

QUESTION I - JULY 2007

PLEASE NOTE: QUESTION I was a "Multistate Performance Test" (MPT) and is not reproduced here. For additional information see: <http://www.ncbex.org/>.

QUESTION II - JULY 2007

PLEASE NOTE: QUESTION II was a "Multistate Performance Test" (MPT) and is not reproduced here. For additional information see: <http://www.ncbex.org/>.

Model Answers

QUESTION III - JULY 2007

Annie and Ben married in 1997 and settled in Vermont. Their daughter, Cassie, was born in 2002. Annie, who had a master's degree in developmental psychology, stayed at home to care for Cassie. This gave Ben considerable freedom to establish a very successful software company. Ben's income averaged \$250,000 per year from 1998 through 2005. In 2005, Ben moved out and filed for divorce. Pursuant to a temporary court order, the parties shared legal and physical rights and responsibilities for Cassie at all times prior to entry of a final order. The final hearing is scheduled for July, 2007.

In 2006, Ben relocated to a community fifty miles away and began living with his new girlfriend and her fourteen-year-old son. By that time, Annie had begun home-schooling Cassie, who had reached kindergarten age and had been diagnosed with some developmental delays. Cassie has become very emotionally attached to Annie since her father's departure. Ben routinely sees Cassie every other weekend, while Annie takes care of Cassie during the weekdays and on alternate weekends. Ben has tried to integrate Cassie into his new home life, but her developmental difficulties have made it difficult for her to adjust to Ben's new girlfriend and her son. Based in part on these factors, Annie has experienced a change of heart and has decided to seek sole physical and legal rights and responsibilities with respect to Cassie. Ben continues to want to share parental rights.

Also in 2006, Annie learned that she had inherited \$300,000 from an elderly relative. That same year, Ben's business lost a major contract, reducing his income for 2006 to \$150,000. The parties had acquired a house valued at \$450,000 during the course of the marriage. In addition, while Annie has no retirement funds in her own name, Ben has built up a substantial 401(k) retirement fund.

Annie retained an attorney from the same medium-sized firm Ben had used to set up his software business. Annie's attorney had no involvement in setting up Ben's business and knew nothing about his business practices. Based upon information provided by Annie, however, the attorney threatened to expose Ben's improper and possibly illegal business accounting practices in order to obtain a favorable divorce settlement for Annie. The threat did not work and was not ultimately acted upon.

- (1) What factors should the court consider in determining an award of parental rights and responsibilities? Based on those factors, what should the court conclude?
- (2) Is the \$300,000 inheritance part of the marital estate? Discuss.
- (3) What factors should the court consider in making a property award? Analyze those factors as applied to Annie and Ben's circumstances.
- (4) Did the conduct of Annie's attorney raise any ethical considerations? Discuss.

Model Answers

QUESTION IV - JULY 2007

This past spring, Peter Paine graduated from college with a degree in mechanical engineering. Hoggie-Doggie, Inc., a company that makes high quality frozen ice cream bars, offered him a job. Hoggie-Doggie's president told Peter that the job would last for a period of two years and would pay him \$4,000 a month. Hoggie-Doggie's gross receipts are about \$500,000 per annum. Peter's job involved servicing Hoggie-Doggie's top-secret processing equipment at its Landsbury, Vermont plant. Peter's position gave him access to highly valuable trade secrets in the ice cream production business. The day Peter began work with Hoggie-Doggie, Peter was required to sign the following document:

In consideration for Hoggie-Doggie's offer of employment, I hereby agree and covenant not to work for any other business enterprise, profit or non-profit, which in any manner is engaged in the production of ice cream products within the Town of Landsbury, Vermont, for a period of two years from the date of my termination of employment with Hoggie-Doggie. This covenant not to compete shall be fully enforceable regardless of the reason for my termination of employment with Hoggie-Doggie or the effective date of such termination. The parties agree that any violation of this covenant not to compete shall result in an award of actual damages in the amount of \$1,000 per day as the sole and complete remedy for any and all violations of this covenant not to compete. If any portion of this agreement is found to be unenforceable, the rest and remainder of this agreement shall remain fully enforceable by a court of competent jurisdiction.

/s/ Peter Paine Dated at Landsbury, Vermont this 1st day of May 2007
Peter Paine

Peter signed the document of his own accord, absent any fraud, duress, or undue influence and with full mental capacity.

After only one month of working for Hoggie-Doggie, Peter was terminated for no stated reason, despite the fact that his work was satisfactory. Hoggie-Doggie has failed to pay Peter any portion of his salary. Two weeks later, Peter began working for Bob and Joe's Inc. in their

Landsbury, Vermont, ice cream factory in a position of supervising engineer in charge of maintaining the plant's equipment.

Presume for the sake of this memorandum that no bad faith or fraud was committed by either Peter or Hoggie-Doggie in any manner relative to the issues in this matter.

