

SELECT ANSWERS

to the

FEBRUARY 2007 NORTH CAROLINA BAR EXAMINATION

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Essay Questions and Selected Answers

February 2007 North Carolina Bar Examination

This publication contains the essay questions from the February 2007 North Carolina Bar Examination and one or two selected answers for each question.

These answers received good scores and were written by applicants who passed the examination. The handwritten answers were typed as submitted, being edited as little as possible, and without correcting errors in spelling, grammar or punctuation.

These published answers are representative of the general quality of answers that merited the particular score on that question. They are intended to provide the applicant with examples of the various quality of answers and the standards employed by the graders in scoring the examination.

Since the scoring of the essay examination is based upon the relative scale rather than an absolute scale, the average answer on one question may have been better or worse than the average on another question.

<u>Question Number</u>	<u>Subject</u>
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Joe Smith was tried on June 30, 2000, in Superior Court, Wake County for the first degree murder of a security guard at a Big Mart store who was trying to apprehend him on suspicion of armed robbery. This was the second time the case had been called for trial. The first time Smith entered a guilty plea to second degree murder which was later overturned on a Motion for Appropriate Relief on the basis that the plea was not knowingly and understandingly entered.

The prosecution introduced the testimony of a paramedic who arrived at the scene of the shooting and was assisting the guard. He testified that the guard was writhing on the ground, that blood was coming out of his mouth and that the guard was crying "please help me, I don't think I'm going to make it." He testified further that the guard told him he knew the person who shot him because that person formerly worked at the same store as a shelf stocker. He gave a description of the shooter as being approximately 6 feet tall and weighing 200 pounds. He said that the perpetrator was known as "Smitty" when he worked at Big Mart. The evidence further showed that the guard was taken to the hospital in a semi-conscious state, was placed on life support and died two weeks later. The State also called the defendant's wife, over the defense's objection, to testify. She testified that her husband told her before he left home on the morning of the shooting that he needed some quick money. He also asked her if she knew where his gun was located.

After the State rested its case, the defendant took the stand and testified that he did not mean to shoot the guard. He stated his gun went off accidentally when they were struggling while he was trying to get away. He also testified he weighed 175 pounds and was 5 feet 8 inches tall.

1(2)

On cross-examination, over the defense's objection, the trial judge allowed the prosecution to elicit information from the defendant regarding his previous guilty plea. The jury found the defendant guilty of first degree murder and the defendant appealed.

QUESTIONS:

1. Did the trial court rule correctly in allowing the paramedic to testify as to the guard's identification of the defendant?
2. Did the trial court rule correctly in allowing the testimony of the conversation between the defendant and his wife to be heard by the jury?
3. Did the trial court commit reversible error in allowing the prosecutor to question the defendant about his previous guilty plea?

Answer A, Part 1 and 2 to Question 1

(1) Yes, the trial court ruled correctly in allowing the paramedic to testify as to the guard's identification of the defendant.

An out of court statement offered to prove the truth of the matter being asserted therein is generally inadmissible because it is hearsay. The North Carolina Rules of Evidence, however, contain an exception to the hearsay rule for dying declarations. To qualify as a dying declaration, a statement must be made by a person under the belief that they are facing impending death and be concerning the circumstances surrounding his impending death. Although it is only required that the declarant believe they are going to die, not necessarily that they do die, the dying declaration exception also requires that the declarant be unavailable at the time of trial. If these requirements are met, the statement will be admitted at trial as an exception to the general hearsay rule.

Here, the paramedic's testimony was that the guard was severely injured by the shooting -- writhing on the ground with blood coming out of his mouth. The paramedic's testimony confirms that the guard was under the belief that he was going to die from his injuries. The guard's statement "I don't think I'm going to make it" although not 100% positive of impending death, is strong enough evidence that the guard believed his death was imminent. It is irrelevant that the guard did not actually die until several weeks later, the test is whether his belief was that his death was imminent, not that it actually was. Additionally, the guard's statement was about and concerning the person and the manner of his death. He identified the shooter a former shelf stocker in the same store, his approximate height and weight, and his nickname at the time he worked at Big Mart. Although some of the information given was not identical to the actual description of the Defendant -- the Defendant actually being significantly shorter and lighter than the description -- it is sufficient to show that the guard's statement was about his shooter and any discrepancies go towards its weight and not its

admissibility. Finally, because the guard died in the hospital two weeks later, he is now unavailable to testify at trial.

Because the elements of the dying declaration exception to the hearsay rule have been met, the paramedic's testimony about the guard's out of court statement is admissible and the trial court's ruling was correct.

(2) No, the trial court did not rule correctly in allowing the testimony of the conversation between the defendant and his wife to be heard by the jury.

Testimony is not admissible at a criminal trial if it qualifies for the confidential communications between spouses privilege. In North Carolina, private communications made from one spouse to the other, outside of the presence of third parties, are not admissible in a criminal trial unless the privilege is waived. The privilege for such communications is held by both spouses and therefore cannot be waived by only one spouse. This privilege is for statements made during the marriage, but continues to be effective even after the marriage ends. The policy for the privilege is to encourage open and honest communications between spouses. The only exceptions are that a spouse is allowed to testify over objection to prevent future criminal acts and in cases of domestic or child abuse which involve the destruction of the family unit.

Here, the facts state that the defendant's wife testified about the husband's communications to her regarding needing money and the location of his gun on the morning of the shooting. There was no evidence present that any third parties were present at the time of the communication between the spouses. Additionally, because the defendant's wife called to testify over the defense's objection, there was no waiver of the privilege by the

defendant. Thus, the testimony is inadmissible and the trial court erred in allowing defendant's wife to testify regarding these confidential spousal communications.

Answer B, Part 1 and 2 to Question 1

(1) Yes, the trial court properly admitted the dying declaration of the victim on testimony of the paramedic.

The issue is whether the hearsay statements of the victim were properly admitted under the dying declaration exception to hearsay.

Hearsay is an out-of-court statement offered by a witness to prove the truth of the matter asserted in the statement. The declarant is the person who made the statement and is not the witness testifying. Hearsay is not admissible in a civil or criminal trial.

However, numerous exceptions have been carved out to allow otherwise inadmissible hearsay into evidence. One such exception is the dying declaration. Dying declarations are statements made by a declarant under the belief that their death is imminent and must relate to the cause of their death, and may include such information as who was responsible for their death. The North Carolina Rules of Evidence further require that the declarant be unavailable to testify in the current trial.

Under the federal rules, a dying declaration may be admissible only in a homicide case. However, North Carolina allows admission of a dying declaration in any case.

Here, the declarant, the victim, is no longer available as the facts state that he died. His statements to the paramedic, who is now testifying, related to the cause of his death. The declarant believed at the time that his death was imminent ("please help me, I don't think I'm going to make it"). Further, his belief was clearly reasonable under the circumstances, as he did in fact die two weeks later and was in a semi-conscious state when he was taken away from the scene of the crime.

The fact that the statement of the victim seemed to be varying in its description of the defendant from the actual height and weight of the defendant is not a bar to its admissibility. The jury can weigh the statement in its determination of the issues at trial. In

fact, the varying physical description might have aided the defendant in his defense by indicating that someone else committed the crime.

Thus, the statement of the victim was properly allowed as a dying declaration exception to hearsay.

(2) No, the trial court erred in allowing the defendant's wife to testify over the defendant's objection regarding the conversation between the defendant and his wife.

The general rule in North Carolina is that there is a Marital Privilege between a husband and a wife for communications between the husband and the wife while they are married. This rule is predicated on the notion that it is good public policy to allow for communications between a husband and a wife to be protected and private. In this case, the communication in question concerns the defendant telling his wife when he left home that "he needed some quick money" and asking his wife if she knew where his gun was located. The defendant had a reasonable expectation of privacy and the privilege would apply in this case.

The marital privilege can be exercised by either party, husband or wife. In this case, even if the wife wants to testify against the defendant, if the defendant objects, then she is precluded from testifying at trial regarding this communication. Therefore, the defendant's objection to the wife's testimony should have been honored and the wife should not have been allowed to testify at trial.

Part 3 to Question 1

NOTE: No applicant provided an excellent response to Part 3 of the Question. The following response, although not fully correct, is overall among the best.

3) Yes, in all likelihood the court erred by admitting the testimony regarding the prior guilty plea.

A defendant may plead guilty to a crime, given that the plea is after being fully informed of his rights, the repercussions of it, & that it will be binding. This must be voluntarily given. When a plea is overturned, it is as though the plea never existed, & a new trial may begin as though it was the first. A guilty plea cannot be used as a prior inconsistent statement of the A, if wrongfully obtained, as the motive for entering may not have been guilt, but could have been a recognition of a weak case or otherwise.

