

INDIANA ESSAY EXAMINATION
QUESTION 1
February 2019

Among other things, the Indiana Alcohol and Tobacco Commission (“Commission”) regulates the manufacture, sale, possession, and use of alcohol. The Commission may suspend or revoke any alcoholic beverage permit for violation of Commission laws, rules, and/or regulations. The Indiana State Excise Police (ISEP) is the law enforcement division of the Commission that enforces the applicable laws, rules, and regulations.

Commission regulations allow individuals who are at least 19 years old to “ring up” sales of alcoholic beverages at grocery or drug stores if there is at least one other employee on the premises who is at least 21 years old and supervises the minors.

Ringo’s Grocery (“Ringo’s”) has a permit to sell beer, wine, and liquor in Indiana. On January 23, 2018, an ISEP Officer entered Ringo’s and bought beer from an apparently unsupervised 19-year-old sales clerk. ISEP filed a report with Commission. The Commission then served on Ringo’s a “Notice of Violation,” alleging Ringo’s allowed an unsupervised underage employee to “ring-up” a sale of alcoholic beverages.

At the hearing, the Officer testified she only saw the sales clerk in the store, but she could not recall asking whether any other employees were working at the time and could not say with certainty if she looked in the back of the store, although she thought she did. Ringo’s 62-year-old owner testified that, at the time of the sale, he was working in the back of the store.

In his proposed order, the hearing judge (who happened to be the Officer’s former coach) found the Officer’s testimony credible and found the sales clerk was alone at the time of the purchase. The judge cited the Officer’s “years of experience and exemplary service to the Commission” and her “reputation for thoroughness in all she does.” The judge recommended the Commission suspend Ringo’s liquor license for 90 days. Ringo’s timely objected to the proposed order.

The Commission issued a final order overruling Ringo’s objection and accepting the hearing judge’s proposed order. It noted Ringo’s had two prior tobacco sale violations in 2015 and 2016. Ringo’s timely filed a Petition for Judicial Relief in an Indiana Circuit Court.

1. Under the Indiana Administrative Orders and Procedures Act (AOPA), what must a petitioner show, and what must a trial court find to grant judicial relief from the final order of an agency.
2. Assuming AOPA applies here, what arguments should Ringo’s raise in its Petition for Judicial Relief to overturn the Commission’s final order suspending Ringo’s license?

IN 2/2019 IEE 1

This scenario clearly calls into play administrative law pertaining to agency adjudication and the remedies individuals are afforded should an agency adjudication occur. This is an adjudicatory action (as opposed to legislative) because it is an action having a retrospective effect (rather than a prospective application, in rulemaking). Below, an analysis of the proper process and remedies judicial review of an adjudicatory action entails as well as arguments Ringo should raise for a well-advocated reversal of the agency action at hand.

1. Under the Indiana AOPA, what must a Petitioner shown, and what must a trial court find to grant judicial relief from the final order of an agency?

The AOPA is the statutory authority that governs how agencies must act in regards to rulemaking and adjudicative proceedings. It applies to all state-wide agencies and the Alcohol and Tobacco Commission (ATC) does not appear to be one of the few agencies excluded from its purview. As such, AOPA does apply.

Under the AOPA, the procedures employed by an agency in making judicial determinations are loosely set forth. First, an agency is empowered to perform judicial functions through the use of administrative processes. The agency may have their ultimate authority judge the matter or appoint an ALJ to do so. Here, there was clearly an ALJ identified as the "hearing judge". However, for an ALJ to properly preside over a matter, they may not be biased, untimely in their decision, or make public comments on the matter in issue. Additionally, although not necessarily relevant here, ALJ's may not engage in ex parte communications with prohibited individuals.

Once an ALJ is appointed, basic due process rights are afforded to all parties and certain actions must be taken by the agency: a hearing must be held if a property interest is being deprived, evidence must be allowed to be introduced, cross-examination of witnesses and evidence must be accorded and, generally, if sought, counsel must be allowed to be present at any proceeding. Once a hearing begins, the rules of evidence in a typical court of law do not apply and an ALJ may allow into evidence anything relevant to the proceedings. The only bright-line evidentiary rule is that ALJ's may not base their decision entirely upon hearsay (although they may partly base their decision upon it). Once a decision is made, the ALJ must submit the final decision to the ultimate authority in the agency for approval. Until approval by the agency head is complete, administrative remedies have not been exhausted and judicial review is untimely. Here, the ultimate authority did approve the ALJ's decision.

Upon judicial review of an action, once a Petition for Judicial Relief is properly filed naming all proper parties (agency head, state attorney general, ALJ, parties) a Petitioner only has five grounds on which they can challenge an agency adjudicatory decision: (1) that the agency decision is arbitrary, capricious, or an abuse of discretion, (2) that the decision is contrary to constitutional rights, (3) that the agency was in excess of their statutory authority in issuing the order, (4) that the agency acted without observance of proper procedures, and (5) that the decision is unsupported by substantial evidence. The petitioner must be prejudiced based upon one of the above factors. As such, to specifically answer this question, any

petition for judicial review must allege one of the preceding five grounds for relief and the trial court must find that one the preceding five grounds exists for the agency decision to be overturned or, more likely, remanded.

2. What arguments should Ringo's raise in its Petition for Judicial Relief to overturn the Commission's final order suspending

Ringo's license?

Of the five grounds previously mentioned for judicial review of an agency adjudicatory action, Ringo's should argue that the ATC decision at hand both violated proper adjudicatory procedures and is not based upon substantial evidence.

