

## QUESTION 1

Bob Smith and Frank Smith, who are brothers, pooled their money and bought a red 1972 Mustang. They titled the car under the name "Frank Smith Classic American Cars," and spent long hours restoring it. The brothers found that many people loved the Mustang and often asked to borrow it for special occasions. Bob and Frank decided they could take advantage of this and decided to lease the Mustang. Leasing the Mustang became such a lucrative enterprise that Bob and Frank borrowed money from a bank and bought and restored a second car, a Corvette, for the same purpose. They titled the Corvette under the name "Bob Smith Classic American Cars."

Because things were going so well, Bob and Frank agreed to operate their business together for the next five years. They called the business "Classic American Cars." They also agreed that they would pay for all costs associated with the operation of the business and divide what was left equally. Three months after they made this agreement, Bob was killed in a traffic accident while driving the Corvette. The Corvette was completely destroyed in the accident.

Frank made a claim with the business's insurance company for the value of the Corvette. Shortly thereafter, a check for the loss of the car was sent to Frank. Bob's widow, however, believes that the insurance funds belong to her since the Corvette was titled in Bob's name.

### QUESTIONS:

1. Describe and define what kind of business relationship Bob and Frank established.
2. As a result of Bob's death, what should happen to the Mustang, the debt to the bank, the insurance proceeds, and any cash from the operation of Classic American Cars?
3. What becomes of the business as a result of Bob's death? May Frank continue to operate the business if Bob's widow objects?

## QUESTION 2

Ann and Joe each contributed \$500 to open a children's clothing store. They decided to do business as a corporation, A - J, Inc. Joe typed the articles of incorporation and submitted them to the Secretary of State's office in September of 1997. By mistake, Joe typed "December 1, 1997" rather than "October 1, 1997" as the date when he intended A - J, Inc. to begin doing business. All the formalities of forming a corporation were correctly completed, including issuing shares of stock in Joe's and Ann's names.

During October, A - J, Inc. entered into a lease, obtained insurance, and ordered \$100,000 worth of children's clothing on credit from various suppliers, with Ann signing as President. The grand opening of the store was held on November 1, 1997. On November 15th, 1997, the contents of the store were destroyed by fire.

The insurer refused to pay for the destroyed goods, claiming its policy only covered corporate property. Because A - J, Inc.'s certificate of incorporation was not issued until December 1, 1997, the insurer claimed that there was no corporation at the time of the loss and thus no coverage.

### QUESTION:

The suppliers seek to hold Joe and Ann personally liable for the amount owed for the children's clothing. Ann has come to you for advice concerning her personal liability to the suppliers and the insurer's obligation to pay for the destroyed goods. Please limit your discussion to principles of corporate law.

### QUESTION 3

On May 1, Buyer received the following letter:

Dear Buyer: I have decided to give up my ranch and move to town. I thought that you might consider buying it from me. I will sell it to you for its current market value, \$80,000. Call me by May 10. I will keep this proposal open, and will not withdraw it, until after that date.

/s/ Seller

The next day, Buyer mentioned to a friend, Mary, that he was considering buying the ranch. Mary responded that an acquaintance of hers, Jody, also had received an offer from Seller to purchase the ranch. Buyer immediately went home and prepared a letter of acceptance, addressed to Seller, and deposited it in the mail at 9:30 A.M.

At 10:00 A.M. on May 2, Seller entered into a written agreement with Jody for the purchase of the ranch.

At 2:00 P.M. on May 2, Buyer called Seller to arrange for a survey of the ranch. Seller informed Buyer that he had already sold the ranch. Upon hearing this, Buyer exclaimed, "We have a deal. I sent you an acceptance this morning by mail."

#### QUESTION:

Discuss whether there is a contract between Buyer and Seller and the basis for your conclusion.

## QUESTION 4

ABC Company manufactures and sells heavy equipment to industrial users. ABC utilizes a manufacturing process known only to it and considers this process a valuable trade secret.

ABC borrowed \$1,000,000 from Bank to use as operating capital. In exchange for the loan, ABC agreed to grant Bank a security interest in the following ABC property and assets:

All rights to payment including, without limitation, accounts, notes, and general intangibles; and all equipment, and any proceeds derived therefrom.

ABC defaulted on its loan and Bank repossessed ABC's equipment. Bank now has come to you seeking advice on how it should proceed. Bank informs you that it expects ABC's equipment and accounts to produce, at best, no more than \$250,000.

### QUESTIONS:

1. What are Bank's duties as a secured party in possession of collateral?
2. May Bank, pending resale of the equipment, under any circumstances, permit periodic use by interested parties of any of ABC's equipment? Explain.
3. How can Bank best realize its interest in the receivables of ABC?
4. Is ABC's manufacturing process subject to the security agreement? Explain.
5. Is there any circumstance under which Bank may benefit from ABC's "trade secret"? Explain.

For purposes of the questions above, assume that the Uniform Commercial Code is in effect in this jurisdiction, and that the security interest of Bank has been perfected.

## QUESTION 5

On June 15, 1997, Dave Defendant and Alex Accomplice entered Mega Store and shopped for about one hour. As Defendant and Accomplice approached Mega's exit, Mike Manager stopped them and ordered them to come with him to his office in the back of the store. With the door shut, Manager accused Defendant of stealing diamond earrings, questioning him for twenty minutes. Defendant stated that he did not take anything from the store, but he refused to be searched saying, "We're wearing shorts and T-shirts. Any fool can see we don't have anything." Manager then questioned Accomplice, who simply stared at him and said nothing. After a few more minutes, Manager allowed both to leave the store.

Defendant and Accomplice went straight to the parking lot and got in Defendant's brand new sports car. Defendant drove and Accomplice sat in the right front passenger seat. Defendant sped out of the parking lot, turning left in front of Olive Officer, a local police officer. Officer followed Defendant for two blocks, noticing that Defendant's right tail light was not working, in violation of a city ordinance. Officer thought Defendant looked suspicious because he appeared too young to be driving such an expensive car. Because of this suspicion about Defendant, Officer activated her lights and siren to stop Defendant.