In this case, the first guilty plea by the defendant was apparently wrongfully obtained, & cannot therefore, be discussed or admitted in the subsequent trial on the same offense. It is overly prejudicial, if nothing else, & statements made during negotiations & entering of plea are equally off-limits.

Yes, this court committed reversible error by admitting the guilty plea questioning (unless the prosecutor can show clear and convincing evidence it was harmless error).

On January 1, 2005, his seventeenth birthday, Dale Driver received a phone call from Fast Freddy, a family friend who owned a race car team. "Dale," he said. "I want you to drive my team's race car this year. Meet me at the track tomorrow." The next day, Freddy met Driver and handed him a piece of paper entitled, "Driver Contract," which read,

Dale Driver and Fast Freddy agree that Dale Driver will be employed as the driver of Fast Freddy's race car for the entire 2005 racing season. Salary is \$1000 a race.

Driver read the paper, said "Cool, I'm in," and went off to look at the car. Neither Freddy nor Driver signed or dated the paper. Driver drove Freddy's car every race during the 2005 season and was paid \$1000 a race.

On January 1, 2006, Freddy called Driver on the telephone and said, "Dale, I want you to drive the 2006 race season for me. Same deal as last year on the salary." Dale replied, "I'll think about it." Driver and Freddy saw each other frequently at the track over the next three weeks, but neither said anything about their employment discussion. No additional writing was ever prepared.

Driver drove Freddy's race car in the first race of the season and won. After the race, Driver told Freddy he wanted a raise to \$1500 a race. Freddy said, "No way, we've already got our deal." Driver refused to drive the second race of the season, and Freddy's race team did not participate in the race.

Freddy then sued Driver in Iredell County Superior Court for breach of contract, asking the court to require Driver to drive Freddy's race car as promised during the 2006 season and to also award money damages. The parties stipulated to the facts described above.

2(2)

QUESTIONS:

1. Did Driver and Freddy enter into a valid, enforceable contract for the 2006 racing season?
2. If there was a valid contract for the 2006 racing season, what relief is Freddy entitled to recover in his lawsuit against Driver?

Answer A to Question 2

1) Driver and Freddy entered into a valid, enforceable contract for the 2006 season.

A valid contract requires offer and acceptance, consideration, and must be definite in its terms. An offer may be accepted by a return promise or by performance. When a contract is oral, courts look to the intent of the parties to determine whether a sufficient agreement was reached that is definite in its terms.

Here, Freddy made an offer on January 1, 2006. Dale accepted the offer by driving Freddy's race car in the first race of the season. Consideration was the payment on the same terms as the prior year. The contract was definite in that it referred to the terms of the 2005 contract between the parties.

While the 2005 contract was entered into when Dale was a minor this does not automatically make that contract void. Rather, it is avoidable obligation of the minor and, as Dale has not indicated intent to void that contract, it still stands. Reference to this prior arrangement is sufficient to make the current contract definite in its terms.

Because Driver accepted Freddy's offer by performance and because the terms were definite, a court may conclude that Driver and Freddy entered into a valid, enforceable contract for the 2006 season.

2) Freddy is entitled to recover monetary damages rather than specific performance. A court may require specific performance where: (1) the legal remedy is inadequate, and (2) specific performance is feasible. However, in personal services contracts, a court is unlikely to require a party to perform personal services through a grant of specific performance. Courts prefer to rely on monetary damages in such instances.

With respect to monetary damages, a plaintiff has a duty to cover and therefore, mitigate damages. However, a plaintiff may also be permitted to recover incidental and consequential damages flowing from the breach.

Freddy will not be entitled to a grant of specific performance because courts are unlikely to provide that remedy where they will have to force a party to perform personal services. Therefore, a court will not require Driver to drive Freddy's race car for the remainder of the season.

Freddy would have a duty to mitigate damages by hiring someone else to drive the car. If he had to pay a higher salary to another driver, Driver would have to pay the difference between the new salary and the \$1000 contractual salary. If Freddy can prove any incidental or consequential damages, he would be able to recover those as well

Answer B to Question 2

2)

2.1. Did Driver Freddy enter into a valid, enforceable contract for the 2006 racing season?

Common law governs, 1 year service contract

Yes. Driver entered into a valid, enforceable contract when he drove the first race effectuating an acceptance to an offer by performing. In NC common law, a contract is formed when an offer is made by one party to another in consideration for some type of performance. In North Carolina, if a service contract is engaged, it must be in writing if the contract cannot be completed within a year or it will be considered void under the statute of frauds. In this case, the service contract was for completion in one year, the 2006 race season, so Statute of Fraud rules will not govern. Furthermore, the fact that it is a service contract and not a sale of goods contract (governed by Article 2) means that the fact that Freddy offered Driver 1,000 for performance is not considered within the Statute of Frauds.

That said, without a Statute of Frauds consideration, Freddy made a contract with Driver which involved a promise to pay Driver 1,000 if he would drive his car for the race season. By showing up and racing in the first race, Driver tendered his acceptance to the offer thus cementing the oral contract. Driver's attempt to bargain for a wage increase of \$1500 was an attempt to revoke the prior contract, Additional consideration must be given to incorporate that change. In this case, Driver was attempting to get more money for doing the same thing he originally contracted with Fast Freddy to do--drive his car. Freddy will not benefit from any additional bargain by paying him the additional \$1500. Furthermore, Freddy rejected the second offer, invoking his right to performance based on the original agreement. Based on the combined facts that Driver showed up and drove the first race, had seen Freddy on multiple occasions before the race at the race track and

did not reject the offer indicates that he had formed the necessary intent to accept the offer when he performed. He engaged in no negotiation prior to his performance so the offer of \$1000 stands as the amount tendered for consideration of Driver's driving for Freddy's race team.

On a side note, Contract formation requires an offer, acceptance, consideration given for the offer and an amount to be paid. Driver is 18 years of age when he was asked to drive again by Fast Freddy for the 2006 race season. While the 2005 race season contract could have been voided by Driver because he was a minor in 2005, in 2006 he is an adult thus if a contract is created then it is enforceable and Driver is liable for any breach that he may have created.

2.2. If there was a valid contract for the 2006 racing season, what relief is Freddy entitled to recover in his lawsuit against Driver

The contract between Driver and Freddy would be considered a service contract and thus would have it fall under North Carolina common law. The court will not enforce a requirement that Driver be forced to race for Freddy based on a North Carolina common law rule that courts will not enforce servitude contracts treating it as a potentially punitive form of damages via a demand for specific performance. Forced-servitude damages are illegal in North Carolina and unenforceable because they place an undue burden on the court to make a person engage in an activity that are not willing to do which in this case would not benefit any party if Fast Freddy wants a winning race team. The court would interpret a forced performance to be punitive in nature and should not award Fast Freddy the right to specific performance in this claim.

Money damages are awardable in breaches of contract cases. Freddy could demand damages for the foreseeable costs due to the loss of Driver's performance and also could receive money damages for any costs Freddy assumed in trying to mitigate Driver's

breach by hiring another driver.

Under foreseeable damages, Freddy could receive money damages for the cost of having a racing crew stand idle for the second race. In addition, if the rules of the sport make participation mandatory for all races and inability to race in one voids the right to race in the rest of the season, Freddy could demand money damages for the cost of not being able to race for the rest of the season.

Common law encourages parties to repair breaches if possible. Thus if a party can mitigate a breach by hiring another person to complete the task, then that person can receive money damages for the cost of finding a second party to fulfill the task originally contracted with the first party. On these facts, if Freddy is forced to hire another driver, he can seek money damages from Driver for the cost incurred from hiring the other driver to fulfill the duties he originally contracted with Driver on.

Under the rules of equity, Freddy could also seek an injunction from preventing Driver to drive for other cars during the 2006 racing season if the court believed that a one year injunction would not be unusually burdensome on Driver. In North Carolina, injunctions to prevent performance can be given though a court will limit the time an injunction is enforced and will also look to the facts of whether or not Driver's

participation in the racing season will unfairly harm Freddy's interests if he drives for another team.

Wanda and Hank were married June 5, 1989 while Hank was in medical school and still had several years of residency remaining. Wanda worked during these years providing all the support for the family. They have two children born on April 3, 1995 and May 5, 1997. They separated September 15, 2003. After a lengthy trial in the Wake County, NC District Court on the issues of custody and child support, the court awarded custody of the two children to Wanda.

