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JULY 2010 MPT SUMMARY

QUESTION # 1

In re City of Ontario (July 2010, MPT-2)

In this performance test, applicants work for the City Attorney for the City of Ontario, Franklin. The City Attorney has been reviewing the city ordinances and procedures that cover the Liquor Control Commission, the administrative agency composed of the mayor and the city counsel that is responsible for granting liquor licenses and enforcing the relevant city ordinances. The City Attorney is concerned that the current Commission procedures would not be given preclusive effect by the courts should a licensee appeal a decision. Applicants' task is to draft an objective memorandum analyzing whether the courts would be likely to grant preclusive effect to the Commission's decisions and recommending what changes to the current procedures would make it more likely that the courts would do so. In addition, applicants should consider how any recommended changes would affect the City's goal of having cost- and time-effective procedures for addressing violations of the Liquor Control Act. The File contains the instructional memorandum from the City Attorney, excerpts from the City of Ontario Liquor Control Ordinances, and the Notice of Liquor Control Violation form used by the City. The Library includes three cases.

MINNESOTA BAR EXAMINATION
JULY 27, 2010
REPRESENTATIVE GOOD ANSWER
QUESTION 1

City of Ontario
City Hall
131 West Fifth Street, Ontario, Franklin 33875

MEMORANDUM

TO: Lawrence Barnes, City Attorney

FROM: Applicant

DATE: July 27, 2010

RE: Liquor Control Commission Procedures

You have asked me to research the issue of whether the Liquor Control Commission ("the Commission") has the power to issue decisions that will be given preclusive effect in order to protect against re-litigation in state and federal courts. Below is an outline, based on the specific ordinance and notice of violation form, of which city procedures comply with the preclusion requirements, which do not, and how any changes I recommend can affect the city's cost and time-effectiveness goals. This issue is important because the doctrine of preclusion, as stated in *Thompson v. Franklin State Technical University*, gives finality to matters already decided where there has been an opportunity to litigate them. Additionally, it serves the important public policy of adjudicating disputes once, bringing disputes to an end, conserving resources, and encouraging parties to use local administrative procedures to settle disputes.

2-1 Liquor Control Commission

The Franklin Supreme Court in *Thompson v. Franklin State Technical University* applied the doctrine of preclusion to a determination made by an administrative agency in holding that only where an administrative agency has the authority to adjudicate disputes and where the agency, in fact, does decide the disputed issues properly before it, does the doctrine of preclusion apply. Preclusion does not apply where the administrative agency acts "legislatively" in adopting rules, or "ministerially" in implementing action without discretion.

Upon analyzing Section 2-1 overall it appears that the Mayor and City Council comprise the Liquor Control Commission, and the Commission has the power to conduct hearings and render decision and even impose penalties for violation of the ordinance. This

would certainly indicate that under the “Thompson” decision the Commission has the authority to adjudicate disputes and does in fact do so. Thus, the doctrine of preclusion may potentially apply. There is a limitation, however, in that preclusion will not apply if the agency adopts rules or implements rules without discretion. It appears in this section that the Mayor alone has several powers that allow him to make many decisions and take many actions alone. However, it does not appear that the Commission has any power to act legislatively in adopting rules, which is a good argument for allowing Section 2-1 the power of preclusion.

This section of the ordinance states that the Mayor and City Council comprise the Liquor Control Commission for the City. However, the Mayor alone has several powers and duties outlined in the section. Not only does the Mayor alone have the ability to investigate applicants, the Mayor can also conduct hearings and render decisions and even impose penalties. (As seen in subsections 1, 5 and 6 of section 2-1). Due process is an important aspect of having the power of preclusion because a person must be given notice of what they violated as well as an opportunity to be heard. However, due process also requires that the hearing be fair and before an impartial tribunal and this does apply to administrative agencies as well as the court under the decision of *Lui v. Polk County Housing Board*. This is because cities and counties are creations of the state, and thus their agencies are state agencies. The “Lui” case went on to state that impartiality may be impossible when there is a commingling of investigatory, prosecutorial, and adjudicative functions. Additionally, when the adjudicator has personal or institutional financial interests in the outcome, impartiality is at risk.

By allowing the Mayor to not only investigate, but also to conduct hearings, make the decisions and impose penalties, the City will not meet the requirement that the hearing be before a fair and impartial tribunal. There is no tribunal here, rather there is only one person, the Mayor, acting as the person with sole authority. The commingling of investigatory, prosecutorial and adjudicative functions will need to be altered in this subsection in order to help make the process more impartial. In addition, giving the Mayor this type of authority affects impartiality because there are institutional financial interests in the outcome. Specifically, the city has an interest in having procedures be cost-effective and expeditious.

Aside from subsection 1, 5 and 6 which were previously discussed above, it appears that the rest of the subsection (2, 3 and 4) are fairly neutral acts. However, subsection 2, relating to entering or authorizing any law enforcement officer to enter, at any time, any premises licensed under the Ordinance to enforce it, has the potential to be problematic if one argues that this gives the Mayor the power to implement action without discretion. One of the ways this specific subsection could be amended would be to only allow entry to a premises licensed under the Ordinance to an independent investigator of the City who can ensure the ordinances are not being violated. Hiring a new employee would not be cost conscious, however it may be possible to train building inspectors, or some other similarly situated employee, in the applicable law in order to implement this subsection impartially. It may be a good idea to also only allow entry

into a premises with a license for reasonable cause or even probable cause that the ordinance is being violated. That could possibly allow the Mayer himself to still implement this subsection without costing the city any additional money.

2-2 Notice; Hearings

The "Thompson" court held that the doctrine of preclusion can only apply when the parties had an opportunity to litigate the claim or issue before the agency; thus, agency procedures must comport with due process. In addition, the more an administrative agency acts like a court, the more sound the reasons for giving preclusive effects to its decisions. This section of the Ordinance states that the Mayor shall issue written notice of the charge or charges and there shall be an opportunity to a hearing under this Section as long as the licensee wishing to contest the charge requests a hearing within 10 business days of the notice. This appears to satisfy minimal due process requirements, however the last line of the section states that the Mayor is the person who shall conduct the hearing and this will likely not be allowable because the "Thompson" court has held that it is critical that the adjudicators be independent of those prosecuting the matter. Here, since the Mayor is the sole person who will conduct the hearing and impose penalties as well as allow premises to be checked for violations, the Mayor essentially acting as both prosecutor and adjudicator, which points to the argument that the Mayor is not in fact independent. However, as discussed above, the entry on to the premises can be changed relatively easily without much additional cost, if any.

In addition, it may be better for the sake of impartiality to have someone else conduct the hearing. The City could rotate various administrative law judges to make the decision, or even have someone who is an independent member of the City Council conduct the hearing (no additional money will be added, however additional time will need to be given), although this may point to impartiality as well. Under *Barber v. Piedmont Housing Authority,* the court held that in a case involving public housing, the manager of a public housing building was not so management oriented as to be disqualified from presiding over a hearing involving a tenant in a building across the city. This may allow a City Council member who is from a very different area of the city to have the authority to hear license violation cases based on where the premises is located.

