MPT 1
July 2020

In re Alice Lindgren **(July 2020, MPT-1)**
In this performance test, the examinee works for Neighborhood Immigration Services, a nonprofit immigration law office, which is representing Alice Lindgren in her petition for a U visa. U visas are meant to encourage immigrant victims of crime, who might otherwise be afraid to interact with law enforcement, to report crime and assist in the investigation or prosecution of crime. Lindgren, a native and citizen of Sweden, came to Franklin as a graduate student in the University of Franklin's architecture program. About six months ago, Lindgren was mugged late at night close to campus. She sustained some physical injuries during the assault and continues to suffer from post-traumatic stress disorder (PTSD). The perpetrator was apprehended and ultimately convicted. Lindgren assisted the prosecution and testified at trial. Her student visa has now lapsed, however, and the law firm has determined that she likely qualifies for a U visa. The examinee's task is to prepare a persuasive cover letter to the United States Citizenship and Immigration Services on Lindgren's behalf, making the argument that Lindgren meets all requirements for a U visa. The File contains the instructional memorandum from the supervising attorney, the office guidelines for cover letters to USCIS, Lindgren's affidavit, a police report, a case-status memorandum, a letter from Lindgren's psychologist, and a printout from the Crimmigation Experts listserv. The Library contains excerpts from the Immigration and Nationality Act § 101(a)(15)(U), Title 8 of the Code of Federal Regulations § 214.14, and excerpts from the Franklin Penal Code.

July 28, 2020

USCIS
Franklin Service Center 119 Exchange St.
Franklin City, FR 33705

Re: Alice Lindgren A 21-454-988
Form I-918 Petition for U Nonimmigrant Status

Dear USCIS Officer:

We represent Alice Lindgren in her Form I-918 Petition for U Nonimmigrant Status. We submit this letter, Ms. Lindgren's Form I-918, and documents in support of her petition for a U visa.

Under INA § 101(a)(15)(U) an alien qualifies for a U Visa if (I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity, (II) the alien possesses information concerning qualifying criminal activity, (III) the alien has been helpful . . . to a law enforcement official . . . or prosecutor . . . in investigating or prosecuting qualifying criminal activity, and (IV) the qualifying criminal activity violated the laws of the United States or occurred in the United States. For the reasons discussed below, Ms. Lindgren meets all of the eligibility requirements and her U Visa application should be approved.

I. Ms. Lindgren has suffered substantial physical and mental abuse as a result of having been a victim of qualifying criminal activity.

A. Ms. Lindgren has suffered qualifying physical and mental abuse.

Under 8 C.F.R. § 214.14, physical or mental abuse is defined as "injury or harm to the victim's physical person, or harm or impairment of the emotional or psychological soundness of the victim." Ms. Lindgren's injuries clearly satisfy the requirement for abuse, as she suffered both physical and emotional/psychological harm as a result of the crime. In terms of physical harm, when her assailant appeared, Ms. Lindgren attempted to flee and consequently fell down on bare concrete, injuring her wrist and scraping her face. In terms of psychological harm, since the crime Ms. Lindgren has had significant emotional problem. She has dropped out of her graduate architecture program, is afraid to go out at night or onto

the university campus where the crime occurred, has trouble sleeping and experiences nightmares, and has begun seeing a counselor to deal with post-traumatic stress. The counselor that she has been seeing, Dr. Charles Einhorn, states that Ms. Lindgren has been suffering from intense anxious and fearful feelings and thoughts, and also post-traumatic stress disorder (PTSD) directly related to the robbery.

B. The abuse was substantial.

8 C.F.R. § 214.14(b)(1) defines "substantial" abuse as being based on a number of factors, including but not limited to: the nature of the injury inflicted or suffered, the severity of the perpetrator's conduct, and the extent to which there is permanent or serious harm to the mental soundness of the victim. There is no single factor that is a prerequisite to establish that the abuse suffered was substantial; rather, a series of acts taken together may be considered to constitute substantial physical or mental abuse even where no single act alone rises to that level. Here, the test for substantial abuse is clearly met. In terms of the enumerated factors, the physical injuries that Ms. Lindgren suffered were serious, as the fall injured her wrist and face. She also has suffered a variety of psychological harms. The perpetrator's conduct was severe, as he approached Ms. Lindgren when she was in a vulnerable position and alone at night in a "seedy" area. And the last enumerated factor is the most persuasive, as the mental harm that Ms. Lindgren suffered was extremely serious and potentially permanent, as evidenced by the multiple manifestations (anxiety, fearfulness and PTSD) and the fact that the effects persist to this day. An additional fact that should be considered is that Ms. Lindgren's harm is exacerbated by her isolation. Following the robbery, Ms. Lindgren broke up with her long-term boyfriend and all of her friends and family are still in Sweden. In summary, even if any one of the previously mentioned factors is deemed independently insufficient, a proper analysis considers the totality of the circumstances. Here, the combination of Ms. Lindgren's physical and psychological harms clearly rises to the level of substantial abuse.

C. The criminal activity she was a victim of is qualifying.

8 C.F.R. § 214.14(a)(9) defines a qualifying crime or criminal activity as including certain enumerated activities in violation of Federal, State, or local criminal laws or any similar activities. The term "any similar activity" is defined as referring to criminal offenses in which the nature and elements of the offenses are substantially similar to the statutorily enumerated list of criminal activities. One of the enumerated

criminal offenses is felonious assault. In Franklin, felonious assault is codified under Franklin Penal Code § 22 as aggravated assault. Although Ms. Lindgren's perpetrator was charged and convicted of robbery and not aggravated assault, the nature and elements of robbery are substantially similar to the nature and elements of felonious assault under their respective Franklin Penal Code provisions. Specifically, the elements for aggravated assault and robbery both essentially involve the requirements that one must intentionally or recklessly cause or threaten bodily injury to another person. The only significant differences are that under aggravated assault, the injury must be serious or done with a deadly weapon. However, this difference does not outweigh the significant similarities and overlap between the nature and elements of the two. The elements of both crimes are substantially similar and essentially involve actions where the perpetrator causes or attempts to cause harm to another. That is exactly what occurred in Ms. Lindgren's case.

Accordingly, under Franklin law, robbery is a "similar activity" to felonious assault and Ms. Lindgren was the victim of qualifying criminal activity.

In summary, Ms. Lindgren has suffered substantial physical and mental abuse as a result of having been a victim of qualifying criminal activity, and therefore this requirement is satisfied.

II. Ms. Lindgren possessed information concerning qualifying criminal activity.

8 C.F.R. § 214.14(b)(2) requires that the alien possesses credible and reliable information establishing that she has knowledge of the details concerning the qualifying criminal activity upon which her petition is based. The facts must be specific, leading a certifying official to determine that the petitioner has provided assistance to the investigation or prosecution of the qualifying criminal activity. Here, Ms. Lindgren possessed specific information about the robbery. She was able to describe the appearance of the perpetrator, the getaway car, and the first three numbers of the license plate.

