JULY 2006 BAR EXAMINATION

QUESTIONS AND REPRESENTATIVE GOOD ANSWERS

QUESTION 1

Ron White and Jeff Foxworthy were returning home to Cecil County, Maryland after spending the day in Atlantic City. White was driving his car and Foxworthy was the passenger. Close to home in Maryland, White's car ran off the road after he saw a deer running in the roadway. White and Foxworthy's recollections differed as to the actions of the deer. No other people or vehicles were involved in the accident.

The Maryland State Police arrived and White was issued citations for driving under the influence of alcohol, driving while impaired by alcohol, negligent driving and speeding.

White paid the preset fine for the speeding violation. White later appeared, with counsel in the District Court of Maryland sitting in Cecil County. Through negotiations with the Assistant State's Attorney, the driving under the influence of alcohol charge was dropped. White pleaded *nolo contendere* to the charge of driving while impaired by alcohol and guilty to the charge of negligent driving.

Foxworthy has sued White in the Circuit Court for Cecil County for injuries he suffered in the accident.

In th civil case, Foxworthy wants to introduce as evidence the payment of the ticket, guilty plea and *nol contendere* plea.

How should the trial court rule? Explain.

REPRESENTATIVE ANSWER 1

In Maryland, violation of a statute is admissible as evidence of negligence in tort actions. There is no negligence per se so even admittance of all of the evidence Foxworthy seeks to introduce would allow the finder of fact in the case to analyze any admitted statutory violations and each parties account of the incident involving the deer.

White pled guilty to the charge of negligent driving. A guilty plea in a case where the defendant has the same motivation to vigorously defend himself as he would in a subsequent tort action can be used against him as an admission in that subsequent action. As an admission of a party opponent, White's guilty plea is admissible in Foxworthy's case.

The payment of the preset fine for speeding by White can also be viewed as a guilty plea.

This is a much closer call than the negligent driving guilty plea, however, because the fine is a very small penalty and may be less costly than defending against the speeding ticket. Since there is less indicia of the reliability of paying a fine for speeding as an admission than there is for a guilty plea for negligent driving (which presumably carries a much stiffer penalty), it is less likely that White's payment of the speeding ticket will be admissible as an admission of a party opponent.

A nolo contendere plea faces many of the same issues of reliability that payment of the speeding ticket did. White may have received a very lenient sentence in return for his pleading nolo contendere and may have avoided facing a trial in which the penalty would have been much more severe. Also, in his plea of nolo contendere, White is specifically denying the charges being brought against him despite the fact that he is pleaing out. White's refusal to admit guilt leads to a very large problem in allowing the plea as an admission by White at a subsequent tort proceeding because there are indicia directly counter to reliability of the statement and ample evidence that White did not have the motivation to vigorously defend himself because of the type of risk that was involved.

The trial court should admit White's guilty plea for negligent driving, but the court should not allow White's payment of the speeding ticket or plea of nolo contendere for driving while impaired by alcohol as admissions by White. Foxworthy may still introduce evidence to suggest that White engaged in these activities.

REPRESENTATIVE ANSWER 2

1. Payment of the Ticket: Foxworthy wishes to introduce as evidence the fact that White paid the preset fine for the speeding violation. Foxworthy should not be permitted to introduce the payment into evidence. White's payment of the ticket is not an admission of guilt or an admission by Foxworthy that he was speeding. Thus, the court should not admit the evidence if Foxworthy wishes to prove that White admitted to driving over the speed limit on public policy grounds.

2. Guilty Plea: The court may properly admit evidence of White's guilty plea. A civil party may introduce evidence of a criminal defendant's guilty plea in a criminal proceeding. The only limitation is that the guilty plea is only admissible in a subsequent civil trial arising out of the same occurrence or transaction as the criminal proceeding. Here, Foxworthy is bringing a claim for damages based on the same incident for which White was criminally charged. The evidence, thus, should be admissible as non-hearsay admission by a party-opponent.

3. Nolo Contendere: The court should find that White's *nolo contendere* plea is inadmissible on the grounds of public policy. Maryland courts do not allow pleas of nolo contendere to be admitted against a criminal defendant in either a subsequent civil or criminal trial. Foxworthy wishes to introduce the evidence of White's nolo contendere plea to the driving while impaired by alcohol charge. A *nolo contendere* plea is not an admission by the criminal defendant of guilt. Therefore, the court should exclude evidence of the nolo contendere plea on public policy grounds.

QUESTION 2

You are the Maryland attorney representing Venice Marriot, a volatile hotel heiress and socialite, in her highly contentious divorce and custody battle with her soon to be ex-husband, Elmo Klump in a Maryland Circuit Court. The proceedings are not going well for her and in the weeks before trial, it is clear that Elmo will likely receive sole custody of their 3 children, alimony and a significant monetary award. All of this has made Venice even more distraught.

On May 1, 2006, Venice meets with you in your office to prepare for her deposition. At your suggestion, she brings her best friend Mercedes to the meeting to serve as a calming influence. During the meeting, you hear Venice tell Mercedes how they should kill Elmo by "slicing him up like a piece of sushi." You think they are joking, but on the way out of your office, Venice comments on how much she likes the samurai sword collection prominently displayed in your office.

On May 5, 2006 you read in the newspaper that Elmo survived an attack by two samurai sword wielding female assailants. You also notice that two of your swords are missing. Later that day Venice comes to your office and tells you that she has your missing swords in the trunk of her car and asks for your help disposing of them.

You are now concerned about your continued representation of Venice and seek permission from the Court to withdraw as her counsel. As the trial date is near, the Court refuses your request unless you provide an explanation as to why you are unable to continue your representation.

a. May you disclose Venice's statements made in your office on May 1, 2006 and May 5, 2006 to the trial judge in support of your motion to withdraw from the case? Explain your reasoning.

ADDITIONAL FACTS

Venice and Mercedes are now facing trial in a Maryland Circuit Court for the attempted murder of Elmo. The state's attorney has subpoenaed you to testify about the statements made by Venice on May 1, 2006 and May 5, 2006. Venice argues those statements are confidentially protected communications and you should not be allowed to testify about them.

b. How should the trial judge rule? Explain fully.

REPRESENTATIVE ANSWER 1

A. An attorney generally has a duty to maintain confidential communications with his or her clients. In this case, Venice's friend Mercedes was present during consultations. The

presence of a third party will not defeat confidentiality where that person was present for the purpose of aiding the exchange of legal advice. Mercedes was present at the meeting at my suggestion in order to serve as a calming influence. The Maryland Court of Appeals has ruled that communications between an attorney and client in the presence of a person who is serving to calm the client retain their confidential character. Thus, the presence of Mercedes does not relieve me of my duties to maintain confidence.

An attorney may disclose when there is a significant likelihood that disclosure will prevent death or substantial bodily harm. Here, I was initially under the impression that the two were joking about "slicing [Elmo] up like a piece of sushi." Given the attack on Elmo, which occurred within four days of the meeting, was perpetrated by two female assailants, and was committed with two samurai swords, it is quite likely that the women attempted to kill Elmo. I could reasonably fear for the possibility of future violence against Elmo or the children. As such, disclosure would be permitted.

Venice has informed me that she has my missing swords and would like my help disposing of them. Neither the attorney-client privilege nor the confidentiality protect against physical evidence that has been touched by an attorney. An attorney has a duty to not engage in any fraud that would impair the administration of justice. Under these facts, I could reasonably conclude that communications. In Newman v. State, the case from which these facts are derived, the Court of Appeals ruled that the presence of a third person at the request of an attorney for the purpose of claming discussions did not defeat the privilege. Admission of an evidence as to the discussion on May 1 would violate Venice's attorney-client privilege.

