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MPT QUESTION #1

Monroe v. Franklin Flags Amusement Park (July 2013, MPT-1) In this performance test item, examinees are associates at a law firm representing the Franklin Flags Amusement Park. Franklin Flags is being sued for negligence by Vera Monroe, a patron who was injured at the amusement park's haunted house attraction the previous Halloween. Ms. Monroe claims three acts of negligence on the part of the park: after being frightened by a staff member dressed as a zombie, Ms. Monroe ran into a wall, breaking her nose; upon leaving the haunted house, she slipped on a muddy path, injuring her ankle; and finally, she fell and broke her wrist after being startled by another staff member in a scary costume. Examinees' task is to draft the argument section of a persuasive brief in support of the park's motion for summary judgment, refuting each of Ms. Monroe's claims that the park was negligent and is liable for her injuries. The File contains the instructional memorandum, guidelines for drafting persuasive briefs, and excerpts from the deposition transcripts of the plaintiff, the general manager of the park, and a park staff member. The Library contains two Franklin Supreme Court cases that address liability for dangerous conditions and how a duty owed to patrons is modified on Halloween.

**MINNESOTA BAR EXAMINATION
JULY 2013
REPRESENTATIVE GOOD ANSWER
QUESTION 1**

TO: Partner
FROM: Kevin Broich
DATE: July 30, 2013
RE: *Monroe v. Franklin Flags Amusement Park*, Motion for Summary Judgment

I. Caption

[omitted]

II. Statement of Facts

[omitted]

III. Legal Argument

A. Summary judgment is appropriate in this case

B. The plaintiff, by voluntarily entering the haunted house, relieved the operators of the duty to guard against patrons reacting in bizarre, frightened, or unpredictable ways; and there was no breach of the duty of care by Franklin Flags Amusement Park when its staff member dressed up as a zombie and frightening the Plaintiff.

To establish a claim of negligence, a plaintiff must show: 1) What duty was imposed on the defendant in the particular circumstances, 2) whether there was a breach of that duty that resulted in injury or loss, and 3) whether the risk which resulted in the injury or loss was encompassed within the scope of the protection extended by the imposition of that duty. As recognized by the Franklin Supreme Court in *Larson v. Franklin High Boosters Club, Inc.*, “[p]atrons at an event which is designed to be frightening are expected to be surprised, startled, and scared by the exhibits.”

Moreover, the Franklin Supreme Court stated, “[T]he operator [of events designed to be frightening] does not have a duty to guard against patrons reacting in bizarre, frightened, or unpredictable ways.” The analysis of whether a person was negligent is objective in courts of this jurisdiction, but may take into account what an ordinary, prudent person in a particular situation would do.

Larson Franklin High Boosters Club, Inc. is nearly identical to the case brought by Monroe against Franklin Flags Amusement Park. In *Larson*, the plaintiff entered a haunted house, dubbed “The House of Horrors,” after which he was frightened by a “vampire” in that haunted house, and then tripped over his feet sustaining injuries. In that case, the court held that the operator of the haunted house had no duty to guard against patrons reacting in bizarre, frightened, or unpredictable ways.

In the present case, the facts are not in contest with regard to the event leading to Monroe’s broken nose: she was frightened by a staff member dressed up as a zombie, which caused her to run into a wall and break her nose. This would be a bizarre event, and certainly a breach of duty in most environments outside of the situation in this case. Here, Monroe entered into a haunted house with the expectation of being frightened, and the haunted house was designed to do just that. Because of this relationship, the operator did not owe a duty, as a person in an ordinary life event might owe, to protect Monroe from being frightened, or reacting in a bizarre or unpredictable way. Moreover, an ordinary, prudent person going into a haunted house expecting to be frightened would not sprint into a wall in fear of her life, as an ordinary prudent person would understand that it was not, in fact, a zombie chasing after her, but a staff member just trying to surprise her. Although the lighting was dim and may have contributed to the injury, this was part of the frightening experience. Her reaction to the zombie and the dim lighting, in combination, were a part of the injury. But Monroe’s reaction to the zombie in the poorly lit room was outside of the scope of what an ordinary and prudent person would do: no such person would sprint into a wall after being frightened by a zombie in a haunted house. This is evidence by the fact that no other such injuries have occurred at the Franklin Flags Amusement Park. There is no duty imposed on any person for another’s reaction that is extraordinary in a given situation. As a result, Monroe cannot be entitled as a matter of law to any relief for the injuries she sustained when she ran into the wall due to the fact that she was frightened by the zombie.

C. The defendant, by training and instructing employees to care for patrons or call for a doctor in the event of a serious injury incurred by a patron, has satisfied its duty of care owed to the plaintiff.

The plaintiff has also noted that in *Larson*, the Franklin Supreme Court states that operators of amusement attractions do have a duty to protect patrons from “unreasonably dangerous conditions,” including a duty to hire “adequately instructed individuals should some unfortunate event occur which injured a person.”

Mr. Lasparri, the General Manager of Franklin Flags, set up the haunted house. He set up a series of staff members at various points in the haunted house to ensure patron’s safety. There is one staff member in each room of the haunted house specifically employed to assist a person if they get in any trouble or need help, and they may be in or out of character. A staff member verified this in her

deposition. In addition, there is a doctor. In our situation, there is no evidence that the staff was inadequate, and Monroe has not presented evidence to the contrary. There is evidence, however, showing that Franklin Flags satisfied the duty of protecting patrons from unreasonably dangerous conditions by hiring staff and having a doctor on site in case any unfortunate event might occur. The plaintiff asserts that the employees were not given specific training on assisting patrons, but this does not constitute an unreasonably dangerous condition. Accidents such as the one Monroe incurred are rare at the haunted house: Monroe's injuries were the only ones sustained by any patron there last year. In addition, Monroe has not shown that the personnel were inadequately instructed as to how to handle a situation in an unfortunate event. The employees of Franklin Flags were instructed to assist patrons in any manner, and call for a doctor in the event of signs of a serious injury. No special training needed to be given for an employee to effectively do this. Thus, given the undisputed facts, Franklin Flags has not breached its duty of care owed to Monroe.

D. The natural ground upon which the plaintiff slipped did not constitute an unreasonably dangerous condition, because it was natural ground that any ordinary and prudent person would be able to walk on without sustaining injury.

In *Costello v. Shadowland Amusements, Inc.*, the Franklin Supreme Court reaffirmed its position on dangerous physical conditions explicated in *Parker v. Muir*, stating that the owner or custodian of property is “answerable for damage occasioned by its dangerous condition, but only upon showing that the owner knew: [1]) of the dangerous condition, [2]) that the damage could have been prevented by reasonable care, and [3]) that the owner failed to exercise such reasonable care.” When analyzing whether a condition is unreasonably dangerous, the Franklin Supreme Court also stated that an accident occurring on a custodian's property as a result of a dangerous condition does not elevate the condition to one that is unreasonably dangerous. In assessing whether a condition is unreasonably dangerous, the Franklin Supreme Court examined: 1) the past accident history of the condition, and 2) the degree to which the danger could be observed by a potential victim. Lastly, for a condition to be unreasonably dangerous, it must “constitute a danger that would reasonably be expected to cause injury to a prudent person using ordinary care under the circumstances.”