Additionally, Officer James Sanders at the Franklin City Police Department certified that Ms. Lindgren was the victim of robbery, and that she has been helpful in the investigation and prosecution of the robbery. Thus, this requirement is satisfied.

III. Ms. Lindgren was helpful to law enforcement and prosecutors in investigating

and prosecuting the qualifying criminal activity.

8 C.F.R. § 214.14(b)(3) requires that the alien has been helpful to the certifying agency in the investigation or prosecution of the qualifying criminal activity upon which her petition is based. Here, Ms. Lindgren assisted the police with their investigation and testified at the perpetrator's trial. Moreover, Officer James Sanders at the Franklin City Police Department certified that Ms. Lindgren was helpful in the investigation and prosecution of the robbery. Thus, this requirement is clearly satisfied.

IV. The qualifying criminal activity occurred in the United States.

This requirement is also satisfied, as the robbery took place across the street from the University of Franklin campus, located in the state of Franklin.

In conclusion, Ms. Lindgren meets all four eligibility requirements set out under INA § 101(a)(15)(U), and her U Visa application should accordingly be approved.

Please contact me should you have any questions or require any additional information. We thank you for your consideration of Ms. Lindgren's petition.

Elizabeth Saylor, Supervising Attorney
cc: Alice Lindgren

Enclosures

MPT 2
July 2020

***Fun4Kids Terms of Service Agreement* (July 2020, MPT-2)**

In this performance test, the examinee's law firm represents Fun4Kids Inc., a client planning to start a commercial internet service designed to provide educational games for children ages 11 through 14. Because there are both federal and Franklin state laws and regulations governing websites aimed at children, the owner of Fun4Kids seeks legal advice regarding the appropriate "terms of service" agreement for the website. In particular, Fun4Kids must navigate regulations that set limits on what personal information may be obtained from children of certain ages, when and how parental consent must be obtained, and the circumstances under which a child's personal information may be disclosed to third parties. The examinee's task is to prepare a memorandum for the supervising attorney identifying the issues raised in the client interview and making recommendations as to how to address those issues. The File contains the instructional memorandum, the transcript of the client interview, and excerpts from a Federal Trade Commission press release concerning a fine levied on Persimmon Inc., an online service for children, to settle a complaint alleging violation of the law. The Library contains excerpts of the Children's Online Privacy Protection Act (COPPA), 15 U.S.C. § 6501 et seq.; excerpts of Federal Trade Commission regulations under COPPA; a Franklin Civil Code provision dealing with disaffirmance of contracts; excerpts of the Franklin Children's Protection on the Internet Act dealing with prohibited online advertising for children; and a Franklin appellate case addressing the difference between "browsewrap" and "clickwrap" terms of service agreements.

MEMORANDUM

To: Tony Briotti
From: Examinee
Date: July 28, 2020
Re: Terms of Service Agreement for Fun4Kids

Issue: Whether Fun4Kids should use a "browsewrap" or "clickwrap" terms of service agreement.

Analysis and Recommendation: Fun4Kids should use a clickwrap agreement.

A browsewrap agreement typically has links to a website's terms of service, but the user's consent is deemed given by the mere use of the website, without the need to click on an "Agree" or "Disagree" button. *Sampson Scientific Foundation*. A clickwrap agreement requires clicking "Agree" or "Disagree." *Id*. In Franklin, browsewrap agreements are not necessarily binding, but rather depend on fact-specific scenarios. *Id*. A clickwrap agreement, however, is valid and binding in Franklin. *Id*.

In *Hartson v. Hobart* (Fr. Ct. App. 2011), the validity of a browsewrap agreement was at issue. The Franklin Court of Appeal concluded that, because no affirmative act is required by the website user to agree to the terms of a contract other than his or her use of the website, the determination of the validity of a browsewrap contract depends on whether the user has actual or constructive knowledge of a website's terms and conditions. *Sampson Scientific Foundation*. Noting that the overwhelming majority of users of the service were unsophisticated, the court found that users did not have actual or constructive knowledge and that the browsewrap agreement was non-binding. *Id*.

Conversely, in *Sampson Scientific Foundation, Inc. v. Wessel*, the Franklin Court of Appeal was tasked with determining the validity of clickwrap agreement. In that case, Wessel, an associate professor, was granted access to Sampson Scientific's research website. *Id*. Each user of the website was required to explicitly "Agree" or "Disagree" to the terms of service by clicking the appropriate button each time the user accessed Sampson Scientific's website. *Id*. Sampson brought a breach of contract action alleging Wessel violated the clickwrap agreement and Wessel contended the agreement was non-binding. *Id*. Contrasting that case with *Hartson*, the court concluded that clickwrap agreements are binding in Franklin because they

provide adequate notice to users.

Therefore, Fun4Kids should use a clickwrap agreement because it is binding in Franklin.

Issue: Whether Fun4Kids needs to obtain parental consent prior to their children's use of Fun4Kids' product.

Analysis and Recommendation: Fun4Kids should obtain parental consent before children use Fun4Kids' product.

Under Franklin law, a contract made by a person before he or she has attained the age of 18 years may be disaffirmed by that person's parent or guardian. Franklin Civil Code § 200.1.

Here, Franklin law provides that a contract is voidable if it was entered into by a minor without parental consent. As such, in order to bind a child user to the terms of any service agreement offered by Fun4Kids, a parent of the child, or a legal guardian, must provide consent. In order to comply with Franklin law, Fun4Kids should make its clickwrap agreement explicitly state that parental consent is required before a child is to access Fun4Kids' product. It is crucial for Fun4Kids to do this, because its intended target market is kids ages 11 to 14.

Issue: Whether Fun4Kids needs to obtain parental consent prior to use of children's personal information for advertising purposes.

Analysis and Recommendation: Fun4Kids needs to provide notice to parents, obtain verifiable parental consent prior to collection of personal information, provide a reasonable means for a parent to review personal information collected, and not condition a child's participation or use of a Fun4Kids product on the child's disclosing more personal information than is reasonably necessary to participate in such activity.

The Children's Online Privacy and Protection Act (COPPA) states that it is unlawful for an operator of a website or online service directed to children, or any operator that has actual knowledge that it is collecting personal information from a child, to collect personal information from a child in a manner that violates Federal Trade Commission regulations. 15 U.S.C. § 6502(a)(1). The Federal Trade Commission

regulations provide four key requirements for the use and disclosure of personal information obtained from children. 16 C.F.R. § 312.3. First, an operator must provide notice on the website or online service of what information it collects from children, how it uses such information, and its disclosure practices for such information. *Id*. at (a). Second, an operator must obtain verifiable parental consent prior to any collection, use, and/or disclosure of personal information from children. *Id*. at (b). Third, an operator must provide a reasonable means for a parent to review the personal information collected from a child and to refuse to permit its further use or maintenance. *Id*. at (c). Lastly, an operator must not condition a child's participation in a game, the offering of a prize, or another activity on the child's disclosing more personal information than is reasonably necessary. *Id*. at (d).

