INDIANA ESSAY
QUESTION # I
July 2005

Husband and Wife, both in their fifties, married thirty years ago, immediately after they graduated from college. They have one child. Husband filed a petition for dissolution of marriage in February, 2005, and the final hearing was scheduled in April, 2005.

Prior to the marriage, Husband inherited stock worth $25,000 from his mother's estate. Husband kept the stock in his name alone, and it is now worth $125,000.

The parties have other assets, including a home worth $200,000, and a $50,000 savings account. The couple has satisfactorily divided their household goods and vehicles. They have no debts.

Husband has a vested pension with a $150,000 present value. Husband's employer placed the money into the pension account for Husband. Funds are not accessible until husband's death or husband reaches the age of sixty-two.

Husband earns $75,000 per year. Wife worked until their daughter's birth and then stayed home until the daughter entered high school. Daughter is now twenty-seven years old and married. Wife now earns $25,000 per year.

Throughout their marriage, Husband liked to gamble. During the last two years of the marriage, Wife secretly recorded in a small notebook the cash withdrawals from their checking account, which she believed Husband had gambled away. The withdrawals totaled $12,500 over the two-year period. Wife had no other evidence regarding Husband's gambling habits, except her opinion that Husband gambled at about the same rate each year during their marriage.

Discuss all factors that the court will use in arriving at a fair division of property between Husband and Wife.

INDIANA ESSAY
QUESTION # II
July 2005

Luxury Limousine Services, Inc. ("LLS") is an Indiana corporation owned 65% by Jamie Jones ("Jamie"), President and CEO, and 35% by Chris Cavanaugh ("Chris"), Secretary/Treasurer. LLS provides limousine and airport shuttle services to businesses and individuals. Chris and Jamie, who are also the only two directors of LLS, are both employees of LLS, active in its day-to-day operations. Chris is in charge of billings and accounting. Jamie is in charge of strategic planning, marketing, and business development.

At times, LLS receives requests for limousine services that it is unable to provide with its own fleet of vehicles. When that happens, LLS subcontracts with another limousine service to handle the overflow business. LLS bills the customer directly for the services and then, after the customer has paid LLS, LLS pays the subcontractor 80% of the amount billed, and keeps the remaining 20%.

Through these subcontractor contacts, Jamie learns that a small limousine business, A-1 Limo Connection, Inc. ("A-1") is for sale at a very advantageous price. Without telling Chris, Jamie buys the business, which is then operated by Jamie's son, Ted. Jamie instructs LLS employees that, anytime LLS is unable to directly provide requested services, LLS is to subcontract the work exclusively to A-1. Like before, LLS bills the customer for the services provided by A-1, deposits the customer's check when received into LLS's bank account, and then issues a check to A-1 for 80% of the amount billed by LLS.

The Friday before the Indianapolis 500, one of LLS's busiest weekends, Jamie contacts the LLS customers who will be provided services through A-1 and instructs them to give their checks, made payable to LLS, to the driver at the time services are provided. He then tells Ted to endorse LLS's name to the checks and deposit them in A-1's bank account, which Ted does. As soon as the checks clear, Ted and Jamie withdraw the money and close A-1's account.

Several weeks later, Chris contacts these customers to find out why LLS has not received payment, and learns that the customers' checks, although made payable to LLS, were given to A-1 at the time services were provided, and have cleared the customers' bank accounts. Chris then discovers that A-1 was purchased by Jamie. Chris comes to you for legal advice.

1) Analyze what claims Chris can bring against Jamie and what he must do, if anything, to bring those claims.

2.) Analyze what claims LLS may have to recover the proceeds of the checks deposited into A-1's bank account and against whom those claims can be asserted.

INDIANA ESSAY
QUESTION # III
July 2005

Testator was married to Wife, and they had four adult children. At the time of his death, Testator owned in his individual name common stock in Acme Corporation valued at $500,000. He owned with Wife as joint tenants with rights of survivorship a certificate of deposit in the amount of $75,000. Testator's will was duly probated.

The will created a testamentary trust and named the local bank as trustee. The testamentary trust provided that only the income from the trust should be used for Wife's support and maintenance. The will further provided that upon Wife's death, the remainder of the trust was to be distributed to their four children, in equal shares. Testator's will further provided that Wife could direct that the stock be distributed to one of the four children in Wife's Last Will and Testament by specifically referring to and exercising the power set out in Testator's will.

Testator and Wife's youngest child was Susan, an attorney. After Testator died, Wife moved to Susan's home.

Susan prepared Wife's Last Will and Testament shortly before Wife's death. Susan's secretary acted as a witness, and Susan acted as the second witness. Wife's will did not leave anything to her three older children and bequeathed the Acme stock and the certificate of deposit to Susan, without making any reference to Testator's will. Wife's will was duly probated, with Susan's secretary signing the proof of will.

The three older children come to you, requesting your advice whether they have any basis to challenge Susan's receiving all the assets. How do you advise the children?