2-3 Conduct of Hearings

The conduct of the hearings under the Ordinance appears to be relatively close to a court adjudication, which only lends support for the fact that the doctrine of preclusion should apply. However, as addressed above, the Mayor has the power to issue subpoenas, rule under objections, dismiss charges, and generally adjudicate the matter. This impartiality has been dealt with in other areas of the memo. However, the basic structure of the section appears to comport with preclusion.

2-4 Burden of Proof; Evidence

The “Thompson” court has held that courts are more willing to preclude review where the parties litigated after some prehearing disclosure and where aggrieved parties had the opportunity to present evidence through witnesses and exhibits, and to challenge evidence presented by other parties through cross-examination. It has held that an agency acts like a court when it provides the opportunity for representation by counsel and follows basic rules of procedures and evidence. In this section, the City has the burden of proof regarding the charges alleged against the licensee. Additionally, the Mayor will admit into evidence any report relevant to the charges and the Licensee is permitted to cross-examine and present evidence in defense. However, there is no indication of any prehearing disclosure nor an opportunity for representation. In addition, it expressly states the Franklin Rules of Evidence shall not apply.

In terms of the Rules of Evidence, *Trenton Nursing Home v. Franklin Department of Public Health* has held that admission of hearsay evidence alone is insufficient grounds for finding that due process was violated. Rather evidence as a whole must be evaluated. The times when hearsay was in fact struck down were only for third hand accounts from unnamed sources, the accuracy of which the court could not evaluate. Here, although the rules of evidence do not apply, only police or other investigative authority reports are allowed. Allowing an opportunity for representation could easily be met by the city by allowing lawyers an opportunity to meet pro bono hours by representing licensees. But, the “Trenton” case added that the Franklin Supreme Court rejected a due process challenge to an agency decision even though the plaintiff did not have counsel or the right to prehearing discovery. Thus, these two items that are missing from this section may not be necessary to the application of preclusion.

Notice of Liquor Control Violation Form

The form notifying licensees that they have violated the statute appears to need only a few minor alterations. The “Lui” case held that notice is sufficient if it apprises the accused of the claims against him and gives him sufficient information to defend himself. It need not have the formality or completeness of an indictment. The notice in that case informed the accused of the specific paragraphs of the lease he violated and described his actions that allegedly violated the lease, as well as when those actions occurred in sufficient specificity that he could defend against the charges. The City’s form provides the licensee with specific information as to the specific section of the statute the licensee has allegedly violated. However, there is no information that would allow the licensee to know what conduct constituted violation or when those actions occurred. This makes defense by the licensee more difficult. This could easily be changed by simply creating a new form with additional space and information as to the conduct and date of occurrence. It could look similar to the format used for the name of licensee line at the top of the form. This would not add much time to the creation of the form and wouldn’t cost any additional money.

I hope this information has been helpful to you. Please advise if you would like any further handling.

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QUESTION #2

On December 30, X Corporation's legal record date, X Corporation had 100 shares of issued and outstanding common stock. Fifty shares were owned by Amy, 25 shares were owned by Brian, and 25 shares were owned by Carter. X Corporation also had 50 shares of stock that it previously had issued to, but later repurchased from, Amy.

On January 30, X Corporation's annual shareholders' meeting was validly held. Before the meeting, X Corporation's staff prepared a list of shareholders entitled to vote at the meeting and mailed proper notice to them. That notice stated that a proposal requiring shareholder approval would be voted on at the annual shareholders' meeting.

Before the annual shareholders' meeting and in a timely manner, Amy mailed in her duly executed proxy, directing the secretary of X Corporation to vote her 50 shares in favor of the proposal. However, before the annual shareholders' meeting date, Zach called the secretary of X Corporation and truthfully told the secretary that Amy's shares belonged to Zach because he had bought the shares from Amy on December 31. Zach then mailed the secretary a duly executed proxy directing the secretary of X Corporation to vote his 50 shares against the proposal.

Prior to the annual shareholders' meeting, Brian duly executed a proxy in favor of Dell. The proxy stated in its entirety, "I, Brian, hereby grant Dell full authority to vote my 25 shares of X Corporation at the January 30th annual shareholders' meeting." Dell timely mailed a duly executed proxy directing the secretary of X Corporation to vote Brian's 25 shares against the proposal. Dell also sent the secretary a copy of the proxy given to Dell by Brian. Brian, however, attended the annual meeting and voted his 25 shares in favor of the proposal.

Carter personally appeared at the annual shareholders' meeting and voted his 25 shares against the proposal.

X Corporation's president attended the annual meeting and, on behalf of X Corporation, voted the 50 shares that X Corporation had repurchased from Amy against the proposal.

X Corporation's Articles of Incorporation require an affirmative vote by the holders of two-thirds of the shares entitled to be voted to approve any proposal at a shareholders' meeting. The bylaws, on the other hand, require a unanimous vote of such shares to approve any proposal.

Your law firm represents X Corporation. You have been asked to advise the firm's senior partner on whether the proposal received sufficient votes to be approved. Explain your conclusion.

MINNESOTA BAR EXAMINATION
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REPRESENTATIVE GOOD ANSWER
QUESTION 2

The issue in this case is how the shareholders of X Corporation voted on the proposal, and whether the proposal received sufficient votes to be approved. Because Amy ("A") and Brian ("B") voted their shares for the proposal and Carter ("C") voted against, and because X Corporation is not entitled to vote the issued but repurchased shares, the required 2/3 approval has been met.

The Articles of Incorporation Control the Votes Required

Certain corporate actions require board action and/or a shareholder vote. For the proposal in this case, the articles of incorporation require an affirmative vote by the holders of 2/3 of the shares to approve such a proposal. The facts state that the corporation validly called and held an annual meeting after mailing proper notice (e.g. notice 10-60 days before the meeting).

The articles of incorporation is the fundamental founding document of a corporation. Changing the articles is a fundamental corporate change, while changing the bylaws is not. The articles of incorporation control over the bylaws, if there is an inconsistency. Here, there is an inconsistency between the bylaws and the articles. Therefore, the articles control. Because the articles control, this proposal requires an affirmative vote by the holders of 2/3 of the shares entitled to vote to pass. It is irrelevant that the bylaws require a unanimous vote.

Shareholders may attend the annual meeting and vote their shares in person. In general and by default, all voting shares are counted equally. If shareholders chose not to attend, shareholders may authorize a proxy to vote their shares on their behalf. Importantly, proxies are revocable by default. Proxies are only irrevocable if they are coupled with an interest.

A's Vote for the proposal

The issue is whether A was entitled to vote the 50 shares, since she sold them to Zach ("Z") on December 31. Shareholders who hold the shares on the corporation's legal record date are entitled to vote the shares. X Corporation's legal record date was December 30. On December 30, A held the shares. Therefore, A is entitled to vote the shares because she held them on the record date. A could have appointed Z her proxy, thereby giving him the right to vote the shares when she sold him the shares. However, she did not. Instead, she mailed her proxy voting her 50 shares in favor of the proposal. Therefore, even though Z owned the shares and purported to vote the 50 shares against the proposal, this proxy was ineffective because Z did not own the shares on the record date.

