

Professor Melanie B. Jacobs
Michigan State University College of Law

Attached are materials from my Family Law: Child, Parent & the State class; Decedents' Estates & Trusts; and Property.

In these classes, I endeavor to incorporate assignments, problem sets, or a practice exam so that the students can assess how well they are learning. Equally important, when I review the student material I can assess both their knowledge of the material and how well I am teaching the material; for example, if the majority of students have struggled with one or two doctrinal issues, it alerts me that I need to review that material and do so in a way that they will better understand it. Some of these exercises are graded; others are not. My experience has been that students work hard regardless of whether the material is graded because they are very anxious to get professor feedback.

FAMILY LAW II: CHILD, FAMILY & THE STATE SYLLABUS

Spring 2009

Professor Melanie B. Jacobs

CASEBOOK Weisberg & Appleton, MODERN FAMILY LAW, 3D ED.
Recommended: Family Law Stories

OFFICE HOURS Room 416 Law College Building.
Tuesdays and Thursdays 11:30am - 12:30p.m. and by
appointment.
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COURSE OBJECTIVES

The purpose of this class is to introduce you to important doctrines involving the interrelationships of parents, children, and the state. Throughout the course, we will explore a variety of topics that demonstrate the multiple tensions and fragile balance of interests between these three parties. To enhance your knowledge and understanding of the doctrines we will study, this course will involve a significant amount of participation, research, and writing; the purpose of the exercises described in the syllabus is to make family doctrine more "real" and give you an opportunity to practice skills you will need to be an effective lawyer.

GRADING POLICY

As noted above, this course involves significant participation, research and writing. Your grade will be based on a combination of the exercises described herein as well as the grade you receive on your final exam. Your final course grade will be determined as follows:

- the paternity assignment will be worth 20% of your grade;
 - the ART assignment will be worth 30% of your grade;
 - class participation, your timely submission of additional, required written work, and participation in oral exercises will be worth 20% of your grade;
- and

-the final, take home exam will account for the remaining 30% of your final grade.

Assignments are due at the start of class. Late submissions will result in a minimum of one full grade reduction. Failure to turn in an assignment without seeking an extension will result in an "F" for that assignment.

ATTENDANCE AND CLASS PARTICIPATION

The ABA requires that students be regular and punctual in their class attendance. MSU College of Law interprets this to require students to attend a minimum of 85% of the scheduled classes for a particular course. Therefore, you are permitted to have four (4) absences in this class. Neither the ABA nor I distinguish between "excused" and "unexcused" absences. If you know you will need to miss class for personal reasons, plan accordingly to ensure you do not miss more than four classes. If you exceed four absences you may not sit for the final exam.

TWEN SITE

The class TWEN (The West Education Network) site contains this syllabus and updates/announcements. (To access the TWEN site, go to the lawschool.westlaw.com website and follow the links through TWEN to the Jacobs Family Law II page.) I will post items to TWEN, so it is incumbent upon you to register on the class TWEN site, with a working e-mail address, so that you will receive all of the necessary class materials and updates.

ASSIGNMENTS:

The following is a general outline of the course. The arabic numbers on the left are the assignment numbers. We will cover approximately one assignment each class period. The pages listed for each assignment refer to the casebook, except where otherwise noted.

As the syllabus makes clear, I will also be distributing many handouts during the semester. Rather than make you pay for a coursepack, I will photocopy all

relevant materials and distribute them to you in advance. For purposes of organization, I encourage you to purchase a three ring binder or folder so that you can keep all of these materials in one place.

I. FAMILY PRIVACY?

Throughout the course we will explore the tension between state regulation and familial privacy. What does "privacy" mean and whose interests are protected?

(1/13) 1. Pages 1-14 (Griswold, Eisenstadt), 56-72 (Lawrence).

II. WHO CONSTITUTES A FAMILY?

In affording certain groups the "benefits" of familial definition, how do courts decide which groups constitute a family?

(1/15) 2. Communal living and extended family. Pages 361-395 (Moreno, Moore, Marvin).
Family Law Stories, Chapter 3.

(1/20) 3. Tort Recovery. Pages 396-405 (Graves).
Employment. Pages 405-415 (Shahar).
Health. Pages 415-422 (Kowalski).

(1/22) 4. Housing and Inheritance. Pages 426-447 (Braschi, Peterson, Vasquez).

(1/27) 5. Getting married: substantive and procedural regulations. Pages 140-160 (Loving, Zablocki, Turner).
Family Law Stories, Chapter 1.

(1/29) 6. Marriage for same-sex couples. Pages 160-184 Goodridge v. Massachusetts.
Family Law Stories, Chapter 2.
What is happening in the news, especially here in MI and in CA?

Please bring to class a recent news item (from the paper or an online source) regarding same-sex marriage and be prepared to share your news item with the class.

First memo due today (TBD).

III. THE RIGHTS AND RESPONSIBILITIES OF PARENTS

Legal parentage has its privileges and its responsibilities. What special treatment do parents have within family law? Do all parents have the same rights and responsibilities? What role does the state play in protecting parents?

- (2/3) 7. Parental Privacy. Pages 15-20 (Meyer, Pierce) and 857-873 (Prince, Yoder, and Parham only).
- (2/5) 8. Parent v. Non-Parent. Pages 789- 794. (Troxel) and Doe v. Doe (handout).
Family Law Stories, Chapter 5.
- (2/10) 9. More Parent v. Non-Parent. Pages 794-808 (Jones) and ALI Principles of Dissolution Regarding Custody and Visitation (handout).
Family Law Stories, Chapter 8.
- (2/12) 10. Negotiation and Mediation in Child Custody Disputes. Pages 845-856 and in-class negotiation exercise (TBD).
- (2/17) 11. Paternity. Pages 447-463 (Clark, Wallis, Stanley) and Dubay v. Wells(handout). **Paternity assignment due** (TBD).
- (2/19) 12. How Many Parents. Pages 460-485 (Michael H, Elisa B.) and Jacob v. Schultz-Jacob (handout).

IV. PROTECTING FAMILY MEMBERS FROM ABUSE

How is family abuse defined and what role does the state play in protecting

family members from abuse by other family members? How does the state balance the safety of children and the rights of parents?

- (2/24) 13. Read "Mary's Story" (law review article handout) and research and bring to class a copy of the Michigan Abuse Prevention Statute (I encourage you to review the annotated statute to find some recent, applicable cases that you could use in your oral argument). On page 45 of the article, Mary mentions seeking a PPO in June 1990; how would you argue for a PPO under the MI statute? How would you argue against it? In class, students will be asked to represent Mary or Russ at the PPO hearing.
- (2/26) 14. Defining "domestic violence." Guest Speaker: Holly Rosen, Executive Director of MSU Safe Place.
- (3/3) 15. Child abuse and neglect. "The Case of Marie and Her Sons" (handout) and Pages 873- 895 (Juvenile Appeal, Newby).
- (3/5) 16. Continued Discussion of child abuse and neglect and defining those terms. Pages 909-924 (In re A.H., Phillip B., Shane T., and M.W.).

(3/10 AND 3/12 SPRING BREAK)

- (3/17) 17. "Failure to Protect" video (in-class).
- (3/19) 18. Dispositional Alternatives. Pages 952- 981 (OFFER, DeShaney and Marisol).
- (3/24) 19. Termination of Parental Rights. Pages 981-1005 (Santosky, Brady, and J.C.).
- (3/26) 20. Termination of Parental Rights. A Michigan Case Study: In Re Trejo (handouts) and research and review the applicable

Michigan abuse and neglect statutes. Specific assignment TBD.

V. ADOPTION AND ALTERNATIVES TO ADOPTION

What role does the state play in the creation of families through less traditional means? How are the participants treated under existing law?