1. Discuss whether Hoggie-Doggie can enforce the covenant not to compete against Peter.
2. What types of remedies may be available to Hoggie-Doggie if it is able to enforce the covenant not to compete against Peter? Discuss each potential remedy, including the likelihood of a court awarding it to Hoggie-Doggie.
3. Discuss whether Peter can enforce Hoggie-Doggie's promise of employment.
4. What types of remedies may be available to Peter for his work at Hoggie Doggie, now and for the remainder of the two years of his promised employment with Hoggie-Doggie? Discuss each type of remedy, including the likelihood of a court awarding it to Peter.

Model Answers

QUESTION V - JULY 2007

Joe approaches the end of life almost alone. His wife is dead. He had one child, Tom. Tom has not had any contact with Joe for years; no one knows if he's still alive. Joe's only other relatives are two nephews (Paul and Bob) who live near the Vermont nursing home where Joe has spent his last few years. Bob has visited the nursing home several times a week. Paul has visited Joe infrequently.

Joe never had a will. In January of 2007, after repeated urgings by Paul, Joe agreed to sign a will if Paul could make the arrangements. Although Paul was not a lawyer, he was ready to help create a will for Joe. He had a form for a will downloaded on his laptop computer. Paul asked Joe what he wanted to do with his property. Joe said it did not matter. Paul then completed the form to state that all of Joe's stocks, bonds, bank accounts and real estate would be left to Paul.

Paul printed the will, gave it to Joe, asked three nurses to come into the room, went outside and left Joe alone with the nurses. Joe read over the will. One of the nurses asked Joe if he really wanted to do this. Joe said: "I should do something, so I might as well do this." Joe then signed the will, and the three nurses signed as witnesses. Paul then returned and took the signed will. Joe never saw Paul again.

In March of 2007, Joe's health took a turn for the worse. Joe asked one of the nurses for a pen and paper. Joe wrote: "I revoke the previous will that I signed. I do not want to leave my property to my son Tom or nephew Paul. I am hereby giving all of my stocks and bonds and bank accounts to my nephew Bob, the one person in the world who truly cares about me." Joe signed the document, and asked the nurse to sign it as a witness and give it to Bob. Joe told the nurse to make sure that everyone knew he wanted to revoke the will prepared by Paul. The nurse

took the document out of the room and had two other nurses sign their names to it. The document was never notarized. The nurse gave the document to Bob the day before Joe died.

1. Discuss and analyze the validity and effect of the document prepared by Paul.
2. Discuss and analyze the validity and effect of the document prepared by Joe.
3. Discuss and analyze the court procedure for determining the disposition of Joe's property.
4. Discuss and analyze the possible dispositions of Joe's property.

Model Answers

QUESTION VI - JULY 2007

Benmont is located in Madison County, Vermont. The Benmont City Council regularly meets on the second Tuesday of each month at 7:30 p.m. in the council chambers of the city hall. The council consists of eleven duly-elected members. A quorum consists of a majority of the council.

The July 10, 2007 meeting of the council takes place with eight members present in person and one member, then on vacation in Maine, taking part on a speaker phone. The agenda for the evening includes a discussion and vote on a proposal that the city enter into a purchase option for a tract of land within the city for the purpose of building a parking garage. Several members of the public who are interested in the parking garage issue attend the meeting, including members of the Benmont Heritage Society, a historic preservation group opposed to the purchase and construction of the parking garage as in conflict with the nineteenth-century streetscape of Benmont.

At the beginning of the discussion on this item, the city manager distributes to the council members a memorandum from the city planner to the city manager discussing the pros and cons of entering into the purchase option. The council members silently read, and do not disclose, the contents of the memorandum (a copy of which had earlier been faxed to the member participating by telephone). The council members then proceed to discuss the issue. After some time it becomes apparent that members holding opposing viewpoints are hardening in their positions, and it is decided to take a ten minute "coffee break" so that the members can get some coffee and possibly cool down a bit.

The council members excuse themselves and exit the council chambers. Six of them go outside for a cigarette by the back door to City Hall. In this more informal atmosphere the council members chat about the parking garage issue and some of them are able to resolve their differences. When the meeting resumes, a motion to enter into a purchase option is made, seconded and a vote taken. The motion is approved by a vote of six to three, with the vacationing member voting in favor.

After the meeting, representatives of the Heritage Society learn that discussion regarding the parking garage issue occurred during the “coffee break.” They approach you for some legal advice on whether they have any recourse at this point. Please advise them on the following points, referencing the pertinent statutory provisions:

1. Is the Heritage Society entitled to a copy of the memorandum? Discuss.
2. Does the “coffee break” discussion create any concerns? Discuss.
3. Is the vote cast legal? Discuss.
4. If there were statutory violations in the conduct of the meeting, what, if any, relief could the Benmont Heritage Society seek, and how would they go about doing so?

Board of Bar Examiners

2418 Airport Road, Suite 2

Barre, VT 05641

109 State St. Montpelier VT 05609-0702

TEL: (802) 828-3281

FAX: (802) 828-1695