

These materials are copyrighted by NCBE and are being reprinted with the permission of NCBE. For personal use only. May not be reproduced or distributed in any way.

**MPT 1**  
**February 2022**

***Painter v. Painter (February 2022, MPT-1)***

This performance test requires the examinee to draft an objective memorandum addressing issues arising in a divorce action. The client, Denise Painter, is filing for a divorce from her husband, Robert Painter. The parties have been married for nine years and have an eight-year-old daughter, Emma. The examinee's memorandum should address whether a court is likely to grant joint legal custody of Emma to both Denise and Robert or sole legal custody to just Denise, taking into consideration the rebuttable presumption in the Franklin Family Code in favor of joint legal custody. In addition, the examinee should determine the proper classification under Franklin law of the couple's property and debt, including how a court would likely allocate the appreciation of the house in which the Painters lived during their marriage and where Denise and Emma continue to reside. The File contains the instructional memorandum, notes from the initial client consultation with Denise and from a conversation with Robert, and a list of the parties' assets and debts. The Library contains excerpted sections of the Franklin Family Code, including the Franklin Community Property Act, and two Franklin appellate cases.

To: Harold Huss

From: Examinee

Date: February 22, 2022

Re: Denise Painter Divorce

## **MEMORANDUM**

Denise and Robert Painter are seeking a divorce. You requested that I write a memorandum summarizing Denise's chances of being awarded sole legal custody over the Painters' eight-year-old daughter Emma, rather than an award of joint legal custody. You also requested that I determine which of Robert and Denise's assets are separate property and community property. I have done so below.

### **I. Court More Likely to Award Joint Legal Custody of Emma to Robert and Denise**

The issue is whether Denise has enough evidence to rebut the presumption that joint legal custody is in the best interest of the Emma. "Legal custody is the right to make decisions about a child's medical care, education, religion, and other important issues regarding the child." FCC §420(a). A district court determines custody decisions in accordance with the best interests of the child. §421. When determining what actions are in the best interest of the child, the court considers the following factors: (1) agreement or lack of agreement of the parents on joint legal custody, (2) past and present abilities of the parents to cooperate and to make decisions jointly, (3) the ability of the parents to encourage the sharing of love, affection, and (4) contact between the child and the other parent, and the mental and physical health of all involved. §421. According to Franklin law, "there shall be a rebuttable presumption that joint legal custody is in the best interests of a child." §422. That presumption can be rebutted by demonstrating that a joint legal custody determination would fail because it could not meet the above factors. Denise is unlikely to be able to meet these standard and rebut the presumption.

#### **1. Agreement or Lack of Agreement of Parents on Joint Legal Custody Factor Weighs Toward Joint Legal Custody**

If parents can agree on joint legal custody, then a court is more likely to find that giving both parents joint legal custody is in the best interest of the child. Here, Denise would like sole legal and physical custody of Emma. Robert has stated that he does not object to Emma living with Denise, but he wants regular visits with his daughter. Further, he wants joint legal custody but is not requesting sole legal custody. Because both parents are not seeking sole legal and physical custody of Emma and seem to be willing to compromise, this factor weighs toward giving joint legal custody of Emma to both Robert and Denise.

## **2. Parents' Ability to Communicate and Cooperate Factor Weighs Toward Joint Legal Custody**

If parents cannot communicate and cooperate to make decisions jointly, then a court should not award joint legal custody over their child. Parents' ability to communicate and cooperate to make decisions jointly does not require parents to have a totally amicable relationship. *Sanchez v. Sanchez*. Parents "must be able to cooperate in decisions concerning major aspects of child-rearing." *Ruben*. A court should not award joint legal custody unless there is "a record of mature conduct on the part of the parents evincing an ability to effectively communicate with each other concerning the best interests of the child, and then only when there is strong potential for such conduct in the future." *Sanchez*.

Denise has some facts that could support awarding her sole legal custody based on her and Robert's inability to communicate and cooperate. Robert texts Denise regularly requesting to see Emma, but Denise only responds by calling and leaving voicemails, and he never returns her calls. While this is not entirely functional, it is a far cry from *Sanchez v. Sanchez*, where the court refused to award joint legal custody because of the parents' inability to communicate and cooperate. In that case, the mother was so hostile toward the father that she refused to communicate directly with him, and instead would call his parents and ask them to relay messages to him. She had extreme anger toward the father and the exchanges of the child became so acrimonious that the trial judge ordered the parents to exchange the child at a public library. Denise and Robert's situation does not seem so dire. Denise and Robert do not seem to have anger or hostility toward each other, as they communicate peacefully and when Robert has called Denise and asked to see Emma, Denise has agreed.

A court would likely find that there is strong potential for effective communication between Robert and Denise in the future, so the rebuttable presumption for joint legal custody would not be rebutted.

## **3. Parents' Ability to Encourage the Sharing of Love and Affection Factor Weighs Toward Joint Legal Custody**

A court would likely find that joint legal custody over Emma is in her best interest because Robert and Denise can encourage each other to share love, affection, and contact with Emma. Emma and Denise have a close relationship that involves meaningful time spent together. Emma spends time with Denise's mother, who is also involved in Emma's life. Robert seems to understand that it is best for Emma to spend time with her mother, and he is not seeking full custody. Denise seems to encourage contact between Robert and Emma because she has allowed Robert to see Emma twice and allows the two to text. There are no facts that indicate that Robert and Denise cannot meet this prong, so this weighs toward the conclusion that joint legal custody is likely in Emma's best interest.

#### **4. Mental and Physical Health of All Individuals Involved Factor Weighs Toward Joint Legal Custody, Though Less Heavily Than Other Factors**

The presumption for joint legal custody can be rebutted by evidence that a parent has been diagnosed with a mental condition that affects their ability to participate in decision making for the child. *Ruben v. Ruben*. To rebut the presumption, there must be a nexus between the parent's condition and the parent's ability to make decisions for the child. *Williams v. Williams*. Untreated drug addiction is a legitimate factor in rebutting presumption of joint legal custody. *Williams*.

Denise has some facts that could help rebut the presumption for joint legal custody in this manner. Robert began drinking alcohol heavily about a year ago, and it clearly impacted his ability to participate in decision making. He forgot to pick Emma up from school and was arrested for a DUI. He lost his job and has moved out of the house. However, Robert has been in treatment for the past six months. He has been sober for the past four months and has a new job doing construction work. This is not an untreated addiction, and it seems that Robert wants to make decisions for Emma and support her. So, it is unlikely that Denise would succeed in this argument, and a court would look to the best interest of the child factors.

#### **5. Other Relevant Factors Weigh Toward Sole Legal Custody in Denise**

When determining whether granting joint legal custody is in the child's best interest, a court will also look at the parties' ability to support the child and a child's connection to school and community. Here, Denise works full time and earns \$40,000 per year. She has a close relationship with Emma and Emma has a close relationship with Denise's mother, who helps Denise with child care after school and before Denise gets home from work. Robert was fired from his job as a mechanic six months ago but now works for a construction business making around \$25 per hour. Thus, it seems like both Denise and Robert are financially able to support Emma, but Denise has a more stable set up. Denise lives in the house that Emma has lived in since she was born and is able to keep her attending the same school she has attended since kindergarten. Robert is living in an extended-stay motel on the edge of town and is attending voluntary outpatient rehabilitation for alcohol addiction. It is clear that living with Denise would be best for continuity and connection to school and the community.

