

### 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.

### 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.

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. \_\_\_\_\_

## QUESTION 2

Beginning on September 1, and continuing through October 31, the Daily News published the following announcement each day in its newspaper:

### Attention Word Builders!

In honor of its fiftieth anniversary, the Daily News is sponsoring a contest. Whoever finds the most words using the letters in the phrase HAPPY BIRTHDAY DAILY NEWS, and delivers the word list to us by November 1, will receive \$2000! The word list should include only words that appear in the Standard English Dictionary, 2nd Edition. No proper nouns, foreign words, or contractions. Good luck!

On October 1, the Daily News received a word list from Alice Adams. Attached to the word list was a note in which Adams wrote that she had included proper nouns and foreign words because sometimes judges did not follow the rules and she wanted to have the longest list.

On October 10, Barbara Burns delivered her word list to the Daily News. Her list conformed to the published rules.

On October 20, Cathy Cook called the News and asked what would happen if two or more contestants tied for the longest word list. The receptionist checked with the publisher and then told Cook that, in that case, the winners would split the \$2000. Cook then compiled her list, which conformed to the rules, and delivered it to the Daily News.

On November 1, the Daily News announced that Burns and Cook had tied for first place and that each would be awarded \$1000. Adams read the announcement, reviewed the winning lists, and discovered that, even without the improper words, her list had every word that appeared on the winning lists plus ten additional words. When she called the newspaper to complain, she was told that she had been disqualified from the contest because of her note and the paper had not counted the words in her list.

### **QUESTION:**

Your law firm represents the Daily News. Adams, Burns, and Cook each claim to be entitled to \$2000 under the rules of the contest. Please advise your client regarding each claim.

## DISCUSSION FOR QUESTION 2

Under common law, the announcement published in the Daily News constituted an offer to contract. An offer is the 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. *Restatement (Second) of Contracts*, section 24. The announcement clearly specified all terms necessary for a reader to understand that he or she was invited to create and deliver to the Daily News the longest list of conforming words.

The offer created powers of acceptance in Adams, Burns, and Cook. An offer may create a power of acceptance in anyone or everyone who renders a specified performance. *Restatement (Second) of Contracts*, section 29(2); see *Chang v. First Colonial Savings Bank*, 410 S.E.2d 928, 931 (Va. 1991). Because the offer was directed to any "Word Builders" and published in the newspaper, it created a power of acceptance in the general public. See also *Lefkowitz v. Great Minneapolis Surplus Store*, 86 N.W.2d 689, 691 (Minn. 1957).

### Potential Claim of Adams

Adams did not accept the offer because she did not perform its specified terms. An acceptance must comply with the requirements of the offer as to the performance to be rendered. *Restatement (Second) of Contracts*, section 58. Although offers may be interpreted in accordance with common understanding in order to permit inconsequential variations, an intentional violation of the rules does not sufficiently comply with the terms of the offer. *Id.* Comment A. See also *Scott v. People's Monthly Co.*, 228 N.W. 263, 266 (Iowa 1929) ("Other contestants, who substantially complied with the rules, should not lose to one who intentionally and deliberately violated them."). By deliberately including nonconforming words, Adams failed to accept the offer.

If Adams' performance did not constitute acceptance, the Daily News was under no duty to Adams. Although a defective performance may operate as a counter-offer, silence by the original offeror does not operate as acceptance of the counter-offer except under exceptional circumstances not present here. See *Restatement (Second) of Contracts*, sections 69 and 70. As noted in section 70, comment a: "The exceptional cases where silence is acceptance fall into two main classes: those where the offeree silently takes offered benefits, and those where one party relies on the other party's manifestation of intention that silence may operate as acceptance."

### Potential Claims of Burns

Conversely, by delivering conforming word lists to the Daily News before November 1, Burns and Cook both accepted the offer and by their performances supplied consideration to support contracts with the Daily News. Any performance which is bargained for can constitute consideration unless it involves the performance of a legal duty or forbearance to assert an invalid claim. *Restatement (Second) of Contracts*, sections 70, 73, 74.

Although both Burns and Cook are entitled to enforce those contracts, there is an issue as to the amount of prize money which must be awarded to each under the contract. The Daily News asserts that they are to split the \$2,000. Burns will argue that she is entitled to the entire \$2,000 because she found the most words, which was the term of the contract as it was

**DISCUSSION FOR QUESTION 2**  
**Page Two**

announced by the offer. Where the interpretations of both parties are reasonable, a court will normally interpret the term against the party who supplied it, in this case, the Daily News. *Restatement (Second) of Contracts*, section 60. Accordingly, the Daily News will prevail against Burns only if a court finds that Burns' interpretation is unreasonable. Since both interpretations are reasonable, Burns should recover the full \$2,000 because she had fully performed the contract under its terms.

Potential Claim of Cook

Cook cannot make the same argument as Burns to claim the full \$2000. The Daily News clearly explained the terms of the contract to Cook prior to her performing under the contract. An offer may be modified or withdrawn before it is accepted. *See Lefkowitz, supra*. An offeree's power of acceptance is terminated when the offeror manifests an intention not to enter into the proposed contract. *Restatement (Second) of Contracts*, section 742. Because Cook was told that in case of a tie, the winners would split the \$2000 before she accepted by compiling and delivering it to the Daily News receptionist, Cook accepted that modified term as part of a new offer, and is entitled only to \$1,000.



3140

## Essay 2 GradeSheet

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General

1. Identify elements of contract (offer, acceptance, consideration). 1. \_\_\_\_\_
2. Recognize that this advertisement was an offer. 2. \_\_\_\_\_
3. Recognize unilateral contract: i.e., the offer could be accepted by performance of its terms. 3. \_\_\_\_\_
4. In a unilateral contract, performance as requested constitutes the consideration. 4. \_\_\_\_\_

Adams

5. Because she deviated from the published rules, Adams did not accept the offer. 5. \_\_\_\_\_

Burns

6. By delivering conforming word lists to the Daily News by November 1, Burns/Cook accepted the offer. 6. \_\_\_\_\_
7. Identify issue as to whether the Daily News explained this offer or changed the terms of its offer when it said that \$2000 would be split among tying winners. 7. \_\_\_\_\_
8. Contract will be enforced according to reasonable interpretation of its terms. 8. \_\_\_\_\_
9. Where both parties' interpretations are reasonable, contract will be interpreted against the drafter. 9. \_\_\_\_\_
10. If the written offer is interpreted to mean that each winner is entitled to \$2000, then Burns had fully performed before Daily News clarified the terms to her and thus can enforce the original contract. 10. \_\_\_\_\_

Cook

11. Because the offer to Cook was not accepted until she was notified of the change, she accepted the changed term by compiling and delivering her entry. 11. \_\_\_\_\_

## QUESTION 5

On March 5, Vendor, who owned a piece of real estate called Nutacre, telephoned Byers saying: "Nutacre is for sale. I'll let you have it for \$100,000 in cash. Although I've talked to other prospective buyers, I assure you that I won't sell it to anyone else before April 1. I'll hold the offer open exclusively for you until that time. Closing will be on April 15."

On March 6, Byers, who was familiar with Nutacre, went to see Vendor. He told Vendor, "I need to look at some other property before I can decide. It will be the last week in March before I can get back to you. Here is \$50 to keep your offer open until April 1."

Vendor replied, during the same conversation, "Thank you for the \$50. I will definitely keep the offer open until April 1."

On March 21, Vendor sold Nutacre to Smith.

On March 22, Byers first learned of the sale to Smith when he read about it in the local paper.

On March 23, Byers hand delivered to Vendor a letter that read, "You gave me your word you would keep the offer open until April 1. I hereby accept your offer to sell Nutacre to me for \$100,000 in cash. I will give you the cash on April 15. [Signed] Byers."

On March 25, Vendor responded in a letter to Byers that he had already sold the land to Smith.

On April 15, Byers tendered \$100,000 in cash to Vendor, but Vendor refused to accept it.

### **QUESTION:**

Discuss whether Byers has an enforceable contract with Vendor for the sale of Nutacre. Be sure to discuss whether Vendor's promises to keep his offer open are enforceable.



## DISCUSSION FOR QUESTION 5

An offer is the 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. *Restatement (Second) Contracts* Section 24. Vendor's March 5 phone call was an offer. He identified the relevant specifics of the sale (what he intended to sell, for how much, and by when) and indicated a willingness to do so.

An offer is not terminated by revocation until the offeror has communicated the fact of revocation to the offeree. *Id.* at Section 42. It is possible, however, for the offer to be terminated by an indirect revocation which occurs 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." *Id.* at Section 43. Vendor's sale of the property to Smith on March 21 would be an inconsistent action sufficient to revoke his offer to Byers, if Byers had known about it then. But, since Byers did not know about the sale to Smith until March 22, the sale, in and of itself, did not operate as an indirect revocation. Nevertheless, the offer was terminated by indirect revocation on March 22 when Byers read about the sale to Smith in the newspaper. *Berryman v. Kmoch*, 221 Kan. 304, 559 P.2d 790 (1977).

The offer could not be revoked, however, if Vendor's assurance that it would be held open until April 1 created an option contract, or in other words, an enforceable contract of its own to keep open Byers' option to accept Vendor's March 5 offer. To be enforceable, the Restatement requires that an option contract be "in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time." *Restatement (Second) of Contracts* §87.

In this case, Byers' discussion with Vendor on March 6 was an offer to enter into an option contract; the \$50 was sufficient consideration; and Vendor's promise was an acceptance, sufficient to form an option contract.

However, a contract for the sale of land must be in writing in order to be enforced. This is true for a contract for the sale of land, as well as for an option contract regarding the sale of land. *Garbarino v. Union Savings & Loan Association*, 107 Colo. 140, 109 P.2d 638 (1941).

