

QUESTION 1

The General Assembly of the State of Bliss created a Department of Transportation under the following statute:

There is hereby created a Department of Transportation. It is authorized to enact all regulations it deems necessary. Such regulations will be deemed to have been validly promulgated unless either chamber of the General Assembly objects by a vote of the majority within 90 days of their publication.

Several months after its creation, the Department of Transportation released its first set of regulations. The regulations prohibit the transportation of toxic chemicals through Capitol City, the capitol of Bliss, on the two main interstate highways which cross Capitol City. However, the regulations specifically allow the chemicals to be transported on Capitol's residential streets.

QUESTION:

Discuss any available grounds that might be used to invalidate the regulations and whether the regulations will withstand judicial review. Assume that a statute similar to the federal Administrative Procedure Act has been adopted in Bliss.

QUESTION 2

The state legislature of New Arcadia was concerned about the danger of terrorist threats against New Arcadia's population. Accordingly, they enacted the "New Arcadia Terrorism Prevention Act" (the "Act"), which provides: "Any resident of New Arcadia who is not a citizen of the United States must register with the New Arcadia Department of State. As part of the registration process, the Department shall photograph and fingerprint the resident, and the resident shall be issued an identification card that (s)he must carry at all times."

QUESTION:

Discuss any arguments that might be raised that the Act violates the United States Constitution.

QUESTION 3

John flew his plane out of town on a business trip. When he got to the airport for the trip home, he went into the pilot planning room to chart his flight. Another pilot, Paul, was already there, charting his own flight. The two made small talk for about fifteen minutes. During their conversation, Paul noticed that John's speech was slurred and that John appeared intoxicated. In front of Paul, John then called his wife, Cathy, to let her know he was leaving. He told Cathy he had had several drinks on his way to the airport and probably shouldn't be flying, but was determined to get home that night. Cathy asked John not to fly, but John insisted he was fine. Two hours after John left the airport, his plane crashed, killing him.

Cathy sued Wings, the manufacturer of the plane. Wings settled the lawsuit with Cathy for an undisclosed sum.

Cathy then sued Fly Right, the manufacturer of the plane's autopilot, claiming the autopilot was at fault in the crash. At trial, Cathy testified that John was not a drinker and that he was a cautious pilot.

Fly Right's defense claims that John's reflexes and judgment were impaired because he was drunk, and that the crash was caused by pilot error. Fly Right called Paul as a witness to testify regarding John's drunken state at the airport shortly before he took off.

QUESTIONS:

Discuss: (1) the admissibility of Paul's testimony that John was drunk and seemed confused when planning his flight; (2) whether Cathy can be cross-examined about her phone conversation with John; and (3) whether Cathy can be cross-examined about her settlement with Wings.

Assume the Federal Rules of Evidence apply and that the court in which the Fly Right trial is being held follows the majority of jurisdictions on all issues.

QUESTION 4

Late one night, police Officer Johnson was on street patrol. He spotted William Dunn driving his car on Main Street. The car appeared to be in good order, all lights and other equipment on the car were working properly. Dunn was not violating any law and there was no evidence of intoxication. Nevertheless, because, in Officer Johnson's words, "one never knows what one will find," he decided to stop Dunn just to check his license and registration.

Dunn promptly stopped in response to Officer Johnson's lights and siren, and produced a valid license and registration. Officer Johnson checked the documents and found that everything was in order. Officer Johnson then asked Dunn why he was driving around so late at night. Dunn told Officer Johnson that he had recently gotten off work and that he had had a "rough day." He was just out driving around to "calm down."

Officer Johnson continued to question Dunn for fifteen or twenty minutes. He then asked Dunn's permission to search the trunk of the car. Before Officer Johnson began his search, he very politely informed Dunn that he had a constitutional right to refuse the request. Nevertheless, Dunn consented to the search. Unfortunately for Dunn, his 16 year-old son had hidden one pound of marijuana in the trunk of Dunn's car that morning. Officer Johnson found the marijuana and immediately arrested Dunn. In response to Officer Johnson finding the marijuana Dunn blurted out, "I'll be darned. My son must have hidden that dope."

Dunn was charged in state court with criminal possession of marijuana.

QUESTION:

Discuss the legal issues the defense is likely to raise, and how they should be resolved.

QUESTION 5

Sally owns and operates a corporation called ACME SALES. ACME actually is incorporated under the name WIDGET SALES CORPORATION, but only the name ACME SALES appears on the corporation's letterhead and all other materials.

Molly is employed by ACME as its chief financial officer (CFO). She is responsible for all of ACME's financial and tax related matters, and prepares weekly financial reports for Sally.

Molly wanted to explore whether ACME could reduce its state tax liability by enacting some accounting changes. She met with Consultant who stated that he could implement accounting changes which would do just that. Therefore, Molly entered into a service agreement with Consultant. She signed the contract "ACME SALES by Molly, CFO." Molly had no express authority to act for ACME.

Consultant and Molly know each other only as fellow members of the local Lions Club. Consultant assumed Molly had authority to enter into the contract on behalf of ACME. Prior to the signing of the contract, Consultant had no actual knowledge of any aspect of ACME SALES or its business. Several months after the contract was entered into a dispute arose.

QUESTION:

Discuss whether the consultant, ACME, and Molly are bound by the contract.

QUESTION 6

Harold and Wendy were scheduled to be married at Wendy's church in Leadville, Colorado on August 12, 2002. One day before the wedding, Harold was required to travel out of the country on business. Because he would not be able to make the wedding, Harold called his old fraternity buddy Jack and asked him to stand in for him. The wedding ceremony took place as scheduled with Jack standing in for Harold. Harold returned on August 17, 2002, and took part in a smaller "second" wedding ceremony with Wendy at her church.

In 2003, Harold's parents gave him a vacation home in Grandview, a previously sleepy resort town that, in the next few years, suddenly became very popular and desirable.

Early in 2007, Wendy filed for divorce. In her petition, Wendy asked for the Grandview vacation home as part of the property division. She also asked the court to order Harold to pay her attorney fees incurred in the dissolution action and requested a jury trial on all contested factual issues.

QUESTIONS:

Discuss:

1. Whether Harold and Wendy are married and the effective date of their marriage.
2. Whether Wendy has any claim to the Grandview home.
3. What the court must consider in addressing Wendy's request for attorney fees.
4. Whether Wendy is entitled to have a jury resolve factual issues in the case.

QUESTION 7

Ted Driver is a Canadian citizen admitted to permanent residence in Denver, Colorado. He is employed by Big Drilling Corporation. Big Drilling is incorporated under the laws of Delaware with its principal place of business in Denver.

Preston Peters is a United States citizen who resides and works in Los Angeles, California. Peters owns a cabin in Colorado where he spends two weeks each year. Peters always returns to Los Angeles at the conclusion of his vacations in Colorado.

Last year, Peters came to Colorado for his usual two weeks. Upon arriving at the cabin, he discovered Driver operating a bulldozer on his property. Driver explained that he was clearing land for a road to access a proposed mine. When Peters told Driver he was trespassing, Driver contacted his employer, Big Drilling, and learned that he was at the wrong location. Driver apologized and left.

Peters' land was badly damaged by the bulldozer and cluttered with construction waste. Peters obtained an estimate for the removal of the construction waste and restoring the land. He learned that it would cost at least \$25,000.

After negotiations between Big Drilling and Peters failed, Peters filed a civil action in United States District Court for the District of Colorado basing jurisdiction on diversity of citizenship. The complaint names Peters as plaintiff and Driver and Big Drilling Corporation as defendants. It states a cause of action for trespass to real property and demands damages jointly and severally from each defendant in the amount of \$75,000. The complaint also seeks an injunction ordering the defendants to remove the construction waste from Peters' property. Both Big Drilling and Driver are represented by Big Drilling's in-house counsel/vice-president. She accepted service of the summons and complaint for both parties at Big Drilling's office in Denver.