Wanda works as a secretary for a law firm and earns \$30,000.00 per year. She was recently diagnosed with Multiple Sclerosis. Hank is a dermatologist and earns \$300,000.00 per year. He is a partner with 3 other persons. Hank is 40 years old and Wanda is 39 years old.

The marital home does not have a mortgage and is valued at \$400,000.00. In addition to Hank's share of the medical practice valued at \$600,000.00, the marital property includes Wanda's retirement plan valued at \$20,000.00 and Hank's retirement plan and profit sharing valued at \$500,000.00. The other investments of the parties have a value of \$600,000.00.

After the separation and before the equitable distribution trial, Hank inherited \$2,000,000.00 from his father. This property is his separate property and not subject to equitable distribution.

The equitable distribution trial is held in January 2006 in Wake County, NC. Wanda has asked for an unequal division of the marital property.

3(2)

QUESTIONS:

1. Can the court divide the marital and divisible property unequally?
2. Is Wanda entitled to more than one half of the marital property?

Answer A to Question 3

1) Yes, the court can divide marital and divisible property unequally.

In NC the rule is that a judge may consider all the surrounding circumstances in making an equitable distribution of marital and divisible property. Although generally the assumption is that 50-50% would be equitable. On a case-by-case basis a judge will consider such factors as relative incomes of the spouses, age, health status, earning power, retirement assets and also if one spouse has sufficient separate property or income from a 3rd party to justify a smaller distribution. Accordingly, where one party is clearly in a superior financial status that also is factored in to the decision as is the history of the couple during the marriage as to who worked outside of the home or provided sole support while the other gained professional training or education.

The judge in her final order must state the reasons and facts supporting each distribution of marital and divisible property but can exercise discretion in the interest of justice.

2) Yes Wanda is entitled to more than ½ of the marital property.

As previously discussed, the goal in making property distributions is to promote equity. Several factors in this case support an award of more than ½ for Wanda.

First, Wanda provided sole support for Hank while he attended medical school. During these years, Wanda increased H's earning power while forgoing an opportunity for future individual professional advancement. As result H has a income 10 times that of Wanda's and has the capacity to continue to earn as a partner in a medical practice while W as a secretary is unlikely to greatly increase her income.

Wanda's health also is another factor supporting a larger percentage of property. Because W has multiple sclerosis, the judge would find a greater need for assets as her potential for earnings made be limited or prohibited in the future.

The marital home also could fairly be awarded to W because of the need of stability for the young children.

Similarly, W has a smaller amount of retirement support of H's career.

Further, here we H has an inheritance of 2 million dollars. W will not get a share of this because it is separate property but clearly H has substantially greater assets as a results.

Therefore, W should in equity receive more than $\frac{1}{2}$ of the marital and divisible property.

John Doe and wife, Jane Doe own two tracts of land in Forsyth County. Tract one is owned by John and Jane as a tenancy by the entireties. Tract two is owned by John only.

John and Jane execute and deliver a deed of gift to their son, Sam in 1998 covering both tracts which Sam immediately records in the Register of Deeds office in Forsyth County.

In 1999, John Doe died testate devising all his real property to his wife, Jane.

In 2000, Jane Doe instituted suit against Sam Doe to set aside the 1998 deed on the grounds that John Doe was legally incompetent on the date of execution and delivery of the deed.

Sam defended asserting the estoppel by deed doctrine would give him paramount title irrespective of John's competency.

QUESTIONS:

Can Sam prevail on this defense?

(a) as to Tract One?

(b) as to Tract Two?

Answer A to Question 4

4)

1. With respect to Tract one, Sam's defense of estoppel by deed will probably be successful in Jane's action to set aside the earlier conveyance. The doctrine of estoppel by deed (or doctrine of after acquired title) arises where a purported grantor who does not have valid title in the property conveyed to the grantee (who records the conveyance) thereafter acquires title in the land conveyed. The doctrine will operate to vest valid title in the grantee as long as the property is not conveyed to a bona fide purchaser (who gives value for the land without notice of the prior conveyance) before the grantee records his interest. It should be noted that North Carolina is a race jurisdiction, which follows the rule that no conveyance in property is valid against a subsequent purchaser unless it is first recorded. We should also note here that John and Jane owned tract one in a tenancy by the entirety as is stated by the facts. Tenancy by the entirety requires five unities: possession, title, time, interest, and marriage. A tenancy by the entirety has an implied right of survivorship meaning once a spouse dies, title to the property vests entirely in the surviving spouse. Any conveyance of a property where the grantors hold by a Tenancy by the entirety, requires that both spouses join in the conveyance. Any conveyance by one spouse alone will be invalid to convey title. Also in order to convey a property by deed there must be intent to deliver and transfer of physical possession (transmutation of possession) from the grantor to the grantee or from the grantor irrevocably to a third party with instructions to deliver it to the grantee. Finally no conveyance by gift of real property is valid in North Carolina unless it is recorded within two years. Here, we have no problem on Sam's end of the conveyance because he recorded his gift deed within two years. Jane will argue that John lacked the necessary intent to deliver as a gift and as a result the gift fails for lack of intent to deliver and since there was only a valid

conveyance by one of the tenants by the entirety the gift should fail. However if Sam asserts the estoppel by deed argument he should prevail. Here all the elements exist. Assuming arguendo that John had no capacity to or intent to deliver the deed as a gift to Sam in 1998, Jane will argue, that as the grantor in this analysis she did not have valid title to transfer the property to Sam by herself at the time of the conveyance. So we have the element of no title in the grantor here resulting in a failed conveyance. However, Jane subsequently obtained title to tract one when John devised all his property to her upon his death. Since a person taking by the right of survivorship via a tenancy by the entirety cannot constitute a bona fide purchaser for value, and because the conveyance from John and Jane to Sam is recorded, the doctrine of estoppel by deed will operate to vest title solely in Sam. As a result he will be successful in his defense against Jane's claim of invalid conveyance due to lack of competency.

2. With respect to Tract number two as John held that in fee simple by himself however because Jane purported to grant this property to Sam in the 1998 deed executed by her to Sam (and recorded by him that same year) and because she later acquired the property via will, Sam will probably prevail on his defense of estoppel by deed. As noted above estoppel by deed requires a purported transfer of property by a grantor who has no interest in the property. If the grantor subsequently obtains title and the grantee of the failed conveyance recorded his conveyance before the grantor conveys the property to a subsequent purchaser the original grantee will take via the doctrine of estoppel by deed. Here Jane's initial deed (with the now deceased John) purported to convey title in tract two, property in which she had no title. Jane later acquires title via John's will. Jane cannot be considered a bona fide purchaser as a devisee because she gave no value for the property. Since Sam recorded his deed, the doctrine of estoppel by deed will be valid

against Janes argument for lack of capacity.

Answer B to Question 4

1) The issue is whether Sam has the title to the first tract on the basis of estoppel by deed.

First, it must be noted that gift deeds of real property are enforceable in NC. No consideration is required, so the deeds could be conveyed enforceably.

A physical act is required, and Sam's recording of the gift deeds amounts to one. As such a gift deed is enforceable as defined here.

In order to deliver property, a party must, however, be competent to do so. If not, the delivery of deed will be adjudicated unenforceable. Here, Jane has sued claiming John was incompetent. Sam has not contested this fact. As such, the issue does not appear to be in dispute. Therefore, the gift deed by John from 1998 was not valid.

Estoppel by deed is a doctrine whereby a party who purports to convey an interest in real property that in fact they do not own is estoppel from keeping that property if it is obtained later. If the conveying party later obtains title, essentially, it goes straight to the party to whom title (albeit improperly) was deeded to earlier.

Here, that one was owned by Jane and John by tenancy by the entirety. Only available to married couples tenancy by the entirety includes a right of survivorship. Thus, if one of the spouses died, the other spouse would inherit all of dying spouses interest.

A tenancy by the entirety can be severed by the sale of one spouse's interest in the property. Here, while John was incompetent to convey, Jane was fully able to sell her interest in the property. This severed the tenancy by the entirety. As a result, following the gift deed, Sam owned $\frac{1}{2}$ and John owned $\frac{1}{2}$ each of tract one. Upon John's death, his property passed to Jane. As such, Jane will gain title to tract one.

However, she has purported to convey her interest in tract one to Sam already. As such, the doctrine of estoppel by deed will apply. Therefore, the estoppel by deed will pass the title on to Sam, and he will own 100% of tract one in fee simple.

