

**FEBRUARY 2001  
BOARD'S ANALYSIS**

**QUESTION 1**

1. Clearly, a limited liability company will better enable Alan and Brittany to implement their objectives. The principal reason is that a general partnership will not shield Alan from liability to business creditors, and therefore, may require him to increase his investment.

A limited liability company, on the other hand, will enable Alan and Brittany to achieve all of their objectives. Specifically,

(a) Limited Liability - As a member of the LLC, Alan will not be liable for the obligations of the company solely by reason of being a member. He would have to personally guaranty LLC obligations in order for personal liability to exist. §4A-301 of Corporations Article.

(b) Limited Investment - The Operating Agreement may limit Alan's obligations to contribute capital and should specify that he is to perform no services. §4A-502.

(c) Profits - Profits and losses will be allocated to Alan and Brittany in proportion to their respective capital interests, unless the Operating Agreement specifies otherwise. Since profits are to be allocated equally, regardless of the capital accounts, the Operating Agreement should so specify. §4A-505.

(d) Alan's Loan - Unless the Operating Agreement provides otherwise, Alan, as a member of the LLC, may lend money to the LLC and, subject to other applicable law, has the same rights and obligations with respect to the loan as a person who is not a member. §4A-405. Therefore, Alan's rights as a creditor may be detailed in a Promissory Note, signed by the LLC.

(e) Veto Power - The Operating Agreement may limit Brittany's right to act as an agent for the LLC. However, Alan's creditors may not be bound by this limitation where the LLC should be estopped from denying that Brittany was its agent. §4A-401.

2. In order to accomplish the client's objectives, the following documents are necessary.

(a) Articles of Organization – the purpose of Articles of Organization is to legally establish the LLC. This is accomplished by filing the Articles of Organization with the State Department of Assessments and Taxation. The Articles of Organization need not be signed by Alan or Brittany, but can be signed by anyone over 18.

(b) Operating Agreement – the purpose of an Operating Agreement is to define the rights and obligations of Alan and Brittany vis-à-vis the LLC and each other. The Operating Agreement should spell out the agreements of Alan and Brittany regarding his investment, his veto power over basic decisions, Brittany's salary and duties and the division of profits. The Operating

Agreement may contain other provisions, relating for example, to restrictions on transfer, deadlock and dissolution. The Operating Agreement must be signed by Alan and Brittany, since they are the Members.

(c) Promissory Note - Alan's investment of \$60,000 should be documented by a Promissory Note, containing the interest rate and terms of repayment. The purpose of the Promissory Note is to establish Alan's legal rights and allow him to enforce them easily by legal means in the event of default by the LLC.

(d) Security Agreement and Financing Statement - Alan wants to secure his investment by a lien on the equipment and other assets of the LLC. A Security Agreement (by which the LLC grants him a security interest) and a Financing Statement must be signed by the LLC and recorded among the financing records of the SDAT in order to perfect Alan's lien.

(e) Employment Agreement for Brittany - Brittany's right to receive a salary of \$500 per week and her employment rights and duties may be spelled out in an Employment Agreement

3. Other Issues – The question raises issues of professional responsibility. No discussion of these issues is required. An answer which mentions or addresses these issues may receive additional credit.

## QUESTION 2

Dear Ronnie:

(a) Purchase of the shopping center. A claim may exist against Sam for failing to advise you, as a co-director of S & R, Inc., of the opportunity to purchase the shopping center. A director is not allowed to profit personally by acquiring property that the director knows the corporation will need or intend to acquire, so long as the interest, actual or in expectancy, existed while Sam was involved as a director of S & R, Inc. Corporate managers are “precluded from diverting unto themselves opportunities which in fairness belong to the corporation.” *Maryland Metals, Inc. v. Metzner*, 282 Md 31, 49, 382 A.2d 564 (1978).

In this case, it must be recognized that S & R, Inc was not in the same line of business as owning a shopping center. But S & R, Inc. did have a lease in this center, and, at least, had a leasehold interest as a tenant. Sam may argue that purchasing the shopping center is not a corporate opportunity for S & R, Inc., whose purpose is to operate a hair salon. However, this issue is likely to be a question of fact, to be decided by a judge or jury, and not as a matter of law, since S & R, Inc. also is authorized to engage in other business activities.