Defendant immediately stopped his car. Officer approached Defendant and said, "Where did you get a car like this, kid?" Although Officer could see that neither Defendant nor Accomplice was armed, she ordered both to exit the car and stand on the sidewalk while Officer wrote a citation for the broken light. After checking for outstanding warrants, and finding none, Officer handed Defendant the traffic citation, and asked him to consent to a search of the vehicle. Defendant agreed. During her search, Officer found two pairs of diamond earrings under the front seat – one under the driver's side and one under the passenger's side. The earrings matched the description of jewelry just reported stolen from Mega Store. Officer then arrested Defendant and Accomplice.

On the way to jail, Officer remarked, "Nice day, isn't it, guys? I love it when it gets above 70." Accomplice then said, "You can't arrest us; we paid for those earrings!"

### QUESTIONS:

1. Explain whether the statements Defendant made to Manager may be suppressed at trial.
2. Explain whether the statements Accomplice made to Officer may be suppressed at trial.
3. Explain whether the diamonds may be suppressed at trial.

## QUESTION 6

On January 5, 1990, Debra Duncan completed a printed form will. Frank Fellows and Gail Garven, two of Debra's co-workers, witnessed the will in Debra's presence and in the presence of each other. Neither read the will nor knew its contents. The completed will read: [Debra's handwritten additions are in bold]

### LAST WILL AND TESTAMENT

I, **Debra Duncan**, a resident of **Smalltown** in the county of **Orange** of the State of **Generality**, being of sound and disposing mind and memory, do make, publish and declare this my last WILL AND TESTAMENT, hereby revoking and making null and void any and all other Wills and Codicils heretofore made by me.

FIRST, All my debts, funeral expenses, and any Estate or Inheritance taxes shall be paid out of my Estate, as soon after my death as shall be convenient.

SECOND, I give, devise and bequeath, **my 1989 Ford Escort to Frank Fellows and all my investments to Martha Murdo.**

THIRD, I nominate and appoint **Sally Smith** of **Smalltown** as the executor of this my Last Will and Testament.

In Testimony Whereof, I have set my hand to this, My Last Will and Testament, on this 5th day of **January**, in the year **1990**.

/s/ Debra Duncan

The foregoing instrument was signed by **Debra Duncan** in our presence who at her request and in her presence and in the presence of each other have subscribed our names as witnesses.

/s/ Frank Fellows Dated this 5th day of **January 1990**.

/s/ Gail Garven Dated this 5th day of **January 1990**.

Debra Duncan died on February 14, 1998. After Debra's death, her sister, Sally Smith, found a file folder in Debra's desk labeled "WILL." In the file were the printed will form (above) and a piece of paper dated November 11, 1996, in Debra's handwriting and signed by her that read:

#### Addition to My Will

1. All of my jewelry and clothing shall go to Sally Smith.
2. All my books and music shall go to Ned Duncan.

/s/ Debra Duncan - Dated this 11th day of November 1996.

Debra Duncan never married and had no children. Her parents and her brother, Brad Duncan, predeceased her. She is survived by her sister, Sally Smith, and her brother's son, Ned Duncan.

At the time of her death Debra owned: (1) a house at 1211 Main Street; (2) a portfolio of stocks valued at \$100,000; (3) household furnishings, including books and music; (4) jewelry and clothing; and (5) a 1989 Ford Escort.

#### QUESTION:

Assuming that the will is to be probated in a UPC jurisdiction, explain how Debra Duncan's property should be distributed.

## QUESTION 7

Pat sued Dan for assault and battery in the U.S. District Court for the State of Broncomania. Dan claimed that he acted in self-defense. The following testimony was offered at trial.

John testified that he is personally acquainted with Pat, and has known him on both a business and a social level for the last eight years. John also testified that he lives in the same neighborhood and works for the same company as Pat. Pat's lawyer asked John, "In your opinion and based on your personal observation, is Pat a violent or peaceful person?" Dan's lawyer objected, but the judge nevertheless required John to answer the question.

On cross-examination, Dan's lawyer asked John: "Have you heard that Pat has a prior arrest for assault and battery?" Pat's lawyer objected, but the judge compelled John to answer the question.

Later, Dan's lawyer called Wayne to the stand. Wayne testified that he arrived at the scene of the fight just as it started. Wayne then testified that a bystander exclaimed to him: "I was talking to Dan when Pat jumped Dan from behind." Pat's lawyer objected to Wayne's testimony and moved to strike.

### QUESTIONS:

1. Explain whether the judge's ruling on Pat's lawyer's question was proper.
2. Explain whether the judge's ruling on Dan's lawyer's question was proper
3. Explain how the judge should rule on Pat's lawyer's motion to strike.

## QUESTION 8

Betty and Sam married when both were 16, one month before Betty's 17<sup>th</sup> birthday. Betty was four months pregnant with their child at the time of the marriage. Baby Joe was born five months later. After the wedding, Betty and Sam moved into an apartment in State X. At the time of the marriage, State X had a statute that read:

A child reaches the age of majority at the age of 18. Persons who have reached the age of 15 may be married, but a marriage license shall not be issued to either party without the consent of a parent or legal guardian.

Neither Betty nor Sam had the requisite consent at the time of their marriage.

Before their marriage, Sam told Betty that he had inherited a large sum of money and was independently wealthy. Based on this representation, Betty agreed to marry Sam. Betty subsequently purchased \$10,000 worth of baby clothes and furniture for baby Joe on credit. During the celebration of baby Joe's first birthday, Sam announced that he was in fact broke, and that there was never any inheritance. Although they are still living together, Sam's lie has had a profound disturbing effect on Betty. She has come to you seeking advice on the following issues.

### QUESTIONS:

1. On what basis might Betty have the marriage annulled?
2. Can Betty avoid paying the credit debt?
3. Discuss custody, visitation rights, and child support issues if the marriage is annulled.