Amy did not attend the annual meeting. However, as stated above, attendance is not mandatory. Amy mailed in a duly executed proxy, directing the secretary to vote her shares in favor. Because she executed this proxy, her shares will be voted in favor at the annual meeting. It does not matter that Z called the secretary and told the secretary that he owned the shares as of December 31, because the record date was December 30. X Corporation should therefore record A's 50 votes as she voted: in favor of the proposal.

B's Vote for the proposal

The issue here is whether B's first proxy or second proxy is effective. His second proxy will be effective. When a shareholder executes a proxy, it is by default revocable. A proxy is only irrevocable if it is coupled with an interest. Here, B granted Dell ("D") the authority to vote his shares prior to the meeting by a duly executed proxy. Had nothing else been done, D could have effectively voted B's shares. However, a shareholder may always attend the meeting and vote how he or she chooses, even if he or she has already executed a revocable proxy. And again, proxies are only irrevocable if they are coupled with an interest, e.g. with sale of the shares themselves as the interest. Here, B did not couple his proxy to D with an interest, so it was revocable. B's attending and voting at the meeting, therefore, acts as a revocation. It makes no difference that D was earlier appointed proxy, and that D attempted to vote by proxy. B can always revoke the proxy. Therefore, all that matters is that B attended and voted in favor of the proposal, thereby revoking the earlier proxy to D.

B's attendance at the annual meeting effectively voted his 25 shares in favor of the proposal.

C's Vote against the proposal

A shareholder may always appear personally at the annual meeting and vote on a proposal. C appeared and voted against the proposal. Therefore, C's 25 shares count against the proposal.

X Corporation's president's vote

X Corporation has 100 shares issued and outstanding. It previously issued 50 additional shares but has since repurchased those shares. These shares remain available for resale by the corporation. However, issued but repurchased shares may not be voted by the corporation. If the corporation resold these shares, the purchaser would of course be able to exercise voting rights. However, officers of the corporation are not entitled to vote these shares. Therefore, the vote is among the 100 shares issued and outstanding. These 50 shares are treated as if they do not exist.

Result of the Vote

In sum: A and B effectively voted their 75 shares in favor of the proposal. C voted his 25 shares against. X Corporation is not entitled to vote the issued but repurchased shares. Because the Articles of Incorporation control, the required 2/3 vote to pass the proposal has been met (75/100 is more than 2/3 – it is 3/4). Therefore, the proposal received sufficient votes to be approved.

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QUESTION #3

Police officer (P) received a tip that Driver (D) had just stolen a diamond necklace from a jewelry store, had placed the necklace in the trunk of a car, and had driven away in that car. The tip included a detailed description of the car and its license plate, and P soon spotted a car fitting the description, driving down the highway. It is conceded by all parties that at this point P had both probable cause to arrest D and probable cause to believe the car contained contraband, specifically the diamond necklace.

P pulled the car over to the side of the road and performed a valid custodial arrest of D. He search D's person and then handcuffed D, placing him in the back seat of the police car, where he was guarded by P's partner. P proceeded to search the entire car, beginning with the passenger compartment, including the glove compartment. In the glove compartment, he found a baggie containing marijuana. He then continued searching the passenger compartment, finding drug paraphernalia (rolling papers) under the back seat. Finally, he searched the trunk, where he found the diamond necklace. P had no warrant for the search of the car or the arrest of D.

D is charged with theft of the necklace and with possession of illegal contraband (marijuana) and drug paraphernalia (rolling papers.)

Defense counsel concedes that the police had probable cause to arrest D and probable cause to believe that the car contained the stolen necklace.

What arguments will defense counsel raise for suppressing the necklace, the marijuana and the rolling papers under the Fourth Amendment? What arguments will the prosecutor raise in response? How should the judge rule and why?

MINNESOTA BAR EXAMINATION
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REPRESENTATIVE GOOD ANSWER
QUESTION 3

Defense counsel ("Defense") will argue that all of the evidence found in Driver's (D's) car should be suppressed because it was found as a result of an unreasonable search and seizure in violation of D's 4th Amendment rights. The 4th Amendment affords protection against unreasonable search and seizures by government agents of areas and items in which a person has a reasonable expectation of privacy. The principal method of 4th Amendment protection is the requirement and compliance with valid arrest and search warrants.

It must first be determined whether Police officer's (P's) search of D's vehicle falls within the 4th Amendment's protections. Defense will argue successfully that D had an expectation of privacy in his vehicle. Additionally, the search was conducted by an on-duty police officer, who constitutes a government agent for 4th Amendment purposes. Therefore, the 4th Amendment does apply to the search of D's car and ultimate seizure of evidence found within that car.

Defense may also argue that the evidence must be suppressed because it was not located pursuant to a valid search warrant. Before conducting a 4th Amendment search, police officers must ordinarily obtain a valid search warrant, based on sufficient probable cause, that specifies with particularity the area to be searched and the items to be searched for and seized. However, there are a number of instances when police officers need not have a warrant before executing a search under the 4th Amendment, and Prosecutor will argue that a number of these exceptions apply.

The first exception that Prosecutor will rely on is the automobile exception. The automobile exception allows an officer to search a vehicle when he has probable cause that contraband or evidence of a crime will be found in the vehicle. The officer need not have the probable cause at the time he pulls the vehicle over, as long as he has it before the search is conducted. Defense concedes that the police had probable cause to believe that the car contained contraband (i.e., the stolen necklace). P had received a tip that D had stolen the necklace and placed it in the trunk of his car. This tip also included a detailed description of the car and its license plate. Therefore, when P spotted a car fitting the description (and presumably, with a matching license plate), he certainly had probable cause under the automobile exception to search the vehicle. The automobile exception extends to the trunk of a vehicle. Therefore, P rightfully searched the trunk for the necklace, especially when his tip told him that's where the necklace had been placed. The automobile exception also allowed P to search the cabin of the vehicle for other contraband and incriminating evidence. Consequently, the marijuana and drug paraphernalia located within the cabin of the vehicle were also valid finds under the automobile exception.

Defense may argue that the baggie of marijuana should be excluded because it was located within the glove compartment. This argument will fail. The automobile exception allows an officer to search the entire vehicle, *including* the glove compartment (as well as under the back seat, where the drug paraphernalia was found).

Prosecutor may also argue that the exception for search incident to a lawful arrest applies. Prosecutor can rely on this exception for the search of D's person. When an arrest is lawful, a police officer may search a suspect's body and within the suspect's wingspan for purposes of officer safety and in an attempt to discover incriminating evidence. More importantly, this exception also allows a police officer to search the *cabin* of a car, as well as all closed (but *unlocked*) containers inside the cabin, subsequent to a suspect's valid arrest once the suspect is secured. This exception, however, is much more limited than the automobile exception for purposes of searching a vehicle. For one, it does not allow an officer to search the trunk of the vehicle. Moreover, once the officer has secured the suspect, he may only search the cabin of the vehicle for evidence or contraband for the very crime for which the suspect has been arrested. Thus, for example, if an arrest was made for a stolen monkey, the search incident to a lawful arrest exception would not allow an officer to search the glove compartment or containers located within the cabin, because a monkey would not fit into either.

