

INDIANA ESSAY EXAMINATION
QUESTION 1
July 2019

Angie and Bill met while they were both attending law school. They became engaged the summer after they graduated from law school. The couple had many lengthy conversations about finances. They decided that, when married, they would keep their assets and debts separate and divide all household expenses equally. They also promised that, if they divorced, neither of them would ever seek child support from the other.

The day before the wedding, Angie presented Bill with a premarital agreement she had signed. The agreement provided each party would keep any inheritance gained during the marriage and neither party would pay the other child support for a child born of the marriage. Bill told Angie the premarital agreement looked fair to him, but in the excitement of the wedding activities Bill forgot to sign it.

One year later, Angie gave birth to a son, Cameron. Bill decided to quit his job so he could stay home with Cameron. Angie continued to work to support the family financially. Shortly thereafter, Angie's beloved grandmother died and left Angie \$100,000. The couple used the money as a down payment on a new house.

Six years later, Angie began an affair with a co-worker and filed for dissolution of marriage. Bill desperately wants to preserve his marriage.

Assume Indiana law applies.

1. Based on the facts set forth above, explain what effect, if any, the premarital agreement will have in the dissolution of marriage proceedings?
2. Will Angie's inheritance be subject to division by the Court? Why or why not?
3. What *legal* steps can Bill take to oppose the dissolution and preserve his marriage?
4. Will the Court order child support? Why or why not?

Question One

Angie and Bill's situation requires an analysis of various family law issues including Indiana's adoption of the Uniform Premarital Agreement Act, property division during a dissolution proceeding, an individual's rights during a dissolution proceeding, and rules regarding child-support.

1. Effect of Premarital Agreement on Dissolution of Marriage Proceedings

Indiana has adopted a form of the Uniform Premarital Agreement Act which allows individuals to contract to various rights such as disposition of real and personal property upon dissolution of marriage and spousal support. Since the agreement is a contract, consideration is needed in order for the agreement to be enforceable, however, entry into a marriage is sufficient or consideration in this context. Premarital agreements must be in writing and signed by the party to be charged. Oral agreements are unenforceable. The agreement becomes enforceable upon marriage and will be enforced as long as it was entered into free of duress or fraud. As long as all these requirements are met, the agreement will be enforceable unless the court finds that enforcing the agreement would cause one of the parties substantial harm that was not foreseeable when the agreement was entered into.

Angie had put their premarital agreement in writing and when Bill reviewed the agreement the day before their wedding, he said that the agreement looked fair to him, meaning that it would have been entered into free of duress or fraud. However, as stated in the facts, Bill never signed the agreement. Therefore, the premarital agreement cannot be enforced against Bill. The premarital agreement will have no effect in the dissolution of marriage proceedings, however, as will be discussed below, some of their conversations about finances before they entered into marriage may have an effect on the dissolution proceedings.

2. Splitting the Marital Pot and Angie's Inheritance

In Indiana, in absence of a premarital agreement, all of a couple's assets and debts will go into a "marital pot," which is to be split in a just and reasonable manner. In Indiana, "just and reasonable" is presumed to be a 50-50 split. However, this is a rebuttable presumption and there are a number of factors that the court will consider in splitting up the marital estate. I will discuss some of the factors below and apply them to Angie and Bill's situation.

- The court will consider how much each spouse brought into the estate. There are not any facts here to analyze this factor.
- The court will consider how much each spouse contributed toward the estate. In analyzing this factor, Angie worked to support the family financially, so she was the one that brought in all the income to the family. However, when analyzing this factor, courts also look at things such as housekeeping and emotional support. Bill stayed home and took care of their son, Cameron, inevitably saving the family money on daycare costs.
- The court will consider each spouse's spending habits throughout the marriage, such as if one spouse was extremely frugal, while the other was running up bills

on the credit card. When analyzing this factor, the court may consider the couples' discussions about finances that they had before marriage. They had planned to keep their assets and debts separate and to divide all household expenses equally. The court will likely look to see if they had followed through on this mindset when dividing the marital estate.

- The court will consider each spouse's earning ability. From the facts, Angie had been the breadwinner, but Bill had a job before the birth of their son, so there is no evidence that there is a difference in their earning abilities.
- The court will also consider where the money in the marital pot came from, such as if the money was a gift or the result of an inheritance. The \$100,000 at issue came from an inheritance left by Angie's grandmother. However, because of Angie's treatment of the money, it will likely be subject to division by the court. At the time that Angie filed for dissolution, it had been five years since she received the inheritance. Angie and Bill used the money as a down payment on a new house. If Angie had made any effort to keep the money for herself or had made a down payment on a house that was titled only in her name, the court may consider not including the inheritance in the 50-50 split. However, Angie chose to use the money to buy a house with her husband. Therefore, it is likely that the money will be subject to division by the court. Going back to question one, keeping inheritances separate could have been something that the couple contracted to in the premarital agreement if they had followed the procedural requirements. However, they did not.