## QUESTION 9

Paula Plaintiff, a citizen of Pennsylvania, sued Frank Franchisee, a citizen of Florida, in a federal district court in Pennsylvania. In her suit, Plaintiff alleged that by purchasing hamburger from a supplier other than her, Franchisee breached the franchise agreement between the parties. The franchise agreement stated that it was governed by Florida law. Applying Florida law, the Pennsylvania District Court held that the franchise agreement permitted Franchisee to purchase hamburger from other suppliers, and awarded Plaintiff nothing.

A few months after the Pennsylvania District Court rendered its opinion, Plaintiff sued David Defendant, a citizen of Florida, in Florida District Court for breaching an identical franchise agreement that was the subject of the Pennsylvania suit. She alleged that Defendant had purchased hamburger from a supplier other than her and claimed damages in the amount of \$30,000.

Defendant argued that he was not liable to Plaintiff because of the Pennsylvania District Court's interpretation of the agreement in the earlier case against Franchisee, a party unrelated to Defendant. Defendant also filed a counterclaim alleging that he made a personal loan to Plaintiff in the amount of \$25,000 several years ago, and that she failed to repay him.

The Florida District Court found in favor of Plaintiff, and entered judgment in the amount of \$20,000. The court ruled against Defendant on his counterclaim.

Defendant has come to you for legal advice. He tells you that he does not want to appeal the judgment against him on the personal loan to Plaintiff, but that he wants to know the grounds upon which he can appeal the \$20,000 judgment.

### **QUESTION:**

What arguments would you make for Defendant before the Court of Appeals?

## DISCUSSION FOR QUESTION 1

Bob and Frank have formed a general partnership. According to the Uniform Partnership Act (“UPA”), and Revised Uniform Partnership Act (“RUPA”), a partnership is “an association of two or more persons to carry on as co-owners a business for profit” (UPA §6) (RUPA §202(a)). A person receiving a share of the profits is generally presumed to be a partner (RUPA §202(c)(3)).

As the intention to carry on a business for profit is an essential element in forming a partnership, (UPA §6(1)) (RUPA §202(a)), the brothers did not form the partnership when the Mustang was first purchased for their own amusement. Only when they decided to go into business leasing the car was a partnership formed.

Since the Mustang purchased by the brothers before the partnership was formed there may be some question as to whether it was to be partnership property. However, the fact pattern does not indicate any intention of the part of Bob or Frank for either the Mustang or the Corvette to be the individual property of the brother named in the title. As the Corvette was apparently purchased with partnership funds, and so long as no contrary intent appears, titling the cars in the names of the individual partners with the words “Classic American Cars” on the title did not transform the cars into individual property (UPA §8(2)) (RUPA §§203 and 204). Partners are “tenants in partnership” of partnership property. Upon the death of a partner, his right in specific partnership property vests in the surviving partner, not in his surviving heirs or next of kin (UPA §25) (RUPA §501). Therefore, Bob’s widow is not entitled to keep the insurance proceeds for the Corvette. The insurance proceeds continued to be partnership property.

A dissolution of a partnership can be caused by the death of a partner when the partnership is for a definite term (UPA §31(4)) and (RUPA §801(a)(2)). On dissolution, a partnership is not terminated, however, but continues until the winding up of partnership affairs is completed (UPA §30) (RUPA §802). The surviving partner has the right to wind up partnership affairs (UPA §37) (RUPA §803). Upon dissolution, each partner, as against his co-partners, and all persons claiming through a partner (such as Bob’s widow) have the right to have partnership property applied first to discharge partnership liabilities, with the surplus applied to pay in cash, the net amount owing to each respective partner (UPA §38) (RUPA §807). To continue in business would have required the consent of the representative of the deceased partner (UPA §41(3)) (RUPA §802(b)). If Bob’s widow objected to Frank continuing the business, she has the ability to have the partnership wound up in order to obtain a cash payment of Bob’s net interest in the partnership (liquidation).

Thus, the Bank debt should be paid from partnership assets and the Mustang should be sold in order to convert it to cash. Then, the remaining cash of the partnership, including the insurance proceeds, should be divided equally between Frank and Bob’s widow.

## DISCUSSION FOR QUESTION 2

The determination of Ann's liability to the suppliers, as well as of the insurer's obligation to pay for the destroyed goods, depends on whether A-J Inc. will be recognized as a corporation prior to December 1, 1997.

A de jure corporation is one created as a result of compliance with all legal requirements of the state of incorporation. At the time of the fire, A-J Inc. was not a de jure corporation. The articles stated that the corporate existence would not begin until December 1st, and the certificate of incorporation was not issued by the Secretary of State until that date. It is the general rule that organization in accordance with its charter and the statutory provisions is necessary before a corporation can enter into a binding contract or transact any business. Under modern statutes, incorporation is complete upon the issuance of the certificate of incorporation. Fletcher Cyc. Corp. (Perm. Ed.) § 3737.

Ann ordered the goods on behalf of A-J Inc. prior to the formation of the corporation. She may be deemed to have acted as a promoter by entering into pre-incorporation contracts and be held personally liable to the suppliers on that basis. *Id.* § 190.

However, A-J Inc. may be a de facto corporation. The three elements necessary to form a de facto corporation appear to have been met in this case. There apparently was a law under which a corporation could be formed, Joe made a bona fide attempt to form the corporation pursuant to that law, and through the use of "Inc." and the observance of corporate formalities, there was an attempt to use or exercise corporate power. People v. Zimelman, 194 Colo. 384, 572 P.2d 830 (Colo. 1977); Fletcher Cyc. Corp. (Perm. Ed.) § 3777.

With respect to the suppliers and the insurer, A-J Inc. may be a corporation by estoppel. As of October 1st, Ann and Joe held the business out as a corporation. If in their dealings, the suppliers and insurer relied solely on the corporate entity as the other contracting party, then they may be estopped from claiming the corporation did not exist. *Id.* § 3910.

Shareholders are not generally liable for the debts of the corporation. *Id.* § 6647. Even if there is a corporation, however, whether de facto or by estoppel, the suppliers may be able to pierce the corporate veil and reach the shareholders' assets, especially here, where the original capitalization of the corporation was small. *Id.* § 44.