QUESTIONS:

Discuss whether:

1. The court has subject matter jurisdiction.
2. The Court has personal jurisdiction.
3. The defendants were properly served.

QUESTION 8

Tina Testator executed a valid will in 2003 which included the following two provisions:

1. I will leave a list of my valuable art in my bank safe deposit box. The list will include the names of the persons who are to receive my art.
2. I devise the residue of my estate to my cousin, Charles Turner.

In 2004, Tina validly executed a codicil to her will that devised Blackacre to Neighbor. The codicil was witnessed by Neighbor and Witness.

Tina died in 2006. A paper in Tina's handwriting was found in Tina's desk at her home after her death. In the top right hand corner of the paper Tina had written "May 6, 2004." The paper included a list of items of art. Next to the description of each item, Tina had written the name of a person. The paper did not include any other writing and was not signed. Tina owned each item described on the list when she died. No list of art was found in Tina's safe deposit box.

Tina did not have a cousin named Charles Turner. She, however, had a cousin named Charles Thomas, who she was not close to and had not seen in years. She also had a nephew named Charles Turner, who she was very close to and saw regularly.

QUESTION:

Discuss who will be the recipients of Blackacre, Tina's art collection, and the residue of her estate. Assume all persons named above survived Tina. Also assume the Uniform Probate Code is in effect in the jurisdiction where the above events took place.

QUESTION 9

Motion Picture Corporation (MPC) is a large public corporation with a thirty person board of directors. MPC's Articles of Incorporation state:

The board of directors shall have authority to establish an Executive Committee. This committee shall have authority to act on behalf of MPC to enter into routine contracts and engage in routine activities.

The board met, with all directors present, and unanimously voted to establish an Executive Committee. They then elected three directors to the Executive Committee. The board also unanimously passed a new bylaw which states:

The Executive Committee shall have authority to act on behalf of the board in all business transactions entered into by MPC except for dissolution of the corporation itself.

The Executive Committee entered into a contract, on behalf of MPC, with Sam Producer to produce a movie. The budget for the movie was six times larger than the budget for any movie ever produced by MPC. After the movie was completed, the full board met and approved two contracts for worldwide distribution of the movie. A dispute subsequently arose over ownership of the movies and MPC breached its contract to pay Sam Producer.

QUESTION:

Discuss any arguments that MPC may raise claiming it is not liable on the contract. Also, discuss counter-arguments that Sam Producer can make that MPC is liable on the contract.

DISCUSSION FOR QUESTION 1

Although this is a state agency, basic administrative law principles set out in the federal Administrative Procedure Act often apply by analogy to state and local agencies.

Delegated authority. The first question to be addressed is whether the General Assembly properly delegated authority to the Department of Transportation. The traditional rule is that a legislative body may not totally delegate all of its functions to an administrative agency and that the legislative body has to establish adequate standards to guide the agency action and limit its discretion. See *Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935). Most modern case law upholds broad delegation to agencies, including those with vague or extremely broad standards. See, e.g., *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001). (A statute directing the EPA to set air quality standards to protect the public health with an adequate margin of safety was sufficiently lawful.)

Here, there are no standards to guide the agency's action. In fact, the delegation of authority is not limited in terms of subject matter in any way. It appears under either view, the traditional or more modern rule, the delegation of authority may have been improper because both regulations require at least minimal standards.

Notice. The second question is whether the Department of Transportation properly promulgated the regulations. Although there is no constitutional right to notice and hearing in agency rule-making, see *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), the Administrative Procedure Act (APA) provides by statute for notice by publication of proposed rule-making in the Federal Register, and the right by interested parties to participate in the rule-making process by submitting written data or arguments. See, e.g., 5 U.S.C. § 553(b) and (c) respectively. There is generally, with limited exception, no right to an oral or evidentiary hearing. Note there are exceptions in the APA to the rule-making procedures: military or foreign functions; rules internal to the agency; certain matters relating to public property, loans, grants, benefits or contracts and interpretive and other policy statements. The agency is excused from the requirements if it finds for “good cause” such procedures are impractical, unnecessary or contrary to the public interest.

There does not appear to have been notice of anything in this case, except that regulations had been promulgated. Neither does it appear that there was any chance for public participation. Therefore, the DOT improperly failed to follow APA procedure in releasing the regulations.

Judicial review. The third question is whether the regulations can withstand judicial review. Section 704 of the APA provides that all final agency action shall be judicially reviewable whether made reviewable by statute or not (unless statutes preclude review of agency action committed by law to agency discretion). (Section 701(a)). **Also, there is a well-established presumption of reviewability with clear evidence of congressional intent to preclude review.**

Under the APA, 5 U.S.C. § 706(2) (A), a court is permitted to hold unlawful and set aside agency action which it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." A reviewing court may substitute its judgment in reviewing agency decisions as to law, including jurisdiction (authority), procedure and policy. Section 706 provides that the reviewing court, to the extent necessary, shall decide all relevant questions of law, "shall... (2) hold unlawful and set aside agency action, findings and conclusions found to be... (d) without observance of procedure required by law..." Accordingly, because procedures under the APA were not followed, there is substantial doubt that the regulations would withstand judicial review.

DISCUSSION FOR QUESTION 2

The New Arcadia Terrorism Prevention Act may violate either of two constitutional provisions: (A) the Supremacy Clause (Article VI, Clause 2) or (B) the Equal Protection Clause of the Fourteenth Amendment.

(A) The Supremacy Clause of the Constitution provides that “[t]his Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land.” U.S. CONST. Art. VI, cl. 2. The Supreme Court, in the doctrine of federal preemption, has construed the Supremacy Clause to bar states from taking actions that contradict or interfere with federal authority. Federal law may preempt state law where the state law either conflicts directly with federal law or if it appears that Congress intended to “occupy” the entire field, thus precluding any state regulation. Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947). The Act implicates this latter category of preemption, “field preemption.”

The Court will find field preemption where (a) the scheme of congressional regulation is so pervasive that no room remains for states to act, (b) the federal interest in the field is so dominant as to preclude state regulation, or (c) the object of the federal law and the character of the obligations it imposes imply preemption. Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190 (1983). Challengers to the Act will argue that it violates principle (b) of Pacific Gas. For support, they will point to the Court’s repeated holdings that Congress enjoys plenary power over all matters relating to immigration and naturalization. See, e.g., Harisiades v. Shaughnessy, 342 U.S. 580 (1952). The challengers will contend that the “plenary power” doctrine reflects an understanding that the federal government has an overriding interest in regulating non-citizens.

New Arcadia can attempt two responses. First, it can argue that the Act does not operate within the “field” preempted by federal immigration regulation because it deals with domestic security, not immigration. This argument is easily refuted, because the Court has broadly defined the scope of the plenary power doctrine. See, e.g., Kleindienst v. Mandel, 408 U.S. 753, 766 (1972). Imposing regulatory burdens based on immigrant status clearly would diminish some non-citizens’ desire to enter the United States. Second, New Arcadia can argue that, under the Tenth Amendment, protecting citizens against local threats is a quintessential matter of traditional state concern. Cf. Carter v. Carter Coal Co., 298 U.S. 238 (1936). This, however, amounts to an argument that the Tenth Amendment affirmatively limits federal power. The Court has consistently rejected such an interpretation, holding instead that the Tenth Amendment simply reserves to the States any power not granted to the federal government. See United States v. Darby, 312 U.S. 100 (1941). The Tenth Amendment argument is especially weak in this case, where the nature of federal authority is clear. The challengers should be able to defeat the Act on grounds of field preemption.