3. Legal Steps to Oppose Dissolution of Marriage

It is unlikely that Bill will be able to take legal steps to oppose the dissolution and preserve his marriage. Indiana is a no-fault state, which means that individuals do not need to provide a reason to obtain a marriage dissolution. They only need to allege that an irretrievable breakdown in the marriage has occurred. Angie's affair with her coworker will have no impact on their ability to seek dissolution.

Indiana courts can issue a legal separation between parties, which can last up to a year. This gives a couple a chance to work out their differences and try to preserve their marriage, however, the court can only issue a legal separation if neither of the parties have moved for dissolution of marriage. Unfortunately for Bill, Angie has already filed for a dissolution of marriage.

Once a petition for dissolution has been filed in the court, the individuals must wait 60 days before the court will schedule a hearing. The public policy reason behind this is to give the couple time to try and work things out. In this time, Bill can make a personal attempt to save his marriage with Angie, however, there do not appear to be any legal options for Bill.

4. Child-Support Order

The Uniform Premarital Agreement Act forbids a couple from making a contract regarding child-support payments. Therefore, even if the premarital agreement between Bill and Angie had been signed and become enforceable, the couple still could not have contracted to limit or avoid liability regarding child-support payments. In Indiana, child-support is calculated by filling out a child support worksheet. Once the court gets around to dissolving the marriage and ruling on custody issues, child-support will be calculated and included in the custody order.

INDIANA ESSAY EXAMINATION
QUESTION 2
July 2019

Blue City, Indiana owns, operates, and fully funds the Blue City Soup Kitchen and Shelter (“the Shelter”). The Shelter is located adjacent to the Blue City Government Building. The Shelter provides daily meals without condition, but guests who stay overnight at the Shelter may only stay if they agree to attend Sunday morning church services at the nearby Blue City Christian Church.

John Smith stayed for the weekend at the Shelter. On Sunday morning, Smith refused to attend Blue City Christian Church services. In response, Shelter staff permanently banned him from eating or staying at the Shelter.

On Monday morning, Smith and several others sat on the sidewalk in front of the Shelter and the Blue City Government Building, blocking both entrances to protest the Shelter’s church attendance policy. Blue City police officers warned the protestors that they would be arrested if they failed to disperse and leave the vicinity.

Smith began yelling that the police officers were infringing on the protestors’ constitutional rights. Smith also yelled that the well-known Pastor of the Blue City Christian Church had bribed the Mayor to require church attendance by Shelter guests. A *Blue City Daily News* reporter wrote a story with the headline “Pastor Bribed Mayor” and forwarded it to the Pastor for comment. The Pastor filed an emergency Petition for Preliminary Injunction seeking to enjoin the *Blue City Daily News* from publishing the story.

Smith filed his own lawsuit seeking to enjoin Blue City from (1) funding the Shelter and (2) requiring overnight Shelter guests to attend church.

Limit your analysis solely to the Indiana Constitution:

- A. Analyze the likelihood that the Court will enjoin Blue City from (1) funding the Shelter and/or (2) requiring Shelter guests to attend church. Include in your answer a description of any relevant religion provisions of the Indiana Constitution.
- B. Analyze the likelihood that the Court will grant a preliminary injunction to the Pastor and analyze any potential defenses the *Blue City Daily News* may have to the Pastor’s Motion. Identify in your answer any additional facts necessary to analyze the matter fully.

Question 2:

The following answers apply Indiana Constitutional provisions to the facts regarding John Smith, Blue City, Indiana (Blue City), the Blue City Soup Kitchen and Shelter (Shelter), and the Pastor of Blue City Church (Pastor).

A. Religious Protections Afforded by the Indiana Constitution

The Indiana Constitution contains strong provisions for the protection of religious freedom in the State of Indiana. It is worth noting that in Indiana's "Bill of Rights" (and Indiana's Constitution as a whole), sections regarding religious freedoms and protections are some of the first sections listed. This is important because when analyzing the Indiana Constitution, the Indiana Supreme Court has held that the text controls, followed by a historical analysis of the framers' intentions and subsequent historical interpretations of such provisions through history. As a result, we can infer that Indiana's religious freedom rights granted under the state Constitution are weighty and not to be trifled with.

Specifically, some of the rights specifically enumerated in the Indiana Constitution regarding religion are as follows: the freedom to worship as one chooses, freedom from being compelled to worship or participate in religious activity, a prohibition on using religion as a test for holding any public office, a prohibition on expending state funds for the promotion of religion, and a prohibition on the state endorsing any religion. Applying this law to the facts at hand, it appears that Blue City has a tough road ahead if they would like to keep funding the Shelter and requiring Shelter guests to attend church.