If there is no corporation or if the corporate veil is pierced, then Ann will probably be held personally liable to the suppliers and the insurer will probably not be obligated to honor its contract. If there is a corporation and if the corporate veil cannot be pierced, Ann will probably not be personally liable to the suppliers and the insurer will probably be obligated to cover the loss.

### DISCUSSION FOR QUESTION 3

An offer is a manifestation of willingness to enter into a bargain so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. **Res.2d Contracts § 24**. In this case Seller's letter is an offer, since under the objective test of intent, a reasonable person in Buyer's position would understand that Seller was in fact seeking Buyer's assent to his invitation.

An ordinary offer can be revoked at any time before it is accepted. This is true even if it expressly states to the contrary, because of the doctrine that an informal agreement is binding only if supported by consideration. **Res.2d, Contracts, sec. 42 comm. a**. In this case, Seller's promise to keep the offer open and not withdraw it until May 10 would not make the offer irrevocable. **See also Dickinson v. Dodds 2 Ch.Div 463 (1876)**.

An offeree's power of acceptance is terminated when the offeror takes definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to that effect. **Res. 2d Contracts sec. 43**. Generally, making an offer to another person to sell the same property is not considered an act inconsistent with an intention to enter into the contract. **Murray, Contracts, p 107**. Thus Buyer learning that Seller had made an offer to sell The Ranch to Jody would not result in an indirect revocation. Moreover, the fact that Seller had sold the property to Jody would also not result in an indirect revocation since Buyer did not acquire reliable information to this effect.

Unless the offer provides otherwise, an acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of assent as soon as it is put out of the offeree's possession, without regard to whether it ever reaches the offeror. **Res. 2d, Contracts, sec. 63**. In this case the offer states that Seller must call Buyer by May 10. This language is sufficient to require that the acceptance must be received by Seller by phone before there is an effective acceptance. **See Res.2d, Contracts, sec. 63 ill. 3**. Thus, placing the letter in the mail was not an effective acceptance.

A direct revocation is a manifestation of intention by the offeror not to enter into a proposed contract. **Res.2d Contacts § 42**. It is effective upon receipt. In the present case, Seller's statement made directly to Buyer would be an effective direct revocation, since it was received before Buyer could make any further manifestation of acceptance. Thus, no contract was formed.

## DISCUSSION FOR QUESTION 4

Section 9-207(1) of the Uniform Commercial Code provides that a secured party must use "reasonable care" when it has collateral in its custody. The details of what constitutes reasonable care are fact specific and not raised by the question.

Section 9-207(4) of the UCC, by negative inference, prohibits the use of collateral by a secured party in possession except for the purpose of preserving the collateral or its value, or pursuant to court order or specific provision in the security agreement.

Under §9-502(1) of the UCC a secured party whose collateral consists of accounts may notify account debtors to remit payment directly to it at any time that the debtor is in default. The secured party is also entitled to "take control" of proceeds of accounts which are perfected pursuant to §9-306 of the UCC. Here, since proceeds are specifically covered by the security agreement, the interest is perfected regardless of when the debtor received them. UCC §9-306(3)(a).

Trade secrets are general intangibles. UCC §9-106. An interest in trade secrets should be evidenced by specifically describing the trade secret or by including general intangibles as one of the categories of collateral in which a security interest is granted. Here, although the term "general intangibles" is included in the security agreement, it seems to be used as a subset of "rights to payment" and not as a category of collateral in and of itself. A trade secret is not a right to payment and is arguably, therefore, not covered by the security agreement. However, the Bank may ultimately realize the value of the trade secret. It cannot be sold by the debtor without creating "proceeds," a "right to payment," or "accounts," all of which are collateral.

## DISCUSSION FOR QUESTION 5

### DEFENDANTS STATEMENTS TO MANAGER

Miranda warnings are required for any person before a police custodial interrogation takes place. Miranda v. Arizona, 384 U.S. 436 (1966). The warnings are not required when there is no government conduct. See, e.g., Illinois v. Perkins, 496 U.S. 292 (1990). Mike Manager is not a police officer and was not acting under color of state law. Therefore, Manager was not required to give Miranda warnings before asking questions of Defendant. Defendant's statements to Manager are admissible despite the absence of Miranda warnings.

### ACCOMPLICE'S STATEMENTS TO OFFICER

Police officers are required to give Miranda warnings before questioning any arrestee. However, Officer did not interrogate Accomplice before his statement. Although interrogation can include not only questions, but also any statement designed to elicit an incriminating response, asking about the weather does not fall into that category, and Alex's statement is admissible.

### DIAMONDS

#### **1. Traffic Stop**

If Olive's initial stop of the vehicle was invalid, then all the flows from that illegality must be suppressed as "fruit of the poisonous tree." Olive's reason for stopping the car - that Dave seemed too young to be driving an expensive car - was not a legitimate basis on which to stop a vehicle. However, an officer's motive for a traffic stop does not invalidate otherwise objectively justifiable conduct under the Fourth Amendment. Whren v. United States, 116 S.Ct. 1769 (1996). An officer's subjective intent in making a stop is irrelevant under the Fourth Amendment. Whren. If a police officer has probable cause to believe a violation has occurred, the stop is valid. Whren. The broken brake light provided an objective reason for the stop, which is therefore permissible under the Fourth Amendment, despite Olive's invalid subjective reason.

Police officers have discretion to order passengers out of cars stopped for routine traffic violations even when an officer has no reason to suspect a passenger has committed a crime or threatens the officer's safety. Maryland v. Wilson, 117 S.Ct. 882 (1997). Oliver did not act inappropriately in ordering Dave and Alex from the car.

#### **2. Consent**

Any warrantless search without probable cause must fall within an exception to the Fourth Amendment. Although there is an automobile exception, this requires probable cause, which Olive clearly did not have. The other relevant exception is that the search was conducted pursuant to a knowing and voluntary consent. A police officer may ask motorists detained for traffic violations for permission to search their cars without advising them that they have the right to refuse. Ohio v. Robinette, 136 L.Ed.2d 347 (1996). Olive did not violate Dave's rights by asking for his consent or by searching pursuant to that consent.

