

INDIANA ESSAY EXAMINATION
QUESTION 1
July 2015

Linda and Don are Indiana residents, have been married for 16 years, and have one child, Joey, who is 15 years old. Joey was diagnosed with Type 1 diabetes when he was 10 years old.

Joey is active in sports and student government at his high school. He struggles academically and requires tutoring.

Both parties are employed. Linda is an accountant and Don is a middle school teacher and football coach. Linda works long hours during tax season, but works regular hours the rest of the year. Don has summers off, but is very busy during the school year with coaching.

Linda has battled depression throughout the marriage. Her depression is currently controlled with medication.

Linda and Don have different parenting styles. Don is more permissive and Linda is very strict. Joey used to be closer to Linda but now feels she does not understand him and she has way too many rules. Joey and Don share a love of sports and enjoy similar activities.

Linda is the parent who typically arranges for Joey's doctor and dentist appointments and tutoring. Linda is the parent who primarily communicates with Joey's teachers and drives him to his sporting events and activities. Linda is also the parent who more closely monitors Joey's blood sugar and medications.

Linda and Joey left the marital residence and moved in with Linda's 80-year-old mother, Alice. Alice is in the beginning stage of Alzheimer's disease. Alice also lives in Indiana, 40 miles away from the marital residence on a family farm. Joey misses his old school and the city. He is annoyed that he now has to do chores on the farm and help take care of his grandmother.

Linda filed for divorce a month after moving in with her mother.

At the final hearing, the parties agree to share joint legal custody of Joey. However, Linda and Don strongly disagree on the issue of physical custody of Joey. Each party requests physical custody of Joey.

1. Identify the statutory factors the Court will consider in determining which parent should have physical custody of Joey and discuss how the factors would apply in this case.
2. If Linda and Don are awarded joint legal custody of Joey, what types of decisions will they need to make together?
3. Does an award of joint legal custody require an equal division of physical custody of the child?

Indiana State Board of Law Examiners

Question: 1
Sample Answer

1)

This question concerns three issues under Indiana family law: what factors does a court consider in awarding physical custody, the meaning of joint legal custody, and the effect of joint legal custody on an award of physical custody.

I. Statutory factors the Court will consider in determining which parent should have physical custody of Joey.

There are eight statutory factors the Court will consider in determining which parent, Linda or John, should have physical custody of Joey. The factors considered by a court in awarding physical custody to one parent focus on the best interest of the child and include: age and sex of the child; wishes of the child's parents; wishes of the child (with more consideration being given if the child is over the age of 14); interaction of the child with his parents, siblings, and other important individuals; mental and physical health of the parties involved; adjustment of the child to his school and community; evidence of domestic violence by either parent; and evidence of a de facto custodian. Each of these eight factors are discussed in depth below.

1) Age and sex of the child

Joey is a 15 year old boy. This factor is often more relevant if there is an infant needing a mother's care for nursing. As a teenage boy, Joey might arguably be best raised by a male role model, and it appears he has a close bond with his father. This factor is either neutral or slightly favors Don.

2) Wishes of the child's parents

Joey is a lucky child, as both of his parents seek physical custody of him. This factor often becomes relevant if one parent wants custody and another does not, but

here, it is neutral.

3) Wishes of the child, with more consideration being given if the child is over the age of 14

Joey appears to want to return to the marital home where Don seemingly still lives. He is currently living on a family farm 40 miles away from the marital residence, but he misses his old school and the city, and he is annoyed that he now has to do chores on the farm and help take care of his grandmother. Because Joey is 15 and thus over the age of 14 years old, his opinion will be given more weight. As such, this factor probably favors Don, as it sounds like Joey would prefer to live with his father in his old home.

4) Interaction of the child with parents, siblings, and other important individuals

Joey is an only child, so there are no interactions with siblings to consider. Joey used to be closer to Linda but now feels she does not understand him and she has too many rules, so it sounds as if their relationship is strained. Joey is also frustrated with taking care of his grandmother, with whom he and his mother are currently living. Joey and Don share a love of sports and enjoy similar activities. Notably, both parents are employed, with the mother working long hours during tax season and regular hours the rest of the year while the father works longer hours during the school year but has summers off. As long as neither parent would completely neglect Joey due to work responsibilities, this factor probably favors Don as he and Joey seem to have a stronger relationship.

5) Mental and physical health of the parties involved

Mental and physical health is especially prevalent to Linda and Don's situation. Linda has battled depression throughout her 16-year marriage to Don, but her depression is currently being controlled with medication. Linda's depression should probably not weigh on the Court's decision of Joey's best interest because it appears that her depression is under control with medication. However, if this was an untreated condition or likely to cause problems in Joey's well-being, then this factor

would favor Don.

Joey has had Type 1 diabetes for five years. Importantly, Linda is the parent who more closely monitor's Joey's blood sugar and medications. She also has been primarily responsible for arranging Joey's doctor and dentist appointments. This fact tends to favor Linda, as careful attention to a child's serious health condition is crucial to Joey's best interest. However, there is no evidence that Don is unable to monitor Joey's blood sugar and medications. If that is the case, and he is not attentive to Joey's health needs or incapable of scheduling necessary doctor appointments, then this factor would almost certainly favor Linda's physical custody of Joey.

