JULY 2015 MICHIGAN BAR EXAMINATION
EXAMINERS' ANALYSES

EXAMINERS' ANALYSIS OF QUESTION NO. 1

Car: Because there was no consideration for Dan's promise (either explicit or implied) Paul cannot succeed on a contract claim. Applicants received credit for identifying the lack of consideration in Dan's promise. Applicants also received credit for discussion of acceptance as an element of contract formation and the extent to which, if any, Paul's notation and "voicing his agreement" is relevant to this element.

His only other possible theory of recovery is that there was an intended *inter vivos* gift of the car. A gift is a voluntary transfer of property by one person to another without any consideration. Absolute title to property passes to the donee at completion of the gift. A valid gift requires three elements: (1) present donative intent; (2) delivery, either actual or constructive; and (3) acceptance. *Buell* v *Orion State Bank*, 327 Mich 43, 55 (1950).

Paul cannot enforce the *intended* gift of the car for two reasons. First, although Paul accepted the promise of a gift, the car was never delivered. To effectuate an *inter vivos* gift, there must be an unconditional delivery, either to the donee directly or to his agent. *Chaddock* v *Chaddock*, 134 Mich 48, 50 (1903). Second, the donative intent must be *present in time*. An intention to make a gift in the future, no matter how clearly expressed, does not satisfy the present donative intent requirement. *Loop* v *Des Autell*, 294 Mich 527, 531 (1940). Dan's expressed desire to give Paul a gift in the future has no binding effect on Dan. Paul's memorialization of Dan's promise in his notebook is irrelevant, even though it was made contemporaneously.

Motor scooter: Normally, a person claiming title to personal property by gift has the burden of proving the gift by a preponderance of the evidence, as the law does not presume a gift. *Molenda* v *Simonson*, 307 Mich 139, 144 (1943). However, a conveyance from a parent to a child is generally presumed to be a gift. *See Love v Francis*, 63 Mich 181, 191 (1886) ("It requires less positive and unequivocal testimony to establish the delivery of a gift from a father to his children than it does between persons who are not related, and in cases where there is no suggestion of fraud or undue influence very slight evidence [e.g., evidence of constructive delivery] will suffice."

Thus, when the parties are in a parent/child relationship, the burden shifts to the person contesting the gift to overcome the presumption. *Id.* Here, because Dan is Paul's father, Dan has the burden of proving that the motor scooter was not intended as a gift. According to the fact pattern, Paul will succeed as against Dan's counterclaim because the elements of a gift were otherwise satisfied, and there are no facts to overcome the presumption.

Applicants received credit for identifying that Dan's transfer of the scooter to his son lacked consideration.

EXAMINERS' ANALYSIS OF QUESTION NO. 2

(1) A "trust" is the right to the beneficial enjoyment of property to which another holds legal title. The property is held by the *trustee* at the request of the *settlor* for the benefit of a third party (the *beneficiary*). Black's Law Dictionary, 8th Edition.

In order to establish a valid trust, the trust must comply with the requirements contained in the Michigan Trust Code, MCL 700.7101, *et seq.* Among the five methods of creating a trust in Michigan, one is the transfer of property to another person as trustee during the settlor's lifetime or by disposition taking effect upon the settlor's death. See MCL 700.7401(1)(a). In this regard, the facts indicate that Dennis transferred $50,000 to another person as trustee (his sister, Carolyn) during Dennis's lifetime. Thus, MCL 700.7401(1)(a) is satisfied.

No matter which method of creating a trust is chosen, a trust is validly created *only* if five statutory requirements are met: (1) the settlor has the capacity to create a trust; (2) the settlor indicates an intention to create the trust; (3) the trust either has a definite beneficiary, is a charitable trust, is a trust for a non-charitable purpose, or is a pet care trust; (4) the trustee has duties to perform; and (5) the same person is not the sole trustee and sole beneficiary. See MCL 700.7402(1)(a)-(e). The requirements in section 7402(1)(a)-(e) also appear to be met. The facts assume that Dennis had the capacity to create a trust, and Dennis clearly articulated his intention to create a trust. Moreover, the trust has a definite beneficiary - the twin Dennis put his arm around in front of 200 attendees. Additionally and according to the facts, Carolyn had a duty to manage the trust assets wisely. Lastly, the same person was not the sole trustee and sole beneficiary.

The Michigan Trust Code specifically permits the creation of an oral trust. MCL 700.7407 states that "[e]xcept as required by a statute other than this article, a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established *only by clear and convincing evidence.*" (Emphasis added). Dennis's statement, announced to all of the attendees at the graduation party, would more than likely satisfy a "clear and convincing" standard of

proof, and therefore it appears that a valid oral trust was created in June 2010.

(2) MCL 700.7415 provides that "[t]he court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement."

Thus, if Dennis's intent and the terms of the trust were affected by a mistake of fact or a mistake of law, Michigan law provides a mechanism to reform the terms of a trust, even if those terms are otherwise clear and unambiguous. A **mistake of fact** is a misunderstanding, misapprehension, error, fault, or ignorance of a material fact or a belief that a certain fact exists when in fact it does not exist. *Montgomery Ward & Co v Williams*, 330 Mich 275, 279 (1951).

In this case, a plausible argument could be made that Dennis's intent and the terms of the trust were indeed affected by a mistake of fact – that he intended to name Lana as the beneficiary, but mistook Millie for Lana. Generally, the party seeking reformation bears the burden of proving it. *Lyons v Chafey*, 219 Mich 493 (1922). Thus, the burden would be on Lana to prove the mistake of fact by clear and convincing evidence.

EXAMINERS' ANALYSIS OF QUESTION NO. 3

(1) Race Notice:

Michigan is a race notice state, and whoever records first generally takes title. MCL 565.29. A buyer who is on notice of someone else's interest in the property, however, does not take title even if he records first. Notice may be actual or constructive. *Richards v Tibaldi*, 272 Mich App 522 (2006). Actual notice can exist where one "has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries". *Kastle v Clemons*, 330 Mich 28, 31 (1951) (citation omitted).

Freda should take title because Jenny never recorded her interest in the property. While Jenny might have some recourse against the seller or his realtor, she has no recorded interest in the home, and Freda has already recorded her interest. Under Michigan's race notice statute, Freda wins.