### 3.Standing

To challenge a search under the Fourth Amendment, the defendant must have standing. This means that the defendant must have a reasonable expectation of privacy in the place searched or of the item seized. A defendant can only challenge the search if it violates his or her own reasonable expectation of privacy. Rakas v. Illinois, 39 U.S. 128 (1978). Defendant had a reasonable expectation of privacy in his car, but Alex had none. Dave has standing to challenge the search; however, the seizure of the diamonds violated none of Alex's constitutional rights, and are clearly admissible against Alex. Accordingly, the diamonds are admissible against both Dave and Alex.

## DISCUSSION FOR QUESTION 6

Debra's will was properly executed pursuant to UPC § 2-502(a) as Debra signed in the presence of both witnesses, and both witnesses signed immediately after her. *See, In re Estate of Kimble*, 117 N.M. 258, 871 P.2d 22 (1994). The signed attestation clause creates a rebuttable presumption that the will was duly executed. *Id.*

Under UPC § 2-505 a witness may also be a beneficiary under the will. The fact that an interested person witnesses the will neither renders the will invalid nor deprives that beneficiary of the property bequeathed. *See, In re Estate of Martinez*, 99 N.M. 809, 664 P.2d 1007 (1983) (where the beneficiary was a witness and the issue was not raised in the will contest). Thus, the fact that a witness to Debra's will was left property under that will does not affect its validity.

The November 11, 1996, document is a valid holograph will as defined by UPC § 2-502. A holographic document must be executed with testamentary intent, must be in the testator's handwriting, signed by her, and dated. UPC § 2-502(b). Here, all formalities were observed. The words "Addition to My Will" and "please give" evidence Debra's testamentary intent, as intent may be gleaned from the language of the document. *See, In re Estate of Kimble*, 117 N.M. 258, 871 P.2d 22 (1994); *In re Estate of Harrington*, 850 P.2d 158 (Colo. App. 1993); *In re Estate of Olschansky*, 735 P.2d 927 (Colo. App. 1987); *In re Estate of Kelly*, 99 N.M. 482, 660 P.2d 124 (1983).

The 1990 will could be revoked by another testamentary document that specifically revokes it or that revokes it by making inconsistent dispositions. UPC § 2-507. *See, In re Estate of Blake*, 120 Ariz. 552, 587 P.2d 271 (1978). The November 11, 1996, document does neither. Therefore, Frank Fellows and Martha Murdo will be allowed to take the property given to them in the January 5, 1990 will. Thus Fellows gets the 1989 Ford Escort and Murdo takes the stock portfolio valued at \$100,000. The dispositions in the holographic codicil are valid as well. Sally takes the jewelry and clothing and Ned takes the books and music.

Debra's remaining property, the house and its furnishings, pass by intestacy because these items were not specifically disposed of in either testamentary document and because neither testamentary document contained a residuary clause. Debra is survived only by her sister Sally and her nephew, Ned. Under UPC § 2-103 the descendants of a decedent's parents share equally. A deceased sibling's share passes to his descendants by right of representation. Debra's deceased brother, Brad, had one son Ned. Thus, Ned and Sally share equally in Debra's intestate property.

Where property passes to two or more persons, that property passes by tenancy in common, not as joint tenants with the right of survivorship. *See, Colo. Rev. Stat. Ann. §§ 38-11-101 (personal property), 38-21-101 (real property).*

## DISCUSSION FOR QUESTION 7

### Opinion as to Pat's Character Traits

Overruled. John may answer under FRE 405 and 701. Since Dan is claiming that he acted in self-defense, evidence of Pat's character as a peaceful or violent person is relevant. Evidence of Pat's character trait for violence/peacefulness may be in the form of opinion testimony under FRE 405. John's opinion is admissible under FRE 701 if it is based on his own perception (which it should be given that John has known Dan for eight years), and if it will be helpful to the determination of a fact at issue. John's opinion should be helpful to the jury's determination whether Pat or Dan was the aggressor.

### Cross-Examination on Knowledge of Arrest.

Overruled. John must answer provided that Dan's lawyer has evidence that the arrest actually occurred. Dan's lawyer must have a good faith belief that Pat was arrested for assault and battery. Under FRE 405(a) after a witness has testified as to a person's character, opposing counsel may inquire into relevant specific instances of conduct on cross-examination. Not only does this go to Pat's violent or peaceful character trait, but it may also impeach the credibility of John's opinion.

### Bystander's Statement

Overruled. Motion to strike is denied. The testimony is hearsay, but it is admissible under either the present sense impression exception (FRE 803(1)) or the excited utterance exception (FRE 803(2)). It is admissible as a present sense impression because it describes the fight and was made immediately after the fight started, It is admissible as an excited utterance because it relates to a startling event (the fight) and was made while the declarant was still subject to the excitement caused by the fight.

## DISCUSSION FOR QUESTION 8

Courts have generally held that a misrepresentation concerning one's wealth is not fraud sufficient for an annulment, because such a misrepresentation does not relate to an essential element of the marriage. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 2.15, 110-11 (2d ed. 1988). Moreover continued marital cohabitation with knowledge of the true circumstances is a defense to an annulment based on fraud. So it is unlikely that Betty can obtain an annulment based on fraud.

A marriage that is defective because the parties were underage at the time it was contracted becomes valid if there was marital cohabitation beyond the age of consent. UNIFORM MARRIAGE AND DIVORCE ACT Sec. 208 (b) (3). Under UMDA §208(b)(3), an underage marriage may be declared invalid only "prior to the time the underaged party reaches the age at which he/she could have been married without satisfying the omitted requirement," and only the underaged party has standing. Thus, Betty does not have standing to bring an annulment proceeding because she is now over eighteen.

An unemancipated minor's contractual obligations may be disaffirmed before the minor reaches majority. However, through marriage a minor becomes emancipated and legally independent of his/her parents... CLARK Sec. 8.3. Accordingly, Betty cannot disaffirm the debt even if the annulment were to terminate her marriage; she is now of majority age under the statute.