INDIANA ESSAY
QUESTION # IV
July 2005

Charles Curtis was operating his vehicle eastbound on a two lane county road in Red County, a rural Indiana county. Charles was approaching the county line, where a sign indicates the driver has left Red County and has entered the next county to the east, Blue County. In Blue County, Danny Davis was operating his vehicle in the westbound lane on the same county road as Charles. As the drivers approached the county line, Danny's vehicle entered Charles' lane, causing Charles to drive into a ditch. Charles' vehicle overturned, resulting in the destruction of Charles' vehicle and serious personal injuries to Charles. Danny stopped his vehicle, undamaged, in Red County.

The investigating police officers determined that Danny's vehicle left the westbound lane while in Blue County, and Charles' vehicle left the roadway while in Red County. Charles' vehicle was in Blue County when it stopped. The two vehicles never made contact.

Charles is a resident of an Indiana county, Yellow County. Danny is an Indiana resident, and a resident of Blue County. Danny was driving a vehicle owned by Tim's Trucking, Inc. to Red County to make a delivery for his employer, Tim's Trucking, Inc., a Delaware corporation authorized to do business in the state of Indiana.

Charles retained an attorney, who filed a suit on Charles' behalf in Red County. Charles' attorney placed an advertisement in a newspaper in Red County notifying Danny and Tim's Trucking, Inc. about the suit. Charles' attorney made no other attempts to serve Danny and Tim's Trucking, Inc. Danny's sister noticed the advertisement in the newspaper and called Danny the same day. Tim's Trucking, Inc. immediately hired you, an Indiana attorney, to advise Danny and Tim's Trucking, Inc. regarding this lawsuit. Analyze what procedural issues you would raise to protect Danny's and Tim's Trucking, Inc.'s interests, and how and when you would raise them. What steps, if any, can Charles' attorney take to cure any defects in the issues you raise.

INDIANA ESSAY
QUESTION # V
July 2005

Jack and Mary Ryan have been married since 1972. Jack's employer for his entire adult life was his uncle, Edward, who owned a successful business. Jack had total control of the couple's finances during the marriage. Jack told Mary each year, in April, that he had given the couple's tax information to an accountant to prepare their state and federal income tax returns. Jack had Mary sign what she thought were accurate tax returns for each tax year.

The joint federal tax return that Jack and Mary filed for the 2002 tax year did not include $50,000 in cash that Jack's uncle-employer, Edward, had paid to Jack. Edward did not include the payment in Jack's W-2. When asked by his accountant to explain the $50,000 payment to Jack, Edward said, "I paid this money to Jack; it was more like a gift than salary. I just appreciate him so much as an employee and as my nephew. He worked so many extra hours without getting any overtime. The money wasn't for anything specific. I paid it just because he's such a great person and employee. That's why I didn't consider it income, just a gift." Jack did not tell Mary about the $50,000.

In 2003, Jack and Edward attended a sales convention. Jack bought a raffle ticket to win a 2003 Ford Mustang convertible. Jack won the convertible, but he did not want Mary to find out about the vehicle. Jack had the vehicle titled in Jack's name, but Jack stored the Mustang on his Uncle Edward's property to hide it from Mary. Jack did not include any reference to the Mustang on his and Mary's joint income tax return that they filed for the 2003 calendar year.

In August 2004, Jack fired his secretary. The secretary, who knew about all of the above financial matters, called Jack and threatened to go to the IRS and reveal all of the transactions.

You represent Jack and Mary. Analyze the tax issues presented by the above facts and give reasons for your analysis. Do not discuss any family law matters.

INDIANA ESSAY
QUESTION # VI
July 2005

Assume that the Indiana Legislature became very concerned with the increase in the state's divorce rate. Studies made available to the members of the legislature tended to show a correlation between the youth of persons marrying and the probability of their marriages ending in divorce. More specifically, the information suggested that the younger an individual is, the more likely he or she will enter into a marriage on impulse and/or also seek to end the marriage without getting counseling or considering the long-term consequences to any children born of the marriage. Accordingly, the legislature enacted a statute that provided that (1) persons under the age of twenty-one could not marry without attending a three-day long workshop—funded by the state free of charge—on marriage, parenting, and divorce; and (2) that anyone under the age of twenty-six with children who sought to obtain a divorce was required to wait for a six-month "cooling off" period after separating to file for a divorce; alternatively, he or she could provide proof of having participated in marriage counseling from a list of state-approved providers for at least six counseling sessions.

Evaluate the validity of this statute under the Indiana Constitution.

Indiana Essay Question I
Sample Answer
(Verbatim transcription of answer by an examinee)
July 2005

Under Indiana law ass assets brought to the marriage or acquired during the marriage are marital property. Under the "one pot" theory, all marital assets are put in one pot and divided evenly. However, equal division of the property is a rebuttable presumption. The court may deviate from the equal division if it would not be just and reasonable. Although there is no evidence of them here, certain assets, such as the value of educational degrees and tort recovery after separation, are not included in the marital assets. In this situation the marital assets will include: $125,000 inherited stock, $200,000 home, $50,000 savings account, and the vested pension worth $150,000. The pension is considered a marital asset worth its present value because it is considered wealth generated during the marriage. The wife should obtain a Qualified Domestic Relations Order (QDRO) in order to avoid tax consequences of transfer of the pension.