Jenny is arguing that there is some question as to whether Freda had actual notice of another claim to the property because she was apparently aware that Chris "lacked integrity" and therefore might have been put on inquiry notice to investigate further. However, this claim should fail because Freda in fact purchased the property first and there was no *earlier* interest for Freda to uncover. She would therefore take title to the house despite hearing rumors about Chris before she recorded her title.

(2) Seller Disclosure Act:

Under the Seller Disclosure Act, MCL 565.951 *et seq*, ("SDA") a seller may be liable for certain hidden defects in real property. A buyer may rescind the sale contract if he discovers the misrepresentation before closing. MCL 565.954(3)-(4), *Roberts v Saffell*, 280 Mich App 397, 411 n 4, judgment aff'd 483 Mich 1089 (2009). MCL 565.957 sets forth a disclosure statement that must be attached to real property. Each disclosure must be made in good faith, and the seller may be liable for fraudulent misrepresentation or silent fraud for false statements in the disclosure statement. *Roberts*, 280 Mich App at 401.

That said, a seller has no duty to use ordinary care to discover defects. *Id.* at 408. The seller is not accountable for any error that is not within the personal knowledge of the seller. MCL 565.955(1). Thus, under the SDA, a seller cannot be made liable for unknown and undisclosed information. Furthermore the seller cannot be liable for information that could have only been obtained through inspection or expert knowledge. *Bergen v Baker*, 264 Mich App 376, 384 (2004); MCL 565.955(1).

Here the issue is a plumbing problem that frequently floods the basement. The question is whether Randy, the former owner, was aware of it. If Jenny can establish that Randy was aware, she could successfully bring suit based upon the SDA for silent fraud or fraudulent misrepresentation, and recover damages. Otherwise, Jenny would not be entitled to a damages award. Finally, because Jenny had already taken title to the home, she cannot rescind the contract. MCL 565.954(4); *Roberts*, 280 Mich at 411 n 4.

EXAMINERS' ANALYSIS OF QUESTION NO. 4

Henry v. Plumber:

Henry may maintain his suit against Plumber because he is a third-party beneficiary of the contract between Plumber and AquaCare.

Under Michigan statute, "[a]ny person for whose benefit a promise is made by way of contract . . . has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee." MCL 600.1405. "A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person." *Id.* at 600.1405(1). "An objective standard is to be used to determine, from the form and meaning of the contract itself, whether the promisor undertook to give or to do or to refrain from doing something directly to or for the person claiming third-party beneficiary status." *Schmalfeldt v N Pointe Ins Co*, 469 Mich 422, 428 (2003) (citations omitted).

In the contract between Plumber and AquaCare, Plumber undertook to provide services directly for Henry's benefit. The contract specified the particular work Plumber was to perform to enhance Henry's aquarium and required Plumber to work directly with Henry in executing the contract. These facts are similar to those in *Vanerian v Charles L Pugh Co, Inc*, 279 Mich App 431 (2008), in which the contract "contained a detailed list of instructions and requirements relative to the job" and "[t]he work to be performed under the contract related entirely to repairs and improvements in plaintiff's house," *id.* at 433; "plaintiff [was] expressly referred to in the contract," *id.* at 436; and "plaintiff and defendant discussed the project with each other," *id.* The court concluded that "[d]efendant undertook to do something directly for plaintiff," *id.* at 434, making him an intended third-party beneficiary.

AquaCare v. Henry:

I. *Installation of Heater*

A court should find that the contract provision regarding the heater installation is void because it violates a statute.

"Contracts which violate a statute are contrary to public policy and cannot be enforced by the courts". *Peeples v City of Detroit*, 99 Mich App 285, 302 (1980). *See also Johnson v QFD, Inc*, 292 Mich App 359, 365 (2011) ("[C]ontracts founded on acts prohibited by a statute . . . are void." (internal quotation marks omitted)); *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 244 (2000) (holding a contract "void and unenforceable" because it violated a statute and an accompanying administrative rule); *Kukla v Perry*, 361 Mich 311, 324 (1960) ("where an illegal contract is involved, the court will not enforce it or grant relief thereunder").

However, the void heater-installation provision is severable from the fish-feeding provision. "A general rule of contract law is that a void section of an otherwise valid provision can be severed if it is not an essential part of the whole." *Peeples*, 99 Mich App at 296. *See also Stokes v Millen Roofing Co*, 466 Mich 660, 666 (2002) (if illegal provision is not "central to the parties' agreement," lawful provisions can be severed and enforced). "[I]f any part of an agreement is valid, it will avail pro tanto, though another part of it may be prohibited by statute, provided the statute does not, either expressly or by necessary implication, render the whole void, and provided the sound part can be separated from the unsound, and enforced without injustice to the defendant." *Smilansky v Mandel Bros*, 254 Mich 575, 582 (1931) (internal quotation marks omitted).

"The primary consideration in determining whether a contractual provision is severable is the intent of the parties." *Prof'l Rehab Assocs v State Farm Mut Auto Ins Co*, 228 Mich App 167, 174 (1998). "As a general rule, a contract is . . . severable when, in its nature and purpose, it is susceptible of division and apportionment. The singleness or apportionability of the consideration appears to be the principal test. The question is ordinarily determined by inquiring whether the contract embraces one or more subject matters, whether the obligation is due at the same time to the same person, and whether the consideration is entire or apportioned." *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 537-38 (1991) (internal quotation marks omitted); *see also E Distrib Corp v Lightstone*, 257 Mich 184, 186 (1932). Here, the heater-installation provision and the fish-feeding provision address different subject matters, and each is supported by separate consideration. No facts suggest that the statute banning installation of the heater affects, "either expressly or by

necessary implication," AquaCare's duty or ability to feed the fish.

II. *Feeding of Fish*

A court should find in favor of Henry based on the doctrine of impossibility. "The important question is whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract." *Bissell v LW Edison Co*, 9 Mich App 276, 285 (1967) (internal quotation marks omitted). "'[W]hether a promisor's liability is extinguished in the event his contractual promise becomes objectively impossible of performance may depend upon whether the supervening event producing such impossibility was or was not reasonably foreseeable when he entered into the contract.'" *Id.* at 284 (quoting 84 ALR 2d 12, § 6 (1962)). *See also Roberts v Farmers Ins Exch*, 275 Mich App 58, 73-74 (2007).