First, we will examine whether Blue City may continue to fund the Shelter. The Indiana Constitution prohibits government funds being used to promote religion, implying that funds cannot be distributed to religious entities. Since Blue City is funding the Shelter, we can assume the Indiana Constitution would apply here. However, in this situation we see no facts that the Shelter is religiously affiliated other than the requirement to attend religious services. If the Shelter is not religiously affiliated, there would likely be no basis to enjoy Blue City from funding the mission if Blue City so chose. Even if there were, the Court could apply the analysis used in the recent Indiana Supreme Court case *Meredith v. Pence*. Here, the Court upheld Indiana's school voucher program even though state funds were being disbursed to religious parochial schools. The reasoning was that religious institutions have played a large role in Indiana's educational history and the intent is simply to provide low-income folks with education, not to fund ministries. Similarly to this case, even if the Shelter were religiously affiliated, religious organizations in Indiana have a long history of helping the poor and so Blue City supplying a soup kitchen to help the poor should be allowed.

However, the requirement that patrons of the shelter who stay overnight attend Church services is patently unconstitutional under the Indiana Constitution. First, Blue City can be seen as compelling a citizen to attend religious services. Second, the provision of funds to the Shelter to house overnight guests with a condition of church attendance could be seen as funding religion with state dollars. Finally, this could be seen as a promotion by the State of one religion over the other since the Shelter doesn't just require patrons to attend *any* religious service—it specifically requires them to attend services at Blue City Christian Church. Conveniently, the Indiana Supreme Court has decided a similar case, *Center Township v. Coe*, that is nearly identical on the facts to this case. Here, the Court held that a requirement to attend church services in return for receiving free services funded by the government was unconstitutional on the basis of the Constitutional provisions outlined above.

In sum, although it is possible that Blue City may be allowed to continue funding the Shelter, the Shelter must cease conditioning public supports on church attendance.

B. Preliminary Injunctions

In order to receive a preliminary injunction, a party must show that they: (1) are likely to suffer irreparable harm if they can't stop the actions of the opposing party before they happen; and (2) that the moving party is likely to succeed on the merits when the case can be fully litigated at trial. It is likely that the Pastor's reputation will suffer irreparable harm should this story claiming that the Pastor bribed the Mayor to allow the Shelter to require their guests attend the Church hit the news. To determine whether the Pastor is likely to succeed on the merits, we must next turn to the Indiana Constitution.

There are a couple angles that inform our analysis. First, the freedom of speech under the Indiana Constitution is laid out in the *Price* case. Unlike the Federal Constitution, Indiana affords broad protections for "political speech" and few protections for "non-political speech." There is no content-based analysis. Thus, political speech (i.e., aimed at the government, etc.) may be regulated only if a private nuisance is created by the speech (in other words, the speech is tortious). However, if only a public nuisance is created by speech, such as creating a disturbance on the steps of the Courthouse or yelling at a police officer, then the speech is protected and there can be no "material burden" placed on that speech. Thus, under this analysis, Mr. Smith's yelling about the police infringing on his rights is only a public nuisance and therefore his speech may not be burdened.

However, we are not asked to examine Smith's conduct, but that of the Blue City Daily News (the Daily). Here, we can assume that the Pastor is seeking an injunction based on the libellous nature of the speech that the Daily is about to put forth (the tortious nature of this action is outside the scope of this essay). Therefore, under the *Price* analysis above the Daily's speech could be a tortious action. This leads us to another layer of analysis.

First of all, the Indiana Constitution specifically states that truth is always a defense to libel. Therefore, if the story is actually true and the Daily can prove it, the Pastor may not enjoin the publication, nor can he sue for damages. However, if its not true or undecided, then Constitutionally the Pastor will only succeed in his actions if: (1) regarding a private individual, he can show that the Daily negligently or recklessly failed to verify or confirm the truth of the matter; or (2) regarding a public individual or occurrence, that the Daily printed the story with malice in that it knew the story was false and printed it anyway. To analyze this outcome fully, we need more facts regarding the Daily's efforts to verify the story. For instance, did they know it was patently false and the ramblings of someone angry with the Shelter and publish it anyway? Did they simply regurgitate what was said on the street without looking into it? Or did they make some effort to investigate the allegation to make sure

there was some level of plausability before publishing? These factors would play into whether the Pastor is likely to succeed on the merits. If the case involved just the Pastor, he would be a private individual and could sue (and therefore enjoin) if the Daily was negligent in looking into the issue. However, since it involves the Mayor, the Pastor may have to prove actual malice and knowledge of falsity before printing.

Therefore, I think it is likely that the Pastor will not be able to enjoin the Daily from printing the news story because (1) this will likely be determined to involve a private individual; and therefore (2) he will have to prove actual malice and a knowledge of falsity on behalf of the Daily. These are hard burdens to meet. However, as discussed above, his prospects could turn drastically depending on the actions of the Daily. (Either way, it is also worth noting that under the Indiana Rules of Trial Procedure an order confirming or denying a preliminary injunction is appealable as a matter of right).

INDIANA ESSAY EXAMINATION
QUESTION 3
July 2019

Matt, an Indiana resident, works full-time for Big Company, an Indiana employer. He enjoys woodworking as a hobby. Matt bought his woodworking tools and supplies from Bob's Woodworking Shop, an Indiana sole proprietorship. He also took some classes through Bob's shop. Matt failed to pay Bob for much of what Bob supplied him, accruing a debt of \$9,000.