Sam has exposed himself to a potential liability by not disclosing the opportunity to the Board of Directors of S& R, Inc., together with an explanation of the surrounding circumstances. Even if it were unlikely that S & R would have or could have taken advantage of the opportunity, Sam could have avoided potential liability if he had notified Ronnie of his opportunity to purchase the shopping center and invited S & R, Inc. to participate as a partner with Carl. See generally, *Billamn v. State Dep. Corp.*, 86 Md. App. 1, 585 A.2d 238 (1991); *Ind. Distributors v. Katz*, 99 Md. App. 441, 637 A.2d 886 (1994);

(b) Failure to renew the lease. S & R, Inc. may have rights against Sam for the loss of its lease. As an existing tenant, S & R, Inc. had an expectancy of the renewal of its lease. Sam, a director of S & R, Inc., was in a conflict of interest position when the acquiring partnership refused to renew the lease. Sam, it appears, made no effort to avoid his conflicting interest. Further, he did not disclose to the directors of S & R, Inc. that the shopping center was being sold and that he was involved as a partner of the purchaser. Had this information been known, S & R, Inc. arguably, could have taken steps to better protect its interests. On the other hand, Sam will argue that there is no obligation on the partnership to renew or extend S & R’s lease, and that it dealt at arms length with S & R, Inc. Equal credit will be given for a reasoned answer reaching either conclusion.

(c) Who can sue? Ronnie, as a stockholder, has no rights directly against Sam. The rights belong to S & R, Inc. Ronnie must demand that S & R, Inc. seek to enforce its rights against Sam. If S & R refuses, as is likely, Ronnie may bring a stockholders’ derivative action on behalf of S & R, Inc.

(d) Interested Director Transaction. These facts do not give rise to the “interested director” provisions of §2-419 of the Corporations Article, because the purchase of the shopping center by Sam’s partnership is not a transaction with S & R. Inc.

### QUESTION 3

First, Valerie may file for a Protective Order under 4-504 of the Family Law Article of the Annotated Code of Maryland. Such an Order would require Steven to vacate the family home, give Valerie the temporary use and possession, and to refrain from further abuse or threats of abuse, and award her temporary custody of the minor children. Such an order might also require Steven to pay the mortgage on the family home and provide additional financial support.

Secondly, Valerie may file for an absolute divorce in accordance with 7-103(7) (cruelty of treatment) or 7-103(8) (excessively vicious conduct) of the Family Law Article. It is likely that, because of Steven's history of abuse, she will be awarded custody of the children.

In connection with her complaint for divorce, she would be eligible for an award of child support based upon the parties total monthly gross income. Such an award would also include an award toward the daycare expenses, the private school tuition of the children and their health insurance. If she is awarded custody of the children, she will probably also be awarded the use and possession of the family home for up to three years following an absolute divorce. During the period of use and possession, Steven might also be required to pay the mortgage on the family home.

She would also be eligible for an award of alimony which should allow her the funds to continue to pay the mortgage payment on the marital home following the use and possession period and to pay the necessary family expenses. The length of the alimony period would be set by the Court, but, because of her current age and because of her lack of education, it is possible that the incomes of the parties will be so disparate that she might qualify for permanent alimony.

When the home is finally disposed of, she would be entitled to receive her share of the equity value.

## QUESTION 4

1. In order to assume his defense, Sam must first notify his attorney of record that his services are no longer required and requesting that he strike his appearance in accordance with Rule 2-132(a) of the Maryland Rules of Procedure and request that he forward a complete copy of the file to you. You must file a Motion to Enter Appearance in accordance with Rule 2-131(b) and serve a copy upon all parties. Since his former attorney is now a trustee for the sale of the property, he must be served with a copy of the Motion.

2. Because of Gladys' death, on May 15, 1999, prior to the sale of the property, Sam, as a joint tenant, acquired sole title to the property. The Consent Order signed by the Court and appointing the attorneys for the parties as trustees for the sale of the property is of no legal effect because Sam's attorney did not have his authorization to enter into such an agreement. While an attorney has the right to make certain tactical decisions on behalf of his client in a lawsuit, Rule 1.4(b) requires that the attorney explain a matter to the extent reasonably necessary to permit the client to make an informed decision, and Rule 1.2(a) requires the attorney to abide by the client's decisions concerning the objectives of the representation. An attorney must abide by a client's decision whether to accept an offer of settlement of a matter.