Even if the court were to grant an annulment, some provision would have to be made regarding custody and support. If "the interests of justice would be served," the court should not make the decree retroactive. A child born of an invalid marriage is considered legitimate, UMDA Sec. 208, and the husband is rebuttably presumed to be the father. Clark Sec. 4.4. Therefore, the court would order provision made for baby Joe. Assuming that Betty would get custody, Sam would have to pay child support and have visitation rights. The only way that Sam would not receive visitation rights would be if the child would be adversely affected, either emotionally or physically, by continued contact.

## DISCUSSION FOR QUESTION 9

The Florida District Court should not have ruled in favor of Plaintiff. First, the Federal District Court did not have subject matter jurisdiction over the action. Under 28 U.S.C. § 1332, the Federal District Courts have jurisdiction over a matter where there is diversity of citizenship of the parties and \$75,000 in controversy. Although the diversity of citizenship requirements are met since Plaintiff is a resident of Pennsylvania and Defendant is a resident of Florida, the amount in controversy requirement is *not* met by the inadequate \$30,000 in dispute.

A counterclaim amount will not be added to Plaintiff's claim to attempt to meet the "amount in controversy" requirement. The counterclaim is permissive as it did not arise out of the same transaction or occurrence as Plaintiff's claim. Fed. Rule Civ. Proc. 13(b). A permissive counterclaim will not be aggregated with plaintiff's claim to meet the jurisdictional amount. See, e.g., St. Paul Indemnity Co. v. Red Cab Co., 303 U.S. 283,288; Motorists Mutual Ins. Co. v. 404 F.2d 511,514 (7th Cir. 1968). (In addition, a permissive counterclaim must have independent grounds for federal jurisdiction. State Farm Fire & Cas. Co. v. Geary, 699 F. Supp. 756, 762 (N.D. Cal. 1987)). Furthermore, the court does not have "arising under" jurisdiction under 28 U.S.C. § 1331 because the lawsuit does not involve a federal question.

Lack of subject matter jurisdiction means that the court did not have power over the cause of action. A subject matter jurisdiction objection can be raised at any time. See, e.g., Canron v. Van Noorden, 6 U.S. 126 (1804). If Defendant raises the objection on appeal, the Court of Appeals should reverse the District Court and dismiss the case. Thus, this is an important argument for Defendant to make.

Defendant may also argue that the Florida District Court should have applied the doctrine of collateral estoppel (issue preclusion). In order to find that collateral estoppel applies, a court must find that the issue asserted in the second action is identical to the issue asserted in the first action. See Bernhard v. Bank of America Nat'l. Trust and Savings Assoc., 122 P.2d 892, 895 (1942); 18 C. Wright, A. Miller & E. Cooper § 4417. The facts of the instant case indicate that the issue Plaintiff litigated against Franchisee was identical to the issue she litigated against Defendant.

In addition, Defendant must show that the issue to be precluded was litigated and decided in the prior court's action, and that it was essential to the court's judgment. Bernhard v. Bank of America Nat'l. Trust and Savings Assoc. 122 P.2d 892, 895 (1942); Restatement (Second) of Judgments § 28 (1982). Again, the facts indicate that the issue of whether the contract permitted a franchisee to purchase burgers from another supplier was litigated by the parties, decided by the Pennsylvania District Court, and was essential to the court's judgment.

The harder issue Defendant must grapple with is whether the court permits nonmutual collateral estoppel. That is, Defendant was not a party to the action between Plaintiff and Franchisee, so he had nothing to lose in that action, but he is seeking to use the Pennsylvania court's decision against Plaintiff. Since Bernhard v. Bank of America Nat'l. Trust and Savings Assoc., 122 P.2d 892 (1942), was decided by Justice Traynor in 1942, the courts' prior tendency to refuse to allow nonmutual collateral estoppel has steadily been eroding. In Bernhard, as in many other cases applying nonmutual collateral estoppel, the party asserting the doctrine is

**DISCUSSION FOR QUESTION 9**  
**PAGE TWO**

using it as a shield, not a sword. Where it is used as a shield against a party who was the plaintiff in the prior action as well, it should be upheld (at least in a civil lawsuit between private parties). See Laboratories v. Univ. of Ill. Foundation, 402 U.S. 313,328 (1971). Here, Defendant is using the doctrine as a shield against Plaintiff's claim for liability. Thus, Defendant may have a good argument that the District Court should have applied collateral estoppel.

Under Fed. Rule Civ. Proc. 8(c), collateral estoppel is an affirmative defense, which must be raised or it will be waived; although the facts do not expressly indicate this, it appears that David timely raised the defense.

Examine # \_\_\_\_\_

Final Score \_\_\_\_\_

**SCORESHEET FOR QUESTION 1**  
**ASSIGN ONE POINT FOR EACH STATEMENT BELOW**

1. A partnership is
  - 1a. An association of two or more persons; 1a. \_\_\_\_\_
  - 1b. To carry on as co-owners; 1b. \_\_\_\_\_
  - 1c. A business for profit. 1c. \_\_\_\_\_
2. Bob and Frank formed a partnership when they began to lease the car to make a profit. 2. \_\_\_\_\_
3. The death of Bob has dissolved the partnership. 3. \_\_\_\_\_
4. Upon Bob's death the process of winding up the partnership should begin. 4. \_\_\_\_\_
5. The Mustang, should be sold in the process of winding up the partnership. 5. \_\_\_\_\_
6. The debt to the Bank should be paid from partnership assets before any distribution to partners. 6. \_\_\_\_\_
7. The insurance proceeds for the Corvette are partnership property, and do not belong to Bob's widow. 7. \_\_\_\_\_
8. The cash in the Bank remaining after liquidation of assets and payment of debts should be dispensed equally to Frank and to Bob's widow. 8. \_\_\_\_\_
9. Frank may not continue the business without the express consent of Bob's widow. 9. \_\_\_\_\_