Bob stopped selling anything to Matt and repeatedly demanded payment. Matt did not respond. In the meantime, the tools Matt had purchased from Bob depreciated significantly in value through normal use.

Bob finally decided he had no choice but to sue Matt for the money Matt owed him. Within six years after he first supplied goods and services to Matt, Bob filed a complaint in an Indiana court, seeking to recover \$9,000. Matt, who was properly served with all documents in the litigation, failed timely to file an answer or otherwise respond to the complaint.

- A. What are the next two procedural steps Bob needs to take in his attempt to recover the money Matt owes him?
- B. Assume Bob takes the proper procedural steps. The Court holds a hearing during which the following information is revealed:
- Matt has \$250 in a checking account. He has no savings account.
 - Matt has \$5,000 in Big Company's retirement plan. He has no other investments.
 - Matt rents half a duplex from a friend for \$100/week.
 - Matt has a very old van (value \$1,500) that is his only means of transportation.
 - Matt has no personal property other than his clothes, cell phone, and some household items (including the depreciated woodworking tools and equipment).
 - Matt works 40 hours per week for Big Company. Big Company withholds only taxes and FICA, making his net check \$800/week.
 - The federal minimum wage has been increased to \$10/hour.

Explain what relief, if any, this information would enable the Court to provide to Bob.

- C. Explain what impact, if any, a subsequent court order requiring Big Company to deduct \$300 from Matt's weekly disposable earnings for child support would have on a prior grant of relief to Bob?

Indiana Essay 3

Procedural steps Bob needs to take to recover the money Matt owes him

First, Bob needs to ask the court to enter a default judgment against Matt. A defendant who has properly been served in a piece of litigation must timely respond to service of a complaint and summons with some sort of response, whether it be an answer or motion to dismiss. Because Matt has not responded at all to timely service, the court can enter default judgment against Matt for the money he owes Bob. With this default judgment, Bob can ask the court for a writ of execution. A writ of execution needs to be given to the county sheriff in the county where the judgment was entered. This writ of execution will allow the county sheriff to levy on the property of the debtor, Matt, that is located in the county where the default judgment entered against him, seize that property, sell it, and give the proceeds of the sheriff's sale to Bob in order to pay off the \$9,000 judgment owed to him by Matt. Additionally, anytime a judgment is owed and entered in a county, then the judgment automatically becomes a judgment lien on any real property the defendant might located in that county. While the judgment automatically attaches, it can only be levied on once the judgment is indexed in the county records.

However, in some situations, the sheriff will not be able to levy on a writ of execution if the assets of the debtor are not ascertainable. In this kind of scenario, then the plaintiff-creditor, here Bob, should go to the court and ask for proceedings supplemental in order for the court to determine what assets the debtor, Matt, has that can be levied on. The debtor, Matt, must appear at this proceedings supplemental hearing after being summoned, or else could be found to be in contempt of court. At the hearing the judge will determine what the debtor's assets are in order to give Bob some relief in accordance with his judgment against Matt.

What relief Matt's financial information enables the Court to provide Bob

This financial information about Matt's assets will be helpful for the Court in providing relief to Bob. Some assets of a debtor are considered exempt property and out of the reach of creditors. First, the list of assets from the court shows that Matt has \$250 in a checking account. A debtor can exempt up to \$400 in cash and accounts so Bob will not be able to get to the \$250 in Matt's account. Next, the retirement plan will be exempt from the reach of Bob. The duplex is not real property owned by Matt, so that won't apply to the automatic lien on real property rule that is outlined above. Matt's very old van, worth \$1,500 can also be exempted by Matt. A debtor can exempt personal property in the amount of up to \$10,250, and his van certainly falls below that mark. His household items can also be exempt under this \$10,250 claim as personal property. However, the woodworking tools are likely recoverable by Bob. They do not fall into the category of tools needed for a trade, since the facts state woodworking is only a hobby for Matt, so Bob may be able to levy against he woodworking tools.

However, Bob's best bet for relief is to ask the court for a garnishment of Matt's wages from Big Company. Garnishment is a court order that allows a creditor to be paid from money owned by the debtor, but held by another, such as an employer. Here the wages are earned by Matt, but held by the employer until paid. Therefore, the court can enter a garnishment order against Matt's wages. The starting guidelines for garnishment orders fall into the 25/30 rule. The debtor's disposable earnings can be garnished from the lesser of 25% of their disposable earnings or 30x the amount that the debtor's wages exceed the federal minimum wage.

In this case, 25% of Matt's disposable weekly earnings is \$200. The minimum wage in this question is \$10/hour ($10 \times 30 = \300 and $800 - 300 = \$500$) the other part of the garnishment calculation would be \$500. Because the lesser of the garnishment possibilities is \$200, Matt's wages can be ordered garnished for up to \$200 and given to Bob to satisfy the debt Matt owes him.