3. As Sam's new attorney, you must file a Motion to Strike the Consent Order because it was entered into without Sam's knowledge or consent, and move to dismiss the suit as moot because of Gladys' death.

4. You may also wish to consider an action against Sam's previous attorney for breach of contract for his failure to consult with Sam and properly represent his interests.

5. You may also wish to refer the matter to Bar Counsel for investigation and possible action.

### EXTRACT SECTIONS FOR QUESTION 4

**Annotated Code of Maryland, Maryland Rules**

**Title 1. General Provisions: Rule 1-331**

**Title 2. Civil Procedure — Circuit Court: Rules 2-131 and 2-132**

**Title 3. Civil Procedure — District Court: Rules 3-131 and 3-132**

**The Maryland Rules of Professional Conduct: Rules 1.2, 1.4, 1.7 and 1.8**

## QUESTION 5

1. The testimony of Ms. Plaintiff as to her alleged agreement with Mr. Elderly generally would be admissible as an admission by Mr. Elderly. MR 5-803(a). However, the claim against the Estate based on an oral agreement between the decedent and the plaintiff is thus subject to Maryland's "Dead Man's [sic] statute", Md. Code Cts. & Jud. Pro. Art. § 9-116 which prohibits a party to a proceeding against an estate from testifying as to a transaction with or a statement by the decedent unless the statement (or evidence of it) is first introduced by the opposite party or the claimant is called as a witness by the opposite party. The testimony is clearly not admissible under the Dead Man's Statute. See *Farah v. Stout*, 112 Md. App. 106, 117, 684 A.2d 471 (1996), *cert. den.* 344 Md. 567, 688 A.2d 445 (1997).

2. There are two components of Michael's testimony. The first component is what Anne told him what Mr. Elderly promised. This is hearsay within hearsay and can be admitted only if both statements qualify for admission under one or more exceptions to the general rule against the admission of hearsay evidence. This statement does not fall into any of the hearsay exceptions. The second component is a description of Anne's intent. It would normally be admissible as a statement of intent or state of mind if used to help prove the declarant's future actions. MR 5-803(b)3). However, the testimony also would fall afoul of the Dead Man's Statute:

The statement was one that Ashe could not have testified to herself, as she was a party to the suit and prohibited by the dead-man's [sic] statute from testifying to it . . . . It should be obvious that if she could not testify to these matters herself, she could not render them admissible by the simple expedient of telling them to someone else. *Jones v. Selvaggi*, 216 Md. 1, 10, 133 A.2d 246 (1958).

3. The testimony of Mr. and Mrs. Witness is admissible. Mr. Elderly's statement that Plaintiff provided him with assistance and that he promised to leave her \$125,000 in his will are admissions by Mr. Elderly against his pecuniary interest. MR. 5-803(a). The Dead Man's Statute does not apply since the Witnesses are not parties to the claim.

4. The testimony of Rev. Knox would not be admissible unless and until Mrs. Plaintiff's credibility was attacked by the defendant. L. McLain *Maryland Evidence* § 608.3. Thus it is inadmissible in Plaintiff's case in chief.

## QUESTION 6

The First Amendment of the United States Constitution provides, in pertinent part, that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof (the Establishment Clause). Through the Due Process Clause of the Fourteenth Amendment, this restraint is binding on the states.

Does the City Revitalization Program satisfy this test under the facts presented? There are two aspects to the problem: first, the construction of the chapel and, second, the use of the chapel for religious purposes.

The Supreme Court applies a three part test to determine whether a law violates the Establishment Clause:

1. The law must serve a secular legislative purpose.
2. The law 's primary effect must be one that neither advances nor inhibits religion.
3. The law must not foster an excessive government entanglement with religion.

*Lemon v. Kurtzman*, 403 U.S. 602 (1971). See also, *Roemer v. Board of Public Works*, 426 U.S. 736, 748 (1976); *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988); and *Agostini v. Felton*, \_\_\_ U.S. \_\_\_ 117 S.Ct. 1997, 2010 and 2015-2106 (1997).