Here, the search was conducted pursuant to a valid custodial arrest. The search only occurred after D had been handcuffed and placed in the back seat of the police car. Defense may argue that P had no right under the search incident to a lawful arrest exception to search the cabin of the vehicle for the necklace, because P's tip provided that the necklace had been placed in the trunk, and therefore, P had no reason to believe that evidence of the crime for which D was arrested would be found in the cabin. While this argument might be given slight credence, it is unlikely to be successful. Had P first searched the trunk and found the necklace, he may have been limited under the search incident to a lawful arrest exception from searching the cabin because he had already found evidence of the crime for which the suspect had been arrested, but that is not how the sequence of events played out.

It should be noted that Defense could correctly argue that the search of the trunk was not valid pursuant to the search incident to a lawful arrest exception. Regardless, the search of the trunk was still valid pursuant to the automobile exception.

Defense's argument that evidence of the drug paraphernalia and the baggie of marijuana found within the cabin should be suppressed will fail. P might claim that he truly was searching the vehicle's cabin for the stolen necklace, as allowed under the search incident to a lawful arrest exception, and even if that was not the case, he can still fall back on the automobile exception.

Additionally, even if the officer did not have the automobile exception to rely on, the evidence would have been discovered pursuant to an inventory search upon the police's impounding of the vehicle. While the inventory exception to the warrant

requirement is not specifically implicated by these facts because there is no indication that P was conducting an inventory search prior to impounding, it is still possible that it could be relied upon. Reasonable inventory regulations are constitutional, and an inventory search will be valid under the 4th Amendment so long as it complies with such regulations. Prosecutor could argue that even if the evidence of the drug paraphernalia and the marijuana were fruits of the poisonous tree (i.e., evidence obtained as a result of an unlawful search), they are still admissible under the inevitable discovery doctrine, because even if they hadn't been located when P initially searched the vehicle, they would have been located upon a valid inventory search when the vehicle was later impounded subsequent to D's arrest for the stolen necklace.

The judge should rule that all of the evidence is admissible and can do so based on the automobile exception alone. The search incident to a lawful arrest exception also likely applies, and supports P's recovery of the evidence located within the cabin of the vehicle without an arrest warrant. If, for whatever reason, the judge concludes that some or all of the evidence was unlawfully obtained in violation of the 4th Amendment, the evidence may still be admissible if P's mistakes were reasonable. Moreover, although suppression of the evidence would prevent Prosecutor from offering the unlawfully obtained evidence in her case-in-chief, she will still be able to offer the evidence on cross-examination for impeachment purposes.

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QUESTION #4

On May 15, 1985, Tess executed a will and a revocable trust. Both documents were properly signed and witnessed and left all Tess's property to her sister, Sally. The next day Tess transferred her stock portfolio into the revocable trust.

On June 1, 1990, Tess married Henry. Tess and Henry did not have a prenuptial agreement. Henry did not sign a waiver of rights.

A few months later, Tess purchased a residence in town called Homeacre. She paid all the consideration, and title was only in her name. Tess and Henry resided at Homeacre until Tess's death in 2010.

On March 1, 2000, Tess wrote a letter to her nephew, Ned, saying: "As we discussed, I really could use assistance on Farmacre. As you know, Farmacre is my farm property outside of town which I purchased long before my marriage to Henry. If you will work with me for five years on Farmacre, I will leave you Farmacre in my will." The letter was signed by Tess. On March 15, 2000, Ned sent Tess a letter saying, "I can be there by June 1st. Thanks." This letter was signed by Ned.

Ned moved to Farmacre on June 1, 2000, and worked there until Tess's death in 2010. Tess allowed Ned to live in the house on Farmacre. He paid only the utility bills and the costs of maintenance of the house. Tess paid all the other bills related to operating the farm. Tess did not otherwise pay Ned for his work on Farmacre.

Tess died on January 15, 2010. She was survived only by her husband (Henry), her sister (Sally,) and her nephew (Ned). She had not revised or revoked her May 15, 1985 will or revocable trust. Tess owned Homeacre, Farmacre, an automobile, and household furnishings. The revocable trust was still in existence. Henry owned no property of his own.

Fully analyze and discuss what rights Henry, Ned, and Sally have in Tess's property.

MINNESOTA BAR EXAMINATION
JULY 27, 2010
REPRESENTATIVE GOOD ANSWER
QUESTION 4

Tess's Will and the Revocable Trust

To be a valid will, the testator must be over the age of eighteen and possess testamentary intent. In addition, wills must be signed by the testator, and the signature or acknowledgement of said signature must be witnessed by two persons. Some states require that the witnesses are in each other's presence, and some do not. If these five formalities are met, a will validly disposes of all of a testator's property at death unless it is later revoked.

There is no indication in the facts that the will executed on May 15, 1985 is anything but valid. In fact, it is stated that the document was "properly signed and witnessed." The will apparently leaves all of Tess's property to her sister Sally, with no specific devises of particular personal or real property, either to Sally or anyone else. Whether the will is to be probated in this manner, giving all of Tess's property to Sally, is another matter and will be analyzed below with respect to each of the persons claiming rights in Tess's estate.

Revocable trusts are arrangements wherein property is transferred to a third party (the trustee) to be held for the benefit of named beneficiaries. The property is known as the res, and it must be transferred contemporaneously with the creation of the trust (unless there is a valid pour-over clause in the will). Trusts must be created with the requisite intent on the part of the creator (or settlor) and must have a valid purpose. Revocability of the trust means that the settlor retains the right, until death, to revoke the arrangement. Revocable trusts that purport to transfer property on death are valid, even though it has been argued at times that the arrangement violates the formalities of making a will in allowing the property to pass outside of probate, may permit a settlor's creditors to reach the res.

We are told that the revocable trust in this case was validly executed and, like Tess's will, named Sally as the sole beneficiary. Although revocable trusts (and pour-over clauses depositing a res into a trust) are valid as explained above, there are some problems with the creation of this particular trust. First, there is no named trustee. Sally is apparently named as the beneficiary with the benefits of ownership, but no one is named as the trustee, who has the burdens. We are not told much about the trust so it is possible that Tess is the trustee, since it is revocable. This would be permissible, since Tess is not also the sole beneficiary. Additionally, a trust will not fail for want of a trustee, as a court would simply appoint one to administer the trust. More problematic is the lack of a trust res at the time of creation. As explained above, a trust *may* be empty if a will is executed with a pour-over clause, depositing property into the trust at a settlor's death. On the facts presented, there does not appear to have been any pour-

over clause and Tess simply tried to transfer the stock portfolio into the trust the next day. This will likely be invalid. Tess should have transferred her stock portfolio into the trust on the day of creation in order for the trust to have been validly created. Thus, it appears that she failed to form the revocable trust, which would also have been for the sole benefit of Sally.