Furthermore, although not a custodial parent or party to the divorce proceedings, Linda and Joey currently live with Linda's 80-year-old mother Alice who suffers from Alzheimer's. There is no evidence that Alice's condition has negatively impacted Joey, but he does feel annoyed that he has to help take care of his grandmother.

6) Adjustment of the child to school and community

Joey currently lives with his mother and grandmother at a family farm, 40 miles away from Linda and Don's former home together. Joey misses his old school and the city. If Linda intends to remain on the family farm while Don remain at the marital home, then this factor tends to favor Don taking physical custody of Joey so that Joey can return to his old school and life in the city, where he was active in sports and student government at his high school. Furthermore, since Joey struggles academically and requires tutoring, then he should likely stay in the school where he is already receiving the help he needs. However, as Linda was primarily responsible for scheduling Joey's tutoring and communicating to Joey's teachers, Don needs to be able to step up and fulfill these rolls if he is to keep physical custody of Joey.

7) Evidence of domestic violence by either parent

There is no evidence that either parent has committed acts of domestic violence. Accordingly, this factor is neutral and favors neither parent.

8) Evidence of a de facto custodian

A de facto custodian is a third party that has been or was primarily responsible for raising the child whose best interest is being considered. A de facto custodian is one who served as the primary caregiver to a child under 3 years old for more than 6 months of her life or a child over 3 years old for more than 1 year of her life. There is no such evidence of a de facto custodian in this situation, as Linda and Don were married for 16 years and seemingly raised Joey together the entire 15 years of his life. Thus, this factor is neutral and favors neither parent.

In conclusion, each parent appears to be a suitable caretaker for Joey, and there are no red flags - like instances of domestic violence or a parent with untreated health issues - that suggest one of the parents should be denied physical custody. Linda and Don are likely ideal candidates to share physical custody, based ultimately on the Court's decision of what is in Joey's best interest. However, because the parents are currently residing 40 miles apart, one parent should likely take primary physical custody so as to not disrupt his academics during the school year. Accordingly, it is likely the Court will find Don should take primary physical custody of Joey and keep him in the marital home, where he is receiving the tutoring he needs and where he can stay active in sports and student government at the high school. This conclusion is of course dependent on the assumption that Don can devote the time necessary to raising Joey during the school year with his busy coaching schedule, and that Don is capable of monitoring Joey's Type 1 diabetes and medical care.

II. Decisions Linda and Don will need to make together if granted joint legal custody.

If Linda and Don are awarded joint legal custody, the legal decisions they will need to make together include medical, religious, and education decisions that affect Joey. The medical decisions are especially important as Joey has Type 1 diabetes, which is a serious condition requiring constant medical supervision. Linda and Don will have to work together to agree on treatment plans and what is in the best interest of Joey and his health. Education decisions might be relevant as Joey struggles

academically and requires tutoring, so if the parents ultimately decide to send him to a private school or make other decisions about his academics, those will need to be made together.

III. Effect of joint legal custody on physical custody.

An award of joint legal custody does not require an equal division of physical custody of the child. Many divorced parents share legal custody while one parent has primary physical custody of the child, as opposed to an equal division of physical custody.

If the Court awards primary physical custody to Don, then Linda is entitled to parenting time. The decision on how much parenting time Linda should be given is determined by the Indiana Parenting Time Guidelines, although the parties may arrive at an agreement outside of that which the Court would need to approve. For example, a custody agreement could take into account that Don has more time in the summer available to spend with Joey while Linda works long hours during tax season, so she might exercise more of her parenting time outside of tax season. Furthermore, some parents split a school week with a child spending a couple nights a week at the non-custodial parent's home. This is probably not the best option for Don and Linda as they are living 40 miles apart, and that would disrupt Joey's school schedule. It might be best for Linda to exercise her parenting time on holidays and weekends.

INDIANA ESSAY EXAMINATION
QUESTION 2
July 2015

Grind & Drink, Inc. is an Indiana corporation with two coffee shops in Sweethome, Indiana. Its shareholders are brother and sister, Ed and Gwen, who each have a 50% interest. The corporation's board of directors consists of three members, Ed, Stew, and John. Stew and John are Gwen's sons.

The coffee shop business is competitive in Sweethome. At all family gatherings, director meetings, and shareholder meetings for the last 10 years, Ed, Gwen, Stew, and John have discussed the need to buy out competitors, wherever possible.

In April of 2015, John was approached by the owner of a local competitor, Lotso Java. Lotso Java's owner informed John that his parents' health had taken a permanent turn for the worse and he had to sell Lotso Java fast, even if that meant selling it for less money, so he could relocate and care for his parents in a faraway city. John did not inform the Grind & Drink board or anyone else about the conversation, and he proceeded to make a low offer to buy Lotso Java for himself. The offer was quickly accepted, and John became the sole owner of Lotso Java.

About the same time, Gwen was approached by a local competitor, Deep Dark Roast. Deep Dark Roast's owners were not from Sweethome but were originally from Texas. Both had full military pensions, and their daughter, who still lives in Texas, just had twins. The owners of Deep Dark Roast told Gwen they also wanted to sell their coffee shop quickly, even cheaply. Gwen did not inform anyone that Deep Dark Roast wanted to sell, but rather she proceeded to make a low offer to buy Deep Dark Roast in her own name. Gwen's offer was quickly accepted, and Gwen became the sole owner of Deep Dark Roast.