All states except Louisiana have adopted the land-sale provision of the English statute of frauds by statute or judicial decision. *Restatement (Second) of Contracts*, Statutory Note to Chapter 5. The English statute provides, "...no action shall be brought...upon any contract or sale of lands...unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith..." *An Act for the Prevention of Frauds and Perjuries*, 29 Charles II, Ch. 3 (1677). Colorado's version of the statute of frauds is slightly different.

The Colorado statute differs from the majority of state statutes of fraud, which generally require a memorandum signed "by the party to be charged." *See, e.g.*, Ariz.Rev.Stat. Ann. § 44-101 (West 1994); Cal. Civ.Code § 1624 (West 1985); Conn. Gen.Stat. § 52-550 (1995); see also 72 Am.Jur.2d Statute of Frauds § 364 (1974). Colorado's statute, however, requires that contracts for an interest in land be evidenced by a memorandum signed by the party by whom the sale is to be made, in other words, the vendor.

*Boyer v. Karakehian*, 915 P.2d 1295, 1298 (Colo. 1996). However, this difference is not significant in the context of this question, since under either version of the statute of frauds, the writing must be signed by Vendor (who is both the party to be charged and the vendor).

Here, there is no writing which satisfies the statute of frauds. Obviously, Vendor's phone call of March 5 was oral. While the parties' March 6 conversation was otherwise sufficient to constitute an option contract (since it included an offer, acceptance, and consideration), it also was oral. Byers' March 23 writing would satisfy the requirement that there be a memorandum in writing because it contains all the essential terms of the contract. *Restatement (Second) of Contracts* §13. The fact that the writing was made after the contract was entered into is not important. *Id.* at §133. Despite this, the memorandum does not satisfy the statute of frauds as it was not signed by Vendor. The agreement to sell Nutacre is unenforceable because there is no memorandum signed by the party to be charged. Without Vendor's signature, Byers' March 23 writing is not sufficient to satisfy the statute of frauds.



21551

**Essay 5 GradeSheet**

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1. Vendor's March 5 phone call was an offer to sell Nutacre to Byers. 1. \_\_\_\_\_
  
2. An offer is a manifestation to enter into a bargain, made to invite another to accept that invitation. 2. \_\_\_\_\_
  - 2a. An offer must contain all relevant terms such as: what is to be sold, for how much, and by when. 2a. \_\_\_\_\_
  
3. An offer is not revoked until the offeror has communicated its revocation to the offeree. In other words, revocation occurs when the offeror takes action inconsistent with the offer and the offeree acquires reliable information to that effect. 3. \_\_\_\_\_
  
4. Thus, the mere selling of Nutacre to Smith did not operate as revocation because Byers did not know about the sale. 4. \_\_\_\_\_
  
5. However, Byers reading about the sale on March 22 was a revocation which did terminate the offer. 5. \_\_\_\_\_
  
6. The offer could not be revoked if Vendor's assurance not to sell created an option contract. 6. \_\_\_\_\_
  
7. Recognition of statute of frauds issue. 7. \_\_\_\_\_
  
8. An option contract for the sale of real estate is created if it satisfies requirements which include:
  - 8a. that the promise to keep the offer open must be in writing and signed, and 8a. \_\_\_\_\_
  - 8b. that it must be supported by consideration. 8b. \_\_\_\_\_
  
9. The problem here is that the contract option was not signed by Vendor. 9. \_\_\_\_\_

### QUESTION 3

Homeowner decided have a sprinkler system installed in his yard. He looked in the phone book for someone to do the work. Homeowner found an advertisement by Landscaper that read:

Will install sprinkler systems. You buy the parts and we install them for you. Any residential lot under 1,000 square feet, less than \$1,000, guaranteed!

Homeowner thought Landscaper's price was good, so the next morning he faxed her the following note:

I am thinking about installing a sprinkler system in my yard. I haven't decided what to do yet. The yard is 500 square feet. How much would it cost to have you do the work? If I buy the parts myself, can you install them for \$500? If you can do it for \$500, let's do it within the next two weeks.

That same day, Landscaper sent Homeowner the following fax:

Thank you for your interest. We look forward to installing your sprinkler system. Unfortunately, \$500 will not cover our costs. We have a minimum charge of \$750. We'll plan on showing up in two weeks to do the work for \$750 unless I hear from you before then. Please have the parts ready for us.

Two weeks later, Landscaper showed up at Homeowner's house. She knocked on the door, but no one answered. She saw the sprinkler parts sitting by the garage and installed them. At the end of the day, just as Landscaper was getting in her truck to drive off, Homeowner drove up and asked Landscaper what she was doing. After Landscaper explained, Homeowner told her that he had hired someone else to do the work for \$500. Homeowner said he was not going to pay Landscaper a penny, much less the \$750 that Landscaper wanted.

### QUESTION:

Discuss potential claims that Landscaper may have and compensation to which she may be entitled.

### DISCUSSION FOR QUESTION 3

In order to form a contract, Landscaper must first prove that an offer was made. An offer is the 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; in order to be an offer, a statement must contain terms that are reasonably certain. *Restatement (Second) of Contracts*, §24 and §33.

Landscaper's advertisement was not an offer. It was not specific as to terms. Although it said no fee would be more than a certain amount for yards under a certain size, it did not say what the specific fee would be for a yard Homeowner's size.

Homeowner's fax is more questionable. It began as a general solicitation of interest, but by the end of the fax, it became specific enough that it could conceivably have been an offer. Even if Homeowner's fax had become an enforceable offer, though, it was rejected by Landscaper's fax. By saying he would do the work for more money than Homeowner's fax, Landscaper proposed a substantially different deal than that proposed by Homeowner. Therefore, Landscaper's fax became a counteroffer, acting as a rejection of any offer by Homeowner. *Id.* at §39.

For an offer to become a contract, it must be accepted. Homeowner did not respond to Landscaper's fax. Generally, silence is not sufficient to constitute acceptance. *Id.* at §69. However, Landscaper's counteroffer specifically said that Homeowner needed to do nothing to accept it. Landscaper might try to argue that under these particular circumstances, Homeowner's silence constituted acceptance, so that a contract was formed at \$750. But, absent some indication from Homeowner that he was willing to be bound by his silence, it is unlikely that his silence would be binding.

One contract argument Landscaper could make is that Homeowner's fax constituted an offer for the reasons already explained, and that his performance constituted acceptance. Assuming Homeowner's fax was an offer, Landscaper might argue that Homeowner promised to keep it open for two weeks. Landscaper could argue that Homeowner invited him to accept by performing any time in the next two weeks and that he did so accept and perform. Under this theory, Landscaper would have a claim for breach of contract, and his remedy would be the \$500 amount described in Homeowner's offer.

But, even if Homeowner's fax were an offer (granting Landscaper a two week window during which to perform), it was not supported by consideration. For a promise to be enforceable, it must be supported by consideration. *Id.* at §42, comment a. Therefore, Homeowner's statement -- even if it were considered a promise to keep an offer open for two weeks -- was not enforceable.

Because Landscaper did the work, though, he can argue that he is entitled to some recovery on a quasi-contract theory (also called, "quantum meruit," "unjust enrichment," or even "quantum valebant"). *Id.* at §4, comment b. Under this theory, Landscaper cannot recover the full contract price of \$750, but he may be able to recover the reasonable value of his services.



21382

**Essay 3 GradeSheet**

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and write numbers clearly

1. In order to be an offer, a statement must contain terms that are reasonably certain. 1. \_\_\_\_\_
2. Generally, advertisements are not considered offers. 2. \_\_\_\_\_
3. Homeowner's fax probably was an offer because it was specific as to all relevant terms. 3. \_\_\_\_\_
4. Homeowner's offer was rejected by Landscaper. 4. \_\_\_\_\_
  - 4a. Landscaper's reply fax was a counteroffer; it had a different price. 4a. \_\_\_\_\_
5. Homeowner did not accept Landscaper's counteroffer, silence usually is not construed as acceptance. 5. \_\_\_\_\_
6. If Landscaper's fax was a counteroffer, however, the amount of the claim would be \$750. 6. \_\_\_\_\_
7. Landscaper may claim that Homeowner's fax invited acceptance by performance within the two week period. 7. \_\_\_\_\_
  - 7a. If so, the amount of the claim would be \$500; the amount offered by Homeowner. 7a. \_\_\_\_\_
8. If Landscaper cannot prove either contract claim, she still may argue that she is entitled to some recovery on a quasi-contract theory (also called "quantum meruit," "unjust enrichment," or even "quantum valebant"). 8. \_\_\_\_\_
  - 8a. Under any of these, Landscaper's remedy is the reasonable value of his services. 8a. \_\_\_\_\_

### QUESTION 8

Father's adult child, Son, was seriously injured in a car accident. Doctor, a licensed physician, who happened by the scene of the accident, found Son unconscious, treated him at the scene, and took him to his hospital. A few days later Father came to the hospital and told Doctor, "If you continue treating Son, I'll pay all of your fees, those for the services you have already rendered and those you will deliver to Son in the future." Doctor thanked Father and continued to treat Son until he died two days later, never having regained consciousness.

The reasonable value of Doctor's services before his conversation with Father was \$3,000; the reasonable value of the services after their conversation and before Son's death was \$2,000. Father has refused to pay for any of Doctor's services.

#### QUESTION:

Discuss:

1. any theories that Doctor may have to recover for his services against Son's estate and/or Father; and
2. the defenses which the Son's estate and/or Father may assert against Doctor's claim.

## DISCUSSION FOR QUESTION 8

### Action against Son's estate.

If Doctor had treated Son at Son's request, there would have been an implied-in-fact contract between them; Son's request being an implied promise on his part to pay for Doctor's services. In this case, however, Son was unconscious throughout his treatment and could not have made a promise even by implication. There cannot be a contract without a promise. Restatement (Second) of Contracts §1; Farnsworth, Contracts, 2d Ed., 1990) §1.1, p. 3. Since Son made no promise, either express or implied, to pay Doctor, neither Son nor his estate has a contractual obligation to pay Doctor.