Some courts also look at the support that a parent has given to a child when determining custody. Both Robert and Denise gave Emma support for the first seven years of her life, but for the past year, only Denise has been supporting Emma. There is no indication that Robert has financially supported Emma over the past year and he has only requested to see her twice. While Robert expresses interest in attending Emma's extracurricular activities like soccer games and music lessons, and he wants to share in Emma's spiritual life, it is clear that Denise has been the one supporting Emma for the past year. Robert seems to be making progress and expressed that he wanted to wait until he got his act together to contact Emma, which shows that he is trying to act in her

best interest. However, Robert's lack of support may weigh against a court giving Robert joint legal custody.

In sum, all four factors weigh toward a court finding joint legal custody over Emma between Denise and Robert to be in Emma's best interest. Denise is unlikely to succeed in this claim, but it seems like Robert will be amicable to having Emma continue to live with Denise as long as he can be involved in Emma's life and have regular visits. Other factors such as economic ability to care for Emma, connection to community and school, and past support lend credence to Denise's claim for sole legal custody, but as these are not specifically enumerated in statute, they are unlikely to tip the balance

## **II. Asset and Debt Distribution**

The issue is how to categorize the client's assets: as separate property/debt or community property. According to Franklin law, "separate property means property acquired by either spouse before marriage or after entry of a decree of divorce, property acquired by either spouse by gift, bequest, devise, or descent, property designated as separate property by a written agreement between the spouses." §430(a). "Community property includes personal and real property owned by either or both of the spouses that was acquired by either or both of the spouses during the marriage." *Barkley v. Barkley*. Community debt means "a debt incurred by either spouse or both spouses during marriage." §431(b). The Painter's Property will be divided as follows:

### **1. Community Property**

The following pieces of property and debt are community property and debt because they were acquired by either or both spouses during the marriage. Robert and Emma were married in 2013 and all of the following property and debts were acquired after 2013:

- bedroom set
- 62-inch Samsung TV
- leather couch and loveseat
- dining set
- 2017 Toyota Tacoma pickup
- 2014 Ford Explorer
- Best Buy credit card
- CarMax loan

- Target credit card

This community property and debt will be divided equally among Denise and Robert. While the value of community property and debt must be divided equally, the court may exercise discretion in awarding specific property and debt to each spouse to reach an equal distribution of 50% to each party. *Barkley v. Barkley*.

## 2. Separate Property

The following pieces of property are separate property because they were acquired before marriage or during the marriage by gift, bequest devise, or descent:

- The 2009 Kawaskaki motorcycle is Robert's separate property because it was acquired as a gift during the marriage in 2019.

- House at 212 Lake Street was acquired by Emma as a gift before the marriage. It was worth \$215,000 in 2013 when she received it as a gift.

Separate property is given back to each spouse at the end of the marriage.

## 3. Increase in Home Value Is Denise's Separate Property

The issue is how to distribute the increase in the value of the house at 212 Lake Street between Denise and Robert. "Community property includes all income and appreciation on separate property due to the labor, monetary, or in-kind contribution of either spouse during the marriage. Conversely, separate property includes passive income and appreciation acquired from separate property by one spouse during the marriage." *Barkley*. "Passive income is defined as income acquired other than as a result of the labor, monetary, or in-kind contribution of either spouse." *Chicago v. Chicago*.

In *Barkley v. Barkley*, the court dealt with a similar situation. The husband had \$150,000 in a savings plan before marriage that appreciated \$50,000 during marriage as a result of both husband's contributions and market appreciation. During the marriage, the husband contributed \$30,000 and that generated \$3,000 in interest. The court found that \$33,000 of the retirement plan was community property and should be divided 50/50, but the remaining \$17,000 of growth during the marriage was separate property because it reflected an increase in value was on separate property, not community property.

Here, the Robert and Denise's house grew in value by \$30,000 between 2013 and 2022. Denise and Robert invested \$10,000 into improvements. So, a court would likely find that \$10,000 of that growth is community property and divide it in half between Robert and Denise. The court would also likely find that the remaining \$20,000 in growth is Denise's separate property because it is passive income on her separate property. Unless Robert can show that marital funds were used to pay taxes on the

house or were used for other types of labor, then the \$20,000 in growth is Denise's separate property.

#### **4. Deck and Detached Garage Improvement Value Is Robert and Denise's Community Property**

The issue is how to divide the value of the deck and the garage improvements between Denise and Robert. A trial court will give one party credit for the work they put into property owned by the other spouse before marriage. In *Barkley v. Barkley*, the husband moved into wife's house after marriage. The husband made various improvements to wife's house that he paid for during marriage. The wife testified that some improvements were necessary to sell the house, but many were over her objection and were solely for husband's benefit. The court treated the improvements as community property and divided the expenditures (\$40,000) in half and awarding the husband his share as community property (\$20,000). The wife wanted to calculate the value of the community property by subtracting the fair market value of her house before the improvements from the value after improvements. But because she did not submit any evidence about the pre- or post-improvement valuation, the court divided the money the husband spent on improvements equally as community property.

Here, Denise and Robert spent \$5,000 building the detached garage and \$5,000 on building the deck. This money came from the couple's savings. The value of the house increased by \$30,000 between 2013 and 2022. Even though a court has the pre- and post-improvement valuation, it will likely treat the \$10,000 in improvements as community property and divide it equally between Denise and Robert, because it would be difficult for a court to tell how much of the appreciation came from the improvements and how much from other market factors.

In conclusion, I have analyzed the likelihood of a court granting joint legal custody over Emma to Denise and Robert or Denise gaining sole legal custody and determined that a court is likely to grant joint legal custody. I have categorized the Painter's property into separate and joint property and analyzed issues relating to appreciation and enhancement of the house's value. If you have any further questions you need me to look into or any questions about my work, please reach out.

These materials are copyrighted by NCBE and are being reprinted with the permission of NCBE. For personal use only. May not be reproduced or distributed in any way.

**MPT 2**  
**February 2022**

***State of Franklin v. Ford (February 2022, MPT-2)***

In this performance test, the client, Sylvia Ford, has been charged in a three-count indictment with the sale of cocaine, possession of marijuana with intent to sell, and being a felon in possession of a firearm based on a 2015 felony conviction. The alleged drug sales occurred six months apart, under very different circumstances: the cocaine sale occurred at an apartment, and the marijuana and weapons charges arise from a traffic stop. The state public defender is representing Ms. Ford. The examinee is tasked with preparing a persuasive argument in support of a motion to sever the three charges for trial so that Ms. Ford is not tried in a single trial for all three alleged offenses. In doing so, the examinee should make two arguments under the Franklin Rules of Criminal Procedure in support of severance: that the three counts are improperly joined under Rule 8 (Joinder of Offenses or Defendants), and that even if some of the offenses are properly joined, pursuant to Rule 14 (Relief from Prejudicial Joinder) Ms. Ford will be prejudiced by the lawful joinder. The File contains the instructional memorandum, the office guidelines for drafting persuasive briefs, a summary of the client interview, the indictment, two affidavits in support of the arrests, and the motion to sever. The Library contains excerpts from the Franklin Rules of Criminal Procedure and the Franklin Rules of Evidence, which are identical to the federal rules, as well as three appellate cases.