2) As to tract 2, Jane did not own any portion of tract 2 in 1998. The facts state it was John's separate property. As such, Jane had nothing to convey at the time in 1998. The facts stipulate that she conveyed her property in a simple deed conveying both tracts. As such, the estoppel by deed doctrine will be applicable here as well.

Since Jane has conveyed her interest to Sam, she cannot now be estoppel from passing that property onto Sam.

It should be noted that Jane would be entitled under the circumstances to perhaps exercise her right to elective share or statutory dowery. As such, she would be entitled to a life estate in the principal residence or $\frac{1}{2}$ (given only one lineal descendant) of the real property.

Even if in question 1 above it is determined that the tenancy by the entirety was not severed in 1998 by Jane's delivery because John could not, and thus did not, deliver the gift deed to Sam, then Jane would take 100% of tract one under her right of survivorship upon John's death. However, the doctrine of estoppel by deed would again be implicated under this scenario. Though she could not legally do in 1998, Jane deeded her interest to Sam. She would therefore be estopped from claiming a property interest under the estoppel by deed doctrine. As such, her interest would therefore pass to Sam at that point irregardless.

Joe Green was severely injured in a motorcycle accident on April 30, 2001 in Wake County, North Carolina when Dee Driver ran through a stop sign. Joe Green retained a lawyer to pursue his claim. Dee Driver's insurance carrier retained a lawyer to defend the claim.

Green's lawyer filed the complaint on Thursday, April 29, 2004, with the Clerk of Superior Court of Wake County; however, he could not remember Dee Driver's home address. The clerk told him that he would need to have that information on the summons so that the sheriff could properly serve the summons and complaint. Green's lawyer did not get the summons issued until Thursday, May 6, 2004. The summons and complaint were duly served on Dee Driver on Monday, May 10, 2004.

Driver's lawyer filed a Rule 12(b)(6) Motion to Dismiss the complaint on the grounds that the action was barred by the three year statute of limitations. At the motion hearing, Green's lawyer argued that since he filed the complaint on April 29, 2004 within three (3) years of the date of the accident, April 30, 2001, the action was not barred by the statute of limitations.

Driver's attorney admitted the complaint had been filed within the three year statute of limitations period. She argued, however; that the summons was not issued within five (5) days of the filing of the complaint as prescribed by Rule 4(a). She further argued that because the summons was not issued within five days from the filing of the complaint, the action abated and therefore, the action did not commence until May 6, 2004, when the summons was actually issued six days after the three year statute of limitations period expired. Green's lawyer responded that the summons was timely issued.

5(2)

The trial court ruled that because more than five days had passed from the filing of the complaint until the summons was issued, the action had abated. Because the action had abated

it was not deemed commenced until May 6, 2004, six days after the expiration of the statute of limitations on April 30, 2004; the trial court granted the motion to dismiss.

QUESTION:

Was the trial court correct in granting the motion to dismiss for failure to commence the action within the three year statute of limitations?

Answer A to Question 5

5)

No, the trial court was not correct in granting the motion to dismiss.

Rule 6 of the North Carolina Rules of Civil provides the rules for time and the counting of days. The rule states that the first day to count is the day after the action is filed and if the period is less than seven days, Saturdays, Sundays, and Holidays are not counted. If the period is longer than seven days, weekends and holidays are counted. Here, the trial court ruled the action abated solely because of the period between the filing of the complaint and the issuance of the summons which in turn moved the commencement date outside the statute of limitations. The complaint was filed on Thursday, 29 APR 04. The issuance of the summons occurred on 6 MAY 04. The rules state the first day to count in a required action is the next day, so day one is 30 APR 04, then the weekend comes and is not counted, the 2nd counting day is 3 MAY, 3rd is 4 MAY, 4th is 5 May, and the 5th counting day is 6 MAY 04. The summons was issued on 6 MAY 04, so it was timely. As a result, action did not abate and original filing date is within the statute of limitations. A statute of limitation is the period from the act or knowledge of the act until the statutory limitation period is complete. These facts here highlight the need to file well within the statute limitations period and make the filings as timely as possible.

Answer B to Question 5

5)

The trial court improperly granted the I 2(b)(6) motion to dismiss for failure to file within the 3 year statute of limitations. The complaint was timely filed on April 29th, a Thursday. Rule 4(a) grants five days in which to issue a summons in order for the action to be deemed to have commenced on the date of the filing of the complaint. Since the time period for the issuance of the summons is less than 7 days, intervening Saturdays, Sundays, and hoLidays are not counted. Additionally, the first day of the time period is not counted and the last day is counted. Therefore, April 29th will not be counted in the five days. Since April 29 was a Thursday, the first day counted is April 30 (a Friday). May 1 and May 2 are disregarded because they are a Saturday and a Sunday. May 3 is viewed as the 2nd day of the 5 day time period, May 4 is the 3rd, May 5 is the 4th and May 6th is the 5th. Since the summons was issued on May 6th, which was the last day of the 5 day time period, the summons was timely and the cause of action will relate back to the filing of the complaint, which was within the statute of limitations. Therefore, the I2(b)(6) motion should have been denied because the action was timely filed within the statute of limitations.

Baker loaned Able \$10,000 to Purchase a boat. Able signed a note that read:

This is to verify that Susan Baker loaned me \$10,000 to purchase a boat.

This money was loaned until such time as Start-up, Inc. can be formed.

Within one year of its formation, the company shall issue \$10,000 worth of stock to Baker in satisfaction of this note.

Able informed Baker that Able was forming Start-up, Inc. as a computer technology company for Huey, Dewey and Louie - who would be equal shareholders and the three directors; and Able would be a vice-president. Start-up, Inc. was incorporated by Able as a North Carolina corporation located in Wilmington, North Carolina. The company fired Able as vice president six months after incorporation and refused to issue any stock to Baker. Baker demanded that the company issue stock to her with a value of \$10,000 claiming that the contract was binding on the company because the company knew about the existence of the contract and never repudiated it.

QUESTION:

Can Baker force Start-up, Inc. to issue stock to her under the contract?

Answer A to Question 6

6)

Issue: Can B force S to issue stock to her under the contract?

First, need to determine whether or not there is a valid contract to enforce. In order to have a valid contract there must be (1) offer (2) acceptance (3) material terms (4) consideration. Here, B offered to loan \$ to A so that he could purchase the boat and in exchange (exchange of promises) A promised that B would get S stock. The terms of the contract were set out - including time of performance (within 1 year of formation of S). Therefore, valid K between A and B (but not B and S).

Second, need to determine who is liable under the contract. Here, Able (A) was working as a promoter for S, Inc. which had not yet been formed according to the facts. A incorporated the corporation in NC after the contract was entered into with B. S refused to honor the agreement between A and B. B is now arguing that S must pay her with a value of \$10 K in stock because the contract was binding on S because S knew about the existence of the contract and never repudiated it. That is not the correct legal standard. A corporation is not required to repudiate a contract that its promoter entered into before the corporation was formed.

When a promoter enters into a contract for a corporation that has not yet been formed, the corporation may nonetheless adopt/assume the contract after the corporation is formed in a variety of ways. The corporation can do so expressly by agreeing to do so. There is no evidence in the fact pattern that the corporation agreed with B to assume the contract. The corporation could have adopted/assumed the contract by benefitting from the contract - i.e. using the goods. Here, there is nothing in the fact pattern to indicate that the boat was ever used for corporate purposes. In fact, S Inc. is a computer technology company so a boat would not be needed for corporate purposes.

Therefore, it seems obvious that A wanted to purchase the boat for personal reasons and instead of paying B he decided to guarantee the loan by promising that the company - a third party - would issue \$10,000 worth of stock. This contract was not entered into on S's behalf and the contract was never adopted/assumed by the corporation (expressly or otherwise).

Another issue is whether or not A was more than a promoter - was A able to legally bound the corporation here? Not based on the fact pattern. This is because A did not become VP until after the corporation was formed (he was therefore not a VP when he entered into the K with

B). Had A been a VP when he entered into the K it would have been arguable that he had the authority (express, apparent, inherent) to enter into a K on S's behalf. However, because A was only a promotor and not a VP at the time that the K was entered into (and B knew this) A did not have the authority to bind the corporation and B cannot argue otherwise.

Also, B cannot argue that A misled her re: the status of the corporation because A informed B that A was forming a start-up computer technology company FOR 3 other people (H, D and L) and not on his own behalf. B should have known that she could not enforce the K against the company because the company (SH's and Directors) were not party to the K and that because the K was for a boat for A's personal use (no indication for business purposes) that S would not adopt the K and assume the obligations under the K.