(B) Alternatively, the challengers can attempt to defeat the Act under the Equal Protection Clause. Where a law treats classes of persons differently, it is an equal protection question. To uphold a classification it must be substantially related to an important governmental objective. The court applies three standards: Suspect classification – requires

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strict scrutiny – the classification is necessary to achieve a compelling interest; Quasi-suspect classification – requires scrutiny – the classification must be substantially related to an important interest; Other classifications – minimal scrutiny – will be upheld unless action is not rationally related to a legitimate government interest. The Supreme Court has held that distinctions drawn among people based on their citizenship status are “suspect classifications” subject to strict scrutiny. See Graham v. Richardson, 403 U.S. 365 (1971). Accordingly, such distinctions must represent the least restrictive means to satisfy a compelling governmental interest. Here, the challengers will argue that the Act places a burden on non-citizens that is not justified by any compelling interest.

New Arcadia will argue that it can satisfy strict scrutiny. The State will contend that prevention of terrorism clearly is a compelling governmental interest, justifying distinctions that otherwise would be unconstitutional. The challengers will argue that the Act’s recordkeeping, registration, and identification requirements impose substantial burdens on non-citizens by dramatically eroding their civil liberties, and thus are not the least restrictive means to satisfy a compelling governmental interest..

DISCUSSION FOR QUESTION 3

(1) Paul's testimony that John seemed drunk and confused when planning his flight

Opinion testimony of lay witnesses is generally inadmissible. However, it is admissible when it is rationally based on the perception of the witness; helpful to a clear understanding of his testimony or to the determination of a fact in issue; and not based on scientific, technical, or other specialized knowledge (the subject of expert testimony). Fed. R. Evid. 701; see also FRE 602 (a witness may not testify unless a foundation is laid that the witness has personal knowledge of the matter).

The determination whether opinion testimony (whether of an expert or lay witness) is admissible is within the discretion of the trial court. See FRE 104(a).

Paul's testimony is based on his observations of John during a 15 minute conversation with him, and of John preparing his flight plan. Thus, Paul's testimony that John was drunk and confused is based on his personal observations and experience, not scientific, technical, or other specialized knowledge. His testimony is helpful to the determination of a fact in issue: whether John was drunk when he flew the plane.

Accordingly, Paul's testimony is admissible.

(2) Cross-examination of Cathy regarding her phone conversation with John

The short answer is that the cross-examination of Cathy about her conversation with John is proper. This question involves three issues: the proper scope of cross-examination; the marital privilege; and hearsay.

Scope of Cross-Examination

"Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." FRE 611(b). The facts indicate that Cathy testified on direct that John did not drink and was a cautious pilot. Questioning her about her conversation with John, in which he told her he was drunk and shouldn't be flying, is within the proper scope of cross-examination.

Marital Privilege

FRE 501 provides that privileges are recognized only as provided by the common law. Thus, privileges are not created by the Rules.

At common law, confidential communications between a husband and wife are inadmissible into evidence against either spouse, absent the consent of the spouse against whom the communications are offered. The marital privilege is different from the testimonial privilege, which enables one spouse to prevent the other spouse from testifying against him. Trammel v. United States, 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980).

For the marital privilege to apply, the communication must be made during a valid marriage. United States v. Lustig, 555 F.2d 737 (9th Cir.), cert. denied, 434 U.S. 926, 98 S.Ct.

408, 54 L.Ed.2d 285 (1977). The facts indicate that Cathy is John's wife, so the examinees should assume they are married.

In addition, the communication must be made in confidence. It is generally presumed that communications between spouses are intended to be confidential. Pereira v. United States, 347 U.S. 1, 74 S.Ct. 358, 98 L.Ed.2d 435 (1954); Hipes v. United States, 603 F.2d 786 (9th Cir. 1979). However, the presumption can be overcome where the communication is made in the known presence of a third party. Under those circumstances, the communication is not privileged. Pereira v. United States, *supra*; Wolfle v. United States, 291 U.S. 7, 54 S.Ct. 279, 78 L.Ed.2d 617 (1934); United States v. Koehler, 790 F.2d 1256 (5th Cir. 1986).

The facts indicate that John called Cathy in front of Paul. Thus, even though Paul did not listen, the communication was made in the known presence of a third party and is not privileged.

Hearsay

Hearsay is "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FRE 801(c).

John's statement that he was drunk and shouldn't be flying is admissible under the present state of mind or declaration of physical condition exception to the hearsay rule. Under this rule, a declarant's statement about his then-existing state of mind or physical condition is admissible when his state of mind or physical condition is directly in issue and material to the controversy. The declarant's availability is immaterial to the application of this exception.

Some examinees might argue that the statement is admissible hearsay because it is a statement against interest by an unavailable declarant. See FRE 804(3). John is obviously unavailable. But for this rule to apply, the statement must have been "contrary to the declarant's pecuniary or proprietary interests, or so far tended to subject him to civil or criminal liability" when the statement was made. Although flying drunk might be a crime and might subject John to civil liability, the materials the examinees study for the bar exam don't cover such a crime or aviation law, so they shouldn't be expected to cover this point.

Some examinees might also argue that the statement is non-hearsay because it is an admission by a party-opponent. See FRE 801(d)(2). But John is not a party. Although some types of relationships can result in the declarant's statement being admissible against the party ("vicarious admissions"), none of those relationships exists here (co-parties, principal-agent, partners in a partnership, co-conspirators). See e.g., United States v. Hendricks, 395 F.3d 173 (3rd Cir. 2005); Boren v. Sable, 887 F.2d 1032 (10th Cir. 1989).

(3) Cathy's settlement with Wings

FRE 408 provides that evidence of a settlement is inadmissible to prove the validity or amount of a claim. The rule also bars the admission of evidence of conduct and statements made during the course of compromise negotiations.

The examinees should recognize that the situation here does not involve a settlement between the same parties who are involved in the suit being litigated. Rather, this situation involves a settlement of a claim arising out of the same transaction, but between a party to the suit being litigated (Cathy) and a third party (Wings). Rule 408 makes compromise agreements inadmissible in such circumstances as proof of liability for, or invalidity of, the claim or its amount, because:

Settlements have always been looked on with favor, and courts have deemed it against public policy to subject a person who has compromised a claim to the hazard of having a settlement proved in a subsequent lawsuit by another person asserting a cause of action arising out of the same transaction.

Hawthorne v. Eckerson Co., 77 F.2d 844, 847 (2nd Cir. 1935); see also 2 Weinstein's Federal Evidence § 408[04], especially notes 9-13.

Thus, Fly Right cannot introduce evidence of Cathy's settlement with Wings to establish the invalidity of her claim against Fly Right.

Evidence of settlements may be admissible if it is offered for purposes other than to prove liability or invalidity of the claim amount. 2 Weinstein's Federal Evidence § 408[05]. However, none of the enumerated exceptions applies here, and the facts do not suggest a valid purpose for admitting the evidence of Cathy's settlement with Wings.

Some examinees might discuss whether the amount of any judgment Cathy gets from Fly Right should be offset by the amount she got in her settlement with Wings. But the question asks only about the admissibility of the settlement, not the damages/set-off issue.

DISCUSSION FOR QUESTION 4

This case presents important questions regarding police investigatory power, particularly the power of police to “stop” and search citizens. Stated conversely, the question involves the rights of citizens to be free from “unreasonable searches and seizures.”

Stop of Dunn’s car

The initial issue is whether Dunn was legally “seized” when Officer Johnson pulled him over. As a general rule, the police may not stop an individual without a “reasonable suspicion” that the individual is involved in criminal activity. *See Delaware v. Prouse*, 440 U.S. 648 (1979). In other words, the police cannot pull citizens over to engage in a “fishing expedition,” and cannot pull them over simply to check a driver’s license and registration. In this case, Officer Johnson lacked either probable cause or a reasonable suspicion, and did in fact pull Dunn over simply to check his license and registration. Accordingly, the stop was illegal.