The first requirement is notice to parents of the use of a child's personal information. Notice must be clearly and understandably written, complete, and must contain no unrelated, confusing, or contradictory materials. 16 C.F.R. § 312.4 (a). Regulations require direct notice to be made to parents. *Id*. at (b). In terms of the contents of the notice, the operator must indicate that it has collected personal information from the child, along with the child's name; indicate that the parent's consent is required for collection, use, and disclosure of such personal information; indicate additional items of personal information the operator intends to collect; include a hyperlink to the operator's notice of its information practices; indicate the means by which a parent can provide verifiable consent; and indicate that if the parent does not provide consent within a reasonable time from the date notice was sent, that the operator will delete the parent's online contact information from its records. *Id*. at (c)(1)(i) - (vi).

The second requirement is verifiable parental consent. Regulations require the operator to give the parent the option to consent to collection without consenting to disclosure of his or her personal information to third parties. *Id*. at § 312.5(a)(2). In terms of consent method, regulations require it to be reasonable given the circumstances and technology. *Id*. at (b)(1). Specifically, an operator may provide a form to be signed; require a parent to use a credit card, debit card, or other online payment system that tracks each transaction; have a parent call a toll-free number staffed by trained personnel; or verify a parent's identity via government-issued identity methods. *Id*. at (b)(2)(i) - (v).

The third requirement is that a parent must retain the right to review personal information provided to the operator by the child. Upon request, an operator must provide the following: a description of the specific types of personal information collected from children, such as name, address, telephone number, email address,

hobbies, and extracurricular activities; an opportunity at any time to refuse use or future use and collection of data, and to delete the child's data; ensure that the requester is the parent of the child and that the parent is not unduly burdened. *Id*. at § 312.6.

The fourth and final requirement is a prohibition against conditioning a child's participation on collecting information. Specifically, an operator may not condition use on the child's disclosing more personal information than is reasonably necessary to participate in such activity. 16 C.F.R. § 312.7.

In summary, Fun4Kids must provide notice, obtain verifiable parental consent, provide reasonable means of parental review, and must not condition a child's use on providing more information than is reasonably necessary. Specifically, Fun4Kids can provide notice by form, clickwrap agreement, or other reasonable means. Next, because Fun4Kids desires to have a significant amount of its payments received by credit card, it should only allow parents to make purchases via credit card. By doing do, it also satisfies the verifiable parental consent requirement, as specific credit card transactions by parents are sufficient for consent under the law. This arrangement also avoids a situation such as that of Persimmon Inc., which issued millions of dollars of refunds after an FTC complaint, and protects Fun4Kids from potentially suspect credit card schemes. Next, any personal data Fun4Kids retains must remain available so that a parent can review the data if necessary. Lastly, Fun4Kids must ensure that it is not conditioning a child's participation on disclosure of more data than is reasonably necessary. Because Fun4Kids would like to provide some of this personal information to advertisers, it must take great care and caution to safeguard the information and make sure no more information than is necessary is being disclosed.

Issue: Whether there are limitations on the types of advertisements Fun4Kids can allow to have on its website.

Analysis and Recommendation: Yes, Fun4Kids needs to ensure no advertisements for any products listed in the Franklin Children's Protection on the Internet Act (CPIA) are present on its website.

Franklin's CPIA requires that an operator of an Internet website, online service, online application, or mobile application directed to minors shall not market or advertise a product or service described in subsection (h). CPIA § 18(a). A "minor" is described as an individual under the age of 18 years. *Id*. Section (h) of the CPIA forbids advertisements for the following products: 1) alcoholic beverages, 2) firearms, handguns, or ammunition, 3) cigarettes or other tobacco products, 4) dangerous fireworks, 5) tickets or shares in a lottery game, 6) permanent tattoos, 7) drug paraphernalia, and 8) obscene matter. *Id*. at (h).

In short, because Fun4Kids' target market is kids ages 11 through 14, it will need to be compliant with section (h) of the CPIA. Fun4Kids should review this list and make sure it does not contract to provide advertising services on its website for any entity involved in advertising items listed in section (h).

MEE Question 1

A woman brought a tort action against a trucking company in a federal district court in State A one month after a traffic accident in State A. The woman had been driving a car that collided with a truck owned by the trucking company and driven by one of its employees. As a result of injuries sustained during the accident, the woman is permanently disabled and unable to work.

The diversity action, which is properly before the federal court, requires a determination of fault. The woman alleges that, at the time of the accident, the truck driver was driving under the influence of prescription narcotics and lost control of his truck on the highway, which caused the collision. The trucking company argues that the woman caused the accident by driving her car at an excessive speed.

The woman will seek to introduce the following three items of evidence:

1. In-court testimony from a trucking company representative that, less than one hour after the accident, the trucking company began an internal investigation into the accident, which resulted in the truck driver's being fired the next day.

2. A handwritten letter the woman received while she was recuperating in the hospital. The letter, dated one week after the accident, read: *"I am terribly sorry about the accident that I caused. It was all my fault. I was taking pain pills prescribed by my doctor and shouldn't have been driving."* The letter was signed with the name of the truck driver. The woman no longer has the original (hard copy) letter, but she has a photograph of the letter that she took with her cell phone.

3. In-court testimony from the truck driver's doctor that the truck driver has suffered from chronic pain for years and that she had prescribed a powerful narcotic to treat that pain one month before the accident. The doctor is licensed in State A, where she has treated the truck driver for many years.

The truck driver will be unavailable to testify at trial because neither party has been able to procure his attendance and his whereabouts are unknown. The woman's cell phone has been examined by a neutral computer expert, who reports that the photograph of the letter is clearly legible and that the image has not been altered in any manner. The doctor has informed the parties that she does not want to testify about her communications with her patient, the truck driver, and that she has had no contact with her patient since the week before the accident.

The defense team will seek pretrial to exclude all three items of evidence proffered by the woman. Assume that the judge will find all three items relevant under Rule 401 of the Federal Rules of Evidence and will refuse to exclude any item of evidence under Rule 403 of the Federal Rules of Evidence.

With respect to each item of evidence that will be proffered by the woman, identify and explain the most plausible objections that the trucking company's defense team could make, any plausible responses the woman's attorney should make to those objections, and how the court should rule.

1. The in-court testimony from a trucking company representative, that less than one hour after the accident, the trucking company began an internal investigation into the accident, which resulted in the truck driver's being fired the next day.