The impact a subsequent child support order would have on a prior grant of relief to Bob

The garnishment equation written above is only a starting point for the court's in determining how much a debtor's disposable earnings can be garnished. When there is a support order, the amount can go up to as high as 55-65% of the debtor's disposable earnings. Under the garnishment rules, a garnishment pursuant to a support order for a dependent child takes precedence over garnishment orders to creditors, even if the child support order is subsequent to the creditor's garnishment order. So, the child support order would take priority over Bob's order, and if the child support order garnishes the maximum amount allowed out of Matt's wages, then Bob's garnishment order will have to wait in line behind the child support garnishment order until Matt's child support obligations are over.

INDIANA ESSAY EXAMINATION
QUESTION 4
July 2019

Jim married Sue, who already had two children, David, age 4, and Maddie, age 2, by another man. Neither child's paternity was established by law at birth or at any later time. Sue died. While raising David and Maddie alone, Jim fathered a third child, Carly. Carly's paternity had been established by law, so after her mother died she came to live with Jim.

Jim executed and funded an Irrevocable Living Trust. The Trust, which did not identify any of the three children by name, stated in pertinent part:

If at the time of my death, the youngest of my children (including any after-born children) shall not have attained the age of thirty (30), I appoint my brother Sam as Trustee. Trustee may make distributions for the health, education, support, and welfare of any of my children. When all of my then-living children have attained the age of thirty (30), the Trust shall terminate, and the balance shall be distributed equally to my children.

Jim died. Sam became guardian of the person and estate of all three children. They lived with him. Once Jim's affairs were settled, the Trust contained \$450,000. Sam didn't tell the children about the Trust until he terminated it and distributed the funds. While the Trust existed, Sam made the following distributions, which the children believed came out of Sam's pocket:

- To David, who did not go to college: \$10,000 for a used car for his 18th birthday and \$20,000 paid directly to credit card companies on David's behalf.
- To Maddie, who went to college: \$25,000 for a new car for her 18th birthday, \$75,000 for her college-related expenses, and \$20,000 for a down payment on a house.
- To Carly, who dropped out of high school: \$12,000 for a used car for her 18th birthday and \$1,000 in gift cards when she had a baby.

When Carly turned 30, Sam told the children about the Trust, provided an itemized accounting of all Trust activities (Sam kept impeccable records and prudently invested the funds), and distributed the remaining \$300,000 equally among the three children.

Assume Indiana law applies.

- A. Identify and analyze the claim(s), if any, the children have against Sam for not advising them of the Trust.
- B. Was Sam required to make equal distributions to the children while the Trust existed? Explain why or why not. Discuss what claim(s), if any, David and Carly have against Sam with regard to the distributions to Maddie.
- C. Should David and Maddie have received anything since paternity was never established?

Question 4:

This question brings about three issues. First, whether Jim's children have any claims against Sam for keeping the trust secret. Second, whether Sam was required to make equal distributions and whether David and Carly have a claim against him for Maddie receiving more. Third, whether David and Maddie were entitled to receive assets as children.

Issue 1: Claims against Sam for Secret Trust

The children may have a claim for breach of fiduciary duty against Sam for failing to disclose information about the trust to them before termination. Indiana requires certain disclosures to trust beneficiaries. Generally, a trustee should make available an accounting of assets on a yearly basis, unless the trust specifically states otherwise. Additionally, trust beneficiaries may compel a trustee to provide an accounting of assets and of his activities, unless the trust specifically states otherwise. However, Indiana does not allow secret trust, wherein the trustee may keep secret aspects of the trust assets, accountings, and the instrument. Beneficiaries have certain rights and the trustee has a fiduciary obligation to the beneficiaries of the trust. If those fiduciary duties are breached, a beneficiary can file a claim for breach of fiduciary duty if they can show breach, show harm, and show that the breach was the cause of that harm.

Here, the facts indicate that after the resolution of Jim's affairs and Sam had taken over as trustee, the children believed that Sam had been making distributions for their benefit out of his own pocket. Regardless, they may still have a claim for breach of fiduciary duty against Sam for failing to disclose proper information about the trust to them. However, Sam's record keeping was impeccable and would have been available, had a beneficiary requested a copy of the trust or an annual accounting. Regardless, if the provisions of the trust, which are not entirely apparent from the facts, had a clause which did not require Sam to voluntarily disclose information to the beneficiaries, he may have a defense. Nevertheless, he still has a fiduciary duty to the beneficiaries of the trust, of loyalty, honesty, full disclosure, prudent investment, and to generally put their benefits before his own.

While David, Maddie, and Carly may be able to raise a claim for breach of that duty for nondisclosure, the children had no way to compel distributions so showing harm would be unlikely. Furthermore, other than the nondisclosure of the existence, since they could not compel distributions, the fact that the existence was not disclosed, additionally caused them no harm.

David, Maddie, and Carly may have a claim, but the likelihood of success on that claim may be difficult to prove.

Issue 2: No Requirement for Equal Distribution Prior to Termination

Pursuant to the terms of the trust, Sam, as Trustee, had full discretion to make distributions of income and or principal to the beneficiaries for their health, education, support, and welfare. Generally, trusts will provide guidelines and duties upon a trustee for when and how distributions are to be made and whether those distributions are to be from income, principal, or both. If a trustee has discretion to make a distribution, he may use any ascertainable standards to base that discretion upon. If there is an obligation, then he must follow any standards and obligations set forth by the grantor of the trust.