With regard to the first test, a law that seeks to revitalize inner city neighborhoods by using state funds to finance the acquisition and renovation of vacant buildings to serve the community, has a secular purpose. Therefore the first test is satisfied.

With regard to the second test, the Court has held that providing aid to an organization that is pervasively sectarian has the primary effect of advancing religion. However, when an organization has religious and secular activities that can be separated, aid for the secular activities does not have the primary effect of advancing religion. *Tilton v. Richardson*, 403 U.S. 672, 679-681 (1971), *Hunt v. McNair*, 413 U.S. 734, 742-743 (1973), and *Roemer*, 426 U.S. at 755. By applying this distinction, the Court has upheld state-sanctioned financial assistance for institutions of higher education which have a religious affiliation upon finding that the religious and secular functions can be separated, and that the assistance is focused on secular purposes. *Tilton*, 403 U.S. at 679-682 and *Hunt*, 413 U.S. at 742-745. An important factor in concluding that the assistance was focused on secular activities was a prohibition on the use of the facilities for religious services or other religious activities. *Tilton*, 403 U.S. at 680-681 and *Hunt*, 413 U.S. at 744. Providing public money to an organization to construct or renovate a building in which religious services are conducted is an advancement of religion.

The Church is an organization that is sectarian by its very nature, but its plan to serve low income and elderly families by offering child and adult day care, job training classes, and recreation for youths can be separated from its religious functions. However, using a portion of the CRP grant to construct a chapel for religious devotions, even though attendance is voluntary, would advance religion and violate the Establishment Clause under *Tilton, supra, and Hunt, supra*.

While the signs are intended to convey the message that attendance at the chapel services are voluntary, they nonetheless contain a clear religious import because it announces the schedule of services. Again, it advances religion.

The third test may be met because the Court has indicated that a one time grant presents less potential for entanglement than a continuing financial relationship. *Tilton*, 403 U.S. at 688.

In conclusion, the CRP grant to the Church probably would violate the Establishment Clause. The second test would not be met because using State funds to construct a chapel for religious services would appear to advance religion. Were the chapel not constructed, there probably would not be a violation of the Establishment Clause because the Church 's activities at the Center would be secular, and would not have the primary effect of advancing religion.

## QUESTION 7

a.) To prevail on negligence claims against the Hotel, Chris will need to prove all four elements of the tort. First, Chris must show that the Hotel owed a duty to Chris to provide safe lodgings. Next, Chris must show that the Hotel breached its duty to Chris. The third element that Chris must prove is that the breach of duty by the Hotel proximately caused injury to Chris. Finally, Chris will have to prove damages. In this case, Chris may be able to show that the Hotel owed him a duty to provide safe lodging, including safe access to and from the Hotel. Chris can also prove injury and damages. What Chris cannot show is that the Hotel breached a duty owed to Chris or that any action of or failure to act by the Hotel proximately caused Chris' injuries.

The Hotel does owe its guests the duty to provide safe lodgings, and to maintain the Hotel in a safe condition. The Hotel did provide a safe entrance for its guests, which was reasonable under the circumstances of a sudden storm with quick accumulation. The danger of slipping and falling on the ice was clearly evident, and the facts show that Chris had actual knowledge of the danger. Chris cannot prevail unless his conduct was reasonable in the face of a known danger. In this case, Chris knew about the storm, because it forced him to seek emergency shelter. Chris also knew through both personal observation and the clerk's warning that the sidewalks and parking lots were icy and that the footing was dangerous. In fact, Chris had firsthand knowledge of the danger because he struggled across the ice to the hotel room once and slipped all the way there. Chris voluntarily put himself in peril by taking a second trip out onto the icy walkways after nearly falling once. Chris could have avoided danger or minimized exposure to it by taking a room near the front of the Hotel where the walkways were clear, or even by unloading the dog and the luggage in the clear area. However, Chris insisted on having an isolated room in an uncleared and untreated section of the parking lot and on hauling a dog and luggage into the room where it was dangerous to do so.