The trucking company should object that such testimony is inadmissible under public policy rules because it is a subsequent remedial measure. Under the Federal Rules of Evidence, a party may not admit evidence of a subsequent remedial measure to show fault. Here, the woman is trying to show that because the company subsequently investigated the accident and fired the driver, it shows that the driver was at fault. Such evidence is inadmissible.

The woman can try to argue that the evidence is admissible for other purposes, such as to show ownership or control, but those issues do not appear to be in dispute. The company is not denying that the driver was its employee. Accordingly, the court should sustain the trucking company's objection.

2. The picture of the truck driver's letter.

The trucking company can make three objections to this piece of evidence. They should argue there are issues with authentication and the best evidence rule. With regard to authentication, the trucking company should argue that there needs to be additional evidence authenticating that the letter was actually written by the driver. In terms of the best evidence rule, or the requirement of the original, the trucking company should argue that the picture is inadmissible copy of the original letter. Finally, the trucking company should object that the letter contains inadmissible hearsay.

The woman should respond that the driver's handwriting provides sufficient evidence of reliability such that the court may determine that the letter was written by the driver. Under the handwriting rule, handwriting may be authenticated by an expert or an individual who is familiar with the handwriting, as long as that person did not become familiar with the handwriting for the litigation. Here, an expert or someone who is familiar with the driver’s handwriting could authenticate the letter and the signature under this rule, as long as the authenticating person did not become familiar with the handwriting to prepare for the trial.

The best evidence rule requires the production of the original document, photograph, recording, or video when the contents of the item are called into question. Typically, duplicates are admissible so long as their authenticity is clear. If a party has lost a document, in the exercise of good faith, the duplicate will be admissible. Here, a neutral computer expert has analyzed the woman's phone and determined that the photograph of the letter is clearly legible and has not been altered in any manner. Because the duplicate's reliability has been verified, the picture of the letter will not be a violation of the best evidence rule.

Assuming the court finds that authentication and best evidence are satisfied, the trucking company should still object that the letter contains inadmissible hearsay. Hearsay is an out of court statement that is offered for the truth of the matter asserted.

Hearsay is inadmissible unless it falls within one of the enumerated exceptions or exclusions. There are several exceptions available depending on whether the declarant, or the one who made the out of court statement, is available or unavailable. Among the exceptions for when a declarant is unavailable are statements against interest. A statement is against the declarant's interest and will be admissible if, at the time it was made, it was against the declarant's pecuniary, proprietary, civil, or criminal interest. A declarant is unavailable if they are absent and their presence cannot be obtained by judicial process, the declarant now lacks any memory, the declarant is dead, or the opposing party wrongfully caused the declarant's unavailability.

Here, the truck driver, as the declarant, is unavailable because neither party has been able to procure his attendance and his whereabouts are unknown. This satisfies the basis for unavailability. Next, the truck driver's statement is an out of court statement because it was written in a letter that was dated a week after the accident. The statement is being offered for its truth to show that the truck driver was negligent and that he was at fault at the time of the accident.

The woman will be successful in arguing that the truck driver's statement is a statement against interest. She can argue that it is a statement against interest because it was against the driver's criminal and civil interest for him to make the statement. Specifically, he is subjecting himself to potential criminal and civil liability by indicating he was at fault, taking pain pills, and should not have been driving. Therefore, the woman can successfully argue the letter is a statement against interest and the court should admit it on those grounds.

3. Testimony by the truck driver's doctor about medical history and treatment.

There is no federally recognized doctor-patient privilege. But the Federal Rules of Evidence devolve privileges to the states when there is an action in diversity. Here, State A's law on privilege would determine whether the doctor can assert this privilege.

Assuming State A has a doctor-patient privilege, the typical privilege bars the entry of communications made to a doctor for the purposes of seeking medical treatment. The privilege is owned by the patient, but generally doctors will assert the privilege on behalf of their patient unless told by the patient to waive the privilege or there has otherwise been a waiver of the information. Here, the statements likely qualify as privileged. The doctor is being asked to testify regarding a man's medical condition and the treatment that she prescribed.

The woman may argue that the privilege has been waived by the truck driver by his letter. A privilege may be waived when its confidential nature is destroyed by intentional disclosure to a third party. When the man sent the letter to the woman disclosing his medical condition and his taking of the pain pills, he may have vitiated the privilege.

The court should not admit this testimony because of doctor-patient privilege, unless it finds it has been waived by the man's actions.

MEE Question 2

A shareholder of Retailer Inc., a publicly traded corporation in the retail business, is concerned about reports in a respected national business magazine that Retailer has been making large donations to a secretive political group, Americans Fighting Against Wrongdoing (AFAW). AFAW places television election advertisements supporting state and federal political candidates who AFAW believes are committed to fighting wrongdoing. The shareholder believes that Retailer's donations to AFAW do not promote Retailer's business in any way.

The shareholder, who owns 100 shares of Retailer stock, has decided to take action. The shares, which the shareholder has held for the past 10 years, have a current market value of $5,000.

The shareholder has sent a letter to Retailer requesting that she be allowed to inspect all minutes of the meetings of Retailer's board of directors relating to donations made by Retailer to AFAW. The shareholder explains that her purpose is to confirm these donations and seek to have the board desist from further waste of corporate assets.

The shareholder has also sent a second letter to Retailer requesting that a proposed shareholder resolution be presented for a vote of the shareholders at the upcoming annual shareholders' meeting. The resolution reads: "We the shareholders of Retailer Inc. hereby resolve that Retailer's board of directors shall not approve any political expenditures by Retailer unless such expenditures are specifically authorized by a majority vote of all outstanding shares of Retailer." The shareholder explains, "This resolution is to stop the board from wasting corporate assets, including by making further donations to AFAW."

Retailer is incorporated in State X, which has adopted the Model Business Corporation Act (MBCA).

1. Under State X law, is the shareholder entitled to inspect the requested board minutes? Explain.

2. Under State X law, is the shareholder's proposed resolution a proper subject for submission to Retailer's shareholders for their vote? Explain.

3. Assuming that the resolution is proper for submission for shareholder action under State X law, would the resolution (if approved) infringe Retailer's First Amendment rights? Explain.

1. The shareholder is entitled to inspect the requested board minutes, if it is for a proper purpose and gives the board at least 5 days' notice. Under the MBCA, a shareholder is generally allowed to inspect general corporate documents at any time. These documents include copies of the shareholder meeting minutes, the annual report, copies of the articles of incorporation/bylaws, and names/addresses of board members. However, if the shareholder is seeking more sensitive corporate materials, the shareholder must request the documents, state a proper purpose, and allow five days for the board of directors to comply. The more sensitive corporate documents include the names/addresses of all shareholders, financial statements, and, importantly here, minutes of the corporation's board meetings. A proper purpose is one that is related to the shareholder's interest in the proper administration of the corporation. Seeking information about potential violations of fiduciary duties by the board of directors is a proper purpose.