In *Larson*, the Franklin Supreme Court noted that “an operator of an amusement attraction who invites a patron that is an invitee . . . impliedly represents that he has used reasonable care in inspecting and maintaining the premises and equipment furnished by him, and that they are reasonably safe for the purposes intended.”

Moreover, “the operator is not bound to protect patrons from every conceivable danger, only from *unreasonably dangerous conditions*.” (emphasis added) That is, such operators of amusement attractions are held to have an obligation “to ensure that there are . . . adequate physical facilities. . . .”

Monroe, in the current event, noted that there was a pathway through the graveyard that she could walk, but stated that “in her panic” she slipped on the walkway. The accident itself does not show that the pathway through the graveyard was unreasonably dangerous. An ordinary, prudent person, from an objective standpoint, would have been aware the risks associated with natural walkways. Monroe, however, did not act how an ordinary prudent person did. Despite being separated from the staff member dressed as a zombie, she was still panicked in a wide open area with tombstones. As a result of this panic, she slipped on an ordinarily safe, natural walkway, and sustained injuries. Franklin Flags did everything a reasonable custodian would do in this situation to ensure the grounds were kept reasonably, but could not protect Monroe from herself and the unreasonable anxiety that she carried with her, which cause the accident.

Moreover, there have been no other incidents noted as a result of the graveyard’s walkway. In addition, any ordinary, prudent person would be able to see that natural ground can become slick when many people walk upon it, and walk slower across that surface in order to reduce the risk of injury. There is no dispute as to the facts, and Monroe admitted herself that she was panicked when she slipped, and failed to observe the condition of the natural walkway that was readily available to be seen. Given these facts, judgment as a matter of law must be given to the defendant: there was no negligence in maintaining the grounds of the graveyard area at the haunted house.

E. The defendant was not negligent in hiring a staff member to wield a chainsaw and wear a mask outside of the graveyard area because the defendant entered the haunted house expecting to be frightened, and the area immediately outside of the haunted house is included as part of the haunted house.

To establish a claim of negligence, a plaintiff must show: 1) What duty was imposed on the defendant in the particular circumstances, 2) whether there was a breach of that duty that resulted in the injury or loss, and 3) whether the risk which resulted in the injury or loss was encompassed within the scope of the protection extended by the imposition of that duty. As recognized by the Franklin Supreme Court in *Larson v. Franklin High Boosters Club, Inc.*, “[p]atrons at an event which is designed to be frightening are expected to be surprised, startled, and scared by the exhibits.”

Moreover, the Franklin Supreme Court stated, “[T]he operator [of events designed to be frightening] does not have a duty to guard against patrons reacting in bizarre, frightened, or unpredictable ways.” The analysis of whether a person was negligent is objective in courts of this jurisdiction, but may take into account what an ordinary, prudent person in a particular situation would do.

Here, the facts are not disputed: Monroe entered into the haunted house with the expectation to be frightened. Although Monroe was outside of the haunted house, and through the graveyard, any ordinary and prudent person would

anticipate that they were not clear of the area in which they could be frightened. Thus, when the man with the chainsaw and mask surprised Monroe, there was no breach of duty. Franklin Flagg did not have a duty to protect Monroe from being frightened, or the injuries she sustained as a result. Moreover, an ordinary and prudent person would understand that the person wearing the mask and holding what appeared to be a chainsaw was, in fact, an ordinary individual hired by Franklin Flagg that meant no harm to her. Thus, Monroe's reaction to the man with the mask and chainsaw was an overreaction outside of the scope of any danger that could be anticipated by frightening a person with a fake chainsaw at a haunted house. Franklin Flagg should not be found negligent as it satisfied its duty of care and Monroe's reaction was out of the scope of protection extended by any duty owed by Franklin Flagg.

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QUESTION #2

Palindrome Recording Contract (July 2013, MPT-2) Examinees' law firm represents the four members of the rock band Palindrome, who have retained it to negotiate a recording contract with Polyphon, an independent recording label. Polyphon has presented the band with a detailed contract, and examinees are asked to redraft certain provisions of that contract to comport with the band's contractual demands and objectives. In particular, the band is concerned about artistic control of its recordings, licensing of the band's trademark, and use of the band's images and trademark for marketing purposes. Examinees are asked not only to redraft those contract provisions but also to explain why changes are being made to each, and to analyze legal aspects or complications involved with each provision, if there are any. The File contains the instructional memorandum, a transcript of an interview by the assigning partner with the leader of the band, an agreement among the band members concerning the division of income, and selected provisions of the recording contract. The Library contains a Franklin statute concerning contracts for personal services and two cases discussing the assignment and licensing of trademarks.

**MINNESOTA BAR EXAMINATION
JULY 2013
REPRESENTATIVE GOOD ANSWER
QUESTION 2**

TO: Levi Morris
FROM: Examinee
DATE: July 30, 2013
RE: Palindrome Recording Contract

Mr. Morris,

As you requested, I have reviewed the portions of the Palindrome (the "Band") recording contract (the "Contract") you gave me. In this Memorandum, I will address the provisions I feel should be revised. I will give you my revisions, and also an explanation detailing why I think the law or the Band's goals require the change.

From the materials you gave me, I have determined the Band's goals to be:

1. To sign the contract, if possible.
2. Avoid contractual commitment of more than 3 albums or 4 years.
3. Retain artistic control.
4. Retain image/message control (particularly avoiding Band's images being used to promote or be associated with drugs or alcohol).
5. Retain trademark/merchandise control.

I will keep these goals in mind to best serve our client as we progress through the contract revisions. We should keep in mind that, per the Band's partnership agreement, unanimous consent is needed for any action, even though Mr. Smyth is leading the negotiations. Here are the relevant provisions that I believe should be modified. For each provision, I have provided the original clause and my changes. Any language I have deleted is underlined, and any language I have inserted is italicized.

Section 3.03

The initial Contract Period will begin on the date of this Agreement and will run for one year. You hereby grant Polyphon eight (8) two (2) separate options, each to extend the term of this Agreement for one additional Contract Period of one year per option ("Option Period"). Following the two Option Periods in Polyphon's discretion, the parties

may exercise an additional three option periods with the unanimous consent of the parties. In the event that you do not fulfill your Recording Commitment for the initial Contract Period or any Option Period, that period will continue to run and the next Option Period will not begin until the Recording Commitment in question has been fulfilled. Notwithstanding the Option Periods, this Agreement will terminate four (4) years after it is signed unless the parties unanimously consent to extend it for any remaining option periods.

