

**FEBRUARY 2012 MARYAND BAR EXAMINATION  
BOARD'S ANALYSIS**

**QUESTION 1**

A single action for wrongful death may be brought for the benefit of Wanda, a surviving spouse, and Carla and Curt, the children of Harry. A child of parents who have not participated in a marriage ceremony, but whose paternity has been acknowledged in writing or openly and notoriously recognized, by the father, is a "child" for the purposes of a wrongful death action; however, a step child is not so considered. Wanda, Carla and Curt are entitled to recover damages for pecuniary loss from the date of death (loss of Harry's earnings, economic support and services), as well as for Wanda's loss of consortium and for solatium for the children during minority.

In addition, Wanda may seek the appointment of a personal representative of Harry's estate. The personal representative may bring a survival action to recover Harry's medical expenses, loss of earnings prior to his death, property damage to the vehicle, and damages for conscious pain and suffering.

Non-economic damages are subject to a statutory limitation.

The survival action must be brought within three years of March 1, 2011, when Harry's personal cause of action arose. Since Harry was not under a disability when the cause of action arose, the statute of limitations may not have been suspended when Harry lapsed into a coma. *Fink v. Zepp*, 76 Md. 182, 24 A. 538 (1892).

The wrongful death action must be commenced within three years of March 5, 2011, the date of death. This is a condition precedent to bringing the action, rather than a statute of limitations which must be specifically pleaded as a defense. Even though the cause of action for wrongful death accrued in favor of two minors (as well as an adult), and only a single action may be commenced, the time in which to commence the wrongful death action is not tolled by the disability of minority. *Waddell v. Kirkpatrick*, 332 Md. 52, 626 A.2d 353 (1993).

**Abstract**

Courts & Judicial Proceedings, §3-901, 3-902, 3-903, 3-904, 5-101, 5-201, 11-108, 11-109.

**FEBRUARY 2012 MARYAND BAR EXAMINATION  
BOARD'S ANALYSIS**

**QUESTION 2**

As to the ad:

According to MRPC 7.2(c), as attorney cannot exchange anything of value for referrals from any person. Here Attorney Adam is offering to give a gift card to anyone who sends him a client who retains his services. Comment [7] to MRPC 7.2(c): A lawyer is allowed to pay for advertising and may purchase a law practice but otherwise may not pay another person for channeling professional work.

Additionally, MRPC 7.1(b) states that an attorney cannot create unjustified expectations by his advertisement. Comment [2] to MRPC 7.1: lawyer cannot advertise nor imply that favorable results in the past indicate future abilities. Lawyer should specifically state that each case is different and that past is no guarantee of future results. In this situation, Attorney Adam implies that his internships with the State Department of Labor help him win all labor cases.

Next, Adam wrote a check to "Cash" from his trust account. This is in violation of MRPC 1.15(b) which states that an instrument drawn on an attorney trust account cannot be made payable to "cash" or "bearer". Also, MRPC 1.15 states that an attorney may not borrow money from his trust account which is what Adam is doing when he takes out money to pay his bills. He has not yet earned any of that fee. *Attorney Grievance Commission of Maryland v. Cherry-Mahoi*, 388 Md. 124, 2005.

Attorney Adam further finds himself with two clients involved on the same side of the same case but who have differing interests. It is reasonable from the fact pattern that Adam should know that either client may testify in a manner harmful to the other. MRPC 1.7(a)(1) prohibits representation in this manner. Absent consent in appropriate circumstances, an attorney cannot simultaneously represent parties with adverse interests. *Gaumer v. McDaniel*, 23 F. 3d 400, 1991. In addition, a lawyer shall not represent a client whose interests are materially adverse to those of a prospective client in the same or substantially the same matter. MRPC 1.18.

**FEBRUARY 2012 MARYAND BAR EXAMINATION  
BOARD'S ANALYSIS**

**QUESTION 3**

Moe's attorney will attempt to suppress both Moe's statement and the evidence seized from the search of Curlie's vehicle. Moe will not be able to suppress Larry's statements or the drugs found in Curlie's car.