- (3/31) 21. Parental Consent to Adoption. Pages 1021-1038 (Scarpetta, Kelsey S.) and 1051 - 1060 (Lofton) and handouts.
- (4/2) 22. Equitable Adoption and Jurisdiction issues. Pages 1060-1084 (Hare, Ford, Clausen).
- (4/7) 23. Indian Child Welfare Act. Guest lecturer, Ms. Kate Fort. Holyfield (handout) and pgs. 1038 - 1051 (Baby Boy C). Family Law Stories, Chapter 6.
- (4/9) 24. Consequences of Adoption. Pages 1084-1102 (Tammy, Groves, and Lisa Diane) and articles "Adopted Children Badly informed" and "Looking for Their Children's Birth Mothers" (handouts).
- (4/14) 25. Alternatives to Adoption. Pages 1102- 1127 (Anonymous, Elisa B., Barnhart, and Lifchez). Surrogacy reading (handouts).
- (4/16) 26. In Vitro Fertilization and Preembryos. Pages 1127- 1148 (A.Z., K.M.) and handouts. Family Law Stories, Chapter 9.
- (4/21) 27. You will be given a short case history and asked to research an issue regarding ART. Please come to class with at least four cases for discussion. (Specific assignment TBD and due 4/23).
- (4/23) 28. Tying Up Loose Ends and Review

Family Law II: Child, Family & the State
Professor Jacobs

Memo Assignment

I have attached a news item about a Missouri town ordinance that may prevent an unmarried couple with children from legally occupying a house they have purchased. Please read the news item but do no other outside research on the particular case. I would like you to prepare a memorandum in which you address the legality of the occupancy ordinance, based on our recent case readings and discussions. Specifically, please explain why or why not you think the couple can successfully challenge the ordinance.

The memorandum is due at the beginning of class on Thursday, January 29th. Your memo should be at least two and not exceed four (4) double-spaced pages (using one-inch margins and minimum 12-point font). This memo will be graded on a check/check plus/check minus basis and is required as part of your class participation.

Family Law II: Child, Family & the State
Professor Jacobs

Paternity Assignment

Joan married Lawrence Smith in 2002. Their marriage was far from ideal and two years after she married, Joan began an affair with Christopher Jones. Joan became pregnant in February 2005. Based upon the assumed date of conception, Joan believes Christopher is the baby's father. In May 2005, Joan moved out of the marital residence and moved in with Christopher.

In December 2005, Joan gave birth to Ana. Christopher was present at Ana's birth and has held himself out as her father since her birth. In fact, he is listed as Ana's father on her birth certificate. Christopher, Joan, and Ana lived together until May 2008, at which time Joan decided to move out. She is now dating another man, Scott, and she has prevented Christopher from having any contact with Ana since August 2008. Joan told Christopher she plans to marry Scott.

Christopher is distraught. He had encouraged Joan to divorce Lawrence so that he and Joan could marry and continue to raise Ana together. He believes the divorce is final, but has not seen the actual paperwork. It has been six months since he has had any contact with Ana. He wants to establish his legal paternity of Ana and have custodial rights so that he may maintain his relationship with Ana. He has come to your office and asked you to file a Complaint for Paternity on his behalf. **You have TWO interrelated assignments: 1) please draft the paternity complaint that you would file with the court and 2) draft a memorandum of law (to me) in which you discuss any potential legal complications or concerns you have regarding this legal action.**

You should apply Michigan law only and you should not research the law of any other jurisdictions. You may wish to begin your search with the Michigan practice materials, which will be a great source of cases/statutes on this topic and also give you sample complaint forms. You may also search the applicable paternity statute and recent cases; annotations and recent cases should lead you to any "seminal" cases decided less recently, but as a way to narrow this assignment, the statute and cases decided in the previous two to three years will give you a very good start.

Your complaint should be no more than two pages; be certain, though, to include all facts relevant to the complaint and surrounding legal issues. Your memorandum should not exceed five pages, double-spaced with one-inch margins and 12-point font. You should apply "IRAC" and integrate your rules of law and analysis.

Family Law II: Child, Family & the State
Professor Jacobs

Memo Assignment

Please respond to the following question in a short memorandum that is due at the beginning of class on Tuesday, March 24th. Your memo should be at least two and not exceed four (4) double-spaced pages (using one-inch margins and minimum 12-point font). This memo will be graded on a check/check plus/check minus basis and is required as part of your class participation.

Please read *In Re Trejo* and Professor Deborah Paruch's article, *The Orphaning of Underprivileged Children: America's Failed Child Welfare Law & Policy* (handouts). Then research and review the applicable Michigan abuse and neglect statutes (i.e., those relied upon by the MI Supreme Court in their opinion). Based upon your review of the abuse and neglect statutes, Professor Paruch's article, and the cases we have reviewed in class, please prepare a memo in which you advise whether the decision should be upheld or overturned by the U.S. Supreme Court (**focus, please, on the substantive TPR issues, not jurisdictional ones!**). Use the statutes, materials we discussed in class, and a critical analysis of Professor Paruch's article to support your reasoning. While your memo should include traditional legal analysis, it may also include your thoughts and opinions on the child welfare system generally and your thoughts regarding any needed improvements.

Prof. M. Jacobs
Family Law II - Child, Parent & the State
ART assignment

MEMORANDUM

To: Junior Associate

From: Senior Partner

Re: Sperm Donor v. Single Mother

Date: April 2, 2009

Welcome to the firm, I look forward to working with you. I hope you are ready to jump right in; I have a new case that is a case of first impression in this jurisdiction and I need your research assistance. Our client is Single Mother, who is the mother of Baby Girl. Baby Girl's biological father is Sperm Donor, who agreed not to seek any parental rights to Baby Girl, but who has recently filed a paternity complaint and request for joint legal custody and parenting time. Single Mother ("Mother") has asked us to represent her; this is what she told me when I met with her yesterday:

Mother, 41, is a mechanical engineer who works for one of the Big Three. Three years ago, when she was 38, she made the decision to become a single mother as she had not yet met a potential partner and very much wished to become a parent. Mother researched various sperm banks and considered using anonymous donors but ultimately preferred using a known donor. Mother was friendly with Sperm Donor ("Donor"), who is another engineer at the company. Donor was also not married but in a committed relationship with another man. He expressed some interest in fathering a child, although he expressed no interest in raising the child.

Mother and Donor began to more seriously consider the possibility of Donor providing sperm to Mother. Mother talked with Donor on multiple occasions and expressed an interest in her future child having some "male role model" in the child's life, but more akin to an uncle or close friend than a parent. Mother did not want the child to learn of Donor's biological parental status nor did she want Donor to assume any parental rights. Donor expressed comfort with this arrangement; he liked the idea of assisting Mother and of having some biological offspring, although he was not prepared to assume the responsibilities of parenting.

In November 2007, Mother and Donor entered into a written contract whereby Donor agreed to provide Mother with sperm for artificial insemination and that if a successful childbirth resulted, Donor would have no parental rights. Moreover, the contract specifically provided that

neither party could seek to establish parental rights or responsibilities for Sperm Donor by the institution of a paternity action.

To save money, Mother chose to self inseminate, rather than seek physician assistance. Donor provided sperm to Mother on three separate occasions; after the third insemination attempt, Mother told Donor that she was pregnant. Mother paid all of the expenses associated with the pregnancy and had minimal contact with Donor during her pregnancy (an occasional work related lunch and several conversations). On January 5, 2009, she gave birth to Baby. Mother listed her name as the mother on Baby's birth certificate but did not identify a father.

Donor visited Mother and Baby once at the hospital and then visited again at Mother's home. He saw several of his features in Baby Girl's face and realized that he wanted to play a more active role in Baby's life. Mother permitted him to visit three times in the first three weeks that Baby was born, but Donor wanted more visitation time. Mother became alarmed that Donor was violating the spirit of their agreement - in that he appeared to want to play a more parental role - and she denied him further contact with Baby.

Donor proceeded to file a paternity petition in which he is seeking custody and visitation. Mother absolutely objects to the establishment of Donor's paternity and custody or visitation rights (which would violate their contractual agreement).