Justifications:

First, this contract runs a substantial risk of being unenforceable as written. The original period and eight subsequent options would total nine years minimum, with the possibility of running indefinitely if each period runs more than a year. Franklin Labor Code Section 2855 states that no personal services contract may be enforced for more than 5 years, or more than 10 years for the production of "phonorecords," which would be applicable to this contract. While the Band could continue to render service under the contract beyond 10 years, the contract would only become a presumptive measure of compensation. In your negotiations with Polyphon, you have a strong position in contending that the contract as written would run a substantial risk of being unenforceable as a matter of law.

Second, the Band has clearly stated its desire to not be bound to this Contract for more than 3 albums or 4 years. However, the Band indicated a willingness to be bound for longer if the deal ends up being good for the Band. Accordingly, I struck the 8 subsequent options and inserted 2 options. This would give the Band a maximum three record commitment. I also inserted language that would allow the Band and the record label to extend the Contract if it is mutually agreeable. This would allow the Band to continue to perform under the Contract if they feel it is a good situation, per their goals.

Given the indeterminate nature of the Option Periods, I also inserted a provision that would terminate the agreement after 4 years, regardless of the option periods. This is designed to ensure that the Band is not trapped in a perpetual contract if it does not meet the requirements of each period. However, I also built in a mutually agreeable extension, so if the Band desires to remain with the record label after 4 years, the Band can do so.

Section 4.01

Polyphon Artist shall, in its sole discretion, make the final determination of the Masters to be included in each Album, and Polyphon shall have the sole authority to may assign one or more producers who shall collaborate with you on the production of each Master and each Album, *subject to approval by Artist. No album may be released without final approval from Artist.*

Justifications:

There are no legal reasons for the changes to this section. However, this section is very important to our client's goal of retaining artistic integrity. I made a number of

changes to address those concerns. First, under the original contract, Polyphon made the final determination of which Masters would be included in each Album. I don't see many alternatives that would align with our client's goals other than giving that power directly to the Board. Accordingly, I took that power from Polyphon and gave it to the Band.

Second, I gave Polyphon permissive authority to assign producers to the production of each Master and Album. Previously, the Band had no control over the producer with whom they would be working, so I added in a phrase giving the Band a right to approve or reject the producer assigned by Polyphon. This should protect our clients from being forced to work with a producer they do not like.

Finally, I added in a concluding sentence that expressly states that the Band has final approval over what music is released. This will protect our client from unforeseen circumstances that may jeopardize their control of their art.

Section 8.01

Artist warrants that it owns the federally registered trademark PALINDROME (Reg. No. 5,423,888) and hereby *non-exclusively licenses* transfers all right, title, and interest in that said trademark to Polyphon. Polyphon may use the trademark on such products as in its sole discretion, it sees fit to produce or license, *subject to Artist's subjective approval in all respects*, and all *net* income from such use shall be *seventy-five percent (75%) Artist's and twenty-five percent (25%) Polyphon's alone*.

Justifications:

A naked assignment of a trademark, or an assignment in gross, is not valid. *Panama Hats v. Elson Enterprises*. Additionally, such a transfer of a mark may cause the assignor to lose all rights in the mark and can leave the mark open for acquisition by the first subsequent user of the mark in commerce. *Panama Hats*. The original agreement was such a transfer and would expose the Band to the risk of losing the mark. Accordingly, I changed the language to be a non-exclusive license rather than a complete transfer to avoid that problem and to ensure that the Band's other non-exclusive licenses would not be jeopardized.

Second, because a mark is designed to indicate to the public the source and quality of goods, and the source and message of the owner, mark owners have not only a right, but a duty to control quality. *M & P Sportswear v. Tops Clothing*. If an owner of a mark fails to control quality, it can result in abandonment of the mark and cancellation of the registration. *M&P*. Therefore, it is very important to our clients that they retain control over the quality and message of any merchandise that uses their mark. Not only is that control legally required, but it is a central goal of our clients. I changed the clause to remove sole discretion from Polyphon and give the Band subjective approval rights in all respects.

Lastly, I divided the income up the way the Band stated they were willing to split merchandise income. I allowed for the use of net income, and gave 75% to the Band

and 25% to Polyphon, as Mr. Smyth stated. Previously, Polyphon would have been entitled to all income from merchandise. Note that Mr. Smyth indicated that the Band expects higher royalties in exchange for the merchandising concession, but royalties are outside the scope of this Memo.

Section 8.02

Artist hereby authorizes Polyphon, in its sole discretion, to use Artist's, and each member of Artist's, name, image, and likeness in connection with any marketing or promotional efforts *for Artist's Albums or merchandise*, and to use the Masters in conjunction with the advertising, promotion, or sale of goods or services *relating to Artist's Albums or merchandise*. *Any and all uses of Artist's name, image, or likeness under this section is subject to the approval of Artist and that individual member whose name, image, or likeness is used.*

Justifications:

There are no legal justifications for these changes. It is important to our clients that they retain control over their image, particularly given the sensitivity regarding drunk driving, alcohol and drugs. Therefore, I removed the phrase giving sole discretion to Polyphon, and added a sentence at the end of the section ensuring that the Band gets sole approval of any use of the images. The ability of each individual to approve is likely unnecessary because for the Band to approve anything, it must get a unanimous approval from all members, but I included it to be safe. Second, I limited the ability of Polyphon to use the Band's images for any marketing or promotional purpose and restricted it to promoting the Band's music, and goods and services relating to the Band. I feared that otherwise the language was too broad, and would give Polyphon the ability to license the Band's image for totally unrelated promotions or goods. This limitation, along with the Band's ability to approve, should ensure that the Band controls the use of its images.

Conclusion:

Our client has several goals which require changes to the contract. Because of the importance to our client of limiting the duration of the contract, maintaining artistic control, image and message control, and trademark/marketing control, I have changed sections 3.03, 4.01, 8.01 and 8.02 to help ensure those goals are met. If you have any questions or concerns, or would like me to look into further matters on this contract, please don't hesitate to contact me.

/s/

Examinee

QUESTION #3

A woman was born and raised in the largest city (“the city”) of State A, where she also attended college.

Three years ago, the woman purchased a 300-acre farm and a farmhouse in neighboring State B, 50 miles from the city. She moved many of her personal belongings to the State B farmhouse, registered her car in State B, and acquired a State B driver’s license. She now spends seven months of the year in State B, working her farm and living in the farmhouse. She pays income taxes in State B, but not in State A, and lists State B as her residence on her federal income tax returns.

However, the woman has not completely cut her ties with State A. She still lives in the city for five months each year in a condominium that she owns. She still refers to the city as “home” and maintains an active social life there. When she is living on the farm, she receives frequent weekend visits from her city friends and occasionally spends the weekend in the city at her condominium. She is a member of a health club and a church in the city and obtains all her medical and dental care there. She is also registered to vote and votes in State A.

