JULY 2019 MICHIGAN BAR EXAMINATION
EXAMINER'S ANALYSES

EXAMINERS' ANALYSIS OF QUESTION NO. 1

These inquiries involve analysis and application of Michigan law on gifts. The three elements of a valid gift are: (1) an intent by the donor to pass gratuitous title to the donee; (2) delivery of the gift, either actual or constructive; and (3) acceptance of the gift by the donee. *In re Handelsman*, 266 Mich App 433, 437-438 (2005). If the property given benefits the donee, the law presumes that it has been accepted. *Id.* at 438. Most gifts convey absolute irrevocable title to the donee. However, some gifts are considered conditional. For instance, engagement rings are an exception to the general irrevocable title rule since it is impliedly given in contemplation of marriage. If the engagement is cancelled, the ring must be returned if the donor so requests since the gift is not capable of being completed because the condition or marriage is not met. *Meyer* v *Mitnick*, 244 Mich App 697, 703-704 (2001). Moreover, delivery of the property "must be unconditional . . . must place the property within the dominion and control of the donee . . . [and] must invest ownership in the donee beyond the power of recall by the donor." *Osius* v *Dingell*, 375 Mich 605, 611(1965) (citations omitted). See also, *In re Casey Estate*, 306 Mich App 252, 263-264 (2014).

Based upon the above law, the following applies with respect to each of the factual scenarios:

1. The necklace given to Samantha constitutes a gift. Darren intended to give it as a testament to their then longstanding friendship. He delivered the valuable necklace to her and she wore it. There is no dispute that the elements of

donative intent, delivery and acceptance were met. As such, Darren's change of heart about the gift, while perhaps understandable, does not legally obligate Samantha to return it.

2. Tyson could have legally demanded return of the engagement ring from Debra prior to the marriage. However, once the condition of marriage was satisfied, the gift was deemed completed and Debra is not obligated to relinquish the ring to him just because the marriage was in jeopardy just months later.

3. Jeremy is not entitled to the vintage car as a gift from Papa Earl. Donative intent was established by Papa Earl's offer to give the car to Jeremy, and it is at the very least legally assumed that Jeremy was accepting of the offer given the car's value and utility. However, no delivery of the property to Jeremy occurred since he failed to retrieve the title, keys and car as directed. Therefore, a gift of the car to Jeremy was not established. As such, Papa Earl was at liberty to change his mind and instead gift the car to Liza who is now the legal owner as all the elements of a gift are satisfied with respect to her.

EXAMINERS' ANALYSIS OF QUESTION NO. 2

The Michigan summary proceedings act (the "act") governs civil actions to recover possession of real property. MCL 600.5701 et seq. However, the act specifically precludes entry of a judgment of possession in certain instances that amount to retaliation by the plaintiff landlord in response to particular actions by the defendant tenant to advance rights under the tenancy. With respect to Sarah's specific retaliation allegation, MCL 600.5720(1)(b) provides:

> (1) A judgment for possession of the premises for an alleged termination of tenancy shall not be entered against a defendant if 1 or more of the following is established:
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> * * *
>
> (b) That the alleged termination was intended primarily as a penalty for the defendant's complaint to a governmental authority with a report of plaintiff's violation of a health or safety code or ordinance.
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> * * *

The burden of proving that a retaliatory termination does not exist falls on the plaintiff landlord where the defendant complained to a governmental authority about health or safety code violations within 90 days from the summary proceedings filing since such an occurrence creates a presumption that the termination action is retaliatory. By the same token, however, a presumption that a termination action is not retaliatory is established if no such governmental complaint of code violations against the landlord is filed within that 90-day window, and thus the burden of proof is borne by the defendant tenant to prove the retaliation defense. MCL 600.5720(2).

If the retaliatory eviction law was applicable to this scenario, Sarah would bear the burden of overcoming the presumption that the termination was not retaliatory since Sarah's complaint occurred 6 months ago, way beyond the 90-day retaliatory termination presumption window. Even more importantly, though, is that this retaliatory termination law does not even apply to the factual scenario presented because the fixed term lease between

Cassie and Sarah expired by its own terms and thus, party motivation is irrelevant. *Frenchtown Villa* v *Meadors*, 117 Mich App 683, 689 (1982). According to *Frenchtown* "the retaliatory eviction defense does not extend to summary proceedings instituted at the expiration of a fixed-term lease." *Id*. As the court explained:

> [A] tenancy for a fixed term of years pursuant to a lease is ordinarily terminated on the expiration of the term of the tenancy as fixed by the lease. Thus, a tenant's right to possession of leased premises expires or terminates pursuant to the lease absent the securing of an extension. (citation omitted). As a result, a landlord seeking repossession of premises upon the expiration of the term of a fixed lease does not terminate the tenancy, but merely seeks repossession pursuant to the termination that has otherwise taken place. Because the landlord has not independently caused the termination, his motivation in seeking repossession or declining to renew the lease agreement is irrelevant to the operation of MCL 600.5720; MSA 27A.5720. [*Id*.]

Thus, Sarah's retaliatory eviction/termination of tenancy defense is without legal merit in Michigan.

Additionally, if Cassie obtains a judgment of possession of the property and Sarah has not voluntarily vacated by the date stated in the judgment, Cassie may enforce the judgment by seeking to obtain a writ of restitution, also known as an order of eviction. MCL 600.5741; MCR 4.201(L)(1). Generally, a writ of restitution "must not be issued until the expiration of 10 days after the entry of the judgment for possession." MCL 600.5744(5). Such order would direct an authorized person (e.g. sheriff, court officer, etc.) to restore full possession of the premises to Cassie. MCL 600.5744(1).

EXAMINERS' ANALYSIS OF QUESTION NO. 3

Estates in Michigan are statutorily governed by the Estates and Protected Individuals Code ("EPIC"), MCL 700.1101 et al.

