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**BOARD'S ANALYSIS**

## QUESTION 1

Biff should consider the defenses of involuntary intoxication, voluntary intoxication, and not criminally responsible.

Intoxication is a complete defense when it was involuntary and so excessive as to temporarily deprive the defendant of his reason. Voluntary intoxication may be a defense if a specific intent is an essential element of an offense, such as common law burglary and common law larceny, and the defendant was so intoxicated as to be mentally incapable of entertaining the requisite intent. Voluntary intoxication is not a defense to a general intent crime, such as "break and enter a dwelling house." Clark & Marshall, *A Treatise on the Law of Crimes* §§ 6.09-6.11 (7th ed. 1967).

The defense of intoxication may be available even if the intoxication resulted from use of a substance other than alcohol.

In a case where a defendant becomes intoxicated as the result of willful ingestion of a substance, an issue may be whether the intoxication is voluntary or involuntary. In a statute "voluntary" requires that an act be intentional and the product of a free will. *Wills v. Jones*, 340 Md. 480, 677 A.2d 331 (1995). A person is considered to intend the normal consequences of an act by that person. This raises the question of whether a reasonable person would know that anabolic steroids may produce a state of intoxication.

Biff ingested a substance and was "barely-coherent" when the police arrived. He asserts that his mind "went blank." His motive for the theft is neither typical nor apparent. He made no attempt to conceal the stolen articles. The facts should be sufficient to generate an issue as to whether Biff was temporarily deprived of his reason. It may be inferred from these facts, if combined with expert testimony as to the nature and cause (i.e., steroids), that he was either intoxicated or lacked criminal responsibility, or both. Whether or not Biff was aware of the likely effects of his use of steroids, and either freely and voluntarily assumed the risk, or whether he inadvertently and involuntarily became intoxicated, may determine whether his intoxication, if any, was voluntary or involuntary, and whether he can raise that defense to all charges or just to the charges of the specific intent crimes of burglary and larceny.

A defendant is not criminally responsible for criminal conduct if, at the time of that conduct, the defendant, because of a mental disorder, lacks substantial capacity to either appreciate the criminality of that conduct or conform that conduct to the requirements of law. *Md. Ann. Code*, Criminal Procedure Article, § 3-109. A "mental disorder" is a behavioral or emotional illness that results from a psychiatric or neurological disorder. *Md. Ann. Code*, Health-General Article, § 10-101(f).

It is generally recognized that amnesia, in and of itself, is not a defense to a criminal charge. An "amnesic episode" is not a mental disorder if it is not a mental, behavioral or emotional illness. Automatism (or unconsciousness) is the state of a person who, though capable of action, is not conscious of what he is doing. A person who acts automatically does so without intent, exercise of free will, or knowledge of the act. Automatism is distinguished from insanity. *Evans v. State*, 322 Md. 24, 585 A.2d 204 (1991).

Biff's mental condition and aberrant behavior, even if caused by the use of steroids, must be the product of a "mental disorder" in order for Biff to assert a criminal responsibility defense. It is sufficient if the "mental disorder" arose from the intoxicant, although intoxication of itself is not a mental disorder.

Diminished capacity is not a defense to criminal culpability. *Stebbing v. State*, 299 Md. 331, 473 A.2d 903 (1984), *cert. den.,* 469 U.S. 900.

In order to rely on a criminal responsibility defense, a defendant must file a written plea that the defendant was not criminally responsible by reason of insanity. A defendant who is competent is entitled to decide whether to raise the defense of criminal responsibility, and the defendant's decision is generally binding on the defendant's attorney and the trial judge. A defendant must establish the defense by a preponderance of the evidence through competent medical testimony. *Md. Ann. Code*, Criminal Procedure Article, § 3-110; *Treece v. State*, 313 Md. 665, 547 A.2d 1054 (1988).

## QUESTION 2

There are two issues pertaining to the contract and its non-competition clause: 1. is it enforceable under Maryland's Statute of Frauds and 2., assuming it is enforceable, are there public policy reasons militating against enforcement?

*1. The Statute of Frauds*

The Maryland Statute of Frauds, codified in pertinent part in Courts and Judicial Proceedings Article § 5-901, provides:

> No action may be brought:
>
> (3) Upon any agreement that is not to be performed within the space of one year from the making thereof[.]
>
> Unless the . . . agreement . . . or some memorandum . . . is in writing and signed by the party to be charged . . . .