In order for a warrantless search or arrest to be legal it must be based upon probable cause. In terms of quantifiable probability, the probable cause for a search is the same as the probable cause for a warrantless arrest. Pursuant to Md. Code Ann., Crim. Pro. §2-202, a police officer can arrest an accused without a warrant if the officer has probable cause to believe a crime has been or is being committed by an alleged offender in the officer's presence. In *Carroll v. United States*, 267 U.S. 132 (1925), the Supreme Court first recognized an "automobile exception" to the Fourth Amendment's warrant requirements. The exception allows vehicles to be searched without a warrant provided that the officer has probable cause to believe that a "crime item" is within the car. Following *Carroll*, the Supreme Court has held that during a lawful traffic stop, officers can compel the driver and passengers to exit the vehicle. The Supreme Court has gone on to hold that a passenger's property left within a vehicle, when occupants are ordered out of a car, falls within the permissible scope of the automobile exception to a warrantless search. There, however, must be a reason articulated or indicated as to why it is necessary to detain a passenger who chooses to leave the scene of the traffic stop and probable cause to arrest.

At the time Moe attempted to run away from the scene, there was no probable cause or reasonable suspicion that he had done anything. "[F]leeing from a police officer or disregarding a police officer's command to stop, in and of itself, does not give rise to probable cause or even a reasonable suspicion sufficient to justify the use of force to detain the person fleeing, ...where that person is a passenger in the automobile". *Dennis v. State*, 345 Md. 649, 650 (1997). Without additional information that Officer Donald had to establish Moe's knowledge and dominion or control over the yet undiscovered contraband there was insufficient information to establish probable cause or reasonable suspicion to detain a non-owner, non-driver for anything that might be found in the car as a result of the K-9 scan of the car. While under Maryland law the alert by a drug dog on a person undisputedly gives a police officer probable cause to believe that there is contraband somewhere on a person, that only occurred after Moe was forcibly detained without probable cause—and then no drugs were found on him.

The Fifth Amendment protects against compelled self-incrimination. Accordingly, in order to assure that defendants have voluntarily waived their right to silence during a custodial interrogation, they must first be advised of their *Miranda* warnings. The Fifth Amendment, however, does not protect against non-compelled or voluntary admissions or utterances. Moreover, the Fifth Amendment does not protect against utterances by others. Similarly, the Fourth Amendment does not protect against unreasonable searches of someone else or someone else's property. The legality of search of Curlie's car is irrelevant to Moe. Moe has no standing to assert violations of any Fourth Amendment rights Curlie may have had, nor Larry's Fifth Amendment rights. Thus, it is likely that although the K-9 sniff of Moe will be excluded, the drugs found in Curlie's car and Larry's statements regarding the ownership of the drugs will be admissible in the trial against Moe. It is doubtful, however, that Moe's own incriminating

**FEBRUARY 2012 MARYAND BAR EXAMINATION  
BOARD'S ANALYSIS**

statements will be admissible, notwithstanding the fact that it was not compelled, because it was the result of Moe's unlawful detention.

**QUESTION 4**

**Page 4 of 16**

**FEBRUARY 2012 MARYLAND BAR EXAMINATION  
BOARD'S ANALYSIS**

David has liability for Freddy's injury in that his failure to drive in a careful and prudent manner was the direct cause of the accident in which Freddy was injured.

Neither Nightwatchman Company nor the Orphan's Home has any liability for David's negligence.

In Maryland an employer may be held liable in damages for personal injury or death caused by the tortious conduct of its employee only, if at the time of the accident, the employee was engaged in an activity in connection with the purposes of his employment and in furtherance of objects within his line of duty. *Lewis v. Accelerated Transport-Pony Express, Inc.*, 219 Md. 252 (1959). The decisive test of the employer-employee relationship, essential to the creation of liability, is the right of the employer to direct and control the employee at the time and in respect to the occurrence out of which the accident arose.