On May 5, Venice attempted to obtain my help in doctoring or hiding evidence that was probably related to a crime. While an attorney must not aid a client in hiding or destroying exculpatory evidence, the discussion about such actions retains privilege. The court should only admit evidence of the May 5 meeting to the extent that I moved, touched or manipulated evidence. Barring such actions on my part, the conversation would be both confidential and privileged.

REPRESENTATIVE ANSWER 2

(A) I have reasonable grounds to believe that my client Venice attempted to murder her husband Elmo. I am representing her in a divorce and custody battle and I have serious problems fighting for her to get custody since she probably tried to kill Elmo, which may be quite repugnant. Both of these rationales support filing the motion to withdraw, as does her request to get my help perpetrating what I quite reasonably believe is a crime (obstruction) by hiding the swords.

If Venice's statements in my office were not privileged I could disclose them to the court without worry. Because a third-party, Mercedes, was there at the time, the statement might not be privileged. Mercedes was not there at my request to help Venice's case (like an expert), she was there as Venice's "calming influence." She was there, however, at [my] request, and although she (Mercedes) was not acting in furtherance of the case, since she was there at my request, and the

purpose of the meeting was to prepare the depo testimony, it is quite likely Venice's statement would fall under the attorney-client privilege.

Even though it is probably privileged, I can reveal it to the judge because it is crucial to explaining why I want (and maybe need) to withdraw. First, I should try being vague and saying that I have strong reason to believe my client has engaged in criminal conduct, and has tried to get my help in furthering it. If that isn't enough, disclosing the statements to just the judge is warranted.

Venice's statement on May 5 would also be disclosable since she tried to get me to further what I reasonably believe was a crime. I should tell her at the time I can't help and that any fruits/instrumentalities of a crime should not be disposed of, as that is also a crime.

(B) Venice's statement on May 1 would be a confidentially protected communication. Despite the third party presence, it was made in the context of an attorney-client meeting, and the meeting was for the purpose of working on the litigation. At the time, it seemed like a joking statement. The statement about the sword collection may be admissible, since it was on the way out, if anyone else heard it, since that was not made in the context of the depo prep and would not be privileged in the presence of a random third party.

The statements on May 5 are probably not protected. They were made in the effort to perpetrate a crime or fraud, whether or not it involved me, in that she was seeking to dispose of evidence. That makes them an exception to the attorney-client privilege.

QUESTION 3

Rex Reporter is a sports reporter for The Post-Gazette. Rex is investigating alleged steroid abuse by Buddy Bigman, a star of Maryland's professional baseball team. Rex has learned that Buddy's ailing father, Frank Bigman, resides in a private nursing home in Baltimore City. With the approval of the newspaper's editor, Rex goes to the nursing home during regular visiting hours. When he arrives at the nursing home, pursuant to the home's policy as to visitors, Rex signs his name in a book at the reception desk and writes that he is visiting Frank Bigman. Rex then walks to Frank's room. The door to Frank's room is slightly ajar. Rex opens the door, walks in and says "Hello Mr. Bigman. How are you feeling today?" Frank Bigman responds "I'm fine, but who are you?" Rex introduces himself as a reporter for The Post-Gazette, and asks Frank if he knows anything about his son's use of performance enhancing steroids. Frank becomes agitated and demands that Rex leave his room immediately. Rex states that he only has a few questions and asks Frank to be patient. Frank again demands that Rex leave his room. Rex angrily responds that he only is doing his job, and again asks Frank about Buddy's alleged steroid use. Frank yells "Get out of here!" This time Rex leaves, slamming the door behind him on his way out. Frank remains very upset over this incident, and for the next several days experiences shortness of breath and has trouble sleeping.

A few months later Frank and his son Buddy visit your office to discuss a possible lawsuit against the Post-Gazette. After the meeting, Buddy telephones you and tells you that his father is 86 years old and has been diagnosed as suffering from the initial stages of dementia. Buddy says that his father "has good days and bad days" and that often Frank is lucid but sometimes is confused and forgetful. Buddy thinks the stress of a trial would be harmful to his father. Buddy also says that his father is a very proud person and would be humiliated if he knew that Buddy had disclosed this information to you and asks you not to tell his father.

a. Analyze what causes of action Frank may have against *The Baltimore Post-Gazette*, and the likelihood of success.

b. Should the information provided to you by Buddy affect your professional obligations to Frank? Are you obligated to disclose the telephone call with Frank?

REPRESENTATIVE ANSWER 1

(a) Frank's cause of action: Frank may sue the Post Gazette (PG) for Rex's torts if they were within the scope of Rex's employment. It appears that is the case, since Rex's conduct was not only to further and advance PG's interest, but Rex first obtained approval from PG's editor before visiting Frank. Therefore, Frank has the possible causes of action against PG:

Trespassing: Rex trespassed into Frank's room when he entered without permission, and particularly when he stayed about being told twice to leave.

Invasion of Privacy: Frank had a reasonable expectation of privacy in his private room. Rex

violated that privacy by continuing to stay after being told to leave. This cause of action will be difficult to prove.

Intentional Infliction of Emotional Distress: Rex's behavior was extreme and outrageous. He should not have made demands of an old man in a nursing home, particularly after seeing how much he was upsetting Frank. Frank suffered severe emotional distress as a result of Rex's purposeful behavior ("very upset", "shortness of breath", "trouble sleeping") with actual physical symptoms. This will also be difficult to prove, however, since the conduct may not be considered extreme and outrageous enough.

(b) My client in this situation is Frank, not his son Buddy, even if Buddy is paying my fee. Therefore, my obligation is to Frank alone. I must do what is in Frank's best interests. I also have an obligation to disclose to Frank information regarding his case and keep Frank aware of developments. Buddy's remarks do not fall into this category, and therefore, I do not need to disclose the information. It does not affect Frank's case against PG. However, I should keep the information in mind when I decide on a strategy with Frank. Since I must do what is in my client's interests, I cannot do things that will be harmful. I must make that determination myself, however, and cannot allow Buddy to dictate the strategy for Frank. My obligations to Frank remain the same under the Maryland Rules of Professional Responsibility. I will discuss the impact of a trial with Frank and let Frank determine if he can handle it as the final decision is always the client's.

REPRESENTATIVE ANSWER 2

a. In the first place, Frank may sue the Baltimore Post Gazette directly under a theory of respondent superior, as Rex is clearly in an agency relationship with the PG. Frank could also join Rex in the suit as a joint tortfeasor with PG.

Frank has two real options for causes of action, but only one has a chance of success. First, Frank may sue on the theory of Intentional Infliction of Emotional Distress. This is very unlikely to succeed, because while Rex's behavior may have been a little obnoxious, it could hardly be called extreme or outrageous. Also, the incident seems to have physically/psychically injured Frank for only a few days, an injury which probably isn't severe enough to bring an IED claim. Also, Maryland does not recognize a negligent IED claim, so Frank has no real shot at an emotional distress claim.

However, Frank may have a trespassing claim against Rex. Rex never clearly got permission to enter Frank's room (though he was validly in the nursing home). Even if he did originally have permission to be in Frank's room, Frank clearly revoked Rex's license to be on his property when he twice demanded that Rex leave the room, then yelled "get out of here!" This claim is likely to prevail as Rex was intentionally on Frank's property, and caused Frank injury (i.e. emotional fragility, shortness of breath, trouble sleeping).

As a side note, Frank could not bring a claim for slander or defamation of his son, since the statement was never published, was not clearly a statement (rather, a question), and the right belongs to his son, Buddy, to bring suit.

b). Frank must still be treated like a regular client. Buddy's information will probably lead me to treat Frank more carefully. That is, explaining everything fully and in detail, so I can be sure Frank understands what is going on. If I notice his mental state clearly deteriorating, I may have to appoint a guardian for him.