Here, performance of the fish-feeding provision became impossible because there were no longer any fish to feed. This circumstance was not "reasonably . . . within the contemplation of both parties when they entered into the contract" because neither Henry nor AquaCare thought the cat was capable of catching and eating the fish.

EXAMINERS' ANALYSIS OF QUESTION NO. 5

1. Use of deposition testimony at trial: Charlie's deposition can be read into evidence at trial. Charlie is currently an unavailable declarant under MRE 804(a)(5), because he "is absent from the hearing and the proponent of a statement [Bob] has been unable to procure [Charlie's] attendance . . . by process or other reasonable means." *Id.* If necessary for its determination, the court may determine unavailability through the MRE 104(a) process. Here, Bob made diligent efforts to locate and serve Charlie with a subpoena, which is sufficient to establish unavailability.

Where the declarant is unavailable, his prior "[t]estimony given as a witness in a deposition taken in compliance with law in the course of the same or another proceeding" can be used as long as the party opposing admission "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." MRE 804(b)(5). If it satisfies MRE 804(b), the former testimony qualifies as an exception to the hearsay rule and may be used at trial. In addition, since it is deposition testimony that is being offered, there is an additional basis for finding Charlie is unavailable - he is presently outside the United States, which also renders him unavailable "unless it appears [his] absence . . . was procured by the party offering the deposition." MRE 804(b)(5)(A). Since Artie, the party opposing the deposition, seemingly procured Charlie's absence with threats, Bob cannot be blamed for the absence and MRE 804(b)(5)(A) provides an additional basis for finding Charlie to be unavailable and for admitting his deposition.

In addition, Artie's attorney received notice of and even attended Charlie's deposition. The fact that he walked out before asking any questions does not negate his opportunity and motive to cross-examine Charlie, so Artie cannot exclude the deposition on this basis. See *People* v *Goldman*, 349 Mich 77, 79 (1957).

2. Admissibility of Artie's statement: "I know you know I've been stealing money." The statement is admissible as non-hearsay - a party admission. Charlie attributed the statement to Artie, the defendant. Bob is "offer[ing] the statement

against a party [Artie] and [it] is . . . the party's own statement." MRE 801(d)(2).

The statement is not rendered inadmissible under MRE 408, because it was not made in the context of "compromising or attempting to compromise a claim which was disputed" at the time. MRE 408. Rather, Artie gratuitously made the statement at a time he and Charlie had no dispute. *Ogden v George F Alger Co*, 353 Mich 402 (1958). Any dispute between the two arose later, after Artie fired Charlie.

3. Admissibility of Artie's first offer to pay Charlie for his silence: Artie's initial offer to pay Charlie the $500,000 for disappearing and staying silent also should not be excluded under MRE 408. Although Artie's settlement negotiations with a third party like Charlie may fall under MRE 408, *Windemuller Elec Co v Blodgett Memorial Medical Center*, 130 Mich App 17 (1983), these "negotiations," like Artie's gratuitous statement, occurred before any dispute existed. And even if a dispute had existed, MRE 408 does not protect negotiations evidencing a criminal intent. Artie's offer is also a party admission and so cannot be excluded as hearsay.

4. Admissibility of Artie's second offer to pay Charlie for his silence: The second offer is also admissible and may not be excluded under MRE 408 because of Artie's criminal intent: "this rule . . . does not require exclusion when the evidence is offered for another purpose, such as . . . proving an effort to obstruct a criminal investigation or prosecution." MRE 408. While no prosecution has occurred to date, Artie had admitted to a criminal act and then tried to buy off a witness to that act. In addition, Artie's offer, like the first time he made it, is a party admission and so is admissible non-hearsay.

EXAMINERS' ANALYSIS OF QUESTION NO. 6

An understanding of these facts and questions requires applicants to understand how an attorney-client relationship is formed, how to treat communications with prospective clients, how the rules of professional conduct regarding conflicts and confidentiality apply to internet advertising, and the circumstances in which an attorney's conflict of interest is imputed to other members of the attorney's firm.

1. Yes.

For Jones' communication with the law firm to be confidential, there must either have been an attorney-client relationship, or the communication must have been made when the lawyer and Jones were considering whether to establish an attorney-client relationship. Determining whether an attorney-client relationship exists is a question of law, and the standard is whether the putative client reasonably believed that there was an attorney-client relationship. Neither an express representation agreement nor a written agreement is necessary;[1] an attorney-client relationship can arise based on the parties' actions and the reasonable perceptions of the putative client. *Cf., e.g., Dalrymple v National Bank and Trust Co of Traverse City*, 615 F Supp 979, 982 (WD MI 1985) ("In determining whether an attorney-client relationship has been created, the focus is on the putative client's subjective belief that he is consulting a lawyer in his professional capacity, and on his intent to seek professional advice."); *Fletcher v Board of Education*, 323 Mich 343, 348 (1948) (in determining whether an attorney-client relationship exists, focus is on reasonableness of putative client's belief based on objective circumstances). See also *ABA/BNA Lawyers' Manual on Professional Conduct*, 31:101 ("A lawyer-client relationship ... arises when someone asks a lawyer

[1]If the individual had retained the firm on a contingent fee basis, a written fee agreement would have been ethically required because of the nature of the fee agreement, MRPC 1.5(c), but no written agreement is required in order to form an attorney-client relationship.

for legal help and the lawyer expressly or implicitly gives it or agrees to give it."); *Restatement of the Law (Third) Governing Lawyers*, §14: "A relationship of client and lawyer arises when: (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services".

Where, as here, a law firm has invited members of the public to share, on its website, the details of their possible causes of action, an individual such as Jones would reasonably believe that information is transmitted to the firm for the purpose of obtaining legal advice *unless* the website contains adequate safeguards against such a belief. If, on the other hand, Jones had contacted the firm by sending an uninvited email, the information disclosed would not be confidential; uninvited communications from non-clients are not confidential.

Even if no attorney-client relationship is deemed to have been established, the communication was presumptively confidential because Jones reasonably understood that it was made when the lawyer and Jones were considering whether to establish an attorney-client relationship and in furtherance of that decision-making process. *Cf. Restatement of the Law (Third) Governing Lawyers* §15.

2. Presumptively yes. Applicants will gain points in answering this question by noting the application of the rules of professional conduct involving former clients and the imputation of conflicts.