## **I. Statement of the Case**

[omitted]

## **II. Statement of Facts**

[omitted]

## **III. Argument**

### **A. This Court should consider the affidavits in support of Defendant's arrest when deciding whether to join the charges because the indictment does not provide sufficient facts of the relatedness of the charges.**

In deciding whether charges have been improperly joined, the trial court should generally limit itself to those facts contained in the indictment. (*Sayers*). If, however, the indictment does not provide sufficient facts to clarify the connection between the counts, the trial court may look to other documentary evidence in the case, such as affidavits in support of arrests or affidavits in support of search warrants. (*Sayers*).

Here, the indictments simply state that Defendant allegedly sold and possessed controlled substances and possessed a handgun in violation of a previous conviction. There is no evidence in the indictment itself that justifies joining these claims together. The affidavits in support of arrest provide more information and help to clarify whether there is any connection between the counts. Thus, the court should consider the affidavits when determining whether to allow joinder of the charges.

### **B. This Court should sever Count I and Count II because they are separate and distinct incidents and do not constitute parts of a common scheme or plan.**

Under Rule 8(a) of the Franklin Rules of Criminal Procedure ("FRCP"), two or more offenses may be charged in the same indictment if they are of the same or similar character, are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan. The defendant bears the burden of establishing the impropriety of the joinder. (*Sayers*).

In *Sayers*, the district court joined two robbery charges into one indictment on the sole fact that they were both robberies. There, the court of appeals overturned the district court's joinder of the two charges because the charges occurred two years apart and were distinct from one another -- one was robbery of a convenience store and one was robbery of a hiker in a state park. (*Sayers*). Similarly, here, while the first two counts are both "drug" charges, they are distinguishable from each other. Count I alleges selling drugs while in an apartment and Count II is a possession charge that occurred while Defendant was driving her boyfriend's vehicle six months later. This is similar to *Sayers*, in which one was a robbery of a convenience store and the other was an attempted robbery of a person in an entirely different place and time.

Under Rule 404(b) of the Franklin Rules of Evidence ("FRE"), evidence of other acts cannot be introduced to prove "propensity," but can be used for other reasons such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. (FRE 404; *Ritter*). In *Ritter*, the court denied the defendant's argument that evidence of each of the charged offenses would not have been admissible in the other's trial due to Rule 404(b). There, the court determined that evidence would have been admissible for non-propensity reasons because *Ritter* sold heroin in the same area, from the same vehicle, and in the same period of time, which was sufficient evidence of a common scheme of plan. (*Ritter*).

Here, there is no permissive use of the drug charges together. This case is different from *Ritter* because the circumstances surrounding the two charges are entirely different and not close enough to be considered a "common plan or scheme."

**C. This Court should sever Count III from all other charges because they are not relevant to each other and trying them together would result in undue prejudice to Defendant.**

In *Pierce*, the defendant was charged for violating an order of protection and possessing a firearm while under another order of protection -- one regarding his former girlfriend and one regarding his former wife. (*Pierce*). The trial court improperly held that the charges were similar and refused to sever. (*Pierce*). The court of appeals overturned the trial court, stating that evidence of the existence of the ex-wife's order was prejudicial to the defendant in his trial about the violation of the ex-girlfriend's order. (*Pierce*).

If the cases were not joined, the jury would not have found out about the other order. (*Pierce*). The existence of the ex-wife's order was not relevant to any issue in the trial for the violation of the ex-girlfriend's order. (*Pierce*). The court held that trying these cases together was unduly prejudicial to the defendant because a jury can be tempted to infer the worst about a defendant if the jury learns of a separate offense. (*Pierce*).

Similarly, here, Defendant was charged for being a felon in possession of a firearm. Because an essential element of this crime is a prior conviction, the jury will need to learn about Defendant's prior conviction for assault with intent to commit murder. The prosecution has stated that it is not willing to allow Defendant to stipulate to the prior felony, and is planning on submitting evidence of the prior conviction to the jury.

This prior conviction for assault with intent to commit murder is completely unrelated to Counts I and II for possession of drugs. Similar to *Pierce*, evidence of the prior conviction would not be admissible in the trials for the drug charges because it is not relevant to any issue in those trials. Therefore, a jury would only use the evidence of the prior conviction as evidence of Defendant's "propensity" to act in accord with her prior bad acts. This use of evidence is not permissible under the Franklin Rules of Evidence and would be unduly prejudicial to Defendant.

The prosecution may argue that Defendant's possession of a gun is evidence that Defendant had the intent to sell drugs, and is therefore relevant to the drug charges. There is some support for this type of argument. In *Ritter*, the court held that carrying a weapon is highly correlated with the intent to sell drugs, similar to the possession of baggies or scales. (*Ritter*). There, the court held that the use of a limiting instruction was sufficient to cure any risk of prejudice. (*Ritter*).

However, this case is distinguishable from *Ritter* in many ways. In *Ritter*, the defendant sold heroin in the same area, from the same vehicle, during the same period of time. (*Ritter*). That was clearly a common scheme or plan and thus the probative value of this evidence outweighed the prejudice against the defendant. In contrast, the facts here do not establish a common scheme or plan. Here, Defendant was present at her brother's home when he sold cocaine to an informant. Six months later, Defendant was pulled over while driving her boyfriend's car which contained marijuana, baggies, a scale, and the handgun.

Not only did none of these items belong to Defendant, but Defendant was driving another person's car, in a different area than the previous charge, six months after the previous incident. The facts of this case are distinguishable from *Ritter*. Therefore, the probative value of this evidence would be substantially outweighed by the prejudice of allowing the jury to draw conclusions about the Defendant based on her past conduct.

**D. This Court should sever the charges because Defendant wishes to testify in her own defense at trial on some of the charges.**

The *Ritter* court also held that prejudice may result if the defendant wishes to testify in his own defense on one charge but not on another. Severance of counts is warranted when a defendant has made a convincing showing that he has both important testimony to give concerning one count and a strong need to refrain from testifying on the other. (*Ritter*). Here, Defendant wishes to testify in her own defense, but as previously explained, the admissibility of evidence related to her prior conviction for assault with intent to commit murder differs between the charges and would be unduly prejudicial. If the court severs these claims, the Defendant will be able to make proper decisions about exercising her right to testify in her own defense regarding each of the charges.

**IV. Conclusion**

For the aforementioned reasons, Defendant respectfully requests this Court grant her motion to sever.

These materials are copyrighted by NCBE and are being reprinted with the permission of NCBE. For personal use only. May not be reproduced or distributed in any way.

### MEE Question 1

A man decided to start a business repairing diesel-engine trucks. His mother's farm had a large metal barn that had been used in the past to repair farm machinery. As his mother no longer used the barn for that purpose, she agreed to let the man perform truck repairs in it. The barn contained a large portable welding machine (worth approximately \$25,000) that would be useful for making repairs on large trucks. The mother made it clear to her son that he could use the barn but not her welding machine. Nonetheless, without his mother's knowledge, the man frequently used the welding machine for truck repairs.