The equitable (50/50) division of the assets is a rebuttable presumption. In deviating from equitable distribution the court will consider: the length of the marriage, any gifts or inheritances, each spouse's earning capacity and current economic circumstances, if one spouse stayed home with the children, and the spending habits of the parties during the marriage.

This couple was married 30 years ago, so it would be more difficult to trace the source of the assets. However, the court will probably consider that Husband received the inherited stock in his name prior to the marriage and the stock remained in his name throughout the marriage. Further, Wife stayed home with their child and subsequently missed out on valuable work experience. The court will consider the unequal income of each spouse also. Finally, the court will consider evidence of Husband's gambling problem. If it can be established that Husband in fact gambled away $12,500 the court will take that into account when determining distribution.

The court can distribute property "in-kind" or in a lump sum. Therefore, if both parties want the home the court may order that it is sold and each spouse is entitled to half the proceeds. If the parties can agree to one spouse keeping the home, then the court can order the distribution in kind. If the distribution is in-kind the court must consider the liquidity of the other assets distributed.

Indiana Essay Question II
Sample Answer
(Verbatim transcription of answer by an examinee)
July 2005

1) Chris' claims against Jamie

Shareholders of corporations are generally not liable for the acts of the corporation, with the exception of when courts pierce the corporate veil. Jamie will therefore not likely be liable to Chris as a fellow shareholder. Jamie is also President and CEO, as well as a director and employee of LLS, and may be liable to Chris on that basis. Chris would technically be suing Jamie on behalf of LLS because the checks were payable to LLS, not Chris. Therefore, Chris would technically need to bring a shareholder derivative suit. He would need to show that he adequately represents the interests of the shareholders, that this suit is timely as he owned shares at the time of the injury, that he filed a verified complaint, and that he made a demand on the board that the corporation bring the suit in its own name instead. However, because the policy behind requiring derivative suits are to protect creditors and shareholders, raise the value of all shareholders' stock, and to protect the corp. from multiple suits, courts have developed an exception to the requirement. This exception, known as the American rule, allows a shareholder of a close corporation (which LLS clearly is, as it has only 2 shareholders) to bring a direct suit when doing so would not risk subjecting the corporation to multiple suits and would not jeopardize the interests of creditors and shareholders. Thus, Chris should be able to proceed with a direct suit.

He has many claims against Jamie who, as CEO and a director, has breached the duty of care, the duty of loyalty, and has usurped a corporate opportunity. The burden is on the plaintiff (Chris) to establish a breach of duty of care. He must show that Jaime failed to act as a reasonably prudent person considering the best interest of the corporation, and that this failure was wilfull or reckless. That is known as the business judgment rule. Here, since Jamie's conduct was clearly wilfull and without any concern for the best interests of LLS, Chris should suceed.

Jamie also breached the duty of loyalty, and it would be his burden to show otherwise. Taking money owed to the corporation and using it for personal benefit clearly is disloyal conduct for a director. In close corporations such as this, courts often look to partnership law and hold that shareholders in close corporations owe each other a duty of loyalty similar to that owed by partners. Under either standard, Jamie's conduct clearly was a breach of duty.

Jamie also may be held liable for usurping a corporate opportunity. When A-1 Limo when up for sale at a good price, Jamie has a duty to present this opportunity to LLS, especially since it is in the same line of business as LLS and nothing indicates LLS could not have purchased A-1 as a corporation. If the corporation (LLS) rejected this opportunity after Jamie fully disclosed it, he may have been able to buy A-1 himself, but by not giving LLS an opportunity, he likely breached his duty of loyalty by usurping a corporate opportunity.

2) LLS' claims for the proceeds of the checks

LLS provided a service for which it was entitled payment. It can assert the claim for these monies against A-1 clearly (since A-1 owes the payment), but since Ted & Jamie withdrew the money, this route would prove fruitless.

The checks were made payable to LLS and as checks, presumably quality as negotiable instruments. The bank therefore, must only pay these checks if they are properly payable. A

check is not properly payable unless all of the essential endorsements are present. Since LLS' endorsement was necessary and Ted, a party with no authority to endorse LLS checks for it, forged the endorsement, the check would not be properly payable. The bank would have to recredit the customer's accounts and then LLS could demand repayment from the customers.

Two of the exceptions to the properly payable rule may hinder LLS, however. First is the negligent entrustment rule which essentially states that if a company entrusts an employee with access to checks and the employee commits a forgery, the check is properly payable. The purpose of the exception is to require companies to police their employees adequately. Since Ted and not Jamie endorsed the checks, this rule may not be applied by the court, but since Jamie was in a position to allow Ted (and in fact ordered him) to do this, Chris should be aware of this potential problem.

The second exception, the fictitious payee rule, applies when someone makes a check out to someone else and then endorses that person/entity's name, never intending that initial payee to receive any benefit. Here, Jamie likely never intended LLS to receive any benefit from these checks, but the rule will likely not apply because customers, not Jamie, wrote the checks.