If the information shared with your colleague was confidential, Jones is treated as a former client of your colleague for purposes of conflicts of interest analysis. Pursuant to MRPC 1.9(a), the colleague who reviewed Jones' submission is presumptively disqualified from representing Smith because the communication involved the same or a substantially related matter – in this case, the same matter – and Jones' interests are materially adverse to Smith's, and where one attorney in a law firm is disqualified from representing a client pursuant to Rule 1.9(a), the conflict is imputed to all other attorneys in the firm. MRPC 1.10(a).

Applicants can gain points by looking to Rule 1.18(c) of the ABA Model Rules of Professional Conduct (as to which there is no Michigan counterpart) and arguing by analogy that, based on the facts presented, there might not be a basis for disqualification if the information Jones provided was not information "that could be significantly harmful to that person in the matter." See also *Restatement of the Law (Third) Governing Lawyers* §15(2) (same). If, for example, the information Jones disclosed to the law firm merely identified the date and location of the accident and there is no dispute as to those facts, and his disclosure did not include details of Jones' version of what happened, the information would not be information "that could be significantly harmful" to Jones "in the matter", and there would be no disqualification if the standard of Rule 1.18(c) were applied.

3. Yes.

An attorney may continue to represent Smith if Jones, as a former client, gives informed consent to the representation. MRPC 1.9(a); MRPC 1.10(d). Although not expected, applicants may gain additional points if they note that, unlike under the ABA Model Rules, the Michigan rules do not require that Jones' consent be in writing. *Id.*

4. In setting up its website, a law firm has the opportunity to include a disclaimer advising prospective clients that information they share with the law firm will not be treated as confidential. Applicants can receive points for noting the significance of a disclaimer, and they can earn additional points for noting that the website can be set up to require a prospective client to click on an acknowledgment of having read the disclaimer and agreeing to its terms. A typical disclaimer will note that (1) sharing information with the law firm does not create an attorney-client relationship; (2) information being submitted is not confidential; and (3) providing information to the law firm will not prevent the law firm from representing a party adverse to the prospective client. If such a disclaimer (and possibly a click-through option) exists on the firm's website, and the prospective client nevertheless discloses otherwise confidential information after clicking the acknowledgment, the information disclosed is not confidential. In the absence of such safeguards, however, the information will be considered to be confidential. *Cf., e.g.,* New Hampshire

Ethics Opinion 2009-2010/1; Massachusetts Ethics Opinion 07-01; Iowa Ethics Opinion 07-02.

EXAMINERS' ANALYSIS OF QUESTION NO. 7

Under Michigan law, similar to the common law, a person may use deadly force - even to the point of taking an attacker's life - if the person reasonably and honestly believes death or great bodily harm is imminent. In order to employ legitimate deadly force, the person may not be engaged in the commission of a crime and must be in a place where he or she has a legitimate right to be. MCL 780.972. The use of legitimate self-defense justifies the killing.

Moreover, a rebuttable presumption exists under Michigan law that an individual who uses deadly force has an honest and reasonable belief that death or great bodily harm is imminent if, among other things, the person against whom deadly force is used, is in the process of a breaking and entering a dwelling or committing a home invasion and is in the dwelling when deadly force is used. MCL 780.951.

Applying these principles to the salient facts produces two very different conclusions. First, Henry's chances of success are high on his self-defense claim regarding the armed intruder. Because that intruder was engaged in the commission of a home invasion or breaking and entering and was in the dwelling at the time Henry shot him, Henry is covered under the presumption. As such, he is presumed to have acted under a reasonable and honest belief of imminent death or great bodily harm. Nothing in the facts undermines or rebuts this presumption. Moreover, Henry was lawfully in his own home and legally possessed a firearm. He was under no obligation to retreat before using deadly force. His claim of self-defense is strong.

As to the unarmed intruder, a different conclusion should be reached. While it is true that this intruder was committing a home invasion or breaking and entering, he was no longer in the house when shot. The presumption is not intact. However, Henry may still hold the requisite mindset - a reasonable and honest belief of imminent death or great bodily harm - without the statutory presumption. Henry was still in his house, lawfully armed, and under statute had no duty to retreat.

But from there, his claim of self-defense disintegrates under both the statute and the common law. An integral part of both is a certain quantum of fear. By the time Henry shot, he was angry and not fearful. Moreover, while originally posing a threat to Henry, the second intruder was in full retreat. Henry actually went after this man, hardly bespeaking fear. Finally, the unarmed man was shot in the back. It is exceedingly difficult to conclude that, when Henry shot this man, Henry had a reasonable and honest belief in imminent death or great bodily harm, a necessary predicate to legitimate use of self-defense.

In sum, Henry's self-defense claim is clearly supported regarding the armed intruder and not supported regarding the unarmed intruder.

EXAMINERS' ANALYSIS OF QUESTION 8

The First Amendment of the U.S. Constitution, applicable to the states via the 14th Amendment, prohibits the state from abridging a person's freedom of speech. Generally, content-based speech restrictions must meet the strict scrutiny standard – the restriction must be narrowly tailored to promote a compelling government interest and must be the least restrictive means of serving that interest. *US v Playboy Entertainment Group, Inc*, 529 US 803, 813 (2000).

However, special rules apply in the context of government employees. Public employees do not surrender all their First Amendment rights by reason of their employment, and a state may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech. *Perry v Sindermann*, 408 US 593, 597 (1972).

The determination whether a public employer has properly disciplined an employee for engaging in speech requires balancing the interests of the employee and the interest of the state in promoting the efficiency of the public services it performs through its employees. *Rankin v McPherson*, 483 U.S. 378, 384 (1987). The Supreme Court of the United States has established a two-part inquiry to determine the constitutional protections accorded to a public employee's speech.

(1) The first part of the inquiry considers whether the employee spoke as a citizen on a matter of public concern. *Garcetti v Ceballos*, 547 US 410, 418 (2006). Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. *Rankin* at 385. Moreover, First Amendment protection applies even when an employee communicates *privately* with the employer rather than expressing his views to the public. *Givhan v Western Line Consolidated Sch Dist*, 439 US 410 (1979). If the employee's speech was **not** made as a private citizen, or does **not** involve a matter of public concern, there is no First Amendment violation premised on the employer's reaction to the speech. *Connick v Myers*, 461 US 138 (1983); *Garcetti, supra.*

If the answer to the first part of the inquiry is yes, then the second part of the inquiry is considered: (2) whether the state had an adequate justification for treating the employee differently from any other member of the general public. *Garcetti, supra* at 418. This inquiry focuses on the effective functioning of the workplace. "Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest." *Rankin* at 388. Employees speaking as citizens on matters of public concern "must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Garcetti, supra* at 419.