Henry's Rights

A testator is free to disinherit any person that she chooses to disinherit. However, the law has determined it to be necessary to protect the rights of spouses in various ways when it comes to the probate of one's estate. First, the pretermitted spouse doctrine allows a spouse who marries the testator *after* a will has been executed, but who is not named in the will, to take what he or she would take under the laws of intestacy provided that: (1) no other provision has been made for the pretermitted spouse; and (2) it would not be against the testator's expressed intent. Republication of a will after marriage would eliminate this protection. Second, a spouse who has been disinherited (or who inherits very little) can take an elective share instead of the amount that he or she takes under the will. This share is computed by calculating what is known as the augmented estate, which includes the net probate estate, transfers to the spouse during life, non-probate assets in which the deceased spouse retained an interest or ability to revoke, and transfers to third parties over $10,000 within a certain period preceding death. The UPC, and many states, allow the spouse to take a percentage of this augmented estate, usually in relation to the duration of the marriage. Finally, a spouse is permitted to take allowances in lieu of homestead, which would include furnishings in the home and an allowance to rely on while the estate is probated. The allowances are taken in addition to the elective share, but would be subtracted from what a spouse would take under a valid will.

Henry is Tess's spouse. They were married in 1990, five years after Tess's will was executed. Since the will was never revised or republished, Henry is a pretermitted spouse and as such, he can take what he would take under the laws of intestacy. Here, since Tess is not survived by any children, Henry would take her entire estate. This includes Homeacre, Farmacre, the car, and the household furnishings. There is no indication in the facts, aside from the fact that she did not revise her will, that Tess desired to disinherit Henry. It would appear from the facts that Henry can recover as a pretermitted spouse provided that Tess did not make other provisions for him before she passed away.

Henry could also decide to take the elective share amount. However, in light of the fact that he would take Tess's whole estate under the above analysis, he probably would not want to do this. If he did take the elective share, the augmented estate would include Homeacre, Farmacre, the car, the furnishings, and likely the stock portfolio. In addition, *if* a court were to find that the revocable trust was indeed validly created (see Part III, below), the augmented estate would include that as well, since it was revocable.

Even if he did not take as a pretermitted spouse, or was not entitled to the elective share, Henry would likely get to keep the homestead (Homeacre, where he lived with Tess until 2010) and the household furnishings pursuant to the allowances described above. This is especially true since we are told he did not waive any of his rights.

Ned's Rights

Ned seems to have a contract with his aunt Tess to work on Farmacre for five years. A contract is a legally enforceable promise, and is valid if there is an offer, acceptance, and consideration. An offer is any expression that evinces the desire to enter into a contractual relationship and reasonably invites a response; acceptance may be by words or performance. Full performance is necessary for a unilateral contract to form. Consideration is bargained for legal benefit or detriment, or a promise for the same. Contracts for the sale or transfer of real property must be in writing to be enforceable, as required by the Statute of Frauds. Material breach of a contract by one party excuses performance by the other party and gives rise to damages, which may be nonmonetary (specific performance) or monetary (damages). The measure of damages in a contract protects the expectation interests of the non-breaching party; so that the person is placed in the position he or she would have been in but-for the breach. Specific performance is provided as a remedy only when damages would not be sufficient.

When Tess offered in writing to convey Farmacre to Ned in her will if he would work on the farm, and Ned in turn promised (again in writing) to do so, and further relied on that promise, moved to the farm, and worked there for a full ten years, receiving living quarters and utilities, but no other salary in return, a contract was formed. Tess's communication was clearly an offer, and Ned's was clearly an acceptance. Consideration was present on both ends; Ned promised to work, which he had no pre-existing legal duty to do, and Tess promised to devise him the property, a legal detriment to her.

Tess breached her contract with her nephew when she failed to revise her will to include the devise of Farmacre to him. Ned can sue to enforce the contract, and would probably ask for specific performance since land, which is always considered unique, might not be adequately replaced by a mere dollar amount. The problem in this particular case, is that under the analysis in Part I, it is possible that Henry is entitled to Farmacre as a pretermitted spouse. It is not clear that a court would award specific performance, and give the farm to Ned even though there was a signed writing. It is possible, however, that Ned will be entitled to Farmacre as specific performance, and Henry would get the rest of the estate. Specific performance is an equitable remedy, and a court would take many other factors into consideration in deciding what to give to whom.

If Ned does not recover Farmacre on a contract theory, it is almost certain that he would recover in quasi-contract. He entered into the agreement with the reasonable expectation of being paid for his services, and if he were not paid for the value of his

labors (perhaps minus living expenses, which Tess appears to have taken care of during her life) Tess's estate would be unduly enriched. Thus, even if he does not take Farmacre, he will be entitled to the value of his services.

Sally's Rights

Incorporating by reference the discussion above as to the validity of the will, which purports to give all of Tess's property to Sally, and the discussion of the revocable trust, which purports to do the same, it does not appear that Sally can assert any rights under either of these documents.

First, as described above, the revocable trust is likely void because there was no property (res) transferred into the trust at the time of its creation. If this is indeed the case, Tess remained the owner of her stock portfolio, and this property would pass under the residue clause of the will or, alternatively, through intestacy. Since Sally is also, on its face, the beneficiary under the will, the failure of the revocable trust would not seem so bad for her in the long run.

However, incorporating by reference Part I above, with regards to Henry's rights as a pretermitted spouse, unless Sally can prove to a court with extrinsic evidence that Tess desired to disinherit her husband, he will likely take all of Tess's estate since that is what he would have received under the intestacy scheme.

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QUESTION #5

Until recently, Paul had always lived in State A. Last year, he decided he would move to State B for at least one year and, after a year, decide whether to remain in State B or return to State A. Six months ago, Paul moved to State B, rented an apartment, and took a job as a temporary employee. Paul has enjoyed living in State B so much that he recently left his temporary job and accepted a position as a permanent employee at a law firm in State B.

Shortly after he moved to State B, Paul bought a vacation home in State A, which he visits about once a month for two or three days. To pay for the vacation home, Paul obtained a loan from Credit Union in State A. Credit Union is incorporated in and chartered by State A. Its only office, located in State A, is both its corporate headquarters and the place where it transacts business with its customers. Ninety-five percent of Credit Union's customers are State A residents who do business with Credit Union in person at its State A office.

Paul's loan agreement with Credit Union provides that he will repay the loan in monthly installments over a 30-year period. Credit Union has a mortgage on Paul's vacation home to secure the debt. The loan paperwork lists Paul's State B address as his mailing and home address. The loan agreement also contains a privacy provision whereby Credit Union agrees not to disclose Paul's personal information to any third party without Paul's written permission. Credit Union sends a loan statement and payment coupon to Paul's State B address each month, and Paul returns the payment coupon with a check for the payment amount.

After the loan closed, a Credit Union employee mailed copies of all the loan paperwork to Paul. Unfortunately, the employee misread Paul's address in State B and sent the paperwork to an incorrect address. Several months later, Paul discovered that someone had gotten his loan paperwork and had used the information (including Paul's Social Security number and credit card numbers) to steal his identity. The identity thief had quickly accumulated $150,000 in unpaid bills in Paul's name. Paul's credit rating was ruined, and no one would extend him new credit.