First, that the agency action was without observance of proper procedures. As stated above, an ALJ may not be biased in their action. Possessing bias towards one party or the other is grounds for disqualification of the ALJ if the proceeding is currently pending or potential dismissal of any action made by the ALJ upon judicial review of the same. Here, the facts indicate that the sole evidence presented by the ATC was that of the officer which bought the alcohol from the clerk at Ringo's. It has been indicated that the ALJ used to be a "former coach" of the officer. On its own, an ALJ's knowing of an individual in a personal capacity is not alone enough to show bias. However, when that individual is an agency actor it becomes a different matter. Courts are less interested in whether there was actual bias in a matter and more interested in whether there is the appearance of bias in a matter. Here, the appearance of bias is relatively clear because an agent of the Agency is testifying as a witness in the matter and that agent personally knows and had a personal relationship with the presiding ALJ. Any argument in this vein will necessarily have to take into account the State's likely argument that the relationship in the past didn't prejudice this decision. However, I think the appearance of bias taints this proceeding and Ringo's has a good chance of success of relitigating the issue on this matter.

Regarding lack of substantial evidence, a court will not place themselves into the shoes of the ALJ as a fact-finder in making a determination. Rather, they will look to see whether substantial evidence was contained in the record to support the ALJ's decision. Assessing the credibility of a witness is the hallmark duty of a presiding judge and ALJ's receive that same deference. Here, the evidence at hand is based solely upon one witness and the facts do not indicate that the proposed order issued by the ALJ even discusses the testimony of the store owner that they were in the store at the time of the purchase. Without referring and assessing all evidence in the case, it is hard to see how such a decision could be said to have been grounded on substantial evidence. However, unlike the argument that proper procedures weren't followed, the remedy in this instance is likely a remand to the agency for additional findings and conclusions to better flesh out the ALJ's reasoning. For that reason, this should be a secondary argument behind the primary argument set forth above.

All in all, it does appear Ringo's has judicial remedies at hand and will likely gain some additional time before his license revocation becomes effective, if it ever does once he initiates litigation.

***** IEE 1 ENDS HERE *****

INDIANA ESSAY EXAMINATION
QUESTION 2
February 2019

Maxine, an Indiana art collector, is a fan of “Piccallo,” a renowned artist. In pursuing her collection, Maxine hired Terri, a professional art buyer in Indianapolis, to curate Maxine’s art holdings and to acquire paintings by Piccallo appropriate to Maxine’s collection. Stacy is Terri’s 21-year-old niece, who is interested in becoming an art buyer like her aunt. Stacy attended several auctions with Terri when Terri was looking for paintings by Piccallo to purchase on Maxine’s behalf.

At a lunch with Maxine, Terri introduced Stacy to Maxine and explained that Stacy had been shadowing her to learn more about the business. Maxine was excited to meet a young person as interested in art as she was and encouraged Stacy to pursue a career as an art buyer and continue shadowing successful art buyers like Terri.

At an auction in Southern Indiana the following week, Terri had to take a phone call outside and instructed Stacy to bid on any paintings by Piccallo that came up for bid while Terri was on her call. While Terri was out, several paintings were auctioned. With Terri’s auction paddle in hand, Stacy stretched out her arm just as the auctioneer asked for a final bid of \$6,500 on a painting by an unknown artist. When Terri returned, the auctioneer had just yelled “Going once, going twice, sold to paddle #342 for \$6,500.” Paddle #342 was Terri’s paddle.

Terri attempted to explain that she did not intend to purchase the painting by the unknown artist and that Stacy was not authorized to make any purchases with Terri’s paddle. Unfortunately, the auction rules, which all participants agreed to in order to be admitted to the auction, were very strict and did not allow for the mistake to be adjusted. At the auction’s conclusion, Terri had to pay for both a Piccallo painting she successfully bid on for Maxine, as well as the painting by the unknown artist.

1. Explain in detail the following legal relationships, if any, as set out in the above facts:
 - a. Between Maxine and Terri;
 - b. Between Maxine and Stacy; and
 - c. Between Terri and Stacy.
2. Assuming no insurance coverage for anything that occurred here, as among Maxine, Terry, and Stacy, identify who is ultimately responsible to pay for the \$6,500 painting. Explain your answer.

IN 2/2019 IEE 2

This question raises several issues of Indiana agency law. The first issue is the relationships between the three women in the problem. The second issue is who is ultimately liable for the \$6,500 painting.

I. Relationships between the parties

Under Indiana law, agency requires (1) the offer of authority from the principal to the agent, (2) the agent's acceptance of that authority, and (3) control by the principal. Consideration is not necessary to create an agency relationship. Agency can be implied or express. Express agency exists when the principal explicitly provides power to the agent. Implied agency exists when a reasonable person in the agent's position would believe an agency relationship was formed. There is also a distinction between *actual* authority, *implied* authority, and *apparent* authority. *Actual* authority exists when the principal gives the agent power to do something. *Implied* authority exists when the agent, given the relationship with her principal and all the facts, would reasonably expect to have authority to do a specific act. *Apparent* authority is where a third party is entitled to rely on the representations of the principal that the person is the principal's agent.

A. Maxine and Terri.

Terri is an actual, express agent of Maxine's.

Here, the requirements for actual, express agency are met, though they might not be in a written contract. Maxine

expressly engaged Terri to find and purchase Picallo paintings for her collection. Although Maxine did not have the right to control Terri's every decision, Terri was effectively controlled by the instructions of her principal, thus satisfying the control element of the test. As Maxine's agent, Terri had a duty to exercise the utmost care and loyalty in discharging her duties. This is because under agency law, any act that Terri performed in the scope of her agency would be imputed to Maxine, including obligations to pay for very expensive paintings.