Miranda violation

The next issue is whether Officer Johnson violated Dunn’s privilege against self-incrimination. The Fifth Amendment to the United States Constitution protects citizens against being “compelled” to incriminate themselves. In the United States Supreme Court’s landmark decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court imposed a number of prophylactic requirements on police interrogations. Whenever an individual is subjected to “custodial interrogation,” the police must inform the individual of the following: that he has the right to remain silent; that if he chooses to speak, anything he says can and will be used against him; that he has the right to a lawyer; and that if he cannot afford a lawyer, one will be provided for him at no expense.

Miranda only applies when an individual is in “custody” and subject to “interrogation.” “Custody” exists when an individual is subject to “arrest” or the functional equivalent of an arrest. *Stansbury v. California*, 511 U.S. 318 (1994). “Interrogation” exists when an individual is subjected to direct questioning or the functional equivalent of questioning. *Rhode Island v. Innis*, 446 U.S. 291 (1980).

In this case, Dunn was subjected to explicit questioning because the officer asked him direct questions, but up until the time that Dunn was arrested, there is doubt about whether he was in “custody.” As a general rule, although roadside investigative stops can involve “seizures” within the meaning of the Fourth Amendment, they do not involve “custody.” In other words, custody is a more severe form of intrusion. *Berkemer v. McCarty*, 468 U.S. 420 (1984). Assuming that Dunn was not taken into custody, then no *Miranda* warning was required.

Finally, Dunn blurted out upon the discovery of the marijuana and his being arrested, “I’ll be darned. My son must have hidden that dope.” At this point Dunn was clearly in police custody, but his statement was volunteered. *Miranda* will not preclude the prosecution’s use of statements volunteered by the defendant.

Search of trunk

The next issue is whether Dunn consented to the search of his vehicle. The officer did not possess a warrant to search the vehicle. In addition, he did not have probable cause to believe that the vehicle contained the “fruits, instrumentalities or evidence” of crime, and therefore the officer could not invoke the automobile exception to the warrant requirement.

The officer might try to justify the search under the “consent” exception to the warrant requirement. A citizen can always consent to the search of his vehicle. The question is whether any consent that was given was valid. In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the Court held that the validity of consent should be determined under a totality of the circumstances test. The ultimate question is whether the consent was voluntary or was coerced. *See Schneckloth*. Although an officer need not inform a suspect of the right to refuse consent, the lack of information is a factor to be considered in the totality. When a suspect has been seized, especially when the seizure is illegal, this is an important factor to be considered in the totality.

In this case, there are factors suggesting that the consent was valid (i.e., that it was “voluntary” rather than “coerced”). Officer Johnson asked nicely and did not appear to be using force. In addition, not only was his gun holstered, but he informed Dunn of his right to refuse consent. However, courts have been more willing to find coercion when a suspect is in custody, especially when the suspect has been illegally seized. Here, the fact that the Dunn had been illegally seized may vitiate the consent. *Miranda* warnings can vitiate the coercion, but no warnings were given in this case. So, there are significant doubts regarding the validity of the consent.

Suppression of Marijuana

The more difficult question is whether the marijuana should be excluded at Dunn’s trial. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court extended the exclusionary evidence rule to state court proceedings. Since this is a state court proceeding, the rule could be applied.

In this case, Officer Johnson violated Dunn’s rights by stopping his car based on insufficient grounds. Even if Dunn’s consent to search was valid (something which is doubtful), the evidence was illegally obtained because of the “fruit of the poisonous tree” doctrine. *Brown v. Illinois*, 422 U.S. 590 (1975). The “fruit of the poisonous tree” doctrine (a/k/a the “derivative evidence” rule) requires exclusion of evidence that was “derivatively obtained” from a constitutional violation. *See Brown* In this case, Officer Johnson would never have discovered the marijuana absent his illegal stop of Dunn. Accordingly, the marijuana was derived from the illegal stop and should be excluded.

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Of course, in applying the exclusionary rule, the United States Supreme Court weighs the “costs” of exclusion (the fact that the prosecution might not be able to obtain a conviction without the evidence, thereby allowing a guilty person to go free, and the fact that there will be substantial costs if the state is forced to retry Dunn without the evidence) against the “benefits” (the hope that exclusion of the evidence will “deter” police misconduct). In this case, Officer Johnson acted at least negligently (in not knowing what the Constitution allows him to do), but there was no evidence that he intentionally violated Dunn’s rights. As a result, even if the trial court concludes that the officer acted illegally, one can argue that he did so in “good faith.” But the Supreme Court has rarely applied the so-called “good faith exception” to warrantless searches. So, it is likely that if the trial court concludes that the evidence was illegally seized, it would be excluded at Dunn’s trial.

DISCUSSION FOR QUESTION 5

The contract was entered into between Consultant and ACME SALES. However, it was executed by Molly on behalf of ACME SALES. Therefore, Consultant is bound on the contract, but whether WIDGET SALES CORPORATION is bound on the contract depends upon whether Molly executed the contract as an agent of WIDGET SALES CORPORATION and with her authority to enter such a contract on behalf of WIDGET SALES CORPORATION. See Restatement (Second) of Agency section 140. In this case it is stated that Molly does not have express authority to execute contracts for Widget Sales Corporation. Therefore, did Molly have any authority to enter into the contract?

An agent shall have implied authority if the agent reasonably believes he/she has authority as a result of the actions of the principal. Molly is employed by ACME/WIDGET SALES as its chief financial officer (CFO) with responsibility for all financial and tax aspects of the business. Therefore, she is an agent of the corporation at least with regard to her employment responsibilities. See Restatement (Second) of Agency sections 1 & 15; H. Reuschlein & W. Gregory, Agency and partnership, section 12, at 31 (2d ed. 1990). Additionally, Molly prepares weekly reports for ACME/WIDGET SALES which summarize all financial, tax and accounting affairs of the business. A reasonable person in Molly's position would believe she had authority to enter into the contract with Consultant to minimize state tax liabilities, since such actions would be within the general scope of her responsibilities of employment. Therefore, it can be argued that Molly had implied authority to enter the contract with Consultant on behalf of ACME/ WIDGET SALES. See Restatement (second) of Agency sections 26 & 35; H. Reuschlein & W. Gregory, Agency and Partnership section 15, at 41-44 (2d ed. 1990)).

A principal can become bound on a contract if the principal subsequently ratifies the agent's act. In this case, Molly prepared weekly reports for Sally which described financial, tax and accounting matters relating to the corporation. Presumably, Sally was aware of the contract from these reports, and since the dispute arose several months after execution of the contract, she must have believed Molly had authority to enter the contract since Sally never objected to the contract. Alternatively, even if Molly acted without authority by entering the contract, it can be argued that the contract was ratified by ACME/WIDGET SALES since there was never any objection to the contract by Sally despite her knowledge about it for several months. See generally H. Reuschlein & W. Gregory, Agency and Partnership sections 27-33, at 72-77 (2d ed. 1990)). Therefore, ACME/WIDGET SALES is bound by the contract with Consultant because it was entered into on behalf of ACME/WIDGET SALES by a duly authorized agent (Molly) of the corporation acting pursuant to implied authority. Alternatively, even if Molly lacked authority, failure of ACME/WIDGET SALES to object to the contract for several months means the corporation acquiesced in or ratified the contract and is now bound by the contract.