David was not working his normal shift when the accident occurred nor was he responding to a call for an after-hours emergency. He therefore was not engaged in an activity in connection with his employment or in furtherance of his employment.

Similarly, the Home did not have the right of control over David's actions. Even though David was in the act of caring for Freddy at the time of the accident the Home would not be held vicariously liable for any injuries caused by David's conduct. To hold the Home liable under these conditions would hold a foster care agency liable for all acts of ordinary negligence committed by a foster parent in the provision of foster care. The Home's responsibility under the Contract with regard to transportation was narrow. The Home simply required that all drivers hold a valid, appropriate driver's license. Rather than exerting continuous control over David's manner of driving, the Home stipulated that anyone driving Freddy had to have a driver's license and adequate coverage-subject to the normal "rules of the road". The right of control of Home over David while transporting Freddy was very slight. Further, David was not an employee of Home. David was in effect and independent contractor responsible for the care of Freddy subject to State regulations governing foster care of children. Those regulations, e.g., the regulations governing discipline of foster children and the motor vehicle code, were not evidence of Home's having a master-servant relationship with David and the ability to more completely control his activities and the manner in which he accomplished them.

David's license status, i.e., that he had a restricted driver's license for employment purposes only might raise two separate lines of inquiry. The first would be whether the Home would have liability, or not, on the basis of negligent entrustment. Maryland recognizes negligent entrustment as a tort. *Rounds v. Phillips*, 166 Md. 151 (1934); *Broadwater v. Dorsey*, 344 Md. 549 (1997). The elements of the tort are:

- 1) The making available to another a chattel which the supplier
- 2) knows or should have known the user is likely to use in a manner involving risk of physical harm to others
- 3) the supplier should expect to be endangered by its use.

**FEBRUARY 2012 MARYAND BAR EXAMINATION  
BOARD'S ANALYSIS**

The Home did not make a chattel available to David (he had a vehicle at his disposal) and had no reason to know that he was likely to use it in a manner involving risk to Freddy.

David's employer did make a chattel available to him, but only for business purposes. His employer was aware of David only having a limited license (limited to work) but only entrusted him with a vehicle for that purpose and had no reason to know that he was likely to use it beyond both their restrictions as well as beyond the limitation on his driver's license. Therefore, neither Home or Nightwatchman Company would have liability on the basis negligent entrustment.

The second line of inquiry is whether the Home in asking David whether or not he had a driver's license used due diligence, or not, in determining that fact. Due diligence is such diligence that a reasonable person under the same circumstances would use, i.e., use of reasonable but not necessarily exhaustive efforts. The Home's inquiry would not appear to be deficient in this case, and, in any case David's lack of a privilege to drive at that particular time did not actually contribute in any way to the accident. Therefore, Home's due diligence, or lack thereof, would not have contributed to the accident and would not be the basis of any liability on the part of the Home.

**QUESTION 5**

**FEBRUARY 2012 MARYLAND BAR EXAMINATION  
BOARD'S ANALYSIS**

Maryland Rule 5-408 prevents the admission of any settlement discussions in order to prove the validity of the claim. Maryland Rule 5-408. Shane should object to any questions with respect to settlement offers, and the objection should be sustained.

Maryland Rule 5-409 proscribes the admission of any evidence of the payment of medical expenses in order to prove liability. Maryland Rule 5-409. Shane should object to the introduction of any evidence that he paid or attempted to pay any of Rich's medical expenses related to the windmill incident, and the objection should be sustained, both because of the strictures of Maryland Rule 5-409 and because the records have not been authenticated pursuant to Maryland Rule 5-901.

Maryland Rule 5-407 bans the admission of evidence of subsequent remedial measures in order to prove negligence or culpability. Maryland Rule 5-407. Shane should object to the introduction of any evidence that he changed his windmill design in light of what happened to Rich, and the objection should be sustained.