B. Maxine and Stacy.

It is unlikely that an Indiana court would find any legal relationship existing between Maxine and Stacy. Stacy only met

Maxine once, at a lunch, where she was introduced as "shadowing" Terri to learn more about her business. Nowhere in this conversation did either of the three women suggest that Stacy would also be retained to purchase art for Maxine. Although Stacy could argue that she was presented as an "apprentice" to Terri, it is more likely that a court would conclude that Maxine did not intend to offer any actual authority to Stacy.

Further, even though Terri gave Stacy authority to buy Picallo paintings at the Southern Indiana auction, this does not create any relationship between Stacy and Maxine. In Indiana, if an agent delegates his or her duties to another (permissibly or not) a *new* agency relationship is created between the agent and the other person (the "subagent.") Absent the actual, implied, or apparent consent of the agent's principal, the subagent does not become an agent of the principal.

C. Terri and Stacy.

Stacy and Terri have two different relationships. It is relatively clear that Terri gave Stacy actual authority to purchase

any Picallo paintings that came up for bid. Although there was no agreement to pay Stacy anything for acting as Terri's agent during the phone call, this is not a prerequisite for an agency relationship to exist. Thus, Stacy was Terri's agent (or subagent, depending on how you frame it) for purchasing Picallo paintings *only*. However, Stacy also had *apparent* authority to purchase paintings from the auctioneer on Terri's behalf. Apparent authority exists when the principal (here, Terri) does some act that gives a third party the reasonable impression that the agent (here, Stacy) has the power to act for the principal. In this situation, Terri's act of giving Stacy her paddle (#342), is sufficient to allow the auction officials to make the reasonable assumption that the owner of paddle #342 was going to pay for any items won by it in the auction.

Under Indiana law, a principal is bound by the authorized acts of her agent within the scope of the agency. A principal is also bound by the other acts of his or her agent if the agent had apparent authority, if the principal ratified the act, or if the principal is somehow estopped from denying the agent's authority. An agent is not liable for acts taken on her principal's behalf, so long as her principal is disclosed and she does not assume personal liability for the act.

The only simple answer here is that Maxine is not liable for the non-Picallo painting. Maxine only authorized Terri to purchase Picallos, and there is absolutely no indication that she accepted, ratified, or suggested that she would pay for any other paintings. As between Terri and Stacy, it gets more complicated.

Under the auction rules and ordinary contract law, Stacy's act of lifting paddle #342 was an offer to buy the unknown artist's painting, and the auctioneer accepted it by saying "Sold to paddle #342 for \$6,500." Under the auction rules, which no one appears to dispute, this made the owner of paddle #342 liable to pay for the painting. As noted above, by giving Stacy her paddle, Terri (wittingly or not) communicated to the auction officials that Stacy was authorized to bid on items at the auction. Although she communicated the Picallo criteria to Stacy, she did not communicate that limit to the auction officials. Thus, under the apparent-agency rules, it is almost certain that Terri, not Stacy, is liable on the contract. This is so despite the fact that Stacy's bid was not authorized--the acts of the agent, done with apparent authority, will bind the principal as to third parties, even if the agent's act is unauthorized. Stacy is not directly liable on the contract, since she did not personally assume any liability and since (presumably) the paddle was registered in Terri's name, not hers.

However, Terri will be able to recover the \$6,500 from Stacy. Although Stacy is not a party to the auction contract, and thus will not be directly liable on it, she has breached the agency agreement with Terri by willfully acting outside her authority. Terri can, therefore, sue Stacy for breach of the agency agreement, which caused \$6,500 in damage to Terri. Terri also probably has a cause of action for breach of the fiduciary duties inherent in the principal-agent relationship--Terri was very clear that Stacy was *only* authorized to bid on Picallos. Absent any evidence that Stacy reasonably thought the unknown painting was a Picallo, she will be liable for breaching the duty of care and loyalty inherent in every agency contract.

In sum, Terri is liable to pay the auctioneer for the \$6,500 painting. Stacy is liable to reimburse Terri and, presumably, can have the painting if she wants. Maxine owes nothing on this matter.

**** IEE 2 ENDS HERE ****

INDIANA ESSAY EXAMINATION
QUESTION 3
February 2019

Bill was a union employee working on one of BIG Co.'s manufacturing lines. The applicable collective bargaining agreement guaranteed BIG Co. could only discharge Bill for just cause.

Just before Bill's fourth work anniversary, Bill's boss went on medical leave. The plant manager placed Bill temporarily in his boss's position, but Bill remained a member of the bargaining unit. After three months of leave, Bill's boss decided not to return to work.

BIG Co. asked Bill to stay in the supervisor job. Bill asked the plant manager if he would keep the same health and disability insurance. The plant manager assured him he would, so Bill agreed to stay in the supervisor job. Human Resources ("HR") then wrote Bill the following letter:

Dear Bill:

Thank you for your service as a temporary supervisor during your boss's absence. This confirms you have accepted the supervisor position on a regular, full-time basis. Although you will no longer be a member of the union, your health and disability insurance coverage and base compensation will remain the same. We will pay you a \$1,500 signing bonus and will review your base compensation at your next performance evaluation. Please sign this letter in the space provided below and return it to us for our records.