Generally, when an agent enters a contract with a third party both the third party and the principal (on whose behalf the agent is acting) are bound by the contract. The agent who actually enters the contract is normally not bound by, nor is she a party to, the contract, provided the agent acts pursuant to authority. Nevertheless, the agent will be bound by the contract along with the principal and the third party if the agent acts on behalf of a partially disclosed or undisclosed

DISCUSSION FOR QUESTION 5
Page Two

principal. See Restatement (Second) of Agency sections 320-322. A partially disclosed principal is one whose existence, but not identity, is known to the third party.

The contract was entered into between Consultant and ACME SALES. However, ACME SALES is not the actual name of the business since the business is a corporation that is incorporated under the name WIDGET SALES CORPORATION. The facts state that Consultant is unaware of any aspect of the business. Therefore, Consultant is unaware that ACME SALES is actually only a D/b/a for WIDGET SALES CORPORATION. Consequently, Molly is acting on behalf of a partially disclosed principal (WIDGET SALES CORPORATION) since by signing the contract "ACME SALES by Molly, CFO", she clearly disclosed she was acting on behalf of another entity but she didn't disclose that the entity was WIDGET SALES CORPORATION. She only disclosed she was acting on behalf of ACME SALES but there is no legal entity that exists under that name. Consequently, Molly is an agent executing a contract on behalf of a partially disclosed principal, and she also is bound by the contract.

DISCUSSION FOR QUESTION 6

1. On what day did Harold and Wendy become legally married?

Harold and Wendy were not legally married until the “second” ceremony that occurred on August 17, 2002. The August 12, 2002 ceremony using Jack as a stand in was not effective. Colorado authorizes marriages by proxy. See § 14-2-109(2), C.R.S. 2006. However, in order to be effective, the statute requires the party “unable to be present” to execute a writing authorizing a third person to act as a proxy. Here, the facts do not indicate that Harold executed any writing. Additionally, it is arguable that Harold’s business trip did not render him “unable to be present.”

2. The Grandview vacation home

Although the vacation home was acquired during the marriage, it was acquired as a gift from Harold’s parents and is, therefore, excluded from the definition of marital property. See § 14-10-113(2)(a), C.R.S. 2006. As Harold’s separate property, the vacation home is not part of the marital estate and the court cannot award the home to Wendy.

However, it appears that the vacation home may have increased in value during the marriage based upon the increased popularity and desirability of Grandview. An increase in value of separate property that occurs during the marriage is considered marital property subject to distribution. See § 14-10-113(4), C.R.S. 2006; In re Marriage of Foottit, 903 P.2d 1209 (Colo. App. 1995). Accordingly, any increase in the value of the Grandview vacation home during the marriage would be marital property and, therefore, part of the marital estate to be equitably divided.

3. Wendy’s request for attorney fees.

In Colorado, a court may order one party to a dissolution proceeding to pay all or a portion of the other party’s costs, including attorney fees. See § 14-10-119, C.R.S. 2006. The decision whether to require such a payment will be based upon the relative financial resources and circumstances of the parties. See In re Marriage of Aldrich, 945 P.2d 1370 (Colo. 1997). Additionally, any award of attorney fees requires a finding that such fees were reasonable and necessary. See In re Marriage of Sarvis, 695 P.2d 772 (Colo. App. 1984).

4. Entitlement to jury

Finally, Wendy is not entitled to a jury determination on factual issues in this dissolution action. All issues raised or presented in a dissolution proceeding are to be resolved by the court in equity sitting without a jury. See § 14-10-107(6), C.R.S. 2006; In re Marriage of Lewis, 66 P.3d 204, 205 (Colo. App. 2003).

DISCUSSION FOR QUESTION 7

Subject matter jurisdiction

Diversity of citizenship. Diversity of citizenship jurisdiction requires that there be complete diversity of citizenship between the plaintiffs on one side and defendants on the other and that the amount in controversy exceed \$75,000 (exclusive of setoffs, interest, or costs). 28 U.S.C. § 1332(a).

Diversity of citizenship of parties. There is complete diversity of citizenship between Peters, Driver and Big Drilling Co. To be a citizen under the statute, a natural person must be both a citizen of the United States and be domiciled in a state. Wolfe v. Hartford Life & Annuity Ins. Co., 148 U.S. 389 (1893)(holding averment of state residence insufficient); see generally Jack H. Friedenthal et al., Civil Procedure 29 (3d ed. 1999). For purposes of federal diversity jurisdiction, an individual's state citizenship is equivalent to domicile. Crowley v. Glaze, 710 F.2d 676, 678 (10th Cir. 1983). To establish domicile in a particular state, a person must be physically present in the state and intend to remain there. Keys Youth Servs., Inc. v. Olathe, 248 F.3d 1267, 1272 (10th Cir. 2001). Once domicile is established, however, the person may depart without necessarily changing his domicile. "To effect a change in domicile, two things are indispensable: First, residence in a new domicile, and second, the intention to remain there indefinitely." Crowley, 710 F.2d at 678. Smith v. Cummings, 445 F.3d 1254, 1259-1260 (10th Cir. 2006).

Peters is a citizen of California because he is a United States citizen domiciled in California where he lives and works. Although he owns property in Colorado, he only spends two weeks per year on the property. He has no intent to remain in Colorado as evidenced by the fact that he returns to California each year after his two week trip.

An alien admitted to permanent residence "is deemed a citizen of the State in which such alien is domiciled." 28 U.S.C. § 1332(a). Accordingly, Driver's place of citizenship is Colorado.

The corporate defendant's place of citizenship is both Delaware and Colorado. The federal statute provides: "For the purposes of this section. . . a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business. . . ." 28 U.S.C. § 1332(c)(1).

Because the plaintiff is a citizen of California and defendants are citizens of Colorado and Delaware, complete diversity of citizenship is established.

Amount in controversy. The amount-in-controversy requirement is normally governed by the monetary value of the relief claimed by the plaintiff in good faith. "[T]he sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify a dismissal." St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289 (1938).

DISCUSSION FOR QUESTION 7
Page Two

The amount of damages demanded by the plaintiff is not sufficient by itself because the statute requires that the matter in controversy exceed \$75,000. 28 U.S.C. § 1332(1). But the valuation of the matter in controversy also requires a consideration of the monetary value of the injunctive relief. See McCarty v. Amoco Pipeline Co. 595 F.2d 389 (7th Cir. 1979)(discussing ways to evaluate value of injunctive relief). The value of the waste removal (whether measured by the cost to defendants or benefit to plaintiff) and land restoration adds additional monetary value to establish a total amount in controversy in excess of \$75,000.

Personal jurisdiction

The court has personal jurisdiction. A federal court has territorial jurisdiction coextensive with the "jurisdiction of a court of general jurisdiction in the state in which the district court is located." Fed. R. Civ. P. 4(k)(1). The Colorado courts have general personal jurisdiction over natural persons residing in Colorado and over corporations engaged in continuous and systematic business in the state of Colorado.

Due process provides limits to the territorial reach of federal and state courts. U.S. Const. amends. V & XIV; International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Pennoyer v. Neff, 95 U.S. (5 Otto) 714, 733 (1877). The exercise of jurisdiction by a federal court over a state resident does not violate due process limits. Milliken v. Meyer, 311 U.S. 457, 462-64 (1940). Nor does exercise of jurisdiction over a corporate defendant with "continuous and systematic general business contacts." Cf. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984).

Insufficiency of service of process

In federal court, process may be served pursuant to federal rule or pursuant to the methods authorized by the state law either of the place where the federal court is sitting or where process is served. Fed. R. Civ. P. 4(e)&(h). See generally, Charles Alan Wright, Law of Federal Courts § 65 at 446 (5th ed. 1994).