1. Have John's actions in acquiring Lotso Java exposed him to any potential liability under Indiana law?
 - a. If so, explain why and identify all potential plaintiffs and any cause(s) of action that may be brought against John.
 - b. If not, explain why his actions are appropriate under Indiana law.

2. Have Gwen's actions in acquiring Deep Dark Roast exposed her to any potential liability under Indiana law?
 - a. If so, explain why and identify all potential plaintiffs and any cause(s) of action that may be brought against Gwen.
 - b. If not, explain why her actions are appropriate under Indiana law.



Indiana State Board of Law Examiners

Question: 2

Sample Answer 2

2)

1. John's actions expose him to personal liability because he has breached his duty of loyalty to Grind & Drink and its shareholders. An individual who sits on a corporation's board of directors owes that corporation a strict duty of loyalty, which entails acting in the utmost interests of the corporation and never his own personal interests. The component of the duty of loyalty that is implicated in this case is the "corporate opportunity" doctrine. In Indiana, if a director usurps a corporate opportunity - meaning an opportunity that essentially belongs or should belong to the corporation on which the director sits - he has violated his duty of loyalty to the corporation if he has taken the opportunity without providing full disclosure of the opportunity and his conflict to the corporation's board of directors or shareholders for their approval.

In Indiana, there are three tests for deciding whether a corporate opportunity exists: (1) the line of business test, meaning that if the director takes advantage of the corporate opportunity, he will be in competition with the corporation because the two are in the same line of business; (2) the expectancy or right test, meaning that the corporate opportunity is one that the corporation had some right to (e.g. the director learned about the opportunity through his official responsibilities, or for example, the opportunity is one that the corporation would have a right to because the person offering the opportunity likely intended it to be offered to the corporation and not the director); and (3) a general fairness test which decides whether it would be fair to the corporation to allow the director to take the opportunity.

If a director is usurping a corporate opportunity or is violating the fiduciary duty of loyalty in any way by entering the company into a transaction in which he has a conflict of interest (for example, by gaining personal profit in the transaction or through an ownership stake in the other contracting party), the director must either fully disclose the facts of the transaction to a disinterested group of directors for an

approval vote, or make a similar disclosure for approval to the disinterested shareholders for approval. The requirement of disclosure also has a "catch-all" provision which allows a director to avoid disclosure if the transaction is otherwise fair to the corporation.

If this process is not followed upon usurping a corporate opportunity, a director is personally liable to the corporation. The facts of this problem seem to indicate that John has breached his fiduciary duty of loyalty to Grind & Drink by purchasing Lotso Javo and not disclosing his corporate opportunity and is thus personally liable to the corporation for this. The purchase was a corporate opportunity under the line of business test because he will be operating a local competing business, and because the sellers of the business likely intended the opportunity to be offered to Grind & Drink and not him.

However, because he is not a shareholder, he owes his fiduciary duty to the corporation and not fellow shareholders - as shareholders do to each other in "incorporated partnership" corporations that are closely held businesses. As a result, the corporation needs to pursue legal action against him for his breach. If the corporation fails to pursue action, the shareholders will have to institute a shareholder derivative suit against him to force the corporation to sue him for breach of his duty because this is an injury to the corporation and not a "direct" injury to the shareholders that would allow them to sue personally. This will require the shareholders - Ed and Gwen - to first make a demand on Rise & Grind's directors to sue John if they haven't already decided to sue. If that demand is ignored by the directors, it is deemed futile and the shareholders can proceed with their derivative suit against John to win recovery for the corporation.

It also should be noted that John has no argument that his actions were appropriate under the business judgment rule because that rule only applies to a breach of the duty of care by a director.

2. Gwen's actions have exposed her to potential liability in purchasing Deep Dark Roast because she has breached the fiduciary duty that she owes her fellow shareholder in a closely held corporation that was formed with a "partnership-like result." In Indiana, shareholders of a closely held corporation owe each other a fiduciary duty to act in the utmost good faith and best interests of each other if the business corporation they formed was intended to resemble a partnership more than a corporation. These sorts of corporations are often called "incorporated partnerships." The fiduciary duties that shareholders owe other are akin to the duties that partners in a general partnership owe each other: the duty of care, the duty to keep other partners informed, and the duty of loyalty (including not to secretly profit)

That appears to be exactly the case in these sets of facts. Ed and Gwen formed a small corporation with an intent to gain a partnership-like result. As a result, Gwen owed Ed a fiduciary duty under Indiana law to keep him informed of any opportunities that should arise and should belong to the corporation. She also breached her fiduciary duty of loyalty by profiting at the corporation's expense, and her duty of care by purchasing a company that is a local competitor of Grind & Drink. If she is running a competing business, she cannot act in the best interests of Grind & Drink's shareholders.

Thus, as a fellow shareholder in an "incorporated partnership" closely held business, Ed has a cause of action against Gwen for breach of fiduciary duty.