Here, Sam had discretion to make distributions prior to termination. His discretion was based on an ascertainable standard: health, education, support, and welfare (HEMS standard). Therefore, Sam was not required to make equal distributions to the three children. Sam was only required to consider a child's health, education, support, and welfare while deciding to make distributions to any given child. There are no restrictions regarding income or other sources of income, or any delineation that each child receive an equal amount.

Therefore, Sam was not required to make equal distributions to the children prior to termination of the trust.

I. Claim against Sam for unequal distributions to Maddie

It is unlikely that David and Carly have a claim against Sam for breach of fiduciary duty, unless they can show that he made distributions to Maddie for another reason besides the HEMS standard. Even so, it would be difficult to allege a breach of the fiduciary duty. Sam had full discretion to make distributions to any of the children based on the HEMS standard.

Here, Sam made distributions to Maddie for a car, for school, and for a house. A distribution for the car could be considered basic support or general welfare, and David and Carly also received funds for a car, even though they were used for cars. Maddie received money to go to college, which is education. This is appropriate, and the others did not go to college. Maddie also received a downpayment for a house, which would fall within support or welfare. Neither David nor Carly have houses, but David received payoff of credit card debt and Carly received gift cards, both would be general welfare or support. Payoff of the debt would be similar to the distribution for the downpayment of the house. The gift cards for Carly upon the birth of her child would be support and welfare too, since Sam would be unable to make distributions to her child since that child is not a beneficiary of the trust.

Since the distributions that Sam made to Maddie are all appropriate regarding the circumstances, they would fall within his discretion while following the HEMS standard.

Issue 3: Should David and Maddie have Received Distributions

The trust provides that distributions should be made to Jim's children. However, David and Maddie were Sue's children and paternity was never established. In Indiana, paternity must be established by executing a paternity affidavit, or in a paternity action. In the absence of paternity, a de facto parent, or in loco parentis relationship can be established. Inheritance is also governed by paternity and if a decedent dies intestate and is a man who has not established paternity over his children, those children of the intestate will not take.

Here, David and Maddie were the children of another man with Sue. Jim was not the biological father. However, he was married to Sue and when she died, he took care of David and Maddie as they were his own. He provided for them and raised them. He also created the trust for them. He referred to them as his children and it was his intent they take under the trust. This relationship could establish a defacto parent or in loco parentis parent child relationship, as he acted as their guardian's since he was the surviving spouse of Sue, their mother. If this relationship was established, then Sam was proper in making distribution to them.

However, if there was no relationship, then distribution to David and Madie may have been improper and Carly would have a claim for breach of fiduciary duty against Sam for making improper distributions from the trust. Carly would need to file suit for interpretation of the trust and breach of fiduciary duty against Sam. Sam would be able to defend his distributions and introduce evidence of the parent child relationship and of Jims intent to refer to DAvid and Maddie as his children. Furthermore, the establishment of paternity as a requirment under the probate code would not apply since it applies to intestate transfers. A grantor may draft a trust to include specific definitiion that coincide with their intent. and if Jim referred to David and Maddie as his children, then they should appropriately receive distributions.

INDIANA ESSAY EXAMINATION
QUESTION 5
July 2019

Landlord wants to lease several Indiana residential real estate properties. Landlord wants to know certain things about leasing these properties. For each of these inquiries, answer the question and provide an explanation for your answer:

1. Must Landlord's leases be in writing?
2. Can Landlord collect a security deposit? If so, following the end of tenant occupancy, for what can Landlord use the deposit and for how long can Landlord hold it?
3. Can Landlord make the Tenancy "AS IS with all faults" and require the tenant to be responsible for the condition of the property and all safety compliance?
4. Can Landlord ban all business use (e.g., beauty shops, day care, private home office)?
5. Can Landlord strictly limit the number of residents?
6. Can Landlord include a provision that requires rent to be tripled in any hold-over term?
7. Can Landlord ban all subleases?
8. Can Landlord set a late fee for any late rent equal to one month's rent?

Question 5:

1. Landlord's leases are not required to be in writing provided that they are for a term of less than one year. A lease for a term longer than one year must be in writing. Furthermore a lease with a term of three years or longer must be recorded in the recorder's office of the county in which the property sits. Despite the legality of oral leases, it is highly advisable to use written leases.
2. Landlord may collect a security deposit, but he must conform his use of that deposit to the Security Deposit Act. After the end of tenancy, landlord may use the security deposit for three primary purposes: (1) to satisfy tenant's unpaid rent obligations; (2) to satisfy utility expenses for which tenant was liable; and (3) for damages to the premises *not* constituting ordinary wear and tear. Ordinary wear and tear includes the types of things a landlord can expect to do after the end of any tenancy, such as interior painting or carpet cleaning. If landlord wishes to use the deposit for these charges, he must provide tenant (upon request) with an itemized breakdown of the costs of repairs (or else with a detailed quote for the proposed costs). If a description is too general (such as "general cleaning" or "general maintenance") then the landlord might be required to return those portions of the deposit. Furthermore, if a tenant recovers even a portion of the deposit under the security deposit act, the landlord may be liable for tenant's reasonable attorney's fees. Provided that the tenant timely notifies landlord, in writing, of his new mailing address, landlord may only hold tenant's security deposit not used for permitted purposes for 60 days. Violation of this statute may require the return of the entire deposit and (as stated above) a possible award of fees to the tenant.
3. Landlord cannot make the tenancy "AS IS with all faults" and require the tenant to be responsible for all safety compliance. While Indiana does not strictly recognize an implied warranty of habitability, the courts have recognized that landlords have certain obligations to tenants. Chief among them is to deliver a premises suitable for living. Therefore, the tenant cannot waive the right to a habitable premises. While the landlord could require, under the lease, that the tenant be responsible for aspects of the condition of the property (such as mowing grass, exterior upkeep, etc.), it cannot force that duty onto the tenant with respect to essential features of a habitable dwelling, such as heating, running water, and electricity. It is reasonable to require a tenant to use the property in a safe manner, but if landlord is asking whether he can make tenant responsible for things like compliance with building codes, then the answer is no. Such features go to the habitability of the dwelling and are part of landlord's responsibility.
4. Landlord probably cannot ban *all* business use of the premises for risk of breaching the covenant of quiet enjoyment. This covenant is another of the obligations owed to the tenant by landlord. A breach of this covenant has been described as something of grave and permanent character which deprives the tenant from the use and enjoyment of all or part of the property. While this covenant includes several components, such as the right to be free from excessive intrusion by the landlord, it also prevents the landlord from generally interfering with the tenant's reasonable use of the property. Landlord can probably prohibit commercial use of the premises, especially given that these are residential properties. Such nonconforming use would be outside of the scope of the covenant of quiet enjoyment. However, using part of the home as a private home office would likely fall into the category of normal use of the home that a tenant is entitled to under the covenant. As such, the landlord will need to be careful in drafting the lease to specify what type of business use is not acceptable.
5. Landlord may limit the number of residents generally to two adults per bedroom in the home. However, consistency in enforcing this is critical. Any variation in enforcement of such a policy can open the landlord up to legal claims, especially in the context of the Fair Housing Act. This problem is compounded when a prospective tenant has children of varying ages. The landlord must be carefully to apply this policy uniformly and reasonably or else risk the appearance of discrimination based on familial status, which is prohibited under the FHA.
6. Landlord may include a provision that automatically escalates rent in the hold over period. The typical rule is that, absent an agreement to the contrary, rent during the holdover period continues at the same rate as during the lease. Landlord may be taking a risk with such an extreme escalation clause for residential property, so caution should be used in fashioning the escalated rent formulation.
7. Landlord can ban all subleases, but such ban must be included in a written lease. The general rule is that, unless otherwise agreed by the parties, all leases may be sublet or assigned.
8. While landlord may set a late fee for late rent, a fee equal to one month's rent would almost certainly be held unenforceable. A late fee is unenforceable if it is penalty, but may be enforceable as liquidated damages. Courts have looked to the relation between the amount of the fee and the additional costs imposed on the landlord by reason of late payment. While there is no bright-line rule, if a late fee looks to be punitive then it is more likely to be an unenforceable penalty and not a permitted liquidated damages provision. Here, unless landlord expects to incur substantial fees every time a payment is late, a fee equal to one month's rent would appear to be a penalty and thus unenforceable.

INDIANA ESSAY EXAMINATION
QUESTION 6
July 2019

Plaintiff properly filed and served a lawsuit against Defendant in an Indiana Court alleging Defendant breached a written employment contract when it fired her from her position as a sales representative. Defendant timely filed an answer denying liability on the basis that Plaintiff's contract listed theft of company property as a cause for termination and Plaintiff had allegedly stolen samples from Defendant. Defendant also filed a counterclaim contending Plaintiff was violating a non-compete agreement by working in her new job for a competitor.

A. Defendant wants to enjoin Plaintiff from working at her new job. What will Defendant be required to show, and what else, if anything, will Defendant be required to do to obtain injunctive relief?

Assume Defendant was unsuccessful in obtaining injunctive relief. Following the denial of its request for injunctive relief, Defendant moved for summary judgment based on its counterclaim. As supporting evidence, Defendant designated portions of the depositions of several of Plaintiff's former co-workers. Plaintiff made no written response to the motion, but her counsel argued at the hearing that Defendant's designated evidence actually raised a genuine issue of material fact as to whether the non-compete agreement actually barred Plaintiff's new employment. The trial court subsequently denied Defendant's motion.