Sincerely,
HR

Bill signed and returned the letter to HR. A few months later, Bill injured his leg on the job, forcing him to take a three-week medical leave. Bill sought worker's compensation benefits. After an HR representative notified the worker's compensation carrier of Bill's claim, she told Bill, "[u]pper management won't be happy about this." Within a week after Bill returned to work, BIG Co. terminated his employment, saying only he was "not a good fit" for the supervisor role. Bill wants to sue BIG Co. for wrongful termination.

1. Describe, in detail, the legal nature of the employment relationship between BIG Co and Bill both before and after Bill accepted the supervisor position on a regular full-time basis.
2. Is BIG Co. liable for wrongful termination under Indiana common law? Explain the rationale for your conclusion.

NOTE: In your answers, use **ONLY** Indiana common law. **DO NOT** discuss any potential local, state, or federal statutory claims (e.g., claims arising under the Family and Medical Leave Act, the Americans With Disabilities Act, the Indiana Civil Rights Act, or ERISA).

IN 2/2019 IEE 3

Indiana has a presumption of employment at will unless otherwise provided for. However, there are several ways that an at-will employment relationship can be modified. An at-will employment relationship can be modified through (1) independent contractual agreement; (2) independent consideration; (3) public policy; or (4) promissory estoppel.

Independent contractual agreement

An independent contractual agreement would require that the new employment agreement be in writing, signed, state a fixed time of employment or a requirement of "just reasons for termination" and be supported with independent consideration. Collective bargaining contractual agreements are valid in Indiana and any contractual agreements entered into pursuant to the agreement are enforceable.

Here, Bill was a union employee working on one of BIG Co.'s manufacturing lines. At that time, there was a bargaining agreement that stated Bill could only be discharged for "just cause." However, this was prior to his change in position as supervisor where a new agreement was signed. Thus, at the time before Bill accepted the new supervisor role, Bill had an independent contractual agreement, which would only enable him to be fired for just cause.

However, there was an independent contract that Bill signed after he became a regular, full-time supervisor, which revoked his status and protections under the collective bargaining agreement that required Bill could only be fired for "just cause." The Human Resources Center stated that Bill was a regular, full-time supervisor. It also stated he "would no longer be a member of the union, but insurance would remain the same. Bill got a \$1,500 signing bonus." Thus, Bill once again had an at-will employment relationship as the new supervisor.

As it appears, he was not fired for just cause, rather he was fired because he was injured and "management was not happy about it." However, these events occurred *after* the Bill was "no longer a member of the union" and thus, did not have the same binding contractual agreements that would prevent him from being fired without just cause.

Whether BIG Co. is liable for wrongful termination under Indiana common law?

Indiana has a presumption of employment at will unless otherwise provided for. The exceptions are set forth below and applied to the wrongful termination argument. Here, Bill wants to sue BIG Co. for wrongful termination.

Public Policy

Public policy can support an argument against termination at-will. Public policy arguments are as follows (1) the condition of the work environment was so intolerable that it would be unreasonable to have the worker endure; (2) the employee cannot be fired for exercising his workers compensation rights; and (3) the employee cannot be fired for refusing to do an act that would subject him to personal liability.

Bill sought worker's compensation benefits after suffering an injury which forced him out of work for three weeks. Bill can use a public policy argument that he cannot exercising his right to workers compensation. Rather, Bill must simply notify the employer of the date, time and place of the injury within 30 days (and doing so is not fatal). Bill will have 2 years to exercise his claim, and cannot be fired for doing so. Further, Bill is entitled to 2/3 his pay for up to 500 weeks under the workers compensation laws. Thus, absent the Bill having been intoxicated, knowingly violating a rule or statute, or doing something illegal or intentional, Bill should not be fired solely for exercising workers compensation.

Promissory estoppel

A promissory estoppel employment argument requires that there be a (1) promise; (2) the employee detrimentally relied on the promise; and (3) injustice can only be avoided by enforcing the employer's promise. Here, this would not be a strong argument. Although when Bill's boss went on medical leave, Bill was the substitute "boss" but still retained his membership in the bargaining unit; this changed once he was offered a contract in writing, which stated Bill was "no longer a member of the union" and thus, did not have the same binding contractual agreements that would prevent him from being fired without just cause.

Independent consideration

Independent consideration requires that the employee give a substantial and independent level of consideration that is separate from the bargaining of the promises of the contractual agreement. Simply put, there must be some form of consideration to support an employment relationship beyond "at-will." Indiana courts have held that merely changing locations for a new job is insufficient independent consideration.

Here, BIG Co. asked Bill to stay in his supervisor job and in return, he was allowed to "keep his health and disability insurance." This could arguably be construed as independent consideration. However, BIG Co. can argue there was no bargaining of promises where Bill retained the same benefits.

Conclusion

In conclusion, the strongest argument against termination at-will and in favor of Bill's wrongful termination is a public policy argument that Bill was merely fired for exercising his worker's compensation rights, and that "not being a good fit" was simply a guise to justify firing him.

***** IEE 3 ENDS HERE *****

INDIANA ESSAY EXAMINATION
QUESTION 4
February 2019

Jaxon and Carly were married but had no children together. Carly had a son, Peter, 23, from a previous marriage. Peter was in college, and although he appeared to enjoy the college life, he had not excelled in school. Carly had concerns about Peter's maturity and lifestyle. Peter had recently incurred significant credit card debt and had built a reputation as the life of the party.