Here, just as in *Garcetti*, Nathan's speech was made pursuant to his official duties as an internal affairs investigator. Because his statements were made pursuant to his official duties, he was not speaking as a citizen for First Amendment purposes, even if the statements addressed a matter of public concern. Therefore, Nathan's constitutional rights were not violated, and the First Amendment does not protect him from employer discipline.

EXAMINERS' ANALYSIS OF QUESTION NO. 9

The 4th Amendment protects against unreasonable searches and seizures. Generally, a search without a warrant is per se unreasonable unless justified by an exception to warrant requirement. *People v Beuschlein*, 245 Mich App 744, 749 (2001). A number of those exceptions apply to the scenarios involved.

Entry into the House

Officer Jenkins' entry into the home, without a warrant, was justified by the emergency aid exception. As stated in *Beuschlein*, citing *People v Davis*, 442 Mich 1, 25, 26 (1999), this exception allows police to enter a home "without a warrant when they reasonably believe that a person within is in need of immediate aid. They must possess specific and articulable facts that lead them to this conclusion." The extent of the entry must be limited to the purpose of the exception. In the instant case, Officer Jenkins heard glass breaking and a woman scream, "Stop it! Stop it!" Officer Jenkins heard a male voice say, "Shut up or take a bullet." The woman screamed for help from ostensibly her child. More tussling and screaming was heard, as well as a cry for help and glass breaking. Indeed after Officer Jenkins yelled "police," he heard the woman yell for help. The combination of these facts clearly supports the necessary rudiments for a warrantless entry into the house. See Michigan Criminal Law Deskbook, Second Edition, §19.190, pages 941-942, 2013. Police need only an objectively reasonable belief that an occupant is seriously injured or immediately threatened. Police may act to prevent injury, not simply to treat it.

Cocaine on Coffee Table

The plain view exception justifies the seizure of the cocaine. Police may seize evidence in plain view if they have a right to be at the point of observation and it is immediately apparent the seized item is fruits, instrumentalities or contraband, or mere evidence; or stated differently, the items' incriminating character is immediately apparent. *People v Champion*, 452 Mich 92, 101 (1999), citing *Horton v California*, 496 US 128 (1990).

The facts show the substance seized was immediately apparent to be cocaine. The substance appeared to be cocaine, and the scales and packing material suggested that as well. Moreover, Officer Jenkins called on his training to draw his conclusion.

The cocaine was able to be seized under the plain view exception.

Entry into the Basement Bedroom

The justification for entry into the house does not extend to entry into the basement because entry into the house was justified to promote aid. Police had Brown secured; the victim was being treated.

However, a protective search or protective sweep of the premises is allowed for officer safety or the safety of other persons. The woman at one point, screamed for "Johnny to help mommy." This strongly suggests a third person in the house and that the person was a child. The 4th Amendment permits a properly limited protective sweep in connection with an in-home arrest if the police reasonably believe the area in question harbors an individual who poses a danger to them or others. *Maryland v Buie*, 494 US 325 (1990). *People v Cartwright*, 454 Mich 550 (1997). (A quick limited search for the sole purpose of ensuring safety is tolerated.) Here, the police were aware a child could be present. The police did not find a gun on the main floor. Due to the nature of Brown's threat, "Shut up or take a bullet" overhead by the police, they were also aware a gun could be present. Searching in the basement for both the child and/or the guns was reasonable and not a violation of the 4th Amendment.

The Pictures

None of the previous justifications - emergency aid, plain view, or protective sweep - justify opening the nightstand drawer. Indeed, none of the exceptions to the warrant requirement seem to apply. See *Slaughter*, 489 Mich 302, 311-312 (2011), for a list of those exceptions. The surrounding circumstances do not suggest anything of connection to those circumstances would be found. The pictures should be suppressed from admission into evidence.

EXAMINERS' ANALYSIS OF QUESTION NO. 10

As set forth in the call of the question, Pauline Plaintiff has asserted two causes of action: (1) assault and (2) battery. The applicant should articulate the elements of each claim and then analyze and conclude whether these claims should be dismissed.

1. Assault

To recover civil damages for assault, a plaintiff must show an "intentional unlawful offer of corporal injury to another person by force, or a force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact." *VanVorous v Burmeister*, 262 Mich App 467, 482-483 (2004), quoting *Espinoza v Thomas*, 189 Mich App 110, 119 (1991). In other words, Dan Defendant can be liable for assault if (1) he acts intending to cause a harmful or offensive contact with the person of Pauline, or an imminent apprehension of such a contact, and (2) Pauline is thereby put in imminent apprehension of such contact. *Mitchell v Daly*, 133 Mich App 414, 426 (1984). Here, the proper analysis is that Dan Defendant's motion should be granted with respect to the assault claim because it is undisputed, based upon the facts, that Pauline Plaintiff was never put in an imminent apprehension of a harmful or offensive contact. Instead, the facts show that she was unaware that Dan Defendant was approaching her from behind and was intending on placing his hands on her shoulders. As a result, Pauline Plaintiff will not be successful in her assault claim against Dan. See *Russell v Bronson Heating and Cooling*, 345 F Supp 2d 761, 796-797 (ED Mich, 2004)(Applying Michigan law).

2. Battery

Battery is defined as "the willful and harmful or offensive touching of another person which results from an act intended to cause such contact." *Smith v Stolberg*, 231 Mich App 256, 260 (1998), quoting *Espinoza v Thomas*, 189 Mich App at 119. Thus, to prevail on her battery claim, Pauline Plaintiff must show that there was a (1) willful and harmful or offensive touching of her

which (2) resulted from an act intended to cause such contact. Here, the most reasonable conclusion is that Pauline can establish a battery claim.