Because Chris was fully aware of the dangerous condition of the parking lot and voluntarily and knowingly assumed the risk of injury, the Hotel should raise the affirmative defense of assumption of the risk. The doctrine of assumption of the risk provides that a person who, with full knowledge and understanding of an existing danger, voluntarily chooses to expose himself to that danger, cannot recover for injury resulting from exposure to the danger. It is clear that a person of average intelligence in Chris' position would have understood the danger of the ice and snow, especially after having difficulty walking on it once and escaping injury. The Court should determine that Chris assumed the risk of injury as a matter of law.

In addition to the defense of assumption of the risk, the Hotel might assert the affirmative defense of contributory negligence as an alternative. While contributory negligence is similar to assumption of the risk in several respects, it is also different in that it requires an underlying finding of negligence by the Defendant. Contributory negligence defeats recovery by a Plaintiff because it is a proximate cause of an accident that happens and causes injury. While it could be argued that Chris was contributorily negligent as a matter of law in deciding to park and walk on uncleared areas that were covered in snow and ice, the trier of fact would first have to determine that the Hotel was negligent. If the Hotel is found to be negligent, the fact finder can then make a

finding that Chris was contributorily negligent based on Chris' testimony regarding his actions and motivations at the time of the accident before determining that Chris was contributorily negligent.

In Schroyer v. McNeal, 323 Md. 275, 592 A.2d 1119 (1991), the Court of Appeals considered the affirmative defenses of contributory negligence and assumption of the risk, and explained the distinctions and similarities between the two defenses. The Court in relying on the distinction in Warner v. Markoe, 171 Md 351, 359-60, 189 A. 260, 264 (1937), explained:

The distinction between contributory negligence and voluntary assumption of the risk is often difficult to draw in concrete cases, and under the law of this state usually without importance, but it may be well to keep it in mind. Contributory negligence, of course, means negligence, which contributes to cause a particular accident, which occurs, while assumption of the risk of accident means a voluntary incurring of an accident which may not occur, and which the person assuming the risk may be careful to avoid after starting. Contributory negligence defeats recovery because it is a proximate cause of the accident, which happens, but assumption of the risk defeats recovery because it is a previous abandonment to complain if an accident occurs.

b.) The Hotel should prevail on its affirmative defense of assumption of the risk. Clearly, Chris knew of the clear and obvious danger of slipping and falling on the ice, and chose to take the risk anyway. The Hotel did not force or coerce Chris to take a room in the unclear area, but, instead it provided a safe alternative and warned Chris of the obvious danger. Under Maryland law, Chris should not recover on the claims raised in the Complaint.

## QUESTION 8

Prior to undertaking the representation, Jones and Brown must consider and satisfy several rules of the Maryland Rules of Professional Conduct.

Jones must consider the conflicts of interest arising from the recent meeting with Smith and Clark. Jones must identify the client Jones seeks to represent, and Jones must describe the scope of representation (Rule 1.2). In the past, Jones has represented Smith, individually, and the corporation. Jones now seeks to represent Clark, the corporation, Smith, and possibly his existing client who Jones believes may become an investor. Also, Jones should refrain from disclosing any confidential information regarding Ms. Investor (Rule 1.6). In addition, Jones must undertake to disclose the conflict fully and obtain consent from his former and prospective clients after consultation with them conducted in accordance with Rule 1.7(c). Jones must reasonably believe that Jones' representation of the client will not be adversely affected by his representation of another client or that the client will not be materially limited by Jones' responsibilities to another client or by the lawyer's own interests (Rule 1.7).

Jones must also consider whether Jones possesses the legal knowledge and skill reasonably necessary to undertake the representation. Even though Jones has never handled an IPO, it is possible that through diligent and thorough preparation, Jones may satisfy the requirement of Rule 1.1.

The Rules require consideration as to whether either the quoted fee or the proposed fee arrangement is ethically permissible. A lawyer may accept an ownership interest in a client as long as the lawyer complies with Rule 1.8(a) regarding business transactions with clients, and with Rule 1.5 regarding the reasonableness of fees. It is clear that Rule 1.8(a) requires that the transaction with the client must be fair and reasonable and must be fully disclosed to a client in writing in a manner so that the client can reasonably understand the disclosure. In addition, the client must be given a reasonable opportunity to seek the advice of independent counsel, and the client must give written consent to the transaction.