Our jurisdiction has enacted no statutes regarding the legal rights of sperm donors. As I mentioned above, this is a case of first impression in our jurisdiction, but I know several states have cases regarding the rights of single mothers and sperm donors. My initial sense is that we should be able to file a motion to dismiss and seek enforcement of the contract, but I would like to have the research to back our position and be prepared for any cases/statutes to the contrary in preparation for argument in support of our motion. I would like you to research how other jurisdictions have decided cases in which a known donor seeks to establish paternity, particularly cases in which the parties entered into a written contract precluding the donor from having any parental rights. **I need to know the likelihood that the written contract providing no parental rights to Sperm Donor will be enforced and our chance of success if we file the motion to dismiss.**

Please prepare a memorandum in which you analyze the issues presented above. The memorandum should not exceed seven (7) double-spaced pages (1 inch margins, 12-point font). You must submit your memo to me no later than 10:00 a.m. on Thursday, April 23rd. Please see me if you have any questions.

Prof. Melanie B. Jacobs
MSU College of Law
sample materials from Decedents' Estates & Trusts

NOTE: I GIVE THIS PROBLEM SET ABOUT HALFWAY THROUGH THE SEMESTER

Professor Jacobs
Decedents' Estates & Trusts
Review Questions

For the following questions, please note that your jurisdiction has adopted the Uniform Probate Code. If there is no UPC provision that pertains to a particular issue, please apply the common law principles that we studied in class.

Question One:

Marie Kaye was a successful cosmetics maven. Her career began with a job at the cosmetics counter in Bloomingdales and she soon became the most popular makeover salesperson. She began to experiment with cosmetics and soon left Bloomie's to found her own business and brand, Marie Kaye Cosmetics ("MKC"). She sold her cosmetics door-to-door and with popular products such as "Sparkle Dew Eyeshadow" and "Slippery Shiny Lip Gloss" her business soon became quite profitable.

Marie Kaye suffered a stroke in 2003. As a result, Marie suffered paralysis on the right side of her body and had difficulty speaking. She was unable to continue her stewardship of the Marie Kaye Company, although she retained her interest in the company, reviewed quarterly reports and made suggestions to the new management.

Soon after her stroke, Marie hired a private duty nurse, Trish, to care for her full time. Trish was a wonderful caretaker and she and Marie became very close; Marie came to rely on Trish exclusively. Trish was able to understand Marie's slurred speech and was one of the only people with whom Marie could regularly converse. Marie's children were not nearly as attentive as Trish and rarely visited Marie after her stroke.

In 2004, Marie asked Trish to help her write a will. Marie dictated its terms to Trish and had her type the will. She directed Trish to sign the will on her behalf, but Marie also placed an "X" next to her name. A few days after Trish typed and Marie signed the will, Marie asked Trish to invite two of her friends to the house so that they could witness the will. Trish's friends Ilene and Ross came to the house to witness the will. Because of Marie's slurred speech, it was hard for Ilene and Ross to understand her, but Trish told them that Marie wanted them to witness the will and pointed out Marie's "signature" and they both attested and signed the will.

The text of Marie's 2004 will provides:

I, Marie Kaye, revoke all of my prior wills and leave this as my last will and testament.

FIRST: Trish has been a great support to me and has cared for me well during my illness. In recognition of her kindness, I leave Trish my house and all of its contents,

except for those items of personal property which I give to my other friends and family as provided for elsewhere in my will.

SECOND: My children are all successful and doing well on their own. They do not need my money, but as a token of my affection, I leave each of them \$10,000. If any of my children contests my will, that child should receive nothing.

THIRD: My friend, Joan, has long admired my collection of gold compacts and I would like for her to have the collection.

FOURTH: My friend, Helen, has long admired my oil painting of a small garden and I would like for her to have it. I would also like her to have my gold and diamond Cartier wristwatch.

Marie Kaye "X"
March 30, 1984

Marie died in 2006 with Trish at her bedside. Marie is survived by Trish and her friend Helen, as well as her two children, Alma and Bernice. Marie's other child, Charles, died in 1998 and is survived by his wife, Nina, and their children, Evan and Fiona. Joan died three days before Marie and is survived by two children, Paul and Tom.

1. Marie's children are very unhappy with the terms of the will and wish to contest it. What arguments can/should they make to challenge probate of the will? How successful will those arguments be?
2. Assume that the will is valid and you have been appointed the executor of Marie's estate. For this question, you need only consider the third and fourth clauses of the will.

You have learned that Marie had two small oil paintings of gardens, one in the living room and one in her bedroom. Helen often remarked how much she liked the painting in the living room. You have also learned that Marie gave her gold and diamond Cartier wristwatch to another friend before she died. How should Marie's property be distributed and why?

Question Two:

T is a 76-year-old widower. His estate is worth approximately \$12 million. He has two children, three grandchildren, and five great-grandchildren.* He asked his attorney to prepare a will that provides that each child will receive \$ 2 million; each grandchild will receive \$1,000,000; and each great-grandchild will receive \$500,000. The remainder of his estate was devised to various charitable organizations.

T validly executed the will and brought it home for safekeeping. Last year, T became quite ill and was hospitalized frequently. Although T's illness affected his physical health, all who knew him agreed that his mental health was good up until the time of his death. During a hospital visit with one of his grandsons, T stated that his will was in the "important papers drawer" in his home office. T was released from the hospital three weeks before his death. He said that he preferred to die at home. After T died several weeks ago, his family searched the important papers drawer, but have been unable to find the will.

1. Can the will still be probated? How?
2. Assuming that the will can be probated, how should T's property be distributed if you learn that T has two great-grandchildren who were born after the execution of his will?
3. Assuming that the will cannot be probated, how would T's estate be distributed? Please determine each person's share using all three distribution methods that we studied in class. [Refer to family tree, below. Yes, I've killed off some additional family members, for your per stirpes pleasure.]

* family tree

Question Three:

Jane was widowed in 1987. She has two sons, Dick and Stan. Jane received a few million dollars from her husband's life insurance policy. Several months after her husband's death, she executed a will in which she provided that her sons will inherit all of her property in equal shares. Subsequent to executing her will, Jane met Frank in 1988 and they were married in 1989. They remained happily married until Jane's death a few weeks ago.

A search of Jane's important papers reveals the will she properly executed in 1987, which leaves her estate (now valued at \$4,000,000) to her sons. She and Frank owned their home as joint tenants and it has a value of \$500,000. In addition, after her marriage to Frank, Jane purchased a life insurance policy, naming Frank as beneficiary, which is now worth \$500,000. Frank has property in his name valued at \$1,000,000.

What portion of Jane's estate, if any, will Frank likely receive?

MEMORANDUM

From: Melanie B. Jacobs, Esq.
To: DET junior associate
Re: Estate plan for Joan Smith
Date: October 24, 2007

Joan Smith retained our firm to assist her with an incapacity and estate plan. We need to move quickly: Joan was recently diagnosed with stage III ovarian cancer. She is planning both for her impending incapacity as well as her possible death.

Joan lives in East Lansing, MI and has one child, Marisa, who is twelve years old. Marisa's father (and Joan's husband), Victor, died three years ago in a car accident. Thus, Joan's diagnosis has been particularly traumatic for Marisa.

Joan expressed several initial concerns, which you will need to further explore during your interview. Most significantly, she wants to ensure a smooth transition for Marisa and establish legal guardianship if she should die. Joan's parents, Walter and Helen, are in their early sixties and have a good relationship with Marisa, although they live in Connecticut. Joan has an older brother, Martin, who is married with children and lives in Royal Oak, MI. Victor's parents, Luis and Rosa, have a great relationship with Marisa, but they are in their late seventies and have experienced several health issues in recent years. They have encouraged Joan to choose other guardians.

Joan is also concerned about how her condition might impair her ability to make medical decisions and would like to discuss a living will and any other documents that could assist her in the event of incapacity.

As for property, she is in executive management at an auto parts company and earns in the high five figures. She mentioned a 401K and likely has other assets.

I would like you to conduct a full and complete interview with Joan; obtain all necessary information regarding incapacity planning and an estate plan, including Marisa's guardianship. You will need a complete and accurate accounting of all of Joan's assets and liabilities, as well as her wishes for how she would like to dispose of them.

Joan is coming to the office on November 5, 2007 at 10:15 a.m. to meet with you. I'll expect you to take the lead in preparing her estate plan and have it completed no later than November 14th.