My duty of loyalty is to Frank, not Buddy, so ordinarily I would have to disclose the phone call. However, if disclosing the phone call would be harmful to Frank, I do not have to disclose it (in the same way that a psychiatrist report does not have to be disclosed if disclosure would be harmful to the client).

QUESTION 4

In 1995, Fred Farmer, his son Albert and Albert's wife, Beth, purchased "Blackacre", a farm in Washington County, Maryland. The deed conveyed title to the property to Fred, Albert and Beth as tenants in common. Later that year, Fred orally agreed with Albert that, if Albert paid the taxes and maintained the farm, he would receive Fred's interest in the farm at Fred's death. Fred died on February 1, 2005, with a will. In addition to Albert, Fred was survived by another son, Dan, who was aware of Albert's and Fred's oral agreement.

Fred's will was duly and legally admitted to probate. The will provided that Fred's estate was to be divided equally between his two sons. The will made no mention of Fred and Albert's agreement. The will designated Albert as personal representative and he was duly and legally appointed by the appropriate court.

On February 15, 2005, Albert wrote to Dan and stated that he had maintained Blackacre according to the agreement and that he was planning to convey the Estate's interest in Blackacre to himself and Beth "to fulfill my agreement with our father."

On April 4, 2005, Dan filed a complaint in the Circuit Court for Washington County for declaratory judgment against Albert personally and as Personal Representative of Fred's Estate. The complaint challenged the validity of the agreement and sought to have it declared unenforceable.

A. Is a complaint for declaratory judgment an appropriate means to obtain the relief sought by Dan? Explain your answer.

ADDITIONAL FACTS:

Albert filed a timely answer to the complaint and, with it, a counter complaint against Dan, asserting the agreement was valid. Dan filed a timely answer, and both parties filed motions for summary judgment.

On August 8, 2005, the Court granted Dan's motion for summary judgment and entered judgment declaring that the agreement was unenforceable. On August 10, Albert filed a motion for a new trial pursuant to Maryland Rule 2-533 and a motion to alter or amend judgment pursuant to Rule 2-534. The basis for both motions was a failure to join a necessary party.

On August 12, prior to the Circuit Court's ruling on his motions, Albert filed a notice of appeal to the Court of Special Appeals.

B. How should the Circuit Court rule on Albert's motions? Explain your answer.

C. In light of Albert's appeal, does the Circuit Court have jurisdiction to decide

Albert's motions? Explain your answer.

REPRESENTATIVE ANSWER 1

a. The complaint for declaratory judgment is proper and appropriate. §3-406 states that "any person interested under a....will...may have determined any question of ...validity...and obtain a declaration of rights". §3-408 states that "any person interest...may have a declaration of rights...in respect to the ...estate of a decedent in order to direct the personal representative...to abstain from doing any particular act...or to determine any question arising in the administration of the estate." §3-409 states that "a court may grant a declaratory judgment...in a civil case, if it will serve to terminate the uncertainty or controversy...if (1) an actual controversy exists or (2) Antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation or (3) a party asserts a legal right...and this is...denied by an adversary party, who also ...asserts a concrete interest in it." Because of the above cited law, Dan's complaint is appropriate. He has a right to have his rights declared, and a declaratory judgment will serve to terminate the controversy. The court has authority to make such judgments.

b. The court should deny both motions. The will states that the estate shall be divided equally between his sons. Fred only had two sons. Both were parties to the action. Rule 2-211(a)(1) states that "a person...shall be joined as a party... if in the person's absence...complete relief cannot be granted." Rule 2-211(a)(2) requires a party if "disposition of the action may impair or impede the person's ...interest." §3-405 (a)(1) states that if declaratory judgment is sought, a person who has claims to the property shall be made a party. Since Dan and Albert are the only two who have an interest in the land as Fred's heirs, there was nobody who should have been joined according to the above stated law. Beth has no claims to the property.

c. The Circuit Court maintains jurisdiction over the motions as specified in Rule 8-202 (c), which states in pertinent part "a notice of appeal filed before the withdrawal or disposition of [motions pursuant to Rules 2-533 or 2-534] does not deprive the trial court of jurisdiction to dispose of the motion[s]."

REPRESENTATIVE ANSWER 2

a. Pursuant to 3-409(c) a declaratory judgment is proper in this case. The issue here is whether Albert or Dan is entitled to Fred's interest in Blackacre. There is an actual dispute that falls under 3-409(I) because Albert claims Fred's interest in the land based upon an oral agreement made with Fred in violation of the statutes of fraud. Albert is wearing two hats because not only is he an adversary to Dan but he is also 3-408 personal representative of Fred's estate. On the other hand, Dan's interest stems from the Will. Granting the declaratory judgment will resolve the controversy that exists with respect to the legal rights of both parties.

b. Albert filed the motions because Beth, since she is a tenant in common, should have been joined in the original action. Beth was required to join the action if Albert shows that in her

absence complete relief cannot be granted, disposition would impede her rights, and may leave the parties in the action to inconsistent litigation. Here, Beth is not a necessary party to the action because the parcel of land that is at issue is Fred's interest in the land. Regardless of the outcome, Beth's interest will not be impeded because she will still have an interest in Blackacre as a tenant in common. In addition, Beth is not needed in order for there to be complete relief because the issue is only with respect to Fred's interest.

Thus, while Albert filed his motions to comply with the 2-533 and 2-534 10-day requirement, his motions will be denied because there are no additional findings or facts that would warrant amendment of the prior judgment.

c. The Circuit Court has jurisdiction over the appeal because the summary judgment was a final decision by the lower court.

QUESTION 5

Mr. Big is a notorious gang member operating in Anne Arundel County, Maryland. On November 11, 2005, Big, Briscoe and Tew Pak were in a Shadyside alley conducting a drug transaction. Big was unaware that Briscoe and Tew Pak were undercover police officers. Big became suspicious just after he handed over a large amount of cocaine to Tew Pak in exchange for $2,000. Big pulled out a gun and shot at both Briscoe and Tew Pak, instantly killing Briscoe. Big was arrested shortly thereafter and Tew Pak filed a Statement of Charges against Big for possession of cocaine. Big appeared in District Court for Anne Arundel County on November 23, 2005, entered a plea of guilty to possession of cocaine, and was sentenced to one year in jail.

On December 11, 2005, the State's Attorney for Anne Arundel County obtained an indictment against Big for possession of cocaine, distribution of cocaine, distribution of cocaine to Briscoe, the first degree assaults of Tew Pak and Briscoe, and the murder of Briscoe. Big's attorney moved to have the indictment dismissed, but his motion was denied.

a. On what grounds may Big appeal the judge's refusal to dismiss any portion of the indictment? Explain your answer.

In January, 2006, a jury found Big guilty of the murder of Officer Briscoe, and the matter was set in for a death penalty sentencing hearing. On the morning of the sentencing hearing, Mr. Big's counsel was hospitalized unexpectedly for an emergency medical procedure.

Correctional officers brought Big into the courtroom in handcuffs and leg irons, claiming concern that the notorious Big was a flight risk. The court ordered that these restraints not be removed. Upon learning that his attorney would not be present, Big stated in open court, "Well, I want this over with" and requested that the hearing proceed in the absence of counsel. Big did not cross-examine witnesses presented by the State, nor did he present any evidence. After several hours, the jury brought back a verdict to impose the death penalty.

b. On what grounds can Big appeal the sentence? Explain your answer.

REPRESENTATIVE ANSWER 1

(A) Appeal

Big can appeal the judge's refusal to dismiss the indictment for possession of cocaine on the grounds of res judicata & violation of the Double Jeopardy Clause.

According to these provisions, a defendant cannot be tried twice for the same crime arising out of the same transaction/occurrence. Big was already charged with possession of cocaine, and pled guilty in district court. He was subsequently sentenced to 1 year in jail. Big cannot be charged again for this crime, as a court with proper jurisdiction has already entered a final judgment on the merits of the case.