A food product distributor sells food items to grocery stores throughout a five-state region that includes States A and B. The distributor is a State C corporation. Its corporate headquarters are in State B, where its top corporate officers, including its chief executive officer (CEO), have their offices and staff. The distributor’s food processing, warehousing, and distribution facilities are all located in State A.

Three years ago, the woman and the distributor entered into a 10-year written contract providing that the woman would sell all the produce grown on her farm each year to the distributor. The contract was negotiated and signed by the parties at the distributor’s corporate headquarters in State B.

The woman and the distributor performed the contract for two years, earning her \$80,000 per year. Recently, the distributor decided that the woman’s prices were too high. At a meeting at its corporate headquarters, the distributor’s CEO asked the woman to drop her prices. When she refused, the CEO informed her that the distributor would no longer buy produce from her and that it was terminating the contract.

The woman has sued the distributor for anticipatory breach of contract. She seeks \$400,000 in damages. She has filed suit in the United States District Court for the District of State A, invoking the court’s diversity jurisdiction.

State A’s long-arm statute provides that “a court of this State may exercise personal jurisdiction over parties to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution.”

The distributor has moved to dismiss the woman’s action for lack of subject-matter jurisdiction and for improper venue.

1. Should the court grant the motion to dismiss for lack of subject-matter jurisdiction? Explain.
2. Should the court grant the motion to dismiss for improper venue? Explain.

**MINNESOTA BAR EXAMINATION
JULY 2013
REPRESENTATIVE GOOD ANSWER
QUESTION 3**

1. Subject Matter Jurisdiction

Federal courts are courts of limited jurisdiction and can only hear certain cases and controversies. In order for a federal court to have jurisdiction, there must be subject matter jurisdiction over the case, which includes either federal question jurisdiction or diversity jurisdiction.

Federal Question Jurisdiction: A case falls into federal question jurisdiction when Plaintiff's well-pleaded complaint arises under federal law, such as by seeking to enforce a federal right. Anticipating that Defendant's defense might raise a federal question is not enough. Here, the woman is suing for anticipatory breach of contract. Contracts are a matter of state law, and there is no federal issue raised so she cannot invoke federal question jurisdiction to get into federal court. Thus, the case must fall under diversity jurisdiction.

Diversity Jurisdiction: Diversity Jurisdiction requires (1) complete diversity of citizenship between Plaintiffs and Defendants and (2) an amount in controversy greater than \$75,000. Diversity is determined based on citizenship. For corporations, citizenship is determined by the corporation's state of incorporation and principal place of business. Here, distributor Defendant was incorporated in State C. Principal place of business refers to the corporation's nerve center, where most of the high-level officers have their offices, which is usually the headquarters – not where the company does business. The Defendant's high ranking officers have their offices and headquarters in State B. Thus, Defendant is a citizen of both State B and State C. Plaintiff needs to have a different citizenship from States B and C in order to meet the complete diversity requirement. For individuals, citizenship is determined based on one's residence plus intent to remain indefinitely. The court will consider where a person is registered to vote, where they pay taxes, where they have a driver's license, and where most of their personal belongings are located. Here, Plaintiff's citizenship is difficult to determine because of her time split between State A and State B. A person can only have one domicile. Plaintiff will argue that she is a resident of State A because she was raised there, still lives there for five months each year, owns a condominium there, calls the city "home," has an active social life there, is registered to vote and does vote in State A, is a member of a health club and church there, and has her medical and dental care done in State A. Defendant will argue that Plaintiff is not diverse because she is a citizen of State B, based on her farm and farmhouse there, the fact that she moved many personal belongings to State B, registered her car there, has a driver's license there, spends seven months of the year there, works in her farm and lives in her farmhouse, pays income taxes in State B, and lists State B as her residence on her federal income tax returns. Even though Plaintiff has many social ties to State A and has a history of it being her "home," the court is more likely to decide that Plaintiff is a citizen of State B. She lives and works there, pays taxes there, and only visits State A,

more like it is a vacation home. Even though she still votes and has medical care done in State A, it is only 50 miles away and is a neighboring state, so that may not be dispositive. It would be helpful to hear from the Plaintiff about where she intends to remain, since that is a key component of domicile. If the court concludes that Plaintiff is a citizen of State B, she cannot sue in federal court because she does not have complete diversity with the Defendant, and the court should grant the motion to dismiss.

If, on the other hand, the court finds that Plaintiff is actually a citizen of State A, then she will meet the complete diversity requirement, and will need to show that the amount in controversy exceeds \$75,000. Typically, the court takes Plaintiff's damages estimate as the amount in controversy, so long as it is claimed in good faith, unless it is clear to a legal certainty that Plaintiff cannot recover greater than \$75,000. Plaintiff has claimed \$400,000 in damages, which is well over the jurisdictional threshold. The amount that Plaintiff actually wins at trial is also irrelevant. Here, Plaintiff alleges anticipatory breach of a 10 year contract, with eight years remaining in the term. During the first two years, the contract earned Plaintiff \$80,000 per year. If Plaintiff expects to continue to receive this amount of profits, it is highly likely that the amount in controversy exceeds \$75,000.

Since Plaintiff is likely a citizen of State B, she lacks complete diversity, and cannot have her claim heard in federal court. The court should grant Defendant's motion to dismiss for lack of subject matter jurisdiction.

2. Motion to dismiss for improper venue

Venue refers to the proper forum to hear the case, and is proper where a case could originally have been filed. Here, Defendant alleges that State A is the improper venue for the case. A motion to dismiss falls under FRCP 12 (b) and certain Rule 12 motions are waiveable unless brought in the first Rule 12 response. Here, it appears that Defendant brought its motion to dismiss for lack of subject matter jurisdiction in the same Rule 12 response, and it appears to be the first response, so Defendant has not waived its ability to dismiss for improper venue. If a case is properly in federal court, Plaintiff can lay venue in any district where all Defendants reside, or where a substantial proportion of the events giving rise to the cause of action occurred. For purposes of venue, a corporate Defendant resides in any state where it is subject to personal jurisdiction.

Venue Bases on Substantial event: Here, most of the events relevant to the lawsuit have taken place in State B. Plaintiff and Defendant negotiated and signed the contract at the Defendant's headquarters in State B, and the subject matter of the contract involves produce from Plaintiff's farm, located in State B. There are no facts which suggest that the contract was negotiated, performed, or related to any action in State A. Thus, the substantial events test for venue would have allowed Plaintiff to lay venue in State B (doesn't support venue in State A, where she filed).