Maryland Rule 5-609 allows for the admission of certain prior convictions in order to attack the credibility of a witness under certain circumstances. The malicious destruction of property conviction should be excluded because it occurred more than fifteen years ago. Md. Rule 5-609(b). Possession with intent to distribute has been held by the Court of Appeals to be an "infamous" crime, and, therefore, admission of evidence of this conviction is properly admissible, as it bears on Rich's credibility. *State v. Woodland*, 357 Md. 519 (1995). This conviction is within the allowable timeframe and the plea of nolo contendere has the same effect as a conviction for the purposes of the Rule. Maryland Rule 5-609.

Maryland Rules 5-801, *et seq.*, generally prevent the admission of hearsay (out-of-court statement offered for the truth of the matter asserted). Maryland Rule 5-801, *et seq.* In this instance, we have hearsay within hearsay, as we have a document being offered by someone other (Shane) than the person who created it (the police officer) containing a statement by Rich, and each instance of hearsay must be resolved for proper admission. Maryland Rule 5-805. Rich's statement would generally be admissible in spite of being hearsay because Rich is a party-opponent in this action. Maryland Rule 5-803(a).

However, the document itself would not be capable of admission through Shane, as he did not create it, unless he could somehow prove that it fell within one of the exceptions to the hearsay Rule. Maryland Rule 5-802. In this instance, the most likely applicable exception would be that for documents kept within the regular course of business; however, it is doubtful that Shane would be capable of identifying/qualifying the document as a police document which is kept in the normal course of police operations. *See* Maryland Rule 5-803(b)(6); *Bernadyn v. State*, 390 Md. 1, 887 A.2d 602 (2005). The only other likely possibility, that the document constitutes the present sense impression of the police officer, also seems unlikely to succeed, as, by its very nature, a police report generally represents a more deliberate and qualified

**FEBRUARY 2012 MARYAND BAR EXAMINATION  
BOARD'S ANALYSIS**

recollection/version of events than the spontaneous utterances meant to be covered by the present sense impression exception. *See* Maryland Rule 5-803(b)(1); *Banks v. State*, 92 Md. App. 422, 608 A.2d 1249 (1992). Rich should object to the introduction of the police report offered by Shane as hearsay, and the objection should be sustained.

Maryland Rule 5-411 forbids the introduction of evidence relating to insurance coverage on the part of a potentially responsible party in an attempt to prove negligence or wrongful conduct. Maryland Rule 5-411. Shane should object to the question about his insurance coverage on this basis, and the objection should be sustained. Shane's attorney should have subpoenaed the custodian of records for the police department and used the custodian to introduce the report.

**QUESTION 6**



**FEBRUARY 2012 MARYAND BAR EXAMINATION  
BOARD'S ANALYSIS**

John and Sarah and the LLC may maintain actions against David that arise under common law and under the Limited Liability Company Act (“LLCA”), Section 4A-101 *et seq.* contained in the Corporations and Associations Article of the Annotated Code of Maryland. Federal Bank may maintain an action against David under the guaranty for repayment of the loan.

The LLCA does not expressly address the fiduciary duties that the members owe to each other or to the LLC. Because there is no Maryland statute precluding or limiting the right against an authorized person and a managing member and because David acted as an agent for each member and the LLC, David owes the common law fiduciary duties of loyalty and care to John and Sarah and to the LLC. See, *George Wasserman and Janice Wasserman Goldstein Family LLC, et al. v. Kay*, 197 Md. App. 586, 14 A.3d 1193 (2011) wherein the Court of Special Appeals held, among several other holdings, that the common law fiduciary duties are owed by a managing member, as an agent, to the LLC and its members. The Court carefully explained and extended the holding of the Court of Appeals in *Shenker v. Laureate Education, Inc.*, 93 A.2d 408, 411 Md. 317 (2009), (in cash-out merger situations, directors owe their shareholders common law fiduciary duties of candor and maximization of shareholder value that were not encompassed or superseded by statute) to partnerships and limited liability companies and their partners and members respectively. See, *Kann v. Kann*, 344 Md.689, 690 A.2d 509 (1997), wherein the Court of Appeals held that no independent cause of action exists in Maryland for breach of fiduciary duties, but the breach of those duties may give rise to one or more actions in tort or contrast.