Conclusion:

B cannot force S to issue stock to her under the contract because S was not a party to the contract and did not adopt/assume the contract. Therefore, specific performance

(issuance of stock) cannot be awarded.

Side note: there was obviously no novation which would relieve A from liability.

Thus, B can go after A for breaching the contract and he will be personally liable

(regardless of whether S assumed the K). It is also possible that B has a lien on the boat

(purchase money interest) based on her loan of \$ to A to purchase the boat. However, this

is outside of the context of this question.

Answer B to Question 6

6)

No, Baker cannot force Start-Up to issue stock to her under the contract.

A promoter of a business is one who enters into agreements with third parties prior to the entity's formation. Here, Able acts as a promoter for Start-up, Inc. He informed Baker of the intent to form Start-up, and attempted to convey assets in the company as part of the agreement. However, the agreement was probably not for Start-up's benefit. The note confers no recognizable benefit upon Start-up, Inc. It provides Able with a boat in exchange for a future delivery of shares, but it is most likely that the boat is for the benefit of Able, and not Start-up. This casts doubt that Able was acting as a Promoter for Start-up or that Start-up will be liable for the agreement.

Assuming he is acting as a promoter, an agreement made by a promoter will be enforceable against the firm where the firm ratifies or adopts the agreement. There is no affirmative duty on a firm to repudiate a contract. A firm ratifies the agreement by accepting benefits conferred and performing. Ratification creates liability for past obligations, whereas adoption is a "from this point forward" assumption of the obligations of the agreement. Here, there is no indication that the firm ever ratified or adopted the agreement. This is understandable, since the agreement between Baker and Able conferred no benefit upon the firm. Since the firm did not adopt or ratify the agreement, it cannot be enforced against them and can only be enforced against the Promoter (Able). Under agency theory, an agent will be able to bind a master if he is given express or apparent authority. Apparent authority exists when the 3rd party has a reasonable belief that the agent is empowered to act on behalf of the master. If apparent authority exists, the 3rd party can take action against the master. Here, the master did not provide Able with apparent authority to enter into this agreement. First, the facts state that Able told Baker

that he “would be a vice president”. This fact does not convey apparent authority. First, Start-up had yet to be formed. Second, Able was going to be a VP, which is not a position one would ordinarily expect to be able to authorize the issuance of shares in a company. Therefore, even if Able had been a current VP with an existing entity, he probably wouldn't have the apparent authority to bind Start-up to this agreement. Having received no benefit from the agreement, and having not adopted or ratified the agreement, there can be no grounds for enforcing it against Start-up.

Paul was seriously injured when he slipped and fell in David's, a grocery chain with over 150 stores in North Carolina. Paul retained Agnes to represent him. Paul could not work and had no disability insurance and was unable to pay most of his living expenses. Paul told the manager of his apartment complex that he could not pay his \$500 a month rent. Paul further advised the manager that his attorney told him that he should receive a large recovery and then he would pay the back rent. The manager, wanting to help Paul, did not press him after Paul said he would pay all of the rent he owed when he received his recovery. The case settled before trial for \$275,000.

The manager heard about the settlement and wrote Agnes asking that she send him \$4,500, the amount of the rent Paul owed. Agnes asked Paul about this and Paul agreed he owed that much in back rent and that once he received his settlement money, he would pay the rent himself.

Agnes received the \$275,000 check from David's insurance carrier, deposited it in her trust account and after paying the costs, distributed Paul's share to him. Paul having recovered from his injuries, took his money and moved to New Zealand but did not pay the back rent. The manager then filed a grievance against Agnes with the North Carolina State Bar.

QUESTION

Which, if any, of the North Carolina Rules of Professional Conduct did Agnes violate?

Answer A to Question 7

It does not appear that Agnes violated any of the Rules of Professional Conduct.

It might have been improper for Agnes to tell the client that Paul should receive a large recovery if she did not believe that to be the case, or to promise a specific outcome. However the term used was “should” receive and he did in fact recover \$275,000, so this does not seem improper. Attorneys can discuss likely outcome of matters.

Agnes complied with the Rules of Professional Conduct by immediately depositing the settlement proceeds in her client trust account. Attorneys must keep separate accounts for operating expenses and for client proceeds or retainers- no co-mingling of funds is allowed.

She was also correct in paying the proceeds directly to her client Pauls rather than sending them to a creditor such as his landlord. An attorney owes a fiduciary duty to her clients to pay the full amount that the client is entitled to, per their engagement agreement (minus costs and reasonable attorneys fees).

The money was due directly to Paul and Agnes did not have authority to decide which, if any, personal debts her client had to settle.

Agnes should have responded to the manger’s letter and let him know that as his attorney she could not transfer funds directly to a creditor and that he should seek payment from the debtor Paul himself.

If manager had obtained a judgment lien for the outstanding rent, he might have been able to reach the money from the settlement directly through the court not Agnes.

Here, however, it is not an attorney’s obligation to earmark settlement funds for specific uses- the money is a personal asset of the client.

Had Agnes made a loan to Paul to pay the rent prior to obtaining the settlement, it would have been a violation of the rules. Attorneys may never make a personal loan to

clients, and there is no de minimus exception to this rule. Paying the rent directly to manger would have been improper.

Manager's cause of action is against Paul personally, not against Agnes. Nothing indicates that Agnes told Paul to stop paying his rent or to promise his landlord that he would be receiving money from a settlement.

Answer B to Question 7

1)

Agnes did not violate any of the North Carolina Rules of Professional Conduct. North Carolina lawyers are required to abide by the Rules of Professional Conduct. Failure to abide by these rules could result in discipline by the North Carolina Bar. Though it could be argued that Agnes violated a duty by 1) telling Paul he “should receive a large recovery” and 2) not paying the manager who was a Creditor of her client, these are not truly violations of the Rule and Agnes acted appropriately under the circumstances.

1. Telling Paul he “should recover a large recovery”

Lawyers are prohibited from making statements that seem to be a guarantee of success. Statements like “I’ve never lost a case” are not allowed. Even if true, such statements may give clients a false impression that such results are guaranteed.

However, even if Agnes made the statement to Paul that he “should recover a large recovery”, this is not necessarily a violation of the Rules, Lawyers are permitted (and encouraged) to evaluate the case and give their clients the strengths and the weaknesses of settling or proceeding to trial. Here, Agnes may have made this statement in a full discussion regarding what the risks were and may have preceded the statement by making sure Paul knew that no results were guaranteed and that every case is a risk.

Therefore, based on the facts we have, Agnes did not violate a Rule of Professional Conduct by stating that Paul “should receive a large recovery.”

2. Failing to pay the manager-Creditor part of Paul’s recovery

Lawyers owe a duty to their clients. This duty is one of loyalty, utmost care, competency, and zeal. Lawyers do not owe any such duties to outside parties, such as the Creditor-manager. A lawyer does not have a duty for the financial responsibility of her

client.

Here, though the Creditor contacted Agnes personally and though Paul admitted to the debt, it was not Agnes' duty to pay Paul's recovery to the Creditor, The Creditor had not established any lien on the recovery and Agnes was not required by law to distribute the money to the Creditor. Instead, Agnes would have violated the rules had she paid the manager and not distributed the money to Paul. Paul expressly stated that he would repay the rent himself. Agnes acted correctly in that when she received the check, she deposited it into her trust account then after deducting costs, distributed the remainder to Paul.

Though a lawyer SHOULD give candid counsel to her client, such recommending the client not leave the country to avoid Creditors, the lawyer is not required to prevent such activity of a client.

Therefore, Agnes responded appropriately and violated no Rules of Professional Conduct.

Jimmy Jones is a 6 year old boy who lived with his parents in a rural North Carolina county. Their home was situated in a wooded area located approximately 200 yards from a substation owned by Power Company. The substation featured tall transmission towers, climbing ladders and electrical equipment transmitting electric power at several thousand volts. Power Company maintained its equipment in a fenced enclosure featuring signs warning of danger due to high voltage.

For about 6 months before the accident in question, Jimmy and his friends, ranging in age from 6 to 10, gained access to the substation by burrowing under the fence. Persons living in the community discovered that children had found a way inside the substation, and they notified Power Company, which gave assurances that it would take measures necessary to keep children away from the dangerous equipment. Jimmy's parents were not aware that Jimmy had played around the substation, but they often lectured Jimmy about the danger there, and Jimmy promised that he would stay away from the power station.

On the day in question, Jimmy, along with 2 of his friends, all minors, passed under the fence and began climbing the ladders on the transmission towers. Jimmy lost his grip on the ladder and fell against a transmission line causing a serious injury, which Jimmy fortunately survived.