Service of the summons and complaint on Driver appears to be insufficient under both federal and Colorado state rules because those rules require service on the individual party or on a person authorized by the party to receive process. Fed. R. Civ. P. 4(e)(2)(service on an individual requires personal service or service at individual's dwelling upon person of suitable age and discretion residing there or service on individual authorized by appointment or law to receive service); Colo. R. Civ. P. 4(e)(1)(requiring service on defendant personally or upon family member at defendant's home or upon person specifically authorized by appointment or law). An individual must specifically authorize his/her attorney to receive process. E.g., United States v. 51 Pieces of Real Property, 17 F.3d 1306, 1313 (10th Cir. 1994); Ransom v. Brennan, 437 F.2d 513 (5th Cir. 1971); Schultz v. Schultz, 436 F.2d 635 (7th Cir. 1971). See also Bush v.

DISCUSSION FOR QUESTION 7
Page Three

Winker, 907 P.2d 79 (Colo. 1995)(holding service on partner's attorney not sufficient service on partnership absent specific authorization to receive service for partnership).

In contrast, service on the corporation is sufficient because the corporation's in-house attorney and vice president is either actually authorized by the corporation to receive service of process or is so authorized by the rules. Fed. R. Civ. P. 4(h)(1)(requiring service on corporation either by method prescribed by state law or by delivery to an "officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. . ."); Colo. R. Civ. P. 4(g)(requiring service on a corporation by delivery of the process in the county in which the action is pending to a corporation's officer, manager, general agent, or registered agent).

The corporation may have authorized its legal counsel to receive process. If it has not, the in-house counsel and vice president still qualifies as a managing or general agent. The test for whether a corporate employee is a managing or general agent who is authorized to receive service under the rules is whether such an employee is "so integrated with the corporation sued as to make it likely that he will realize his responsibilities and know what he should do with any legal papers served on him." Wright, *supra*, at 446. See also, Denman v. Great Western Ry. Co., 811 P.2d 415, 417 (Colo. App. 1990)(observing that general agent qualified to receive service includes employee who performs duties necessary to the corporation's operations and who is responsible for a substantial phase of the corporation's activities). An in-house counsel and vice president meets such a test.

DISCUSSION FOR QUESTION 8

I. Blackacre. Under the UPC, the fact that Neighbor was a beneficiary and a witness to the codicil will not affect the validity of the codicil or any provisions of the codicil. UPC §2-505(b). Thus, Neighbor will take Blackacre. A codicil is a testamentary instrument executed subsequent to a will which amends, alters or modifies the will. As with a will, a codicil requires that the testator have testamentary intent and testamentary capacity, and, further, the codicil must be duly executed.

II. Art Collection. The issue with respect to the art collection is whether it will be distributed to the persons named on the list found in Tina's desk. Under UPC §2-510, for the list to be incorporated by reference into Tina's will, it must have been in existence when the will was executed, and the will must manifest that intent and describe the list sufficiently to identify it. Because the date on the list indicates that it was made in 2004 it was not in existence when Tina executed the will in 2003. Therefore, it cannot be incorporated by reference into the will. In addition, the requirement that the will describe the separate writing sufficiently to identify it might also not be met, because the will describes a writing to be found in Tina's safe deposit box and the list was found in her desk.

UPC §2-513 allows tangible personal property, such as Tina's art, to be disposed of pursuant to a signed, separate writing referred to in the will, regardless of whether the separate writing was in existence when the will was executed. Because Tina did not sign the list, however, it will not be given effect under §2-513. Similarly, the list will not qualify as a holographic codicil because it was not signed by Tina. UPC §2-502(b).

Under UPC §2-503, the list will be given testamentary effect as a part of Tina's will if it can be shown with clear and convincing evidence that Tina intended the list to be an addition to or an alteration of her will. Because the list does not include any reference to her will or other testamentary language, because the will refers to a list to be found in her bank safe deposit box and the actual list was found in her desk, and because Tina did not sign the list, it is doubtful that the clear and convincing evidence standard of § 2-503 will be satisfied.

Accordingly, the art collection should not pass to the persons named on the list, but instead should pass as a part of the residue of Tina's estate.

III. Residue. The residuary clause of Tina's will includes a latent ambiguity, because it leaves the residue to Tina's cousin, Charles Turner, and Tina did not have a cousin by that name. Extrinsic evidence is generally admissible to resolve latent ambiguities. *See, e.g., Ihl v. Oetting*, 682 S.W.2d 865 (Mo. App. 1984). Accordingly, the extrinsic evidence that Tina was close to her nephew, Charles Turner, and was not close to her cousin, Charles Thomas, will be admissible to resolve the ambiguity and cause the residue to be distributed to her nephew, Charles Turner.

DISCUSSION FOR QUESTION 9

MPC is only liable on the contract with Sam Producer if they are legitimately a party to the contract. MPC is a corporation and therefore can not enter a contract on its own since a corporation is an artificial being created by law. Instead, MPC can only become a party to a contract if the contract is entered on behalf of the corporation by a party or entity that has authority to enter a contract on behalf of the corporation. See Greenspon's Sons Iron & Steel Co. v. Pecos Valley Gas Co., 156 A. 350, 351 (Del. Super. Ct. 1931). Therefore, the question of authority is central to the analysis. Generally, authority can be granted to someone to act on behalf of the corporation by the Articles of Incorporation, the corporate bylaws or by a resolution passed by the board of directors. Id. at 351-52; Revised Model Business Corporation Act (RMBCA), section 50.

Additionally, a corporation can become bound on a contract that was entered on its behalf if the corporation adopts or ratifies the contract after the fact. This applies to a contract that the corporation is not initially a party to because it was entered into on behalf of the corporation by a party that lacked authority to enter the contract on behalf of the corporation. Such adoption can be a formal adoption by express action by the board of directors or it can be an informal adoption implied from the actions of the board or corporation. See McArthur v. Times Printing Co. 51 N.W. 216 (Minn. Sup. Ct. 1898; Restatement of Agency 2d Section 104.

In determining the authority of the board or of an executive committee, conflicts may arise between what is permitted by the bylaws and by the Articles of Incorporation. Although bylaws may contain any provision for managing the corporation, such provisions cannot be inconsistent with the Articles of Incorporation. RMBCA, section 2.06. In a conflict situation, the Articles of Incorporation preempt the bylaws. See Paulek v. Isqar, 551 P.2d 213, 215 (Colo. App. Ct. 1976).

MPC's arguments that they are not liable on the contract

The contract entered into by the Executive Committee, on behalf of MPC, and Sam Producer involves a budget six times larger than the budget for any other movie ever produced by MPC. Therefore, this is not a routine contract. It is an extraordinary contract.

Under the Articles of Incorporation, the Executive Committee only has the authority to enter routine contracts. The action of entering this contract therefore exceeds the authority of the Executive Committee that is granted by the Articles of Incorporation. Actions by the Executive Committee that exceed the committee's authority can not bind MPC.

In contrast to the Articles of Incorporation, the new bylaw passed by the board grants the Executive Committee unlimited authority to enter transactions on behalf of MPC. The Executive Committee has authority to enter the transaction in question under the bylaw.

The Articles of Incorporation and the bylaws are in conflict with regard to the authority of the Executive Committee to enter contracts on behalf of MPC. The contract with Sam Producer

would be binding on MPC under the bylaw, but it would not be binding under Articles of Incorporation. When conflicts arise between the Articles of Incorporation and the bylaws, the Articles control. Therefore, in this case, under the authority granted to the Executive Committee by the Articles, the committee exceeded its authority in entering the contract with Sam Producer. MPC should argue that it is consequently not liable on the contract because the Executive Committee lacked authority to enter the contract on behalf of MPC.

Sam Producer's arguments that MPC is liable on the contract

Despite the authority limitation in the Articles of Incorporation, MPC may have informally adopted the contract by the actions of the full board of directors subsequent to the Executive Committee's entering the contract on behalf of MPC.