I. **Angel's Estate**: Because Angel passed away without a will, she is deemed to have died intestate, and the statutory rules of intestate succession apply to the distribution of her estate. MCL 700.2101(1). Since Angel had no surviving spouse and the only living heir at the time of her death was her daughter Hope, the intestate succession rules under MCL 700.2103 dictate that Hope is entitled to Angel's entire estate. Hope is entitled to the estate even though she failed to survive her mother by 120 hours and even though intestate succession rules generally provide that "[a]n individual who fails to survive the decedent by 120 hours is considered to have predeceased the decedent for purposes of . . . intestate succession, and the decedent's heirs are determined accordingly." MCL 700.2104. Hope takes the entire estate because this 120-hour predeceasing decedent law "does not apply if its application would result in a taking of the intestate estate by the state under section 2105." MCL 700.2105 provides that if there is no "taker" under the intestate succession provisions, "the intestate estate passes to this state." If Hope was deemed to have predeceased Angel, the state of Michigan would be entitled to the estate proceeds because there are no other remaining heirs under the intestate succession laws (i.e. no other children, parent, grandparent or siblings) to whom Angel's estate could pass. The law protects against such an outcome, as explained above. Therefore, Angel's estate passes entirely to Hope despite Hope not surviving Angel by 120 hours.

II. **Hope's Estate**: The March 1, 2014 writing that Hope signed qualifies as a valid holographic will. All valid wills require that the testator be at least 18 years old and have "sufficient mental capacity." MCL 700.2501(1). Those initial requirements are satisfied in this instance since at the time she made the writing, Hope was 60 years of age and in good physical and mental health. A holographic will requires no witnesses and is considered valid "if it is dated, and if the testator's signature and the document's material portions are in the testator's handwriting." MCL 700.2502(2). Hope's non-witnessed writing constitutes a valid holographic will because it was dated, signed by her, and in her own handwriting. As such, Hope's entire

estate, which would also now include Angel’s assets, would be distributed to her dear friend Joan according to Hope’s will.

EXAMINERS' ANALYSIS OF QUESTION NO. 4

Written-modification clause

Owen is incorrect that the contract's written-modification clause rendered the oral modification invalid. "Parties to a contract are at liberty to modify . . . the rights and duties established by a contract." *Bank of Am, NA v First Am Title Ins Co*, 499 Mich 74, 102 (2016). Moreover, "it is well established in our law that contracts with written modification . . . clauses can be modified . . . notwithstanding their restrictive amendment clauses." *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372 (2003). Such modification must be a product of the parties' mutual assent. "The mutuality requirement is satisfied where a modification is established through clear and convincing evidence of a[n] . . . oral agreement . . . establishing mutual agreement to waive the terms of the original contract. . . . [A] party advancing amendment must establish that the parties mutually intended to modify the *particular* original contract, including its restrictive amendment clauses such as written modification . . . clauses." *Id.* at 373.

Here, Abby has offered extrinsic evidence that the parties expressly discussed their agreement to modify the written contract, including the written-modification clause. Such evidence satisfies the mutuality requirement. Consequently, the oral modification was valid.

Alternative credit was given for arguing that 1) the oral modification was valid because Owen waived the written-modification clause; or 2) the modification was valid because the emails constituted a writing sufficient to satisfy the written-modification clause.

Integration clause

Owen is incorrect that the contract's integration clause prevented admission of the extrinsic evidence to prove the oral modification. Under the parol evidence rule, "[p]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous." *Barclae v Zarb*, 300 Mich App 455, 480 (2013) (internal quotation marks

omitted). Here, however, the extrinsic evidence, emails in which the parties discussed their agreement to modify the written contract, was not evidence of "contract negotiations" for the written contract, nor was it evidence of agreements that were "prior [to] or contemporaneous" with the written contract. Instead, the email evidence was of *subsequent* negotiation and agreement, offered to show that the written contract was modified. Consequently, neither the parol evidence rule nor the written contract's integration clause would prevent admission of the extrinsic evidence of oral modification. *See Rasch v Nat'l Steel Corp*, 22 Mich App 257, 261 (1970) ("[T]he parol evidence rule does not preclude plaintiff from proving a modification so long as it was subsequent to . . . the date on which the original agreement was signed.").

Invalid consideration

Owen is incorrect that the oral modification was not supported by consideration. "An essential element of a contract is legal consideration." *Yerkovich v AAA*, 461 Mich 732, 740 (2000). "To have consideration there must be a bargained-for exchange; [t]here must be a benefit on one side, or a detriment suffered, or service done on the other. Generally, courts do not inquire into the sufficiency of consideration: [a] cent or a pepper corn, in legal estimation, would constitute a valuable consideration." *Innovation Ventures, LLC v Liquid Mfg, LLC*, 499 Mich 491, 508 (2016) (internal quotation marks and citation omitted) (brackets in original); see also *GMC v Dep't of Treasury*, 466 Mich 231, 238-239 (2002) (same). "[R]escission of [a] contract for inadequacy of consideration will not be ordered unless the inadequacy was so gross as to shock the conscience of the court." *Moffit v Sederlund*, 145 Mich App 1, 11 (1985).

Here, Abby and Owen bargained for an exchange: Abby received the benefit of an extra $1,000 per month and incurred the detriment of an obligation to show vacant apartments one more day per week; Owen received the benefit of having vacant apartments shown one more day per week and incurred the detriment of an obligation to pay an extra $1,000 per month. Regardless of whether the extra $1,000 per month was "excessive," as Owen claims, the benefit he received in return would not be so "inadequate . . . as to shock the conscience of the court." Consequently, the consideration for the oral modification was valid.