A law suit has been filed against Power Company in Superior Court on Jimmy's behalf by his Guardian Ad Litem, and Power Company has moved for summary judgment based upon the defense of Jimmy's contributing negligence in entering a place of known danger.

8(2)

QUESTIONS:

1. What claims does the minor plaintiff have?
2. Should Power Company's motion for summary judgment be granted?

Answer A to Question 8

1) The minor would have a negligence claim against the Defendant. For negligence you must have a duty breach of that duty, causation and damages. This would fall under the Attractive Nuisance Doctrine. This states the defendant is engaged in a dangerous activity or has a dangerous condition on the property. The defendant knows that children have been on the property around the dangerous condition. The child cannot understand or doesn't know or appreciate the danger and the cost to correct danger is minor compared to the injury it could cause.

The defendant power company has a substation that features tall transmission towers, climbing ladders and electrical equipment transmitting electrical power at several thousand volts. This is very dangerous. The defendant was aware and had knowledge that young children were on the property playing because persons in the community had notified Power Company. Plus the workers would be able to see holes burrowed under the fence. Jimmy, at age 6, would not be able to appreciate the danger if he fell and was electrocuted (as he was). The cost, to correct this would be minor considering that a child could die if he fell and touches a transmission line. They could also be seriously injured as Jimmy was in these facts. Jimmy, through his Guardian Ad Litem can sue the power company in negligence.

The power company had a duty to act as a reasonable person would in similar circumstances. They breached this duty by not filling in the holes and keeping children out. This breach was the proximate cause of Jimmy's injuries, but for the hole under the fence he would not have gotten into substation and would not have fallen. His damages are whatever bills he has from the injury and future damages.

2) The Power Company's motion for summary judgment should not be granted. North Carolina follows contributory negligence as a defense, to negligence. If Defendant

is even 1% negligent, they are barred from recovery. Contributory negligence would not apply to Jimmy. North Carolina follows the rule of sevens. If a person is under the age of seven he cannot be negligent. If they are 7-14 are presumed not to be negligent, but it can be rebutted. If child is over 14 to be negligent the r presumed negligent. Since Jimmy is six (6) years old he can not be negligent and therefore summary judgment should not be granted.

Answer B to Question 8

Q. 8 1) Plaintiff has a claim against Power Co. under the Attractive Nuisance Doctrine, in Negligence.

The attractive nuisance doctrine states that where there is a 1. hazardous condition 2. that would prove attractive to minors to misuse (even if they are trespassing to get there); 3. and the party creating that hazard knows of the misuse, 4. then we will look to see if the relative ease of remedying the condition outweighs the risk created. The classic case is a mound of dirt or piece of construction machinery.

Here, the power company's substation is clearly a hazardous condition. Thousands of volts of electricity clearly evidence that.

Second, it's definitely a hazard that would attract children- with ladders and wires and general interest kids take in those sort of things, the substation was an obvious attraction.

The Power Company clearly had notice of the condition, as they were told by the families of the condition and indicated they would remedy it.

The final test is the relative difficulty to make the site more secure vs. the risk existing. Here, the site had a fence & warning signs. Warning signs are not an effective deterrent of minors. Additionally, a fence is often insufficient as well, absent barbed wire. That the kids passed under the fence seems to indicate the fence was not very secure. It would not be very hard to install a fence that went down a few feet into the ground- an iron gate-type fence, for example. Given the danger of a power substation, this would have been a minor fix.

2. Power Company's motion for summary judgment should be denied.

A motion for summary judgment will be granted only where there is no material issue of fact and the movant is entitled to the judgment as a matter of law. Here, Power

Co.'s claim of contributory negligence fails and so Power Co. is not entitled to judgment as a matter of law.

In NC, children under 7 are deemed incapable of negligence. This is true for contributory negligence as well. It is not relevant that the Power Co. had warning signs or that Jimmy's parents warned him of the danger- he simply cannot be contributorily negligent. Thus the Court correctly denied Power Co.'s motion for summary judgment.

Sam, a resident of Guilford County, North Carolina, went to visit his children by his first wife, Alice, who lived in Mecklenburg County, North Carolina. He was rear-ended on I-485, suffering life threatening injuries. He was taken to Presbyterian Hospital South by the emergency medics. En route he asked the two medics how bad off he was and they said it was very serious. Sam then told them to tell his current wife, Mary, that he wanted his son, Charles, to have his vintage Thunderbird (which he was driving) and his daughter, Sarah, to have his father's gold watch (which he was wearing), with his mountain house and everything else to Mary. The medics made a written statement of his requests and read them back to him and he said "That's my will".

Three days later Sam died while still in the hospital and was buried in South Carolina. Alice had Sam's car and personal belongings. No written will was found.

Seven months later Alice discovered from the medics the statements by Sam after the accident. One medic delivered to her the written statements he had made on the day of the accident and which both medics had signed. Alice wants to commence a probate proceeding in the Mecklenburg County Superior Court.

QUESTIONS:

1. Are Sam's wishes legally enforceable?
2. Can a probate action be commenced in the Superior Court for Mecklenburg County?

Answer A to Question 9

9)

1. Most of Sam's wishes are legally enforceable. North Carolina recognizes nuncupative (oral) wills. Such oral wills will be enforceable to devise personal property if made "on the deathbed", which is to say, under a belief of impending death, if witnessed by two disinterested witnesses, and either memorialized by a writing of one of the witnesses within 10 days, or admitted to probate within six months.

These facts meet those requirements. Sam had just received Life-threatening injuries, had just been told by the medics that the situation was very serious. He thus believed he would die. He proceeded to die from his injuries three days later, in the hospital. His words evidenced full testamentary intent, as he first explained his property dispositions, and then asked that the will be read back, and then said "that's my will." There is no evidence to suggest that the medics were interested: it does not appear that he had met them before and none of the dispositions were to the medics. Thus, they appear to have been competent witnesses. One of them wrote the intended dispositions down, and both signed them. This was done within 10 days of Sam's oral will, so the requirement that the will be memorialized within writing or admitted to probate within 6 months is met. It does not matter that Alice did not discover this till 7 months later; because the ten day requirement had been met.

Sam's wishes were to give his son his car, his daughter his watch, and his mountain house and every thing else to his current wife, Mary. Because an oral will will only be effective as to personal property, Sam's wishes can be enforced with respect to the car and the watch, and to all his other personal property encompassed by "everything else." It will not be effective as to his real property, including the devise of his mountain house to Mary, and the devise of any other real property to Mary which was encompassed by

“everything else.” Thus, all of Sam’s wishes relating to personal property are effective.

2. No, a probate action cannot be commenced in the Superior Court for Mecklenburg County. The Superior Court is the trial court which has exclusive jurisdiction over probate actions, so Superior Court is the appropriate trial court to hear the matter.

However, a will should be admitted to probate in the county where the deceased resided, so the proper county is Guilford County. Thus, the probate action should be commenced in Superior Court for Guilford County. A probate action cannot be commenced in Superior Court for Mecklenburg County.

Answer B to Question 9

3)

(1) Sam's wishes are partly legally enforceable.

An oral will is valid to dispose of personal property only and there are certain requirements that must be met. There must be at least 2 witnesses, the will must be made at the decedant's last illness, the decedent must die of that illness and the will must be either offered for probate within 6 months OR recorded within 10 days of the oral statements. There were 2 witnesses because the 2 medics present in the ambulance. The statements were made at his last illness, the injuries from the car wreck. And he did die of those injuries at the hospital 3 days later. He had testamentary intent because he stated, "that's my will." The final element was satisfied when the will was recorded by the medics and signed by them. It would not matter that the will was offered for probate 7 months later, because the last element is an either/or, it is not necessary to have both. There is generally not time limit for admitting a will to probate. The Medics (the 2 attesting witnesses) will have to testify to the facts of the will at the probate proceeding.

Because the oral will is only valid to dispose of personal property, the will will be valid only as to the watch (to Sarah), the car (to Charles), and the other personal property of Sam (to Mary). It will not apply to the granting of the mountain house because that is real property. This would fall to the residue of the estate and would pass by intestacy, unless it was held by Sam and Mary as tenants by the entirety. It doesn't appear that it was though, because he calls it "his" mountain house. A final note, his son, Charles would get the thunderbird that as is (it was involved in the crash), and would not be entitled to have the estate pay to fix it up.

(2) No, probate proceedings should not be commenced in Mecklenburg County. The superior court has exclusive jurisdiction to hear probate matters and administer estates.