Here, the shareholder may inspect the board's minutes provided she waits 5 days for the board to respond. The shareholder sought to enforce her right to inspect the minutes for the express purpose of confirming these donations because she believes they are a waste of corporate assets. The waste of corporate assets would be a violation of the fiduciary duty to Retailer. Because the shareholder requested the sensitive corporate documents with a proper purpose, she should be allowed to inspect the documents with 5 days' notice.

2. The shareholder's proposed resolution is not a proper subject to submission to the shareholder's for a vote. The issue here is whether the proposed resolution improperly restricts the board of directors' discretion to carry on business in their best business judgment. The general maxim under the MBCA is that the shareholders are owners of the company and the directors are the directors of the company. The shareholders are typically permitted to vote on fundamental changes to the corporate structure or sales of substantially all assets. The shareholders are not permitted to dictate corporate policy through shareholder votes. Instead, shareholders can influence corporate policy by electing directors that will implement corporate policy that reflects their views. Political donations and donations to charity historically were not a permitted use of corporate funds. However, now, political and charitable donations may be permitted if their use falls within the business judgment rule. The directors have a duty to act in the best interest of the corporation (the duty of loyalty). They also their actions must be reasonable calculated to benefit the business as another prudent person in like position would do (the duty of care). Political donations are not a per se violation of either duty.

Here, the shareholder's proposal seeks to restrict the business judgment of the directors to create and implement corporate policy. The resolution states that any political expenditures by the board of the directors are subject to a shareholder vote. Political expenditures and donations of such kind benefit from the business judgment rule. So long as the directors are acting in the best interest of Retailer and the political donations are in reasonably related to Retailer's business purpose, then the court will not abide the usurpation of corporate decision making power by the shareholders. Even though the resolution states that it is being made to stop "wasting corporate assets," these complaints may be lodged through a derivative action or simply by replacing the board of directors at the annual shareholder meeting.

3. If approved, the resolution does not infringe upon the Retailer's First Amendment rights. The First Amendment protects the rights of individuals to free speech and expression. Under the broad purview of speech, political donations are typically considered a type of protected speech. In addition, corporations are subject to the same free speech rights in political contributions as individuals. However, the Bill of Rights, as incorporated to the states by the Fourteenth Amendment, is made to protect against state action. Private actors generally are exempt from constitutional challenges. Here, the shareholder's action would likely touch upon the freedom of speech of Retailer Inc. Retailer Inc. as a corporation has the same right to political speech as individuals under the Supreme Court decision in *Citizens United*. However, the restriction on speech is not coming as a result of state action, but rather as a result of private action within the corporation. Because there is no state action, Retailer would not be able to maintain that their constitutional First Amendment rights to political contributions/speech have been violated.

MEE Question 3

Ann, a successful entrepreneur, grew up in a small town in State A. Ann's family could not afford to send her to college, but a group of local store owners, sensing Ann's potential, paid Ann's tuition for college and graduate business school. Twenty years later, in honor of the store owners, Ann created a trust and funded it with $1,000,000.

Under the terms of the trust, the trustee (a local bank) must annually use trust income to purchase and install seasonal plantings on all principal streets in the town where Ann grew up. The trustee is authorized to invade trust principal to purchase and install such plantings if the trust income is insufficient. The trust instrument further provides that the trust will last in perpetuity or until such time as the principal of the trust has been exhausted; no individuals are named as trust beneficiaries. Currently the trust's annual income is $40,000 and the annual cost of seasonal plantings is anticipated to be about $35,000.

Last week, Ann died unexpectedly and without a will. At the time of her death she had $100,000 in a bank account in her name alone. Ann's uncle and niece survive her.

The personal representative of Ann's estate properly filed an action to set aside the $1,000,000 trust on the ground that it is invalid under the common-law rule against perpetuities, which applies in State A. The personal representative also requested judicial approval of a proposal to distribute the assets of the allegedly invalid trust, with the other assets of Ann's estate, to Ann's niece but not to her uncle. Ann's uncle contends that he is entitled to half of Ann's estate.

State A has adopted the Uniform Trust Code.

1. May the trust endure for its stated duration (in perpetuity or until its assets are exhausted)? Explain.

2. Assuming that the trust cannot endure for its stated duration, could a court preserve the trust for any period of time to carry out Ann's intentions? Explain.

3. To whom should Ann's estate be distributed and in what shares? Explain.

1. The trust may endure for the stated duration.

At issue is whether a charitable trust has properly been created.

Under the UTC, an express trust requires: 1) capacity; 2) testamentary intent; 3) a competent trustee; 4) definite beneficiaries; and 5) trust res. Here all elements are easily met except for definite beneficiaries. However, a special type of trust, a charitable trust, does not require definite beneficiaries. Instead, it requires: 1) a charitable purpose; and 2) indefinite beneficiaries. Charitable trusts are not subject to the Rule Against Perpetuities (RAP), and thus can last indefinitely. Conversely, private trusts are subject to RAP and, thus, any interests created thereunder must vest, if at all, within 21 years of the lives then in being. A "Charitable purpose" under the UTC is liberally construed, and includes trusts for created for the purpose of improvements to public land.

Here, the trust was funded with $1 million and was intended to purchase and install seasonal plantings on all principal streets in the town where Ann grew up. This is likely a proper charitable purpose because it is intended to benefit the public at large. The Personal Representative (PR) may argue that there is no proper charitable purpose because it was in honor of the store owners - private parties. If this were true, the trust would not be considered a charitable trust and would fail for want of definite beneficiaries (and even if it didn't fail, it would be limited by RAP). However, this likely is not true because it seems intended to benefit the community as a whole for philanthropic purposes.

Further, "indefinite beneficiaries" is also likely satisfied. The trust itself names no beneficiaries. The PR may argue that the people who benefit from the trust are limited to only the people who live or run businesses on principal streets in her town. In this way, the PR will argue that the beneficiaries are actually a small set of identifiable people. However, this argument is not persuasive because the benefit is not inextricably tied to those people. Rather, to the community as a whole and to people who come in and out of the town on the roads.

Thus, the trust is likely a "charitable trust," is not subject to RAP, and may continue indefinitely.

2. Assuming the trust cannot endure, a court could preserve the trust for any period of time to carry out Ann's intentions.

At issue is whether the court will apply the doctrine of cy pres to conform to the intentions of the settlor of a trust with charitable intentions.

Under the UTC, courts will apply the doctrine of cy pres to preserve distributions of property with charitable purposes. Cy pres means "as close as possible," and allows the court do reform the trust to carry out the intentions of the settlor.

