the best friend.

In the alternative, the court may find that the husband revoked the will. In this instance, the statute would control as the husband would die intestate and his wife would receive \$600,000, his daughter would receive \$600,000, and his friend would receive nothing. In either case, University will not receive any assets on account of the statute deeming the revocable trust to be illusory.

As a side issue, the best friend has standing to challenge the revocation of his \$5000 if the court determined that the will or that provision was indeed revoked. A person generally has standing to challenge the distribution of an estate if they were devised a greater interest under a revoked will. His chances of recovery are slim, because the court would be determining that the husband intended to revoke the provision and his overt act was sufficient to revoke it. In so finding, the court would be effectively determining that the husband no longer had testamentary intent to leave \$5,000 to his friend. The university would not have standing to challenge its lack of receipt because the university never had an interest devised to it in a will, only under terms of the illusory trust.