On June 1, the man obtained a \$50,000 business loan from a local bank. The man and the bank signed a loan agreement. It contained a provision pursuant to which the man granted the bank a security interest "in all my equipment, including equipment hereafter acquired" to secure his repayment obligation. On the same day, the bank properly filed a financing statement listing the man as the debtor and indicating that the collateral was "all equipment, including equipment hereafter acquired."

On June 10, the man bought some specialized tools used for diesel-engine repair. The man agreed to pay the tool seller \$15,000 for the tools, paying \$1,500 down and agreeing to pay the remaining \$13,500 to the tool seller in monthly installments over a two-year period. The man signed a written agreement granting the seller a security interest in these tools to secure the man's obligation to pay the remaining \$13,500. The next day, the tool seller properly filed a financing statement listing the man as the debtor and indicating that the collateral was "diesel-engine repair tools."

The man has defaulted on his obligations to the bank and the tool seller.

1. Does the bank have an enforceable security interest in the portable welding machine? Explain.
2. Both the bank and the tool seller are asserting interests in the diesel-engine repair tools that the tool seller sold to the man.
  - (a) Does the bank have an enforceable security interest in these tools? Explain.
  - (b) Does the tool seller have an enforceable security interest in the tools? Explain.
  - (c) Assuming that both the bank and the tool seller have such security interests in these tools, whose interest has priority? Explain.

**1. The first issue is whether the bank has a security interest in the portable welding machine.**

Article 9 governs the secured transactions. In order to have a secured party retain their interest in a piece of collateral it must be attached to the collateral. In order to attach to the collateral there must be value given, the debtor must own the collateral, and there must be an authenticated security agreement. The security agreement must be a record that identifies the parties, that is signed by the debtor, and must describe the collateral with some degree of certainty.

Here the bank does not have an interest in the welding machine because the bank did not properly attach to the welding machine. There was value given by the bank because the bank did give the man the \$50,000 loan. However, the man did not own the machine because his mother owned the machine. His mother owned the machine because the mother was only letting the son use the barn and did not allow the son to use the welding machine that she owned, so the man did not own the welding machine and could not use it as collateral.

Therefore, because the man did not own the welding machine he could not use it as collateral to the bank.

**2(a). The next issue is does the bank have an enforceable security interest in the tools.**

The rules for attachment are above. A security agreement can have an after acquired clause that allows the secured party to have an interest in after acquired property. This will allow the secured party to be attached to current collateral and collateral that is later acquired by the debtor.

Here, the bank will have a security interest in the tools because the bank has attached to the tools. The bank gave value because the bank loaned the man \$50,000. The man owned the collateral because the man bought the tools and now owns them. The security agreement will attach to the tools because the agreement was signed by the man and described the collateral as all equipment including equipment that was acquired afterwards. The tools were acquired after the agreement, but because of the after acquired property clause the bank's interest will attach as after acquired tools. Thus, they have a security interest in the tools.

**(b) The next issue is whether the tool seller has an enforceable security interest in the tools.**

A purchase money security interest is a security interest that occurs usually when goods are bought through credit. It is generally attached when it is given. A PMSI will create a security interest in the goods when the line of credit is extended to an identifiable source of goods.

Here, the tool seller has a PMSI in the goods because the man bought the tools using the line of credit that the tool store gave him to make the down payment of \$1,500 down with the rest of the \$13,500 due in installment payments. Further, the tools were attached because the man owned the tools and the tool company gave the man tools as value. They signed a security agreement covering the tools. Thus, the tool seller has an attached and enforceable security interest.

**(c) The last issue is who has priority in the tools.**

In order to have priority, a party must perfect its interest. Generally, a perfected party wins over a non-perfected party, and when both parties are perfected, the first to perfect generally will have priority. The way to perfect a security interest is to file a financing statement or have possession or control over the collateral. A PMSI will automatically perfect when the secured party gives goods. A PMSI in equipment will prevail over a perfected security interest if within 20 days a financing statement is filed.

Here, the bank perfected on June 1 when the man got the loan because the bank filed a financing statement on the same day, so they are a perfected party. The tool company gave a PMSI as above, so as long as they filed a financing statement within 20 days they will have priority over the bank. The tool company will have priority over the bank because they filed a financing statement on their PMSI the day after they gave the man the tools. Therefore, the tool company will have priority.

These materials are copyrighted by NCBE and are being reprinted with the permission of NCBE. For personal use only. May not be reproduced or distributed in any way.

## MEE Question 2

A woman runs a gardening and landscaping business in State A. She uses a manual push mower to cut the grass and pruning shears to cut unwanted small branches from trees and large bushes.

Five months ago, the woman was hired to provide common-area mowing and landscaping services to a townhome community in which homeowners own some land commonly and some land individually. She also agreed to accept online service requests from homeowners in the community for individual landscaping jobs.

Last week, the woman was at the community cutting thick brush and small branches using her pruning shears. She finished the work at noon and decided to try to collect an overdue payment from a homeowner who had ordered and received \$100 worth of landscaping services from the woman's business but had never paid for the services. The woman, carrying her pruning shears, walked directly to the homeowner's townhome. When she reached the front door, she was still holding the pruning shears (but down at her side, pointed toward the ground). The woman rang the doorbell, and the homeowner, who was just leaving on an errand, opened the door.

The woman asked bluntly, "Where's the money?" The homeowner did not recognize the woman because the two had communicated only online. Neither the woman's clothing nor her truck bore the name of her landscaping business. Frightened by the woman's cold tone and the pruning shears in the woman's hand, the homeowner immediately pulled five \$20 bills from her purse, held the cash out toward the woman, and said, "Take it. This is all I have!" The woman said, "Fine. That's what I was expecting." The woman put the \$100 in her pocket and walked toward her truck. The homeowner slammed the door and called the police.

On the way to her truck, the woman was still annoyed that it had taken so long for payment. She muttered to herself, "More than three months overdue and not even a tip!" She decided that she was entitled to something extra. She glanced over her shoulder to make sure the homeowner wasn't looking and grabbed a bronze garden figurine from the homeowner's front lawn, put it in her truck, and drove away.

When the woman got back to her workshop, she offered the figurine to her assistant, saying, "I'll sell you this cheap. How about \$10? Just don't ask where I got it." The figurine looked new, and the assistant noticed a \$200 price tag attached to the bottom of the figurine. The assistant quickly handed the woman \$10, saying, "Wow. That's a great deal. These things are in high demand, and I bet I can sell it for a hefty profit."

State A has the following criminal statutes:

**Theft:** Theft is the unlawful taking and carrying away of property from the person or custody of another, with intent to permanently deprive the owner of the property.

**Armed Robbery:** Armed robbery is theft of property, when in the course of the theft the offender is carrying a dangerous weapon and either (1) uses force, violence, or assault or (2) puts the victim in fear of serious injury.

**Criminal Possession of Stolen Property:** A person commits criminal possession of stolen property when the person possesses property that the person knows or reasonably should know is stolen property with intent either (1) to benefit that person or a person other than an owner thereof or (2) to impede the recovery by an owner.

**Dangerous Weapon:** A dangerous weapon is any (1) firearm, (2) device that was designed for use as a weapon and capable of producing death or great bodily harm, or (3) device that is being used in a manner likely to produce death or great bodily harm.