In providing ongoing legal services to either the corporation, Smith, or Clark while Jones owns stock in the corporation, Jones must carefully avoid conflicts between the client's interests and the lawyer's personal economic interests as a stockholder and otherwise comply with the requirements of Rule 1.7. The lawyer must also exercise independent professional judgment in advising the client concerning legal matters as required by Rule 2.1.

## QUESTION 9

(a) Crimes Bob has committed:

(1) Forgery of Charles' name on the check issued by Trust Bank by endorsing the check with Charles' name. Article 27, Section 44(a)

(2) Uttering of forged instrument by knowingly presenting the forged check to County Bank for deposit to his account. Article 27, Section 44(b)

(3) Theft by deception from Trust Bank by misrepresenting to Trust Bank that the proceeds of the check were going to be given to Charles. Article 27, Section 341 and 342 (false pretense)

(b) Trust Bank's entitlement to recover its loss from County Bank:

Trust Bank can sue County Bank alleging it breached its warranty under Section 4-207 of the UCC when it negotiated a check containing a forged endorsement.

Generally, the burden of loss from a forged endorsement (Charles' name) is placed on the bank who dealt with and took the instrument from the forger (Bob). County Bank was a collecting bank. Trust Bank was the payor bank. The collecting bank warrants to the payor bank it has good title for the instrument under Section 4-207(1)(a). Also, since both Bob and Charles were customers of County Bank, County Bank was required to check the validity of the endorsements prior to accepting the check. It does not appear County Bank has any valid defenses and Trust Bank should be entitled to recover its loss assuming Trust Bank acts promptly under Section 4-207(d) and (e). See generally, Bank of Glen Burnie v. Elkridge Bank, 120 Md. App. 402, 707 A.2d 438 (1998), 4-207 UCC.

### EXTRACT SECTIONS FOR QUESTIONS 9

**Annotated Code of Maryland, Commercial Law Article**

**Title 3. Negotiable Instruments: §3-403 and 3-404**

**Title 4. Bank Deposits and Collections: §4-104, 4-105, 4-207, 4-208, 4-401, 4-403, and 4-406**

## QUESTION 10

Andy has committed a solicitation. A solicitation occurs when one counsels, incites or solicits another to commit a felony or breach of the peace misdemeanor, even though the solicitation is of no effect. When Andy agreed to pay Doug to murder Zeke, he clearly counseled, incited and solicited Doug to commit a felony.

Andy has not committed an attempted murder. An attempt requires (1) an intent to commit the crime, (2) a direct and substantial act done toward its commission which falls short of the actual commission of the crime, and (3) at least the apparent ability to commit the crime. The act need not itself be unlawful, but must be something more than mere preparation. The purchase of the gun is not a sufficient act, although delivery of the gun to Doug, particularly at or near the intended place of the crime, might be sufficient.

Andy may assert the defense of entrapment to the charge of solicitation. Entrapment occurs when a person has no intent to violate the law, but is induced or persuaded by law enforcement officers to commit a crime. If there is any predisposition on the part of the defendant to commit the crime, there is no entrapment, even where law enforcement officers provide a favorable opportunity to commit the crime. Andy certainly had a predisposition when he approached Bert. If Andy had abandoned his predisposition, and Doug's statements induced a new purpose of solicitation, then the defense may be successful. However, Andy's reluctance appears to be minimal and the defense will be unsuccessful.

Andy and Bert have formed a conspiracy to commit murder. A conspiracy is an agreement between two or more persons to commit a crime. No overt act is required. When Andy asked for Bert's assistance to have Zeke killed and Bert agreed to help Andy, there was an agreement to commit the murder of Zeke.

Andy has not committed arson. A conspirator is liable for any offense committed by another conspirator with the purpose of furthering the common design and which is a natural and foreseeable consequence of the common design. However, the object of the conspiracy between Andy and Bert was murder, and Andy could not foresee that Bert would commit arson.