Early in the law of contracts, however, the courts developed an action whereby a plaintiff who had conferred a benefit on a defendant, without the defendant's request, could recover for the enrichment he had conferred upon the defendant. To reach this result, the courts imposed a promise on him to pay the reasonable value of the services that had been rendered. This was called quasi contract; it was not a contract because there was no promise to pay, but the plaintiff was allowed to use the contract enforcement procedure (the writ of general assumpsit) to recover the amount the defendant had been unjustly enriched. Restatement (Second) of Contracts §4, comment b; Farnsworth, Contracts, 2d Ed. (1990), §2.20.

Because Doctor was not acting gratuitously or officiously in treating Son, he meets the requirements for a quasi contract action and so is entitled to recover the reasonable value of his services from Son's estate under a quasi-contract theory. Cotman v. Wisdom, 83 Ark. 601, 104 S.W. 164 (1907); Farnsworth, Contracts, 2d Ed.(1990), §2.20, p. 105.

### Action against Father.

A promise is not enforceable unless it is supported by consideration. Farnsworth, Contracts, 2d Ed. (1990), §2.2, p.43. Ireland v. Jacobs, 163 P.2d 203 (Colo. 1945). The Restatement defines consideration as an act, forbearance, or return promise bargained for and given in exchange for the promise. Restatement (Second) of Contracts §71. Father promised to pay Doctor both for the services rendered before he made his promise and for those rendered after his promise. In exchange for his promise he sought continued treatment of Son. Past services alone, however, cannot serve as consideration because they are not bargained for and given in exchange for the promise. Weston v. Livezey, 100 P. 404 (Colo. 1909). Mills v. Wyman, 20 Mass. (3 Pick.) 207 (1825). Had Father promised to pay only for past services, there would not be adequate consideration. But, because Father also promised to pay in exchange for future services, there was consideration for both the prior and future services. The past services here do not fall under the unjust enrichment exception to the bargained-for exchange rule because they were rendered to Son and not to Father. Restatement (Second) of Contracts §86.

The Restatement says that consideration is bargained for if it is "sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise." Id. at §71(2). It is clear, therefore, that Doctor's future services were bargained for in exchange for Father's promise to pay for all. The courts are not concerned about the adequacy of consideration. Casserleigh v. Wood, 119 F 308 (Colo. App. 1902). Embola v. Tuppela, 127 Wash. 285, 220 P. 789 (1923). This is true even though it is clear that the transaction is a mixture of gift and bargain. Restatement (Second) of Contracts §71, comment c. The fact that the services were rendered to Son rather than to Father is irrelevant; the consideration may move from the promisee to a third person. Spelts v. Anderson, 185 P. 468 (Colo. 1919). Restatement (Second) of Contracts §71, comment e. Neither is it necessary that the consideration be a benefit to Father



nor that Father is promising more than he is getting in return for his bargain. Restatement (Second) of Contracts §79(a), comment b and c. Thus, a defense of lack of consideration would most likely fail.

In this case, Father may try to argue that he is not liable for the prior and future medical services to the son because his promise was not in writing and, therefore, subject to the Statute of Frauds. The second clause of section 4 of the original English statute of frauds requires that a "special promise to answer for the debt, default, or miscarriage of another" must be in writing if it is to be enforced. Stat. 29 Car. 2, c.3, §4 (1677). This section has become part of the statutory law of almost every state and is commonly referred to as the "suretyship provision." Farnsworth, Contracts, §6.2 (1990). C.R.S. § 38-10-112. Father may claim that his promise to pay is merely an agreement to pay Son's medical debts and, therefore, must be in writing. Although Father is promising to pay for his son's treatment, it is likely that the court will interpret Father's promise to Doctor as "original" rather than "collateral," i.e., he is not promising to pay as a surety, but intends to assume the obligation as his own. It is not a promise "to answer for the debt of another," and, therefore, does not fall within the Statute of Frauds. City of Highland Park v. Grant-MacKenzie Company, 306 Mich. 430, 110 N.W.2d 270 (1962). Ideal Co. Inc. v. Funnin, 746 P.2d 69 (Colo. App. 1987). Farnsworth, Contracts, §6.3 (1990). Neither does his promise fall within any other section of the statute, and is not required to be in writing to be enforceable. Thus, a defense based on the statute of frauds also would fail.

Doctor would probably be entitled to recover \$5,000 in a breach-of-contract action against Father. There was adequate consideration when the Father agreed to pay for past and future services in exchange for future services. In addition, the promise was an original obligation, not an agreement to pay his son's debt.



21686

### Essay 8 GradeSheet

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1. There can be no contract without a promise (an offer and acceptance). 1. \_\_\_\_\_
2. Son made no promise to pay Doctor for his services. 2. \_\_\_\_\_
3. Doctor may be able to obtain payment under theory of quasi contract to prevent unjust enrichment. 3. \_\_\_\_\_
4. A promise is not enforceable unless it is supported by consideration. 4. \_\_\_\_\_
5. Consideration is defined as an act, forbearance, or return promise bargained for and given in exchange for the promise. 5. \_\_\_\_\_
6. The promise to pay for past services cannot alone serve as consideration, because the services were not bargained for and given in exchange for the promise. 6. \_\_\_\_\_
7. The promise to pay for Doctor's future services is supported by consideration. 7. \_\_\_\_\_
  - 7a. Father need not have benefitted from Doctor's services; the consideration may move from the promisee to a third person. 7a. \_\_\_\_\_
  - 7b. Courts are not concerned about the adequacy of the consideration. 7b. \_\_\_\_\_
8. A promise to answer for the debt of another is within the Statute of Frauds and must be in writing. 8. \_\_\_\_\_
9. Here, Father's promise is an original promise, not a promise to answer for the son's debt, therefore it does not fall within the Statute of Frauds. 9. \_\_\_\_\_
10. The Doctor may assert that the Father is estopped from denying the existence of a contract because he reasonably relied upon the Father's statements. 10. \_\_\_\_\_

### QUESTION 3

On May 1, Grandpa James wrote to Jesse, his unemployed adult granddaughter: "If you will come to Pleasantville and take care of me and my ranch, Outlaw's Roost, for the rest of my life, I will leave Outlaw's Roost to you in my will." (signed) Grandpa James.

On May 3, Jesse moved to Pleasantville and began to take care of Grandpa and Outlaw's Roost.

On May 10, Jesse met with Clyde and offered, in writing, to sell Outlaw's Roost to him for \$100,000 when she received title to the property.

On May 21, Grandpa told Jesse he no longer wanted her to take care of him. When Jesse protested, Grandpa ordered Jesse, at gunpoint, to leave Outlaw's Roost immediately.

On May 22, Grandpa died suddenly.

On May 23, Clyde wrote to Jesse accepting her offer to sell Outlaw's Roost for \$100,000. The letter, although properly mailed, was never received by Jesse.

In his will, Grandpa left his entire estate to the Wild Wild West Society.

#### QUESTION:

Discuss the rights of the parties, their legal relationships, and what remedies might be available to each. Do not discuss the validity of Grandpa's will.

### 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 her asset to the bargain is invited and will conclude it. *Restatement (Second) Contracts, Section 24*. In the present case a reasonable person in Jesse's position would understand that Grandpa, in seeking Jesse's care, offered Outlaw's Roost in exchange for that service. Where an offer invites an offeree to accept by performance only, an option contract is created when the offeree begins the invited performance. *Restatement (Second) Contracts, Section 45* In this case when Jesse immediately moved to Pleasantville and began to take care of Grandpa and his property, Grandpa's offer to leave Outlaw's Roost to Jesse became irrevocable.

Normally, courts will not inquire into the adequacy of the consideration exchanged. *Calamari and Perillo, Section 4-4, pp. 192-195*. The facts of this question are similar to Tuckwiler v. Tuckwiler, 413 S.W.2d 274 (1967) where a woman agreed to take care of someone who had contracted Parkinson's Disease in exchange for leaving her a farm worth \$30,000. The person died about a month after entering into the agreement and left the farm to Dartmouth College. The court held that the exchange should be evaluated at the time it was made, and at that time the decedent could have lived for many years. In the present case, therefore, Grandpa's promise should be enforced since the exchange was adequate at the time it was made.

Every contract imposes upon each party a duty of good faith and fair dealing, *Restatement (Second) of Contracts, Section 205*. Included in this duty is an obligation to do nothing to wrongfully hinder or prevent the other party from performing her obligation under the contract. Baron v. Cain, 4 S.E.2d 618 (1939). In the present case when Grandpa forced Jesse to leave Outlaw's Roost at gun point, Grandpa committed a material breach of contract and the constructive condition of Jesse's further performance was excused. *Calamari & Perillo, Section 11-28, p. 486*.

Specific performance will be decreed when one's remedy at law is inadequate. *Restatement (Second) of Contracts, Sections 359, 360*. Contracts which call for the conveyance of land have traditionally been specifically enforced because a tract of land has been regarded as unique. In the present case specific performance would be the appropriate remedy because Outlaw's Roost would be considered unique. Specific performance would also be necessary because Jesse has an enforceable contract with Clyde and needs legal title to Outlaw's Roost in order to fulfill her obligations under this contract.

An offeree's power of acceptance is terminated when the offeree or offeror dies. *Restatement (Second) of Contracts, Section 48*. In the present case, however, neither the offeror nor the offeree in the Jesse-Clyde transaction has died. Therefore, Grandpa's death has no effect on Clyde's power of acceptance.

Unless an offer provides otherwise, an acceptance made in a manner and by a means invited by an offer is operative as soon it leaves the offeree's possession, *Restatement (Second) of Contracts, Section 63*. In the present case a contract was formed between Jesse and Clyde for the sale of Outlaw's Roost as soon as Clyde acceptance was properly dispatched. The fact that it never arrived has no effect on the right of the parties.

Interference by wrongful acquisition of property at the death of another may be remedied by the imposition of a constructive trust. *Dobbs, Law of Remedies*, p. 615 (1993). In this case, if the Wild Wild West Society should gain title to Outlaw's Roost then Jesse or Clyde should be able to impose a constructive trust on the property for her or his benefit, since the remedy at law would be inadequate.