John and Sarah were individually harmed due to David’s conduct causing them to lose their distributions, reserves and possibly their entire investment. John and Sarah have a cause of action against David for breach of contract under the LLC operating agreement, which includes breach of the fiduciary duties of loyalty and care, to recover the damages sustained by them, as well as for an accounting of the business of the LLC, and for the disgorgement of the personal commissions received by David.

Finally, David will face a suit on his guaranty of the loan from Federal Bank. While David may argue that he signed the guaranty in his representative capacity, it is clear from the facts that he provided personal information in the financial statement portion of the Loan Agreement. When he signed a second time, he did so personally as a guarantor as noted on the Loan Agreement even though he indicated his representative capacity. See, *Ubom v. Sun Trust Bank*, 198 Md. App.278, 17 A.3d 168 (2011), wherein the Court of Special Appeals held that the placement of a second signature by a managing member of LLC, as the guarantor, even with a representative capacity indicated, would render the guaranty inconsequential and it would have added nothing to federal Bank’s security. The conduct of David as a managing member in supplying personal information was inconsistent with the plain and unambiguous meaning of the Loan Agreement. Therefore, David likely will be deemed personally liable, together with the

**FEBRUARY 2012 MARYAND BAR EXAMINATION  
BOARD'S ANALYSIS**

LLC, for the outstanding loan from Federal Bank. If David repays the loan to Federal Bank, he is entitled to contribution from the LLC for the amount paid.

**FEBRUARY 2012 MARYAND BAR EXAMINATION  
BOARD'S ANALYSIS**

**QUESTION 7**

There is no real or free consent to a contract when such consent is obtained through fraud; accordingly, fraud vitiates all contracts, regardless of when the fraud was effectuated. C.J.S. Contracts § 165; *Hall v. Hall*, 147 Md. 184, 127 A. 858 (1925); *National Park Bank v. Lanahan*, 60 Md. 477 (1883). Fraud invalidating a contract is a false representation of a material fact made with knowledge of its falsity and with the intention that it be acted on by the party deceived, thereby inducing said party to contract to his or her injury. C.J.S. Contracts § 153. Fraud is considered material when the contract would not have been made if the fraud had not been committed. *McAlee v. Horsey*, 35 Md. 439 (1872).

A misrepresented fact is material if its existence or nonexistence is a matter to which a reasonable person would attach importance in determining his choice of action in the transaction, or the maker of the misrepresentation knows that its recipient is likely to regard the fact as important, although a reasonable person might not. *Carozza v. Peacock Land Corp.*, 231 Md. 112, 188 A.2d 917(1963). The misrepresentation must have been relied on in entering into the contract (furthered an inducement to contract). *Snyder V. Herbert Greenbaum & Associates, Inc.*, 38 Md. App. 144, 380 A.2d 618 (1977); *Ryan v. Brady*, 34 Md. App. 41, 366 A.2d 745 (1976); *Milkton v. French*, 159 Md. 126, 150 A.2d 28 (1930); C.J.S. Contracts § 163. The right to rely on misrepresentations in any particular case will depend on the circumstances –such as the form of the representation, the relations of the parties, and their respective means of knowledge. C.J.S. Contracts § 163. A lack of ordinary prudence in reliance does not prevent the misrepresentation from constituting fraud. *Sainsbury v. Pennsylvania Greyhound Lines*, 183 F.2d 548 (1950); *McGrath v. Peterson*, 127 Md. 412, 96 A. 551 (1916). Misrepresentations amounting to fraud must relate to past or present facts, not promises or predictions with respect to future events. C.J.S. Contracts § 157.