EXAMINERS' ANALYSIS OF QUESTION NO. 5

As a judgment creditor, Solar has the legal right to garnish the monetary assets of, or payments due to judgment debtors. Michigan Court Rule (MCR) 3.101; MCL 600.4001 et seq. Although Solar has not attempted collection efforts for approximately seven years, the statute of limitations for collection on a judgment is 10 years. MCL 600.5809(3). Thus, there is presently no statute of limitations impediment on collection.

Solar may not garnish Tanya's social security benefits because they are exempt from garnishment by law. 42 USC 407(a). That exemption applies even after the funds are received by the judgment debtor and deposited into a bank account. *Whitwood, Inc* v *South Boulevard Property Management Co*, 265 Mich App 652, 654 (2005).

Pursuant to MCR 3.101(B) Solar may garnish the periodic rental payments owed to Larry from his commercial tenant by seeking from the court a periodic writ of garnishment directing the commercial tenant to withhold rental payments to Larry and pay the rent directly to Solar until the judgment is paid in full. Similarly, Solar may garnish Clarence's wages by requesting court issuance of a periodic writ of garnishment directing Clarence's employer to repeatedly withhold a portion of Clarence's wages from his pay check (maximum 25% of disposable earning for the workweek, 15 USC 1673(a)(1)). Those withheld wages would be forwarded to Solar. Solar may also seek from the court a non-periodic (one-time) garnishment of Clarence's bank account in an amount not exceeding the judgment balance. MCR 3.101.

Solar also has the option of seizing each of the debtor's vehicles, by seeking from the court an order for seizure of property. According to MCL 600.6001, "[w]henever a judgment is rendered in any court, execution to collect the same may be issued to the sheriff, bailiff, or other proper officer of any county, district, court district or municipality of this state." Also MCL 600.6017(3) specifically allows execution to be "made against all personal property of the judgment debtor that is liable to execution at common law, including, but not limited to . . . [g]oods or chattles . . . ." Confiscation of a vehicle would result in a sale of that property, the proceeds of which would be delivered to Solar and credited to the judgment balance. Solar

can also levy against Larry's commercial property under MCL 600.6018, and could place a judgment lien against the property under MCL 600.2803

EXAMINERS' ANALYSIS OF QUESTION NO. 6

1. **Wendy Can Testify to Her Lay Opinion Under MRE 701.**

Pursuant to MRE 701, Opinion Testimony by Lay Witnesses,

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

MRE 701 allows a lay witness to offer opinion testimony "as long as the opinion is rationally based on the perception of the witness and helpful to a clear understanding of [her] testimony or a fact in issue." *Sells v Monroe County*, 158 Mich App 637, 644-645 (1987). Wendy plans to testify to her rational perception of events she observed. Although she was in a bar, she was sober, she could see some of the events unfolding, and there is no evidence that she was anything other than competent. While the decision under MRE 701 is within the discretion of the court, the fact that her view of the events was not as clear as that of the other witnesses, who were closer, does not disqualify her as a witness or preclude her from explaining what she observed and how those events led to her conclusion. Rather, her impaired view, if anything, goes to the weight of her testimony, and is a matter for cross-examination. *Sells*, 158 Mich App at 646-647. Finally, whether Patty or Dennis was the aggressor whose actions were unwelcome is *the* critical issue and therefore should be helpful to determining a fact in issue. The requirements of MRE 701 are thus satisfied and the court should overrule Equity's objection.

2. **Dr. Wilma's Testimony Is Not Admissible Under MRE 702 Because It Is Not The Product Of Reliable Principles And Methods.**

MRE 702, Testimony by Experts, provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In *People v Dobek*, 274 Mich App 58 (2007), the court reviewed a similar expert opinion offered by a psychologist using psychological testing to opine whether or not an accused fit the profile of a sex offender. There, as here, the witness had specialized knowledge that qualified her as an expert. The putative expert had conceded that there remained considerable controversy and disagreement among the psychological community concerning the reliability of identifying sex offenders through psychological testing. In light of the lack of general acceptance among the witness' peers, the court held that the expert opinion "was neither sufficiently scientifically reliable nor supported by sufficient scientific data" to be admissible at trial. *Dobek*, 274 Mich App at 94-95. The same lack of general acceptance is present here. Therefore, the objection should be sustained.

Any Probative Value of Dr. Wilma's Testimony Would Be Substantially Outweighed By Undue Prejudice Under MRE 403.

MRE 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The critical issue in this case is whether Dennis engaged in unwelcome sexual conduct on this occasion, not whether he may have engaged in such conduct on some other occasion or whether he had some predisposition for such conduct under some circumstances that

may or may not have been present in this case. In light of the questionable reliability of Dr. Wilma's novel theory, any arguable probative value would be substantially outweighed under MRE 403, by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *Dobek*, 274 Mich App at 94-95.

Accordingly, Equity's MRE 702 objections should be sustained.

EXAMINERS' ANALYSIS OF QUESTION NO. 7

Article 3 of the Uniform Commercial Code applies because the question deals with a check, a negotiable instrument. MCL 440.3102(1).

With respect to the first question (whether Sally still owes XYZ $1,900 for the computer), the answer is yes. Sally still owes the money. Article 3 has specific rules regarding "payment in full" instruments. MCL 440.3311. A negotiable instrument, including a check, can satisfy an obligation in full if it meets certain criteria, namely: 1) the instrument must conspicuously state the tender is in full payment; 2) the recipient of the check must obtain payment on the instrument; 3) the debt must be disputed or unliquidated; and, 4) the person who tendered the instrument must have acted in good faith. MCL 440.3311.

The first two requirements are satisfied, but the last two are not. While the full payment language was conspicuous and XYZ received payment on the check, the amount owed was not in question. Sally did not dispute the debt. Finally, Sally did not act in good faith. She tried to avoid a legitimate financial obligation and still keep the computer. Therefore, there was no accord and satisfaction by her use of the "payment in full" check. She still owes XYZ the money.