Following trial, a jury found for Plaintiff and awarded her \$175,000 in damages. The jury also found *against* Plaintiff on Defendant's counterclaim, determined the non-compete agreement was enforceable against Plaintiff, and awarded Defendant \$15,000, pursuant to the liquidated damages provision in the contract. The court entered judgment on the jury's verdict that same day. Defendant filed its Notice of Appeal to the Indiana Court of Appeals the next day. No other filings were made in the trial court. On appeal, Defendant made three arguments:

1. The trial court erred by failing to grant Defendant a preliminary injunction;
2. The trial court erred by failing to grant Defendant summary judgment on the counterclaim because Plaintiff failed to designate any evidence in response to the Motion for Summary Judgment; and
3. The judgment entered on the verdict was excessive.

Assume all filing requirements and deadlines in connection with the appeal were met.

Ignoring all substantive legal arguments such as sufficiency of the evidence, etc., what procedural argument(s) should Plaintiff (Appellee) raise in response to each of the three issues raised by Defendant (Appellant) on appeal, and how should the Court of Appeals rule on each argument raised?

Question 6:

A. Injunctive Relief

The Defendant crossclaiming to enjoin the plaintiff from working at her new job with the defendant's competitor likely is seeking a preliminary injunction due to the possibility of immediate harm of the defendant working for a competitor in violation of her non-compete agreement. It would not make sense for the Defendant not to seek a preliminary injunction while waiting for a determination on the merits for all claims as harm could be suffered while the Plaintiff works for the competitor in possible violation of a noncompete.

The Indiana Trial Rules provide that for a preliminary injunction to be granted, the moving party must show the following: (1) the moving party will suffer immediate and irreparable harm; (2) the harm to the non-moving party is not as great as the harm suffered by the moving party in absence of an injunction; (3) the moving party has a reasonable likelihood of success on the merits; and (4) the public interest favors granting the injunction. The Defendant will need to file a request for a preliminary injunction if it did not include that request in the counterclaim.

B. What Arguments Plaintiff Should Raise in Response to Defendant's Arguments

The arguments raised by Defendant are bolded below.

1. The trial court erred by failing to grant Defendant a preliminary injunction

The Plaintiff should respond by arguing that the Defendant should have immediately appealed the denial of the preliminary injunction. The Indiana Trial Rules provide that only final orders may be appealed, with some exceptions, including interlocutory orders as of right (such as for the payment of money or delivery of securities) and certified interlocutory orders (certified by the trial court either on request or through an express determination in the trial court's order stating there is no reason to delay appeal). The granting or denial of a preliminary injunction is considered a final order. A motion to correct error is not required before appealing the granting or denial of a preliminary injunction. While dates are not included in the information provided, it is reasonable to assume that more than 30 days passed between the denial of the preliminary injunction and the date of the jury verdict. The Defendant should have filed a Notice of Appeal of the preliminary injunction within 30 days of the date the denial was entered by the trial court.

The Court of Appeals should hold that the Defendant missed the deadline to appeal the denial of the preliminary injunction.

2. The trial court erred by failing to grant Defendant summary judgment on the counterclaim because Plaintiff failed to designate any evidence evidence in response to the Motion for Summary Judgment

The Plaintiff should argue that the Plaintiff was not required to designate any evidence in response to the Motion for Summary Judgment.

Indiana does not follow the Federal *Celotex* rule that a defendant can successfully seek summary judgment when there is no question of material fact, which can be shown by the defendant demonstrating that the plaintiff has not designated any evidence in support of any element of the plaintiff's claim. Indiana follows its own *Jarboe* holding that if a defendant's evidence raises any genuine issue of material fact, summary judgment is inappropriate. Indiana courts have also held that failing to respond to a motion for summary judgment does not mean a court can grant the motion for summary judgment by default.

The facts indicate that Plaintiff's counsel provided that the Defendant's evidence created a genuine issue of material fact at the hearing on the Motion for Summary Judgment. Furthermore, the fact that Plaintiff ultimately succeeded on the merits of her argument tends to indicate that granting summary judgment for the Defendant would have been improper.

The Court of Appeals should hold in favor of Plaintiff, holding that the Plaintiff was not required to designate evidence in response to the Motion for Summary Judgment.

3. The judgment entered on the verdict was excessive

The Plaintiff should respond to this argument by the Defendant by raising the fact that a party seeking an appeal on the basis of an excessive jury verdict is required to first file a Motion to Correct Error with the trial court. A Motion to Correct Error is usually optional before filing an appeal, except in two circumstances: (1) if the party seeking reconsideration is arguing that a jury verdict is excessive or insufficient or (2) if the party seeking reconsideration has newly discovered evidence that could not have been reasonably been discovered during the trial. In those two circumstances, a Motion to Correct Error is required to be filed within 30 days of the final order of the trial court. If the trial court does not set a hearing within 30 days, or if the trial court sets and holds a hearing within 30 days but does not issue a ruling within 45 days, then the clock starts ticking for the moving party to file the Notice of Appeal (within 30 days).

The Plaintiff should argue that because the Defendant did not first file a Motion to Correct Error on the question of the jury verdict, the Defendant was not eligible to appeal the jury verdict until it had done so.

The Court of Appeals should rule in the Plaintiff's favor and hold that the appeal on the question of the jury verdict was premature because the Defendant did not first file a Motion to Correct Error as required by the Indiana Trial Rules.