In advance of a 21-day adventure trip, Carly had her attorney draft a Revocable Trust naming herself as Trustee and her husband Jaxon as Successor Trustee. The Trust provided that, on Carly's death, her son Peter would be the sole beneficiary. The Trust corpus would be distributed to Peter on his 35th birthday. Until then, the Successor Trustee could, at his sole discretion, make distributions to Peter. Carly also had her attorney draft a Last Will and Testament, which provided that, after paying administration expenses, the residue of Carly's estate would be distributed to the Trust.

On the date the Trust and the Will were to be executed, the attorney's assistant was ill. Carly signed the Revocable Trust Agreement. There were no witnesses. Carly also signed the Will. The Will was witnessed solely by her attorney, because no other witnesses were available. Carly subsequently conveyed all the assets that she thought were titled solely in her name to the Trust, and made the Trust the beneficiary of a life insurance policy she had with Eternal Life Insurance Co.

During her trip, Carly died in a paragliding accident. Eternal Life paid the insurance proceeds to her Trust. After her death, it was discovered that Carly also owned \$45,000 of stock in Eternal Life, which she had neglected to transfer to the Trust. Every other asset Carly owned had been transferred to the Trust prior to her death.

1. Was the Trust validly executed? Was the Will validly executed? Explain your answers.
2. Other than delaying distribution until Peter's 35th birthday, what provision(s), if any, could the attorney have included in the Trust to address Carly's concerns about Peter?
3. Who is entitled to the \$45,000 of Eternal Life stock? Explain your answer. If more than one person is entitled to the stock, state the value of each person's portion.
4. What are the options for transferring the stock to the rightful owner(s)?

IN 2/2019 IEE 4

Yes, the Trust was validly executed. In order to create a valid trust, the settlor (the person conveying their assets to the trust) must name a trustee with powers and a beneficiary, there must be a trust res/corpus, and the settlor must have a present intent to convey. Additionally, the sole trustee and the sole beneficiary cannot be the same person. Here, Carly named herself as Trustee and Jaxon as Successor Trustee. This satisfies the requirement that the settlor (Carly) name a Trustee. The trustee is typically considered to have powers even without express terms in the trust instrument. However, here, the trustee has the power to use their discretion to make distributions to Peter, the beneficiary.

The beneficiary was to be Peter. This satisfies the requirement that the sole trustee and the sole beneficiary not be the same person. Additionally, nearly anyone can be a beneficiary, including charities and entities, however, a beneficiary may disclaim their interest if they do not wish to be a beneficiary. Carly also ensured the trust had property in it. Immediately after signing the trust instrument, Carl conveyed all assets that she though were titled solely in her name to the trust. This would create a sufficient trust corpus to satisfy this requirement. It also demonstrates that Carly had a present intent to convey property to the trust.

1. Was the Will Validly Executed

No, Carly's Will was not validly executed, which may, in turn, result in issues with the trust. In order to validly execute a Will, the testator must be at least 18 years old on the date of execution, have sufficient mental capacity, must sign or otherwise mark the document in the presence of two disinterested witnesses, must "publish" the will to the two witness which requires the testator to state to the witnesses their intent for the document to constitute their will, and the two witnesses must sign in the presence of each other.

First, Carly was clearly older than 18 on the date of attempted execution because she had a 23 year old son. Next, there is no indication that Carly was without sufficient mental capacity to execute a will. Mental capacity requires that the testator understand the nature and value of their property, understand the natural object of their bounty, and understand the nature of the conveyance. Here, Carly seemed to understand which property she owned and could convey via a Will, she understood that Peter was her child and that she wanted to convey the property to him, and she understood that she was making the conveyance via will. Therefore, Carly had sufficient mental capacity to execute a will.

There is no indication the Carly did or did not publish the will by stating that she intended for it to be her last will and testament. However, this is not necessarily relevant because the execution fails for other reasons. The will fails because Carly did not execute the document in the presence of two disinterested witnesses before she died. The only witness was Carly's attorney. Though that is arguably problematic, if the attorney was not a devisee named in the will, he will likely be considered a disinterested witness. Because Carly failed to have a second witness, the Will was not validly executed and cannot be probated upon Carly's death.

2. Other Relevant Will Provisions

Other than delaying distribution until Peter's death, Carly's attorney could have included a spendthrift provision in the trust to ensure that Peter could not use the trust to pay off his credit card debt or to spend it all partying. A spendthrift provision is a provision in a trust that prevents creditors from reaching the trust's property. Though it's typically considered a restraint on alienation, many states allow spendthrift provisions.

When a spendthrift provision is included in a trust, a creditor of a beneficiary may not reach the beneficiary's interest in the trust until it has been distributed. There is an exception to this rule to permit those with judgments for child support to reach the beneficiary's interest in a trust despite any spendthrift provisions.

3. Who is entitled to the Eternal Life Stock

Both Jaxon and Peter are entitled to a portion of the Eternal Life Stock. This is because the stock will transfer through Carly's estate as a probate asset. Absent a will, certain assets of the decedent must go through probate for distribution. Because Carly's will was not properly executed and the stock was not otherwise conveyed to the Trust, it must pass through probate. Notably, life insurance policies transfer outside of probate, which is why the Eternal Life insurance policy was transferred directly to the trust.

Under Indiana's intestacy laws, a spouse is entitled to 1/2 of the real and personal property of the deceased spouse. However, this rule is modified when the surviving spouse is a second spouse and does not have any children with the deceased spouse. Under the modified rule, the second spouse is entitled to 1/4 of all real property and 1/2 of all personal property. Additionally, a surviving spouse is entitled to \$25,000 family allowance.