As to the first portion of the test, the facts show that Dan Defendant's touching of Pauline Plaintiff was offensive to her. Pauline had previously told Dan that he should not try to massage her shoulders, and clearly she was offended by his doing so despite her warnings. The second part of the test is more debatable, though the most reasonable conclusion is that the offensive touching resulted from "an act intended to cause such contact." The facts show that Dan Defendant intended to cause a harmful or offensive contact with Pauline Plaintiff because he had rubbed her shoulders before and she told him never to do it again. A reasonable person would therefore have known that trying to rub Pauline's shoulders again would be offensive to her. See *Restatement of Torts 2nd* §18, pp 32-33. A weaker argument could be made that there is a question of fact, as Dan Defendant stated that he placed his hands on Pauline Plaintiff's shoulders in an attempt to ease her stress at work, not for the purpose of bringing about a harmful or offensive contact or an apprehension of such contact to her. An applicant should get points for either conclusion, as the point of the question is to recognize and discuss Dan's intent in making the contact.

EXAMINERS' ANALYSIS OF QUESTION NO. 11

A preemptive right is a shareholder's right to purchase a corporation's newly issued stock before the shares are offered to the public, in an amount proportionate to the shareholder's current holdings, in order to prevent dilution of the shareholder's ownership interest. Black's Law Dictionary, 8th Ed.

Resolution of Dutton, Arnold and Ping's claims are governed by MCL 450.1343. The statute provides in relevant part:

(1) The shareholders of a corporation do not have a preemptive right to acquire the corporation's unissued shares except to the extent provided in the articles of incorporation or by agreement between the corporation and one or more shareholders.

(2) A statement included in the articles or an agreement that the corporation elects to have preemptive rights, or words of similar import, means that the following principles apply except to the extent the articles or agreement expressly provide otherwise:

(a) The shareholders of the corporation have a preemptive right, granted on uniform terms and conditions prescribed by the board to provide a fair and reasonable opportunity to exercise the right *to acquire proportional amounts* of the corporation's unissued shares upon the decision of the board to issue them.

(b) A shareholder may waive his or her preemptive right. *A waiver evidenced by a writing is irrevocable even though it is not supported by consideration.*

(c) There is no preemptive right with respect to any of the following:

(i) *Shares issued as compensation to directors, officers, agents, or employees of the corporation, its subsidiaries or affiliates.*

* * *

(4) The preemptive rights, whether created by statute or common law, of shareholders of a corporation formed before January 1, 1973, are not affected by subsections (1) and (2) *A corporation may alter or abolish its shareholders' preemptive rights by an amendment of its articles.* (Emphasis added.)

All 3 shareholders will fail in their claim that Muma Corp violated their preemptive rights.

Dutton - because Dutton waived his preemptive rights in writing, the waiver is irrevocable. The waiver is irrevocable despite the fact that the waiver was not supported by consideration. MCL 450.1343(2)(b).

Arnold - enjoys no preemptive right to acquire the shares issued as compensation to the Muma Corp directors. MCL 450.1343(2)(c)(i).

Ping - MCL 450.1343(2)(a) provides that shareholders with preemptive rights have the right to acquire *proportional amounts* of the corporation's unissued shares. Because the facts indicate that Ping owned 5% of Muma Corp shares, he would not be entitled to purchase any higher amount as part of exercising his preemptive rights. Moreover, because the facts indicate that Muma Corp properly amended its articles of incorporation and abolished its shareholders' preemptive rights, Ping's preemptive rights no longer exist. See also MCL 450.1602(n).

EXAMINERS' ANALYSIS OF QUESTION NO. 12

I. Real Party in Interest:

The circuit court properly granted Donovan's motion for summary disposition.

Donovan's motion for summary disposition was properly filed pursuant to MCR 2.116(C)(5), which permits dismissal of a claim when "[t]he party asserting the claim lacks the legal capacity to sue." *Flanders Indus, Inc v State of Mich*, 203 Mich App 15, 34 (1993) (dismissing a claim pursuant to MCR 2.116(C)(5) when the plaintiff lacked standing to assert the claim). Donovan's motion was also timely filed. MCR 2.116(D)(2) states that the grounds listed in subrule (C)(5) "must be raised in a party's responsive pleading, unless the grounds are stated in a motion filed under this rule prior to the party's first responsive pleading." Here, in compliance with the court rule, Donovan asserted Parker's lack of capacity to sue as a defense by motion filed before filing his answer, see MCR 2.116(D)(2).

On the substantive issue before the circuit court, MCR 2.201 provides that, generally, "[a]n action must be prosecuted in the name of the real party in interest." *Miller v Chapman Contracting*, 477 Mich 102, 105-106 (2007). "A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another." *Miller*, 477 Mich at 106, citing *Blue Cross & Blue Shield of Michigan v Eaton Rapids Community Hosp*, 221 Mich App 301, 311 (1997). "'This standing doctrine recognizes that litigation should be begun only by a party having an interest that will assure sincere and vigorous advocacy.'" *Id.*, quoting City *of Kalamazoo v Richland Twp*, 221 Mich App 531, 534 (1997). Accord *Porter v Hill*, 301 Mich App 295, 305 (2013), rev'd on other grounds by 495 Mich 987 (2014) ("A prospective plaintiff lacks standing if he or she is not a real party in interest, because the 'standing doctrine recognizes that litigation should be begun only by a party having an interest that will assure sincere and vigorous advocacy.'"), quoting *City of Kalamazoo*, supra at 534.

Here, the real party in interest is Workout, the bankruptcy trustee. As stated in the facts, once Parker filed for Chapter 7

bankruptcy, all of the debtor's assets become property of the bankruptcy estate, see 11 [USC] §541, subject to the debtor's right to reclaim certain property as "exempt," §522(l)." *Schwab v Reilly*, 560 US 770, 774; 130 S Ct 2652; 177 L Ed 2d 234 (2010). As the owner of a potential cause of action that accrued prior to the debtor's bankruptcy petition, the bankruptcy trustee, not the debtor, is the real party in interest and the only party who has standing to pursue the litigation. *Miller*, 477 Mich at 106; *Young v Independent Bank*, 294 Mich App 141, 144-145 (2011). As such, Donovan correctly argued that Parker herself lacked standing to file the complaint.

II. Statute of Limitations and the Relation-Back Doctrine

A. Statute of Limitations

Donovan also has good grounds to oppose Parker's motion to amend the complaint, as the statute of limitations has expired and Workout is a different and distinct party whose addition would not relate back to the original and timely complaint.