INDIANA ESSAY EXAMINATION
QUESTION 3
July 2015

John and Ann were married in 1960. As of January 1, 2015, they had combined assets of about twelve million dollars. None of the couple's assets was held jointly. The couple had one adult child, Fred. Fred, who is widowed, has one adult child, Norman. John has an adult son, Sam, from a previous marriage. In 2001, Sam was convicted of operating a vehicle while intoxicated for a second time in three years, a Class D felony in the state of Indiana.

In 2010 John executed a valid Will. At that time John's assets were:

Stock Investments	\$ 2,000,000
Two Cars	\$ 60,000
Bank Accounts	\$ 500,000
Farmland (80 acres)	\$ 500,000

The Will's relevant provisions are the following:

1. Fred receives all Stock Investments and tangible personal property. If he predeceases John, Norman will receive those assets.
2. Sam receives all Farmland.
3. Fred also receives all Bank Accounts, but this provision is silent as to what should happen if Fred predeceases John.
4. There is no residuary clause.
5. Fred is named Personal Representative of the Estate. No alternate is named.

John and Fred were in a car accident on January 1, 2015. Fred died at the scene of the accident. John died ten days later. Immediately prior to the accident, John's assets were:

Stock Investments	\$ 2,500,000
One Car	\$ 40,000
Bank Accounts	\$ 460,000
*Farmland (40 acres)	\$ 320,000
Gold bullion	\$ 300,000

*John sold 40 acres of Farmland in 2012 and invested the proceeds in gold bullion.

Ann does not want to claim an elective share and wants Norman to receive as much as possible. Assume all persons are Indiana residents and that all property is located in Indiana.

- (1) Identify and discuss what Ann can do to achieve her goal of ensuring her grandson Norman receives as much as possible.
- (2) Identify who should be appointed Personal Representative of John's Estate.
- (3) Discuss whether or not a Federal Estate Tax Return should be filed.
- (4) Identify what assets Norman will receive and explain why he will receive them.
- (5) Identify what assets Sam will receive and explain why he will receive them.

Indiana State Board of Law Examiners

Question: 3

Sample Answer 3

3)

(1) While Ann will not be able to control the disposition of John's assets that were properly devised by his will, Ann can disclaim any interest in John's property that she holds by virtue of the intestacy statute. Under Indiana law, the intestate statute controls property left by an individual without a will or property that is not devised under the will. Since Ann will be given an interest in this property, she may disclaim it to the next intestate taker.

In this circumstance, there does not appear to be any property that is unaccounted for in the will or under the anti-lapse statute. John died leaving several assets that were not accounted for in the will. This includes the cars and the gold bullion. Normally this property would pass through the intestate statute because John did not include a residuary clause. However, the gold and cars are considered tangible personal property and will pass accordingly.

If John died with additional assets, Ann can disclaim them by delivering a signed writing that disclaims her interest in the property to the holder of the assets. This must be done within 9 months for estate tax purposes.

(2) In Indiana, a personal representative can be any individual who is over 18, is of sufficient mental capacity, and has not been convicted of a felony. Unfortunately for Sam, he cannot be a personal representative due to his Class D felony conviction. Norman appears to be suitable since he is an adult and there does not appear to be any issue related to his capacity or criminal history. Additionally, Ann is qualified to be a personal representative, assuming she is of sound mind and is not a convicted felon. In this case, Norman would probably be the best candidate for personal representative. Norman is young, is inheriting a large amount of the assets, and Ann does not appear to have any interest in John's estate. Therefore, Norman would be the ideal candidate for personal representative under these circumstances.

(3) A federal estate tax return does not have to be filed in this instance, however, I would strongly advise the personal representative to file one anyway in order to take advantage of portability. Under federal estate tax law, a taxpayer does not have to file an estate tax return if the gross estate is under the unified credit amount, currently \$5.43 million. John's estate was only \$3.62 million at the time of his death, so his personal representative is not obligated to file a return. However, if John's personal representative elects to file a return, John's unused unified credit amount will be ported over to Ann. This means that Ann would be able to exclude \$5.43 million (indexed yearly for inflation) plus approximately \$2 million from estate tax liability. This is particularly advantageous since Ann will have assets at her death over \$8 million. If this amount is not ported over, Ann's estate will face a 40% estate tax on all assets over the then current unified credit amount.

(4) Norman will receive the following assets. First, Norman will receive John's stock investments. John's will states that Norman will get these assets if Fred predeceases John. In this case Fred died 10 days before John. Norman will also receive John's gold bullion and cars. These assets are considered tangible personal property, and under the will Norman inherits all of John's tangible personal property if Fred predeceases John. Norman also receives the entirety of John's bank accounts. Under Indiana's anti-lapse statute, if the testator leaves a gift to his descendant, and that descendant dies, the issue of the descendant takes the gift. In other words, the gift does not lapse. In this case, Fred was the child of John and Fred's issue is Norman. Since Fred died before John, Norman still takes under the anti-lapse statute.

(5) Sam will receive the 40 acres of farmland. Under Indiana law, a specific devise is adeemed if it ceases to exist in the testator's estate when the testator dies. Specific gifts specify what property is to be given, other than cash. In this instance, the bequest of farmland was a specific gift. When John sold 40 acres of this property and bought gold bullion, the gift of that 40 acres was adeemed. Sam does not have any rightful claim to the gold bullion as well. While specific gifts are not adeemed if gift changes

in form not substance, for example during a stock split, but here the land was changed in substance to gold bullion.