Venue Based on Personal Jurisdiction: Plaintiff can still prevail on the motion to dismiss for improper venue if she can show that defendant was subject to personal jurisdiction in State A. Personal jurisdiction refers to the court's power over the parties. Personal jurisdiction must comply with statutory and unconstitutional grounds. Here,

the state long-arm statute provides for jurisdiction to the extent permitted by the Constitution. The constitutional Due Process test requires such minimum contacts with the state so as not to offend traditional notions of fair play and justice. If a defendant's actions in the forum give rise to the cause of action, then personal jurisdiction will be based on specific jurisdiction. The defendant must have contacts with the state, meaning it must have purposefully availed itself of the state's resources, such that it was foreseeable that it could be hauled into court there, and those contacts must be related to the state. In addition, there must be a consideration of fairness, by looking at the state's interests in a forum, the Plaintiff's interest in choosing a forum, and convenience. If the Defendant's contacts with the state do not give rise to the cause of action, then personal jurisdiction is general and is based on where a defendant is essentially at home. For a corporation, that means its state of incorporation and principal place of business.

Here, the Defendant likely does have minimum contacts with State A. The Defendant sells food items to grocery stores in States A and B, but the Court has held that mere injection into the stream of commerce in a state, without more, is not sufficient for minimum contacts. Here, the Defendant also has a food processing facility, warehousing, and distribution facilities in State A. This is probably sufficient for purposeful availing because the Defendant has a physical presence in the state, employs people in the state, sells their product there, and probably makes use of local laws and roads. Because the Defendant has such a presence in State A, it is foreseeable that it would be sued there on something related to its business. While its contacts with the state are not directly the reason Defendant is being sued (for example, the lawsuit is not a claim by an employee against Defendant in State A), the reason that Defendant has contacts with State A is related to why Defendant is being sued now. Next, the court will consider the element of fairness. Due Process does not guarantee the most convenient forum for a Defendant, it only guarantees a proper forum. There might be reasons why State A has an interest in providing a forum for its residents, particularly on local contracts. The Plaintiff is considered domiciled in State A because then one of the key witnesses (the Plaintiff) is located there. Defendant can argue that for convenience, its witnesses are in State B, along with key documents related to the contract negotiation. However, since Defendant is a corporation that can transport its evidence and witnesses easily, albeit with more expense, this is likely not a dispositive factor. The court will likely find that Plaintiff can establish that Defendant is subject to personal jurisdiction in State A, because it has sufficient minimum contacts with the state. It Plaintiff must show general personal jurisdiction, that will probably not be satisfied for Defendant in State A because it was not incorporated there and does not have its principal place of business there.

Because Defendant is subject to personal jurisdiction in State A, venue is proper there and the court should deny Defendant's motion to dismiss for improper venue. Alternatively, if the court finds that subject matter jurisdiction is proper, but State B would also be a proper venue, the parties could seek a transfer to that jurisdiction.

QUESTION #4

After a dump truck unloaded gravel at a road construction job site, the trucker negligently drove away with the truck bed still in a raised position. The raised truck bed hit an overhead cable, causing it to fall across the highway.

The telephone company that owned the fallen cable sent one of its employees to the scene in a company vehicle. The employee's responsibilities were expressly limited to responding to cable-damage calls, assessing damage, and reporting back to the telephone company so that a repair unit could be dispatched.

The foreman of the road construction job site asked the telephone company employee if the foreman's crew could lift the cable off the highway. Fearful that the cable might be damaged by traffic, the telephone company employee said, "Go ahead, pick it up. Just don't damage the cable." The foreman then directed his crew to stretch the cable over the highway so that traffic could pass underneath.

Shortly thereafter, a bus passing under the telephone cable hit the cable and dislodged it, causing the cable to strike an oncoming car. The driver lost control of the car and hit a truck carrying asphalt to the road construction site. As a result of the collision, hot asphalt spilled and severely burned the foreman.

The foreman is now threatening to sue the telephone company on the ground that it is responsible for its employee's negligence in authorizing the road construction crew to stretch the cable across the highway. The telephone company argues that, even assuming that its employee was negligent, the telephone company is not liable because:

1. the telephone company employee's acts were outside the scope of his employment and thus cannot be attributed to the telephone company;
2. there is no other agency theory under which the foreman could hold the telephone company liable for its employee's acts; and
3. the telephone company employee's acts were not the proximate cause of the foreman's injuries.

Assess each of the telephone company's responses.

**MINNESOTA BAR EXAMINATION
JULY 2013
REPRESENTATIVE GOOD ANSWER
QUESTION 4**

The Telephone Company's Employee Was Its Agent: Therefore the Telephone Company can be Held Liable for the Employee's Acts.

A. The employee was not acting outside the scope of his authority.

The present facts present a case of respondeat superior. Under this doctrine, an employer can be held liable for the foreseeable acts of its employees who are acting within the scope of their employment. Here, the employee was dispatched at the direction of the employer to the scene of the overhead cable accident. Upon his arrival, he had specific, limited instructions from the employer. The employee was only supposed to respond to the damage calls, assess the damage, and report back to the telephone company so it could send a repair crew out to fix the cable. However, when the employee arrived there was a fluid situation. Acting on actual authority to respond to and assess the damage, the employee attempted to mitigate the damage to the company by attempting to rectify the situation. There was a dangerous situation present and the employee feared that the cable might be damaged by traffic, thus injuring his employer. The employee's actions were within the scope of his employment because he was dispatched to the scene in a company vehicle at the direction of the employer. The employee's actions were also within the scope of his employment and reasonably foreseeable because a reasonable employer can expect that fluid situations will compel its employee's to act outside of their express authority. Since sending the employee to the accident scene may reasonably lead to the employee making decisions based on implied authority, the employee was well within the realm of his agency relationship with the employer. Further, there are not facts to suggest the employee was on a frolic or detour; instead he was actively trying to protect this employer from further losses. Therefore, because the employee was acting within either his express or implied authority, the employer is liable for the employee's actions.

B. The employer is also liable under the theory of apparent authority.

In this case, the foreman witnessed an employee of the telephone company arrive at the scene of an accident involving one of the employer's cables. When the employee arrived on the scene in a company vehicle, the foreman made a reasonable assumption that the employee had authority from the employer over the cable. To the extent this assumption was not true based on express authority, the employee likely had apparent authority. An employee has apparent authority in such a case because the outward appearance to a reasonable person suggests the employee has authority from the employer. Here, as previously stated, arriving in a company vehicle to the scene of an accident involving company property strongly suggests the employee has authority. Therefore, when the foreman listened to the employee's direction to pick up the cable, the employee was acting under apparent authority. Moreover, as the employer's agent, the employee's statements are admissible against the employer in any action under

statement of party opponent. This evidentiary theory of agency law is also available to hold the employer liable for the employee's action in the event of a trial.

C. The telephone company's employee's actions were the proximate cause of the foreman's injuries.

To be liable for negligence, there must be both actual and proximate cause. Here, the employee's actions were the actual cause of the foreman's injuries because, but for the employee telling the foreman to pick up the damage cable, the cable would not have fallen and struck the truck carrying asphalt which eventually resulted in the injury to the foreman. The real issue is whether the employee's actions were the proximate cause.