Examinee # \_\_\_\_\_

Final Score \_\_\_\_\_

**SCORESHEET FOR QUESTION 2**  
**ASSIGN ONE POINT FOR EACH STATEMENT BELOW**

1. A de jure corporation is one created as a result of compliance with all legal requirements of the state of incorporation. 1. \_\_\_\_\_
2. A-J Inc. was not a de jure corporation until December 1, 1997, when the certificate of incorporation was issued. 2. \_\_\_\_\_
3. Prior to that time, A-J Inc. may have been a de facto corporation. 3. \_\_\_\_\_
4. Elements of a de facto corporation:
  - 4a. The existence of a law under which A-J Inc. could have been validly incorporated on October 1, 1997. 4a. \_\_\_\_\_
  - 4b. Bona fide attempt to comply with such law. 4b. \_\_\_\_\_
  - 4c. The business was carried on as a corporation. 4c. \_\_\_\_\_
5. The insurer and the suppliers may be estopped from claiming there is no corporation. 5. \_\_\_\_\_
6. Shareholders are not generally liable for the debts of the corporation. 6. \_\_\_\_\_
7. The suppliers may be able to pierce the corporate veil to reach shareholder assets on the basis that the corporation when established was undercapitalized. 7. \_\_\_\_\_
8. By entering into agreements to purchase inventory before the corporation was formed, Ann may be personally liable to the suppliers as a promoter. 8. \_\_\_\_\_

Examinee # \_\_\_\_\_

Final Score \_\_\_\_\_

**SCORESHEET FOR QUESTION 3**

ASSIGN ONE POINT FOR EACH STATEMENT BELOW

1. An offer is a manifestation of present intention and willingness to enter into a bargain and be bound. 1. \_\_\_\_\_
2. Seller's letter is an offer under a reasonable person standard. 2. \_\_\_\_\_
3. Seller's promise to keep the offer open was not supported by consideration, therefore the offer could be revoked. 3. \_\_\_\_\_
4. Indirect revocation occurs when Seller takes action inconsistent with intention to enter into contract and Buyer acquires reliable information to that effect. 4. \_\_\_\_\_
5. Offer to sell the same property to another not inconsistent with intention to enter into a contract; therefore, Buyer learning that Seller had made an offer to Jody would not result in an indirect revocation. 5. \_\_\_\_\_
6. Acceptance made as invited is operative. 6. \_\_\_\_\_
7. Offer stated that Buyer must telephone Seller by May 10. Therefore, placing the letter in the mail was not an effective acceptance. 7. \_\_\_\_\_
8. A direct revocation is a manifestation of intention by the Seller not to enter into contract. It is effective upon receipt. 8. \_\_\_\_\_
9. Seller's statement made directly to Buyer would be an effective revocation. 9. \_\_\_\_\_

Examinee # \_\_\_\_\_

Final Score \_\_\_\_\_

### SCORESHEET FOR QUESTION 4

ASSIGN ONE POINT FOR EACH STATEMENT BELOW

1. The Bank as a secured party must use reasonable care in the custody and possession of collateral in its possession. 1. \_\_\_\_\_
2. Here, it does not appear that Bank, as secured party, may permit periodic use of the repossessed equipment. 2. \_\_\_\_\_
3. A secured party's use of collateral in its possession is permitted:
  - 3a. To preserve the collateral or its value; 3a. \_\_\_\_\_
  - 3b. Pursuant to court order; or 3b. \_\_\_\_\_
  - 3c. If permitted by the security agreement. 3c. \_\_\_\_\_
4. Bank should notify account debtors of ABC to make payment directly to it and secure any proceeds of accounts to which it is entitled. 4. \_\_\_\_\_
5. Bank can sell accounts at UCC sale. 5. \_\_\_\_\_
6. The manufacturing process is a general intangible. 6. \_\_\_\_\_
7. Unclear whether Bank has an interest in general intangibles since its interest is one in "rights to payment including . . . general intangibles" and a trade secret may not be a "right to payment." 7. \_\_\_\_\_
8. If Bank has a perfected interest in general intangibles it can sell the process; if it does not, it cannot (Bank sale). 8. \_\_\_\_\_
9. If Bank's interest in the manufacturing process is not secured, Bank may still realize value through its interest in the debtor's receivables if the debtor utilizes the process again, or through execution on proceeds of sale (debtor sale), as a "right to payment" if the process is sold by the debtor. 9. \_\_\_\_\_

Examinee # \_\_\_\_\_

Final Score \_\_\_\_\_

**SCORESHEET FOR QUESTION 5**  
**ASSIGN ONE POINT FOR EACH STATEMENT BELOW**

1. Recognize Miranda issues. 1. \_\_\_\_\_
2. Miranda applies to custodial interrogations. 2. \_\_\_\_\_
3. Recognize issue of government action/color of state law. 3. \_\_\_\_\_
4. Miranda requires interrogation (statement designed to elicit a response). 4. \_\_\_\_\_
5. To challenge a search under the Fourth Amendment, a defendant must have standing. 5. \_\_\_\_\_
6. Alex has no standing to challenge the search of the car because he has no reasonable expectation of privacy under Dave's front seat. 6. \_\_\_\_\_
7. Officer's subjective reasons for the stop are irrelevant if there is an objective reason to support the stop. 7. \_\_\_\_\_
8. Recognize issue that Officer had a lawful reason/probable cause for the stop because of the broken light. 8. \_\_\_\_\_
9. A police officer may order the driver and the passengers of a stopped vehicle to exit the vehicle during a traffic stop. 9. \_\_\_\_\_
10. To be valid, a police search must be pursuant to a warrant and probable cause, unless it falls within a recognized exception to the Fourth Amendment. 10. \_\_\_\_\_
11. Recognize consent an exception to the Fourth Amendment. 11. \_\_\_\_\_
12. The police need not advise a suspect that he has the right to refuse to consent. 12. \_\_\_\_\_