Confidential Client Narrative for Joan Smith

Below is a confidential narrative for Joan Smith. It includes information about Joan's wishes for Marisa, her health care concerns, and her assets and liabilities. The narrative certainly is not exhaustive. Reviewing this document should enable you to answer many of the attorneys' questions, but you should feel free to create additional details for Joan and give more specific responses as necessary. The narrative also includes questions that Joan is likely to ask. You should ask these or other questions of the attorneys, to ensure that they are able to explain the estate and incapacity planning process to Joan.

Guardianship for Marisa

Nothing is as hard for me as worrying about Marisa. She's only twelve; her father, Victor, died three years ago, and now I might die?! I want her to be happy and feel loved. I know my parents adore her and would take excellent care of her, but I am worried about Marisa moving to Connecticut - it's hard enough to lose your parents, but even harder to lose all your friends at the same time.

My brother, Martin, lives in Royal Oak with his wife, Riza, and they have three kids. It wouldn't be easy for them to have space for her, like my parents do. But maybe she would still be able to see her friends some weekends and not feel so isolated. She could still go to the Detroit Zoo and Tigers games and maybe feel a bit more settled. Although, my parents are retired and could bring her to visit on school breaks and holidays. I'm just not sure!

How will it work with money? Neither my parents nor Martin are "rich." Can I set something up so that they wouldn't have to pay all of her expenses? I would want to make sure that Marisa has money for clothes, and school trips, and that they have money to buy her gifts for her birthday and Christmas and stuff. I also want to make sure that she has money to go to college and money for any health related expenses. The dentist said Marisa might need braces and that's pretty expensive. I'm really nervous about that.

Health Care

I'm scared. I'm already in pain and the doctors tell me it will get much worse. This is a horrible, aggressive cancer and there is very little that can be done to cure me. I'm already on some heavy medication and sometimes it is hard to work and concentrate.

I hate being sick!! I don't want to die and leave Marisa alone, but I also am afraid of a painful, protracted death that she would witness. I know she will want to visit me, and I want her to be able to see me, but I want her to remember me as her fun-loving mom. I don't want her to see me in unbearable pain, especially if I cannot recognize her because of medication. I'd like to know more about ways in which I could structure some kind of visitation for Marisa.

Who makes decisions for me? I made some decisions for Victor, but who makes them

for me? What if I can't make decisions in a few weeks? months? years? Riza, my sister-in-law is a nurse and she's pretty level-headed, so I think she might be a good person to talk to the doctors on my behalf. Definitely better than Martin or my parents, because they will be too emotional. My friend Carmen might also be helpful with that.

Is there a way that I can tell the doctors what I want to happen now? I certainly want pain medication. But I don't want to be experimented upon like a guinea pig or something. I have a good friend whose mother had lung cancer and it seemed like the doctors were constantly experimenting on her but she never felt better.

You know my husband was in a car accident. After Victor was admitted to the hospital and examined, the doctors said he was in a persistent vegetative state. His parents and I agreed that it would be better to let him die naturally than to continue artificial treatment. It's one of the hardest decisions I ever made in my life, but my husband had always said he never wanted to be kept alive by machines. Seeing him die peacefully, while awful, seemed better than the trauma of making more decisions about machines. Is there a way I can ensure that doctors will not keep me alive if I suffer complications or coma?

Property Disposition

My husband had a \$250,000 life insurance policy. So after he died, I invested that money and it's in an account with Fidelity. I hope to use it for Marisa's college education. We owned our home jointly and now it's in my name. The house is probably worth about \$175,000 and there's \$145,000 remaining on the mortgage. I own a 2003 Toyota Corolla worth about \$8,000. I don't have too much credit card debt; I have a VISA card and the balance usually doesn't go above \$2,000. I also have a life insurance policy; I think Victor might still be the beneficiary but I'm pretty sure Marisa is the contingent beneficiary. That policy is for \$200,000. I've been working for about five years and have a small 401K account - probably \$35,000.

Since my parents live so far away and my brother is happy in Royal Oak, I guess if I die they should just sell the house and take whatever money is left. I'd like Marisa to be able to keep any furniture or personal items from the house that she wants. Is it possible that it could be stored for her if there isn't room for her to take all the furniture she might want? I want her to take anything of mine that she might want to keep - jewelry, clothes, pictures, just stuff. I guess my parents and brother could also take anything from the house and the rest should be sold or given to charity.

I guess I need to have a plan for where all the money goes, huh? I definitely want Marisa to get most of it, but how can I arrange for her to have what she needs put also save most of it for college or health expenses, like I mentioned? I'd also like my parents and brother to get some money; maybe they can split the money from the house and the other money can go to Marisa. I think there should be a way to save the money for Marisa for a period of time, but once she's 25, she should be allowed to manage it on her own. Do you think that's a good age?

NAME: _____

MICHIGAN STATE UNIVERSITY COLLEGE OF LAW

PROPERTY
PROFESSOR MELANIE B. JACOBS

MIDTERM EXAMINATION

March 17, 2009

INSTRUCTIONS

1. You have **70 minutes** to complete this exam.
2. This midterm exam contains three (3) pages. Count every page before you begin this exam to ensure that you have all of the pages.
3. **This exam consists of one short answer question and one essay question. I have indicated suggested times for each question: ten (10) minutes for the short answer question and fifty (50) minutes for the essay questions. As you will note, that leaves an additional ten (10) minutes to read the questions and consider your answers before you begin to write. I ENCOURAGE YOU TO READ AND RE-READ THE QUESTIONS BEFORE YOU BEGIN TO DRAFT YOUR ANSWER.**
4. This is a limited open book exam. You may make use of your textbook, your notes, any materials distributed in class, and any outlines which you have made or which you have assisted in making. You may not use any commercial outlines or supplements during the exam.
5. All examination booklets must be turned in with your answers and all of your blue books (even those used for scratch paper).
6. Please make a special effort to write legibly. **It is recommended that those who are handwriting the exam write on every other line of the bluebook and/or skip pages.**

7. Keep your answers focused and concise. Good lawyering consists not only of knowledge of the law and keen analysis; it requires the ability to convey that information clearly and efficiently. There is no bluebook or page limit on this exam. However, **grading will be based on quality not quantity, and cogent, effective writing will be favorably considered.**

8. **Please read the specific questions and instructions at the end of each part carefully!!** The instructions following each question indicate precisely the issues that you are to address in your response. You will be graded on your identification of the issue(s) and applicable law, and on your arguments for and against the various parties. **Remember: do not merely tell me the result but show me how you got there.**

9. Good luck!

Short Answer Question (10 minutes)

Lily was listening to her iPod while studying in the library. A classmate walked up and asked her a question and she put the iPod down to hear and answer. Unfortunately, she forgot the iPod in her study carrel. Daisy was absolutely delighted to find the iPod a few hours later when she sat down to study. She didn't like all the tunes on this one, but she planned to download her own favorites. Daisy used the iPod for five days when she accidentally left it at Sparty's. Rose couldn't believe her good fortune - she only had one final for which to study AND she found an iPod! The next day, Daisy saw Rose with the iPod and demanded that Rose return it to her. Rose said, "finders keepers, losers weepers" and turned up the volume. **Who has rightful possession of the iPod, Rose or Daisy? In 300 words or less (no more than two bluebook pages), please explain your reasoning.**

Essay Question (50 minutes)

Elder Abode ("EA") is spearheading a new type of living arrangement for adults aged 55 and older. EA proposes to build developments consisting of approximately sixty three-bedroom single-family homes designed to accommodate up to six residents who will live family-style and share the costs of the household. The houses will be outfitted with sophisticated monitoring devices that will allow the residents to request medical assistance 24 hours a day. Each development will also have an activity center.

EA is planning two developments - one in an urban setting and one in a predominantly rural area. EA plans to build the urban development in a block in the City that consists of a series of contiguous lots that EA bought from individual owners. A title search of each lot revealed no restrictions on the deeds and the proposed use conforms with existing zoning. However, there is a problem with one of the lots.