21382

**Essay 3 GradeSheet**

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1. A contract is formed when there is an offer, an acceptance, and adequate consideration. 1. \_\_\_\_\_
2. Grandpa's letter to Jesse was an offer to give her Outlaw's Roost in exchange for her taking care of Grandpa and the property. 2. \_\_\_\_\_
3. Jesse accepted the offer by moving to Pleasantview and by beginning to take care of him and Outlaw's Roost. 3. \_\_\_\_\_
4. Once Jesse began performance, Grandpa's offer became irrevocable. 4. \_\_\_\_\_
5. Jesse's taking care of Grandpa and Outlaw's Roost, even for a relatively short period of time, probably was adequate consideration to support Grandpa's promise to leave Outlaw's Roost to her. 5. \_\_\_\_\_
6. Grandpa may have breached his obligation of cooperation (good faith and fair dealing) when he prevented Jesse from taking care of him and his property. 6. \_\_\_\_\_
7. Jesse or Clyde may be entitled to specific performance. 7. \_\_\_\_\_
8. Clyde's power of acceptance was not terminated by Grandpa's death because only the death of the offeror or offeree will result in such termination. 8. \_\_\_\_\_
9. Clyde's acceptance was effective despite the fact that Jesse never received it (mail box rule). 9. \_\_\_\_\_
10. Jesse or Clyde may be able to impose a constructive trust on Outlaw's Roost against the Wild Wild West Society. 10. \_\_\_\_\_

## QUESTION 8

Pat agreed to purchase residential property from Dan. Dan drew up a contract of sale, whose terms were legally sufficient in all respects, and mailed it to Pat. Pat signed the contract and mailed it back to Dan along with the agreed-upon down payment. Dan received the contract, but never signed it. He did, however, deposit the down payment in his checking account.

Despite that the contract was never signed by Dan, he allowed Pat to move into the house. Dan then received a better offer for the property, told Pat that he would not transfer the property to her, and told her she must move out.

### QUESTION:

Discuss the issues raised by Dan's failure to honor the contract with Pat.

## DISCUSSION FOR QUESTION 8

Because the contract of sale is a contract for conveying real property, the Statute of Frauds applies. Roger Cunningham, William Stoebeck & Dale Whitman, The Law of Property § 10.1 at 658-60 (West 2d ed. 1993). The Statute of Frauds will not permit a contract to be enforceable unless it is signed by the party against whom enforcement is sought (the party to be charged). Id. at § 10.1 at 659. Here, although Pat signed the contract, Dan did not. Since Pat seeks to enforce the contract against Dan and Dan failed to sign it, the contract would not be enforceable.

Here, however, the doctrine of part performance should make the contract enforceable. When a contract fails to meet the requirements of the Statute of Frauds, but the plaintiff has partially performed in a substantial way in reliance on the contract, the contract may still be enforceable. Id. at § 10.2 at 662-68.

Making a down payment is rarely considered sufficient part performance to invoke the doctrine. However, here, Pat not only made the down payment, but she also took possession of the property. These two actions together usually are considered partial performance substantial enough to make the contract enforceable. Id. at § 10.2 at 663-64.

Although part performance permits the remedy of specific performance, it does not permit the remedy of damages. Id. at § 10.2 at 664-65. Therefore, Pat can seek specific performance and require Dan to transfer the property, but she cannot sue Dan for damages.

As an alternative remedy to specific performance, Pat can seek restitution and reclaim the down payment. Id. at § 10.7 at 694. If Dan resists returning the down payment, Pat can seek a vendee's lien on Dan's property, giving Pat an interest in the property equal to the amount of the down payment. Id. at § 10.8 at 698-70.





21686

### Essay 8 GradeSheet

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1. The Statute of Frauds is applicable to this contract *or* contracts for the conveyance of interests in real property must be in writing. 1. \_\_\_\_\_
2. The contract must be signed by Dan, the party against whom enforcement is sought. 2. \_\_\_\_\_
3. Identify partial performance as a way to make contract enforceable. 3. \_\_\_\_\_
4. To invoke partial performance, the performance must be substantial. 4. \_\_\_\_\_
5. Pat's down payment, coupled with possession, would probably be enough to trigger enforceability. 5. \_\_\_\_\_
6. Part performance permits the remedy of specific performance. 6. \_\_\_\_\_
7. Part performance does not permit the remedy of damages. 7. \_\_\_\_\_
8. Alternatively, Pat can seek restitution and reclaim the down payment. 8. \_\_\_\_\_
9. Pat can seek a vendee's lien on the property to help recover the down payment. 9. \_\_\_\_\_

## QUESTION 8

During negotiations between Alice Author and Pat Publisher, Publisher stated to Author, "Because your last book was so successful, if you'll forgo your normal advance and write the Great American Novel, I promise to pay all your expenses and guarantee that you will receive a minimum of \$500,000 in royalties." Author replied, "Sounds great!" At Publisher's request, Author then signed Publisher's standard form contract without reading it. The contract reads:

Author agrees to write "Great American Novel" for Publisher. Publisher shall have the right to review Novel and determine, in its sole discretion, whether it is satisfactory for publication. If Novel is published, Publisher shall pay Author fifty cents (\$0.50) per book published. Publisher shall have the exclusive right to publish the novel, and complete discretion as to the price and number of books published.

(s) Author

For months, Author lived off her savings and devoted her full time to writing the novel. She also declined several offers to write screenplays during this time. When the novel was complete, Author submitted her book to Publisher. On the same day he received it, Publisher called Author and told her the novel was unacceptable. When Author protested the decision, Publisher replied that the contract clearly states that he didn't have to publish or print any books if he didn't want to.

### QUESTION:

Discuss Author's possible theories of recovery for her living expenses and \$500,000 in royalties, as well as Publisher's defenses to Author's claims.

## DISCUSSION FOR QUESTION 8

### Author's Arguments for Enforcement of Oral Contract

Contracts can either be express, implied or quasi. Express contracts can either be written or oral, and in order to be enforceable, there must have been a valid offer and acceptance and adequate consideration. Here, Author can argue that an express contract existed between herself and Publisher based upon their oral negotiations. To constitute adequate consideration, a performance or return performance must be bargained for and must constitute a benefit to the promisor or a detriment to the promisee. Restatement of Contracts (Second) §70. Here, Publisher offered to pay Author's living expenses and guaranteed her a minimum royalty of \$500,000 if she agreed to forgo her normal advance and write the "Great American Novel." Author orally indicated her agreement and performed by forgoing her normal advance and writing the novel.

Should Author's express contract argument fail, she may also argue that she can recover in quasi contract (promissory estoppel.) A promise which the promisor should reasonably expect to induce action on the part of the promisee, and which does induce such action, is binding if injustice can only be avoided by enforcement of the promise. *Id.* at §90. In this case, Author not only gave up her normal advance, but also paid her own living expenses for a year and passed up several opportunities during that year to earn income from writing screenplays. Evidence of agreements and negotiations made prior to the adoption of a written contract are admissible to establish grounds for granting a remedy based on promissory estoppel. *Id.* at §214(e).

### Publisher's Defenses

Publisher may argue that the oral agreement between himself and Author is unenforceable given Author's subsequent execution of the written form contract containing different terms. The parol evidence rule bars evidence of prior agreements or promises where the parties have expressed their agreement in writing with the intent that the written agreement embody the full and final expression of their bargain.

Because the promises by Publisher to pay living expenses and guarantee a minimum royalty were not included in the written agreement, the promises may be barred by the parol evidence rule. However, it is unclear whether it was the parties' intent to embody all the terms of their agreement in the Form Contract. Under the parol evidence rule, if the parties intended the writing to be a final statement of the terms contained in the writing, but not all of the terms of their agreement, it is considered a partial integration. *See Farnsworth*, (3<sup>rd</sup> Ed.) p. 431. On the other hand, if the parties intended the writing to be a completed and final statement of all of the terms of their agreement, it is considered a total integration. *Id.* If the agreement is integrated, evidence of a prior or contemporaneous agreement is not admissible to contradict the terms of the writing. Restatement of Contracts (Second) §215. If the agreement is only partially integrated, evidence of a prior agreement is admissible to supplement the writing but not to contradict it. *Id.* at §215, 216.

Generally the question of whether the writing is integrated or not is determined as question of law by the trial judge. *Calamari & Perillo* (4<sup>th</sup> Ed.) p. 126. Historically, courts applied the so-called "four-corners" rule. Under this view if the instrument appeared complete on its face, the judge determined the intention of the parties by looking only at the writing, and would not listen to evidence of any oral statement by the parties. Modernly, however, agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish whether the writing is or is not an integrated agreement. Restatement of Contracts (Second) §214(a),

In the present case, it appears that the agreement was only a partial integration. The writing does not contain a merger clause, i.e., a clause that expressly states that it is a complete and final statement of all of the terms of the agreement. The guarantee of \$500,000 plus reimbursement should be viewed as an additional term, since the price of 50 cents per book is quite low. The oral terms were quite important, but since Author signed a standard form contract, it likely that the form had no space for extra terms, and under the circumstance they might naturally be omitted. *See Res. 2d §216(2)*.

### **Publisher's Arguments for Enforcement of Form Contract**

Publisher may argue that the Form Contract is a valid express written contract signed by Author and supported by adequate consideration. Publisher may also argue that the Form Contract was intended to embody the parties' full and final agreement because it was entered into subsequent to the parties' oral negotiations. Publisher may also argue that the parol evidence rule bars admission of evidence of prior oral agreements or promises where the parties' intended to embody their entire agreement in the Form Contract.