Here, the trust clearly has a charitable purpose as explained above. Therefore, the court would apply cy pres to make it conform to the RAP.

3. To whom should Ann's estate be distributed and in what shares?

Ann has two sets of assets: 1) the $1M trust; and 2) the $100,000 bank account. The trust should be disposed of as explained above - it is not part of the probate estate. At issue is how the laws of intestacy require distribution of the remaining $100K.

Most intestacy statutes assign property as follows: 1) to the decedent's linear descendants; 2) to decedent's parents; 3) to decedent's grandparents' linear descendants or parent's linear descendants, depending on the state. The majority rule is per capita with representation.

Here, if the state includes the grandparent's linear descendants in its intestacy statute, Uncle will take half of the estate because and Niece will take half of the estate. Under per capita with representation, the court would examine the number of living takers, here just the two of them, and divide up the estate based on the representation present in the first generation entitled to taker, which would result in Uncle taking one half and Niece taking one half. In states in which only the parent's linear descendants take under intestacy statutes, Niece will take the entire $100K share because uncle would not be included in the state's intestacy statutes.

MEE Question 4

Ten years ago, a husband and wife were married during a one-day stopover in State A while they were traveling by train on a cross-country vacation. After this trip, the husband and wife returned to their home in State B.

Five years ago, the couple had a child, Sarah, in State B. The wife then quit her job and stayed at home to serve as Sarah's primary caregiver.

Two years ago, the husband was seriously injured when he was struck by a car while walking across a street. After the accident, the husband began drinking to excess. He also became physically and emotionally abusive toward his wife and was convicted of assault after a physical attack led to her hospitalization. The husband has not worked since his injury.

Nine months ago, the wife took Sarah and moved to State A, where the wife's sister lives. The wife did not tell her husband that she was leaving, but she called him a week after arriving in State A, gave him her address, and told him that she intended to remain in State A with Sarah. The wife found a job in State A and moved out of her sister's home and into a nearby apartment. The husband made no effort to contact the wife or Sarah.

One week ago, the wife commenced a divorce action against the husband in State A. In this action, the wife seeks custody of Sarah and a share of the couple's marital property. The husband was personally served with a summons and divorce complaint at his home in State B.

The husband has never been to State A except for the one-day stopover when he and the wife were married there. He owns no assets in State A.

State A law allows for both fault-based and no-fault divorce and requires that either the divorce plaintiff or the defendant have been residing in State A for six months before the plaintiff may file a divorce petition. State A has adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).

1. Does a State A court have jurisdiction to grant the wife

    (a) a divorce? Explain.

    (b) sole physical custody of the couple's daughter, Sarah? Explain.

    (c) a share of the couple's marital property? Explain.

2. Assuming that the State A court has jurisdiction, could the court grant the wife

    (a) a divorce based on the husband's fault? Explain.

    (b) sole physical custody of Sarah? Explain.

1(a). Jurisdiction over divorce

The State A court has jurisdiction to grant wife the divorce. At issue is whether the petitioner is domiciled in the state for the relevant period of time.

For a court to have jurisdiction to grant a divorce the court needs to have jurisdiction over just one of the parties. The court will have jurisdiction over the party if she has been domiciled in the state for the relevant statutory period. Here, State A requires that the one of the parties have been in State A for six months before filing the divorce petition.

Here, wife meets this requirement, as she has resided and been domiciled in State A for 9 months. To be considered domiciled: (1) there must be physical presence; and (2) intent to remain. Here, wife has physically been in State A for 9 months. Additionally, she has the intent to remain as she moved there, found a job and has now found a nearby apartment to stay in. She has no intent of returning to State B. Since, State A has proper jurisdiction over wife for the relevant statutory period, the State A court can grant wife the divorce.

1(b). Jurisdiction over physical custody

The State A court has jurisdiction to grant wife sole physical custody of Sarah. At issue, is whether the court has jurisdiction under the UCCJEA.

Under the UCCJEA, the court with proper jurisdiction over custody will be where the child is "at home." If no state is where the child is at home, then alternatively a state can have jurisdiction if the child has a significant relationship to the jurisdiction and there is substantial evidence in the jurisdiction. A child will be considered "at home" under the UCCJEA if they have lived in the state with their parent or guardian for at least 6 months. However, if a child is wrongfully in the jurisdiction, due to something like kidnapping, the court will not have jurisdiction.

Here, State A court has jurisdiction over custody of Sarah because Sarah is "at home" in State A. She has lived with her mother for the last 9 months (more than 6) in State A, so therefore Sarah is "at home" and the court has jurisdiction to determine custody. Although wife took Sarah with her to State A without husband's knowledge or consent, she informed husband where they are and gave their address. Husband has since shown no interest in contacting Sarah or wife or

arguing that Sarah is wrongfully in State A. Therefore, State A has jurisdiction under the UCCJEA.

1(c). Jurisdiction over marital property

The State A court does not have jurisdiction to grant wife a share of the couple's marital assets. At issue, is whether the court has jurisdiction over both the parties or alternatively the property itself.

In order for a court to have jurisdiction to grant division of property rights the court must have jurisdiction over both the parties or the specific property itself. A court can have jurisdiction over the specific property itself if it is within the state.

Here, State A has jurisdiction over wife (see 1(a)). However, the court does not have jurisdiction over husband. Husband lives in State B. Husband has only ever been to State A for one day, the day they got married. Further, the majority of the ten year marriage occurred in State B. The majority of the couple's assets and marital property is located in State B, so is therefore not in the jurisdiction of State A.

Therefore since the State A court lacks jurisdiction over both parties or the marital property itself, the court cannot grant wife a share of the couple's marital assets.

2(a). Fault-based divorce

Assuming the State A court has jurisdiction (which it does), the court can grant wife a divorce based on the husband's fault. At issue, is whether the elements of fault are met.

Traditionally, states' fault-based divorces require a showing of fault by the defending party, such as: (1) abandonment; (2) adultery; (3) abuse; or (4) incapacity of a spouse. There are common defenses to these fault-based divorces which include: (1) the parties colluding to bring forth fault; (2) both parties are guilty of the offense; (3) the party had permission; and (4) the party forgave the spouse (typically includes reengaging in marital relations).

Here, wife can argue that it is a fault-based divorce because Husband became physically and emotionally abusive towards wife and was convicted of assault after placing the wife in the hospital. This abuse can create the grounds for fault. Husband could try to argue that the parties continued their marital relationship after the abuse

and therefore the wife forgave him. However, there is no evidence to support this argument and although wife did not immediately leave after the abuse, it was reasonable for her to ensure that her and Sarah had a safe place to move before leaving husband. Therefore wife has proper grounds for a fault-based divorce.

2(b). Sole Custody

The State A court should grant the wife sole physical custody. At issue, is whether the wife can overcome the typical presumption towards joint custody.