EA purchased Lots G and H from Edward Hall. Lot G still has a building on it which is in disrepair and which EA plans to demolish. Lot H has no building on it, but for the last 15 years a neighborhood group has used it as a community vegetable garden and a self-proclaimed "people's park." The neighbors have improved the lot with benches and playground equipment. They have planted trees, shrubs, and, of course, vegetables. The lot is clearly marked by a sign that reads "20th Street People's Park." When asked about this use, former owner, Hall, explained that he was just happy that "someone was keeping the lot clean."

In 1,000 words or less (no more than ten bluebook pages), summarize the arguments the neighbors will raise to stop EA from building on Lot H and predict the likely result.

Grading Matrix (48 total points)

Student's Name _____

Short Answer Question (7)

- ___ (1) Identify the issue: b/w 2 finders, who has a greater claim to the property?
- ___ (3) b/w 2 finders, the first finder has greater rights to found property than everyone else except TO OR a prior/rightful possessor (relativity of title) but the TO always has the superior claim
- ___ (2) clarify lost/mislaid v. abandoned property
- ___ (1) finders statute

Essay Question (41)

Adverse Possession (26)

- ___ (1) Identify the issue: Can neighbors prove adverse possession of Lot H
- ___ (2) state the rule: all 6 elements of AP
- ___ (3) clarify evidentiary std: prove AP by clear & convincing evidence
- ___ (2) apply actual possession
- ___ (2) apply open & notorious
- ___ (2) apply continuous
- ___ (4) is this adverse?
- ___ (4) is this exclusive?
- ___ (2) does it meet the SOL?
- ___ (2) If prove all of this, makes them the true owners with the right to exclude
- ___ (2) policy considerations

Prescriptive Easement (9)

- ___ (1) identify the issue: can neighbors alternatively prove PE?
- ___ (2) state the rule: same as AP, except actual use v. actual possession & differs exclusivity
- ___ (1) implied, not in writing (an exception to SOF)
- ___ (3) apply the rule
- ___ (2) won't be true owners, but able to use w/o EA interference

Easement by Estoppel (6)

- ___ (1) Identify the issue: can neighbors alternatively prove EBE
- ___ (2) Rule: converts revocable license into irrevocable easement
- ___ (3) Apply rule / similarity to Holbrook

Midterm Sample Response

I have provided you with a “sample response” to the two midterm questions. These are solid A answers, but they are not perfect. You may have organized your thoughts a bit differently or used different cases. These answers are purely illustrative and are intended, along with the Grading Matrix, to help you identify the strengths and weaknesses of your own responses and to help you better prepare for the final exam.

Short Answer Question

Lily was listening to her iPod while studying in the library. A classmate walked up and asked her a question and she put the iPod down to hear and answer. Unfortunately, she forgot the iPod in her study carrel. Daisy was absolutely delighted to find the iPod a few hours later when she sat down to study. She didn't like all the tunes on this one, but she planned to download her own favorites. Daisy used the iPod for five days when she accidentally left it at Sparty's. Rose couldn't believe her good fortune - she only had one final for which to study AND she found an iPod! The next day, Daisy saw Rose with the iPod and demanded that Rose return it to her. Rose said, “finders keepers, losers weepers” and turned up the volume. **Who has rightful possession of the iPod, Rose or Daisy? In 300 words or less (no more than two bluebook pages), please explain your reasoning.**

Sample Response

The issue in this situation is relativity of title, which examines who has a better claim to the property and who has rightful possession of the iPod. Given the facts, Daisy would more than likely have rightful possession of the iPod. Generally the true owner (TO) has rightful possession over everyone else, but where the TO is not involved, the rule that applies is that a finder has greater rights in the property than everyone else except for the TO or a prior/rightful possessor (*e.g. Tapscott*).

The iPod could be either lost or mislaid property. Lost property is property that the possessor loses accidentally or involuntarily. Mislaid property is property that the possessor has intentionally placed somewhere and then forgotten the placement, but the possessor has no intent to relinquish possession. More than likely the iPod is lost property because the facts state that Lily forgot to grab it, not that she forgot where she put it, when she left and Daisy accidentally left it in Sparty's. The only way Daisy would not have recourse against Rose would be if she had the intent to relinquish her rights in the iPod (abandoned property), but given there is no evidence this intent existed, Daisy would have greater rights in the iPod than Rose, but not the TO (Lily). [FYI - this response is just over 200 words, so well under the limit]

Essay Question

Elder Abode (“EA”) is spearheading a new type of living arrangement for adults aged 55 and older. EA proposes to build developments consisting of approximately sixty three-bedroom single-family homes designed to accommodate up to six residents who will live family-style and share the costs of the household. The houses will be outfitted with sophisticated monitoring devices that will allow the residents to request medical assistance 24 hours a day. Each development will also have an activity center.

EA is planning two developments - one in an urban setting and one in a predominantly rural area. EA plans to build the urban development in a block in the City that consists of a series of contiguous lots that EA bought from individual owners. A title search of each lot revealed no restrictions on the deeds and the proposed use conforms with existing zoning. However, there is a problem with one of the lots.

EA purchased Lots G and H from Edward Hall. Lot G still has a building on it which is in disrepair and which EA plans to demolish. Lot H has no building on it, but for the last 15 years a neighborhood group has used it as a community vegetable garden and a self-proclaimed “people’s park.” The neighbors have improved the lot with benches and playground equipment. They have planted trees, shrubs, and, of course, vegetables. The lot is clearly marked by a sign that reads “20th Street People’s Park.” When asked about this use, former owner, Hall, explained that he was just happy that “someone was keeping the lot clean.”

In 1,000 words or less (no more than ten bluebook pages), summarize the arguments the neighbors will raise to stop EA from building on Lot H and predict the likely result.

Sample Response

The neighbors have three potential arguments to prevent EA from building on Lot H: adverse possession, prescriptive easement, and easement by estoppel.

I. Adverse Possession

To successfully prevail on a claim of adverse possession, the neighbors will need to prove: 1) that they actually possess the property; 2) that the possession is open and notorious; 3) that their possession is “exclusive,” i.e., of the type that would be expected of the title owner; 4) that the possession is continuous; 5) that the possession is hostile or adverse; and

6) that such possession has lasted for more than the period defined by the statute of limitations. Moreover, the majority of jurisdictions require that adverse possession be proved by clear and convincing evidence. If the neighbors are able to prove they adversely possessed the property, they will be the true owners with the right to exclude Elder Abode.

The neighbors should have little difficulty proving the first three necessary elements. The neighbors have clearly possessed the property in an open and notorious manner. They have improved the property with equipment and plantings (much like the parties in Nome and Brown) and have even placed a sign “20th People’s Park” which certainly put Hall on notice that the use was open and notorious. Moreover, the facts indicate that the use has been continuous.

The neighbors may have a more difficult time proving that their use of Lot H was exclusive, hostile, and meets the time requirement. Regarding exclusivity, the neighbors must demonstrate they are using the property in a manner such as that of the titled owner. Moreover, usually exclusivity is proven when the use is personal, not public. The use of Lot H as a recreational park may not satisfy the exclusivity element of their adverse possession claim. However, the neighbors may argue that as a group they are exclusively using Lot H and that although the sign indicates a “people’s park” only a select group of neighbors actually uses Lot H. Additionally, regarding the hostility element, permission of an owner defeats a claim of adverse possession. However, if the true owner has said nothing, the majority of jurisdictions will apply a presumption and find that the owner’s silence means the use was nonpermissive. The facts here are not 100% clear regarding whether Hall actually gave permission to the neighbors or if he was merely silent. If the neighbors can prove that Hall never affirmatively gave permission to use Lot H for a garden/park, then they will likely prevail on this element.

In addition, the neighbors need to prove that they have used the property for more than the defined statute of limitations. In many jurisdictions, the statute is ten years and in some, like Michigan, it is fifteen years. Assuming that this jurisdiction applies a ten or fifteen year statute of limitations, the neighbors will likely be able to prevail on this element.

Thus, the neighbors’ ability to satisfy the exclusivity, hostility, and time requirements will dictate whether they will succeed with their adverse possession claim.