### **Author's Defenses**

Author may argue that the Form Contract is unenforceable due to failure or lack of adequate consideration. Words of promise which by their terms make performance entirely optional with the "promisor" are illusory and do not constitute consideration. *Id.* at §77, comment a. In this case, Author might claim that the agreement is illusory because Publisher is not committed to anything. He can either accept or not accept the novel if he feels like it. He can price the book and print as many as he sees fit. Historically, Courts have accepted this reasoning. *See Farnsworth* (3<sup>rd</sup> Ed.), p. 76; *Calamari & Perillo*, (4<sup>th</sup> Ed.), p.203. The modern decisional tendency is against lending the aid of courts to strike down bargains freely entered into where it is clear that the parties clearly intended that the agreement be enforceable. *Farnsworth* (3<sup>rd</sup> Ed.), p. 77; *Calamari & Perillo* (4<sup>th</sup> Ed.), p 203. For example, where, in an agreement, an officer of a corporation promised to devote as much time "as he in his sole judgment shall deem necessary", the Court read his promise as requiring him to act in good faith. *Grean & Co. v. Green*, 82 N.Y.S.2d 787 (1948). Thus, today every contract imposes upon each party a duty of good faith and fair dealing. Restatement of Contracts (Second) § 205. Publisher's dissatisfaction, however, must be with the circumstance and not with the bargain, and the mere statement of the obligor that he is not satisfied is not conclusive on the question of his honest satisfaction. *Id.* at §228 comment a.

Author may also argue that Publisher has not met his obligation of good faith and fair dealing. In this case the agreement requires that Publisher must be subjectively satisfied with the novel. *Id.* at §228. The agreement leaves no doubt that it is only honest satisfaction that is meant and no more. If the condition does not occur and if the obligor is honestly, even though unreasonably dissatisfied, the duty to perform does not arise. Here, however, Publisher expressed his dissatisfaction only a few hours after Author delivered the book to him. It would seem that it would be physically impossible for anyone to read and review a 1000 page book in this short period of time. It is therefore arguable that Publisher was not acting in good faith when he expressed his dissatisfaction about the quality of the work. Similarly, it appears that Publisher's statement about his responsibilities to price and distribute the book were a further expression of his lack of good faith, since they were made in response to Authors protest rather than as a result of any actual circumstance related to the pricing or printing of the book.



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### Essay 8 GradeSheet

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1. A contract may either be express, implied or quasi. 1. \_\_\_\_\_
2. In order for a contract to be enforceable, there must be an offer and acceptance and adequate consideration. 2. \_\_\_\_\_
3. Author may argue that the parties had a valid oral contract. 3. \_\_\_\_\_
4. Author may argue that even if the written contract is enforceable, the parties did not intend it to be a full and final expression of their agreement and it is therefore not a complete integration of the terms to which the parties agreed. 4. \_\_\_\_\_
5. Author may argue that she also can recover under a theory of promissory estoppel. 5. \_\_\_\_\_
6. Elements of promissory estoppel: Reasonable expectation author would act on promise; and she in fact relied/acted on promise. 6. \_\_\_\_\_
7. Identification of concept of parol evidence rule. 7. \_\_\_\_\_
8. Parol evidence rule does not bar admission of evidence of prior agreements or promises when theory of recovery is promissory estoppel. 8. \_\_\_\_\_
9. Publisher may argue that the written form contract is enforceable. 9. \_\_\_\_\_
10. Author may argue that the written form contract is unenforceable due to lack of adequate consideration because Publisher's obligations thereunder are entirely optional and are therefore illusory. 10. \_\_\_\_\_
11. Author may argue that in rejecting the novel, Publisher has duty of good faith and fair dealing. 11. \_\_\_\_\_

#### QUESTION 4

Widow acquired title to Greenacre through her late husband's will. When Widow applied to Bank for a loan to be secured by a mortgage on Greenacre, Bank replied, "Because it is possible that your husband's child by his first marriage, Son, has an interest in Greenacre we will give you the loan only if you obtain Son's quitclaim deed to the property before May 1st." Widow then wrote to Son telling him what Bank had said and added, "Although I know that you have no interest in Greenacre, I will pay you \$800 if you agree to deliver to me a quitclaim deed to the property before May 1st." Widow had intended to offer Son \$500, but mistakenly had typed \$800 in the letter. Son had no reason to know that Widow intended the amount to be \$500.

Son, who knew that he had no interest in Greenacre, immediately replied, "I want to talk it over with my lawyer before I accept. If you don't hear from me before April 25th, however, you may assume that I have agreed to your offer." Widow replied, "O.K."

On April 26th, Bank told Widow that the quitclaim deed would not be necessary, and Widow immediately wrote to Son revoking her offer. Son received this letter on April 28. There were no other communications between Widow and Son until April 30th on which date Son tendered to Widow a quitclaim deed to Greenacre and demanded payment of \$800.

#### QUESTION:

Discuss whether Widow is obligated to pay Son the \$800 for the quitclaim deed.

## DISCUSSION FOR QUESTION 4

A contract requires that there be a bargain and exchange, Restatement (Second) of Contracts, §17, and a manifestation of mutual assent to the exchange, *Id.* §18. The manifestation of assent usually takes the form of an offer, the manifestation of assent by the offeror, and the acceptance, the manifestation of assent by the offeree. *Id.* §22. Widow's first letter to Son is an offer if it is a manifestation of Widow's "willingness to enter into a bargain" and if it would justify Son "in understanding that his assent to that bargain is invited and will conclude it." *Id.* §24. With the possible exception of the price term, the letter contains all the essential terms - parties, subject matter, and time of performance. It is clear that Widow wants the quitclaim deed and is willing to pay something for it. She told Son why she needed the deed and, therefore, a reasonably prudent person in Son's position would be led to believe that his assent would conclude the bargain. Widow's letter is, therefore, an offer.

Whether there has been mutual assent to the bargain will be determined objectively. Farnsworth, *Contracts*, 2d. Ed., §3.9, p. 134. Objectively, Son was led to believe that Widow promised to pay \$800 for the quitclaim deed and it is irrelevant that Widow actually thought she offered \$500. Objectively, she agreed to pay \$800. Where only one of the parties is mistaken about the facts relating to the contract, the mistake will not prevent formation of a contract. Thus, where the parties have attached materially different meanings to a contract term, and one party has no reason to know of the mistake, and the other party has reason to know of the meaning attached by the first party, the meaning attached by the first party is operative. Restatement (Second) of Contracts, §20(2)(b). Because Widow signed and mailed the letter containing the price of \$800 to Son, she had reason to know that Son would attach the meaning of \$800 to the price term. If there is a contract, therefore, the price term is \$800.

Widow's offer invited or required Son to manifest his assent (his acceptance) by acting, forbearing, or promising. Restatement (Second) of Contracts, §30(1). If nothing is indicated to the contrary, the offer will be interpreted as inviting acceptance in any manner and by any medium reasonable under the circumstances. *Id.* §30(2). The language used by Widow could lead Son to believe that he could manifest his assent either by delivering the deed or by promising to deliver the deed before May 1. Clearly his letter in reply to the offer is neither a delivery of the deed nor a promise to deliver the deed before May 1, and, therefore is not an acceptance of the offer. Son's letter did, however, have the effect of his promising to deliver the deed before May 1, if he had not rejected Widow's offer before then. The next question then is whether Son's silence between then and April 25 could operate as an acceptance of the offer.

Ordinarily an offeree cannot accept by remaining silent. *Id.* §69. Under certain circumstances, however, a promise can be inferred from a party's remaining silent. Here Widow and Son agreed that unless Son told Widow to the contrary, at the end of the day on April 25, Son would be promising to deliver the deed before May 1. This silence, then, would constitute an acceptance. *Id.* §69(1)(c), comment d.

## DISCUSSION FOR QUESTION 4

Page Two

Since the manifestation of assent by the offeror and offeree must concur, the next question is whether the offer was still open for acceptance on April 25 so that Son's promise made by his continued silence throughout that day would constitute an acceptance. An offer remains open for the period of time stated in the offer. *Id.* §41. Here the offer stated that it would remain open until May 1. Of course Widow could have revoked her offer before that time, but a revocation is not effective until it has been communicated to the offeree. *Id.* §42. Widow's attempted revocation did not reach Son until April 28, which was after the effective time of Son's acceptance, April 25. (If the acceptance had been the tendering of the deed rather than the promise to deliver the deed, the acceptance would not have occurred until April 28 and the revocation would have been effective.) The party's manifestations of assent had concurred and, therefore, there is a contract if there is consideration to support Widow's promise to pay \$800.

There was, therefore, a contract formed between Widow and Son for the payment of \$800 for the quitclaim deed.



**ESSAY Q4**

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ISSUE

YES NO

- |   |     |                       |                       |
|---|-----|-----------------------|-----------------------|
| 1. A contract requires a bargain and exchange (offer), and a manifestation of mutual assent (acceptance).   | 1.  | <input type="radio"/> | <input type="radio"/> |
| 2. An offer must contain all essential elements: parties, subject matter, time of performance, and price.   | 2.  | <input type="radio"/> | <input type="radio"/> |
| 3. A mistake of fact by only one party relating to the agreement will not necessarily prevent formation of a contract.  | 3.  | <input type="radio"/> | <input type="radio"/> |
| 4. If a non-mistaken party (Son) has no reason to know of the mistake by the other party (Widow), Widow cannot take advantage of the mistake to void the agreement. | 4.  | <input type="radio"/> | <input type="radio"/> |
| 5. Son's letter was not an acceptance because he did not manifest his acceptance in the manner set forth in the offer.  | 5.  | <input type="radio"/> | <input type="radio"/> |
| 6. Ordinarily an offer cannot be accepted by silence.   | 6.  | <input type="radio"/> | <input type="radio"/> |
| 7. Because Widow agreed in her second letter, Son's silence through April 25th operated as an acceptance.   | 7.  | <input type="radio"/> | <input type="radio"/> |
| 8. A revocation is not effective until it has been communicated to and received by the offeree.   | 8.  | <input type="radio"/> | <input type="radio"/> |
| 9. Widow's attempted revocation was not effective because it reached Son on April 28th, after the effective date of his acceptance (April 25th).                    | 9.  | <input type="radio"/> | <input type="radio"/> |
| 10. Therefore, the contract price is \$800.   | 10. | <input type="radio"/> | <input type="radio"/> |
| 11. The Widow is obligated to pay the Son.  | 11. | <input type="radio"/> | <input type="radio"/> |

### QUESTION 3

Paula Hanson Dean, a well respected scientist who had just won the Nobel Prize in chemistry, became engaged in negotiations with Pfizer Kline, the president of Giant Drug Company. On May 1, Dean sent Kline a letter stating:

I would agree to work as vice-president in charge of  
research for a period of four years at a salary of \$500,000  
per year. /s/ Paula H. Dean

On May 3, Kline received Dean's letter and called Dean stating: "Your salary request is too high. Will you reduce it?" Dean replied: "You cheapskate! I am far too accomplished to work for peanuts. That's as low as I can go."