Big can argue that he also should not be charged with distribution of cocaine on the grounds of res judicata. Big can argue that possession & distribution are essentially the same crime, or that possession is a lesser crime of distribution.

A court will try Big on both charges if each requires proof of an element that the other does not. Possession of cocaine involves exercising control/dominion over cocaine with knowledge that the substance in defendant's possession is in fact cocaine. Distribution involves possession of cocaine, knowledge of the substance's illegal nature & intent to distribute the substance. Because all of the elements of possession are encompassed within the crime of distribution, possession of cocaine is a lesser crime of distribution of cocaine.

Because Big has already been charged with the lesser crime, and convicted, he cannot now be charged with the greater crime (distribution).

(B) Appeal of death sentence

Big can appeal the death sentence based on his Sixth Amendment right to counsel. The Sixth Amendment is applicable to the States through the Fourteenth Amendment Due Process Clause. Because the death penalty deprives a defendant of his/her life, the defendant must be represented at the sentencing proceeding. Counsel for defendant must introduce all relevant mitigating factors & circumstances to the jury. The jury must weigh the mitigating factors against any aggravating factors, and only sentence defendant to death if the aggravating factors outweigh the mitigating factors.

Because defendant's counsel was hospitalized for an emergency, the court should have postponed the sentencing proceeding. Without the attorney present to cross-examine witnesses or present evidence, Big's Sixth Amendment right to counsel was violated.

Big can also argue that his due process rights were violated by the presence of the handcuffs & leg irons. By presenting Big to the jury in these restraints, their views were likely tainted. Because Big's appearance likely prejudiced the jury to an unreasonable degree, his due process rights were violated.

REPRESENTATIVE ANSWER 2

A.

Big should appeal the possession of cocaine portion of the State's Attorney's indictment on the grounds that double jeopardy attached to that charge when his guilty plea was accepted on November 23rd, and that bars him from being charged with that crime again.

Double jeopardy may also preclude the State's Attorney from proceeding with the distribution charge because it merely involves one separate element from the charge of possession; intent to distribute. Under the Blockburger double jeopardy test, double jeopardy precludes bringing charges that were previously ruled on unless the two crimes each have a separate element that the other does not. Distribution of cocaine involves possession and

distributing it to another. Possession of cocaine does not involve a separate element. Thus, those portions of the second indictment should be barred. The other charges, although rising from the same incident, should be permitted because double jeopardy has not attach to them.

B.

Big can appeal his death penalty sentence on the grounds that his appearance in the courtroom without an attorney, in handcuffs was highly prejudicial to his case. A defendant in a death sentence hearing is always entitled to, and strongly recommended to have an attorney represent him at a hearing. The judge should have recognized Big's waiver of counsel as inadequate based on his reasoning, "I want to get this over with." The stakes were too high for such a casual waiver of the right to counsel.

The fact that Big did not cross-examine any witnesses or present mitigating evidence also supports his appeal, although the State may argue that he did at least have an opportunity to defend.

Finally, appeals are always permitted in death penalty cases, so Big's arguments' that the handcuffs were unwarranted and extremely prejudicial, that his attorney had a legitimate excuse for failing to appear, and that his casual waiver of right to counsel should have been questioned further by the presiding judge, should be sufficient grounds for appeal.

QUESTION 6

Brian and Patti were married in Howard County, Maryland, on April 1, 1995. Patti gave birth to a son, Kyle, on September 1, 1995.

Brian was employed as an engineer and earned an annual salary of $150,000. He worked long hours, typically 12 hours per day. Patti was employed as a bartender and earned an annual salary of $30,000. She generally worked from 8:00 p.m. until 2:00 a.m.

Brian and Patti gradually became disillusioned with marriage. In April 2003, Brian and Patti separated and Brian moved in with his rich girlfriend, Nicole Mitchie. Brian and Patti entered into a separation agreement that provided for joint custody of Kyle. Patti maintained physical custody of Kyle, while Brian enjoyed liberal visitation, including overnight visitation. Pursuant to the agreement Brian paid Patti alimony and child support in amounts consistent with Maryland law. On April 17, 2005, Brian and Patti received a Judgment of Absolute Divorce from the Circuit Court of Howard County, Maryland, into which their separation agreement was incorporated and merged.

A few months later, Brian quit his job because he wished to spend time with Kyle and coach Kyle's sports teams. He also knew his girlfriend, Nicole Mitchie, could afford to pay all of Brian's living expenses.

After the divorce, Patti informed Brian that he was not Kyle's biological father. This was confirmed by a subsequent blood test.

Although distraught by the unexpected news, Brian loved Kyle and wanted to stay in his life. Brian decided to cease all alimony and child support payments and filed a motion for sole custody of Kyle and termination of alimony. Patti filed an opposition and a motion for contempt.

On May 1, 2006, the Circuit Court held a hearing and ruled that Brian must continue the monthly alimony payments, and granted sole custody to Patti for the next 4 years, at which time sole custody would be given to Brian. The Court also found Brian in contempt and ordered that he pay all arrears for alimony and child support immediately or be jailed with the purge amount being the same as the arrears.

Brian contacts you, a Maryland attorney, from jail and asks if there are any grounds to appeal the Court's decision, and what counter-arguments might be raised by Patti. What would you advise? Discuss fully.

REPRESENTATIVE ANSWER 1

Alimony

A court will modify alimony payments at its discretion in the event of a substantial change in conditions (unless the merged separation agreement states otherwise). Brian can argue that

previously he was employed as an engineer making $150,000 a year; however, he now is unemployed and thus this is a substantial change in conditions which should require a modification of his alimony payments. Patti will argue that Brian has voluntarily impoverished himself by quitting his job and simply doesn't want to make payments. Brian will counter that is not true, he quit to spend more time with Kyle and he knew his girlfriend could afford to pay his living expenses. Patti will further argue that she only makes $30,000 as a bartender and was used to living on Brian's salary combined with hers. Also Brian can afford payments if he just starts working again.

There are no facts that indicate that alimony can't be modified, thus court can do it.

Custody

The court determines custody of a child using the best interest of the child standard. Here Brian can argue that it is not in Kyle's best interest for Patti to be granted sole custody because she works late hours and this is a time when a child needs adult companionship and supervision. Further, even after Brian found he wasn't Kyle's biological father he still wanted to stay in his life and loves Kyle. Patti will argue that she should not be penalized for trying to make an honest living. She has maintained physical custody since they separated and has allowed Brian to visit.

Brian can argue that the separation agreement givens them joint custody. It was merged and incorporated into the divorce judgment and therefore he should have joint custody. Brian may also argue that it is in Kyle's best interest for him to keep visiting Kyle even if Patti has sole custody. Kyle is at a young and impressionable age and it's important to have a father figure around. It is in his best interest.

Child support

Brian can argue that since Kyle is not his child he should not have to pay child support. Patti will counter all parents must support their children and children born during the marriage are presumed to be the biological child of the marriage. Further, it is in Kyle's best interest that Brian help support him since Patti only makes $30,000 a year.

Contempt of court

Brian can argue that his incarceration violated the 8th Amendment's ban on cruel and unusual punishment. He merely wanted to challenge the custody and alimony agreement and was not being a deadbeat dad. The court will probably reject this argument because in today's society there are too many deadbeat parents who try to evade paying child support and/or alimony.

REPRESENTATIVE ANSWER 2

The separation agreement was merged and incorporated into the absolute divorce

judgment and is thus not subject to modification. Brian should assert that the term that provides sole custody to be given to him starting in four years is invalid as it violates the best interests of the child standard in addition to their separation agreement. The court (if it wanted to switch custody) should have assessed what was in Kyle's best interests at that time.