Once the surviving spouse takes their share, the decedent's children, if any, are entitled to the remainder of the estate. Children's shares are calculated per capita with representation. This means that the estate is divided equally among the children at the first generation with living heirs.

Here, Jaxon is a second spouse and did not have any children with Carly. This means that he would take 1/4 of all real property and 1/2 of all personal property. The Eternal Life stock would be considered personal property, which means Jaxon would take 1/2 of it. Jaxon is also entitled to the \$25,000 allowance, which comes out first. So Jaxon would be entitled to \$25,000 plus 1/2 of the balance. In total, this means Jaxon would be entitled to \$35,000 of the Eternal Life stock.

Peter would receive the remaining balance, which means he would receive \$10,000 of the Eternal Life stock.

4. Options to transfer stock to rightful owners

As previously stated, the stock is a probate asset and, therefore, must typically pass through probate. This requires opening a probate estate in probate court and appointing a personal representative to maintain and distribute the assets. When intestate assets must pass through probate, the Court must appoint a personal representative to maintain and distribute the assets. If this were the case, the Court would appoint a representative to distribute the Eternal Life stock.

Because the estate is so small, the assets may also be able to pass outside of probate. This option is available for estates smaller than \$50,000. In order to do this, Jaxon and Peter, the two heirs, must submit an affidavit to the probate court averring that they are the beneficiaries of the estate. They must state that the estate is less than \$50,000, that no personal representative has been appointed, and that no petition to appoint a personal representative has been filed.

***** IEE 4 ENDS HERE *****

INDIANA ESSAY EXAMINATION
QUESTION 5
February 2019

In 2010, Ron and Ellen attended college in Indiana and moved into an apartment together for their senior year. At the start of their last semester, Ron proposed marriage to Ellen, but she refused. Several weeks later, Ellen learned she was pregnant and told Ron she would like to marry him before the birth of the baby. Ron felt committed to Ellen but had mixed feelings about Ellen's new interest in getting married only after discovering she was pregnant. Ron and Ellen never applied for a marriage license and never had a wedding ceremony. The couple remained together, and Ellen legally changed her name to Ron's last name shortly after their daughter, Kate, was born. Both Ron and Ellen graduated at the end of the semester and raised Kate together, continuing to live together in their apartment.

In April 2012, just after Kate's first birthday, Ron and Ellen decided to separate. They had little property to divide and readily agreed how to split things up. Ron agreed that Ellen should have sole custody of Kate. Because Ellen wanted to make a clean break, she agreed that Ron would not be responsible for any child support. A few months after their separation, Ron started a new job and moved several hours away. Ron sent Kate an occasional card or birthday gift, but otherwise he had no contact with Kate or Ellen.

Ellen stayed in Indiana and eventually met and fell in love with Dan. They married soon after, and Dan formed a close and loving bond with Kate. Kate had less and less contact with Ron over time. Kate regarded Dan as her father, calling him "Daddy." When Kate turned five years old, Ellen and Dan decided it would be best for Dan to adopt Kate. Dan then filed a petition to adopt Kate in the local Indiana court.

1. Based on the facts set forth above, explain what rights Ron has related to the proposed adoption and what actions would be necessary for Ron to assert his rights as Kate's biological father.
2. Assume that after Dan files the adoption petition, but before a hearing is held, Ellen dies and Dan and Ron each want custody of Kate. Explain the standard the Indiana court will use in determining who should have custody of Kate and outline all of the factors to be considered under that standard.
3. Assuming Ellen is dead, evaluate both Dan's and Ron's individual legal arguments to be awarded custody of Kate.

IN 2/2019 IEE 5

Exam Information

The first issue is determining what rights Ron can exercise in relation to Dan's proposed adoption.

Under Indiana Law, a marriage requires, among other things, a marriage license issued by the State of Indiana with a marriage ceremony conducted within 60 days of receiving the license. Indiana law also does not recognize common-law marriage, except those that are established out-of-state. A child born out of wedlock is rebuttably presumed to be the child of both spouses in the marriage. Based on the present facts, Ron and Allen were never legally married, thus, these issues will not be addressed further.

In Indiana, biological parents have the right to either: **(1) Legal custody**, which requires parents consent for major life decisions, including medical care and religious affiliations; **(2) Physical custody**, which allows parents to live with the child and provide daily, routine care; and **(3) Joint custody**, should both parents be willing and able to co-operate, and need not be equal. Further, both the US and Indiana Constitution assert a biological parent's right to reasonable visitation unless there is a danger to the child's mental, physical, or emotional health. An unwed father, however, must assert his commitment to the responsibilities of parenthood in asserting his right to visitation.

Moreover, Adoption requires the revocation of a biological parent's right to his or her child. An unwed, biological father can consent to adoption, thereby waiving his rights, by: **(1)** consenting in a signed writing; **(2)** that is notarized; and **(3)** expressly states that the consent is irrevocable and a waiver of his parental rights. A biological father may also waive his rights by failure to register with the Indiana Putative Father Registry within 30 days of the child's birth. In addition, a father has two years from the child's birth to assert and pursue any parental claims or rights, regardless if he was aware of the child's birth.

In this case, Ron and Ellen were never married but lived together at the time that their child, Kate, was born. Since they were never married, and Kate was born out of wedlock, Ron is not presumed to be the biological father of Kate. Therefore, Ron currently has no acknowledgeable rights that he could exercise over Kate.

#1 (b) - Actions Necessary for Ron to Pursue in order to Establish his rights as Kate's Biological Father

The next issue is determining if there are legal actions that Ron can pursue to establish his rights as Kate's father.