A multi-year obligation, such as the contract at issue, clearly falls within the purview of §§ 3. *General Fed. Const., Inc. v. James A. Federline, Inc*., 283 Md. 691, 695, 393 A.2d 188 (1978). Since there is no current contract signed by Cal, the court must "look to find whether the contract is enforceable under equitable theories of estoppel or part performance" *Friedman & Fuller v. Funkhouser*, 107 Md. App 91, 100, 666 A.2d 1298 (1995) (*disapproved, in part, on other grounds, Pavel v. A. S. Johnson*, 342 Md. 143, 166, 674 A.2d 521 (1996). Several arguments can be made on behalf of MPES.

The doctrine of part performance is premised upon the notion that it would be unfair to allow a party to escape his performance of an oral agreement after he has permitted the plaintiff to perform in reliance on both the agreement and the defendant's inducements.

Cal submitted bonus statements to MPES, which paid them. The "acceptance of bonus monies . . . cannot be construed as anything other than compensation pursuant to the employment agreement [that Cal] now seeks to avoid. [Cal] was not otherwise entitled to such payments, and [MPES] would not have paid same in the absence of what it perceived to be a legally binding contract. There can be no other interpretation of the facts." *Friedman & Fuller v. Funkhouser*, *supra*, at 108 - 109.

The terms of the oral contract can also be enforced on the basis of estoppel. A party to an oral contract will be estopped from denying its enforceability when:

1. there has been a clear and definite promise;

2. where the promisor has a reasonable expectation that the offer will induce action or forbearance on the part of the promisee;

3. which does induce actual and reasonable action or forbearance by the promisee; and

4. causes a detriment which can only be avoided by the enforcement of the promise.

*Pavel v. A. S. Johnson*, 342 Md. 143, 166, 674 A.2d 521 (1996). Here, the president of MPES stated that Cal would continue to work under the standard employment contract and Cal promised to do so. Cal was compensated accordingly and MPES has relied to its detriment.

Thus MPES has two sound arguments that Cal is bound by the terms of the contract. Whether a court will enforce the contract is another issue however.

*2. The Enforceability of the Non-Competition Clause.*

In Maryland, as in most jurisdictions, the general rule is that:

> restrictive covenants in a contract of employment, by which an employee as a part of his agreement undertakes not to engage in a competing business or vocation with that of his employer on leaving the employment, will be sustained 'if the restraint is confined within limits which are no wider as to area and duration than are reasonably necessary for the protection of the business of the employer and do not impose undue hardship on the employee or disregard the interests of the public.'

*Ruhl v. F. A. Bartlett Tree Expert Co.*, 245 Md. 118, 123 - 124, 225 A.2d 288 (1967) ( quoting *MacIntosh v. Brunswick Corp*., 241 Md. at 31, 215 A.2d at 225 (1965)).

In this case, the non-competition provision is for three years and has a geographical extent of 250 miles. It extends to "any entity", not simply MPES's competitors or existing clients. The non-competition clause, if enforced literally, would bar Cal from providing civil engineering services to federal, state and local governments as well. In light of these factors, the non-competition clause can be viewed as imposing an undue burden upon Cal and disregarding the interests of the public by depriving it of Cal's services. Under these circumstances, in the

exercise of its equitable powers, a court might either decline to enforce the clause in its entirety or to modify the clause, a process sometimes referred to as "blue penciling." *Holloway v. Faw, Casson & Co.*, 319 Md. 324, 352,572 A.2d 510 (1990).

## QUESTION 3

### A. Able's Challenge

Able is directly affected by the Board's actions and therefore has standing to challenge her terminations.

Able may not be successful in challenging her termination as pastor because the Church's decision may not be subject to government review per the First Amendment ("In interpreting the First Amendment freedom of religion provision, the United States Supreme Court noted that religious organizations required 'an independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116, 73 S. Ct. 143 (1952) . . . . The First Amendment provides religious institutions with significant freedoms with regard to matters concerning 'theological controversy , church discipline, ecclesiastical government, or the conformity of the members of the church to standard of morals required of them'" [Citations omitted] *Bourne v. Center on Children, Inc.*, 154 Md. App. 42, 52-53 (2003)). Thus, courts generally do not get involved in employment controversies concerning employees "who are involved in the religious activities of the organization", *Bourne*, at 54. The Board will successfully argue that a Pastor is involved in the religious activities of the church and the matter is not subject to further court review.