Brian cannot contest the court's requirement that he continue the alimony and child support payments, just because the blood test confirms Kyle is not his. The child born during the marriage is presumed the husband's and a blood test is not enough to remove Brian's obligations, especially considering the close bond between Brian and Kyle. Patti would also assert that Brian's distress over this is not enough to violate their separation agreement regarding alimony payments.

Brian would argue that giving Patti sole custody for the next four years is an invalid modification of their agreement and that Kyle needs Brian's continued presence in his life. He would also note that if Patti was still bartending those hours it wouldn't be in Kyle's best interests to have her as a sole caregiver when joint custody could help.

Pattie would argue that Brian's voluntary impoverishment was not valid grounds for alteration of alimony payments and that the court's decision to order Brian to continue paying it was correct. Brian could assert a material change in circumstances warranting the change and challenge the decision. He would say it was not voluntary impoverishment since it wasn't to avoid his alimony duties but was to become more involved in his son's life. The court would consider this and see if it was done in good faith.

Brian would also argue that his being put in jail was excessive under the Eighth Amendment, as his "bail" is an excessive amount equaling the arrears. He will assert a better chance at being able to pay if he is released and able to work.

QUESTION 7

Business Associations

Greenacre, Inc., a Maryland corporation, is a land developer in Maryland. Dirt Cheap, Inc., another Maryland corporation, has held title since 2000 to land known as Dreamview in Anne Arundel County, Maryland. All the stock in both companies is held by Ryan. Greenacre owns all the equipment used by both corporations, hires all employees, and manages the payroll and employment matters for both corporations. The two corporations have the same directors and hold joint board meetings in which any matters of either corporation are discussed.

In January, 2005, Ryan, the president of Greenacre and Dirt Cheap, sought investment funding from Carter on behalf of Greenacre. Documentation provided to Carter for review stated that Dirt Cheap was a corporation owned by Ryan and it held title to Dreamview. After reviewing the documentation, Carter preliminarily agreed to loan Greenacre $450,000 to be repaid in one year with interest. Just prior to the execution of the agreement, Carter stated his concern to Ryan that Greenacre would not have the funds to repay the loan at the end of the one year period. Ryan stated to Carter that "we own Dreamview and it would generate enough cash for the repayment within the one year period." Carter loaned Greenacre $450,000. Ryan as president of Greenacre, Inc., signed a confessed judgment promissory note for $450,000 payable to Carter in one year.

At the end of the one year period, Greenacre did not have funds to repay the loan. Greenacre had had several financial setbacks and Ryan had turned to and used Dirt Cheap, Inc. for other development projects. Carter sued on the promissory note and obtained a confessed judgment against Greenacre, Inc. for $450,000 in Anne Arundel County, Maryland.

Carter wants to attach and sell Dreamview to satisfy his judgment against Greenacre, Inc.

1. Based on the given facts, can Carter successfully attach and sell Dreamview for the payment of its judgment against Greenacre, Inc.? Provide a detailed analysis.

2. Based on the given facts, can Carter obtain a judgment against Ryan? Provide a detailed analysis.

REPRESENTATIVE GOOD ANSWER 1

a) The issue here is that Carter has a judgment against Greenacre but title to Dreamacre is held by "another Maryland corporation", Dirt Cheap, Inc. (DCI). To successfully attach Dreamacre, Carter would need to advance a piercing-the-corporate-veil argument, alleging that one corporation was a "mere instrumentality" of the other in order to work a fraud or gross

inequity, so that the court should set aside the corporate form and treat DCI and GI as a single business entity.

Maintenance of corporate formalities will help to defeat a piercing argument. Here, the corporations held "joint board meetings" where "any matters of either corporation" are discussed which tends to show they were not truly separate entities. The mere fact of overlapping or identical shareholders (in this case Ryan), is not very significant to the analysis. The fact that GI "owns all equipment" and manages all operations for both entities does suggest DCI may be an instrumentality of GI. However, the standard for piercing is extraordinarily high and there is insufficient evidence that the corporate form was used to perpetrate a fraud. Thus, Carter will not succeed on a piercing argument.

As an alternative, Carter may attempt an estoppel argument. When he questioned GI's ability to pay, Ryan, as agent/president of GI, said "we own Dreamview", and Carter relied on this representation to his detriment. However, Ryan may not impoverish one corporation he controls, to meet the obligations of another. Thus this agreement also will not succeed.

b) Judgment against Ryan –

Ryan as shareholder – Shareholders are not liable for corporate debts except under a piercing theory, which will fail against Ryan for the same reasons listed above in the horizontal piercing case.

Ryan as director – Directors of corporations are not personally liable to corporate creditors. Here Ryan is the President of G.I. and is not personally liable for corporate debts such as Carter's loan to G.I.

REPRESENTATIVE GOOD ANSWER 2

a) No, Carter cannot successfully attach and sell Dreamview for payment of his judgment against Greenacre. Dirt Cheap is a separate corporate entity from Greenacre. Dirt Cheap holds title to Dreamview. To attach real estate owned by the judgment debtor, it must be exactly that owned by the judgment debtor. Here, Greenacre does not own Dreamview. It does not matter that Greenacre and Dirt Cheap share a common stockholder/president in Ryan. The loan by Carter was given to Greenacre. Moreover, Ryan signed a confessed judgment promissory note to Carter for $450,000 as president of Greenacre. He did not sign it as president of Dirt Cheap. Ryan also sought the loan for Greenacre not Dirt Cheap. Moreover, Carter knew Ryan was owner of two separate corporate entities based on the documentation provided to Carter to review. Therefore, the loan and confessed judgment were all done in the name of Greenacre. Carter may argue that Ryan and Greenacre should be estopped from making this argument based upon the fact that Ryan told Carter "we own Dreamview and it would generate enough cash for the repayment". Carter may also argue this was a misrepresentation which he was induced to rely on and that he did rely on it before giving the loan based on his concerns. However, Carter entered into the loan knowing it was for Greenacre and that Ryan had signed the note as president of Greenacre. Since Greenacre did not own Dreamview, and Carter knew this despite Ryan's statement, Carter is estopped from

making such a claim. He should have secured the loan with Dreamview.

b. It is unlikely Carter can obtain a judgment against Ryan. Ryan is both a stockholder and an officer of Greenacre and Dirt Cheap. As such, his liability is limited with regard to the debts of either corporation. This is the liability protection one receives, as a stockholder and an officer of a corporation. Here, Carter cannot sue Ryan for breach of a fiduciary duty because Ryan owes his duties to the Corporations – not to Carter. Ryan has not breached the duty of care and loyalty to his corporation. Carter's best chance would be to try to pierce the corporate veil at Greenacre to reach its stockholder Ryan. The court will only pierce to avoid fraud or enforce a paramount equity. Courts are generally hostile to doing so. Here, Carter will argue a fraud has been committed based upon Ryan's statement that "we own Dreamview". A court is not likely to pierce here because Carter knew that was not true. He had all the information before making the loan. He knew Dirt Cheap owned Dreamview. Moreover, a court will not find a paramount equity to enforce. Here, there is no evidence that Greenacre was not observing corporate formalities or that it was under funded when it was formed. Moreover, there is no evidence of alter ego. Ryan wasn't using the corporation as his alter ego. Although, it may be an issue that the corporations were holding joint meetings, this doesn't seem to be sufficient to pierce the corporate veil especially when Carter had the information beforehand. Thus, Carter will not be able to obtain a judgment against Ryan.

QUESTION 8

Abel buys and sells stolen goods. Baker is an undercover police officer who has recently infiltrated Abel's business and gained Abel's confidence. Several years ago Charlie, a mob "hit man", was convicted of a firearm violation and incarcerated as the result of information provided to the police by Abel, who was then acting as an informant.