Andy may assert a defense of insufficiency of the evidence of a conspiracy. A defendant may not be convicted solely on the uncorroborated testimony of an accomplice. Bert may be an accomplice. If so, there must be some additional evidence tending to show that Andy engaged in a conspiracy. Only slight corroboration is necessary. The testimony of Carl against Andy, if Carl is called as a witness and if Carl's testimony is not hearsay inadmissible against Andy, might be sufficient. The ultimate solicitation might corroborate the criminal intent of Andy, but does not tend to prove the existence of a conspiracy. The evidence is legally insufficient to convict Andy of conspiracy.

## QUESTION 11

A. The issue raised in the first deed is the tenancy created. The parties were not married at the time the deed was executed. Had they been validly married, a tenancy by the entirety would have been created. However, a tenancy by the entirety can only be created when the parties stand in relationship of husband and wife at the time of the grant to them. Absent such a relationship the attempt to create a tenancy by the entirety fails and generally, this would create a presumption favoring tenancy in common. However, this presumption can be overcome by showing a contrary intent. Proof of that intent would overcome the presumption and create a joint tenancy with right of survivorship.

The subsequent marriage does not convert a joint tenancy (or a tenancy in common) into a tenancy by the entirety. Thus, neither the subsequent marriage nor waiting until after they were married to record the deed would convert the tenancy to “tenancy by the entireties.”

The second deed raises the question of conflicting descriptions. The parcel is described generally as consisting of 6 acres and then more specifically as Lot 10, being one acre. Generally speaking, when a deed contains both a general description of the property and a particular description of such property, weight should be given to the specific description unless a different intention is shown by the deed when considered as a whole. The two descriptions in this case are contradictory. The general description of “6 acres” is inconsistent with the specific description of Lot 10. In this case, particular description will control to convey Lot 10 being one acre.

B. Angie does have a problem with J. Creditor. Angie and Bert never held title to the first parcel as tenants by the entireties. Thus, a judgment creditor could have levied on Bert’s interest in the subject property (either as joint tenant or tenant in common) prior to the divorce taking place. J. Creditor could also levy on the second parcel. While the property was held as tenants by the entireties during the marriage it was converted to a tenancy in common when the divorce was granted. Thus, the judgment of J. Creditor would have become a lien on Bert’s interest in the property and would have continued as a lien even though the property was transferred by Bert to Angie.

## QUESTION 12

The facts raise third party beneficiary and Statute of Frauds issues. When and under what circumstances can a person not a party to a contract enforce its provisions for his/her benefit.

At common law, privity between the plaintiff and defendant is requisite in maintaining an action on a contract, even though the contract was for the benefit of a third party. Now, in Maryland, a person for whose benefit a contract is made can maintain an action upon it if he/she can show that the contract was intended for his/her benefit as a third party beneficiary.

It is not enough that the contract may operate to his/her benefit. It must clearly appear that the parties intended to recognize him/her as a primary party in interest and as privy to the promise. An incidental beneficiary acquires by virtue of the promise no right against the promisor or the promisee.

Maryland has recognized two kinds of third party beneficiaries: (a) A donee beneficiary, and (b) creditor beneficiary. In determining whether one is a third party beneficiary of either type, the intention of the parties revealed by the contract terms, in light of the surrounding circumstances, is determinative.

A person is a donee beneficiary if it appears from the terms of the promise that the purpose of the promisee in obtaining all or part of the performance is to make a gift to the beneficiary or to confer upon him/her a right against the promisor of some performance neither due nor supposed or asserted to be due from the promisor to the beneficiary.

The language of the instrument is the primary source for the determination of the intention of the parties.

A person is a creditor beneficiary if the performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary.

In this case, Susan is a creditor beneficiary and can sue Beacon because its contract with Sampo obligates it to assume all liabilities of Sampo, with respect to unfilled orders.

Susan may also sue Sampo because she has an enforceable claim against Sampo as the initial obligor or promisor. Sampo would then be subrogated to Susan's rights under the contract against Beacon.

The Statute of Frauds does not bar Susan's contractual rights as a third party beneficiary under these facts. Her agreement with Sampo contemplated a series of individual service contracts with Susan for which it would pay a commission for her performance. It was indefinite and clearly could be performed within a year. The commission Susan claims is for fully performed contracts and are not barred by the statute.