With respect to the second question (whether Dr. Jones has a valid cause of action against the bank), the answer is likely yes. Dr. Jones has a valid claim of conversion because First State Bank was a depository bank that took and obtained payment on his instruments bearing forged endorsements. MCL 440.3420(1); MCLA 440.3420(1) Code Comment 1. Dr. Jones' ability to bring an action against First State Bank would require him to prove (i) that he was in possession of the instruments before they were stolen, (ii) the terms of the instruments, and (iii) that he was the named payee of the instruments. MCLA 440.3301, 440.3309, and 440.3420(1)(ii) (and Official Comment 1, third, fourth, and fifth paragraphs). See also MCLA 440.320(3) (and Official Comment 3).

Dr. Jones could likely satisfy these requirements. Moreover, the question does not suggest that Dr. Jones entrusted Sally with the responsibility of making endorsements on the checks. She was a receptionist, had only worked for Dr. Jones for a week, "stole"

the checks from the drawer in his desk, and “forged” his name. See, MCL 440.3405.

The bank was obliged to use “ordinary care in paying or taking the instrument.” MCL 440.3405(2); see also, MCL 440.3404(4); MCL 440.3103(1)(h). The bank likely failed to do so by allowing three checks payable to Dr. Jones for sizeable sums to be deposited into Sally’s individual account, a suspicious transaction. And, the bank’s failure “substantially contribute(d) to loss resulting from payment of the instrument.” MCL 440.3405(2). The person bearing the loss (here Dr. Jones) may recover from the negligent depository bank “to the extent the failure to exercise ordinary care contributed to the loss.” MCL 440.3405(2) (emphasis supplied).

(In addition, the UCC addresses the general problem of persons whose negligence contributes to a forged signature on an instrument in MCL 440.3406, which includes an explicit rule of comparative negligence. Because MCL 440.3405 appears directly applicable on these facts, the more general rule of MCL 440.3406 is not discussed.)

For these reasons, and on the facts presented, Dr. Jones likely has a valid cause of action under Article 3. If, however, an applicant makes a reasoned argument that (a) Dr. Jones failed to exercise ordinary care and that failure substantially contributed to the making of the forged signatures (see MCL 440.3406) and/or (b) First State Bank acted in good faith and exercised ordinary care in taking the checks, to support a conclusion that a full or partial recovery by Dr. Jones is precluded, such answer will be considered.

EXAMINERS' ANALYSIS OF QUESTION 8

This question calls for a Michigan choice-of-law analysis. Michigan law does not permit an award of punitive damages against Declan, but Mississippi law does.

"In tort cases, Michigan courts use a choice-of-law analysis called 'interest analysis' to determine which state's law governs a suit where more than one state's law may be implicated." *Hall v General Motors Corp*, 229 Mich App 580, 585 (1998). Under this analysis, Michigan courts "will apply Michigan law unless a 'rational reason' to do otherwise exists." *Id.* See also *Frydrych v Wentland*, 252 Mich App 360, 363 (2002).

In performing the interest analysis, the court first examines whether any foreign state has an interest in having its law apply. *Hall*, 229 Mich App at 585. "If no state has such an interest, the presumption that Michigan law will apply cannot be overcome. If a foreign state does have an interest in having its law applied," the court uses a "balancing approach" to "determine if Michigan's interests mandate that Michigan law be applied, despite the foreign interests." *Id*.

The first step in the choice-of-law analysis is examining whether Mississippi has an interest in having its punitive damages law apply. Mississippi does have an interest, given that Peter is a Mississippi resident, and that is where the accident occurred. See *Burney v P V Holding Corp*, 218 Mich App 167, 174 (1996) ("Alabama has an interest in having its law applied because one of the parties is a citizen of the state where the wrong occurred.").

The second step is to balance Mississippi's interest against Michigan's own interest in having its law applied. Michigan has an interest in applying its ban on punitive damages because Declan is headquartered in Michigan, and Michigan is its principal place of business. Michigan has a strong interest in ensuring the economic health of companies conducting business within its borders, as they employ Michigan citizens and generate revenue for the state through sales and paying taxes. Michigan also has an interest in encouraging companies to do business in Michigan.

Finally, while the accident occurred in Mississippi, the alleged misconduct largely took place in Michigan, which is where

Peter's vehicle was designed, and where Declan made the decision not to recall it. Because the purpose of punitive damages is to punish wrongdoing and deter others from engaging in similar conduct, as opposed to compensating the plaintiff, Mississippi's interest in imposing punitive damages is not as strong when the defendant is not a resident of the state. Indeed, the facts indicate that a Mississippi court even declined to exercise personal jurisdiction over Declan.

As a result, the presumption that Michigan law applies has not been overcome. Peter's motion for partial summary disposition should therefore be denied.

EXAMINERS' ANALYSIS OF QUESTION NO. 9

1. When faced with a motion to modify a previous custody award, the court must first consider whether the motion establishes proper cause or a change in circumstances. MCL 722.27(1)(c); *Vodvarka v Grasmeyer*, 259 Mich App 499, 508 (2003); *Killingbeck v Killingbeck*, 269 Mich App 132, 145 (2005). This threshold inquiry must be made for the court to determine whether to hold an evidentiary hearing to revisit a prior custody award. *Lieberman v Orr*, 319 Mich App 68, 81-83 (2017).

Should this first step be satisfied, the court must next determine whether an established custodial environment exists because this determination in turn establishes the burden of proof of the moving party. If a modification would change the established custodial environment, the movant must demonstrate by clear and convincing evidence that a change is in the children's best interests. *Duperon v Duperon*, 175 Mich App 77, 82 (1989). If no established custodial environment exists, the burden of proof is by a preponderance of evidence. *Hall v Hall*, 156 Mich App 286, 289 (1986).