A defrauded party has the option of enforcing or disaffirming a fraudulent contract. C.J.S. Contracts § 167. Accordingly, a party may rescind a contract for fraud; i.e. the contract is voidable against the party practicing the fraud, *Faller v. Faller*, 247 Md. 631, 233 A.2d 807 (1967); *Shulton, Inc. v. Rubi*, 239 Md. 669, 212 A.2d 476 (1965); *Hoffman v. Seth*, 207 Md. 234, 114 A.2d 58 (1955); *Cox v. Tayman*, 182 Md. 74, 32 A.2d 368 (1943); *Brager v. Friedenwald*, 128 Md. 9, 97 A. 515 (1916). In order for this relief to be granted, there must be proof of justifiable reliance on a material representation: *Ryan v. Brady*, 34 Md. App. 41, 366 A.2d 745 (1976). This extraordinary relief is typically reserved for a clear case of fraud where the plaintiff has been deceived and injured by said fraud. *Dreienstock v. Hoffman*, 209 Md. 98, 120 A.2d 373 (1956).

John can disavow the contract and sue Buddy for the damage he caused to the Mustang, which was the direct result of Buddy's fraud – i.e., the intentional misrepresentation of his experience which induced John to contract. This fraud action should allow John to recover both his deposit and the money required to repair the Mustang, as well as permitting a claim for

**FEBRUARY 2012 MARYAND BAR EXAMINATION  
BOARD'S ANALYSIS**

punitive damages due to the intentional nature of the tort. *Wiggins v. North American Equitable Life Assurance Company*, 644 F.2d 1014 (4<sup>th</sup> Cir. 1981); *American Laundry Machinery Industries v. Horan*, 45 Md. App. 97, 412 A.2d 407 (1980). Buddy will not be able to enforce the fraudulent contract or recover for monies allegedly owed thereunder under a quantum meruit claim, as an equitable claim requires clean hands, which Buddy does not possess in these circumstances. *Niner v. Hanson*, 217 Md. 298, 142 A.2d 798 (1958).

In the event John were to choose to ratify and enforce the contract, and to sue Buddy for breach, he would not be permitted to seek punitive damages, and Buddy could potentially countersue John for having breached the contract by removing the Mustang from his possession before the agreed-upon amount of time had elapsed, which prevented him from finishing his work and deprived him of his potential profits.

Under these circumstances, John should disavow the contract and sue Buddy for intentional misrepresentation.

**FEBRUARY 2012 MARYLAND BAR EXAMINATION  
BOARD'S ANALYSIS**

**QUESTION 8**

A. The facts suggest Alex and Beatrice have been living separate and apart in Charles County, Maryland without cohabitation and without interruption since January 2010. As of January 2012, they have been living separate and apart for more than two years, which is a no fault ground for absolute divorce in Maryland. Alex would be entitled to file a Complaint for Absolute Divorce on that no fault ground for absolute divorce. (Maryland Legislature in 2011 passed legislation reducing time period to one year for suits filed after October 1, 2011.)

B. This inquiry requires an analysis of assets as being marital and/or non-marital. Generally, property that existed before the marriage of the parties or was inherited or was a gift from a third person would not be a marital asset. Any other assets acquired during the marriage would be considered marital assets. The spouse who is asserting a marital interest in property bears the burden of producing evidence as to the identity and value of each such potential marital asset. (*Melrod v. Melrod*, 83 Md App. 180, 574 A.2d. 1990 (see also *Adummqwe v. Odummkwe*, 98 Md App. 273, 633 A.2d 418 (1993)). If a marital asset is individually titled, it could form the basis for a monetary award in favor of the non-title spouse. Based on the above guidelines, the following analysis should be made.