Typically, courts determine custody weighing a number of factors including: (1) whether the parties agree to joint custody and can get along; (2) whether both parents have mental capacity/character to parent; (3) who has been the primary caregiver; and (4) where the parties reside geographically. Physical custody is the custody of the child's person, whereas legal custody is control over the decisions for the child. The court will look to these factors and determine the best interests of the child.

Here, the factors favor wife getting sole custody of Sarah. First, wife has been the primary caregiver for Sarah since she was born. She has stayed at home with Sarah and cared for her. Second, the parties are not in agreement for joint custody as the wife is seeking sole custody. Further, the parties now reside in separate states making joint custody impracticable.

Additionally, father drinks to excess and has stopped working. He also has a history of abuse, and although not towards daughter, this can weigh against granting him custody. Finally, the husband has shown no interest in being a part of Sarah's life or contacting her for 9 months, since she moved with the wife to State A. Sarah has been with the wife in State A. She is already there. It is likely in her best interests to maintain her stable living environment and relationship with her mother.

Therefore, the court should grant wife sole physical custody of Sarah.

MEE Question 5

On February 1, a company borrowed $100,000 from a bank. Pursuant to an agreement signed by both parties, the company granted the bank a security interest in "all of [the company's] present and future inventory, accounts, and equipment" to secure its obligation to repay the loan. Later that day, the bank filed, in the appropriate filing office, a properly completed financing statement listing the company as the debtor and the bank as the secured party and indicating "inventory, accounts, and equipment" as collateral.

On March 1, the company bought a power generator, for use in the company's business, from a manufacturer. The purchase price of the power generator was $24,000. The manufacturer agreed that the company could pay the purchase price in 12 monthly installments of $2,000 each. Pursuant to an agreement signed by both parties, the company granted the manufacturer a security interest in the power generator to secure the company's obligation to make all the installment payments. Later that day, the manufacturer filed, in the appropriate filing office, a properly completed financing statement listing the company as the debtor and the manufacturer as the secured party and indicating the power generator as collateral. The manufacturer delivered the power generator to the company on March 3.

On April 1, the company entered into an agreement entitled "Lease Agreement" with a supplier. The Lease Agreement, signed by both parties, stated that the supplier was leasing to the company a retinal scanner for use in the company's security system for a fixed term of three years with no right of cancellation by either party. The Lease Agreement also provided that, if the company made each of the 36 required monthly lease payments of $3,000, it would have the option to become the owner of the retinal scanner for no additional consideration. The supplier delivered the retinal scanner to the company on April 2. The supplier did not file a financing statement with respect to this transaction.

The company has defaulted on its obligations to the bank, the manufacturer, and the supplier. The bank and the manufacturer are each asserting an interest in the power generator, and the bank and the supplier are each asserting an interest in the retinal scanner.

1. (a) Does the bank have an enforceable interest in the power generator? Explain.

   (b) Does the manufacturer have an enforceable interest in the power generator? Explain.

   (c) Assuming that both the bank and the manufacturer have enforceable interests in the power generator, whose interest has priority? Explain.

2. (a) Does the bank have an enforceable interest in the retinal scanner? Explain.

   (b) Does the supplier have an enforceable interest in the retinal scanner? Explain.

   (c) Assuming that both the bank and the supplier have enforceable interests in the retinal scanner, whose interest has priority? Explain.

1.

a. The bank has enforceable interest in the power generator because it has an interest in the company's after-acquired equipment.

Article 9 of the UCC governs this transaction because it is a secured transaction. An enforceable security interest is created when (i) the secured party gives value, (ii) the debtor has an interest in the collateral, and (iii) the debtor authenticates a record describing the collateral or the secured party has possession or control of the collateral.

Here, bank has an enforceable security interest in the power generator. First, the bank gave value by giving the company $100,000. Second, the company has an interest in its inventory, accounts, and equipment. Third, the company signed an agreement granting a security interest in the "present and future . . . inventory, accounts, and equipment." This statement sufficiently identifies the collateral. These types of after-acquired designations are enforceable and a security agreement may identify collateral by referring to its type under Article 9.

The power generator is equipment. There are several types of collateral, including inventory, consumer goods, livestock, and equipment. The power generator is not inventory because it is not being offered for sale, but it does fall into the catch-all category of equipment because it is being used in the business. Thus, the power generator falls under the bank's interest because it is after-acquired equipment.

b. The manufacturer has an enforceable security interest in the power generator.

An enforceable security interest is created when (i) the secured party gives value, (ii) the debtor has an interest in the collateral, and (iii) the debtor authenticates a record describing the collateral or the secured party has possession or control of the collateral.

The manufacturer gave value by allowing the company to purchase the power generator on credit. The company has an interest in the collateral because it currently possesses it. And the company signed a record identifying the power generator as collateral. Thus, the manufacturer has an enforceable security interest in the collateral.

c. The manufacturer has the superior interest because it has a purchase-money security interest in the equipment and filed the financing statement

within 20 days of the company's possession.

Both the bank and the manufacturer have perfected security interests. A security interest can be perfected by (i) filing a financing statement in the appropriate office that lists the parties and the collateral, (ii) possession or control of the collateral, or (iii) by automatic perfection. Both the bank and the manufacturer filed financing statements in the appropriate office that met the requirements.

In general, when secured parties have competing perfected security interests, the rule is that the first to file or attach wins. But special rules arise when considering purchase-money security interests.

When a debtor buys collateral on credit or is loaned the money to purchase the collateral, a purchase-money security interest is created. A purchase-money security interest in equipment will have priority, even over other perfected security interests, if the secured party files a financing statement in the appropriate office within 20 days of the possession of the collateral by the debtor.

Here, the company bought the power generator on credit, creating a purchase-money security interest. And the manufacturer filed a financing statement even before the company took possession of the collateral. Thus, the manufacturer's interest has priority over the bank's interest.

2.

a. The bank has an enforceable security interest in the retinal scanner because it has an enforceable security interest in the after-acquired equipment of the company.

For all of the reasons that the bank had an enforceable security interest in the power generator, they also have an enforceable interest in the retinal scanner. The bank gave value, the company has an interest in the collateral, and the company signed an agreement describing the collateral.

Like the power generator, the retinal scanner qualifies as equipment because it is an object used in the company's business but is not being offered for sale.

b. The supplier has an enforceable security interest in the retinal scanner because the transaction was in essence a secured transaction.

Article 9 of the UCC does not apply to leases, but it does apply to any transaction that in reality is a secured transaction. When deciding whether a transaction is a lease or a secured transaction, a court will consider whether the debtor has a right of cancellation and whether the debtor can obtain the collateral at nominal cost following the payments. It does not matter what the transaction calls itself. Here, the transaction is more like a secured transaction than a lease because the supplier was using it to secure payment. The company cannot cancel the transaction and has the option to become the owner of the collateral. Thus, this is a security interest.