Finally, the court's ultimate decision on whether to change custody must be based on the best interests of the children as understood by examining the best interests factors delineated in MCL 722.23(a)-(l).

In sum, Michigan case and statutory authority calls for a three step inquiry: an evaluation of proper cause or changed circumstances, a determination of the established custodial environment, and an evidentiary hearing based on the best interests of the child factors.

2. Measuring Gary's request against this backdrop yields the conclusion that Gary's chances for success on his motion to change custody are very weak.

First, a serious question exists as to whether Gary's single-factor motion (MCL 722.23(f) moral fitness) establishes proper cause or a change of circumstances on the facts present here. The facts supporting the motion, whether premised upon proper cause or change in circumstance, must relate to at least one child custody factor. *Vodvarka*, 259 Mich App at 511-512 (To establish proper

cause or a change in circumstance necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of *an* appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to *at least one* of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being.). Gwendolyn's weekend work was not known to the children and had no stated effect on her parenting, and thus did not impact her moral fitness as a parent. *Foskett v Foskett*, 247 Mich App 1, 9 (2001). A trial court would likely not find this assertion to constitute either proper cause or a change in circumstance.

Second, Gwen has an established custodial environment with the girls. An established custodial environment exists where "over an appreciable period of time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. . . ." MCL 722.27(1)(c). The stated facts here clearly support Gwen having an established custodial environment with the girls. Even when the family was intact, Gary was the "fun parent," while Gwen provided fuller parenting. The girls have grown from toddlers to elementary school age with Gwen, who has provided for them in many ways, e.g. taking them to church, addressing their behavioral problems, facilitating their education and the like. The facts are silent on precisely what Gary provides in these domains. To change custody would upset the established custodial environment, and thus cannot occur without the requisite clear and convincing evidence.

Finally, moral fitness of a parent is a best interest factor. The Michigan Supreme Court held, however, in *Fletcher v Fletcher*, 447 Mich 871, 886-887 (1994) that this factor does not deal with which parent is morally superior. Rather, the factor relates to a person's fitness as a parent. *Id*. No facts exists suggesting Gwen's employment on weekends when the children are with their father impacts her ability to parent. Nor do any facts indicate the children are being shorted their mother's attention or their needs are not being addressed. Even if at the requested evidentiary hearing Gary could show the questionable nature of Gwen's weekend work, this watered down claim of unfitness would not lead to a change in custody.

In sum, Gary will lose his request.

EXAMINERS' ANALYSIS OF QUESTION NO. 10

Before distributing assets to shareholders upon dissolution, a corporation is required to pay or make provisions for its debts, obligations, and liabilities. MCL 450.1855a. After payment or adequate provision has been made for the corporation's debts, the remaining assets are required to be distributed to shareholders according to their respective rights and interests. *Id*. Thus, AWC was legally obligated to pay its debts (here, delinquent property taxes) before Sid and Frank received their respective distributions.

Barney

If a director votes for, or concurs in, making distributions to shareholders during or after dissolution of the corporation without paying the debts of the corporation as required by section 1855a, the director is "jointly and severally liable to the corporation for the benefit of its creditors or shareholders, to the extent of any legally recoverable injury suffered by its creditors or shareholders as a result of the action ..." MCL 450.1551(1); 450.1551(1)(b). The liability is limited to the "difference between the amount paid or distributed and the amount that lawfully could have been paid or distributed". MCL 450.1551(1).

Here, the legally recoverable injury suffered by the City of Springfield is the $50,000 in delinquent property taxes. Barney's liability is limited to the difference between the amount distributed to Sid and Frank ($100,000, or $50,000 each), and the amount that could have been lawfully distributed to Sid and Frank ($50,000, or $25,000 each). Thus, without considering any offsets for the liability of the shareholders, Barney would be liable to the corporation for $50,000.

Under MCL 450.1551(2), Barney would not be liable had he otherwise complied with the business judgment rule, MCL 450.1541a. Under MCL 450.1541a, directors are required to discharge their duties: "(a) In good faith. (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances. (c) In a manner he or she reasonably believes to be in the best interests of the corporation." Here, there really is no claim that Barney's actions were done in good faith. He

deliberately chose to benefit Sid and Frank rather than pay the delinquent property taxes. Thus, the business judgment rule will provide no defense to Barney.

It could be argued that the debt was owed by the corporation and, because the corporation dissolved, the debt is uncollectable. However, a creditor may bring an action directly "against the directors of a corporation for the dissipation of corporate assets during the process of dissolution in the face of known debts." *City of Muskegon v Amec, Inc*, 62 Mich App 644, 647 (1975).

Sid

Pursuant to MCL 450.1551(3), a shareholder who accepts or receives a share dividend with knowledge of facts indicating it is contrary to MCL 450.1551(1) is liable to the corporation for the amount received in excess of the shareholder's share of the amount that lawfully could have been distributed.

The facts indicate the Sid was aware that Barney issued larger dividends in lieu of paying the delinquent property taxes. Because he had knowledge that Barney made distributions without paying the debts of the corporation, he is liable for excess amount. Since he was lawfully entitled to $25,000, but received $50,000, Sid is liable for $25,000.

Frank

Because the facts specifically state that Frank had no knowledge that Barney issued larger dividends rather than satisfy the debts of the corporation, Frank is not liable to the corporation.

EXAMINERS' ANALYSIS OF QUESTION NO. 11

A. Defamation claim against Mikey.

According to the Court in *Mitan v Campbell*, 474 Mich 21, 24 (2005), the elements of defamation are:

> (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication. *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 251 (1992) (libel); *Ledl v Quik Pik Food Stores, Inc.*, 133 Mich App 583, 589 (1984) (defamation).