Under Indiana Law, the father, mother, State Department of Child Services, or the Prosecutor's office have standing to initiate a Paternity Action in order to establish that the biological relationship between an alleged father and child. The mother has a burden by clear & convincing evidence to establish paternity. A man in a paternity action would then be required to register with the Indiana Putative Father Registry and either submit a blood sample for analysis or submit an affidavit. If the blood samples return a 99% DNA match between the alleged father and child or the man expressly acknowledges to be the father in a affidavit, then he is considered to be the biological father of the child. As such, he has given all rights over the child as afforded to him under the Indiana and US constitution. This includes legal custody, physical custody (or right of visitation), or both.

In this case, Ron would need to initiate a paternity action to establish that he is Kate's father in order to exercise his rights over her. The statute of limitations requires that a father bring a paternity action within 2 years of the child's birth, regardless if he was aware of the birth. In this case, Kate is now five years old, thus, Ron is likely barred from bringing a paternity action. However, Ron could petition the State Department of Child Services or the Prosecutor's office to initiate the paternity action. He could also petition the court itself based on exigent circumstances, such as the fact that him and Ellen lived together and were in a committed relationship when Kate was born or that there was a mutual agreement between the two. Nonetheless, Ron needs to have a paternity action initiated in order to establish his paternity over Kate which would then give him parental rights.

#2 - The Standard to Determine Child Custody in Indiana Court

The issue here is to determine the standard and factors that the Indiana court will consider in determining who should have custody over Kate.

Under Indiana Law, child custody is determined based on the best interests of the child which include: **(1) the age & sex** of the child; **(2) the child's wishes**, with more consideration given if the child is over the age of 14; **(3) the parent's wishes**; **(4) the interrelationship** between the child and family or others who affect the best interests of the child; **(5) the child's adjustment** to home, school, and community; **(6) the mental and physical health** of all parties involved; **(7) any evidence of domestic violence**; and **(8) any evidence of a "de facto" parent**. Indiana courts no longer presume that a mother is the best parent to have custody of a child.

In addition, Indiana has adopted the *Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)* which grants an Indiana court to have jurisdiction over a parent through various means. *The Home-State Jurisdiction* under the UCCJEA provides a court with jurisdiction over the parent if: **(1) parent and child live in Indiana**; **(2) the child lives in Indiana at the direction of the parent**; or **(3) the child has lived in Indiana for 6 months or since birth**. Once an Indiana Court obtains jurisdiction and orders custody, they maintain exclusive-continuing jurisdiction over the custody order, including modifications, which will only be lost should parties leave the state or original jurisdiction fails. Finally, third parties have no rights under Indiana law to child custody or visitation of a child, except Grandparents can argue under the Grandparent Visitation Act or other parties under the best interests of the child.

Therefore, Indiana courts will use the UCCJEA in order to establish jurisdiction over the custody case and apply the Best Interests of the Child in reviewing the matter.

#3 - Applying Dan's & Ron's Argument to Have Custody of Kate

In this case, an Indiana court has jurisdiction over both Ron and Dan since both "parents" are Indiana residents and Kate has lived in Indiana since birth. Although Ron moved "several hours away", there is no evidence that he actually left Indiana. Since Dan married Ellen, he is considered the "step-parent" of Kate, which will weigh favorably for him in determining custody. Accordingly, the court will acknowledge that Kate is a five year old female. If Kate wishes to be with either Dan, as evidenced by her calling him "daddy", then that will favor him. Since Ellen has died, the court may look to Dan's wishes, however, this is more likely to be considered as a "de facto" parent. This factor will also weigh favorably for him because Dan lives with Kate and is likely currently providing daily, routine care for her since Ellen has died. Moreover, both Dan and Ron have no issues regarding their health and there is no evidence of domestic violence, so these elements will not favor either parties. Ron could argue that he is the better parent to have custody since he is the biological parent. However, Dan can easily counter argue that he has failed to maintain any type of meaningful connection.

Finally, Kate has a much stronger interrelationship with Dan as evidenced by Kate's interactions with him and living with him. The courts will likely not want to have Kate move "hours away" to live with Ron as there would be a complete change in Kate's schooling, housing, and community.

Therefore, in applying the best interests of the child, an Indiana Court will likely grant Dan custody of Kate.

***** IEE 5 ENDS HERE *****

INDIANA ESSAY EXAMINATION
QUESTION 6
February 2019

On February 8, 2019, Plaintiff properly filed and personally served on Defendant a Summons and Complaint in the Marion County, Indiana Superior Court. The Complaint alleged in pertinent part:

1. Plaintiff, an Indianapolis resident, owns a large home with significant grounds.
2. Defendant, an Indianapolis resident, provides landscaping and other outdoor services.
3. On January 8, 2014, the parties entered into a four-year written contract whereby Defendant agreed to provide lawn care services and snow removal and install holiday decorations on Plaintiffs' property to be removed not later than the following January 6th.
4. In 2014, Defendant failed to perform all contracted-for services. In December of 2014, Plaintiff slipped and fell in his unplowed driveway and suffered personal injuries.
5. Defendant convinced Plaintiff he was adding staff and there would be no more problems. As a result of Defendant's statements, Plaintiff did not terminate the contract.
6. In 2015 and 2016, Defendant's performance improved. However, Defendant failed to timely remove the holiday decorations by January 6, 2017. The decorations remained lit, subjecting Plaintiff to rude comments on social media. In response to the comments, Plaintiff identified Defendant as the reason why his decorations were still up and lit.
7. On February 1, 2017, Defendant responded to Plaintiff's post saying Plaintiff owed him money. Defendant also falsely posted that Plaintiff's business was failing and Plaintiff was not paying his creditors or employees. Numerous people, including Plaintiff, saw Defendant's post that day.
8. On February 14, 2017, when Plaintiff was away from home, Defendant yanked down the decorations and tossed them into a garden shed, irreparably damaging most of them.