If the bank does have to recredit customers accounts because neither of the above exceptions relieves it of liability, it would of course have a cause of action against Jamie and Ted for breach of presentment warranties (since they knew the signatures were forged). Customers who wrote the checks could also sue Jamie and Ted for conversion.

If LLS is not able to suceed on getting customers to reissue the checks following the bank's recrediting of accounts, LLS could try to sue Jamie or Ted personally. LLS would have claims for fraud, embezzlement, and possibly conversion.

Finally, LLS could sue Jamie or Ted in their capacity as owner/shareholder of A-1. We do not have enough facts to determine if this would work, but when evidence shows the corporate form was so controlled, manipulated, or ignored as to be the more instrumentality of another, the court will pierce the corporate veil and hold shareholders personally liable for the corporations' debts. Courts will look at the following factors to decide if personal liability is appropriate: public or close corp.; undercapitalization; fraudulent misrepresentations; disregard for corporate formalities; identity of shareholders, directors, officers; commingling of funds, absence of corp. records, and payment of personal obligations from corporate funds. A-1 meets several of these factors, but we do not have enough info for a complete analysis.

LLS should therefore pursue all of the above options in hopes of getting this unfortunate situation resolved fairly.

The customer are unlikely to be liable to LLS for giving the checks to Jamie because as CEO of LLS, he had actual authority or at least apparent authority to receive them

Indiana Essay Question III
Sample Answer
(Verbatim transcription of answer by an examinee)
July 2005

The older children have several ways to challenge Susan's receiving the assets. They can claim that Wife did not comply with the requirements to distribute the stock set out in the trust and that therefore it was not hers to devise to Susan. They can have at least part of the will set aside or voided because Susan was an interested witness. They can also claim that Susan's abuse of her confidential and fiduciary duty in preparing the will amounted to duress negating the will.

The trust created by Testator provided that Wife could change the distribution of the stock only by specifically referring to and exercising the power set out in Testator's will. By not specifically referring to this power in her own will, Wife was not complying with this specific provision. Therefore, the stock was not hers to devise but rather belonged to the trust. Therefore, the stock should be distributed in 4 equal shares as stated in the trust. The court could find that this provision was ambiguous and that Wife's devise was enough despite this instruction, but the older children should win on this point. If not, they have other ways. Note the certificate of deposit was non-probate and not part of trust.

In order to have a will be valid in Indiana, it must be witnessed by two natural persons. Wife's will was witnessed by two people. However, Susan was an interested person. An interested person is someone who will get something from the will-here, Susan is a devisee of the stock and the certificate of deposit. When one of the witnesses is an interested person, you first look to see if the will would be valid w/o that witness. Here, there was only one other witness so answer would be no. Then, the devise to the interested person would be voided, leaving the rest of the will intact. On these facts, everything appears to have been devised to Susan. Therefore, the entire will would be void and the estate would pass through intestacy. Susan would still get something, but only her ¼ share through intestacy. Even if the trust was determined to be outside of the will, the older children could use this to get @ their share of the CD. The CD was outside of the trust because Wife got it due to her right of Survivorship, not through probate.

The Children could also claim that the will was void due to duress. Because Susan is a lawyer and was drawing up the will, she was in a confidential and fiduciary relationship w/Wife and was in position to exert undue influence. Also because she was living w/ Wife. Susan could also be subject to disciplinary action from the bar for abusing her fiduciary position, although lawyers are allowed to draw up wills for family members.

Indiana Essay Question IV
Sample Answer
(Verbatim transcription of answer by an examinee)
July 2005

Procedural Issues

I would raise two procedural issues. First, I would file a motion to dismiss for failure to effect service of process. Second, if the first motion failed, I would move for a Transfer of venue. I will also explain to Tim's Trucking why an Indiana court can exercise personal jurisdiction over it even though it is a Delaware, not an Indiana, corporation.

Charles' attorney can cure the defects I will raise by effecting proper service and by refiling Charles' case in Blue County or Yellow County.

Improper Service

Indiana Trial Rule 4 governs requirements for service of process. A plaintiff must serve a summons and complaint on all defendants. Service may be effected in four ways: (1) sending the summons and complaint by certified mail, return receipt requested; (2) serving defendants in person; (3) leaving the summons and complaint at the defendant's residence in a conspicuous location and mailing summons and complaint to defendant via first-class mail; and (4) for organizations, leaving the summons and complaint with the organization's registered agent.

If a defendant is not properly served with process, a plaintiff may not maintain an action against him, even if, as here, the defendant has actual notice of the action. Improper service is grounds for a motion to dismiss. Courts, however, prefer to decide cases on the merits, and so may allow a plaintiff to cure the defective service. The Indiana Trial Rules do not provide a deadline for plaintiffs serving defendants, unlike the federal rules, which require service within 120 days of filing the complaint. This case cannot be heard in federal courts, however, as both Charles and Danny are citizens of Indiana.

The Indiana Rules do provide that a case may be dismissed if a plaintiff fails to take any action on the case for 60 days. T.R. 41. But this rule is used sparingly, so it may not make sense to wait for Charles to do nothing.