INDIANA ESSAY EXAMINATION

Question 4

July 2015

In 2012, Ken and Diane decided to open their own salon providing hair and spa services and selling high-end beauty products and styling tools. They formed a corporation, KND, Inc., and decided to do business as “Blue Water Salon & Spa.” At all relevant times, an online search of the Indiana Secretary of State records using standard search logic for KND, Inc. revealed that it operates under the assumed name “Blue Water Salon & Spa.”

Diane’s brother, Jackson, decided to lend the new business \$50,000. Diane, as KND’s president, signed a note requiring KND to repay Jackson in annual \$5,000 installments. The next day, Jackson filed a UCC Financing Statement with the Indiana Secretary of State. The Financing Statement identified Jackson as the secured party and Bluewater Spa as the Debtor. It described the collateral as “all of the debtor’s equipment and all inventory whether now owned or hereafter acquired.”

A week later, KND borrowed \$75,000 from First Bank and entered into an enforceable agreement giving First Bank a security interest in all of KND’s deposit accounts and KND’s inventory, including any after-acquired inventory. First Bank correctly filed a financing statement with the Indiana Secretary of State reflecting its interest.

The business was a big success. In 2013, it expanded to add a nail salon. To do so, KND borrowed \$30,000 from Second Bank and entered into an enforceable agreement giving Second Bank a security interest in all of KND’s deposit accounts, its inventory, and its equipment. KND got a more favorable interest rate from Second Bank by agreeing to maintain at least \$10,000 in a depository account at Second Bank. Second Bank correctly filed a financing statement with the Indiana Secretary of State reflecting its interest.

In late 2014, more than a dozen clients contracted serious infections that the Indiana Department of Health traced back to the company’s pedicure equipment. The infections were widely publicized and KND found itself out of business and facing numerous lawsuits.

In February of 2015, KND filed for bankruptcy. Among the assets KND listed were the following:

- | | | | |
|-------------------------|----------|--------------------------|----------|
| • Account at First Bank | \$500 | • Account at Second Bank | \$15,000 |
| • Equipment | \$90,000 | • Inventory | \$20,000 |

1. For Jackson, First Bank, and Second Bank, identify the nature and extent of any interest each has in any of the four assets listed above.
2. For each of the four assets, identify and explain which entity’s or person’s security interest (if any) has priority.

Indiana State Board of Law Examiners

Question: 4

Sample Answer 4

4)

UCC Article 9 governs secured transactions. A secured transaction creates a security interest in personal property or fixtures to secure a debt. The security interest is created in favor of the secured party, and the debtor is the individual who has rights in the collateral. Attachment is the moment that the security interest becomes enforceable against the debtor.

Attachment has three requirements:

- (1) the debtor has rights in the collateral;
- (2) value is given; and
- (3) one of the following:

- a valid authenticated security agreement with a collateral description
- the secured party takes possession of the collateral
- the secured party has "control" if the collateral is a deposit account

Perfection concerns the secured party's rights as against other creditors and often determines which creditors have priority. The method of perfection required depends on what type of collateral has been used. Most often, a security interest is perfected automatically or by filing a financing statement.

1. The nature and extent of each party's interest

The nature and extent of Jackson's interest

Jackson does not a security interest in any of the assets because he did not satisfy the requirements for attachment. Although KND had rights in the collateral and Jackson gave value in the form of a loan, the parties never executed a security agreement. A note is not the same thing as a security agreement and does not create a security

interest. The fact that Jackson filed a financing statement is irrelevant. And even if a security agreement had been authenticated, the financing statement listed the debtor as "Bluewater Spa," which might be "seriously misleading." Since financing statements are indexed according to the debtor's name, a financing statement is ineffective if the debtor's name is "seriously misleading" such that a search using the standard search logic would not reveal the financing statement. For registered organizations such as KND, the correct name is whatever is determined by the documents filed with the Secretary of State. A search for "Bluewater Spa" may not have turned up either "KND, Inc." d/b/a "Blue Water Salon & Spa."

The nature and extent of First Bank's interest

First Bank has a valid, perfected security interest in KND's inventory because KND had rights in the collateral, value was given in the form of a loan, the parties executed a valid security agreement, and First Bank filed a financing statement. The security agreement also included an after-acquired property clause for the inventory, but this is not required for inventory due to the fact that inventory is constantly turning over.

"Control" over a deposit account can be achieved by executing a control agreement, becoming the customer on the bank account, or by virtue of being the bank that holds the account. First Bank has a valid, perfected security interest in KND's deposit account at First Bank because KND had rights in the collateral, value was given in the form of a loan, and the bank has "control." First Bank does not have "control" over KND's deposit account at Second Bank.

The nature and extent of Second Bank's interest

Second Bank has a valid, perfected security interest in KND's inventory, equipment, and deposit account at Second Bank. As to the inventory and equipment, KND had rights in the collateral, value was given in the form of a loan, a valid security agreement was authenticated, and Second Bank filed a proper financing statement.