Outraged by Dean's flip answer on the phone, Kline immediately sent Dean a letter (first letter) which read:

Resented your statement. No longer interested in hiring  
you. /s/ Pfizer Kline

Later that same day (May 3), Kline decided to accede to Dean's demands and sent a properly addressed, stamped express mail letter (second letter) to Dean which read:

Accept your terms, although I wish you would reconsider  
a lower salary. /s/ Pfizer Kline

On May 4, Dean's personal secretary received Kline's express mail letter (second letter) and placed it on Dean's desk. Kline's first letter had not yet arrived. That same day, before reading her mail, Dean entered into a contract to become Research Director for HealthCo Drugs, a competitor of Giant. She immediately called Kline and stated: "I just agreed to work for HealthCo Drugs." Kline replied: "You can't. I already accepted your offer."

### **QUESTION:**

Discuss whether Giant has a valid contract with Dean and, if so, whether Giant can force Dean to work for them.

### 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 assent to that bargain is invited and will conclude it. *See Restatement (Second) Contracts § 24*. In this case, Dean's letter, made after negotiations, is an offer, because under the objective test of intent, a reasonable person in Kline's position would understand that Dean was in fact seeking Kline's assent to her invitation. Furthermore, the language is sufficiently certain or definite in its essential terms.

A counter-offer is an offer made by an offeree to the offeror, relating to the same matter as the original offer and proposing a substituted bargain differing from the original offer. *See, id.* at § 39. In this case, Kline's call was not a counter-offer, but merely an inquiry regarding the possibility of different terms. This type of response is generally considered too tentative to be a counter-offer.

A rejection is a manifestation of intention not to accept an offer. *See id.* at § 38. In this case, Kline's first letter was a rejection since under the reasonable person test, Dean would understand that Kline was no longer interested in going forward with the employment agreement.

An acceptance is a manifestation of assent to the terms of an offer made by an offeree in the manner required or invited by the offer. *See id.* at § 50. Here, Kline's second letter of May 3 was an acceptance because a reasonable person in Dean's position would understand that Kline was assenting to the offer, and mail was a reasonable means of acceptance.

A rejection sent by mail is not effective (and does not terminate the power of acceptance) until received by the offeror. Thus, a letter of acceptance sent after mailed rejection, but received by the offeror before the rejection, is effective. *See id.* at § 40. In other words it's a race between the two pieces of correspondence. Whichever is received first is effective.

A written revocation, rejection, or acceptance is received when the writing comes into the possession of the person addressed, or of some person authorized to receive it for such person. *See id.* at § 68. When Dean's personal secretary, a person authorized to receive her mail, accepted Kline's express mail acceptance letter from the postal carrier, it was received even though Dean did not know of this fact. Because such receipt occurred before Dean received Kline's rejection letter, a contract was formed between Dean and Giant, notwithstanding the fact that Dean was unaware of this and later entered into the contract with HealthCo.

Where any promise in a contract cannot be fully performed within a year from the time the contract is made, all promises in the contract are within the Statute of Frauds until one party to the contract completes his or her performance. *See id.* at § 130. Here, the four-year employment contract between Giant and Dean cannot be fully performed within one year because of the four-year term. Thus, it falls within the Statute of Frauds.

A contract within the Statute of Frauds is enforceable if it is evidenced by any writing, signed by or on behalf of the party to be charged, which (a) reasonably identifies the subject

### DISCUSSION FOR QUESTION 3

Page Two

matter of the contract, (b) is sufficient to indicate that a contract with respect thereto has been made between the parties or offered by the signer to the other party, and (c) states with reasonable certainty the essential terms of the unperformed promises in the contract. *See id.* at § 131.

In the present case, there is such a writing which is signed by both parties. Thus, the Statute has been satisfied.

A promise to render personal service will not be specifically enforced. *See id.* at § 367. The refusal is based in part upon the undesirability of compelling the continuance of personal association after disputes have arisen and confidence and loyalty are gone and, in some instances, of imposing what might seem like involuntary servitude. To this extent the rule is an application of the more general rule under which specific performance will not be granted if the use of compulsion is contrary to public policy. *See id.* at § 365. The refusal is also based upon the difficulty of enforcement inherent in passing judgment on the quality of performance. To this extent, the rule is an application of the more general rule on the effect of difficulty of enforcement. *See id.* at § 366. Therefore, Dean cannot be forced to work for Giant.

ESSAY Q3

SEAT

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ISSUE

POINTS  
AWARDED

- |   |       |
|---|-------|
| 1. Dean's letter of May 1 was an offer.   | 1. ○  |
| 2. Kline's May 3 call was not a counter-offer/or was mere negotiation.  | 2. ○  |
| 3. Kline's first letter was a rejection.  | 3. ○  |
| 4. Kline's second letter was an acceptance.   | 4. ○  |
| 5. Recognition of rule that when a rejection is followed by an acceptance, first to be received is effective. | 5. ○  |
| 6. Receipt of letter by Dean's personal secretary constituted receipt by Dean.                                | 6. ○  |
| 7. Contract was formed (either by mailbox rule or based on rule in #5).                                       | 7. ○  |
| 8. The contract fell within the Statute of Frauds.  | 8. ○  |
| 9. The Statute of Frauds was satisfied (signed writing).  | 9. ○  |
| 10. Giant's employment contract with Dean is not specifically enforceable.                                    | 10. ○ |

## QUESTION 2

Owner placed the following notice in the local newspaper:

Help! My dog, Fluffy, is lost!  
Fluffy is a 100 pound, brown and black 4-year old Rottweiler-Doberman mix.  
I will pay \$1,000 reward to whomever returns my beloved Fluffy to me.

Finder came upon an illegal dog fight and rescued one of the dogs. Finder took the dog to a veterinarian for necessary treatment, and then, believing the dog to be a stray, took him home to keep him as a family pet. The veterinarian's bill, which Finder paid, was \$100. Finder also spent \$25 for food for the dog.

A few days later, Owner saw the dog in Finder's yard. Owner explained to Finder that the dog was his beloved Fluffy and demanded that Finder return Fluffy to him. Finder could tell that Fluffy was Owner's dog by Fluffy's reaction to seeing Owner. He felt that returning Fluffy to Owner was the right thing to do, so he agreed.

The next day Finder learned about the reward and demanded that Owner pay him \$1,125; \$1,000 as payment for the advertised reward and \$125 as reimbursement for the cost of the dog food and the veterinarian's bill. Owner responded, "I don't owe you anything, but because you took care of Fluffy, I will pay you \$500 if you are willing to wait until the first of the month." Finder agreed.

On the first of the month, Finder asked Owner for the \$500; Owner refused. Finder then sued Owner seeking \$1,125.

### **QUESTION:**

Discuss whether Finder is likely to recover any monetary damages from Owner.

## DISCUSSION FOR QUESTION 2

In order to be successful, Finder's demand for \$1,125 necessitates a finding that Owner was contractually obligated to pay the \$1,000 reward and the expenses Finder incurred in caring for Fluffy. Before there can be a contractual obligation to pay anything, Owner must have made a promise or promises to pay. *Restatement (Second) of Contracts*, §1.

### The \$1,000 Reward:

In order to establish the existence of a contract, Finder must first establish that there was mutual assent among the parties. Mutual assent is shown by an offer and acceptance of that offer. Manifestation of assent may be made by words or by conduct. *Id.* at §3, *Comment d.* Owner made an offer to the public by way of his advertisement in the local paper to pay \$1000 to the person who returned Fluffy. Under the U.C.C. and the Restatement, this qualifies as a traditional unilateral contract. This type of offer contemplates acceptance by performance rather than by a promise, and only the performance requested in the offer will manifest acceptance.

In order for Finder successfully claim the \$1,000 reward, he must have acted with knowledge of the offer and been motivated by it. In this case, Finder did not know of the reward and only returned Fluffy to Owner because he believed Owner to be Fluffy's rightful owner and believed returning the dog to him was 'the right thing to do.' Finder has no contractual right to the \$1,000 reward money; he did not know there was an offer and therefore couldn't accept it – there was no mutual assent and therefore no agreement.

### The Claim for \$125 in Expenses:

Finder might be able to assert a quasi-contractual claim against Owner for the expenses he incurred in caring for the dog. A quasi-contract is a legal fiction designed to avoid injustice by preventing unjust enrichment of one party to the detriment of another. Finder need not show the elements of a traditional contract to recover under this theory. In order to recover under these circumstances Finder must show that he conferred a benefit on Owner, that he had a reasonable expectation of being compensated, that the benefits were conferred at the expressed or implied request of Owner, and that if Owner is allowed to retain the benefits without compensating Finder, Owner will be unjustly enriched.

In this case, Finder is not likely to succeed in a claim based on unjust enrichment. Finder did confer a benefit on Owner and could argue that Owner would be unjustly enriched by not repaying Finder. However, Finder did not have a reasonable expectation of being compensated and did not undertake the expenses of the veterinarian or purchasing the dog food at Owner's request (either implied or express). Rather, he did these things because he believed Fluffy to be a stray and wanted to keep him as a pet.