In order for there to be proximate cause, there must be foreseeability. While the telephone company has a strong argument that the string of events were so attenuated they could not be a proximate cause because they were not foreseeable, this argument either falls as a matter of law or will go to the jury to decide. Here, it would ordinarily not be foreseeable that a cable falling could lead to hot asphalt spilling on the foreman. This leads to the argument that the asphalt truck was a superseding intervening cause that cuts off liability to the telephone company. However, it is foreseeable that a cable that is broken and lifted into the air may fall. It is also foreseeable that when one lifts a broken cable wire over a highway it may fall on a vehicle, and that an accident may occur which injures people nearby. While the employee's actions are not a direct cause of the foreman's injury, they are an indirect cause, and based on the chain of foreseeable events, they likely are a proximate cause of the foreman's injuries. Therefore, the telephone company will be liable for its employee agent's actions that caused the foreman's injuries. At a minimum, this case will go to a jury to determine whether proximate cause exists.

QUESTION #5

Seven years ago, a married couple had a daughter.

Recently, the mother joined a small religious group. The group's members are required to contribute at least half their earnings to the group, to forgo all conventional medical treatments, and to refrain from all "frivolous" activities, including athletic competitions and sports. The mother has decided to adhere to all of the group's rules.

Accordingly, the mother has told the father that she has given half of her last two paychecks to the group and that she plans to continue this practice. The father objects to this plan and has accurately told the mother that "we can't pay all the bills without your salary."

The mother has also said that she wants to stop giving their daughter her prescribed asthma medications. The father opposes this because the daughter has severe asthma, and the daughter's physician has said that regular medication use is the only way to prevent asthma attacks, which can be life-threatening. The mother also wants to stop the daughter's figure-skating lessons. The father opposes this plan, too, because their daughter loves skating. Because the father works about 60 hours per week outside the home and the mother works only 20 hours, the father is afraid that the mother will do what she wants despite his opposition.

The mother, father, and daughter continue to live together. They do not live in a community property jurisdiction.

1. Can the father or the state child welfare agency obtain an order
 - (a) enjoining the mother from making contributions from her future paychecks to the religious group? Explain.
 - (b) requiring the mother to take the daughter to skating lessons? Explain.
 - (c) requiring the mother to cooperate in giving the daughter her prescribed asthma medications? Explain.
2. If the father were to file a divorce action against the mother, could a court award custody of the daughter to him based on the mother's decision to follow the religious group's rules? Explain.

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REPRESENTATIVE GOOD ANSWER
QUESTION 5**

1. The state and father will probably be unable to intervene unless the health or safety of the child is at issue.
 - (a) Based on the facts given it does not appear that either party can force the mother from making contributions. The mother is earning an income; the money she is contributing to the church is from her employment check, not his. Although the father does not agree with the use of these funds, he does not appear to have any legal ground for forcing her to stop contributions. Further, the welfare agency would only become involved if the child appeared to be in danger. The facts state that the father also makes a healthy income and thus probably has enough to support the child.
 - (b) Neither the father nor the state can force the mother to take the daughter to the skating lessons. As a parent they have a fundamental right in raising their child. Where there is no threat of violence or safety concerns for the child, the state would be unable to step in. Here, the mother is simply refusing to take the daughter to skating lessons. While the father also has the same rights as the mother it does not appear that she is forbidding or preventing him from taking her, though his schedule will most likely prevent him from doing so. Unfortunately, the father will probably be unable to intervene in this case.
 - (c) The mother's refusal to give needed medication to the daughter will most likely allow for an action against her by either the father or the State. The State has an interest in the health and safety of a child. The facts state that the daughter has severe asthma that is life-threatening without medication. Here, we would have to weigh these concerns against the mother's religious beliefs. In this instance, safety concerns for the child are out-weighed by the mother's right to raise her child accordingly to her religious beliefs. Further, the father has a say in these beliefs and certainly wants his daughter to have proper medical care. A court would most likely award the father legal rights in making decisions for the child and enjoin the mother from not giving medicine to her daughter.
2. Yes, a court could certainly award custody to the father.

When determining the custody of the child, the court uses the Best Interest of the Child Factors. These factors include:

1. Child Preference
2. Primary care-taker
3. Financial situation of parents
4. Domestic Abuse
5. Keeping children together

Here, we are talking about a single child, thus there are no children to keep together. There is also no stated domestic abuse, however, the mother's failure to give needed medication would certainly be considered. The child would most certainly prefer her father because he allows the medicine and for her to figure skate, something she loves. Her age weighs into this factor; the older she is the greater weight it may have with the court, although a court need not listen. The mother appears to be the primary caregiver because she is at home more, though the father certainly appears involved. Finally, the father is more financially stable and would better be able to handle the burden of the child. As a result, the factors are in the father's favor. He would most likely get the greater share of custody, but at this point, a joint custody situation is the likely result. I would imagine the court granting custody Monday – Friday to the father for the sake of the daughter's schooling. The mother would most likely get every other weekend, as well as time during school vacations and during the summer. However, if the concerns for the daughter's health increase, this may change in the future.

It is important to note that the test is the best interests of the child. The mother has a right to religious freedom and to raise her daughter. Thus the court could not base its decision on the mother's decision to follow the religious group's rules. Though a result of one of the rules affects the safety and health of a child and this result can certainly be taken into account.

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QUESTION #6

The city police department received a 911 call regarding a domestic violence incident. The caller said that she was staying with her sister and her sister's boyfriend. The caller said that she had called the police because her sister's boyfriend was becoming violent. The police department records all 911 calls. The relevant portions of the 911 recording are as follows:

Caller: My sister's boyfriend is out of control right now. He just threw a broken beer bottle at my sister. It hit her on the arm. Now he's holding a chair like he's going to throw that at her, too.
Police Dispatcher: Where is your sister?
Caller: She's running toward the bathroom.
Police Dispatcher: Is she injured?
Caller: I see some blood on her arm.
Police Dispatcher: Does he have a gun?
Caller: I don't see a gun.

A nearby police officer arrived on the scene five minutes after the caller telephoned 911. The police officer found the boyfriend pacing in the front yard and ordered him to sit in the rear seat of the patrol car. The boyfriend sat in the patrol car, and the officer locked the door from the outside so that the boyfriend would stay in the car while the officer spoke to the sister.

When the sister saw that her boyfriend was locked in the patrol car, she came out on the porch to speak with the officer. The sister was in a highly agitated and emotional state, and she had several fresh cuts on her right arm. The officer asked her how she got the cuts. The sister replied, "My boyfriend threw a bottle at me which cut my arm." The sister declined the officer's offer of medical assistance but said that she wanted to press charges against her boyfriend. The sister was in tears throughout her conversation with the officer.

The boyfriend was charged in state court with battery and disorderly conduct. The prosecutor made every effort to secure the appearance of both the sister and the caller at trial, but when the trial began, the sister and the caller did not appear.