As to the deposit account, KND has "control" over the Second Bank account because it is the bank that holds the account.

2. Priority

Account at First Bank

First Bank has priority because it is the bank that holds the account.

Account at Second Bank

Second Bank has priority because it is the bank that holds the account.

Equipment

As between Second Bank and Jackson, Second Bank has priority in the equipment because it is a secured creditor, while Jackson is unsecured. Jackson's financing statement mentioned KND's equipment, but as discussed above, he did not satisfy the requirements for attachment, so no valid security interest was created.

Inventory

First Bank has priority in the inventory because it is a secured creditor and filed before Second Bank. Between two secured creditors in a non-PMSI situation, the first to file or perfect has priority. Jackson is an unsecured creditor so has third priority. Jackson's financing statement mentioned KND's inventory, but as discussed above, he did not satisfy the requirements for attachment, so no valid security interest was created.

INDIANA ESSAY EXAMINATION
QUESTION 5
July 2015

Liz and Sue leased an apartment for one year. Two months before the lease expired, Liz left town to wander around Europe. Liz left no forwarding address or any indication as to when or whether she would return. Liz did pay her share of the remaining two months' rent, but she gave Sue no instructions about what to do with Liz's personal property in the apartment, except to tell Sue that Sue could use Liz's television. Liz took only some of her clothes and toiletries with her and left her remaining clothes, furniture, her computer, and her television.

When the lease expired, Sue moved. She used Liz's share of their returned security deposit to pay for three months' rent on a storage unit at Acme Storage and put most of Liz's belongings in the storage unit, including Liz's furniture: a couch, a bed, and a table. The unit was rented in Liz's name, and Sue gave the key to the owner of Acme to keep for Liz, explaining that Sue did not know where Liz was or when Liz would return.

Sue kept the receipt that stated in small print at the bottom that Acme was not responsible for any damage or loss to property stored in a unit. Sue took Liz's computer and the television to Sue's new apartment. Sue then sent an email to Liz with directions about the storage unit, including when Liz needed to start paying the rent on the unit. Sue did not include a copy of the receipt in her email message and subsequently threw it away. Liz did not respond to the message, but it did not bounce back as undeliverable. Subsequent messages to Liz at that address did bounce back as undeliverable, and Sue lost all contact with Liz.

Liz did receive Sue's email about the storage unit and duly made monthly payments on the storage unit. One year after she left town, Liz returned. In the meantime, Sue, believing that Liz had abandoned her property, gave Liz's computer to Sue's boyfriend, Al. Al upgraded the RAM on the computer and added a new keyboard, at a total cost of \$100.00. Sue kept Liz's television set. When Liz went to the storage unit to get her property, she discovered that her computer, TV, couch, and bed were missing. When Liz contacted Sue, Sue told her that Sue had the television and Al had the computer, but that the bed and couch had been put into the storage unit. Sue refused to return the television to Liz. Al refused to return the computer. When Liz contacted Acme, Acme took the position that it was not responsible for the loss of the bed and couch.

Assume Indiana law applies.

1. Identify any possible claims Liz may have against Sue and assess Liz's likelihood of success as to each claim you identify.
2. Identify any possible claims Liz may have against Al and assess Liz's likelihood of success as to each claim you identify.
3. Identify any possible claims Liz may have against Acme and assess Liz's likelihood of success as to each claim you identify.

Indiana State Board of Law Examiners

Question: 5

Sample Answer 5

5)

I. Introduction

In this personal property question it is necessary to examine Liz's rights in the property after she had left them in the possession of her roommate and went to Europe. It is necessary to examine Liz's property rights in terms of bailment, abandonment, and accession to determine what duty was owed to her by her roommate, her roommate's boyfriend, and the storage unit company.

II. Analysis

A. Claims by Liz against Sue

In the present case, there are several possible claims that Liz may have against Sue, her former roommate with regards to the property in the storage unit and television. First, she could make a claim pursuant to bailment law. A bailment is created when the bailee is rightfully in possession of the property, but is not given title to the property by the bailor. The rights and duties with regards to bailment law come up in three different types of bailments. The first type is a bailment solely for the benefit of the bailee. Here the bailee must take extreme caution and will be liable for even minor breaches of that duty. Second, is a bailment for mutual benefit in favor of both the bailee and the bailor. In such a case, the bailee will only be liable under the theory of standard negligence. The last, is a bailment for the benefit of the bailor. In such cases, the bailee will be liable only if their conduct is grossly negligent.

In the present case, this appears to be a bailment for the benefit of the bailor. In essence, this arrangement was undertaken by Sue for Liz's benefit so that her property was not simply discarded. As such, Sue would only be liable for damage or destruction to Liz's television and storage unit property if she were grossly negligent.

Going out of her way after Liz had gone of to Europe without warning, obtaining a storage unit, paying the first three month's rent from the damage deposit goes above and beyond what would be expected with regard to Liz's bed and couch. The television is a different matter. It appears, here, that Liz at the very least created a bailment of mutual benefit by telling Sue that she could use the TV while she was gone, but due to her conduct may have abandoned it and the computer. Abandonment occurs generally when a party knowingly disposes of property. This would likely be a difficult case to make for sue with regard to the television and computer, but it is possible, because Liz had not responded to any of Sue's emails with regard to the property so a court could theoretically find that an abandonment had occurred as it pertains to the television and computer. Despite this, it is my position that a bailment for mutual benefit probably occurred with regards to these two items with Sue being able to use them so long as she kept them safe while Liz was away. As such, Liz is likely entitled to the possession of her television and computer and they must be returned or Sue will be liable.