As Abel is getting into his car after a meeting, Baker tells Abel that Charlie has been released from prison and intends to get even with Abel. Baker offers to provide Abel with a handgun for protection. Abel at first refuses, stating "I have never carried a gun and don't intend to start now." Baker places the handgun visibly on the front seat of Abel's car and tells Abel that Charlie intends to kill Abel that night. Abel is convinced that Baker is telling him the truth. As Abel starts his car, Abel sees Charlie standing across the street. Charlie points at Abel and makes a threatening gesture. Abel reaches for the handgun and tells Baker that "I would never take this except for your advice and unless it was necessary for my own protection" and speeds away.

As Abel drives away, Baker calls a uniformed officer and tells the officer to intercept and arrest Abel for possession of the handgun. Several miles away Abel is lawfully arrested and found to be in the unlawful possession of a handgun as the result of a lawful and proper search and seizure. Abel tells the arresting officer, "I only had the gun because I had no other means to protect myself from Charlie."

What defense(s) can be raised by Abel on the charge of unlawful possession of a handgun?

REPRESENTATIVE GOOD ANSWER 1

Abel may first argue that he was entrapped by the police. Baker had already gained Abel's confidence in his capacity as an undercover officer. Abel acted in part based on his confidence in Baker, and certainly would not have thought that after acting as an informant the police would turn on him. He would not have taken the gun but for Baker's handing it to him.

The state will likely counter that Abel already has a disposition to commit the offense. Disposition is in fact the reason that entrapment defenses usually fail. However, Abel has a good response to this argument. When offered the gun, he insisted that he did not want it and that he never possessed one before. Baker coaxed him at that point by telling him that Charlie intended to kill him. Baker assured him that he would not take it but for that threat. Thus, Abel may be able to craft an argument that he legitimately was entrapped.

Abel may also claim necessity or self-defense. A necessity argument would not succeed since that is typically reserved for cases where natural forces are at issue, or someone takes the life of another to save the group, etc. Self-defense will also be a difficult argument to make. While Abel may have feared Charlie, there does not appear to be an urgent or immediate danger

that would prevent Able from going through the process of lawfully obtaining a handgun or seeking police protection.

Finally, Abel may argue that he does not posses the requite mental state (i.e. intent) to be guilty of violating the statute. This argument is also a weak one. Abel intended to retain possession of the gun, and was fully aware that what he possessed was a handgun. Mistake of law would be no defense, nor would the fact that someone else gave him the gun.

Overall, Abel's best argument on these facts would be entrapment.

REPRESENTATIVE GOOD ANSWER 2

Abel's best defense against the charge of unlawful handgun possession is entrapment. The entrapment defense is available if a defendant is induced to commit a crime by the state that he had no propensity to commit without the state's action. Baker, as an undercover police officer, is clearly a state actor whether Abel knew it or not, and his action induced Abel to take possession of the gun. Baker offered to give the gun to Abel, told him that Charlie was about to kill him, and did this in a place where both men could see each other. Baker obviously acted in such a way as to maximize the chance that Abel would take the gun.

Abel has not in the past shown any propensity for handgun ownership or any sort of violent crime. In the past he has bought and sold stolen goods, a crime that has little relevance to a propensity for handgun possession. Moreover, Abel repeatedly tells Baker he does not want to own a handgun, and only takes it reluctantly because it is necessary for his own protection. Because Abel was induced to take the handgun by a police officer, and had no propensity to commit this crime, he can successfully assert a defense of entrapment.

Abel could raise a defense of self-defense, but this would likely be unsuccessful. Self-defense requires the use of force in response to an immediate danger. Despite the fact that Abel believes that Charlie will kill him that night, and this likely is reasonable, this probably still does not qualify as imminent enough. More importantly, because handgun possession is a statutory crime with a common law equivalent, it is not clear that self-defense is ever available as a defense.

A more appropriate defense might be necessity which justifies the commission of a lesser crime in order to avert a greater harm. Certainly, Abel's possession of a handgun is a lesser crime than the murder of Abel by Charlie. However, this defense may not be available to Charlie if the threat to him was reasonable but not real (this is not clear from the facts). Necessity involves a balancing test that Abel may or may not succeed at. The defense of entrapment provides him with a much better chance of success.

QUESTION 9

Harry Holder is a screen writer. He gives a check for $5,000 to ABC Bank's teller, Tessa Teller, to cash. The check is written by Chuck Noll for services that Holder provided. Chuck has an account with ABC Bank. Holder signs the back of the check as requested by Tessa Teller. Teller also requests a driver's license from Holder, which Holder provides. Teller then takes the check and puts it into her computer which prints the deposit account number and date on the back of the check. Teller puts a hold on Chuck Noll's account in the amount of $5,000. Just as Teller is about to make payment to Holder, she asks Holder if he is a customer of ABC Bank. Holder replies that he is not. Teller then gives back the check to Holder and requests that he place his thumbprint signature on the check before it's cashed in accordance with the bank's policy. Holder, however, refuses to do so. Teller advises that as a result, ABC will not cash the check. Holder argues with Teller, but she refuses to pay the check without the thumb print.

Because of ABC Bank's refusal to cash the check, Holder has suffered damages. Holder comes to you a Maryland lawyer, regarding his rights under Maryland commercial law against the bank.

Does Harry have any rights under Maryland commercial law with respect to ABC Bank's refusal to pay the check? Discuss fully.

REPRESENTATIVE ANSWER 1

Holder v. ABC

ABC is not liable unless it accepted the check. Thus, the question is whether ABC accepted the check when Teller printed the account info on the computer. Acceptance means ABC's signed agreement to pay a draft as presented. It must be written on the draft and may consist of the drawee's signature alone. ABC was not required to accept the check.

Holder will argue that because Teller put the account number on the check in the machine, that the bank accepted the check. The Court will find that Noll's account info is not ABC's signed agreement to pay. In addition, acceptance only becomes good when the bank notifies that it has made acceptance. Here, Teller told Holder specifically that ABC would not accept the check unless he put his print on the check. Banks have the need to assure the identity of non-customers to prevent fraud. Without acceptance Holder cannot make ABC liable for refusing to pay.

Holder v. Noll

Because ABC did not accept the check, Noll is not discharged of his obligations to Harry. Noll, however, has an argument that he has fulfilled his obligation to Holder, since the check was not dishonored by ABC.

REPRESENTATIVE ANSWER 2

A person is not liable on an instrument unless the person signs the instrument. A Signature may be made manually or by means of a device or machine with present intention to authenticate the writing. A bank does not become liable for refusing to pay a check unless it

accepts it. Although Teller put Noll's account info on the check, it was not intended to be a signature of ABC. Even if it was a signature, under 3-409, acceptance does not become effective unless the bank gives notification. Here, ABC told Holder that they would not accept the check unless he provided his thumb print, which he refused to do. So, under either case, ABC did not accept the check and is not liable for refusing to pay the check unless Holder provided his thumb print.

Holder does not have a claim against Noll either because the check was not dishonored by ABC. If the court determines that ABC did in fact accept the check then Noll would be discharged.

QUESTION 10

Angelina unloaded grocery bags from her minivan in front of her house one afternoon when she was approached by Mr. Meanor. He brandished a handgun and told Angelina he was taking the van. Mr. Meanor jumped into the van and drove off.

As Mr. Meanor turned onto Main Street he noticed a police car in his rear view mirror traveling towards him on Main Street. Mr. Meanor secreted a bag of powder cocaine he was carrying under the driver's seat of the van. He prudently pulled into the flow of traffic on Main Street traveling at the posted speed limit but forgot to use his turn signal. After a few blocks the police car turned on its emergency lights and siren and stopped Mr. Meanor.