II. Prescriptive Easement

The elements for prescriptive easement are much the same as for adverse possession except that the element of “actual possession” is replaced by “actual use.” Also, for prescriptive

easement, the use may be non-exclusive. Here, the neighbors should be able to satisfy the use element. As discussed above, they improved the lot with benches, playground equipment, trees, shrubs, and vegetables. The neighbors should have an easier time proving prescriptive easement than adverse possession because here, they do not need to argue exclusivity. The fact that Lot H is being used by a large number of people should not defeat their claim. Also, unlike the difficulty in Community Feed, here the neighbors can clearly delineate the area that they are using and thus can argue that they have a prescriptive easement to Lot H. The neighbors will still have to demonstrate that the use was hostile and meets the time requirements, as discussed above. If they successfully prove they have a prescriptive easement, they will be able to continue to use Lot H and Elder Abode will not be able to exclude the neighbors from the property.

III. Easement by Estoppel

The neighbors may also argue that they have an easement by estoppel (EBE). Generally, an EBE converts a revocable license into an irrevocable easement. Like a prescriptive easement, an EBE is an implied easement and exception to the Statute of Frauds, which requires an easement to be in writing.

Where a person has had permission to use property and has been induced to rely upon that use, courts have found that it is unconscionable for the true owner to revoke the license and have instead found that the plaintiff has an easement by estoppel. (Holbrook v. Taylor) The plaintiff must demonstrate that s/he has improved the property, sometimes at considerable expense. Thus, even if Hall had granted the neighbors permission to use Lot H for a community vegetable garden/park, that permission would only defeat their claims of adverse possession and prescriptive easement, but not their claim for an easement by estoppel. They could argue that in reliance on Hall's permission, they invested both money and labor to improve the property. This case is very similar to Holbrook where plaintiffs expended considerable sums to improve a road and relied upon use of the road. The court found that the plaintiffs had an EBE. Because of the significant period of time during which the neighbors have used and improved Lot H, and because of their seeming reliance to invest in and improve the property, the court should find that the neighbors have an easement by estoppel in Lot H, as in Holbrook. Thus, EA should not be able to exclude the neighbors from the property.

[FYI, this response is just over 900 words, so well within the limit.]

Advanced Analytical Applications
Professor Pamela L. Perry

In the spring of 2007, Widener School of Law adopted a new course, Advanced Analytical Applications (AAA). The goals of the course were to help first semester, second year students with mid-level GPAs to improve their skills in legal reading, reasoning, and writing, and ultimately to improve their bar passage rates.

Knowing that AAA was a two-credit course with enrollment limited to 20 students per section, I designed a course to enable each student to achieve "A" quality work during the term. I evaluate students based on their initial performance on exams (about 1/2) and their final rewrite on the exams (about 1/2). I grade each exam using a grade sheet that shows points earned for each issue on the exam as well as extensive written comments on each student's exam paper. I return the exam and the grade sheet, give some global comments on the strengths and weaknesses I noted on the exams for the entire class, and then encourage students to confer with me to rewrite the exams to achieve an A.

I also require the students to do two case reading assignments, to take class notes according to two prescribed methods, and to review with other faculty two first-year exams using an Exam Self Evaluation Sheet.

I have included materials used in AAA:

AAA Course Outline

Exam 1

Exam 1 - Feedback

Required Outside Exercises

Fall Term 2008 was the first year Widener students were required to take AAA. Of the 34 students who enrolled in AAA (all of whom had a GPA between 2.5 and 2.69 after two semesters of law school), nine earned a GPA over 3.0 for Fall Term 2008, including two students with a 3.8 GPA and 3.627 GPA. I need to keep track of their future progress to see if the skills they practiced during AAA help them throughout law school and on the bar exam.

Advanced Analytical Applications
Course Outline

Assignments come from Schwartz, Expert Learning for Law Students ("S __"), Dernbach, Writing Essay Exams to Succeed ("D__"), and the AAA Supplemental Reading ("[__]").

Class	Topic	Assignment
1	Introduction A. Reading and Briefing Cases B. Reading and Briefing Statutes	[1-22], S 8-10, [23-25] S 85-123, [26-33]
2	C. Getting Help D. Organizing E. Memorizing Exam 1	Turn in Questionnaire S 139-48 S 149-72, [34-36] S 173-88
3	E. Legal Reasoning Personal Jurisdiction	Turn in two (2) Case Reading Assignments S 205-28 WW VW + Asahi
4	E. Legal Reasoning, Cont'd Personal Jurisdiction + Notice	[37-46] Burger King + Fed. R Civ. P 4
5	Exam 2	
6	F. In-Class Strategies	[47-63], S 125-38
7	G. Exam Techniques	S 229-48, [64], D 1-63
8	H. Exam Technique - Essays	Turn in two (2) Class Notes D65-95, [65-92]
9	F. Exam Technique - Multiple Choice MPT - outline	[93-110] [111]
10	Exam 3 - MPT	Turn in two (2) Exam Self-Evaluations
11	Professional Responsibility	Packet on Professional Responsibility
12	Study Group Session for Exam 4	S 144-46, Fact pattern for last exam
13	Exam 4	
14	Final Review	Last day to turn in rewrites

Grading: (50%) Initial Exam Results
(50%) Exam Rewrites (mandatory first rewrite for exams
1-3 due two weeks after exam graded; mandatory rewrite
for exam 4 due last day of class)
(+ or -) Case Reading Assignment (2), Class Notes (2),
Exam Self Evaluation (2)

Exam 1 AAA

Worker's Compensation Law

Workers in America are injured on the job everyday. Under common law tort schemes, workers rarely recovered for their injuries because of problems proving causation and defenses of contributory negligence, fellow servant rule, and assumption of the risk. The absence of predictable, timely, and adequate recovery for injured workers led legislatures in the fifty states to enact workers' compensation laws.

Workers compensation laws provide a tradeoff between employees and employers for work-related injury. Employees can recover from their employers their limited costs of medical care, absence from work, and permanent disability without proving the employer's fault. If an injured employee can demonstrate their injury was work related, that it occurred "during the course of" and "arose out of" their employment, they are entitled to compensation without regard to fault. Employers provide workers compensation as the exclusive remedy for work-related injuries. Thus, employers are immune from tort liability with its higher recoveries, including compensation for pain and suffering or punitive damages, for example. Thus, employees get quick and predictable recoveries without proving fault and employers avoid higher tort recoveries.

Although all states limit recovery for work-related injuries by employees and their dependents to workers compensation, most

states allow employees to bring a tort suit against their employers where employers engage in intentional misconduct against their employees. This exception to the exclusivity of workers compensation recovery is consistent with the policy of promoting a safe work environment, which is the policy underlying workers compensation. Courts have interpreted the exclusivity exception very narrowly, however, as the attached case shows.

WORKLAW: CASES AND MATERIALS

MARION G. CRAIN

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WHITAKER v. TOWN OF SCOTLAND NECK
Supreme Court of North Carolina
597 S.E.2d 665 (2003)

WAINWRIGHT, JUSTICE.

.... The Town of Scotland Neck (Town) is a North Carolina municipality that provides general governmental services including, among other things, garbage collection. Decedent Carlton Whitaker was employed by the Town as a general maintenance worker assigned to assist in the operation of a garbage truck.

On 30 July 1997, decedent and two other maintenance workers were emptying a dumpster at a private school. The garbage truck backed up to the dumpster, with decedent positioned at the rear of the truck. Decedent's job was to attach the dumpster to the truck's lifting equipment so that the dumpster could be emptied. In order to secure the dumpster for lifting, decedent and his co-worker attached a trunnion bar on the front of the dumpster to latching mechanisms located at the rear of the truck. Decedent hooked the truck's cable winch to the rear of the dumpster. Coupled to the truck in this fashion, the winch hoisted the dumpster into the air, pivoting the dumpster on its trunnion bar, and allowing its contents to fall into the truck's rear compactor.

As the dumpster was being hoisted, the latching mechanism on decedent's side of the garbage truck gave way, releasing the trunnion bar and allowing the raised container to swing free of its restraints. The dumpster swung around to decedent's side of the truck, striking decedent and pinning him against the truck. Decedent's co-workers rushed to his aid, manually pushing

the dumpster aside and lowering decedent to the ground. Following the accident, decedent was conscious and could talk.

Rescue personnel responded and transported decedent to the hospital. Twenty-eight days after the accident, decedent died as a consequence of a crush injury to his chest.