The MPC board of directors, on their own, would have authority to enter the contract with Sam Producer, because the board is charged with managing the business and affairs of the corporation. *See* RMBCA, section 35. Therefore, the full board has the authority to adopt the contract in question even though at the time the contract was consummated it did not bind MPC because the Executive Committee lacked authority to bind MPC.

Although the full board has not expressly adopted the contract in question, it has approved two worldwide distribution contracts for the movie created as a result of the contract with Sam Producer. This may be an implied adoption of the contract with Sam Producer because the board is attempting to take advantage of the benefits of that contract which indicates intent to bind the corporation to the contract. It would be anomalous for MPC to take advantage of the contract with Sam Producer and then claim they were not bound by the contract when it breaches it.

ESSAY Q1

SEAT

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ISSUE

POINTS
AWARDED

- | | | | |
|----|--|-----|-----------------------|
| 1. | A legislative body may not totally delegate its functions to an administrative agency unless at least minimum standards ("intelligible principles") are present. | 1. | <input type="radio"/> |
| 2. | Adequate standards were not present. | 2. | <input type="radio"/> |
| 3. | The APA provides for notice by publication and the right by interested parties to participate in the rule making process. | 3. | <input type="radio"/> |
| 4. | The DOT did not properly promulgate the regulations because there was: | | |
| | 4a. no notice; | 4a. | <input type="radio"/> |
| | 4b. no opportunity for interested persons to participate in the rule-making process. | 4b. | <input type="radio"/> |
| 5. | Participation in the rule-making process may be by written statements. | 5. | <input type="radio"/> |
| 6. | There is no right to a hearing | 6. | <input type="radio"/> |
| | 6a. except in limited circumstances. | 6a. | <input type="radio"/> |
| 7. | Judicial review of agency action is permitted | | |
| | 7a. unless precluded by statute or | 7a. | <input type="radio"/> |
| | 7b. committed by law to agency discretion. | 7b. | <input type="radio"/> |
| 8. | The Court may set aside agency action where arbitrary and capricious, | 8. | <input type="radio"/> |
| | 8a. or without observance of proper procedure. | 8a. | <input type="radio"/> |

ESSAY Q2

SEAT

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<u>ISSUE</u>	POINTS AWARDED
1. The Act may violate the Supremacy Clause (or doctrine of federal preemption).	1. ○
2. The Act may violate the Equal Protection Clause of the Fourteenth Amendment.	2. ○
3. The Supremacy Clause bars states from taking actions that contradict or interfere with Federal authority, or directly conflicts with federal law.	3. ○
4. The Court will find field preemption where	
4a. the scheme of congressional regulation is so pervasive that no room remains for states to act or occupy the entire field,	4a. ○
4b. the federal interest in the field is so dominant as to preclude state regulation, or	4b. ○
4c. the object of the federal law implies preemption.	4c. ○
5. Congress enjoys plenary power over all matters relating to immigration and naturalization (or an overriding interest in regulating non-citizens).	5. ○
6. The State will argue that the Act is not preempted by federal immigration regulation because it deals with domestic security (police power), not immigration.	6. ○
7. Where a law treats classes of persons differently or where similarly situated persons are treated differently, it is an equal protection question.	7. ○
8. To uphold a classification it must be substantially related to an important governmental objective.	8. ○
9. Distinctions drawn among people based on their citizenship status are "suspect classifications" subject to strict scrutiny.	9. ○
10. Such distinctions must represent the least restrictive means or most narrowly tailored to satisfy a compelling governmental interest.	10. ○
11. Challengers argue the Act places a burden on non-citizens that is not narrowly tailored or east restrictive to meet their objective.	11. ○
12. The State will contend that prevention of terrorism is a compelling governmental interest.	12. ○
13. Recognition that 10th Amendment may apply.	13. ○

ESSAY Q3

SEAT

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ISSUE

POINTS
AWARDED

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|----|---|----|-----------------------|
| 1. | To be admissible, evidence must (among other things) be relevant. | 1. | <input type="radio"/> |
| 2. | Relevant evidence is evidence that makes a fact of consequence more likely than not either true or not true. (FRE 401). | 2. | <input type="radio"/> |

Paul's testimony

- | | | | |
|-----|---|-----|-----------------------|
| 3. | Paul's testimony regarding John's apparent intoxication would be opinion testimony by a lay (non-expert) witness. | 3. | <input type="radio"/> |
| 4. | To be admissible as lay (non-expert) opinion testimony (FRE 701), it must be, | | |
| 4a. | Rationally based on his perceptions of John; | 4a. | <input type="radio"/> |
| 4b. | Helpful to the jury; | 4b. | <input type="radio"/> |
| 4c. | Not based on scientific, technical or other specialized knowledge. | 4c. | <input type="radio"/> |

Cathy's testimony

- | | | | |
|-----|---|-----|-----------------------|
| 5. | Cathy's testimony regarding John's call is within the proper scope of cross-examination (FRE 611(b)); her testimony about John opened the door. | 5. | <input type="radio"/> |
| 6. | As John's wife Cathy would normally be prohibited from testifying due to marital privilege. | 6. | <input type="radio"/> |
| 7. | However, privileges are waived if the communication was not made confidentially. | 7. | <input type="radio"/> |
| 8. | Cathy's testimony about what John said to her is hearsay. | 8. | <input type="radio"/> |
| 8a. | Hearsay is an out of court statement offered for the truth of the matter asserted (FRE 801(c)). | 8a. | <input type="radio"/> |
| 8b. | John's statements are arguably admissible as an admission by a party opponent (FRE 801(d)(2)). | 8b. | <input type="radio"/> |
| 8c. | Or arguably as a contemporaneous declaration of his present state of mind (FRE 803(3)). | 8c. | <input type="radio"/> |
| 8d. | Or arguably as a statement against interest (FRE 804(b)(3)). | 8d. | <input type="radio"/> |
| 8e. | Some hearsay exceptions (former testimony, statement against interests, etc.) require proof of the declarant's unavailability. | 8e. | <input type="radio"/> |

Settlement

- | | | | |
|-----|--|-----|-----------------------|
| 9. | Cathy's settlement with Wings is arguably inadmissible because it was a settlement (FRE 408). | 9. | <input type="radio"/> |
| 9a. | However it might be admissible for a purpose other than to show Fly Right's culpability (e.g., that Cathy has already recovered and/or that Wings not Fly Right was culpable.) | 9a. | <input type="radio"/> |

ESSAY Q4

SEAT

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ISSUE

POINTS
AWARDED

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|---|-------|
| 1. Recognition of 4th Amendment search and seizure issue regarding the stop of D. | 1. ○ |
| 2. Stop = seizure, for 4th Amendment purposes. | 2. ○ |
| 3. Stop must be based on reasonable, articulable grounds for suspicion. | 3. ○ |
| 4. Recognition of Miranda issue. | 4. ○ |
| 5. Miranda is triggered by custodial interrogation. | 5. ○ |
| 6. Traffic stops don't usually amount to custody for Miranda purposes. | 6. ○ |
| 7. Volunteered statements do not offend Miranda. | 7. ○ |
| 8. Recognition of 4th Amendment issue re search of trunk. | 8. ○ |
| 9. Search of trunk requires warrant and probable cause, or some exception. | 9. ○ |
| 10. Recognition of consent as an exception. | 10. ○ |
| 11. Consent to search depends on totality of circumstances. | 11. ○ |
| 12. Recognition that discovery of marijuana may have been the "fruit of the poisonous tree," i.e., the prior unlawful stop. | 12. ○ |