Paul has sued Credit Union in the United States District Court for the District of State B for breach of the privacy provisions of the loan contract. The parties have stipulated that Paul's actual loss was $80,000. Paul's suit seeks $240,000 in damages, plus attorney's fees, pursuant to a State A statute that entitles victims of identity theft to recover treble damages and attorney's fees from anyone who wrongfully discloses their personal information. Paul's complaint also asserts that a federal statute restricting damages in state-law identity-theft cases to actual damages is unconstitutional and therefore does not preempt the treble damages provisions of the State A statute. The complaint asserts that the State B federal court has both diversity and federal-question jurisdiction over the case.

The long-arm statute of State B extends personal jurisdiction as far as the Constitution allows.

1. May the United States District Court for the District of State B exercise personal jurisdiction over Credit Union? Explain.

2. Does the United States District Court for the District of State B have diversity jurisdiction over the case? Explain.

3. Does the United States District Court for the District of State B have federal-question jurisdiction over the case? Explain.

MINNESOTA BAR EXAMINATION
JULY 27, 2010
REPRESENTATIVE GOOD ANSWER
QUESTION 5

1. Personal Jurisdiction over Credit Union

The U.S. District Court for the District of State B ("the Court") may exercise personal jurisdiction over Credit Union consistent with due process. There are two requirements for personal jurisdiction. First, there has to be a state statute authorizing the jurisdiction. In this case, there is a long-term statute in State B that extends personal jurisdiction as far as the constitution allows. Second, personal jurisdiction must comport with the constitutional requirement of due process. Specifically, the constitutional requirements for due process are that defendant must have such minimum contacts with the forum state so that exercise of personal jurisdiction comports with notions of fairplay and substantial justice. The courts have analyzed this according to a two-prong test looking at (1) minimum contacts and (2) fairness and substantial justice.

A. Minimum Contacts

Minimum contacts can be further divided into two inquiries: (1) whether the defendant purposefully availed himself to the forum's benefits; and (2) whether the defendant's conduct with the forum made it foreseeable that he could be haled into court in the forum. As to purposeful availment, Credit Union did not conduct business in State B. Its mortgage was attached to property in State A. Still, it sent loan statements and payment coupons to State B, where it knew Paul lived. The courts have held that correspondence by mail across state lines is like "reaching in" to the state. Thus, the first inquiry is satisfied. Second, defendant's conduct with the forum state made it foreseeable that he could be haled into court there because his conduct included sending Paul's private information to a person who lived in State B. This was a breach of contract. Obviously, it is foreseeable that Credit Union could be haled into court when its conduct constituted a breach of contract. The minimum contacts prong is satisfied.

B. Fairness

The fairness prong considers: (1) the relationship between the claim and the forum; (2) whether the defendant has ongoing and continuous contact with the forum such that it would be fair for the court to have general jurisdiction over the defendant; and finally (3) a balancing test weighing the convenience of the parties and the state's interest in the claim. Beginning with the relationship between the claim and the forum, the claim and the forum are directly related because the claim arose out of actions which took place in State B. State B is where Paul's personal information was discovered by the identity thief.

Accordingly, it would be fair to exercise personal jurisdiction over Credit Union. As to continuous contact, State B could not exercise personal jurisdiction on that ground because the facts indicate that Credit Union does its business in State A. Its contact with State B is minimal.

Finally, as to the convenience of the parties and the interest of the forum state, State B has an interest in hearing the claim because it has to do with the rights of one of its residents and the event took place in State B. It would be convenient for Paul to litigate in State B because that is where he lives. Moreover, there is nothing in the facts to suggest it would be inconvenient for Credit Union to litigate in State B.

Because Credit Union has had such minimum contacts with State B such that the exercise of jurisdiction over Credit Union comports with notions of fairplay and substantial justice, the constitutional requirements for personal jurisdiction are met. State B can exercise personal jurisdiction over Credit Union.

2. Diversity Jurisdiction

Federal courts do not have the power to hear cases unless they have subject matter jurisdiction. One basis for subject matter jurisdiction is diversity jurisdiction. Diversity jurisdiction requires complete diversity between parties and an amount in controversy exceeding $75,000.

A. Complete Diversity

Complete diversity of parties means that all plaintiffs and all defendants must be domiciled in different states. The facts indicate that Credit Union's domicile is State A. Corporations are domiciled in the state they're incorporated in and where its corporate headquarters are located or where it transacts most of it business. Credit Union was incorporated in State A, its headquarters are there, and it conducts all of its business there. Therefore, Credit Union's domicile is State A.

Paul's domicile is State B. Individuals are domiciled in the state where they live and intend to remain. The facts indicate that Paul was initially domiciled in State A. When he first moved to State B, his plan was to only stay for a year. Thus, during that first year, his domicile remained State A. However, after a year, Paul accepted a permanent position in State B and decided to remain there. Thus, Paul's domicile became State B. Accordingly, at the time of the action, Paul's domicile was State B. Because Paul's domicile is State B and Credit Union's domicile is State A, there is a complete diversity between parties.

B. Amount in Controversy

The facts indicate that the amount in controversy exceeds $75,000. Paul is claiming $240,000 pursuant to a State A law. State B will not apply state A law, but even if restricted to general damages, the amount in controversy is still $80,000, which exceeds $75,000.

There is diversity jurisdiction for the Court to hear this case.

3. Federal Question Jurisdiction

Federal courts can also obtain subject matter jurisdiction if the case or controversy involves issues of federal law, including the U.S. constitution, statutes, regulations, etc. The federal question must be pleaded on the face of complaint. Paul's claim is that Credit Union breached its contract when it violated the privacy provisions in their agreement not to disclose Paul's personal information. Contract rights are state rights, they are not rights created by federal law. Accordingly, Paul's breach of contract claim against Credit Union is not a federal question sufficient to confer subject matter jurisdiction.

Paul also contends that a federal statute restricting damages in "state-law identity-theft cases" is unconstitutional. This question about damages is arguably a federal question. However, it is not the basis of Paul's underlying claim. His underlying claim is that Credit Union breached its contract. The damages issue is collateral. Moreover, the "right" Paul seeks to vindicate is a "state right" to damages provided by State A, and he's suing in State B. In other words, it does not appear that Paul is entitled to those damages under the laws of State B. This makes his constitutional argument regarding damages inappropriate. Because the federal issue is collateral, it is insufficient to confer federal question jurisdiction.

Because the claim arises out of state law, and not federal law, the Court does not have federal question jurisdiction.

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QUESTION #6

The Church of Peace (the Church) is a religious organization that advocates "peace to everyone." Recently, a Church chapter (Chapter) was organized in the town of Homestead. Chapter members decided to spread the Church's message to the people of Homestead by handing out leaflets that proclaimed in bold letters, "PEACE TO ALL!" Chapter members who participated in passing out the leaflets stood on a public sidewalk and distributed the leaflets to pedestrians. The Chapter members did not block traffic or take any actions except passing out leaflets and remarking, "Peace to all!"

Many people who took the leaflets threw them onto the sidewalk, and Homestead employees spent several hours cleaning up these discarded leaflets. Chapter was fined $3,000 under a municipal anti-leafleting ordinance that prohibits any distribution of leaflets "in or on any public space, including roads, streets, and sidewalks." No Chapter member threw leaflets or other litter onto the ground.