Actions seeking damages for personal injury must be filed within 3 years of the date of the injury. MCL 600.5805(10); *Rusha v Dep't of Corrections*, 307 Mich App 300, 311 n 8 (2014). Here, Parker sustained her injuries in March 2010, and although she filed her complaint in February 2013, which was within the 3-year statute of limitations, she had no standing to file the action. Because Parker's complaint was dismissed in April 2013, after the statute of limitations had expired, Parker can maintain this action only if Workout, the bankruptcy trustee, can properly be substituted as the plaintiff named in the complaint filed in February 2013.

B. Relation-back Doctrine

"MCR 2.118(A)(2) provides that leave to amend a pleading 'shall be freely given when justice so requires.'" *Miller*, 477 Mich at 106-105. A motion to amend should be "denied only for particularized reasons," such as when an amendment would be futile. *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 656 (1973); see also *Miller*, 477 Mich at 106. The proposed amendment of the complaint to substitute Workout as plaintiff would be futile because Workout being named as plaintiff cannot

relate back to the filing of the original complaint. Likewise, the naming of Parker as plaintiff cannot be found to be a scrivener's error that can be corrected by substituting Workout as the plaintiff. Rather, the naming of Workout as plaintiff must be considered to be an untimely addition of a new party after the statute of limitations has expired.

MCR 2.118(D) provides:

An amendment that adds a claim or defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading.

However, "[a]lthough an amendment generally relates back to the date of the original filing if the new claim asserted arises out of the conduct, transaction, or occurrence set forth in the original pleading, MCR 2.118(D), the relation-back doctrine does not extend to the addition of new parties." *Employers Mut Cas Co v Petroleum Equip, Inc*, 190 Mich App 57, 63 (1991). The question here is whether the naming of Parker as plaintiff, constitutes a scrivener's error or misnomer which can be corrected by naming Workout as the new party to the complaint, or if the naming of Workout as plaintiff, constitutes the addition of a new party.

"'As a general rule, . . . a misnomer of a plaintiff or defendant is amendable unless the amendment is such as to effect an entire change of parties.'" *Miller*, 477 Mich at 106, quoting *Parke, Davis & Co v Grand Trunk Ry System*, 207 Mich 388, 391 (1919). "The misnomer doctrine applies only to correct inconsequential deficiencies or technicalities in the naming of parties". *Id.* at 106-107. However, where "the plaintiff seeks to . . . add a wholly new and different party to the proceedings, the misnomer doctrine is inapplicable." *Id.* at 107. Workout is a new party because she possesses only a beneficial interest in the cause of action against Donovan. As the real party in interest, who possesses a vested right to bring a legal cause of action, Workout is a different and distinct party. See, e.g., *Barclae v Zarb*, 300 Mich App 455, 483-484 (2013); *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 354-357 (2013); *MOSES Inc v SEMCOG*, 270 Mich App 401, 411-416 (2006).

C. Conclusion

Under the facts presented here, Donovan has a legitimate reason to oppose Parker's motion for leave to file an amended complaint, and Parker's claim should be dismissed, because an amendment that substitutes Workout as the plaintiff would not relate back to the date of the original filing, and the three-year statute of limitations had expired.

EXAMINERS' ANALYSIS OF QUESTION NO. 13

With respect to the first question, the answer is yes: ABC can terminate payment of weekly workers' compensation without first receiving permission from the state workers' compensation system. Unlike some other states, in Michigan voluntary payment of workers' compensation is not a determination of liability or coverage; it does not bind the employer. *Gilbert v Reynolds Metals Co,* 59 Mich App 62, 68 (1975). Nor does it bind the employee (the employee may, for example, accept workers' compensation and later sue for an intentional tort). The relevant statute is MCL 418.831, which says: "Neither the payment of compensation or the accepting of the same by the employee or his dependents shall be considered as a determination of the rights of the parties under this act." This provision has the effect of encouraging swift and easy payments of benefits in borderline cases because the decision to pay or accept payments is not binding. Therefore, ABC need not seek preapproval from the state before terminating voluntary payment of Bob's workers' compensation benefits. (If ABC had been ordered to pay Bob workers' compensation benefits following a hearing, the result would be different. ABC would need to obtain another order from the workers' compensation agency relieving it of further payments. See, Workers' Compensation Agency: General Rules, Rule 10[1], R 408.40; See also, Brown v Dept of Social Services, 127 Mich App 234, 237-38 [1983].)

With respect to the second question, ABC's payment of a partial rate was appropriate. The workers' compensation statute says: "A disability is partial if the employee retains a wage earning capacity at a pay level less than his or her maximum wages in work suitable to his or her qualifications and training." MCL 418.301(4) (a). "'(W)age earning capacity' means the wages the employee earns or is capable of earning at a job reasonably available to that employee, *whether or not wages are actually earned.*" MCL 418.301 (4) (b) (italics added). Here, Bob retained the ability to earn at a reduced pay level (one-half of his typical average weekly wage) at work suitable to his qualifications and training. The fact he was not actually earning those lesser wages is not determinative. What is determinative is what he is capable of earning. Compare, *Lofton v AutoZone, Inc,* 482 Mich 1005 (2008). A possibility

exists under the statute for Bob to receive higher weekly compensation benefits "as if totally disabled," but Bob would need to establish "a good-faith effort to procure work" within his limitations and here he sought none. MCL 418.301 (4) (c).

With respect to the third question, nothing in Michigan's workers' compensation statute compels an employer to offer an injured employee a job. While that is often done to mitigate workers' compensation liability and because other statutes might require accommodating employees, the workers' compensation statute does not mandate a job offer.

EXAMINERS' ANALYSIS OF QUESTION NO. 14

1. The issue is, what are the terms of the contract when the acceptance by Beverly Florist, Inc. did not mirror the offer made by Cottage Gardens.

The first issue is to determine whether UCC or common law applies. The UCC applies to the sale of goods. Goods are defined as all things which are movable at the time of the contract. MCL 440.2105. Here the contract pertains to the sale of flowers. Flowers are moveable and therefore considered goods. Article 2 of the UCC applies.

The next issue is to determine the terms of the contract. Under the UCC, the general rule is that additional terms are to be construed as proposals for addition to the contract if one of the parties is a non-merchant. MCL 440.2207(2). However, if the transaction is between merchants, such terms become part of the contract unless the offer expressly limits acceptance to the terms of the offer; they materially alter it; or notification of objection to them has already been given or is given within a reasonable time after notice of them is received. MCL 440.2207(2)(a), (b) and (c).