B. Potential Claims by Liz against Al

Here, Liz may have a claim against Al for repossession of her computer. If it is found as alluded to above that the property was not abandoned, but that instead a bailment for mutual use had been created it is likely that Liz will be entitled to the return of her computer. This, however, gets more tricky, because Al has made improvements to the computer. Generally, an accession occurs when one person through combination of their property or the improvement of someone else's property adds value. If that person is a good faith possessor and the property can be split each party will be entitled to their respective contributions. If they are a bad faith accessor, however, the property will revert back to the owner and they will lose any additions made to the property. Here, it appears that Al was a good faith possessor. He was told by his girlfriend that the property was abandoned by Sue's former roommate and that he was entitled to it. There was no indication that she would be returning for the computer and as a result he made improvements by upgrading the RAM and getting a new

keyboard.

In this case, the result should be relatively simple. Here, the computer will be returned to Liz minus any improvements made by Al. Here, any software purchased by Al to improve the ram and the keyboard are easily removed and can be used by Al in any subsequently purchased device. Since a division of the property appears to be so simple in this case it is likely this will occur with regard to the computer. In short, Liz will have the computer returned, while Al will get the value of the property he added to it. Despite this, it is possible that Al could succeed on a claim that the property had been abandoned. Unlike the TV, Liz never told Sue she could use it. She merely left it at their apartment, and left for Europe without any word a couple months before their lease ran out. Of all the property, it is my position that the computer is the most likely to be found to have been abandoned. Even if it is not, however, because Al acted in good faith he should be able to retain the value of the additions he made to the computer.

C. Claims by Liz against ACME

Here, ACME is a storage unit company which was employed by Liz's roommate for the purpose of safeguarding Liz's property. In short, a bailment was created between Sue and ACME with regard to Liz's property. This bailment was continued by Liz when she found out about the storage unit and she continued to pay the price for the storage unit. The question, therefore, is whether Acme who served as bailee to Liz with regard to her bed and couch can be liable for their disappearance from the storage unit.

As alluded to above a bailment is a situation in which the bailee is in rightful possession of the property but does not receive title to the property. Bailments can be for the benefit of either the bailee, the bailor, or for mutual benefit and as mentioned above, they carry varying degrees of liability with regards to the bailee.

In the present case, the relationship between ACME and Liz is a bailment for mutual benefit. Here, Liz pays ACME to hold her property. Both parties are receiving benefits in that ACME is receiving compensation and Liz is having her property protected. As such, the level of potential liability that would be faced by ACME is that of standard negligence. In other words, it is necessary to ask whether ACME was negligent in the disappearance of Liz's property from the storage unit. Here, there are simply insufficient facts to establish liability although I believe that a case for Res Ipsa Loquitur could be made by Liz with regard to the storage unit. With more details it will be possible to determine liability. It is also worth noting that the receipt included a notice that ACME was not responsible for damaged or lost property while it was contained in the unit. Generally, however, a court will likely not uphold such a clause on a receipt as there is no bargained-for exchange and it would have been difficult for the party to see or even notice the small print. As such, it will turn on whether ACME was negligent in their control over the property in question.

IV. Conclusion

As discussed above, it is likely that Sue will have to return the Television as a bailment for mutual benefit was likely created when Liz left and allowed Sue to use the television and it was not likely abandoned. With regard to Liz's furniture it is unlikely that she will be liable as she took more than reasonable precautions to safeguard the property. Regarding Al, he was a good faith possessor of the computer and made an accession by improving the computer through his own work. This improvement can be severed, however, from the computer as a whole and he will likely retain his improvements while Liz will get the property returned. This, however, is the most likely case for abandonment and such a claim may be possible by Al. Last, ACME created a bailment for mutual benefit with Liz. As such, the disappearance of her couch and bed will turn upon whether ACME was negligent.

INDIANA ESSAY EXAMINATION
QUESTION 6
July 2015

Able Corporation sued Bang Corporation for breach of contract. Able and Bang are both incorporated in Indiana and have principal places of business in Blue County, Indiana. The contract was to be performed in Blue County, Indiana.

Able filed the lawsuit in Red County. Bang moved for change of venue, arguing that Blue County is the preferred venue. The trial court denied the motion, with an order stating: "Able Corp. has argued that the courts of Blue County are more congested than the courts of Red County, so it will receive speedier justice in Red County. Applying my discretion, I deny the motion to change venue." Bang took no further action in the trial court regarding venue.

The case was tried to a jury, and Able won a judgment of \$100,000. The jury issued its verdict on May 26. The trial court entered judgment for \$100,000 on May 28.