Proper venue lies where the decedant was domiciled at death, regardless of where the beneficiaries reside or where the property is located (unless out of state). Here, Sam was domiciled in Guilford County upon his death. Even though his children live in Mecklenburg and some of the property that will be handed out is in Mecklenburg, the proper venue is Guilford County.

The Burke County, North Carolina public schools require high school students to perform 50 hours of community service. The community service must be performed after school, on weekends or holidays, or during summer vacations. The principal of each Burke County high school has final authority to decide whether a particular activity merits community service credit. Work for which students receive monetary compensation cannot be used to satisfy the community service requirement. After students complete the 50 hours of required community service, they must submit a one-to-two page paper reflecting on their community service experience. Failure to complete the community service requirement makes a student ineligible to receive a high school diploma.

Paul Phifer, a junior at Freedom High School in Burke County, and his parents sued the Burke County Board of Education in the United States District Court for the Western District of North Carolina, claiming that the community service requirement violated (1) Paul's right to freedom from involuntary servitude, (2) his parents' right to direct the upbringing and education of their son, and (3) Paul's right to personal liberty and privacy. The lawsuit sought a declaratory judgment and an injunction prohibiting the Board of Education from implementing the community service requirement.

QUESTION

Will Paul and his parents prevail on each of the three grounds?

Answer A to Question 10

No, Paul and his parents will not prevail on any of the three challenges to the community service requirement.

1) Paul's right to freedom from involuntary servitude.

Personally, Paul's specific claim will be that the community service requirement violates the Thirteenth Amendment's prohibition against slavery. The government cannot take any action that violates this prohibition and it can pass law's that prohibit private actors from undertaking to enslave others.

Here, under these facts, it is very unlikely that a court will find that Paul's right to freedom from involuntary servitude has been violated. Factually speaking, the community service requirement is a classroom requirement for which Paul receives academics credit. If he is claiming that the failure to compensate him for the 50 hours of service constitutes involuntary servitude, it is likely that the court would consider academic credit as a form of payment thus negating the argument that his services are being used by another without just compensation.

Secondly, the intent of the Thirteenth Amendment is to prevent people from owning other people as chattel and forcing them to work for free. Here, there is no indication that the organization for which Paul would have to work would fulfill the 50 hours would treat him as an indentured servant or enslave him. While he may believe this is against his will, it certainly does not convey any ownership interest in Paul in the community organizations.

Finally, the school, or public school board, may require activities outside the classroom in fulfillment of academic credit. That he must give this without compensation on time outside of school should not mean that he has been forced into slavery. What is more, if there were some indefinite term of service that did not end, he might have a

better argument, but this is only 50 hours and Paul has a choice of which organization with which he will volunteers.

2) Regarding Paul's parents' rights to direct the upbringing of their child: While this most closely falls into the rights to Due Process afforded to the States through the Fourteenth Amendment to the U.S. Constitution, the substantive due process right that Paul's parents likely are involving does not recognize a fundamental right to direct public education. Although, as tax payers, citizens of the U.S. have a general interest in how our public dollars are spent, including educational dollars, it is inherently a political question as to how publicly elected officials decide on curricula requirements for grades kindergarten through twelve. Moreover, if the public schools were enforcing a requirement that hinged upon or impacted a fundamental right like the right to have children or marry, then Paul's parents might have a claim that their substantive due process rights had been violated and that the public school system must establish a curriculum that meets a standard of strict scrutiny- that is, in order to be valid, the school system must prove that the community service requirements is a compelling state interest which is narrowly or strictly tailored so as not to impinge upon that fundamental right.

Here, because no fundamental right to direct the upbringing and education of a child has been recognized, the standard would be whether the public school system had a rational basis for the important government interest of exposing children to the community experiences before graduating from high school. On this very permissive standard, which the parents must overcome, it is likely the public school would win.

3) Lastly, Paul's right to "personal liberty and privacy" likely will not be found to have been violated by the community service requirement. Again, as stated in Part 2, the likely premise for Paul's claim is that he has a fundamental right to privacy and liberty.

First, the Supreme Court has never recognized a general fundamental right to privacy. Rather the Court has found that the Constitution guarantees certain protection under the Due Process Clause for rights that flow from a right to privacy, including a right to an abortion and the right to engage in sexual activities with other adults, and the right to contraception.

Here, no right rising to the level of a fundamental privacy right has been recognized in a right to be free from community service requirements outside the school day.

As for liberty protections, the court has never classified a right as one of “liberty”- perhaps freedom from discriminations, but not liberty.

Again, the state (and public school system) need only show that its community service policy is rationally related to an important government interest.

Here, the interest Paul and his parents describe pertain to economic liberty- that he should not work for others for only school credit- such economic burdens usually only require a rational basis.

Finally, if Paul and his parents object to the community service requirements, there is no prohibition against or requirement that Paul attend public school. The parents are free to remove him from public school and send him to a school of their choosing that does not require community service. Public school standards again are more of a political question that simply is not justifiable (a court must find standing and an actual case or controversy to take a claim). Here, as a political question, there is no case or controversy and a court will decline to hear the case or grant any relief because relief can only be granted through the political elective system.

Answer B to Question 10

Question 10(1)

The community service requirement does not violate Paul's 13th Amendment right to be free from involuntary servitude.

Requiring Paul to perform a certain number of hours of community service undoubtedly places a burden on him as a condition of earning a high school diploma. But, it is no different in kind from any number of burdens that schools place on students all the time. For example, no one would contend that if Paul is required to do math homework in order to pass math, and is required to pass math in order to graduate, that his right against involuntary servitude is violated because he will now have to spend time working on his math homework. The 13th Amendment aimed at a very particular harm: slavery, as experienced in the United States prior to the Civil War. Requiring a student to meet requirements to graduate from school does not bear any resemblance to this harm.

(Although violations of constitutional rights by schools are not cured by the ability of a student to move to another school, the lack of resemblance to involuntary servitude is clear when one considers that the distinguishing characteristic of involuntary servitude in the United States was the inability to be free from it; here, of course, Paul may attend another school or simply not fulfill the requirement and not graduate, and no one will force him back into the community service program). Nor is it likely that a study of history would reflect that, in the years after the 13th Amendment was adopted, schools changed curriculums to be entirely voluntary to avoid problems with that amendment. The amendment has traditionally been interpreted by the Supreme Court to hew very closely to actual slavery and related problems, and not to reach questions such as that raised by Paul.

Question 10(2)

Paul's parents will also not prevail based on the right the Supreme Court has recognized that parents have to direct the upbringing and education of their children.

Certainly, parents have some substantive due process right to direct the education of their children; it is on this basis that the Supreme Court has recognized a constitutional right to send one's children to private school (which Paul's parents, like the parents before the Supreme

Court, could choose to do if they disagreed with the prevailing values of the public education system). That right is not, however, a right to dictate the content of a student's education in a public school. A right to direct the upbringing and education of your son that brought with it a right to direct the government how to run its educational system would render public education entirely unworkable. If every one of the hundreds or thousands of students in a given school had parents who wanted to "direct" their education in a slightly different manner, education would be prohibitively expensive - especially as parents decided to "direct" their children's education by such acts as arranging for the public school to offer 5 full-time tutors exclusively to their child).

Certainly, parents have some rights with respect to the content of state-run education. They can object if their children are subjected to religious indoctrination in violation of their First Amendment rights. They can object if they believe their children are discriminated against on the basis of race, as parents with a case before the Supreme Court this term have done. In other words, they can object if their children's public education is carried out in a way that violates the individual rights of the child. But their right to actually direct the education of the children is a right to school the children at home or in a private school, not a right to dictate curriculum and process to the public school.

Question 10(3)

Again, Paul will not prevail based on his right to personal liberty and privacy.

The government limits liberty and privacy all the time. As to liberty, virtually every law is a limitation on liberty (e.g., do not murder). Governments have wide discretion to restrict liberty so long as the laws restricting liberty survive rational basis scrutiny (rationally related to a legitimate government interest), were adopted through appropriate procedures, and do not contravene independent constitutional guarantees. As to privacy, although the Supreme Court has struck down particular laws as a violation of an individual's "right to privacy" - e.g., some abortion laws, laws against certain behavior by homosexuals - it has done so either upon a recognition that a certain right is so fundamental to being a member of a free society that it cannot be limited or because it believed the law at issue could not survive even the low standard of rational basis scrutiny.