Chapter members who attend High School, a public school in Homestead, recently formed the "Church of Peace Club" (Church Club) to pray together and to do good works. High School has a policy that permits student groups to meet in High School classrooms after scheduled classes. Under this policy, student groups must first obtain permission from Principal before using a classroom for a meeting. Pursuant to this policy, the Chess Club, the Drama Club, and the Future Lawyers Club all use classrooms for after-school meetings. Church Club officers asked Principal if they could meet in a classroom after school. Principal denied this request and stated that after-school use of a classroom by Church Club would be "a violation of the separation of church and state."

Father, a Chapter member and the parent of a Church Club officer, learned about Principal's decision and went to High School to see Principal. Outside Principal's office was a sign reading "No admittance without an appointment." Father, who had no appointment, threw open the closed door and marched into Principal's office, interrupting a meeting between Principal and another parent, and told Principal,

"Your policy is unwise and unconstitutional. I believe that you are discriminating against members of my faith." Principal asked Father to leave the office until the meeting with the other parent was concluded, but Father refused. Principal called the police, who forcibly removed Father from Principal's office.

Father was convicted of trespassing on government property.

Does the First Amendment, as applied to state and local governments through the Fourteenth Amendment,

1. Preclude Homestead's enforcement of its anti-leafleting ordinance against Chapter? Explain.

2. Preclude Principal's denial of Church Club's request to use classroom space for its meetings? Explain.

3. Provide grounds to vacate Father's trespass conviction? Explain.

MINNESOTA BAR EXAMINATION
JULY 27, 2010
REPRESENTATIVE GOOD ANSWER
QUESTION 6

The First Amendment, as applied to state and local governments through the Fourteenth Amendment, protects the rights to free speech, free exercise of religion and prevention of the government's establishment of religion. All three require some government or state action in order to apply.

Anti-Leafleting Ordinance

Freedom of speech is a fundamental right. Therefore, there are significant limitations on what the government may do to inhibit that right. Regulations on speech in traditional public forums must be reasonable time, place and manner restrictions. Traditional public forums include, public parks, public streets and public sidewalks. In order to be reasonable, time, place and manner restrictions in a public forum must be content neutral, provide ample alternatives for speech, and must be narrowly tailored to meet a compelling state interest.

Here, the ordinance is an action by a city government, Homestead, and is therefore sufficient to qualify as state action. The ordinance is regulating speech on public roads, streets, and sidewalks which are all traditional public forums. Therefore, the ordinance must be a reasonable time, place and manner restriction. In this case, the ordinance is a place and manner restriction because it targets a particular type of speech by prohibiting leafleting in a particular place: streets and sidewalks.

First, to be reasonable it must be determined if the regulation is content neutral. A regulation is content neutral so long as it does not target a particular idea or message. This ordinance is not targeting the content but rather the manner of all speech regardless of its message. Therefore, it is content neutral because it is not aimed at, for example, religious speech in particular.

Second, the regulation must provide for ample alternatives for the speech. Since the ordinance only prohibits leafleting, there are sufficient alternative outlets for the Church to speak. Here, the Church may use verbal speech, make signs, or distribute leaflets on private Church property or even in a public park. The ordinance is limited sufficiently to allow the Church to get their message out so long as they do not distribute leaflets on streets and sidewalks.

Lastly, the ordinance must be narrowly tailored to meet a compelling state interest. Because of the fundamental right to speech, this is a strict scrutiny test. The government has the burden to prove this element. Here, it appears the city ordinance is aimed at preventing litter on public sidewalks and also to prevent the time and money spent having to clean up the litter. Thus, the city likely has a compelling interest in

keeping the city clean and preventing the litter from flying into roads and possibly interfering with the flow of traffic. The ordinance is narrowly tailored to meet this interest because it is limited to leafleting which is likely to cause litter and is only limited to those areas where it will enter the roadways: public streets and sidewalks.

Therefore, the ordinance is likely to be upheld as a valid time, place and manner restriction of a public forum since it is content neutral, leaves ample alternative opportunities for speech, and is narrowly tailored to meet a compelling state interest.

Denial of Church Club's request

The denial of the Church Club's request to use the classroom for a meeting is unconstitutional. Freedom to assemble is also a fundamental right. A public school is an entity of the state and therefore is included under the First Amendment as a state action. A public school, however, is not a traditional public forum. Speech regulated in a non-traditional or limited public forum may be limited to a greater extent than a traditional public forum. However, rooms where the school has designated for group meetings, i.e., speech, are limited or designated public forums. In these forums, the government may limit the speech to the subject matter and type that is appropriate for the forum so long as the restrictions are viewpoint neutral and narrowly tailored to meet a substantial state interest.

Here, the school has a policy that only allows student groups to meet in classrooms after obtaining permission from the Principal. The policy, on its face, is viewpoint neutral and is reasonable in its limitation of use of school group meetings since it is a public school. The school has a strong interest in assuring the use of its classrooms is not disruptive to the learning environment of the school and the limitation to after school groups is narrowly tailored to meet that interest.

However, the application of the rule must be viewpoint neutral as well. The Principal, as an employee of the school, is a state actor. Here the Principal is discriminating against the group on the basis of religion. Therefore, it is not viewpoint neutral because it is targeting the religious views of the group as a reason for denying the group the use of the space for its meeting. Therefore, the actions of the principal are in violation of the First Amendment. His belief that allowing the use would be violation of the Establishment Clause is wrong.

The Establishment Clause of the First Amendment prohibits the government from the establishment of religion. Under that clause, the government may not do anything which a reasonable person would perceive as an establishment of religion. Under the lemon test, if the action serves a secular purpose, its primary effect is not to impede or promote religion, and it is not an excessive entanglement with religion, it will be upheld. Here, the use of the room for all student groups is a secular purpose and has no significant effect on religion. Also, it is by no means an excessive entanglement with religion. Therefore, it does not violate the Establishment Clause and the Principal may not use it to defend against his actions.

Although the High School policy is constitutional, the denial of the Church Club's request was not.

Father's Trespass Conviction

The Father does not have any constitutional grounds for overturning his conviction. The Principal's rule that no one is allowed into his office without an appointment is constitutional. As stated in the above analysis, a school is a non-public forum. As such, reasonable restrictions which relate to the function of the forum are constitutional. Here, the Principal has restricted who may enter his office. The office is a place of business activity and it is a significant interest for the school to prohibit the entrance and speech of people who do not have appointments. This restriction is therefore narrowly tailored to the interest of conducting official school business and not disrupting the learning objective of a school. Therefore, this regulation is constitutional and the Father was trespassing when he entered the office. His conviction will be upheld.

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QUESTION #7

In 1996, Oscar sold Blackacre (a tree-covered property overlooking a lake) to Abigail, who immediately recorded her warranty deed.

Abigail and her friend Betsy hiked on the land and later built a primitive picnic shelter on the land. They hung a sign saying "A&B Ranch" from the shelter's roof. They built a brick oven and hung a sign on it saying "Betsy's Bakery."