State A courts have determined that all State A criminal statutes should be interpreted to incorporate common law mens rea requirements.

1. Analyzing all elements of each crime, did the woman commit
  - (a) armed robbery of the \$100 cash? Explain.
  - (b) theft of the figurine? Explain.
  - (c) criminal possession of the figurine as stolen property? Explain.
2. Did the woman's assistant commit criminal possession of stolen property? Explain.

1.a) The first issue is whether the woman committed armed robbery of the \$100 cash.

Armed robbery is theft of property, when in the course of the theft the offender is carrying a dangerous weapon, and either (1) uses force, violence, or assault or (2) puts the victim in fear of serious injury.

A dangerous weapon is any firearm, device that was designed for use as a weapon, or device that is being used in a manner likely to produce death or great bodily harm.

The elements for theft include the unlawful taking and carrying away of property from the person or custody of another, with the intent to permanently deprive the owner of the property.

Here, the first element to consider is whether the woman was in the course of theft when she asked for the \$100. The woman was not unlawfully taking and carrying away property when she asked for the money. Rather, she was trying to collect on an overdue payment from the homeowner. Further she lacked the intent to permanently deprive the owner of property. She had gone to the door to collect the money owed to her. She was not intending to deprive the homeowner of money rightfully belonging to the homeowner. Therefore, the element of theft was not met.

The second element to consider is whether the woman was carrying a dangerous weapon. The woman was carrying her pruning shears, which she used for work. She was carrying it down at her side, pointed toward the ground. The shears were clearly not a firearm, nor were they designed for use as a weapon. Further, since the shears were down at her side, they were not being used in a manner likely to produce death or great bodily harm. Therefore, the woman was not carrying a dangerous weapon.

The third element to consider is whether the woman used force, violence, or assault or put the alleged victim in fear of serious injury. The homeowner was frightened by the woman's cold tone and pruning shears. However, she was carrying it down at her side, pointed toward the ground. She was not intending to put the homeowner in fear of serious injury.

Therefore, the elements of armed robbery are not met, and the woman did not commit armed robbery of the \$100 cash.

b) The second issue is whether the woman committed theft of the figurine.

The elements for theft include the unlawful taking and carrying away of property from the person or custody of another, with the intent to permanently deprive the owner of the property.

Here, the woman took the figurine from the lawn after she collected her overdue payment. She took the figurine because she felt she was "entitled to something extra." She carried the item away from the homeowner when she took the figurine with her. Her

intent to permanently deprive the homeowner of the property can be implied in how she not only grabbed the figurine, put it into her truck, and drove away; but she also sold the item to her assistant, permanently depriving the owner.

Therefore, the woman committed theft of the figurine.

c) The third issue is whether the woman committed criminal possession of the figurine as stolen property.

The elements for criminal possession of stolen property occurs when a person possesses property that the person knows or reasonably knows is stolen property with the intent to either (1) benefit that person or a person other than the owner thereof), or (2) to impede the recovery by an owner.

Here, the woman was in possession of the figurine, which was stolen property. She knew it was stolen property because she was the one who removed it from the homeowner's yard.

Further, the woman intended to benefit herself with the stolen property. She took the figurine because she felt she was "entitled to something extra." She intended to benefit herself, not the owner when she took the figurine thinking she deserved it.

Therefore, the woman committed criminal possession of stolen property.

2. The issue is whether the woman's assistant committed criminal possession of stolen property.

The elements for criminal possession of stolen property occurs when a person possesses property that the person knows or reasonably knows is stolen property with the intent to either (1) benefit that person or a person other than the owner thereof), or (2) to impede the recovery by an owner.

Here, the assistant should have reasonably known the figurine was stolen property. When the woman offered it to him, she said, "Just don't ask where I got it." Further, the woman offered to sell it for cheap. This should make the reasonable person suspicious of whether the item was stolen.

Further, the assistant intended to benefit himself from the figurine. The assistant saw the price tag for \$200, and he knew the woman was offering it for \$10. The assistant said, "these things are in high demand, and I bet I can sell it for a hefty profit." The assistant knew he was getting a deal, and intended to resell it for a large profit.

Therefore, the woman's assistant committed criminal possession of stolen property.

These materials are copyrighted by NCBE and are being reprinted with the permission of NCBE. For personal use only. May not be reproduced or distributed in any way.

### MEE Question 3

Six years ago, Amy and Bill incorporated a craft beer business as Beer Corporation (BC) in State A, whose corporate statute is modeled on the Model Business Corporation Act. Amy and Bill were the corporation's sole shareholders and sole directors at the time it was incorporated, and both of them were employed by BC.

Every fall after incorporation, Amy and Bill traveled to an internationally famous craft breweries trade show held in Germany to learn about the latest in craft brewing. Employees of other craft beer businesses that competed with BC did so as well. BC treated all expenses associated with attending the trade show as "ordinary and necessary" business expenses for accounting and tax purposes, and every year Amy and Bill used the corporate credit card to pay these expenses.

BC was successful, and Amy and Bill wanted to expand the business if they could get a significant capital infusion. Last year, they met Sharon, who agreed to invest in BC. In exchange for her investment, BC issued her new shares in the corporation. Sharon then owned 40% of the outstanding shares of BC. Amy and Bill then each owned 30% of BC's outstanding shares, and they continued to run the day-to-day business. Sharon was elected as the third director of BC.

At the first board meeting after Sharon's election to the board, Sharon questioned the need for Amy and Bill to go to Germany every year at corporate expense. Amy explained, "The trips give us new ideas about ingredients and brewing techniques. And incidentally, while we are there, we can do some sightseeing." In fact, many of BC's competitors covered such travel to Europe for their key employees. Sharon was not convinced about the need for this travel and said, "As far as I'm concerned, the practice must stop!"

At last month's regularly scheduled board meeting, Amy and Bill announced to Sharon that they were planning to travel to Belgium and not to Germany. "We believe that Belgium, not Germany, is where innovations in craft brewing are now happening, and we want to bring back fresh ideas for our business. We expect that the trip will take a full week, and while visiting different breweries we can also take in nearby museums and historic sites. As in the past, we will have BC pay all the expenses for that week."

Sharon objected and said, "If you do this, I'm going to sue!" But Amy and Bill were undeterred, and as a majority of the board, they voted to approve their trip to Belgium at corporate expense. The following week, they traveled to Belgium using BC's credit card. Upon their return, they caused BC to pay the credit card bill.

1. Did Amy and Bill have the authority as members of the board to vote to approve their trip to Belgium at corporate expense? Explain.
2. Did Amy and Bill violate the duty of loyalty by having the corporation pay for their Belgium trip over Sharon's objection? Explain.

3. Assuming that Amy and Bill violated the duty of loyalty by having the corporation pay for their Belgium trip, can Sharon personally recover from Amy and Bill all the expenses for that trip paid by BC? Explain.
4. Assuming that Amy and Bill violated the duty of loyalty by having the corporation pay for their prior trips to Germany, can Sharon bring a derivative claim to recover from Amy and Bill the expenses paid by BC that related to their prior trips to Germany? Explain.