### Enforcing the Promise to Pay \$500:

The only other promise made by Owner was the promise to pay \$500, "...because you took care of Fluffy." Argument could be made that this promise was a promise to pay for past

## DISCUSSION FOR QUESTION 2

Page Two

benefits received by Owner from Finder. A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice. *Restatement (Second) of Contracts*, §86(1). *Promise for a Benefit Received*. One limitation on § 86 is that if the promisee renders the services with 'donative' (volunteer) intent, the subsequent promise to pay by the promisor is not enforceable. *Id. at* §86. In this case, Finder performed the acts of paying the veterinarian's bill and purchasing the dog food for two reasons, he felt it was the morally appropriate thing to do, and he wanted to keep Fluffy for himself as a pet. This situation more closely resembles a 'gift' or the act of someone volunteering their time/money as opposed to an act done by Finder to benefit Owner. Therefore, Owner's promise to pay Finder \$500 is likely unenforceable.

Alternatively, when Finder demanded \$1,125 from Owner, Owner denied that he owed anything to Finder but did promise to pay \$500. This promise could be construed as an offer to compromise a disputed claim which Finder accepted. In such case, the consideration to support Owner's promise would be Finder's implied promise to surrender his claim to \$1,250. Such forbearance will be consideration even if Finder's claim is invalid, if the claim is in fact doubtful, or if Finder honestly believes that he has a valid claim. *Id. at* §74. However, there was no agreement between the parties or even discussion of settlement for a potential claim, so Finder is not likely to prevail under this theory either.

Conclusion: Finder is not likely to recover any damages against Owner.



ESSAY Q2

SEAT

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ISSUE

POINTS  
AWARDED

**\$1,000 reward**

- |    |   |    |   |
|----|---|----|---|
| 1. | To establish a contract must establish mutual assent - offer and acceptance.                                    | 1. | ○ |
| 2. | Ad in paper constitutes unilateral contract.  | 2. | ○ |
| 3. | Only way to show acceptance is through performance.   | 3. | ○ |
| 4. | In order for Finder to get the reward, he must have acted with knowledge of the offer and been motivated by it. | 4. | ○ |
| 5. | Finder did not know of the reward - no offer- no acceptance - no mutual assent.                                 | 5. | ○ |

**Quasi-contract**

- |     |   |     |   |
|-----|---|-----|---|
| 6.  | Identify quasi-contract.  | 6.  | ○ |
| 7.  | Avoid injustice by preventing unjust enrichment of one party at other's expense.  | 7.  | ○ |
| 8.  | Finder must show that he conferred a benefit on Owner;  | 8.  | ○ |
| 9.  | that he had a reasonable expectation of being compensated; and  | 9.  | ○ |
| 10. | that the benefits were conferred at the expressed or implied request of Owner.  | 10. | ○ |
| 11. | Finder had no expectation of being compensated and benefits were not conferred at request of Owner. Therefore, no recovery. | 11. | ○ |

**Promise to pay \$500**

- |     |   |     |   |
|-----|---|-----|---|
| 12. | A promise made in recognition of a past performance or moral obligation is enforceable.   | 12. | ○ |
| 13. | Finder, however, rendered the services voluntarily, therefore the subsequent promise to pay is not enforceable.                     | 13. | ○ |
| 14. | Promise to pay \$500 could be construed as an offer to compromise a disputed claim. (Consideration is surrender of Finder's claim.) | 14. | ○ |

## QUESTION 9

Bill Buyer and Susana Seller are both citizens of the State of Fiction, a jurisdiction which follows majority position common law. On a number of prior occasions, Buyer and Seller have had casual conversations regarding Buyer's interest in purchasing Blackacre, a piece of real estate owned by Seller and located in Fiction. Recently, Buyer called Seller and asked Seller if she would be willing to meet later that evening and discuss the purchase of Blackacre. Seller initially declined, indicating that she was sick and on medication. After some additional coaxing from Buyer, Seller agreed.

Later that evening, Buyer and Seller met at a local pub. Seller initially did not drink because she was not supposed to consume alcohol with her medication. As the evening progressed, Seller began drinking and ultimately consumed several beers. After a couple of hours, Buyer turned the discussion toward the potential purchase of Blackacre. Buyer asked Seller, "How much is it going to cost for me to buy Blackacre from you?" Seller, who had a glazed look on her face, asked Buyer to repeat the question. Buyer did so. Seller leaned back, gazed up at the ceiling, and told Buyer that she would sell Blackacre for \$10,000. Buyer was shocked and excited because he believed the property to be worth at least \$50,000. Buyer stuck out his hand to shake on the deal and exclaimed "you've got a deal." Buyer took out a pen and wrote on the back of a cocktail napkin that Seller had agreed to sell Blackacre to Buyer for a total purchase price of \$10,000. Buyer dated the napkin and showed it to Seller. Seller nodded her head in apparent agreement that the terms on the napkin accurately reflected the terms for the sale of Blackacre. Buyer offered Seller \$100 as a down payment toward the property. Seller accepted the \$100, then the two shook hands again and left the bar.

The next morning Buyer called Seller to discuss a date to complete the transaction which they had negotiated the night before. Seller told Buyer that she did not know what Buyer was talking about; she did not recall any of the events from the preceding night; and she had no intention of selling Blackacre for \$10,000.

### QUESTION:

Discuss whether Seller must sell Blackacre to Buyer for \$10,000.

## DISCUSSION FOR QUESTION 9

Where the subject matter of a contract is unique, such as the land at issue in this question, Buyer may be entitled to seek specific performance. However, in order to do so, the contract for sale of land must be valid. As a general matter, oral contracts may be enforceable provided that the agreement includes the essential elements necessary for the formation of an enforceable agreement. A contract, whether oral or written, requires the essential elements of offer, acceptance and consideration. Bain v. Bd. of Trustees of Stark Memorial Hospital (Ind.App. 1990), 550 N.E.2d 106. Also essential to the formation of the contract is the existence of a "meeting of the minds" between the contracting parties. Thus, a contract is formed only after a "meeting of the minds" has occurred, and an offer is made and subsequently accepted. Id.

Beyond the initial inquiry as to whether the necessary elements of a contract exist, the facts presented in this instance raise an issue as to whether Seller possessed the necessary capacity to enter into a binding contract. "The test of mental capacity to contract is whether the person possesses sufficient mind to understand in a reasonable manner the nature and effect of the act in which he is engaged." De Bauge Bros., Inc. v. Whitsitt (1973), 212 Kan. 758. An individual may lose his or her capacity to enter into a valid agreement by reason of voluntary intoxication. Daelstrom v. Roulette Pontiac-Cadillac GMC, Inc. (1983), 1983 WL 6159 (Ohio App. 11 Dist.). The facts provided in this case indicate that Seller most likely lacked capacity to

enter into the agreement. Moreover, to the extent that some jurisdictions may require that the other party have knowledge as to the incapacity, the facts likely satisfy this requirement in that Buyer was aware that Seller was not feeling well, was taking medication, and had consumed several beers at the time the contract was negotiated.

Beyond the question as to the existence of an oral contract and Seller's capacity to enter into an agreement, the sale of real estate is subject to the Statute of Frauds. Vargo v. Clark (1998), 716 N.E.2d 238 (Ohio App. 4 Dist.). Thus, in order to prevail, Buyer must either prove that the Statute of Frauds was complied with or that an exception to that requirement exists.

Buyer will initially claim that a writing exists in the form of the notes which he took on the bar napkin and that this writing satisfies the Statute of Frauds. An issue exists as to whether the terms set forth on the napkin are sufficient to satisfy the Statute of Frauds requirement. "That property was not property described in writing does not necessarily mean that, as between the parties, the contract was unenforceable if evidence shows that both parties clearly understood what land was intended or if the Seller had put the purchaser into possession of a particular tract." Higgins v. Insurance Co. of North America (1970), 469 P.2d 166.) This issue is not relevant, however, because in order for a writing to satisfy the Statute of Frauds, it must also be signed by the party against whom performance is sought. King v. Cheatham, 104 S.W. 751 (Ky.). In this case, the writing was not signed by Seller, and thus the writing does not satisfy the requirements of the Statute of Frauds.

Lastly, Buyer may claim that the Statute of Frauds was satisfied by virtue of his part performance of the contract, namely that he paid \$100 of the purchase price to Seller. Although part performance of a contract under the Statute of Frauds will sometimes suffice to excuse the absence of a writing, partial payment for the purchase of real estate without some further indicia of possession is insufficient and does not eliminate the requirement of compliance with the Statute of Frauds. Arnold v. Broadmoor Development Co. (1979), 585 S.W. 2d 564.

ESSAY Q9

SEAT

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ISSUE

POINTS  
AWARDED

- |    |  |     |                       |
|----|--|-----|-----------------------|
| 1. | Availability of specific performance for real estate/land sale contracts.  | 1.  | <input type="radio"/> |
| 2. | Possibility of <u>oral</u> contract between Buyer & Seller.  | 2.  | <input type="radio"/> |
| 3. | Necessary elements of contract (offer, acceptance, and consideration.)   | 3.  | <input type="radio"/> |
| 4. | A valid contract also requires a "meeting of the minds / mutual assent."   | 4.  | <input type="radio"/> |
| 5. | Issue as to whether Seller possessed capacity to enter into a contract.  | 5.  | <input type="radio"/> |
|    | 5a. Intoxication may eliminate Seller's capacity to contract.  | 5a. | <input type="radio"/> |
| 6. | Real estate transactions (interests in land) are subject to Statute of Frauds.   | 6.  | <input type="radio"/> |
|    | 6a. Buyer may claim that napkin is a writing that satisfies the Statute of Frauds.   | 6a. | <input type="radio"/> |
|    | 6b. Writing is sufficient only if it contains every necessary material or essential term.  | 6b. | <input type="radio"/> |
|    | 6c. Writing must be signed by the person against whom the contract is to be enforced or charged.   | 6c. | <input type="radio"/> |
| 7. | Buyer may claim that his tender of \$100 or partial performance of the contract satisfies the Statute of Frauds.   | 7.  | <input type="radio"/> |
| 8. | Partial payment of a contract for the sale of real estate does not constitute partial performance alone – possession or valuable improvements are also required. | 8.  | <input type="radio"/> |

### QUESTION 3

Seller and Buyer had been negotiating the sale of property located at 200 N. Main Street in Smallville. On March 1, Seller sent the following letter to Buyer:

I will sell you the 200 N. Main Street property for \$100,000 cash, the deed to be delivered and the cash paid on June 1. If I do not hear from you by March 30, I will assume that you have accepted this offer. I would not sell this property for this price to anyone but you.