1. The settlement proceeds from the wrongful termination tort litigation of \$550,000. In *Murry v. Murry*, 190 Md. App. 553, 989 A.2d. 771 (2010) the Court of Special Appeals confirmed that the tort settlement involving employment discrimination suit could potentially constitute marital property. Whether the award is marital property depends on the underlying nature of the damages that the recovery is intended to remedy rather than the mere timing of the underlying claim or settlement award. The Court indicated that only that portion of such claim proceeds which compensates a spouse for lost wages or earning capacity during the marriage, medical expenses paid from marital funds or for joint loss of consortium is marital property subject to equitable distribution. To the extent that the proceeds compensate the injured spouse for a future post marital wages, bodily injury or pain and suffering, they constitute the non-marital property of the recipient spouse.

2. The race car: It was acquired before marriage by Alex and his father. Improvements were made during the marriage, potentially with marital funds. Half of the value of the improvements were made during the marriage would constitute marital property.

3. The boat: It could be argued that the boat was on loan from Alex's friend and therefore not a marital asset. Because it is titled in Alex's name, there is a presumption that it is a marital asset as it was acquired and titled during the marriage. It could be argued that it was a gift from the friend which would make it non-marital. It appears that the titling was as a matter of convenience for the real owner of the property and the Court could conclude that the property, in reality, is not a marital asset.

4. The 100 shares of bank stock: It was acquired by Alex before marriage and is a non-marital asset. Stock dividends and stock splits occurring during the marriage are traceable to the non-marriage asset and the increase in amount and value of the shares from 100 to 250 shares is not a marital asset. See *Wilen v. Wilen*, 61 Md App. 337, 486 A.2d. 775 (1985).

**FEBRUARY 2012 MARYAND BAR EXAMINATION  
BOARD'S ANALYSIS**

5. Personal household goods and furnishings: With respect to the titling of personal property, the Court of Appeals has recognized a distinction between the broad category of personal property and the narrower one of household goods and furnishings purchased for the use of the family unit. Unless rebutted by evidence of individual ownership, the presumption that the purchasing spouse makes a gift of ones goods in the latter category to the marital unit results in joint ownership of such assets. Thus, the Court should conclude that the personal property items are jointly held marital property. *See Pleasant v. Pleasant*, 97 Md. App. 711, 632d A.2d. 202 (1993).

6. Contingent fee cases in husband's sole practitioner law practice; In *Quinn v. Quinn*, 83 Md. App. 460, 575 A.2d. 764 (1990), the Court reviewed cases from other jurisdictions suggesting that contingent fee cases should not be considered an asset of a law firm or a marital asset for purposes of equitable division because it is an unenforceable expectation of future earnings. The Court indicated it would not prohibit a finding that a contingent fee could be an asset of a law practice but Alex should be able to reduce considerably the impact of the contingent fees on the appraisal/valuation of his law practice as a marital asset.

7. \$2,000 security deposit on his current rental residence: This would be a marital asset as it is a cash asset accumulated during the marriage and refundable to Alex under certain conditions and paid for from marital earnings.

8. \$50,000 Certificate of Deposit in name of Alex's sister. There is a good likelihood that this asset would be considered a marital asset. Normally, under Maryland Law, if the Court finds that property was intentionally dissipated in order to avoid inclusion of that property toward consideration of a monetary award such dissipation is no more than a fraud on marital rights and the Court should consider dissipated property as extant marital property to be valued with other existing marital assets. The Certificate of Deposit will be considered as part of the husband's marital property, even though titled in his sister's name (*See Sharp v. Sharp*, 58 Md. App.386, 473 A.2d. 499 (1984))

**FEBRUARY 2012 MARYAND BAR EXAMINATION  
BOARD'S ANALYSIS**

**QUESTION 9**

- a. Bob does not lose status as a joint tenant merely by vacating the House. He is entitled as a joint tenant to rents that are received by a cotenant. In accordance with Real Property Article §14-106, Alice must account for and pay to Bob 50% of all rents (net of shared expenses) received from Charlie until the levy and completed sale in execution on Deirdra's judgment are concluded in accordance with Maryland law. See *Eder v. Rothamel*, 202 Md. 189, 95 A.2d 860 (1953).
  