Transfer of Venue

If the Red Circuit or Superior Court allows Charles to cure the defective service; I will next move for a transfer of venue under Trial Rule 75. Although Rule 75 provides that all Indiana courts of general jurisdiction have venue, Rule 75 goes on to say that "preferred venue" lies in certain counties. The venue rules are generally defendant friendly, providing for preferred venue in a defendant's county of residence. Preferred venue also lies in the county where the accident occurred.

Here, the accident principally occurred in Blue County. Danny crossed the center line in Blue, and Charles car came to rest in Blue. Thus, breach and damage occurred in Blue. True, Charles moved off the road in Red, but that fact probably is not enough to establish preferred venue there.

Danny lives in Yellow County, so preferred venue would lie there as well. If Tim's Trucking maintains an office in Indiana, preferred venue may lie in that county as well.

Before filing for a transfer of venue, I would first investigate whether there are any advantages to being in Red. Venue defenses may be waived and it might be our advantage to be in Red.

Charles' attorney can refile in another county if the court grants our transfer motion. Charles will have to ay the costs of refiling and might have to pay our attorneys' fees for resisting improper venue if he filed in Red in Good faith. That seems unlikely, given the unusual nature of this accident.

I would note that transfer of venue differs from change of venue under Trial Rule 76. There, the case is in a preferred venue, but either (1) a county is a party, or (2) a fair trial is unlikely given local prejudice. No evidence of such local prejudice exists here.

Personal Jurisdiction

Tim's Trucking cannot resist the suit on personal jurisdiction grounds. Such grounds should be raised first, or they are waived. Here, although Tim's is a Delaware corporation, its agent and its truck were involved in an accident in Indiana. That suffices for personal jurisdiction purpose under both Trial Rule 4.4 (causing injury in Indiana) and the Due Process Clause of the 14th Amendment (specific jurisdiction).

Indiana Essay Question V
Sample Answer
(Verbatim transcription of answer by an examinee)
July 2005

2002

There is a very strong presumption that employer's do not give employee's gifts. The assumption is that money or other benefits transfered from an employer to an employee is gross income and subject to both income tax as well as FICA, umployment insurance, and other payroll taxes.

The test for determining whether a transfer is a gift is whether it was given out of disinterested generosity and not in exchange for anything. Family members can typically give gifts to other family members. However, some of the money in this $50,000 appears to be more like an employee bonus than a gift, because of Edward's explanation to the accountant.

If this $50,0000 was in fact a gift to Jack then it would be excluded from Jack's gross income. However Edward would then be subject to gift tax consequences. Edward could exclude $11,000 of the gift to Jack or if Edward was married he could split the gift and exclude $11,000 of the gift for himself and also exclude $11,000 for his wife. The gift could also be divided up between Jack and Mary with each receiving $25,000 and then Jack could exclude $11,000 from the gift to each of them. Or if Edward is married then $22,000 could be excluded from each gift. Since Mary was never aware of the gift it is unlikely that she received ½ of the gift for tax purposes. Assuming also that Edward is unmarried he will only be able to exclude $11,000 of the $50,000 gift leaving him with a total of $39,000 in taxable gifts. This $39,000 will then count against him in the Calculation of his Unified Gift and Estate tax credit. The amount of gift tax he will owe will be entirely dependent upon how much he has previously given as lifetime gifts.

In determining whether this was a gift or was in fact compensation, the status of the payment on Edward's books is important. If the payment came from Edward's personal funds then it is more likely to be considered a gift. If it came from Edward's business it is more likely to be compensation. Especially, if Edward deducted the $50,000 as an above the line business expense. Another consideration is Jack's overall compensation package. If Jack was being paid a small or unreasonably low salary and this seemed like a bonus it is more likely that it is compensation.

To specifically analyze the facts of the case to determine how the IRS would likely find I will need to consult the IRS decisions to see what the IRS has found in similar cases. Given the merky nature of the $50,000 dollar payments status it seems unlikely that either Jack or Mary could be found criminally liable. Mary almost certainly could not be found criminally liable because she had no knowledge. Jack could possibly be found liable if it was determined that he acted in consort with his uncle to actually defraud the IRS. If the IRS finds that taxes are owed Jack and Mary will be liable for the back taxes as well as interest.

If this is found to be income Jack and Mary will also owe Indiana Income tax. If it is a gift Edward will not have to pay Indiana gift tax, because Indiana does not have a gift tax.

2003 Mustang

To begin everything that is received is income unless it is found to have been paid for. If an individual finds a rare coin worth $1,000,000 and keeps it the individual will immediately recognize $1,000,000 in gross income. However, if the individual pays $100 for the coin that turns out to be worth $1,000,000 dollars it will be considered to be a bargain purchase and no income will be recognized until it is sold. Here Jack paid value for a raffle ticket so the question becomes whether this is sufficient consideration to be considered a bargain purchase? The answer to this question is no. This is virtually identical to purchasing a lottery ticket, the winnings of which are gross income. Consequently Jack realized and recognized gross income at the moment he won the car. As such the value of the car should have been included in Jack & Mary's gross income for 2003. This is a much more clear area than the previous question and at least Jack is probably liable for tax evasion as well as back taxes and interest. Mary should not be criminally liable because she was not aware, but she would be jointly liable for the back tax.