Because he is a private person (as opposed to a public figure or limited public figure), Jones had to prove that the challenged statement was published negligently or with some degree of fault greater than negligence. See MCL 600.2911(7) and *Michigan Microtech v Federated Publications*, 187 Mich App 178, 184 (1991). "A communication is defamatory if it tends to harm the reputation of another so as to lower that person in the estimation of the community or deter third persons from associating or dealing with that person." *Glazer v Lamkin*, 201 Mich App 432, 438 (1993).

Jones should succeed on his defamation claim. First, the facts show that Mikey made false and defamatory statements concerning Jones - that Jones repeatedly cheated as a baseball coach - which was not true. Second, there was no privilege for Mikey to make these statements to these third parties, i.e., to the parents and others in the community. Third, Mikey was at least negligent, though a good argument could be made that he acted with malice, in making the statement. Again, he made up the story and communicated it to others with the intent that Jones lose his coaching position, which is what occurred. Fourth, and finally, Jones has established special harm, he lost his job as a result of the false rumors, and he is entitled to economic damages as a result of the negligence-based defamation. MCL 600.2911(7); *Glazer*, 201 Mich App at 437. Loss of his sales job would suffice for economic damages, so long as he can prove causation.

Additionally, because Jones has a strong case to prove malice, if he attempts to and does prove that, he could recover for damages to his lost reputation. *Id*.

B. Negligence claim against Tom.

In *Zapalski v Benton*, 178 Mich App 398 (1989), the court held that parents cannot be held liable for their children's torts based merely on vicarious liability. Instead, a plaintiff must produce some evidence that the parents failed "to exercise the control necessary to prevent their children from intentionally harming others if they know or have reason to know of the necessity and opportunity for doing so." *Id.* at 403.

> Instead, plaintiff sought recovery under a negligent parental supervision theory. This being so, plaintiff could not merely allege vicarious responsibility for the tortious acts of the child, but was required to allege negligent conduct on the part of the parents themselves. *Dortman v Lester*, 380 Mich 80, 84 (1968). Parents may be held liable for failing to exercise the control necessary to prevent their children from intentionally harming others if they know or have reason to know of the necessity and opportunity for doing so. *Id.; American States Ins Co v Albin*, 118 Mich App 201, 206 (1982). Liability for negligent supervision will not lie where supervision would not have made the parents aware of their child's tortious propensities. *Muma v Brown*, 378 Mich 637, 645 (1967). [*Zapalski* at 402-403.]

Here, there is no evidence that Tom failed to exercise proper control of Mikey, for there is nothing in the facts indicating any prior knowledge that he may act as he did. Nor are there any facts showing that Tom was aware that Mikey was making these untrue statements about Jones. Thus, there is no basis for a negligence claim.

EXAMINERS' ANALYSIS OF QUESTION NO. 12

Outside of certain class actions or other discrete circumstances, there are two primary grounds for removing an action from state court to federal court—(1) federal-question jurisdiction, or (2) diversity jurisdiction. Thompson's lawsuit is based on unpaid taxes under SRETTA, a state tax law. Defendants, as the removing parties, bear the burden of showing that federal jurisdiction exists at the time of removal. See *Eastman v Marine Mech Corp*, 438 F3d 544, 549 (CA 6, 2006). There is nothing in the fact pattern to suggest a federal question, so federal-question jurisdiction cannot be a basis for removal.

Therefore, the only possibility for removal would be under diversity jurisdiction. To show diversity, there must be "complete diversity," i.e., (1) a plaintiff must be a citizen of a state different from any state where a defendant is a citizen (i.e., no plaintiff can be a citizen of the same state where a defendant is a citizen), and (2) there must be over $75,000 in controversy. 28 USC 1332. *Newman-Green, Inc v Alfonzo-Larrain*, 490 US 826, 828-829 (1989). In addition to complete diversity, removal based on diversity also requires that no defendant be a citizen of the state where the original state action was filed. 28 USC 1441(b)(2). Thus, for Mulligan Properties Inc. to have a valid basis for removal, it must show that there is complete diversity among the parties and that no defendant is a citizen of Michigan.

The monetary threshold is likely met here, as the allegations in the complaint make clear that the likely amount in controversy is in the six figures, i.e., $100,000 or greater.

As for citizenship, Thompson is the plaintiff and, in his official capacity as Register of Deeds, he is a citizen of Michigan. Mulligan Properties Inc. has dual citizenship because it is a citizen of the state of its incorporation and the state of its principal place of business. Where its shareholders are domiciled is irrelevant. Thus, Mulligan Properties Inc. is a citizen of Delaware and Texas for purposes of diversity. Finally, as an unincorporated sole proprietorship, Wyatt Title is a citizen of the state where its member-owner resides, Michigan.

Therefore, at first blush, there does not appear to be sufficient grounds to remove based on diversity. Both the

plaintiff, Thompson, and one of the defendants, Wyatt Title, are citizens of Michigan. Under this analysis, the case would likely be remanded for at least two reasons: (1) lack of complete diversity; and (2) one of the defendants is a citizen of the state where the original state-court action was filed.

But, the key point to identify here is that fraudulent joinder of a non-diverse defendant will not defeat removal based on diversity. "Fraudulent joinder is a judicially created doctrine that provides an exception to the requirement of complete diversity." *Casias v Wal-Mart Stores, Inc*, 695 F3d 428, 432-433 (CA 6, 2012) (internal quotation marks and citation omitted). The relevant inquiry in determining whether a non-diverse party has been fraudulently joined is whether there is a colorable basis for predicting that the plaintiff may recover against that party. *Id.* at 433. The fact pattern makes clear that, under SRETTA, it is the *seller* who is responsible for paying the transfer tax. Here, the only seller is Mulligan Properties Inc. There are no allegations to suggest that Wyatt Title had any ownership interest in any of the 20 properties. Thus, there is nothing in the fact pattern to suggest that there is a reasonable basis for predicting that state law (SRETTA) might impose liability on Wyatt Title. Indeed, no allegations of failure to pay the tax were even made against Wyatt. Rather, the title company was likely added as a defendant only to defeat removal based on diversity jurisdiction.