Here it must be determined whether the parties are merchants. A merchant is defined as a person who deals in goods of the kind involved in the transaction. MCL 440.2104(1). Cottage Gardens is in the business of growing and selling plants. Beverly Florist, Inc. is a florist that sells flower arrangements. Each party deals with flowers--the goods involved in this transaction--therefore, both parties are merchants.

Cottage Gardens sent a written offer to sell 1,000 white roses to Beverly Florist, Inc. at $3.00 each, plus delivery. Beverly Florist's response accepted the offer, but changed the terms indicating that the price was $3.10 and that delivery was included. Pursuant to MCL 440.2207(2), the terms suggested by Beverly Florist become part of the contract unless one of the sub-rules applies. Under these facts, the only applicable sub-rule is that the new terms materially alter the original contract. MCL 440.2207(2)(b). An alteration will not be included if it materially alters the bargain. MCL 440.2207, Note 3.

Here, Beverly Florist increased the contract price by $100 and that increase in price included delivery. This does not materially alter the original contract because the increased cost paid for the delivery. Further, this increase in price arguably did not increase the risk of Cottage Gardens or limit any remedies available to it in the event of a breach of contract. Therefore, the terms proposed by Beverly Florist will become part of the contract (1,000 white roses at $3.10 and delivery is included).

2. The issue is whether Beverly Florist must accept tender of the white roses that were delivered on March 11, 2015, when the initial delivery was not a perfect tender.

In a single delivery contract, if the goods or the tender fail in any respect to conform to the contract, the buyer may reject all, accept all, or accept any commercial units and reject the rest. MCL 440.2601. Here, the delivery by Cottage Gardens on March 10, 2015 contained 250 red roses. These were the wrong color as the contract specified that they should be white. Beverly Florist, Inc. kept the 750 conforming white roses and rejected the 250 non-conforming red roses. This was a single delivery contract and because all of the roses were not white as per the contact, the delivery was not a perfect tender. Beverly Florist, Inc. was within its rights to accept the conforming flowers and reject the non-conforming flowers.

However, where any tender or delivery by the seller is rejected because the goods were non-conforming and time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery. MCL 440.2508(1). An action is taken seasonably if it is taken at or within the time agreed or, if there is no agreed time, at or within a reasonable time. MCL 440.1205. The performance deadline for the contract was March 11, 2015. There was still one day left for Cottage Gardens to cure the defect in the delivery. Further, the facts indicate that upon receipt of the rejection, Cottage Gardens immediately faxed a notice to Beverly Florist, Inc. indicating that it intended to supply the 250 remaining white roses by March 11, 2015. Taking action without any delay shows intent to act promptly to cure a problem within the performance time set by the contract. Therefore, there was

time left for performing and the notice to cure was sent within a reasonable time.

The facts further indicate that Cottage Gardens delivered the 250 white flowers by 9:00 a.m. on March 11, 2015. The new tender was made within performance deadline set in the contract. Cottage Gardens sent the notice to cure within a reasonable time, and supplied the 250 white roses before the expiration of the contract deadline. Since Cottage Gardens complied with the statutory requirements, Beverly Florist, Inc. is required to accept the tender of the 250 white roses that were delivered on March 11, 2015.

EXAMINERS' ANALYSIS OF QUESTION NO. 15

While a precise definition of "marital property" is not found in statutes, case law has set some workable precepts. Courts have generally interpreted marital property to include property acquired during the marriage or acquired as a result of efforts during the marriage, excluding gifted property, inherited property, and passive appreciation of separate property. See Michigan Family Law, May 2014 update, ICLE, page 866.

"Separate property" most often includes property owned by one party before the marriage, property acquired during the marriage by one spouse through gift or inheritance, and passive appreciation on separate property.

Applying these principles to the items in question yields the following conclusions.

Item 1: The home and its appreciation are clearly marital assets. Both parties contributed equally to its purchase and maintenance, and it served as the marital residence. While it may be noted that the $200,000 each spouse contributed was separate property, concluding that the house is separate property will warrant little consideration. The appreciation occurred during the marriage. Therefore, the home and the appreciation are classified as marital assets. It does not matter that some of the appreciation may have occurred after the parties separated. The term during the marriage encompasses the period from the date of the marriage to entry of the divorce judgment. See *Reeves v Reeves*, 226 Mich App 490 (1997) and *Byington v Byington*, 224 Mich App 103 (1997). Periods of cohabitation prior to marriage and the date of separation do not alter these principles.

Item 2: William's stock shares are his separate property. They were purchased prior to the marriage date with his funds. That they appreciated during cohabitation is of no significance as *Reeves* makes a distinction between cohabitation and marriage. Moreover, appreciation of the shares during the marriage was "passive." Passive appreciation occurs irrespective of the parties' efforts. Here, this publicly traded stock appreciated

without contribution of either party. Though some appreciation occurred during the marriage, it is not a marital asset. Accordingly, the stock shares and their appreciation are William's separate property.

Item 3: For similar reasons, Margaret's pre-marriage purchase of the Ferrari classifies it as her separate property. It remained titled in her name, was used solely by her, and maintained by her, and it was fully paid for before the marriage. That Margaret used marital money to maintain the car she drove might be noted, such an observation would not transform this clearly separate property into a marital asset.

Item 4: The $100,000 check from William's Uncle Charlie is a marital asset, for a couple of reasons. First, assuming it was received after the wedding, it was therefore received "during the marriage." Second, a formulation of marital property includes property that came to either party by "reason of the marriage." MCL 552.19. The check was a wedding gift and it is hard to imagine that a wedding gift does not come to the spouses by reason of the marriage. Moreover, the check, although from William's relative, was written in both names with a note indicative of a desire to have two recipients. Uncle Charlie's clear intent was to give the money to both spouses. The original $100,000 was therefore marital. *Heike v Heike*, 198 Mich App 289 (1993). Appreciation on a marital asset is also a marital asset.

Item 5: The beach house is Margaret's separate asset. That the deed was received after separation is not determinative; rather, it is the circumstances of the conveyance that are important. Typically, inheritance, even during the marriage, is the separate property of the inheriting party. *Deyo v Deyo*, 474 Mich 952 (2005). This conclusion is buttressed by the clear intention of Aunt Nelly that the beach house was intended for just Margaret because Aunt Nelly did not specifically name William.