Indiana Essay Question VI
Sample Answer
(Verbatim transcription of answer by an examinee)
July 2005

Issue No. 1 Does the statute prohibiting people under the age of 21 from marrying without takings a class impermissibly infringe on the fundamental right to marry?

Unlike the Federal Constitution there are no varying levels of scrutiny applied to such Constitutional rights in Indiana. Absent an issue regarding core values (right to worship, right to political speech) Indiana legislature need only show a rational relationship between the State's goals without substantial interference of the citizen's rights.

In this instance, the State has a legitimate goal is decreasing the divorce rate and contributing to the stability of marriage. If the State were to change the age people were allowed to marry, the statute might have considerably more difficulty making its case. Additionally if the State required people to pay for the 3-day counseling session and did not make any provisions for exceptions for those who could not afford to pay (thus impermissibly forbidding them, for all practical purpose to marry), then the statute might be considered invalid.

However, requiring people under the age of 21 to participate in a counseling session is likely to be considered permissible as it does not stop anyone from marrying. It would be to the State's advantage in advancing its argument to put forth some credible statistics showing that these counseling sessions will benefit the problem it seeks to solve. These requirements, however, could be analogized to other procedural requirements governing family law such as the requirement for a license, a rubella immunization for women, the receipt of information regarding AIDS and even, the requirement regarding divorce that divorcing parents attend the Children Cape With Divorce seminar prior to their divorce being finalized.

Issue No. 2 – Does the second statute requiring a "cooling off" period of 6 months impermissibly infringe on the fundamental rights of the parties?

This statute can be analyzed under the same standard as the first statute, but is raises a more troubling question regarding the counseling sessions and, potentially victims of domestic violence. The statute seems too broad and, a such, impermissibly infringes upon the rights of some seeking a divorce.

The alternatives of waiting for six months prior to filing a divorce or attend 6 counseling sessions with individuals approved by the State might be considered to place a significant roadblock in the path of those requiring a speedy divorce. People unable to afford six counseling sessions which are not, as under Statute 1, provided free of charge are forced to endure six months of "cooling off" prior to filing for divorce. Additionally, the statute fails to grant any exceptions for instances of domestic violence when a six month "cooling off period" could serve only to increase the amount of time one spouse is permitted to abuse another.

This six month period also limits a party's access to the Courts for the disposition of certain necessary issues. This statute offers no opportunity for the disposition of crucial issues such as child custody, child support, maintenance, protection or distribution of assets or possession of the marital residence and, by its failure to offer exceptions, may cause further difficulties for the children it purportedly seeks to protect.

Issue No. 3 – If the right to privacy is determined to be a core value do these statutes materially burden the core value?

At present the only core values held to exist under the Indiana Constitution are the right to political speech and the right to worship. However, the right to privacy is currently under consideration by the Indiana Supreme Court to determine if it, too, is a core value. If it is determined to be a core value, it is possible that these statutes could be determined to materially burden that value.

Core values are considered to be materially burdened when the restrictions cause them to lose their function. The right to marriage and, conversely, what is often seen as a "right" to divorce could easily be determined to be issues protected by a right to privacy and, as such, these statutes, by virtue of their restrictions, to materially burden that right in such a way that it loses its values.

Issue No. 4 Do these statutes violate the Equal Protection/Privileges & Immunities Clause of the Indiana Constitution?

Such an issue is clearly indicated whenever classes of people are treated differently from others. These statutes treat two classes of people differently. Statute 1 treats those under the age of 21 who wish to marry differently from all other eligible people who wish to marry. Statute 2 treats all people with children under the age of 26 who wish to divorce differently from all other people with children who wish to divorce.

Under the Indiana Constitution, such classifications are permissible only when there is some inherent characteristic that makes the class different which justifies the different treatment and when all members of that "inherently different" class are treated the same way.

Here, the distinction in both statutes is age. Age is certainly an inherent characteristic and members of the identified classes in the statutes appear to be treated the same way, so the question remaining is whether there is a legitimate State goal the State wishes to achieve that is directly related to the inherent difference?

The fact pattern here indicates that there are studies suggesting that young people are more likely to enter into marriage or divorce on impulse and without considering the ramification. The State has, in recent decisions, most specifically Morrison v. Sadler identified creating stable homes for children as a legitimate State goal.

The difficulty arises here in considering whether the studies considered by the Legislature are sufficient support for that goal and whether these statutes are an appropriate response to that State goal. If there is a significant challenge to these statutes, this is where it should be made. Can the State adequately demonstrate that impulsiveness is so much more present in those 26 and under that such statutes, particularly without allowing for the discussed exceptions, sufficiently tie with the inherent characteristic of age to the State goal of creating marriages and families that are more stable?