In 1997, Abigail executed a quit-claim deed that included the legal description to Blackacre and read "to Betsy so she can enjoy this land's great beauty until the end of her days." Abigail showed the deed to Betsy and placed it in a sealed plastic bag, saying, "Now you know you'll always have this place to come to after I'm gone." Betsy lifted one of the shelter's floorboards and Abigail slid the plastic bag underneath the floorboards.

In 1999, Betsy was injured in a car accident. After that, she and Abigail stopped visiting the property.

In 2004, Abigail executed a second quit-claim deed to Blackacre and delivered it to her nephew Carl with a note reading "Happy Birthday." The deed stated that Abigail was transferring "all of my interest in Blackacre to Carl." Carl immediately recorded the quit-claim deed.

In 2005, Carl transferred a fee simple interest in Blackacre to his fiancée, Deborah, by warranty deed. The deed stated: "…for $10 and in consideration of our impending marriage." Deborah immediately recorded the deed. Two weeks after their summer wedding, Deborah executed and delivered a quit-claim deed of the property to her adult son, Eddie.

In 2007, Abigail died. Soon after Abigail's death, Betsy remembered the 1997 deed to Blackacre. Betsy recovered the deed from under the shelter's floorboards and recorded it. The following week, she properly executed a new deed and gave it to her daughter, Yvette, saying, "maybe you can enjoy it better than I can now."

Last week Eddie was shocked to find Yvette directing a bulldozer to clear Blackacre, the first step in mining the property for coal. He immediately recorded the deed from Deborah to himself, and then he came to your office for advice.

Fully analyze and discuss who owns Blackacre, or an interest in Blackacre. If Eddie does not own Blackacre, does he have any basis for claiming against Deborah, Carl, or Yvette?

MINNESOTA BAR EXAMINATION
JULY 27, 2010
REPRESENTATIVE GOOD ANSWER
QUESTION 7

Interest in real property is conveyed by deed. A proper conveyance requires that the deed identify the land and the interest in land to be conveyed, as well as the parties between whom the conveyance is made, and that the deed be delivered to the recipient.

A deed may be a quitclaim deed or a warranty deed. A quitclaim deed does not warrant that the conveyor has any interest in the land, and comes with no covenants of title. Instead, it simply transfers whatever interest the grantor has. Still, the deed must be delivered to be effective. By contrast, a warranty deed comes with six covenants of title: seisin, the right to convey, the right against encumbrances, warranty, further assurances, and quiet enjoyment. Again, both deeds must sufficiently describe the parties land and interest at issue, and be delivered, to be effective.

The Grant to Betsy

When Abigail ("A") executed a quitclaim deed to Betsy, she included the proper legal description of the land and the grantee. There is some ambiguity as to Betsy's interest in land, because of the "end of her days" language, but that is probably mere precatory language not sufficient to create a life estate. That is, if the grant was "to Betsy for life," she would take merely a life estate and A would retain a reversionary interest. However, "to Betsy so she can enjoy … until the end of her days" does not condition the grant on a reversion at the end of her days. Betsy would enjoy to the end of her days under a life estate or under a fee simple. The language seems to be merely celebratory, not restrictive. Therefore, the language *would* create a fee simple in Betsy, if delivery were effective.

However, there was no proper delivery to Betsy. Delivery can be directly to a person, or even to a third party, e.g. to escrow. However, merely placing a deed in a drawer, or under a floorboard, is not sufficient to constitute delivery. The requirement is strict, and the grantee or third party must actually take the deed. Therefore, Betsy never took an interest in the property, because of lack of delivery. If she took an interest in Blackacre at all, it was in 2007 when she took the deed out from under the floorboards and delivery was accomplished. Although the effect of recording statutes will be discussed below, the result of this lack of delivery in 1997 is that A retained her interest in Blackacre despite her purported grant to Betsy in 1997.

The Grant to Carl

When A executed her deed to Carl, therefore, A still had her full estate in Blackacre. This estate is presumably a fee simple, since the facts state that Blackacre was sold to A, not that some property interest less than fee simple was sold to her. The fact that the

deed was a quitclaim deed simply means that she conveyed whatever interest she had, with no warranties. However, because she still held the land in fee simple due to the ineffective delivery to Betsy, that is the estate she transferred to Carl. This deed was properly delivered to Carl. Although the deed did not give a proper legal description of the land, that will not prevent the interest from transferring so long as it is apparent what land she intended to grant. Here it is obvious that A's particular piece of land, Blackacre, is at issue. Therefore, the grant to Carl was effective.

The Grant to Deborah

Carl took an interest in Blackacre in 2004, which he then conveyed to his fiancée Deborah in 2005. This deed is a warranty deed, and purports to transfer a fee simple. Again, it is not clear what interest Oscar sold to A, although the facts suggest a fee simple since they state he "sold" the land completely to A. The important point is that if A had less than a fee simple, Carl took less than a fee simple, and could not convey a fee simple to Deborah. This would breach several of his covenants, including seisin (which warrants that he has the interest he alleges) and warranty (which warrants that he has and can transfer the interest alleged). Still, whatever interest Carl had would transfer to Deborah.

The facts do not state whether Deborah properly received delivery of the deed. However, the fact that the deed recited $10 and marriage as consideration is irrelevant for purposes of the grant itself. A grant of property is not a contract, and no consideration is required. The fact that this was for consideration, however, would protect Deborah as a bona fide purchaser in some instances under recording statutes (see below). Regardless, so long as Deborah properly received delivery, and it appears that she did, she received Carl's interest in Blackacre.

The Grant to Eddie, Betsy's Recordation and Grant to Yvette

Deborah's grant to Eddie was executed and delivered, pursuant to the facts. Therefore, Eddie took whatever interest A had in the land – presumably, fee simple. However, he did not record his interest until after Betsy recorded and granted to Yvette.

The effect of recordation would depend on what kind of recording statute, if any, was in place in the jurisdiction. The common law rule was first in time, first in right, which provides that the first grantee takes regardless of any subsequent grants by the grantor. That means that, in this case, *if* A's grant to Betsy was valid in 1997 – and it was not because of lack of delivery – she would take the property and the entire chain of title from Carl to Eddie would be invalid. However, because A's grant to Betsy was not valid, she would not have an interest in land under the common law rule. And the common law rule is largely abolished in any event.

Most modern jurisdictions have recording statutes, which protect subsequent purchasers. Unless it is a race statute, the subsequent purchaser must be a bona fide purchaser, one for value and without notice (actual, constructive, or recorded) of an

earlier grant. Regardless of the statute – whether race, notice, or race notice – they protect subsequent purchasers. Here, the only true subsequent purchaser is in the chain of title beginning with Carl. Because that led to a grant to Deborah, who had no notice, took for consideration, and recorded immediately, there could be no further protection for subsequent purchasers from A regardless of the statute effective.

Eddie's Claim if he does not own Blackacre

Eddie took Blackacre by a quitclaim deed. As stated above, this type of deed does not include any of the covenants of title that a warranty deed does. Therefore, Eddie takes whatever interest the grantor had to give, and has no suit for a breach of title.