- b. Alice and Bob owned the House as joint tenants as a result of the June 2007 deed. Although Maryland disfavors joint tenancies, a joint tenancy may be created by a deed which expressly provides that the property granted is to be held in joint tenancy. Real Property Article §2-117. In order for Deirdra to assert her rights against Bob's interest in the House, she must ensure that her judgment is properly recorded and indexed in the land records of Baltimore County, which ordinarily happens automatically upon entry of a judgment in the county. Deirdra also must levy upon Bob's interest in the property pursuant to Maryland Rule 2-642. The Sheriff of Baltimore County must execute the writ by going to the property and posting and delivering the required notice, thus attaching the property for sale. The Sheriff's sale of Bob's interest severs the joint tenancy previously held by Bob and Alice. Deirdra then takes the net proceeds of the sale of Bob's interest in partial satisfaction of the judgment she previously obtained. Alice and the buyer of Bob's interest then are owners of the House as tenants in common. *Eastern Shore Bldg. and Loan Corp. v. Bank of Somerset*, 253 Md. 525, 253 A.2d 367 (1969); *Eder v. Rothamel*, 202 Md. 189, 95 A.2d 860 (1953); and *Helinski v. Harford Memorial Hospital*, 376 Md. 606, 831 A.2d 40 (2003). For Sheriff's sales procedures, see Courts & Judicial Proceedings §11-402, 11-502, and 11-509.
  
- c. Charlie is entitled to quiet enjoyment of the unit he leased until the expiration of the lease term on June 30, 2018, absent some provision in the lease (not stated on the facts in this question) prescribing a different agreement between the landlord and tenant. Real Property Article §2-115. Charlie's leasehold estate entitles him to remain in possession until the end of his lease term because his leasehold interest, properly recorded in July 2008, takes priority over the subsequent deed of conveyance resulting from Deirdra's execution on the judgment against Bob. Real Property Article §3-203. Any buyer of Bob's interest takes title subject to Charlie's leasehold interest. Alice and the buyer of Bob's interest, owners as tenants in common of the House (which includes the Unit occupied by Charlie), both will be entitled to collect a proportionate share of the rent paid by Charlie pursuant to the ten year lease he signed with Alice and Bob. Real Property Article § 14-106.

**FEBRUARY 2012 MARYAND BAR EXAMINATION  
BOARD'S ANALYSIS**

**QUESTION 10**

If Employee's position as a clerk was a position where he was entrusted with "responsibility," then Commercial Law Article Section 3-405 would apply. An employee that is entrusted with duties that enable the employee to determine the address to which a check is to be sent and controls the disposition of the check may be considered a "responsible" employee. "Responsibility", however, does not include authority that merely allows an employee to have access to checks or other instruments. Thus, if Employee was a responsible employee then the Latimer Inc. will be held responsible for Employee's facilitation of the forgery of the endorsement, the drawee bank may debit the Latimer Inc.'s account in the amount of the check, and there is no breach of warranty by depository bank, ABC Bank under Section 3-417 (a) (1) or 4-208 (a) (1).

If Employee's duties as clerk do not allow Employee to supply information determining the address of payee of the check, then the endorsement is not effective under Section 3-405 (b). However, Section 3-406 might apply. The issue would be whether the Latimer Inc. was negligent in safeguarding the check and/or the comparative negligence of the bank or banks and that of Latimer Inc. If Latimer Inc. was not negligent, it could assert that the endorsement was forged and bring an action for conversion against its bank pursuant to Section 3-420.

The Latimer Inc. may also file a claim against Employee for recoupment of the \$285,000 to the extent that he can find him.