Multistate Performance Test I
Sample Answer
(Verbatim transcription of answer by an examinee)
July 2005

Mackenzie, Asp & Norman LLP
Attorneys at Law
550 Enterprise Blvd., Suite 2500
Cypress, Franklin 3337

July 26, 2005

Ms. Jasmine Clarke, President
Clark Corporation
800 Robinson Blvd.
Cypress, Franklin 33337

Dear Ms. Clarke:

The question you come to us with is whether Clark Corporation can be held liable for Mr. Regan's death. More specifically whether the product line successor rule can be invoked to impose liability on Clarke Corporation for Clarke Corporation's predecessor, Santoy Enterprises, manufacture of Pure View.

The answer is that the product line successor rule can not be imposed against Clarke Corporation.

As you know in 1990 Clarke Corporation acquired Santoy Enterprises Drug Manufacturing Division. The Drug Manufacturing Division comprised approximately eighty (80%) of Santoy's manufacturing operations. The other twenty percent (20%) consisted of fledgling Industrial Chemicals Division. Pure View was one of five pharmaceutical products manufactured by Santoy's Drug Manufacturing Division.

Clarke's acquisition of the Drug Manufacturing Division was accomplished through an Asset Purchase Agreement where Clarke purchased certain assets and assumed certain liabilities from Santoy for $2.5 million. No stock was transferred and none of Santoy's officers, directors or shareholders became affiliated with Clarke.

Following the sale, pursuant to the Asset Purchase Agreement, Santoy changed its name to "Sentinel Enterprises". Two years after the transaction with Clarke, Sentinel filed for bankruptcy and its assets were liquidated.

After the acquisition, Clarke initially continued to manufacture the five former Santoy products using identical manufacturing processes and the same product names. Clarke did solicit former Santoy customers for business, by informed them that it was now Clarke who was the manufacturer.

Six months following the acquisition, Clarke discontinued production of Pure View due to the decline in the market. Since then, Clarke has not manufactured or sold Pure View or any similar product.

In Gray v. Ballard Corporation (Franklin Supreme Court, 1987) the Court recognized the product line successor rule as an exception to the traditional rule governing successor liability. Three conditions were set out by the court and where all three of the conditions have been satisfied, a party that acquires a business and continues to manufacture the acquired product line assumes liability.

The first condition is whether the successor's acquisition of the original manufacturer's business caused the virtual destruction of the Plaintiffs remedies against the manufacturer. Unlike Gray, the predecessor was not dissolved within two months, and the predecessor did not immediately cease to exist as a business entity. Rather our situation lies somewhere between the facts of Kramer v. Macintosh Inc. (Franklin Court of Appeal, 1995) and Shatner v. Burger Company (Franklin Court of Appeal, 1999). Clarke did purchase nearly all of the assets of the predecessor and the purchase of the assets left the predecessor with 20% of the business and thus contributed to the demise. However, like Burger, Clarke paid no direct role in the decision because the two entities had no corporate overlap, and the predeseccor continued on with business for 15 months.

The court is liked to find that due to Santoy's continued business for two years following the acquisition and the fact that the companies shared no corporate overlap, that the first condition of Gray has not been met.

The second condition addressed by the court in Gray was whether the successor corporation had acquired from the predecessor those resources essential to its ability to meet its responsibility to people injured by product defects. Looking at the decision in Rollins v. Hardy Systems (Franklin Court of Appeals, 1997) where the court determined that, because the successor had continued in the same general business, it was liable, regardless of whether it continued to make the specific injurious product. As Clarke, you could argue that since these products only make up 15% of your business this would not apply to you. The court is likely to find against Clarke in this situation, although similar to Burger Clarke was not enganged in the same business as its predecessor at the time the action against it was initiated.

Finally, the third condition is the fairness of requiring the successor to assume responsibility for defective products as a consequence of the successors enjoying the predessor's goodwill.

The third conditions benefit/burden balance would lead the court to conclude it would be unfair to impose product line successor liability on Clarke. The passage of time, the short length of time Clarke made Pure View, the unknown risk, the payment of consideration, and the fact that the sucessor continued as a business for two years after the deal supports this conclusion.

The evidence here weighs against imposition of product line successor liability on Clarke.

Sincerely,

Margaret Mackenzie
Attorney at Law

Multistate Performance Test II
Sample Answer
(Verbatim transcription of answer by an examinee)
July 2005

RE: Request for Variance July 26, 2005

Dear Cooper City Zoning Board of Adjustment:

Barbara Brigham, DDS, and her husband Len Brigham, seek a variance from the R-1 single family residential that their home at 2050 Maple Street in Rollingwood neighborhood is currently zoned under. The Brighams seek a variance from this zoning ordinance so that Barbara may relocate her dental practice, currently located at Stirling Professional Center, to her home in Rollingwood. The Brigham's variance request meets the criteria established under Section 35(D) of the Cooper City Zoning Code and therefore their variance request should be granted.