Officers Law and Mann approached the van, and Officer Mann asked Mr. Meanor where he was going. Mr. Meanor replied "that's none of your business pig." Officer Law was familiar with Mr. Meanor, having arrested him several times in the past year on drug charges. He ordered Mr. Meanor out of the van and, on a hunch, searched it. He found a marijuana cigarette in the console between the driver's and passenger's seats. Mr. Meanor then was arrested.

Upon arrest, a 9mm handgun was recovered from Mr. Meanor's waistband. The van was impounded in the evidence control garage where it was searched further. Officers at the garage found a bag of cocaine under the driver's seat. They also cataloged other personal effects found in the van belonging to Angelina.

While at the station, Officers Law and Mann received word that the van Mr. Meanor was driving was stolen earlier in the day. The officers brought Angelina to the police station and walked her past an office where she could see Mr. Meanor seated alone and handcuffed. When she saw Mr. Meanor, Angelina blurted out "that's the creep who took my van!" Mr. Meanor was charged with several felony and misdemeanor offenses including the carjacking of Angelina's vehicle, theft, possession of controlled dangerous substances, and handgun offenses.

You represent Mr. Meanor and you want to file a motion to suppress all evidence obtained. Without discussing any possible charges which may be brought against Mr. Meanor, what issues would you raise in the suppression motion? How do you believe the Court will rule on each issue? Discuss fully.

REPRESENTATIVE ANSWER 1

The Stop: I will file a motion to suppress the initial stop of the car M was driving as being a violation of M's Fourth Amend right against unreasonable searches and seizures. This motion, however, will be denied because the Police witnessed him make an illegal turn. Thus, there was probable cause for the stop.

The Search: Clearly Officer Law did not have probable cause to search the van without consent or a warrant based on a hunch. The problem is that M stole the car and probably does

not have standing in the owner's car to assert a violation of the 4th amend. So the Court will probably deny my motion on this ground and the recovery of the joint will be admissible.

The Arrest: Because the Police had probable cause to arrest M once they found the drugs on him, the gun that was found is ok because it is a result of a search incident to a lawful arrest.

The Cocaine: Police may take apart a vehicle for purposes of an auto inventory. Thus, here the CDS that was found will be admissible because it was found pursuant to an inventory search. I still will be able to argue that my client did not have possession over the hidden CDS because it was not his car.

The ID: I think the court will grant my motion to suppress Angela's ID at the station because it was overly suggestive. M was at the police station, handcuffed in a room when the police took Angelina past him. It would have been different if this was a show up at the scene of the incident immediately following the theft and if M was not handcuffed.

REPRESENTATIVE ANSWER 2

I would argue the officers had no reasonable suspicion or probable cause to stop my client. Any evidence recovered from my client after the illegal stop must be excluded. The court would deny my motion. My client made a turn without using his turn signal, a violation of the Maryland traffic code providing probable cause for the stop of the van.

I would file a motion to suppress the marijuana the officers found in the console. The officers had no probable cause to search the van. Meanor's statement that his destination was none of the officer's business was insufficient to support a search of Meanor or the van. The court would deny my motion because Meanor stole the van and was not in lawful possession of it, so he did not have standing in its contents.

I would file a motion to suppress the handgun because after ordering my client from the vehicle the officers did not observe any further conduct that provided probable cause for a search. The court would deny my motion. The marijuana was properly seized and the officers were justified in arresting Meanor and the gun was recovered in a search incident to the arrest.

I would file a motion to suppress the cocaine because the cocaine was recovered during a search which was not supported by probable cause or a warrant. The court would deny my motion. After the van was taken to the evidence control garage the officers were justified in conducting an inventory search of the contents.

I would file a motion to suppress the identification because the officers brought Angelina to the station and walked her past an office where my client was seated alone and handcuffed. The court is likely to grant my motion. The court would look at the entire i.d. procedure and decide whether the procedure was unreasonably suggestive. The officers

intended for Angelina to see Meanor and identify him, making the identification procedure unreasonably suggestive and prejudicial.

QUESTION 11

At the time of his death on April 1, 2002, Amos owned, individually in fee simple, a 200-acre farm on the Potomac River in Charles County, Maryland. His will admitted to probate in that county contained the following provision:

"I devise my farm, livestock and all farm equipment to my daughter Beth and her husband Clem as joint tenants with the right of survivorship."

The deed from the personal representative of the estate, recorded on July 15, 2002, conveyed the real property, together with the livestock and equipment, to "Beth and Clem, husband and wife". The deed made no mention how title was to be held by them.

Beth and Clem lived on the farm until June 3, 2003 when they separated. They agreed that Beth would continue to live at the farm and Clem would continue to farm the land and provide support to Beth by sharing with her a portion of the income from farm operations.

On January 5, 2004, Clem defaulted on a loan he had obtained from Penny Bank of LaPlata in September 2002, and for which he had individually signed a confessed judgment note. Penny Bank obtained a judgment by confession against Clem on February 15, 2004 and had it recorded and indexed in Charles County as prescribed by the Maryland Rules.

On April 3, 2005 Clem entered into a 60-day option contract with Builder to sell the farm subject to Builder's obtaining favorable zoning approval to build townhouses. On May 20, 2005 Builder elected in writing not to exercise the option.

Clem and Beth were divorced on May 15, 2005. Clem was fatally injured at the farm on June 30, 2005 when his tractor overturned. He died intestate on July 2, 2005. He is survived by Beth and one son, Kurt.

Penny Bank claims a lien on the property based on its judgment. Evaluate the Bank's claim.

REPRESENTATIVE ANSWER 1

The issue is what form of co-tenancy was the farm being upon the death of Clem. Here, there is a conflict between Amos' Will and the deed conveying the property to Beth and Clem. In general, property conveyed to husband and wife in Maryland is presumed to be a tenancy by the entirety. As such, the husband and wife have an undivided interest in the whole. The four unities of time, title, interest and possession must be met, as well as the fact that they are married. Thus, a deed to "Beth and Clem, husband and wife" would suggest a tenancy by the entirety. However, the language in Amos' Will is very specific and uses the correct legal term "joint tenants with the right of survivorship." That is not a favored co-tenancy in Maryland, courts will honor the intent of the grantor. Here, the language in the Will is very specific while the language in the deed does not mention how title will be held. Therefore, the language in the Will prevails.

A joint tenancy with the right of survivorship includes the same unities as a tenancy by the entirety except for the fact of marriage of the co-tenants. However, it is not as protected as a tenancy by the entirety because it may be severed unilaterally by one of the joint tenants. Beth will argue that it was a joint tenancy and was not severed upon divorce (as would be the case with a tenancy by the entirety which would become a tenancy in common). She will further argue that the loan by the bank did not sever the tenancy as a severance does not occur until the Sheriff actually executes the writ. Moreover, she will argue that the sixty day option would not sever the joint tenancy because Builder elected on May 20, 2005 not to execute the option. The option must be exercised in order for the joint tenant to be severed and then become a tenancy in common. Furthermore, she will argue that the divorce did not change joint tenancy because it would only have affected a tenancy by the entirety. Since that is not what she and Clem were holding, it is not affected. Married couples may hold a joint tenancy. Therefore, she will claim that when Clem died on June 30, 2005 she had survivorship rights and became owner of the farm in fee simple absolutely. Had the estate been held as a tenancy in common, Kurt would have inherited Clem's half interest as a tenant in common. However, since the Court will likely find Amos' intent was to create a convey a joint tenancy, Kurt has no interest.

Under Maryland law, a lien has the effect of severing a joint tenancy and turning it into a tenancy in common. Here, Penny Bank will claim that is the case with regard to the judgment. However, under Maryland law, the joint tenancy will not be severed until the Sheriff executes a writ of attachment upon the property. Here, the judgment has been recorded but the facts do not indicate that the Sheriff executed the attachment. As such, the property remains a joint tenancy and the bank has no interest until the writ is executed. Under these facts, Beth became the sole owner of the property immediately upon the death of Clem.