1. The primary issue is what authority is required in a corporation to approve of business expenses. Amy and Bill would have the authority as members of the board to vote to approve their trip to Belgium as a corporate expense in the event that a majority of the directors approved of the trip. Because Amy and Bill represent 2/3 of the board of directors, they have sufficient authority to approve business expenses. Due to Amy and Bill legitimately representing a voting majority of the board of directors they have the authority as members of the board to vote to approve the trip to Belgium.
2. The primary issue is whether Amy and Bill's usage of the corporation to pay for their Belgium trip violated Amy and Bill's duty of loyalty to the corporation. A duty of loyalty is violated when an individual takes an action or fails to take an action that detrimentally affects the interests of the business. Amy and Bill's actions regarding the Belgium trip may have violated the duty of loyalty to the corporation in the event that it is considered self-dealing and is done only for their own enrichment. The duty of loyalty would not be violated in the event the trip is shown to be fair to the corporation. While the trips to Germany and its associated trade show are indicated in the facts as being something that employees of other craft beer businesses regularly did in the course of business, no such indications are made for the trip to Belgium. Amy and Bill do not indicate a craft beer trade show being held in Belgium, and instead will use some of their time to visit breweries, which may not provide the same benefits as the original German trade show. They also intend to visit museums and historical sites that are not business relevant. Unless they can establish a legitimate business interest in the trip to Belgium that is fair to the corporation, Amy and Bill's actions to have the corporation pay for the Belgium trip would violate their duty of loyalty to the corporation due to self-dealing.
3. Assuming Amy and Bill have violated their duty of loyalty, recovery of damages for this violation may be pursued by Sharon. Damages resulting from a breach of loyalty to the corporation may be pursued by utilizing a derivative suit on behalf of the corporation against Amy and Bill demonstrating the harm committed to the corporation and petitioning for damages. This form of suit would only permit the corporation to recover damages from Amy and Bill for the Belgium trip. Due to the damages being incurred by the corporation, relief is only due to the corporation, so Sharon would not be able to personally recover from Amy and Bill the expenses of the vacation. Sharon would only be able to recover on behalf of the corporation.
4. Assuming Amy and Bill violated the duty of loyalty through their previous trips to Germany being paid for by the corporation, the issue of recovery centers on Sharon as a party that joined the corporation at later date. In the event that Amy and Bill violated their duty of loyalty with these previous trips, the duty of loyalty violated is loyalty owed to the company and its shareholders. At the time of the Germany trip, Amy and Bill were the only shareholders in the corporation. Due to the absence of other shareholders to be injured by the violation of the duty to

loyalty, Sharon lacks standing to bring a derivative claim to recover damages from Amy and Bill for the trips to Germany. As a result, Sharon cannot bring a derivative claim against Amy and Bill for the Germany trips.

These materials are copyrighted by NCBE and are being reprinted with the permission of NCBE. For personal use only. May not be reproduced or distributed in any way.

#### MEE Question 4

Peter planned to open a 50-seat pizza parlor that would also make pizzas for home-delivery service. He asked his sister Angela to make some purchases for his pizza parlor. "First, to fit with the parlor's unique decor, I want you to buy 50 red chairs from the local furniture store, but don't spend more than \$10,000 on the chairs. Second, I want you to buy a new electric bicycle for pizza deliveries, but don't spend more than \$5,000. Finally, I'd like you to buy from the local restaurant supplier a pizza oven for the pizza parlor, but it shouldn't cost more than \$12,000." Angela responded, "I fully understand. Agreed."

That day, Angela went to the local furniture store. She told the salesperson that she wanted to buy 50 red chairs and to spend no more than \$10,000. The salesperson responded that red chairs were in high demand and that 50 of them would cost \$20,000, but that for \$10,000, Angela could buy 50 yellow chairs. Believing that Peter would prefer to stay within the \$10,000 budget, even though the chairs were yellow, Angela signed a written contract in her name alone to buy the yellow chairs from the store at that price. Angela did not mention to the salesperson that she was buying the chairs for anyone other than herself or that she had authority to buy only red chairs.

The next day, Angela went to a local bike shop to buy a new electric bicycle, again without mentioning that she was buying the bicycle for anyone else. The bike salesperson truthfully told Angela that she could get a used cargo bike that was not electric, but that could carry more than an electric bike. Believing that Peter would prefer the greater carrying capacity of the cargo bike, Angela purchased it for \$8,000, paying with her personal check made out to the bike shop. She immediately rode the bike to Peter, who at first was very annoyed with Angela for purchasing a used cargo bike rather than a new electric bike. But two days later, after trying out the cargo bike, he called Angela and said that he would keep the \$8,000 cargo bike because he liked its carrying capacity.

The following day, Peter called the local restaurant supplier in the morning and told the owner, "I am going to open a pizza parlor next month. I have asked my sister Angela to come to your store to purchase a pizza oven on my behalf for the pizza parlor." That afternoon Angela went to the supplier and signed a contract to buy a pizza oven as "Angela, on behalf of Peter." The price for the oven was \$15,000, which was a fair price for the pizza oven. The contract specified that the price was payable in full upon delivery. When the restaurant supplier delivered the oven to Peter, he refused to accept delivery or pay the \$15,000 purchase price, telling the delivery driver, "Take it back; I don't want it. It's too expensive."

Assume that there is an enforceable contract in each case.

1. As to the yellow chairs:
  - (a) Is Peter bound by the contract signed by Angela with the furniture store? Explain.
  - (b) Is Angela bound by the contract she signed with the furniture store? Explain.
2. As to the used cargo bike, can Angela recoup from Peter the \$8,000 that she paid to the bike shop for it? Explain.
3. As to the pizza oven, is Peter bound by the contract signed by Angela? Explain.

Agency exists when two parties consent that one (the agent) will act on behalf of the other (the principal) subject to the principal's control. Peter and Angela entered an agency relationship when Peter asked Angela to purchase 50 red chairs, a new electric bicycle, and a pizza oven on his behalf. This is because Peter and Angela consented for Angela to act on Peter's behalf and subject to Peter's control.

### **1. Yellow chairs.**

#### **a) Peter bound to contract signed by Angela with furniture store?**

For a principal to be bound to a contract entered into by the principal's agent, the agent must have been acting with either actual (express or implied) or apparent authority. Actual authority exists when the agent reasonably believes to have authority based on their dealings with the principal, either by express words or implied by conduct. On the other hand, apparent authority exists when a third party believes that the agent has authority based on the principal having held out that the agent had such authority. Apparent authority does not exist when the third party knows that the agent is acting without authority.

Here, Angela was acting with neither actual nor apparent authority. Rather, Peter expressly told Angela to buy 50 red chairs, not yellow chairs, and to not spend more than \$10,000 in doing so. Thus, Angela was not acting with actual authority. Even though Angela believed she was acting with authority and following Peter's instructions by remaining within the instructed price, the delegation of authority to Angela to purchase red chairs was too clear for her to reasonably imply that she had authority to purchase yellow chairs.

Further, no apparent authority existed because the furniture store had no knowledge of Peter's existence, had no interactions with Peter, and Peter had never held out Angela to have authority to buy yellow chairs.