None of these infirmities are present here. There is nothing fundamental about Paul's right to select the activities in which he will engage as part of earning a high school diploma recognized by the state. We have no tradition in this country of individual students having a right to direct the curriculum of their school, in the way, for example, we might have a tradition of parents having rights to choose to educate their children in their home. Instead, it is the longstanding tradition in this country that schools and states, not students, set the graduation requirements. One can hardly say that Paul had been denied such a fundamental liberty that he is barely even free if he has to meet state and local requirements to graduate from high school.

We have no indication that there was infirmity in the adoption of this rule. States commonly delegate to local school boards the authority to deal with local educational issues. Setting a reasonable requirement like a 50 hour community service requirement surely falls squarely within the authority of the school board in Burke County to deal with

such issues.

Finally, this requirement certainly survives the rational basis scrutiny necessary for a law to be an appropriate exercise of state power. Paul would have to prove that the law lacks a rational basis. Clear legitimate government interests that the law may serve include saving money by having students do charity work and promoting a sense of civic duty in students by getting them involved at a young age in giving back to the community. Requiring a small amount of community service, about which a student must then write a paper, is clearly rationally related to achievement of these goals.

Elmo Consulting Service, Inc. (“Elmo”) requested ABC Bank to lend it \$100,000. ABC Bank agreed to lend Elmo said sum in return for a security interest in all of Elmo’s personal property and fixtures. Elmo’s personal property consisted of \$25,000 cash, one Orange brand personal computer used in Elmo’s business, and certain fixtures located at 125 S. Street, Conover, NC. Elmo executed (i) a promissory note in the amount of \$100,000 payable to the order of ABC Bank, (ii) a security agreement in favor of ABC Bank and (iii) a financing statement. The financing statement’s only description of the collateral was “All personal property and fixtures of the Debtor”. ABC Bank properly filed the financing statement.

QUESTION:

Did ABC Bank receive a perfected security interest in Elmo’s personal property and fixtures?

Answer A to Question 11

\$25,000 Cash: The Bank does not have a perfected security interest in the cash. A security interest in cash can only be perfected by means of possession, which has not taken place.

Personal Computer: Assuming the description of this interest in the security agreement has sufficient for the security interest to attach (and also assuming Elmo has “right in” this collateral), the bank has perfected its security interest in the computer by filing the financial statement. The computer is an equipment item of personal property under Article 9 of the UCC. Filing a valid financial statement is a valid means of perfection with regard to equipment. (The fairly generic description of the collateral in the financial statement is acceptable for these purposes.)

Fixtures: The bank does not have a perfected security interest in the fixtures because the “fixture filing” made by the Bank was too generic and incomplete for purposes of perfecting. Even if “properly filed”, a fixture filing itself must identify the location of the real estate and the area of the real estate of which the fixture is located. That is not the case here.

Answer B of Question 11

ABC has a perfected security interest in Elmo's computer but not in fixtures or cash.

In order to have a security interest there must first be attachment through a security agreement in collateral owned by the debtor.

In order to perfect a security interest in personal property and fixtures a secured party creditor must either take possession of the collateral or file a financing statement. The financing statement must contain a description of the collateral. Super generic descriptions are ok in regard to personal property such as all debtor and personal property, but to describe fixtures in real property the financing statement must also state the location of the real property to which the fixtures are attached. Here the description in the financing statement did not adequately describe the location of the real property to which it attached, so the security interest in the fixtures were not perfected. The description was adequate to describe the debtor's personal property which consisted of Elmo's computer. But in order to perfect a security interest in the \$25,000 cash ABC Bank would have had to take control of the cash by having Elmo depositing the money with the bank. This would give ABC possession and control which it needs to perfect a security interest in cash. Because ABC does not have control or possession of the \$25,000 it has not perfected its interest in the money. The other factors for valid perfection includes authentication by the debtor. This is done when there is a security agreement as is indicated here. There was adequate consideration for the security agreement because ABC gave Elmo \$100,000 in exchange for its promise to repay the loan. The loan was in writing and Elmo had rights in the collateral it gave to ABC for the loan the security was valid. ABC has a perfected security interest in the Orange brand personal computer because it filed a sufficient financing statement, but not the cash or the fixtures because

ABC does not have possession of the cash and the description of the collateral did not adequately describe the location of the fixtures.

Big George and Dirty Harry jointly leased and lived in a condominium in Wake County after their respective divorces. On a particular weekend, Dirty Harry brought Magnificent Maude to the condominium. While there, Big George came home and immediately went to his bedroom. During the evening, Maude showed some illicit drugs in her pocketbook to Harry. Harry and Maude used some of the drugs during the evening. On one occasion, Big George came out of his bedroom and smelled what he believed to be illicit drugs. Big George went into the kitchen for a Coke and saw a small amount of what he believed to be cocaine on the counter. Big George then went back to his bedroom. Early in the morning based upon information from a confidential informant, a valid search warrant and a search of the condominium was executed. Illegal drugs were found on the counter of the kitchen, in Dirty Harry's bedroom and in Maude's pocketbook.

QUESTION:

Is Big George guilty of any crimes? If so, what crimes?

Answer A to Question 12

Big George is not guilty of any crimes on these facts- occasional use will not support a “Maintaining a Dwelling” charge (& on these facts, Big George probably would not be seen as having broken an illegally activity provision of any lease).

Though drugs were found in Big George’s residence possession cannot properly be imputed to the driver and other occupants (“constructive possession”). Here, the drugs were in Maude’s pocketbook & on the counter- the former cannot be imputed to him the later might be erroneously imputed to him. The fact of their existence on his counter does not really mean he is guilty of possession: the key question to ask is whether he exercised dominion or control over the drugs- we know he did not, though his protestations to this effect may not be viewed credible by a fact tier on the issue.

North Carolina allows for charging a person with maintaining a dwelling (for use/distribution of a controlled substance) - a comparable charge is possible for automobiles (obtaining a vehicle) allowing for seizure (& sale at auction) of the instrumentalities implicated in the illegality. Here, however, Dirty Harry and Maude were apprehended with controlled substances on one occasion; we were not told more. Additional facts will be dispositive on the issue of whether a Maintaining a Dwelling charge is tenable: how much drugs? Where were they found? Any contraband in the form of paraphernalia? Did money change hands with respects to the drugs? Were they manufactured within the residence? As it is, simple possession of an illicit substance (in “personal use” amounts), without some other evidence of sale, manufacture or delivery is insufficient to sustain additional charges against co-occupants of a residence.

Answer A to Question 12

Yes, Big George is guilty of possession of narcotics.

It is a crime in the state of North Carolina to be in possession of narcotics. Cocaine is a narcotic and is illegal in the state of North Carolina. The question in this case is whether the presence of cocaine on the kitchen counter could be attributed to Big George.

The issue of possession is clear when contraband is found on the person of a defendant.

However, where a residence is searched and illegal drugs are located on the premises, those who have ownership and the right to possess and control that portion of the premises can be held to be in constructive possession of contraband.

In this case, Big George and Dirty Harry jointly leased the condominium that was searched, uncovering narcotics in Harry's bedroom, in Maude's pocket book and on the kitchen counter. Because Big George has the right to possession of the condominium pursuant to his lease, the contraband found in the condominium will be held to be in Big George's possession, if it is found in an area over which Big Harry has control. On these facts, Big George will not likely be held to have control over the contents of Maude's pocket book, which is personal to her and which Big George has no rights over. Big George would not be capable of consenting to a search of the area, had he been asked, because he does not have authority over the area to be searched. By the same logic, he has no right to possession of the pocketbook and cannot be convicted based solely upon its contents and presence in George's home. By extension, George probably cannot be convicted based upon the contents of Dirty Harry's bedroom, which is also not in the control of George, although as a joint lessee he technically has a right to possession of the whole condo, he in fact was not possessing it.

Finally, the cocaine on the counter will likely be held to have been in George's possession. He had a right to possess the kitchen space and had authority over that space.

Thus, the cocaine found there will be presumed to be in his possession. George may be able to rebut this evidence by presenting his own evidence that the cocaine did not belong to him, but technically he could be convicted on these *facts if* the jury does not believe that the cocaine was not in his home due to his consent or personal possession thereof. North Carolina does not impose a duty upon individuals to report crimes of which they have knowledge. Thus, George's failure to report his roommate and friend's drug use was not a violation of any law and George cannot be punished for that act alone.ⁱⁱ Similarly, North Carolina has abolished the common law crime of "accessory after the fact" in favor of common law accomplice liability. Because the facts do not show any act on George's part to participate in the crime of possession of narcotics, he will not be held liable as an accomplice to any crime of Maude or Dirty Harry.

In conclusion, Big George may be found guilty only of possession of the cocaine found on the kitchen counter in his condominium.