The prosecutor is attempting to convict the boyfriend without trial testimony from the sister or the caller. The prosecutor plans to introduce the caller's statements to the police dispatcher and to call the officer to testify and to repeat the statements the sister made to him at her house to prove that the boyfriend attacked the sister.

The 911 recording containing the caller's statements to the police dispatcher has been properly authenticated. Defense counsel has objected to the admission of (1) the caller's statements to the police dispatcher on the 911 recording and (2) the officer's testimony repeating the sister's statements to the officer (at her house). Defense counsel asserts the following:

- a) The caller's statements to the police dispatcher are inadmissible hearsay.
- b) Admission of the caller's statements to the police dispatcher would violate the boyfriend's constitutional rights.
- c) The officer's testimony repeating the sister's statements is inadmissible hearsay.
- d) Admission of the officer's testimony repeating the sister's statements would violate the boyfriend's constitutional rights.

This jurisdiction has adopted rules of evidence identical to the Federal Rules of Evidence and interprets the provisions of the Bill of Rights in accordance with relevant United States Supreme Court precedent.

How should the trial court rule on each defense objection? Explain.

**MINNESOTA BAR EXAMINATION
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REPRESENTATIVE GOOD ANSWER
QUESTION 6**

Issue 1: Are the caller's statements to the police dispatcher inadmissible hearsay?

Hearsay is an out of court statement offered to prove the matter asserted. Generally, exceptions to the inadmissibility of hearsay exist because they are reliable. In this case, the prosecution wants to offer the caller's statements into evidence to prove that the boyfriend attacked the sister. This is an out of court statement since it was made at the time and scene of the crime, and it is offered to prove the matter asserted that the boyfriend attacked the sister. It is hearsay.

It is admissible, however, as a present sense impression. A present sense impression is a statement that describes what is happening or just happened. This is the case here since the caller called 911 while the dispute was happening and described what was happening at each point throughout the dispute. The caller described that she saw the boyfriend just throw a beer bottle and that he was holding a chair to throw and that her sister was running toward the bathroom. This series of statements are admissible as a present sense impression exception to hearsay and the court should overrule the defense's objection to this evidence.

Issue 2: Is admission of the caller's statements to the police dispatcher in violation of the boyfriend's constitutional rights?

A defendant has the constitutional right to confront the witnesses called to testify against him. Here, since the witness is not in court and unable to be cross-examined by the defense, the D is not able to confront a witness whose statements are being offered as evidence against him. This right, however only applies to testimonial evidence; it does not apply to non-testimonial evidence. Non-testimonial evidence is statements given to law enforcement in order to deal with an on-going emergency. Here, the caller's statements are non-testimonial since they were given to the police dispatcher during the violent dispute in an effort to obtain help to deal with a present and on-going threat since the boyfriend was still engaging in violent and unpredictable behavior. Thus, the court should deny the defense's objection to admitting the caller's statements since it is not in violation of D's constitutional rights.

Issue 3: Is the officer's testimony repeating the sister's statements inadmissible hearsay?

The sister's statement that "my boyfriend threw a bottle at me which cut my arm" is an out of court statement because it was made at her house. It is also offered to prove the fact that the boyfriend threw a bottle at her that cut her arm. Thus, it is hearsay. It may be a present sense impression since the action had just ended a couple minutes before and the sister was still under the heat of the moment as she was highly agitated,

emotional, and crying. This evidence isn't as strong as the caller's statements above because they were given while the action was happening. The sister's statement, however, will likely qualify as a present sense impression since barely any time had passed since the dispute had ended and she was still under the stress from the situation, explaining what happened just moments before. The court should deny the defense's objection to this evidence as it is an exception to hearsay.

Issue 4: Is admission of the officer's testimony repeating the sister's statements a violating of the D's constitutional rights to be confronted with the witnesses against him?

The rule noted above for testimonial vs. non-testimonial is incorporated by reference here. Regarding this statement, it is more likely that the sister's statement is testimonial in nature. Because the boyfriend was secured in the car, the emergency was over. The sister was not still dealing with an on-going emergency of which she was soliciting help. The danger was over. Thus, this testimony is more testimonial than non-testimonial. The court should grant the defense's objection on the grounds that its admission violates the D's constitutional rights.

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QUESTION #7

On May 1, a manufacturer and a chef met at a restaurant trade show. The manufacturer showed the chef some carving knives that were on sale for \$100 each. After examining the knives, the chef said, "I love these knives! I'll take 10 of them. Please send them to my restaurant within the month. As soon as I receive them, I'll send you a check for \$1,000." The manufacturer said, "I'll ship the 10 knives to your restaurant in a few weeks," and he took the chef's address for shipping purposes.

On May 15, the manufacturer sent six knives to the chef. Enclosed in the shipping box was a document on the manufacturer's letterhead that stated in its entirety: "It is a pleasure to do business with you. Enclosed, pursuant to our agreement, are six knives. Please remit \$600 at your earliest convenience."

On May 17, the chef sent the manufacturer a check for \$600 and included in the envelope an unsigned note to the manufacturer, handwritten on plain paper, requesting the remaining four knives. The manufacturer did not respond to the note.

The knives were particularly well-suited for the chef's uses, and the \$100 price was a bargain, so the chef was very eager for the manufacturer to deliver the remaining four knives. On June 17, the chef wrote to the manufacturer claiming that the manufacturer was contractually bound to sell the chef 10 knives and that the manufacturer had breached that contract by furnishing only 6 knives. The manufacturer did not reply to the chef's letter.

Is there an enforceable contract against the manufacturer that binds him to sell 10 knives to the chef? Explain.

**MINNESOTA BAR EXAMINATION
JULY 2013
REPRESENTATIVE GOOD ANSWER
QUESTION 7**

Is there an enforceable contract between Manufacturer and Chef?

In this case, there is likely no enforceable contract between the chef and the manufacturer for the sale of 10 knives because the manufacturer will be able to assert the Statute of Frauds as a defense.

Contracts for the Sale of Goods under Article 2

Under Article 2 of the UCC, a sale of goods for more than \$500 must be evidenced by one or more writings that include material terms, the identity of the parties, the identity of the subject matter of the contract and the 'signature of the party to be charged'. Most contract law requires that the price be included in the contract under the Statute of Frauds, but under Article 2, a 'reasonable price' will be filled into the contract if it is excluded.

In this case, the sale the chef wishes to enforce is a sale for 10 knives at \$100 a piece which brings the total to \$1,000. Therefore, the Statute of Frauds applies. However, any oral contract can be evidenced by performance and even though the dealings between the merchant and the chef on May 1 were strictly oral, the Manufacturer's delivery of 6 knives on May 15 along with the letter on the Manufacturer's letterhead satisfied performance for those 6 knives. In fact, the chef's response on May 17 with a check for \$600 made that an enforceable contract between the parties. However, an enforceable contract for only 6 knives for \$600.