Accordingly, Mulligan Properties Inc. could remove the action from Pleasant Circuit Court to the Western District of Michigan and, as part of the removal pleading, the company can make the argument that Wyatt Title was fraudulently joined as a defendant in the state court action. If it can be shown that Thompson does not have a colorable claim against Wyatt Title, then there would otherwise be complete diversity and proper removal jurisdiction—i.e., over $75k in controversy, complete diversity, and no defendant is a citizen of Michigan. Based on this fact pattern, the likely outcome would be that the federal district court would ignore the presence of Wyatt Title as a defendant for purposes of determining whether removal was appropriate, and allow removal to stand.

EXAMINERS' ANALYSIS OF QUESTION NO. 13

The right to a speedy trial is guaranteed by the U.S. Constitution's Sixth Amendment and in Article 1, section 20 of the Michigan Constitution. *People v Williams*, 475 Mich 245, 261 (2006). This right is enforced by statute and court rule. MCL 768.1(1) states in part that "[t]he people of this state and persons charged with crime are entitled to and shall have a speedy trial. . ." Michigan Court Rule 6.004(A) provides that:

> The defendant and the people are entitled to a speedy trial and to a speedy resolution of all matters before the court. Whenever the defendant's constitutional right to a speedy trial is violated, the defendant is entitled to dismissal of the charge with prejudice.

A defendant's right to a speedy trial is not violated after the passing of a fixed number of days. *People v McLaughlin*, 258 Mich App 635, 644 (2003). The issuance of a complaint and warrant by the prosecution does not trigger a criminal prosecution for speedy trial purposes. *Williams*, 475 Mich at 261.

In Michigan, the right to a speedy trial is not triggered until the institution of formal proceedings or defendant's arrest followed by formal charges. The right to a speedy trial does not apply before a defendant is indicted, arrested or formally accused. *US v MacDonald*, 456 US 1, 6 (1982). *People v Rosengren*, 159 Mich App 492, 506, n16 (1987); *Williams*, 475 Mich at 261 citing *United States v Marion*, 404 US 307, 312 (1971). In this case, the starting date for calculating the length of delay is not December 2015, the date of the accident, or the date of the issuance of the complaint or warrant in July 2016, but the institution of formal charges against the defendant in January 2019.

Michigan has adopted the four factor test of *Barker v Wingo*, 407 US 514, 530-532 (1972): 1. The length of the delay, 2. The reason for the delay, 3. The defendant's assertion of the right, and 4. The prejudice to the defendant. *Williams*, 475 Mich at 261-262; *People v Chism,* 390 Mich 104, 111 (1973).

If the delay is eighteen months or more, prejudice is presumed and the burden shifts to the prosecutor to show there is no prejudice to the defendant. *People v Collins*, 388 Mich 680, 695

(1972). The establishment of the presumption triggers an inquiry into the other factors to be considered in balancing the competing interests to determine whether the defendant has been deprived of the right to a speedy trial. *People v Wickham*, 200 Mich App 106, 109-110 (1993). If the delay is less than eighteen months, there is no need to inquire into the other balancing factors. *Chism*, 390 Mich at 112. Defendant has the burden to show prejudice was caused by the prosecution. *McLaughlin*, 258 Mich App at 644.

Applying the *Barker* factors to these facts, no presumption is established because the time from arrest (January 2019) to trial (September 2019) is nine months, not eighteen months. The burden is on defendant to show prejudice. This will be difficult for Dwayne to do.

The defendant has not asserted (demanded) his right but can still assert it. *People v Harris*, 110 Mich App 636, 647 (1981).

Dwayne has not established any specific prejudice to either the person or defense. *Chism*, 390 Mich at 114. Prejudice to the person is usually in the form of incarceration or anxiety. Dwayne was not incarcerated during the time between the accident and his arrest. *People v Rowan*, 76 Mich App 124, 129 (1977). The prejudice is minimal.

Prejudice can also be to the defense. Defendant must demonstrate the delay prejudiced the defense of his case. *Williams*, 475 Mich at 265. Defendant must demand a speedy trial and identify the prejudice with specificity, not general or potential prejudice, which is insufficient. Lost evidence and unavailable witnesses can be prejudice. *People v Harris*, 110 Mich App 636, 648 (1981); *Collins*, 388 Mich at 694. However, Dwayne has not shown how the lost testimony of Al or Tom would be helpful to the defense. *People v Patton*, 285 Mich App 229, 237 (2009); *Collins*, 388 Mich at 695. Moreover, none of this loss of evidence was the result of any delay by the state. *People v Anderson*, 88 Mich App 513, 516 (1979).

Dwayne’s right to a speedy trial was not violated.

EXAMINERS' ANALYSIS OF QUESTION NO. 14

1. Challenge under the 4th Amendment (standing)

The 4th Amendment and Art 1 Sec 11 of the 1963 Michigan Constitution protects against unreasonable searches and seizures. *People v Slaughter*, 489 Mich 302, 310-311 (2011). In order to invoke the protection of the 4th Amendment (Art 1), a defendant must have a legitimate expectation of privacy in the area searched ('standing'). *People v Smith*, 420 Mich 1, 20-28 (1984). An expectation of privacy is "one society is prepared to recognize as reasonable." *Smith,* 420 Mich at 28. A court must consider the totality of the circumstances to determine if a defendant has a legitimate expectation of privacy in the area searched. *Smith*, 420 Mich at 28.