On the day of the accident, Scotland Neck Safety Director C.T. Hasty began his investigation. He found that the dumpster latching mechanism on the truck could not, in fact, be latched by hand and that the dumpster was bent. He interviewed a number of decedent's co-workers, several of whom reported that both the dumpster and the truck's latching mechanism had been broken for at least two months and that such defects had been reported to their supervisor. The supervisor, however, denied any prior knowledge of defects in the truck or dumpster. Based upon his investigation, Hasty concluded that the broken latch and the bent dumpster were the direct cause of the accident.

In August 1997, the North Carolina Department of Labor's Division of Occupational Safety and Health (OSHANC) also investigated the accident and similarly concluded that "defective equipment was the proximate cause of the accident" and that "the accident . . . was a result of employment conditions that were not in compliance with the safety standards of OSHA." More specifically, the OSHANC investigator found five "serious" violations of state labor law. These violations included: failure to train employees in the safe operation of garbage truck equipment, failure to properly supervise employees in the operation of garbage truck equipment, failure to implement a program for inspection of garbage truck equipment, operation of defective garbage truck equipment, and unsafe operation of garbage truck equipment. As a result of these OSHANC violations, the Town was assessed penalties totaling \$10,500.

On 20 August 1999, plaintiffs Donald Whitaker and Thomas Whitaker, Jr., as co-administrators of the estate of decedent, filed a civil action against the Town; Scotland Neck Safety Director C.T. Hasty, in his individual and official capacity; and Scotland Neck Public Works Superintendent Douglas Braddy, in his individual and official capacity. Plaintiffs alleged "willful, wanton, reckless, careless and gross negligence" and demanded compensatory and punitive damages.

Defendants denied all negligence. As an additional defense, defendants responded that plaintiffs' civil action was barred by the North Carolina Workers' Compensation Act, which limits remedies for work-related injuries to those expressly provided by the Act.

The trial court agreed that plaintiffs' claim was barred by the Workers' Compensation Act and granted defendants' motion for summary judgment on 15 August 2001. Plaintiffs thereafter appealed to the Court of Appeals, which reversed the trial court, concluding that plaintiffs had raised a genuine issue of material fact under *Woodson [v. Rowland]*, 407 S.E.2d 222 (1991),] as to whether defendants' actions were substantially certain to cause decedent's death. . . .

As this Court has often discussed, the North Carolina Workers' Compensation Act was created to ensure that injured employees receive sure and certain recovery for their work-related injuries without having to prove negligence on

the part of the employer or defend against charges of contributory negligence. In exchange for these "limited but assured benefits," the employee is generally barred from suing the employer for potentially larger damages in civil negligence actions and is instead limited exclusively to those remedies set forth in the Act.

This Court, however, recognizes an important exception to the general exclusivity provisions of the Workers' Compensation Act where an employee is injured or killed as a result of the intentional misconduct of the employer. In *Woodson*, this Court slightly expanded this exception to include cases in which a defendant employer engaged in conduct that, while not categorized as an intentional tort, was nonetheless substantially certain to cause serious injury or death to the employee. 407 S.E.2d at 226-30. In such cases, the injured employee may proceed outside the exclusivity provisions of the Act and maintain a common law tort action against the employer.

In *Woodson v. Rowland*, the defendant-employer was a construction company that specialized in trench excavation. *Id.* at 225. An employee of the defendant-employer was killed when a fourteen-foot-deep trench in which he was working collapsed. The factual circumstances surrounding the employee's death in *Woodson* were particularly offensive to this Court. In flagrant disregard of safety regulations and industry-wide standards, the defendant-employer's president had knowingly directed his employees to work in a deep trench with sheer, unstable walls that lacked proper shoring. *Id.* at 231. The hazard of a cave-in was so obvious that the foreman of another construction crew working on the project had emphatically refused to send his men into the trench until it was properly shored. *Id.* at 225. Moreover, the defendant-employer had been cited at least four times in the preceding six and a half years for multiple violations of trenching-safety regulations. *Id.* at 231. Thus, there was sufficient evidence from which "a reasonable juror could determine that upon placing a man in this trench serious injury or death as a result of a cave-in was a substantial certainty rather than an unforeseeable event, mere possibility, or even substantial probability." *Id.*

Based on these specific facts, this Court in *Woodson* defined a narrow exception to the general exclusivity provisions of the North Carolina Workers' Compensation Act. We specifically held that when an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Act.

The *Woodson* exception represents a narrow holding in a fact-specific case, and its guidelines stand by themselves. This exception applies only in the most egregious cases of employer misconduct. Such circumstances exist where there is uncontroverted evidence of the employer's intentional misconduct and where such misconduct is substantially certain to lead to the employee's serious injury or death.

In the present case, there is insufficient evidence to reasonably support plaintiffs' contention that defendants intentionally engaged in misconduct

knowing that it was substantially certain to cause serious injury or death to decedent. Indeed, the facts of the present case are readily distinguishable from those that gave rise to our holding in *Woodson*.

In *Woodson*, the defendant-employer's president was on the job site and observed first-hand the obvious hazards of the deep trench in which he directed the decedent-employee to work. *Id.* at 225. Knowing that safety regulations and common trade practice mandated the use of precautionary shoring, the defendant-employer's president nonetheless disregarded all safety measures and intentionally placed his employee into a hazardous situation in which experts concluded that only one outcome was substantially certain to follow: an injurious, if not fatal, cave-in of the trench. *Id.* at 231-32.

In the present case, there is no similar evidence that defendants were manifestly indifferent to the health and safety of their employees. The Town has a long history of garbage collection, yet there is no evidence of record that the Town had been previously cited for multiple, significant violations of safety regulations, as in *Woodson*. On the day of the accident, none of the Town's supervisors were on-site to monitor or oversee the workers' activities. Decedent was not expressly instructed to proceed into an obviously hazardous situation as in *Woodson*. There is no evidence that defendants knew that the latching mechanism on the truck was substantially certain to fail or that if such failure did occur, serious injury or death would be substantially certain to follow. As discussed in *Woodson*, simply having knowledge of some possibility, or even probability, of injury or death is not the same as knowledge of a substantial certainty of injury or death.

In *Woodson*, evidence was presented from which a jury could reasonably conclude that the defendant-employer's president recognized the immediate hazards of his operation and consciously elected to forgo critical safety precautions. *Id.* at 231. Here, there is no such evidence. Moreover, in *Woodson*, the employee worked in a deep, narrow trench in which it was impossible for him to escape or avoid injury once the soil around him began to cave in. Here, however, decedent was not so helpless. In sum, the forecast of evidence in the present case fails to establish that defendants intentionally engaged in misconduct knowing that it was substantially certain to cause serious injury or death to decedent. The facts of this case involve defective equipment and human error that amount to an accident rather than intentional misconduct.

We therefore conclude that plaintiffs failed to raise a genuine issue of material fact as to defendants' civil liability under the *Woodson* exception to the general exclusivity provisions of the North Carolina Workers' Compensation Act. Accordingly, we reverse the ruling of the Court of Appeals and instruct that court to reinstate the original order of the Superior Court, Halifax County, granting summary judgment in favor of defendants.

Reversed.

Fact Pattern

Widner Baking Company, Inc. (Widner), located in Charlotte, North Carolina, employs 151 workers to make their famous cookies. Widner operates three shifts, 24 hours a day, five days a week.

The Plant Manager, Jerry Pas, is required to inspect operations during the last hour of every shift and to respond to any machine malfunctions occurring during any shift while the plant is in operation.

During the month of January 2007, the cookie stamp machine had almost continuous problems. Each time a repair was needed, Jerry had to shut down the machine and remove the guard on the front of the machine to make the repair. This procedure took almost one hour, even though the repair itself took less than a minute. After numerous repairs, Jerry permanently removed the guard to expedite the repairs.

Three days after the guard was removed, four employees on the night shift objected to working on the cookie stamp line without the guard on the cookie stamp machine. They complained to management. Management told them to get back to work. After two weeks without the guard on the cookie stamp machine, the four employees telephoned the Occupational Safety and Health Agency to complain. The OSHA investigation resulted in Widner being cited and fined for removing the guard from the cookie stamp machine.