The first criteria under § 35(D) is that the variance requested will not create a detriment to adjacent and nearby property. Not only will the Brigham's requested variance not create a detriment to neighbors, but allowing the variance will actually bestow a benefit on the neighbors of Rollingwood. In fact, adding a dental office to the Brigham home would increase property values in Rollingwood by 10% and property taxes will only marginally increase according to Bob Zukor of Cooper City Realty. Barbara's dental office employs only 3 people and she schedules 2 to 3 patients an hour for four hours a day. The size of Barbara's practice will only cause a minimal increase in traffic and there is ample off-street parking on the Brigham property. To support the variance request, the Brighams have provided nine letters from landowners near the Brigham property that state that such landowners have no objection to the variance. In addition to increasing property values and minimally increasing traffic, officer David White of the Cooper City Police Department and Sergeant in charge of the Traffic Control Division has recommended placing several mid-size speed bumps in the Rollingwood neighborhood to regulate any increased traffic that might pose a danger to any children. The Brighams have offered to bear the cost of the speed bumps.

To support the claim that the proposed zoning variance will only increase traffic slightly, the Brighams engaged Paul Heinz, a Certified Traffic Control Engineer of Traffic Control, Inc. to conduct an analysis of traffic patterns in the Rollingwood neighborhood. This analysis showed a slight to moderate increase in traffic caused by the addition of a dental office to the Brigham home and stated that the traffic increase can be maintained by the addition of 5 speed bumps.

The second criteria of § 35(D)(2) is that the variance does not alter the general character of the area. As it stands, Rollingwood is a quiet, secluded, neighborhood of single family homes. The addition of a dental office to the Brigham home would not alter the character of Rollingwood. The Brigham home is being remodeled independent of the dental office and the office can be added to the home within the existing structure without adding any additional square footage. Because the dental office will exist entirely within the Brigham home as it now stands, the variance will not change the physical characteristics of Rollingwood. As noted above, any increase to traffic will be light and regulated so that Rollingwood will remain a quiet, safe neighborhood. It is important to note that the general character of the are has already been changed by the addition of garden apartment complex that is to be built on an 18.5 acre plot that sits between the Brigham home and the Stirling Professional Center. This plot has been re-zoned R-R multi-family. The addition of a dental office to the Brigham home fits within the character

of the area before the addition of the apartment complex and after its addition. The nine letters of "no objection" from neighboring landowners also suggests that the neighbors themselves do not think that the requested variance will alter the character of the neighborhood.

The third criteria of § 35(D) is that the variance be in harmony with the provisions and overall intent of the Zoning Code. The stated purpose of the Zoning Code for residential zoning districts can be found in
§276 of the Zoning Code. Residential districts are supposed to provide a variety of residences and complementary uses that conform to the density requirements, policies, and objectives of the Cooper City Land Use Plan. Adding the requested dental office to the Brigham home will provide a service that compliments the neighborhood. As Barbara's practice is mostly a geriatric practice, the addition of the dental office to her home will especially be a complementary sue to the residents of the garden apartment complex. The requested variance is in harmony with the purpose and intent of the Zoning Code because it will not detract from or detrimentally add to the Rollingwood neighborhood as it currently exists.

Finally, under §35(D)(4), the requested variance must meet on of two possible criteria. The first is that unique and peculiar circumstances create practical difficulties or unnecessary hardships that would be alleviated by the variance. The Brigham's requested variance does not satisfy this test because such unique and peculiar circumstance must be found in the land itself. Anton v. Cooper ZBA. This is clearly not the case here. However, the requested variance does meet the second criteria, which is that the public interest will be served by the variance. The public interest will most certainly be served by granting the Brighams the requested variance.

As noted earlier, most of Barbara's dental practice consists of paying and pro bono geriatric clients. The proximity of the garden apartment complex to the Brigham home is important because the garden complex is to house senior citizens. In fact, the March 16, 2005 edition of the *Cooper Daily News* stated that the particular site for the apartment complex was chosen in part because of its proximity to a dentist specializing in geriatrics. Although the current location of Barbara's practice to the apartment complex is equally close (Stirling Professional Center), the office location in the Brigham home is more convenient and safe for senior citizens due to its quiet, secluded, and less-trafficed location as compared to Stirling Professional Center. In addition, if the requested variance is not granted, Barbara will have to move her practice out of Stirling Professional Center due to a 35% rent increase. Because much of her practice is pro bono, Barbara cannot continue to operate in Stirling. The only available rental space is 9 miles away and is a smaller and less attractive office

If Barbara is not granted her variance, then she will be forced to relocate her dental practice 9 miles away and the dental needs of senior citizens in Rollingwood and surrounding area will go unment. See Anton case. It is in the public interest to keep Barbara's dental practice at the Brigham home. It is not only in the best interest of senior citizens, but also the general population because Dr. Brigham is the only dentist in a 3.5 mile radius in this section of Cooper City. If this variance is not granted, everyone in this 3.5 mile section of Cooper City will have to travel 9 miles for dental care.

The Brighams have provided sufficient information to establish that, by a preponderance of the evidence, they have met the requirements of § 35 of the Cooper City Zoning Code and should therefore be granted a variance from R-1 so that a dental office may be installed at 2050 Maple Street in Rollingwood.

Sincerely,

Applicant