If the position is secular in nature (non-religious), however, the Court may examine the duties performed and allow the employee to pursue his/her claims against the religious group. See, *Archdiocese of Washington v. Moerson* , 399 Md. 637 (2007) Perhaps Able could successfully argue that running the daycare is a secular position, especially since it is open to children whose parents are not members of the Church, and the Church had no legal bases to terminate her.

### B. Seth's Challenge:

In *Flast v. Cohen*, 392 U.S. 83 (1968) (recently limited in application by *Hein v. Freedom from Religion Found, Inc.*, 127 S. Ct. 2553 (2007)) the Supreme Court opined that a taxpayer may have standing to challenge congressional spending on grounds that it violates the Establishment Clause. Maryland also grants taxpayers standing to challenge legislation. Accordingly, Seth will have standing to challenge the County's law.

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The First Amendment made applicable to the States via the Fourteenth Amendment, prohibits the enactment of a law "respecting an establishment of religion, or prohibiting the free exercise thereof." As noted by the Supreme Court in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 (1982), "[t]he purposes of the First Amendment guarantee relating to religion were twofold: to foreclose state interference with the practice of religious acts, and to foreclose the establishment of a state religion. . .."

In *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.,Ct. 2105, 2111 (1971) the Supreme Court articulated a 3-prong test to determine whether the Establishment Clause has been infringed:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion …; finally, the statute must not foster an 'excessive government entanglement with religion.'

Seth may successfully argue that the law is violative of the Establishment Clause because it promotes enrollment in the church-sponsored day care and has no secular legislative purpose.

Finally, Seth may challenge the law as a violation of the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause requires a showing that the law advances a legitimate purpose and does not unreasonably discriminate. Day care ownership is not a fundamental right; however, even under the more lenient rational basis analysis a court should invalidate the County's law.

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**QUESTION 4**

(A) Commercial Law Article, section 1-201 (37) (b) states that an agreement to pay the license fees and taxes, keep the equipment in good repair, the assumption of the entire risk of loss of the equipment, and the option to become the owner of the hardware and software, all of which were part of Jasper 's transaction, do not create a security interest. However, on the given facts, the transaction did create a security interest in the hardware and software in favor of Poindexter as the consideration Jasper was to pay Poindexter for the right to possession and use of the hardware and software was an obligation for the term of the lease not subject to termination by Jasper and the original lease term was equal to the remaining economic life of the hardware and software. Commercial Law Article, section 1-201 (37) (a). On the given facts, Jasper agreed to pay $90,000 over the agreement period for the right to possession and use of the hardware and software. The given facts do not state or suggest any termination right of Jasper. The original term of the agreement was 3 years and the remaining economic life of the hardware and software was projected by the parties to be 3 years.

(B) Under the given facts, the notice was sent after default and more then 10 days before the earliest time of the private sale. Commercial Law Article, section 9-612 (b). However, it stated that if the hardware was not redeemed within 15 days of delivery of the notice that the hardware would be sold at a private sale.

This was a misstatement of the time as the private sale actually occurred several months later. Commercial Law Article, section 9-623 (c) (2) provides that a redemption may occur at any time before Poindexter disposed of the hardware. Jasper actually had until the private sale occurred several months later but was not notified of that time. The notice given was not reasonable notification because it was less favorable to Jasper than it was in law. _First National Bank of Maryland v. DiDememico_, 302 Md. 290, 295, 487 A.2d 646 (1985).

(C) Poindexter will not prevail. Poindexters notice limited the redemption to a 15-day period and the private sale did not occur until several months after the notice. Reasonable notice is a condition to a deficiency judgment. This defective notice prevents the deficiency judgment. _First National Bank of Maryland v. DiDememico_, 302 Md. 290, 297, 487 A.2d 646 (1985); _Maryland National Bank v. Wathen_, 288 Md. 119, 414 A.2d 1261 (1980); _see_ Commercial Law Article, section 9-623 (c) (2).

## QUESTION 5

An action for tortious interference with contractual relations is applicable to professional service contracts between attorneys and clients. An attorney has a legitimate interest in a contingent fee contract.

If acting in good faith, a client may settle his claim directly with the defendant or the insurance carrier without his attorney's knowledge or consent.