#### **b) Angela bound to contract she signed with furniture store?**

The issue of whether Angela is bound to the contract depends on whether she was acting with authority and whether she was acting through an undisclosed principal. Ordinarily, an agent is not personally liable to a third party for a contract the agent entered into on behalf of the principal if the agent did so with actual or apparent authority. However, if an agent enters into a contract through an undisclosed or partially disclosed principal, then the agent may also be personally liable. An undisclosed principal is when the third party is unaware that the agent is acting on behalf of another and a partially disclosed principal is when the third party is made known that the agent is acting on behalf of another, but the identity of the principal is not disclosed. As discussed above, Angela was not acting with authority. Regardless of whether she had authority or not, Angela is personally liable because she entered into the contract through an undisclosed principal. She did so by signing with her own name and did not disclose at all that she was operating on behalf of a principal.

Therefore, Angela is personally liable for the contract she signed with the furniture store regarding the yellow chairs.

## **2. Cargo bike.**

Can Angela recoup from Peter the \$8,000 she paid to the bike shop for the used cargo bike?

The issue is whether Angela should be reimbursed by Peter for the cargo bike. Angela may seek reimbursement from Peter because he ratified her purchase when he told her that he would keep the \$8,000 cargo bike. A principal has a duty to compensate the agent for their services and also reimburse the agent for purchases made on the principal's behalf. Even if a principal is ordinarily not liable for a contract when an agent acted without authority, authority may be essentially revived when the principal ratifies the agent's action that originally lacked authority. Here, even though Angela lacked actual authority because she was told to purchase an electronic bike, not a non-electronic cargo bike, or apparent authority because she never disclosed she was acting on a principal's behalf, Peter ratified the purchase when he used it and told her he would keep it. Thus, Peter has a duty to reimburse Angela for the purchase of the bike she made with her \$8,000 personal check because she purchased the bike on his behalf and he ratified the purchase.

## **3. Pizza oven.**

Peter is bound to the contract for the pizza oven because Angela entered the contract under apparent authority. As stated above, apparent authority exists when the principal holds out as the agent having authority to act on the principal's behalf and the third party reasonably believes the agent has authority because of this. Peter called the local restaurant supplier and told the supplier that his sister Angela would be purchasing an oven on his behalf. He did not tell the supplier the condition that Angela should not spend over \$12,000 for the oven. Angela even signed "Angela, on behalf of Peter," for the oven. It was reasonable for the supplier to believe Angela was acting with authority to purchase the oven at this price. Therefore, apparent authority existed and Peter was liable to the supplier for the pizza oven.

These materials are copyrighted by NCBE and are being reprinted with the permission of NCBE. For personal use only. May not be reproduced or distributed in any way.

### MEE Question 5

Ten years ago, Settlor, a widower, established an irrevocable trust. At that time, Settlor had only one child, Daughter, who had two adult children, Ann and Bob.

The trust instrument named Settlor's friend as the sole trustee and stated, in pertinent part:

1. The trustee shall pay all trust income to Daughter, Ann, and Bob, in equal shares.
2. No income beneficiary may alienate or assign his or her trust interest, nor shall such interest be subject to the claims of his or her creditors.
3. Trust principal will be distributed following Daughter's death "as she may appoint by her will, among her heirs at law and in such shares as she, in her sole discretion, may deem appropriate."

Each year after the trust was established, the trustee distributed equal shares of trust income to Daughter, Ann, and Bob.

Two years ago, Settlor remarried. His wife recently gave birth to their twins. Settlor wants to ensure that his twins receive a share of trust principal after Daughter's death. Daughter has agreed to help effectuate this goal.

Last month, the trustee received letters from two of Bob's creditors seeking to have the claims they had against Bob paid from Bob's interest in the trust. One of these creditors, a bank, has a \$20,000 judgment against Bob for a loan that Bob did not repay.

The other creditor is Bob's former wife, who seeks to enforce a \$30,000 judgment against Bob for unpaid child support owed for their five-year-old child.

Since receiving the letters from the two creditors, the trustee has continued to pay trust income to Daughter, Ann, and Bob, but he has refused to pay anything to either of Bob's creditors.

Under the Uniform Trust Code:

1. May the bank reach Bob's interest in present and future distributions of trust income to satisfy its judgment against Bob? Explain.
2. May Bob's former wife reach Bob's interest in present and future distributions of trust income to satisfy her judgment against Bob? Explain.
3. With respect to the power of appointment:
  - (a) What is the proper classification of Daughter's power of appointment? Explain.
  - (b) Is it likely that an appointment of trust principal by Daughter to Settlor's twins would be effective? Explain.
  - (c) If Daughter fails to exercise her power of appointment, to whom would the trust principal pass upon her death? Explain.

**The issue is whether the bank may reach Bob's interest in present and future distributions of trust income to satisfy its judgment against Bob.**

Generally, a beneficiary's interest in a trust is freely alienable absent a statute or a trust instrument. A spendthrift clause in a trust prevents a beneficiary from transferring her interest in the trust. Additionally, the spendthrift clause also prevents creditors from reaching the trust assets. As a result, the creditor can only reach trust assets when they are distributed by the trustee to the beneficiary. However, public policy exceptions exist for when the creditor is a spouse seeking alimony or unpaid child support, or the creditor paid for necessities.

Here, the trust established by the Settlor is a mandatory trust, since the trustee "shall pay all trust income Daughter, Ann, and Bob, in equal share." The trust instrument also contains a spendthrift clause that prevents the income beneficiaries from reaching the beneficiary's trust interest. So, unless the bank qualifies under the public policy exception for spendthrift clauses, the bank will be unable to reach Bob's interest in future distributions. Here, the bank's \$20,000 judgment was for a loan that Bob did not repay, which does not fall within the exception. Therefore, the bank cannot reach Bob's interest in distributions of trust income.

However, the bank can reach Bob's distributions from the trust. That is, as the trustee pays Bob his income per the mandatory trust, the bank can satisfy its judgment by seeking from Bob the trust assets that he receives.

**The issue is whether Bob's former wife may reach Bob's interest in present and future distributions of trust income to satisfy her judgment against Bob.**

See above rules regarding spendthrift clauses. Here, Bob's former wife has a \$30,000 judgment against Bob to enforce an award for unpaid child support owed for their five-year-old child. Bob's former wife will likely be able to reach Bob's interest in present and future distribution of trust income under the public policy exception for unpaid child support.

Therefore, despite the spendthrift provision, Bob's former wife may reach Bob's interest in present and future distributions of trust income to satisfy her judgment against Bob.

**The issue is what is the proper classification of Daughter's power of appointment.**

A general power of appointment gives the donee broad discretion to make appointments. Pursuant to that power, the donee may appoint herself or creditors to receive the assets. In contrast, a specific power of appointment limits the discretion of the donee in making the power of appointment. A specific power of appointment may narrow the class of potential appointees.

Here, the Daughter's power of appointment is a specific power of appointment because, although Daughter has "sole discretion" to make the appointment, the appointment is

confined to "her heirs at law." Accordingly, Daughter's power of appointment must be made within the class specified by the terms of the trust agreement.

Therefore, Daughter has a specific power of appointment.

**The issue is whether an appointment of trust principal by Daughter to Settlor's twins would likely be effective.**

As noted above, a specific power of appointment limits the donee's power to select an appointee pursuant to that power. The donee's power is limited by the terms of the instrument granting her that power.