As a general rule, a passenger in an automobile does not have a legitimate expectation of privacy in a car belonging to another person. *Rakas v Illinois*, 439 US 128, 148-149 (1978). But a person may challenge a potential 4th Amendment violation if, under the totality of the circumstances, a person has a legitimate expectation of privacy in the area searched. *Smith,* 420 Mich at 28.

Donald had no legitimate expectation of privacy in James' car. *Rakas*, 439 US at 148-149; *Smith*, 420 Mich at 28. However, Donald has an expectation of privacy in his own iPad case. Donald had possession of the case in the car and had the right to exclude others from it. It is an "effect" under the 4th Amendment. *People v Norwood*, 312 Mich 266, 272 (1945); *Byrd v US*, 584 US ____ (2018); *Rakas*, 439 US at 150, n17. Donald can challenge the search of his case.

2. Consent

A search performed pursuant to consent is considered reasonable and valid. *Florida v Jimeno*, 500 US 248, 250-251 (1991); *Schenkloth v Bustamonte*, 412 US 218, 222 (1973). The prosecutor has the burden to demonstrate that consent was freely and voluntarily given. *Bumper v North Carolina*, 391 US 543, 548 (1968).

A search by consent is unreasonable if the consent given is not voluntary, given without authority, or the search is beyond the scope of the consent. *Bumper*, 391 US at 548. The scope of the consent is defined by the consenting party and is measured by objective reasonableness. *Jimeno*, 500 US at 251.

The test is whether the facts available to the officer at the time would allow a person of reasonable caution to believe the consenting party had authority over the area. *Terry v Ohio*, 392 US 1, 21-22 (1968); *Illinois v Rodriguez*, 497 US 177, 188-189 (1990).

James' consent was voluntary and valid as to the car only. Consent to search Donald's case must be given by one with actual or apparent authority. *People v Mead,* 503 Mich _____ (2019) (Docket No. 156376); slip op at 11. The iPad case was in Donald's physical possession, not in the trunk of James' car. There was no connection between James and the iPad. There is no evidence that Donald and James shared the case. It would not be objectively reasonable to conclude James' consent to search the car extended to Donald's iPad case. Nor would it be reasonable to conclude that James had the authority (apparent) to consent to search the case. James lacked the actual and apparent authority to consent to search of Donald's case. Moreover, Donald did not expressly consent to the search of the case. Since there is no valid consent, the search is unreasonable and invalid.

EXAMINERS' ANALYSIS OF QUESTION NO. 15

Diane can be charged with the crimes of possession of cocaine; possession with intent to deliver less than 50 grams of a controlled substance, cocaine; aiding and abetting possession or possession with intent to deliver, cocaine; or conspiracy to deliver cocaine. All these answers, with the elements, warrant points. The best answer is possession with intent to deliver cocaine, the elements of which are:

1. The defendant possessed a controlled substance, cocaine;
2. The defendant knew she possessed a controlled substance, cocaine;
3. The defendant intended to deliver the controlled substance to someone else;
4. The controlled substance defendant intended to deliver was in a mixture that weighed less than 50 grams. MCL 333.7101.

'Possession' is not defined in MCL 333.7401 but is construed in its common meaning. *People* v *Harper*, 365 Mich 494, 506-507 (1962); cert den, 37 US 930 (1962). Possession can be actual or constructive, single or joint. *People v Mumford*, 60 Mich App 279, 282-283 (1975).

Actual possession is physical dominion or custody of an item in hand or on the premises of a person. *People v Konrad*, 449 Mich 263, 271 (1995).

Constructive possession is the authority over, or right (not necessarily legal) to, exercise control of the drug coupled with the knowledge of its presence. *People v Wolfe*, 440 Mich 508, 519-520 (1992); *Mumford*, 60 Mich App at 282-283; *Konrad*, 449 Mich at 271. Possession reaches those who own or control the drugs, but don't necessarily physically touch the drug. *Konrad,* 449 Mich at 272; *Harper*, 365 Mich at 506-507.

Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between defendant and the contraband. It is more than the presence of a person at a location, but some other connection linking the defendant to the controlled substance. *People v Davenport*, 39 Mich App 252, 256-257 (1972); *Wolfe*, 440 Mich at 520.

Sole possession is single, exclusive to only one person. Joint possession occurs when more than one person shares possession, actually or constructively. *Wolfe*, 440 Mich at 520.

Possession may be established by direct or circumstantial evidence. *Peterson v Oceana Circuit Judge*, 243 Mich 215, 217 (1928); *People v Gould*, 61 Mich App 614, 626-627 (1975). Circumstantial evidence includes traces of drugs on clothes; cocaine packs and money in sparsely furnished apartment; strong smell of mixing agent, or the presence of a drug component. *Wolfe*, 440 Mich at 521.

Aiding and abetting exists where a person intentionally assists another in committing a crime. MCL 767.39. The elements are: a crime was committed; defendant assisted before, during or after the commission of the crime; defendant intended the commission of the crime or knew the other person intended it at the time defendant gave assistance. *People v Turner*, 213 Mich App 558, 569 (1995).

Conspiracy is an intentional agreement (express or implied); between two or more persons; to intentionally commit an illegal act or do a legal act in an illegal manner. *People v Ashley*, 392 Mich 298, 310-311 (1974).

In this case there is a strong connection between Diane and the drugs. The drugs are in Diane's home, where she gets her mail. The drugs are both on top of and in a dresser which contains only women's clothes. The denomination and quantity of the money, the mixing agent and packaging are indicative of drug sales. All are connected to women's clothes. The packaging, money and location of the drugs establish a sufficient nexus between Diane and the drugs to establish "possession". The intent to deliver element can be inferred from the quantity (35 rocks); packaging (1"x1" zip lock baggies) and other circumstances, such as actual sales by her live in boyfriend Dave. *Wolfe*, 440 Mich at 524-526. Diane can be charged with possession with intent to deliver less than 50 grams of cocaine.