The Complaint pleaded claims for (1) breach of contract; (2) fraud; (3) defamation; (4) personal injury; and (5) property damage to Plaintiff's decorations. The social media posts referred to in paragraph 7 were the only exhibit to the Complaint.

- A. Assuming Defendant asks for no extension of time, and assuming the deadline falls on a business day, when must Defendant file an Answer or other responsive pleading?
- B. In his Answer, Defendant denies allegations 3-8 and all five claims. Describe the basis for all affirmative or procedural defenses that are *apparent on the face of the Complaint*. (Do not include defenses that *may* exist if assuming other facts, e.g., laches or waiver).
- C. The case is assigned to a judge whom Plaintiff dislikes because of the judge's politics. Can Plaintiff get a new judge? If so, identify how and when Plaintiff must act.
- D. Mid-litigation, the Court grants Defendant summary judgment on Plaintiff's fraud count. Plaintiff wants to appeal immediately. Identify the way(s), if any, Plaintiff could *commence* an appeal?

IN 2/2019 IEE 6

***** IEE 6 STARTS HERE *****

A.

Plaintiff filed his Complaint on February 8, 2019. Defendant must file his Answer before the Court within 20 days. Thus, by February 28, 2019, Defendant must file his Answer before the Marion County Superior Court, or risk being adjudicated in default. If the Complaint is served by mail, a Defendant is generally given an additional three days to file his answer. However, as Defendant was personally served with the Summons and Complaint, Defendant must file his Answer by February 28, 2019.

B.

Defendant may allege that Plaintiff failed to file the contract with the Court. Where a Plaintiff alleges a cause of action based on a breach of a contract, the Plaintiff must file the original, or sufficient copy of the contract along with the Complaint. Failure to do so provides Defendant with an Affirmative Defense.

Defendant may assert an Affirmative Defense alleging that the Complaint asserts claims for which the Statute of Limitations ("SOL") has expired. Fraud, defamation, personal injury, and property damage to Plaintiff's decorations all have a two year SOL. Depending on when the particular cause of action occurred, the Affirmative Defense based on breach of SOL, may or may not be warranted. The property damage occurred on February 14, 2017 and Plaintiff was served with the Summons and Complaint on February 8, 2019. Thus, Plaintiff is safe on the property damage claim.

Defendant will likely succeed on his claim that the Defamation claim is outside of the SOL as the defamation allegedly occurred on February 1, 2017, more than two years prior to when Defendant was served with the Summons and Complaint. The SOL for claims of defamation is two years. Unless the defamation continued beyond the February 1, 2017 social media post, Plaintiff is likely out of luck on his claim of defamation against Defendant.

Likewise, Defendant will likely succeed on his claim that the personal injury claim is outside the SOL. Claims for personal injury must be asserted within two years. Plaintiff claims he suffered personal injuries in December 2014 when he slipped and fell in his unplowed driveway. This occurred definitely outside of the two year SOL and will be time-barred by the Court.

It is unclear from the Complaint when the fraud commenced and the exact factual basis supporting the claim for fraud. However, assuming that the claim was ongoing throughout the four-year written contract period, the claim of fraud will not be time-barred, however, again, it is unclear what the factual basis of the claim is.

Defendant may not allege that the breach of contract claim is outside of the SOL, as claims for breach of written contract must be asserted within 10 years of the execution of the contract. Plaintiff is well within this time frame.

C.

Plaintiff can get a new Judge. Any Plaintiff may file a Verified Motion for Change of Judge within 10 days of the filing of the Answer to the Complaint. No reason needs to be given. A Plaintiff is perfectly within their right to ask for a new Judge because he dislikes the Judge's politics. The Verified Motion may not be denied. However, the Plaintiff is given one and only one right to request a new Judge. After that, Plaintiff is stuck with the Judge he has.

D.

Summary Judgment is granted where no genuine dispute to any material fact exists, and the moving party is entitled to summary judgment as a matter of law. Generally, where a summary judgment is partial, i.e., the Order does not dispose of all claims, the Order is Interlocutory. An Interlocutory Order is not a Final Order and may not be appealed. Only Final

Orders may be appealed. There are certain exceptions and certain Interlocutory Orders may be appealed immediately (i.e., an order relating to preliminary injunction/improper venue/granting the award of money/compelling the disbursement of property or execution of a document). Otherwise, a person who is subject to an Interlocutory Order must generally wait until final judgment is issued in order to Appeal.

However, a person who wishes to appeal immediately may petition the Court. The Court may certify that an Interlocutory Order is a final, appealable Order where 1. the petitioner establishes that he or she will suffer substantial injury, harm, or expense if the order is in error and the petitioner must await final judgment in order to seek redress before the Appellate Court, 2. the issue involves a substantial question of law, or 3. where justice otherwise warrants that the petitioner be permitted to proceed to Appeal directly.

Plaintiff could petition the Court to certify that the Order granting Summary Judgment on the Fraud count is a final, appealable order, however, this is unlikely. It is more likely that the Court will require Plaintiff to litigate the original action in the Marion County Superior Court before proceeding to Appeal.

***** IEE 6 ENDS HERE *****