Thus, to be enforceable, the transaction must meet the usual requirements. A enforceable security interest is created when (i) the secured party gives value, (ii) the debtor has an interest in the collateral, and (iii) the debtor authenticates a record describing the collateral or the secured party has possession or control of the collateral.

Here, the supplier gave value by allowing the company to purchase the scanner on credit. The company has an interest in the collateral because they currently possess it. And the parties signed a security agreement (labeled a "lease agreement") that identified the scanner. Thus, the supplier has an enforceable security interest.

c. The bank has priority because the supplier did not perfect their interest.

As described above, a party can perfect their interest by filing a financing statement in the appropriate office. Here, the bank did so. They filed a financing statement describing the after-acquired equipment. The supplier failed to perfect their security interest. It did not file a financing statement, nor does it possess the equipment (its lease interest is insufficient), nor does the retinal scanner qualify for automatic perfection. Thus, the supplier's interest is unperfected.

A perfected security interest will have priority over an unperfected security interest, even if the unperfected security interest is a purchase-money interest. Because the bank's interest is perfected and the supplier's is not, the bank has priority.

MEE Question 6

The owner of a two-story building converted it into three two-bedroom apartments. The owner occupied the ground-floor apartment; the other two apartments were rental units. All the apartment interiors had a similar modern look and design. In the apartments, the owner installed standard modern light fixtures in all rooms except the master bedroom of her own apartment, where she installed a gold-plated chandelier. The chandelier was of an ornate, old-fashioned style and did not match the modern light fixtures in her apartment or the other apartments. But because the owner had inherited the chandelier from her mother, she had a strong sentimental attachment to it. In her living room the owner also placed a 65-inch television on a wall mount affixed to the wall over the fireplace. The conversion was completed last year, and immediately upon completion, the owner moved into her apartment.

The owner then wrote the following advertisement and paid to have it published in the local newspaper:

> Two 2-bedroom apartments for rent. Only professional women (but not lawyers) need apply.

Eight individuals applied to rent the apartments. Three were male accountants. Five were women, three of whom were lawyers. The owner told the men that she "[does] not rent to men." She then rented one of the apartments to a female architect and the other to a female physician. Both leases ended last month and were not renewed. The owner then decided to sell the building.

Last week, the owner showed the apartment building to a prospective buyer. While showing her own apartment, the owner commented to the buyer that the chandelier had come from her mother and meant a lot to her. After seeing all three apartments, the buyer agreed to buy the building. The sales contract, signed by both parties, does not mention fixtures, and the owner and the buyer now disagree on whether the chandelier and the wall-mounted television are fixtures included in the sale of the building.

The state has adopted a fixtures code, of which Sections 1 and 2 provide as follows:

> (1) Unless the terms of a residential real estate contract otherwise provide, upon the closing of the contract the seller shall deliver to the buyer the real property described in the contract, including all fixtures that were affixed or attached to the real property at the time the contract was signed.
>
> (2) For purposes of Section 1, a fixture is an item of personal property affixed or attached to the real property by the seller unless a reasonable person would conclude, based upon all the facts and circumstances relating to the specific personal property, that the item of personal property at the time it was affixed or attached was not affixed or attached to the real property with the intent to make it a permanent part of the real property.

1. Did the owner violate the Fair Housing Act of 1968 by refusing to rent to men and lawyers? Explain.

2. Did the owner or the newspaper publisher violate the Fair Housing Act of 1968 by publishing the owner's rental advertisement? Explain.

3. Assuming that both the television and the chandelier are affixed or attached to the real property:

(a) Is the television a fixture? Explain.

(b) Is the chandelier a fixture? Explain.

1. The owner did not violate FHA by refusing to rent to men or lawyers. Lawyers are not a protected class, and the owner qualifies for the Mrs. Murphy exception.

In general the FHA proscribes discrimination in the provision or terms of rental housing on the basis of membership in a protected class. Discrimination on other bases are not prohibited. The protected classes include sex. However, an exception applies to owner-occupied rental housing with four or fewer units.

Here, the owner's advertisement indicates that she will not rent to men or to lawyers. In fact, she has refused to rent to men specifically because they are men. Refusing to rent to men constitutes discrimination on the basis of sex and would violate the FHA. However, because the owner lived in one of the units and the building had only three units, the owner qualifies for the so-called Mrs. Murphy exception. As such, she is permitted to discriminate on the basis of sex without violating the FHA. Additionally, lawyers are not a protected class under the FHA. Thus, she is free to discriminate against lawyers and has not violated the FHA on that basis.

2. Both the owner and publisher violated the FHA by publishing the rental advertisement.

The Mrs. Murphy exception does not apply to the FHA's prohibition on discrimination in rental advertising. A person violates the FHA if they publish an advertisement that discriminates on the basis of a protected class. Liability extends to both the owner and to any other publisher.

Here, the owner wrote an advertisement that indicated she would not rent to men or to lawyers. As stated above, lawyers are not a protected class under the FHA, so there was no violation on that basis. The advertisement also discriminated on the basis of sex, however, which is a protected class. Because the Mrs. Murhpy exception does not apply to advertisements, the owner has violated the FHA. Because the terms of the advertisement explicitly discriminate on the basis of sex, the publisher of the local paper has also violated the FHA by printing the advertisement.

3(a) The television is not a fixture.

In general, the state law provides that a sale of real property includes the sale of

fixtures attached to the real property, unless the terms of the residential sale contract provide otherwise. The law defines "fixture" as an item of personal property affixed or attached to the real property unless a reasonable person would conclude that, at the time the personal property was attached, it was not attached with the intent to make it part of the real property.

Here, the facts suggest that the owner mounted the TV on the wall of her unit and did not mount TVs in either of the other two units. A 65 inch TV is likely quite expensive. Given the value of the TV and the fact that the owner did not include a TV in either of the units she rented, a reasonable person would not likely conclude that the TV was intended to become a part of the real property at the time it was mounted. Unlike the chandelier, discussed below, most people do not feel sentimental attachment to TVs. Additionally, they decline in value and are replaced over time. A reasonable person would conclude that the owner did not intend for the TV to become part of the real property, and the TV should not be considered a fixture.

3(b) The chandelier is not a fixture.

Similarly, a court would not likely find that a reasonable person would conclude that the owner intended for the chandelier to become a part of the real property when she installed it. The chandelier did not match the light fixtures in the other units, and because she had inherited it from her mother, she had a strong sentimental attachment to it. Based on the stark difference between the chandelier and the other lighting fixtures and on the sentimental value of the chandelier, a reasonable person would not conclude that the owner had intended it to become a part of the real property when she installed it. As such, and because the terms of the sale contract do not provide otherwise, the chandelier is not a fixture.