In May 2007, the cookie stamp machine again required numerous repairs. Once again, Jerry permanently removed the

guard from the machine. The four employees on the night shift again objected to working on the cookie stamp line without the guard on the cookie stamp machine. They complained to management. Management suspended them for insubordination.

After one month without replacing the guard on the cookie stamp machine, there was an accident. Juanita Alvarez, an employee on the day shift on the cookie stamp line, had recently gotten engaged to be married. While she was working, her new engagement ring accidentally dropped onto the cookie stamp machine line. Juanita reached out to grab for it and got her hand stamped by the cookie press. As a result of the accident, Juanita's hand was crushed, requiring hospitalization for two weeks, followed by four months of intense physical therapy. Juanita was absent from work for over four months, although she only had two weeks of sick pay to provide income during the absence. At the end of her rehabilitation, in early June, 2007, Juanita was permanently unable to grasp small items with her left hand.

Question

Juanita would like to sue Widner in tort to recover compensatory damages for her medical bills, lost employment, and pain and suffering, as well as punitive damages. Will Juanita's lawsuit survive Widner's defense that Juanita's lawsuit is barred by North Carolina's Worker's Compensation Act?

END OF EXAM

Exam 1 Review

Technique

Strengths: time management, writing mechanics, answered the question asked (i.e. concluded)

Weaknesses – sometimes, writing clarity – say something that does not follow [?]

Issue Spotting – not problem, only one issue

Rule Statement – mostly all found it

**Rule Application – most did not break rule into its elements and analyze each separately

Conclusion – not every sub-issue, sometimes did not understand logic

Score Sheet for Worker's Comp. Exam

Number: _____

Score: _____
 (Highest Score ____ Points)

Issue	Points Earned	Comments
Statement of Issue 4 points		
Statement of Rule 6 points		
Analysis: 1) Intentional 3 points each for: - case analogies - use of facts - policy		
2a) Substantially certain 4 points for argument		
2b) Death or serious injury 4 points for argument		
Conclusion 4 points		

Exam 1 Key

Issue: Whether Jaunita's suit will be barred by the exclusivity provisions of North Carolina's Worker's Compensation Act.

Rule: Juanita's suit will be barred if Widner intentionally removed the guard from the cookie stamp machine knowing that removing the guard is substantially certain to cause serious injury or death to employees.

See Woodson (S. Ct. N.C.)

Suit not barred:

1) This was intentional misconduct, not an accident

a) Our facts are like Woodson (where suit was barred):

1) Company cited four times prior to accident for violation of trenching standard

2) Company direct employees to enter unsafe trenches.

Widmer knew that removing a **protective guard** would result in injury for which the guard protects. Indeed they were cited for the danger by OSHA. They should be fully responsible for their action.

b) Our facts distinguishable from Whitaker (where suit was not barred)

1) Dispute on whether the company was alerted to the defective latching mechanism.

2) EE was not so helpless that could not escape injury

2) The company's misconduct was substantially certain to cause death or serious injury.

a) **substantially certain:** The purpose of the guard was to avoid allowing body parts, most likely hands, to get into the cookie stamping machine.

b) **death or serious injury:** Here there was serious injury - four months out of work and permanent disability of hand.

3) **Policy** - This is the kind of case where the exception should apply.

a) Widmer's culpability rises to intent.

See 1, above

b) The injury was both certain and serious.

See 2, above.

Suit barred:

This was accident, not intentional misconduct.

a) Our facts not like Woodson (where suit was barred)

1) Company cited four previous times.

Widmer cited only once previously

2) Another foreman refused to allow workers to work in unshored trenches.

No evidence

3) President of company present and ordered employee to work in unshored trench.

No evidence

b) Our facts like Whitaker (where suit was not barred)

1) The equipment was broken for two months

Widmer's guard was removed for only one month

2) There was evidence that the unsafe condition was reported to management

Widmer was notified only by four employees on another shift

3) The employee could have avoided injury (somehow?)

Juanita made an unsafe move around the equipment, almost like contributory negligence.

2) The company's misconduct was not substantially certain to cause death or serious injury.

a) **Not substantially certain:** Removal of the guard would not result in injury but for the fact that Juanita placed her hand under the stamp.

b) **Not cause death or serious injury:** The injury was not so serious as to be on a par with death. Indeed, the employee in Whitaker died and the court still refused to allow the tort suit to proceed. Here Juanita had a relatively short recovery with a relatively minor permanent disability.

3) **Policy** - tort suits are the **narrow** exception to the usual rule that worker's compensation is the exclusive remedy for worker injury.

a) Unless the employer's culpability rises to the level of intent, there should be no recovery.

See 1 above.

b) Unless the injury is sufficiently serious, there should be no tort liability.

See 2 above.

In speaking with some students after class, let me pass on this advice:

As you write an exam, constantly ask yourself, "**Why am I writing this?**" Then, make your answer explicit, e.g.

The employers in both Woodson and the case on the exam were cited for safety violations prior to the injury sustained by the plaintiff. **This fact shows that the employer was on clear notice that their wrongful conduct was unsafe and would expose their employees to injury. Thus, the injuries in both cases were not accidental, but intentional.** Moreover, the employer in Whitaker was not cited for a violation until after the injury, suggesting an accident, not intentional misconduct, on the part of the employer.

You need to be explicit about how each fact you discuss either furthers or detracts from your argument so that the reader can be persuaded to agree with you or not.

On the other hand if you are writing something to give background before actually getting to an argument, make it BRIEF. You will not earn many points on an exam for background.

Required Outside Exercises

AAA students must complete the following outside exercises:

- 1) Complete the Case Reading Assignment for two cases you read for two different law school courses. Due **class 3**.
- 2) Take notes for one law school class according to the method prescribed by Michael Hunter Schwartz on pages 133-36 of his text.
Take notes (by hand, without your computer) for another law school class using the Cornell method described by Seylor in the assigned reading for class 6. Class notes are due for **class 8**.
- 3) Review two exams from your first year, using the following protocol. First, check out your exam from your professor and evaluate your exam skills using the Exam Self-Evaluation Sheet. Second, make an appointment with your professor and have him or her review your exam with you, confirming or challenging your evaluation of your exam skills. You will need to start this process early in the semester. The Exam Self-Evaluation Sheets are due for **class 10**.

Case Reading Assignment

Pre-reading:

1) What is the purpose of this assignment?

2) Where does this assignment fit into the course?

3) What do you hypothesize you will learn from this case?

Reading:

Case Brief:

- 1) What happened in the case?
- 2) What happened in the lawsuit to get to this opinion?
- 3) What is the legal question in front of the court?
- 4) What is the answer to the legal question?
- 5) **Why did the court reach that result?**
- 6) What point(s) do any concurring or dissenting opinions address?

Notes:

- 1) Note in the margins questions or comments about the opinion.
- 2) How does this case relate to others on the topic?
- 3) What are you confused about?

Post-reading:

- 1) Answer the notes and problems after the case.
- 2) Stated succinctly, the majority rule appears to be:
- 3) Stated succinctly, alternative rules appear to be:
- 4) Stated succinctly, the exceptions or defenses appear to be:
- 5) What policies are furthered or conflict with the rule:
- 6) What is the main point of this case in the context of the legal topic?

Exam Self-Evaluation Sheet

Exam course: _____ Student: _____
Give yourself a plus (+), minus (-), or neutral (x) score for each exam skill. Be prepared to support your score.

Exam Technique

Followed Instructions

Organization

Time Management

Writing Mechanics - grammar, spelling, punctuation

Writing Clarity - clear communication of ideas

Answered the Questions Asked

Issue Spotting

Precise and Clear Identification of Issues

Accurate and Complete Identification of Issues

Rule Statement

Identification of Applicable Rules

Accurate and Complete Statement of Rules

Rule Application

Analyzed Every Element of Rule

Effectively Used Exam facts

Effectively Used Authority

Presented Both Sides (where applicable)

Presented Logical Arguments

Conclusion

Concluded Every Sub-Issue

Reached Logical Conclusions