An insurer has a right and duty to enter into good faith negotiations where reasonable and feasible to settle a claim. This right does not include interference with a lawyer's legitimate interest in a contingent fee contract by improperly engaging in conduct calculated to induce or persuade the client to discharge the lawyer and settle his claim directly with the insurer.

To be actionable, the conduct of the insurer (ABC) need not be egregious but only intentional for the improper purpose of inducing the client to settle directly with the insurer.

Any purposeful conduct, however subtle, by which an insurer improperly and intentionally induces or persuades a claimant to repudiate his contingent fee contract and settle directly with the insurer, is actionable.

There is no technical requirement as to the kind of conduct that may result in interference with the third party's performance of the contract. The interference is often by inducement which may be any conduct conveying the other's desire to influence the client not to deal through his attorney. It may be a statement unaccompanied by any specific request.

While one might suspect that Andy's call to Paul inquiring about his health was a subtle effort to induce Paul to consider dealing directly with ABC without Smith's involvement, this conduct falls short of that required to establish a prima facie case of tortious interference with the Contract.

## QUESTION 6

A. The Citation

The Court should sustain the objection by David's attorney. Evidence of issuance of a traffic citation has the effect of inferentially establishing the police officer's opinion of guilt and its prejudicial effect outweighs its probative value in a civil action arising out of an accident that resulted in the citation being issued.

B. The Fine

1. The submission of payments in satisfaction of a traffic fine is not the evidentiary equivalent of a guilty plea in open court. Admission of evidence that David paid a fine naturally includes evidence that he was issued a traffic citation.

2. Payment of a traffic fine is neither a guilty plea nor an express acknowledgment of guilt; it is at most a consent to conviction, closely analogous to a plea of nolo contendere.

It is common experience that people plead guilty to traffic charges for reason of expediency even though they may believe themselves innocent. The cost of defense compared to the inconvenience as well as indirect economic losses of court appearances are practical motivations for paying traffic fines.

The court should deny David's motion for judgment. Evidence that Paula violated a rule of the road by walking on the wrong side of the highway, even if it is a proximate cause of injury, does not constitute negligence per se but is merely prima facie evidence of negligence and is rebuttable.

Where reasonable minds can differ on both the question of whether, under all the circumstances the injured party was exercising ordinary care in walking along the wrong side of the highway with her back to oncoming traffic and without looking behind her, and whether her negligence, if any, was a proximate cause of her injury, the question should be submitted to the jury.

## QUESTION 7

In reviewing the facts of the complaint, I would recommend proceeding against John and Seymour, as follows:

1. Seymour, in his capacity as the supervising lawyer, has responsibility for John's violation of the Maryland Lawyer's Rules of Professional Conduct ("Rules") if it can be proved that he knew of the violation and ratified the conduct. Rules 5.2 and 5.5. Seymour knew that John was directed to handle the preparation of Sam and Lisa's property settlement agreement. It was Seymour's failure to supervise John that caused John and Seymour to violate Rule 1.7 regarding conflicts of interest and Rule 5.5 regarding the unauthorized practice of law. Because John is not currently a member of the Maryland bar, he can temporarily practice law in Maryland only if Seymour actively participates in the matter.

2. In jointly representing Sam and Lisa, Seymour and John have a direct conflict of interest under Rule 1.7(a). Maryland law provides that this conflict of interest is not waiveable by informed consent. John and Seymour should not have undertaken to represent both husband and wife in a domestic relations matter, and they should have withdrawn from the representation when requested to do so by David, Lisa's lawyer. See, *Hale v. Hale*, 74 Md. App. 555, 539 A.2d 247 (1988).

3. The advance payment of fees in the amount of $5,000 should have been deposited into an escrow account in accordance with Rule 1.15 and the Rules on the Attorney Trust Accounts contained in Title 16, Chapter 600 of the Maryland Rules of Procedure. The fee should not be withdrawn or otherwise used or pledged by John, Seymour and the firm until it is earned. Rules 1.5, 1.15, and *Attorney Grievance Commission v. Lawson,* 401 Md. 536, 933 A.2d 842 (2007). Upon termination of representation, the unearned fees must be returned to the client. Rule 1.16(d)

4. John and Seymour should be disciplined for violation of Rule 1.5(d)(1) because a contingency fee was charged on the value of assets that John obtained for Sam in the negotiation of the property settlement agreement.