Examinee # \_\_\_\_\_

Final Score \_\_\_\_\_

**SCORESHEET FOR QUESTION 6**  
**ASSIGN ONE POINT FOR EACH STATEMENT BELOW**

1. The January 5, 1990, will was properly executed. Debra signed it in the presence of both witnesses. 1. \_\_\_\_\_
2. A witness may also be a beneficiary of the will. 2. \_\_\_\_\_
3. The November 11, 1996, document did not specifically revoke the January 5, 1990, will; therefore 1990 will is valid. 3. \_\_\_\_\_
4. November 11, 1996, document is a valid (i.e., handwritten) holographic codicil. 4. \_\_\_\_\_
5. To be a valid holographic will or codicil, the instrument must be entirely in the testator's handwriting, signed and dated. 5. \_\_\_\_\_
6. Fred takes the 1989 Ford Escort. 6. \_\_\_\_\_
7. Martha takes the stock portfolio. 7. \_\_\_\_\_
8. Sally takes the jewelry and clothing. 8. \_\_\_\_\_
9. Ned takes the books and music. 9. \_\_\_\_\_
10. The house and furniture are not disposed of by the will or codicil and therefore pass by intestacy. 10. \_\_\_\_\_
11. Because she is not survived by a spouse or children, property passes to descendants of decedent's parents in equal shares. 11. \_\_\_\_\_
12. A deceased sibling's share passes by right of representation. 12. \_\_\_\_\_
13. The house and furniture therefore pass by intestacy to Sally and Ned; each takes half interest. 13. \_\_\_\_\_

Examinee # \_\_\_\_\_

Final Score \_\_\_\_\_

**SCORESHEET FOR QUESTION 7**

**ASSIGN ONE POINT FOR EACH STATEMENT BELOW**

1. Evidence of Pat's character trait for violence or peacefulness is admissible because Dan is claiming self-defense. 1. \_\_\_\_\_
2. John's opinion testimony of Pat's peaceful/violent character is admissible. 2. \_\_\_\_\_
3. John may give his lay opinion of Pat's peaceful/violent character if: 3. \_\_\_\_\_
  - 3a. it is rationally based on his personal observation and 3a. \_\_\_\_\_
  - 3b. it would be helpful to the determination of a fact in issue. 3b. \_\_\_\_\_
4. Dan's lawyer must have good faith belief that Pat was actually arrested for assault and battery. 4. \_\_\_\_\_
5. Dan's lawyer may inquire into specific instances of past conduct on cross-examination. 5. \_\_\_\_\_
6. Prior arrest is relevant as to Pat's violent/peaceful character. 6. \_\_\_\_\_
7. John's knowledge (or lack of knowledge) of the prior arrest goes to the credibility of his opinion.. 7. \_\_\_\_\_
8. Bystander's statement is hearsay. 8. \_\_\_\_\_
  - 8a. Hearsay is out of court statement made for proving truth of matter asserted.. 8a. \_\_\_\_\_
9. Statement may be admissible as present sense impression if: 9. \_\_\_\_\_
  - 9a. statement describes the fight, and 9a. \_\_\_\_\_
  - 9b. it was made immediately after the start of the fight. 9b. \_\_\_\_\_
10. Statement may also be admissible as excited utterance if: 10. \_\_\_\_\_
  - 10a. statement relates to the fight, and 10a. \_\_\_\_\_
  - 10b. it was made while the declarant was still under the excitement caused by the fight. 10b. \_\_\_\_\_

Examinee # \_\_\_\_\_

Final Score \_\_\_\_\_

**SCORESHEET FOR QUESTION 8**  
**ASSIGN ONE POINT FOR EACH STATEMENT BELOW**

1. Misrepresentation of wealth insufficient for annulment based on fraud. 1. \_\_\_\_\_
2. Cohabitation after knowledge of fraud is a defense to an annulment based on fraud. 2. \_\_\_\_\_
3. Standing to annul based on being underage is defeated when one becomes of age. 3. \_\_\_\_\_
4. Betty is of age under statute, therefore she has no standing to annul. 4. \_\_\_\_\_
5. Contracts may be disaffirmed prior to reaching the age of majority. 5. \_\_\_\_\_
6. Marriage, however, emancipates a minor. 6. \_\_\_\_\_
7. In either case, Betty is obligated to pay the debt. 7. \_\_\_\_\_
8. Husband of annulled marriage presumed to be father of child born of the union. 8. \_\_\_\_\_
9. Either or both parents owe duty to support their child. 9. \_\_\_\_\_
10. Both Betty and Sam could petition for child custody. 10. \_\_\_\_\_  
10a. Essential concern is best interest of child. 10a. \_\_\_\_\_
11. Non-custodial parent be entitled to visitation unless child adversely affected. 11. \_\_\_\_\_

Examinee # \_\_\_\_\_

Final Score \_\_\_\_\_

**SCORESHEET FOR QUESTION 9**

ASSIGN ONE POINT FOR EACH STATEMENT BELOW

1. The Pennsylvania Federal District Court did not have subject matter jurisdiction pursuant to 28 U.S.C. 1332. 1. \_\_\_\_\_
  - 1a. Diversity of citizenship was present 1a. \_\_\_\_\_
  - 1b. Requisite amount in controversy, \$75,000, lacking. 1b. \_\_\_\_\_
2. Neither did the Federal District Court have subject matter jurisdiction under 28 USC 1331, because there was no federal claim. 2. \_\_\_\_\_
3. An objection to subject matter jurisdiction can be raised at any time, even on appeal. 3. \_\_\_\_\_
4. May be collateral estoppel/issue preclusion. 4. \_\_\_\_\_
  - 4a. The issue asserted in the action against David was identical to the issue asserted in Paula's action against Frank. 4a. \_\_\_\_\_
  - 4b. The issue was litigated and decided in the prior action and was essential to the court's judgment in the earlier action. 4b. \_\_\_\_\_
  - 4c. David is seeking to use nonmutual collateral estoppel. 4c. \_\_\_\_\_
  - 4d. Modern courts permit nonmutual collateral estoppel where it is used as a shield and not as a sword. 4d. \_\_\_\_\_
  - 4e. Collateral estoppel is an affirmative defense that must be timely raised. David probably did this. 4e. \_\_\_\_\_