Here, the Daughter has the "sole discretion" to appoint by her will the beneficiaries of the trust principal. However, the Daughter's power is limited to "her heirs at law." As a result, an appointment of trust principal to Settlor's twins would likely be ineffective because they are not Daughter's "heirs at law." Only her two adult children, Ann and Bob, are heirs at law. So, although the Daughter agreed to help the Settlor effectuate his goal of distributing trust principal to the twins, her specific power of appointment likely limits her power to do so.

Therefore, an appointment of trust principal by Daughter to Settlor's twins would likely be ineffective.

**The issue is whether, if Daughter fails to exercise her power of appointment, to whom the trust principal would pass upon her death.**

Traditionally, unless an alternative devise is made, an interest in trust principal lapses if the donee fails to exercise her power of appointment. When a donee fails to exercise her power of appointment, the trust principal is distributed equally among the remaining beneficiaries.

Here, if Daughter fails to exercise her power of appointment, the trust principal will pass to the remaining beneficiaries of the trust: Daughter's children, Ann and Bob. Because Daughter did not use her power of appointment to determine the shares, the trust principal will simply be distributed equally to Ann and Bob.

These materials are copyrighted by NCBE and are being reprinted with the permission of NCBE. For personal use only. May not be reproduced or distributed in any way.

### MEE Question 6

Buyer manufactures scarves from various fabrics, including silk. It buys silk from various fabric importers including Seller, from whom Buyer has made over 250 purchases of silk during the last six years. In each of these earlier transactions, Seller delivered the silk to Buyer at no extra charge, and Buyer paid Seller the purchase price at the time of delivery.

On January 9, Buyer and Seller agreed in a telephone call that Buyer would buy 10,000 yards of silk from Seller on February 1 at a price of \$10 per yard. The next morning, Buyer sent a signed note to Seller, stating, "I'm glad that we were able to reach agreement so quickly yesterday on the deal for the 10,000 yards of silk I'm buying from you." Seller received the note two days later, read it, placed it in its files, and did not respond to it in any way. On February 1, Seller did not deliver silk to Buyer's place of business.

The next day, Buyer contacted Seller to complain. Seller replied, "This isn't a delivery order. You didn't say anything about delivery when you placed this order last month. Come pick it up—and hurry! Your order is taking up space in our warehouse." Buyer, who did not have a truck large enough to pick up the silk, responded by saying, "Deliver it by tomorrow or I'll see you in court."

Two days later, on February 4, when Seller had not delivered the silk to Buyer, Buyer made a good-faith and commercially reasonable purchase of 10,000 yards of silk of identical quality from Dealer at a price of \$12 per yard, including delivery to Buyer.

Buyer then sued Seller for \$20,000, alleging that Seller had breached its obligations under the January 9 agreement.

1. Is there a contract enforceable by Buyer against Seller arising from the January 9 agreement? Explain.
2. Assuming that there is a contract enforceable by Buyer against Seller arising from the January 9 agreement, does the contract require Seller to deliver the silk to Buyer's place of business? Explain.
3. Assume that there is a contract enforceable by Buyer against Seller arising from the January 9 agreement, that the contract requires Seller to deliver the silk to Buyer, and that Buyer suffered no incidental or consequential damages. Is Buyer entitled to damages of \$20,000 based on Buyer's purchase of substitute silk? Explain.

### **1. Is there a contract enforceable by Buyer against Seller arising from the Jan 9 agreement?**

Contracts for the sale of goods are governed by the UCC, while contracts for the services are governed by common law. Contracts for the sale of goods over \$500 must be evidenced by writing signed by the party to be charged under the statute of frauds. However, the UCC allows an exception to this rule to be made under the Merchant Confirmatory Memo rule in which contracts between merchants satisfy the statute of frauds if one of the parties sends the other a signed memo evidencing the contract. A merchant is a one who typically deals with the type of goods in the contract. Typically quantity is a material term which must be included in the writing. If the memo is sent to the other merchant and is not objected to within 10 days of its receipt, the memo binds the merchant and is enforceable under the statute of frauds.

There is an enforceable contract between the Buyer and Seller arising from the Jan 9 agreement because it falls within the Merchant Confirmatory Memo rule. Here, the Buyer and Seller are contracting for silk, which falls within the UCC. Their contract was for goods over \$500 (10,000 yards of silk at \$10 per yard), which falls within the statute of frauds. The parties are merchants because the Buyer manufactures scarves including silk scarves, and the Seller imports silk. There is a contract because the Buyer sent the Seller a memo after their telephone call that stated that he was glad they could reach an agreement for the 10,000 yards of silk. This memo was signed by the Buyer and was not objected to by the Seller within 10 days of receiving it.

Therefore, the Merchant Confirmatory Memo rule applies, and a contract was formed and is enforceable by Buyer against Seller arising from the Jan 9 agreement.

### **2. Does the Jan 9 agreement require Seller to deliver the silk to Buyer's place of business?**

The UCC does not require all terms of the contract to be evidenced by the writing in order to be enforceable. When terms are left blank, such as price or place of delivery, the UCC can fill in the terms with the UCC statutory gap-fillers. Typically, the gap-fillers include a reasonable price and Seller's place of business for delivery. However, the UCC permits alternative ways to fill in gaps in a contract. If there are no express terms for the particular term, the court may look at the parties' course of performance, course of dealing, or trade practices, all in that order. Course of performance means the parties will use what was done in the parties' course of performance in the same contract. Course of dealing means that court will look at how the parties have performed on previous contracts with the same parties. Trade practice are what is typical is the trade.

The Jan 9 agreement does require Seller to deliver the silk to Buyer's place of business because the court will look at the parties' course of dealing to fill in the missing term. Here, the contract has a gap as to where the silk should be delivered.

However, the UCC may look to the parties' course of dealing to fill in the missing term of place of delivery. The UCC would not look at course of performance in this instance because that is when the parties have already performed on the same contract. Since

Buyer and Seller have acted before on previous contracts, the court will look to their course of dealing. Here, their course of dealing shows that the Seller delivered the silk to the Buyer at no extra charge. Therefore, the Jan 9 agreement does require Seller to deliver the silk to Buyer's place of business because the court will look at the parties' course of dealing to fill in the missing term.

### **3. Is Buyer entitled to damages of \$20,000 based on Buyer's purchase of substitute silk?**

Under the UCC, a party breaches the contract if there is not perfect tender. If a party breaches the contract under the UCC between merchants, the non-breaching party may cover her damages by seeking a commercially reasonable contract in good faith that is similar in quality and price to the original contract. If cover damages are sought by the non-breaching party, the non-breaching party is owed the cover damages minus the original contract price plus incidental and consequential damages.

The Buyer is entitled to \$20,000 based on the Buyer's purchase of the substitute silk. Here, the Buyer rightfully sought cover damages after the Seller breached the contract by not supplying perfect tender. The Buyer was entitled to seek a substitute contract that was commercially reasonable and in good faith. The facts demonstrate that the Buyer did so, and therefore she is entitled to cover price minus the original contract price. Therefore, Buyer's damages are \$20,000  $((\$12 - \$10) \times 10,000 \text{ yards})$ .