5. Depending upon John's experience, skills and the difficulty of the negotiations and other related services, the hourly rate of $500 may be excessive and unreasonable. Rule 1.5 (a)

6. John and Seymour had a duty to take reasonable measures to avoid the disclosure of confidential information received from Sam and imbedded in the electronic form of the initial draft. David is not prohibited by the Rules from using the information revealed to

him in the initial draft of the property settlement agreement. See Rules 1.6 and 4.4, as well as Ethics Docket No. 2007- 09, Committee on Ethics, Maryland State Bar Association, regarding the use of metadata.

**QUESTION 8**

Daughter, Mother and Dad have at least arguably overcompensated themselves for their services to the Corporation and failed to continue to make dividends as the Corporation agreed when Son resigned from the Board. Son seeks redress for both of these perceived injuries. The facts indicate that Son, either on his own behalf or on behalf of the Corporation, may have a remedy to address each issue.

In Maryland, "[t]he business and affairs of a corporation shall be managed under the direction of a board of directors." Maryland Annotated Code, Corporations and Associations Article ("Corporations Article") § 2-401(a). Maryland has codified the standard of care for directors:

> A director shall perform his duties as a director . . .
> (1) In good faith;
> (2) In a manner he reasonably believes to be in the best interests of the corporation; and
> (3) With the care that an ordinarily prudent person in a like position would use under similar circumstances.
> * * * * (e) An act of a director of a corporation is presumed to satisfy the standards of subsection (a) of this section.

Corporations Article Section 2-405.1.

In addition, Maryland common law:

> recognizes that minority shareholders are entitled to protection against fraudulent or illegal action of the majority. Especially in closely held corporations, the majority shareholder owes a fiduciary duty to the minority shareholder (or shareholders) 'not to exercise [their] control to the disadvantage of minority stockholders.' *Lerner v. Lerner Corp.*, 132 Md. App. 32, 53, 750 A.2d 709 (2000). A majority shareholder owes a fiduciary duty to minority shareholders not to use his voting power for his own benefit or for a purpose adverse to the interests of the corporation and its stockholders. *Cooperative Milk Serv. v. Hepner*, 198 Md. 104, 114, 81 A.2d 219 (1951).

*Mona v. Mona Elec. Group, Inc.*, 176 Md. App. 672, 697 (2007).

*A. Son's Possible Remedies*

*(1) Son's Direct Action For Dividends*

Son has a direct claim against the Corporation and its directors for its failure to declare a dividend for three consecutive years.

> A shareholder may bring a direct action against the corporation, its officers, directors, and other shareholders to enforce a right that is personal to him. To maintain a direct action, the shareholder must allege that he has suffered "an injury that is separate and distinct from any injury suffered either directly by the corporation or derivatively by the stockholder because of the injury to the corporation." *Hanks*, *supra*, at 271 (footnote omitted). Any damages recovered by the shareholder in the direct action go to the shareholder himself.

*Mona v. Mona Elec. Group, Inc.*, 176 Md. App., *supra.*

When the Son resigned from the Board in 2005, the Corporation and the remaining directors agreed to continue its current dividend practices. The failure to declare dividends does not injure the Corporation; the harm, if any, is suffered by the individual shareholders. Thus, Son has a claim for his *pro rata* share of dividends. However, since the agreement of the Corporation was to continue dividends "as permitted by business conditions", the defendants may have the substantial benefits conferred by Maryland's business judgment rule.

*(2) Son's Rights To File A Derivative Action.*

The facts support the contention that the compensation paid to the officers was excessive and that Dad was paid for consulting services that he did not perform. To the extent that excessive compensation was paid, the officers (as recipients) and the directors (as authorizing payments) would be liable to the Corporation. In order to assert this right on behalf of the Corporation, Son must file a derivative action.

> A derivative action is "an extraordinary equitable device to enable shareholders to enforce a corporate right that the corporation failed to assert on its own behalf. Any recovery in a shareholder's derivative suit is in favor of the corporation, not the individual shareholder (or shareholders) who brought the derivative action. Before bringing a derivative suit in Maryland . . ., the shareholder must either make a demand on the board of directors that the corporation bring the suit, or show that demand is excused as futile.

*Mona v. Mona Elec. Group, Inc.*, , *supra* at 698 (citations omitted).