(signed) Seller

Buyer received the letter while he was ill and in bed. He showed the letter to his son and told him that he intended to accept Seller's offer. Buyer died on March 25 without replying to Seller's offer.

On April 5, Seller learned that Buyer had died. Seller made no attempt to confer with anyone representing the Buyer about the property.

On June 1, the executor of Buyer's estate tendered \$100,000 to Seller for 200 N. Main. (Assume that Buyer's executor was the proper party to purchase the property if there was a contract for its sale.) Seller refused to accept the money or to execute and deliver a deed to the property.

#### **QUESTION:**

Discuss the issues involved in this dispute and the probable outcome.

### DISCUSSION FOR QUESTION 3

An express contract is formed by language, oral or written. A contract is formed if the subject matter is sufficiently identified, there is mutual consent, and consideration. Mutual consent occurs when there is an offer followed by an acceptance. Here the subject matter (the property at 200 N. Main) and the consideration (\$100,000) are sufficiently identified and the document is in writing. The question is whether there is mutual consent.

All of the states have enacted statutes of frauds which require a writing for all contracts for the sale of real estate to be signed by the party sought to be bound. The contract itself need not be in writing. The statute can be satisfied by a note or memorandum in writing containing the essential terms of the contract. Restatement (Second) of Contracts, §133. A signed letter that contains the essential terms will satisfy the requirement. *Aragon v. Boyd*, 450 P.2d 614 (N.M. 1964). Neither does the statute require the signature of both parties, only that of the "party to be charged," which has been interpreted to mean the party being sued. Farnsworth on Contracts, 3<sup>rd</sup> Ed., §6.8, p. 401. The writing may be the offer to enter into the contract. Restatement (Second) of Contracts, §133, Illus. 2. In this case, Seller's letter is an offer to sell and contains all the essential terms and is signed by Seller. This action is brought against Seller and he is, therefore, "the party to be charged." Buyer is not required to sign the document. If there is a contract for the sale of the property, the requirements of the statute of frauds have been met.

There is a question whether Buyer, by remaining silent, has accepted Seller's offer. Ordinarily silence cannot constitute an acceptance. Restatement (Second) of Contracts, §69. Subsection (1)(b) of §69, however, provides "Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree, remaining silent and inactive, intends to accept the offer" his silence will constitute an acceptance. Buyer's intent to accept by remaining silent can be shown by his conversation with his son. Since Seller had invited Buyer to assent by remaining silent, Buyer's silence through March 30 could have constituted an acceptance of the offer if his power of acceptance had not been terminated before then.

According to §48 of the Restatement, the death of either "the offeree or the offeror" terminates the offeree's power of acceptance. Buyer's acceptance in this case would have been effective until March 30, but his death on March 25 terminated his ability to accept. "An offer can be accepted only by a person whom it invites to furnish the consideration." *Id.* at §52. It is clear from Seller's offer that it is intended only for Buyer. Buyer's death before his acceptance terminated the offer and thus there was no acceptance; and, therefore, no contract.

**ESSAY Q3**

SEAT

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ISSUE

POINTS  
AWARDED

- |     |  |     |                       |
|-----|--|-----|-----------------------|
| 1.  | A contract is formed if the subject matter is sufficiently identified; there is mutual consent (offer and acceptance); and consideration is given. | 1.  | <input type="radio"/> |
| 2.  | Statute of Frauds requires a written document for the sale of real estate.   | 2.  | <input type="radio"/> |
| 2a. | It must be signed by the party sought to be bound (Seller).  | 2a. | <input type="radio"/> |
| 2b. | It must contain the essential terms (identity of parties to be charged, subject matter, terms & conditions, consideration).                        | 2b. | <input type="radio"/> |
| 3.  | The letter signed by Seller satisfies the requirement.   | 3.  | <input type="radio"/> |
| 4.  | Usually, silence may not constitute acceptance.  | 4.  | <input type="radio"/> |
| 4a. | Unless offeror (Seller) has stated that assent may be manifested by silence, and   | 4a. | <input type="radio"/> |
| 4b. | Offeree (Buyer) by remaining silent intends to accept.   | 4b. | <input type="radio"/> |
| 5.  | Death occurred March 25th and therefore the offer terminated prior to the effective date (March 30th).   | 5.  | <input type="radio"/> |
| 6.  | An offer may be accepted only by a person to whom it is given (here, Buyer).   | 6.  | <input type="radio"/> |
| 7.  | Therefore, there was no contract for the sale of the property.   | 7.  | <input type="radio"/> |

## QUESTION 2

Father wrote to his adult Son, "I want you to have my property Twelve Oaks as a wedding present, but I would need \$50,000 from you to pay off the mortgage on the property." Son replied in writing, "I will pay you \$50,000 for Twelve Oaks on March 1, provided I can get a loan from the bank before that date." Father replied by mail, "It's a deal." Both Father and Son knew that Twelve Oaks was reasonably worth \$100,000.

Although he tried, Son could not obtain a loan from the bank. Instead, his mother-in-law lent him \$50,000. Son then paid the \$50,000 to Father on March 2 and explained that he was out-of-town on business on March 1, and returned too late to make payment on that date.

Father accepted the money and discharged the mortgage. Later, however, having learned that Son obtained the \$50,000 from his mother-in-law and not from the bank, Father changed his mind about the wedding present and the sale and refused to deed Twelve Oaks to Son. Father gave as his reasons: (1) that there was no consideration to support the deal; (2) that the condition of obtaining a loan from the bank had not occurred; and (3) that Son was late in paying the \$50,000.

### **QUESTION:**

Discuss the validity of Father's reasons for not delivering the deed to Twelve Oaks to Son.



## DISCUSSION FOR QUESTION 2

The exchange of writings by Father and Son would effect an enforceable contract if there is consideration to support Father's promise to deliver the deed. The agreement is in writing and all the essential terms of a land contract are present – parties, description of the property, price, and time of performance.

Consideration consists of an act, forbearance, or return promise, bargained for and given in exchange for the promise. *Restatement (Second) of Contracts*, §71. On these facts, the only thing that could be consideration is Son's promise to pay \$50,000.

The courts are not concerned about the adequacy of the consideration or that what is bargained for is the equivalent of what was promised. *Id.* at §79(b). If it is bargained for it is irrelevant that Son is promising to pay only one-half the value of Twelve Acres.

In this case, Father has two motives for deeding Twelve Oaks to Son – to make a wedding gift (which cannot serve as consideration), and to receive \$50,000 from Son. “Even where both parties know that a transaction is in part a bargain and in part a gift, the element of bargain (here Son's paying \$50,000) may nevertheless furnish consideration for the entire transaction.” *Id.* at §71, comment c. It is clear that Father is bargaining for the \$50,000 so that he can pay the mortgage debt, and, therefore, there is bargained-for exchange to support his promise to deliver the deed. *See Id.* at §71, Illus. 6.

There is no doubt that obtaining the loan from the bank was a condition to Son's duty to pay \$50,000. The question is whether it was also a condition to Father's duty to deliver the deed. Since the origin of the money should make little or no difference to Father, in this kind of situation the courts will interpret the condition as applying only to Son's duty to pay. Farnsworth, *Contracts*, 3rd Ed., §8.4. Son has waived that condition, and so his duty to pay arose even though the condition was not met. *Id.* at §8.4. Since the bank loan was not a condition to Father's duty to deliver the deed, Father's duty to deliver the deed arose when he accepted Son's \$50,000 payment.

Unless it is clear that payment on time is essential to protect the promisor, courts are reluctant to conclude that late payment excuses the promisor from performing his promise. Absent other indications in the contract to the contrary, time of payment is not interpreted as a condition in a land contract. *Id.* at §8.18. Although Father may have an action for any damages he may have suffered because of the late payment, he cannot refuse to perform his promise to deliver the deed because of the one-day delay. Even if payment on time was a condition to Father's duty to deliver the deed, Father waived that condition when he accepted the payment, and, therefore, his duty to deliver the deed arose whether or not the condition was payment on time.

**ESSAY Q2**

SEAT

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ISSUE

POINTS  
AWARDED

- |     |  |                           |
|-----|--|---------------------------|
| 1.  | A valid Contract between Father and Son exists, as all of the elements are present.  |                           |
| 1a. | Offer  | 1a. <input type="radio"/> |
| 1b. | Acceptance   | 1b. <input type="radio"/> |
| 1c. | Consideration  | 1c. <input type="radio"/> |
| 2.  | Since this is a Contract involving land, it must be in writing to comply with the Statute of Frauds.                                 | 2. <input type="radio"/>  |
| 3.  | Son has given valid consideration for the Contract by his promise to pay \$50,000.   | 3. <input type="radio"/>  |
| 4.  | The adequacy of consideration to Father is not a concern under the law, only the existence of consideration.                         | 4. <input type="radio"/>  |
| 5.  | The obligation of obtaining the loan from the Bank is not a condition of Father's duty to deliver the Deed.                          | 5. <input type="radio"/>  |
| 6.  | Unless the Contract is clear that the date of payment is essential to protect the parties, late payment does not excuse performance. | 6. <input type="radio"/>  |
| 7.  | Father cannot refuse to deliver the Deed because payment is late; he can only recover for damages he can prove by the delay.         | 7. <input type="radio"/>  |
| 8.  | Father closed on the contract and waived any condition that payment must be made by March 1 when he accepted payment on March 2.     | 8. <input type="radio"/>  |