REPRESENTATIVE ANSWER 2

Part (a)

The intent of the grantor will control when dealing with conveyance of properties.

A joint tenancy with right of survivorship requires the 4 unities of time, title, interest and possession.

A tenancy by the entirety can only be held by a husband and wife, and requires the 5 unities of marriage, time, title, interest and possession.

Here, Amos devised his farm and equipment to Beth and Clem as joint tenants with the right of survivorship. However, when the deed was actually written it conveyed the property to Beth and Clem, husband and wife. A language that uses "husband and wife" will be deemed to be a tenancy by the entirety, and can therefore not be conveyed without both parties. However, because the intent of the grantor is controlling, and Amos devised the property as joint tenants, Beth and Clem own the property as joint tenants.

As joint tenants, either party could unilaterally sever the tenancy by entering into a lease or mortgage (because Maryland is a title theory state) or contract for sale. Here, Clem entered into an option contract with Builder, which if completed would sever the joint tenancy. However, because builder declined the option, the joint tenancy was never severed.

Therefore, Clem and Beth still owned the property as joint tenants, and upon Clem's death on June 30, 2005, Beth, through her right of survivorship, obtained a 100% interest in the property. The fact that they were already divorced does not matter because a joint tenancy has nothing to do with marriage.

Part (b)

A judgment dies if not executed within the lifetime of the debtor. Here, Penny Bank received a judgment against Clem, and properly recorded it in the land records of Charles County. However, the act was only half the battle.

While the judgment attached to the land, upon recordation, without executing the judgment, by having a sheriff put a levy on the property, Penny Bank lost the opportunity to execute the judgment after Clem died.

QUESTION 12

Don purchased a five-acre tract of land in Carroll County, Maryland on which he planned to create a subdivision. Included within the description of the tract was an unimproved road at some time used for the removal of timber.

Don filed a subdivision plan as required by the County Planning and Zoning Department. The plan included a layout of six lots adjacent to the road which is identified as a "30 foot private right of way".

After approval of the subdivision plan, Don engaged Bob, a real estate broker, to publicize and sell the lots. The promotional material represented that water, electric and sewer systems were available at each lot. Bob showed the lots to Paul who signed a standard contract to purchase Lot 1 for $35,000. The contract described the lot, identified the price and set a closing date. It was signed by Don and Paul.

Prior to signing the contract, while he was inspecting the property, Paul inquired about the road and was told by Bob that the road would be paved and curbed as soon as a house was built in the subdivision. Neither the contract nor the deed made any mention of Bob's statement. The deed gave Paul, his successors and assigns, the nonexclusive right to use the road for ingress to and egress from his lot.

Six months after Paul's house was built no effort had been made by Don to pave and curb the road. During construction, the road deteriorated and became difficult to traverse. Don now denies that he obligated himself to improve the road. He refers to the subdivision plan and plat which do not show paving or other road improvements.

Paul files suit against Don, for breach of contract.

As Paul's attorney what defenses should you anticipate? How should the court rule on them?

REPRESENTATIVE ANSWER 1

Clearly there was a contract between Paul and Don. There was an offer by Paul to buy Don's lot for $35,000 and it was accepted by Don. There was bargained for consideration as well. The basis for the breach claim by Paul is that the contract included a plan to pave the curbed road or alternatively that there would at least be a useable road.

The first defense Don will make to the breach claim is that the contract did not include any mention of a paved road. Furthermore, a paved road is a material issue.

Paul will try to argue that the contract was in writing but there was an additional matter

that was also part of the contract. Paul will try to use Bob's promise as evidence of this. Don will challenge, arguing its parole evidence, which does not allow for information that is not in the contract itself. However, Paul will argue this was a collateral matter and that he relied on it when making his decision. The court may allow Paul to include Bob's statement.

Don will counter that by arguing that paving the road is a material issue and as such, the agreement needed additional consideration. If Paul argues that he detrimentally relied on Bob's promise for a paved road, he would need to show a promise, reasonable expectation of reliance, and that it is in the interest of justice to compensate Paul for this reliance. However, Don can argue that this oral element of the contract violates the statute of frauds since it is not in writing. But this oral promise probably does not fall in the statute of frauds. It's not goods, at best it is a service contract to build a road and that can be completed within a year.

Don will also argue that Bob authorized the agreement, not him. In land deals an agent can only obligate the party he represents in the signed authorization. However, this isn't really a land deal. Don may be liable for his agent, Bob's oral agreement, if Paul can show that Bob was acting within the scope of his role as Don's agent and that he relied on Bob's statements. Don may try to argue that Bob's statements were a misrepresentation, but at best this would only allow Don to collect damages from Bob.

The key to Paul's success here is his ability to admit into evidence his deal with Bob. If it is an exception to the parole evidence rule, the court will likely either reform the contract to meet with the agreement Paul thought he was signing or more likely award damages. The court could also rule that Paul's wish to include the oral agreement was something he detrimentally relied on and grant relief.

Don has one other argument, unilateral mistake. A mistake by one party does not usually allow for that party to collect damages. Don will try to argue that Paul made a mistake and did not understand the terms of the contract, and he is not liable for his mistake.

However, as stated above, Parole Evidence here will be the key issue. If Paul can admit into evidence his deal with Bob, then unilateral mistake will not be a successful defense.

REPRESENTATIVE ANSWER 2

Paul's case hinges on whether parole evidence of the agreement/express assurance of Don to pave the road is admissible and, furthermore, whether a valid oral contract existed.

Oral contract to Dave: Paul argues that he and Don had a valid oral contract, Paul would buy if Don paved the road. Don will argue (1) that there was no contract because Paul and Don signed a contract to sell the land, not pave a road, and that none of the documents in the chain of title, including the recorded subdivision plat and all deeds, mention an improved/paved road. Furthermore, Don will argue that no contract can exist because there was no consideration for such a contract. Paul will counter that he definitely relied on Bob's express assurance that the road would be paved once a house was built on one of the plots.

This detrimental reliance acts as a consideration or substitute creating a valid oral contract since Paul did buy the land and built a house. Thus, a court will likely rule that a valid oral contract existed between Paul and Bob and Don.

Don then argues that Bob had no authority to make such a contract and therefore Don is not liable. But since Don hired Bob to promote and sell the lots, and Bob's promise that the road would be paved post-construction was made within the scope of his agency, Don is bound by that contract as a disclosed principle (disclosed because Don signed the sale contract, so Paul knew Bob worked for Don). A court will likely rule that Bob was acting within the scope of his agency and that Don is liable.

Statute of Frauds: Don will argue that the oral contract violates the statue of frauds because it is not in writing. However, an exception exists for task contracts – service contracts for a single task need not be in writing because they can ideally be performed instantaneously with unlimited resources. Thus, a contract will likely rule out a Statute of Francs defense.

Don will then say that Paul cannot admit evidence of the oral contract because they had a signed, valid land sale contract that was completely integrated. It was in writing, signed by Don and described the land and the price. It made no mention of any road improvements, and thence road improvements were not part of the land sale contract. Paul will contend that parole evidence is admissible to prove conditions precedent to a contract, subsequent oral modification of a contract, and collateral agreements to a contract. The agreement to pave the road is arguably a condition precedent (if Paul would not have entered the contract without the agreement); a subsequent modification to the contract that should have been incorporated into the agreement, or a collateral agreement because it touched tangentially on the sale of the land. A court will likely find that evidence of the agreement will be admissible as a condition precedent, but not as a subsequent modification (because the contract to sell the land hadn't yet been entered). Paul will therefore be able to admit evidence of the agreement, and will likely win the case for breach.