Bang filed a Notice of Appeal on June 8. The parties' contract provided that the prevailing party in any action involving the contract was entitled to attorney's fees. On June 9, Able filed a Rule 59 motion, submitting evidence that it incurred \$75,000 in attorneys' fees in the case. Bang stipulated to the amount of attorneys' fees but did not waive its right to appeal the judgment on the merits. The trial court granted the Rule 59 motion and entered judgment in Able's favor for \$175,000 on June 22. On July 7, the trial court clerk entered and served the Notice of Completion of Clerk's Record stating that the transcript was completed.

Bang filed its Appellant's Brief on August 6, raising three issues:

First issue: The judgment should be reversed because the trial court erred by not granting the motion for change of venue.

Second issue: The judgment should be reversed because Able did not prove breach of contract.

Third issue: Even if there was a breach of contract, the \$100,000 judgment was excessive because Able proved only \$50,000 in damages.

1. Is Bang Corporation's notice of appeal timely? Why or why not?
2. Is Bang Corporation's first issue properly raised on appeal, and how should it be decided?
3. Is Bang Corporation's third issue properly raised on appeal, and how should it be decided?

Indiana State Board of Law Examiners

Question: 6

Sample Answer 6

6)

(1) Notice of Appeal

A Notice of Appeal must be filed in the trial court within thirty days after a final judgment on the merits. The trial court entered a final judgment for Able in the amount of \$100,000 on May 28. The Notice of Appeal was filed on June 8, as a result, this is within the thirty day allotment of time. However, the facts are less clear here. There were still issues that had not been determined in the case; thus, it is likely the May 28th decision was not the final judgment on the merits. The attorneys' fees had to be determined and the final judgment was rendered on June 22nd when the trial court granted a Rule 59 motion in Able's favor for \$175,000. There are times when an appeal can be brought when there are outstanding claims to be determined. In those situations, the judge must certify the judgment and explain "there is no just reason for delay" and order the entry of judgment. In those circumstances, a nonfinal judgment is certified to be appealed before all issues are determined. Here, there are not any facts that explain that first judgment rendered the case a final judgment on the merits because of the outstanding issue of attorneys' fees. When those were rendered on June 22nd, then the case became appealable.

Thus, the first notice of appeal was likely not timely filed. The case needed to be a final judgment. However, if the first judgment was certified under Indiana Trial Court rules, then the Notice of Appeal was properly filed with the trial court. After a timely notice of appeal, the trial court has thirty days to produce a record including the transcript and the chronological case summary to the court of appeals in thirty days. The facts tell us the trial court clerk did prepare the transcript and record by July 7th, falling within the thirty day time limit. However, because the first judgment was not final and there was no certification, the notice of appeal was not timely filed.

(2) Change of Venue

There are certain trial judgments that do not require a final judgment on the merits to be appealed. These include the following: judgments awarding property and

money, preliminary injunctions, class action certifications, and transfer of venue decisions. This is a proper issue to raise on appeal *before* the case finishes its trial, after the decision has been rendered by the trial court on a party's first motion for a transfer of venue. This can be appealed as soon as it occurs. When Bang moved for change of venue, arguing that Blue County is a preferred venue. It was correct that a transfer of venue should have occurred. The preferred venues in Indiana include some of the following: the venue in which any defendant has its principal place of business, the county in which the contract was formed, the county in which the acts leading to the cause of action occurred, and the county to which the parties stipulated in contract, to name a few. Red County is not a preferred venue. As a result, Bang should have motion the court for a "transfer of venue." If a transfer of venue motion is made and the county in which the plaintiff has filed suit is not a preferred venue, then the court must transfer the case. However, the facts tell us that Bang Corporation moved for a change of venue. Change of venue is a motion made when the venue is proper however the the county in which the suit is being heard is a party, or there is likely prejudice to occur to the moving party. Change of venue was the wrong motion to make in this situation.

In conclusion, when Bang made its change of venue motion it should have made a transfer of venue motion. At that time, the decision of the court could have been immediately appealable by Bang. Yet, Bang failed to act. It "took no further action in the trial court regarding venue." Thus, it waived its right to a preferred venue under Indiana law. Venue is not like subject matter jurisdiction. It is waivable. Bang will not win on this issue on appeal.

(3) **Excessive Judgment**

Bang has a better opportunity to win on the excessive judgment claim. However, when a party is claiming the judgment is excessive, or that there was jury misconduct, the party must make a Motion to Correct Errors. A Motion to Correct Errors is filed by the party within thirty days after a final judgment and is to contest the misconduct of the jury or an excessive jury verdict. It is usually a prerequisite to a Notice of Appeal and the motion is heard before the trial court. Thus, the excessive jury verdict

likely should have been raised at the trial court level.

If the issue was proper on appeal, Indiana appellate courts use a de novo standard of review of all issues of law. The court will take the trial court's records of fact and only overrule a decision made by the jury if no reasonable jury could have rendered the verdict. As a result, the decision on the damages in this case will unlikely be overturned on appeal. It will depend a great deal on the trial record, the appellate judge is confined to the record to make a decision as to whether the jury verdict was excessive and it must "shock the conscience." This is such a high standard that it is unlikely Bang will win.

In the unlikely event that Bang would win on appeal on this issue, the court could remand the case, the court could determine that remittur is appropriate (where the plaintiff, Able, agrees to take less than the judgment amount of damages), or the court could enter a judgment for a new trial.