ESSAY Q5

SEAT

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ISSUE

POINTS
AWARDED

- | | |
|---|-------|
| 1. Molly is an agent of Widget Sale Corporation but does not have express authority to enter into contracts for Widget. | 1. ○ |
| 2. Molly has <u>implied</u> authority to enter into Contracts as an agent of Widget Sales Corporation (but not express authority). | 2. ○ |
| 3. Implied authority is authority that the agent (not the third party) reasonably believes she has as a result of the actions of the principal. | 3. ○ |
| 4. It is reasonable for Molly to believe she has authority to enter into financial/tax contracts with third parties due to her employment status and in light of her job duties. | 4. ○ |
| 5. Alternately, Widget Sales Corporation ratified the contract by not objecting to the contract despite knowledge of contract and accepting the benefits of the contract. | 5. ○ |
| 6. When a principal ratifies an unauthorized transaction by an "agent" the principal becomes bound on the contract. | 6. ○ |
| 7. An agent is generally not bound by the contract and is not a party to the contract provided the agent acts pursuant to authority (even with implied authority) and the principal is <u>disclosed</u> . | 7. ○ |
| 8. An agent will be bound by the contract along with the principal and third party if the agent acts on behalf of a partially disclosed or undisclosed principal. | 8. ○ |
| 9. In this case, Molly acted on behalf of a partially disclosed principal (Widget Sales Corporation) since Consultant was unaware of the business relationship. | 9. ○ |
| 10. Molly, acted as an agent for a partially disclosed principal, and therefore she is also bound on the contract. | 10. ○ |
| 11. Consultant is bound on the contract. | 11. ○ |

ESSAY Q6

SEAT

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ISSUE

POINTS
AWARDED

Validity of Marriage

- | | | | |
|----|--|----|-----------------------|
| 1. | Recognition of proxy (stand-in) marriage issue. | 1. | <input type="radio"/> |
| 2. | No valid proxy marriage on August 12 because no written authorization or because H not "unable" to be present. | 2. | <input type="radio"/> |
| 3. | Recognition of possible common law marriage. | 3. | <input type="radio"/> |
| 4. | Effective date of marriage is August 17. | 4. | <input type="radio"/> |

Grandview Vacation Home

- | | | | |
|----|---|----|-----------------------|
| 5. | Marital property excludes <u>gifts</u> received during the marriage. | 5. | <input type="radio"/> |
| 6. | Vacation home, as <u>gift</u> , was not marital and/or is H's separate property. | 6. | <input type="radio"/> |
| 7. | Increase in value of home during marriage is marital property in which W may share. | 7. | <input type="radio"/> |

Attorney Fees

- | | | | |
|----|--|----|-----------------------|
| 8. | Court may award attorney fees. | 8. | <input type="radio"/> |
| 9. | Must consider respective financial resources/circumstances of parties. | 9. | <input type="radio"/> |

Right to Jury

- | | | | |
|-----|--|-----|-----------------------|
| 10. | Dissolution proceedings are equitable in nature. | 10. | <input type="radio"/> |
| 11. | No entitlement to jury in such proceedings. | 11. | <input type="radio"/> |

ESSAY Q7

SEAT

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<u>ISSUE</u>	POINTS AWARDED
1. Federal Courts are courts of limited jurisdiction--either Federal question or diversity of citizenship.	1. ○
2. Diversity of citizenship: all plaintiffs on one side and defendants on the other must be diverse AND amount in controversy must exceed \$75,000.	2. ○
3. Domiciled defined as, "one's true fixed, and permanent home to which he has the intention of returning."	3. ○
4. Peters is citizen of CA. He lives and works there and is citizen of US. He spends only two weeks per year on the CO property and returns to CA after each trip.	4. ○
5. Alien admitted to permanent resident is a citizen of the state in which he is domiciled. Driver is therefore citizen of Colorado.	5. ○
6. A corporation is a citizen of the state where it is incorporated and state where it has its principal place of business. Big Drilling is citizen of both Delaware and Colorado.	6. ○
7. Complete diversity of citizenship exists in this case since plaintiff is citizen of different state than defendants.	7. ○
8. Within injunctive relief (\$25,000) the amount in controversy exceeds \$75,000 and requirement is met.	8. ○
9. Federal Court has personal jurisdiction as if it were a court of the state in which it is located.	9. ○
10. CO courts have general jurisdiction over persons residing in CO and companies doing business in CO. (minimum contacts)	10. ○
11. Federal Court has personal jurisdiction over Driver and Big Drilling Co.	11. ○
12. Federal & CO rules require personal service for individuals or service at their dwelling upon appropriate person, or service on individual authorized by appointment or law to receive service. (any ok)	12. ○
13. Driver must authorize acceptance of service, if he did service is okay.	13. ○
14. Re: Big Drilling Co., Federal & CO rules say service on officer, managing or general agent or any other agent authorized to accept service. (any)	14. ○
15. As VP and counsel she can likely accept service, therefore service of process on Big Drilling Co. is likely ok.	15. ○

ESSAY Q8

SEAT

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ISSUE

POINTS
AWARDED

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|---|---------------------------|
| 1. Elements of Will or Codicil: | |
| 1a. Testamentary Capacity | 1a. <input type="radio"/> |
| 1b. Must be signed by the Testator | 1b. <input type="radio"/> |
| 1c. Must be witnessed by two natural persons | 1c. <input type="radio"/> |
| 2. Blackacre would pass to neighbor pursuant to the Codicil. | 2. <input type="radio"/> |
| 3. Neighbor's witnessing of the Codicil does not invalidate the Codicil. | 3. <input type="radio"/> |
| 4. Since the list of the artworks was not in existence at the time of Tina's death, it will not pass to those persons pursuant to UPC §2-510. | 4. <input type="radio"/> |
| 5. Because Tina did not sign the list of artwork, it cannot serve to pass the artwork pursuant to UPC §2-513. | 5. <input type="radio"/> |
| 6. The artwork would pass as part of the residuary. | 6. <input type="radio"/> |
| 7. Since Tina did not have a cousin by the name of Charles Turner, a latent ambiguity in the will exists. | 7. <input type="radio"/> |
| 8. Because a latent ambiguity exists, extrinsic evidence will be allowed to be offered to determine who receives the residuary. | 8. <input type="radio"/> |
| 9. The nephew will receive the residuary. | 9. <input type="radio"/> |

ESSAY Q9

SEAT

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ISSUE

POINTS
AWARDED

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|---|-----|---|
| 1. Executive Committee must have authority to enter contract with Sam Producer for MPC to be bound on contract. | 1. | ○ |
| 2. Executive Committee doesn't have authority under Articles of Incorporation to enter contract with Sam Producer because it is not a routine contract as the contract involves movie budget six times larger than any previous movie budget. | 2. | ○ |
| 3. Bylaws may contain any provision for managing the corporation. | 3. | ○ |
| 4. Executive committee has authority to enter the contract under bylaw because bylaw grants committee authority to enter all transactions on behalf of MPC. | 4. | ○ |
| 5. Where authority granted by bylaws and Articles of Incorporation are in conflict, Articles of Incorporation control. | 5. | ○ |
| 6. MPC may argue that here the Articles and bylaws conflict, therefore the Executive Committee did not have the authority to enter into the contract. | 6. | ○ |
| 7. Corporation can adopt or ratify the contract made on behalf of corporation where there was no authority. | 7. | ○ |
| 8. Sam Producer may argue that actions of full board of MPC amount to ratification or adoption: | | |
| 8a. Full board approval of worldwide distribution contracts for movie resulting from Sam Producer contract indicates that MPC intends to be bound by the contract. | 8a. | ○ |
| 8b. Anomalous for MPC to get benefits of Sam Producer contract and then deny liability for breach of the contract. | 8b. | ○ |