If the chef wishes to hold the manufacturer to the contract based on the 'battle of the forms' there are two problems to this argument:

- 1) Material terms differ and
- 2) The Statute of Frauds

The Mirror Image Rule

Usually, under the Mirror Image Rule, an acceptance is only valid if it is an acceptance of the offer under the offer's terms. Otherwise, it is a rejection of the first offer and a counteroffer. Under Article 2, however, a 'seasonable expression of acceptance' along with more terms will be a valid acceptance without the new terms in the 'acceptance'. However, an exception is made to the terms so long as both parties are merchants and the terms are not material to the contract. In this case, there is no doubt that the number of knives to be delivered is a material term and the only enforceable contract between the parties is therefore for 6 knives.

The Statute of Frauds

Even if the chef were able to argue around the 'material terms' and the Mirror Image Rule, the ultimate decider in this case is the fact that a contract for 10 knives must be signed by the party to be charged in order to be enforceable. A merchant's letter on the merchant's official letterhead is deemed satisfactory of a signature. However, in this case, the manufacturer's letterhead is on the letter which evidences a contract for 6 knives. Therefore, in order for the chef to enforce a contract for 10 knives, the manufacturer would have had to sign the chef's handwritten note of May 17.

Because the manufacturer did not respond, and did not sign the handwritten note for a further 4 knives (for a total of 10) there is no enforceable contract for the sale of 10 knives.

Suit for Specific Performance

P.S. A further issue in this case would be the remedy that the chef would be able to get from the manufacturer even if there were a valid contract for 10 knives. Specific Performance is only available in land sale contracts and when the plaintiff can show a good is rare or unique. It is unlikely he will be able to get another 4 knives unless he is able to show that these knives are somehow Rare or Unique in the business. Although the facts say the knives are specifically suited to his work that does not rise to the level of 'rare' or 'unique'. Without more, the chef will simple be able to get his expectation damages: the fair market value of those knives.

QUESTION #8

Twenty years ago, John and Mary were married. One month before their wedding, John and Mary signed a valid prenuptial agreement in which each of them waived “any property rights in the estate or property of the other to which he or she might otherwise be legally entitled upon the termination of their marriage by death or divorce.”

Seventeen years ago, John executed a valid will, which provided as follows:

I, John, leave my entire estate to my wife, Mary. However, if I should hereafter have children, then I leave three-fourths of my estate to my wife, Mary, and one-fourth of my estate to my children who survive me, in equal shares.

Fifteen years ago, John had an extramarital affair with Beth, who gave birth to their child, Son. Both Beth and John consented to Son’s adoption by Aunt. At the time of the adoption, Beth, John, and Aunt agreed that Son would not be told that he was the biological child of Beth and John.

Three years ago, Aunt died, and Son moved into John and Mary’s home. At that time, John admitted to Mary that he had had an extramarital affair with Beth which had resulted in Son’s birth.

Three months ago, Mary filed for divorce. Nonetheless, she and John continued to live together.

One month ago, before John and Mary’s divorce decree was entered, John was killed in a car accident. John’s will, executed 17 years ago, has been offered for probate. John’s will did not designate anyone to act as the personal representative of his estate.

John was survived by Mary, Son, and John’s mother.

1. To whom should John’s estate be distributed? Explain.
2. Who should be appointed as the personal representative of John’s estate? Explain.

**MINNESOTA BAR EXAMINATION
JULY 2013
REPRESENTATIVE GOOD ANSWER
QUESTION 8**

1 Who should get the estate?

The entire estate should be awarded to John's wife Mary.

Twenty years ago, the parties had a valid prenuptial agreement. Consenting adults are free to enter into prenuptial agreements, just like most other contracts, and those agreements may govern the disposition of property on death or divorce of the couple. Here, the facts state that the prenuptial agreement was valid, so it would have governed the disposition of property on the death or divorce of Mary and John. In this case, Mary would not receive any property.

However, the valid will which John executed three years later effectively revoked the prenuptial agreement and provided for an alternate disposition of property on death. A subsequently executed will overrides inconsistent provisions in a previous prenuptial agreement, thus, the will executed by John would validly leave his estate to Mary, even though that is contrary to the prenuptial agreement. Had the prenuptial agreement governed, then the gift to Mary would be stricken from the will and one quarter of the estate would go to John's children and three quarters of the estate would fall to the intestate estate (which would give the entire estate to John's children since the prenuptial agreement precludes Mary's taking).

When John had Son 15 years ago, Son would have taken under the will if he had survived John. The will written by John states that if he should hereafter have children, then one fourth would go to those children in equal shares. The will makes no requirement that the children be born of John and Mary, only that they be John's children. Common law used to prevent extramarital children from taking under a class gift to "children" but under most modern statutes that is no longer the rule. As such, when Son was born, he would have taken under John's will.

However, when Son was adopted by Aunt, his legal claim to inherit under John's will was cut off because he was no longer legally John's "child." If both parents consent, a child may be given up for legal adoption. When that child is legally adopted, legal ties with the original parents are cut, and that child will no longer inherit from biological parents under intestacy statutes and will no longer be considered the legal "child" of the biological parents. Thus, when Aunt adopted Son, he legally became the child of Aunt, and was no longer the legal child of John. As such, the class gift to John's "children" no longer applied to Son because he was no longer a child of John. There is an exception to this rule for step-parent adoption, but that does not apply here.

When Aunt died and Son moved in with John and Mary, that did not change his legal status as no longer one of John's "children." John did not re-adopt Son, nor are there any facts indicating that the court should apply adoption by estoppel (such as a promise

to adopt Son). Additionally, it is not clear from the facts that Son was ever aware he was John's biological child. Thus, Son's moving back in with John and Mary had no legal effect on his ability to take under the will. If, however, John had maintained his legal ties (or re-established his legal ties) to Son, then Son would take one fourth of the estate under the will.

Mary's filing for divorce would have prevented her from taking under the will, had John been alive at the time the divorce decree was entered. Normally, when a couple divorces, they are treated as having predeceased each other in their respective wills. However, this does not become effective until a divorce decree is actually entered by the court, not when the divorce is filed. Had the decree been entered, Mary would be treated as having predeceased John and she would not take under the will. However, because the decree was not final, Mary will not be read out of the will, and the gift to her will be valid.

Thus, because John's will dictates the disposition of his property, Mary will take all of John's estate. As described above, because Son was adopted by Aunt, he is not legally a "child" of John, and thus he will not take under the class gift to John's children who survive him.

2 Personal Representative

The court should appoint Mary as the personal representative of John's estate. The personal representative of the estate is the person charged with disposing of the deceased estate per the terms of their will. At the time of John's death, as described above, Mary was still legally John's spouse and she is the primary taker under the will of John's entire estate. Son would not be named the personal representative because he is neither a taker under the will, nor has he reached the age of majority (18 in most locations). Beth should not be named the personal representative because she is neither a taker under the will nor is she related to John. However, a court may decide that, in light of the divorce proceedings between John and Mary, that John's mother should be the personal representative of John's estate.