*(3) Dissolution.*

In addition to his other remedies, as a shareholder, Son can petition the Circuit Court to dissolve the Corporation if he can prove that "those in control of the corporation" have acted in an illegal, fraudulent or oppressive manner." Corporations Article 3-413(b)(2). If Son can demonstrate that the actions of the directors and officers was intended to benefit themselves in furtherance of their personal interests instead of the corporation, an action for dissolution is appropriate. *Birnbaum v. SL&B Optical Centers, Inc*., 905 F. Supp. 267 (D. Md., 1995).

*B. - Defenses*

The primary defense available to the directors is the business judgment rule.

As indicated above, there is a statutory presumption that corporate directors perform their duties in good faith, in a manner reasonably believed to be in the best interests of the corporation; and with the care that an ordinarily prudent person would use under similar circumstances. Corporations Article 2-405.1. Maryland's version of the business judgment rule is focused upon "the manner . . .by which a director makes decisions rather than the results of the decision." D. Hanks, *supra* at 167. In order to be successful, Son must present evidence to overcome the presumption that the directors acted reasonably and in the best interests of the corporation. *Bender v. Schwartz*, 172 Md. App. 648, 667, 917 A.2d 142 (2007).

The facts indicate that Mother, Daughter and Dad voted to increase substantially the compensation to the officers and to pay Dad $500,000 per year for non-existent consulting services. At the same time, they declined to declare a dividend because of "adverse business conditions." There is no evidence that the compensation arrangements were reviewed by any independent party. Thus, Son has colorable arguments that his sister and his parents breached their duty of care with regard to the setting of compensation. The same analysis obtains for a claim for dividends.

The compensation arrangements for Sister, Mother and Dad were considered and approved as a package for all three directors at the same time and thus constituted an "interested director transaction as each director directly benefitted from the board's action. Corporations Article Section 4-119 sets out "safe harbor" procedures for boards to follow in considering interested director transactions. The directors did not avail themselves of any of these procedures. Its failure to do so was neither a grounds for liability, D. Hanks, *supra,* 220.29, nor a basis to set aside the presumption that the Board's action was in the best interest of the corporation, Section 4-119(d); *Sullivan v. Easco Corp*., 656 F. Supp. 531, 535 (D. Md.,1987).

However, approval by non-interested directors would have been very helpful to the Sister, Mother and Dad. *Cf. Mona v. Mona Elec. Group, Inc.*, , *supra* at 704 (approval of compensation by directors who were "friends, relatives, employees and professionals with whom [the dominant shareholder] had a relationship" is sufficient to establish good faith.)

## QUESTION 9

**a. May Al appeal the court order and/or reduce the amount required in the Child Support Guidelines by the amount he pays monthly to his pension plan and his business expenses, which were not brought to the attention of the lower court?**

Since the protective order may be considered in any divorce proceeding filed, *Katsenelenbogen v. Katsenelenbogen*, 135 Md. App. 317 (2000), it is essential that Al appeal the protective order erroneously granted under the facts. The District Court's protective order may be appealed to the Circuit Court of Maryland pursuant to Section 4-507 of Maryland Family Law Code Annotated on the following grounds:

A. There was insufficient grounds to award the 6 months protective order against Al. There was no evidence that he was violent and, in fact, Peg admitted he had never been violent. Mere firing of the nanny and leaving "because this could get ugly" is insufficient. Therefore, it is important to appeal the protective order and have it rescinded.

B. Although the District Court could award temporary custody of the minor children to Peg pursuant to Section 4-506 (d) of the Maryland Family Law Code Annotated, it did not have jurisdiction to grant permanent custody of the children in the protective order, and the order should also be rescinded on this ground. *See,* Coburn v. Coburn, 342 Md. 244 (1996)

C. While Section 12-201 (b) (2) (the Child Support Guidelines) of Maryland Family Law Code Annotated allows the deduction of the ordinary and necessary expenses required to produce income from the income calculations, voluntary contributions to a pension plan are not considered a necessary business expense. Cohen v.Cohen, 162 Md .App. 599 (2005). Although the court can only revisit these matters upon a "material change in circumstances", the business expenses can be factored into the calculations on appeal, as the case will be heard de novo in Circuit Court. (Maryland Family Law Code Annotated, (Sec. 4-507(b))

**b. Is there any way to challenge the divorce proceedings filed by Peg ?**

Section 7-103 (a) of Maryland Family Law Code Annotated lists the grounds for absolute divorce:

(a) Grounds for absolute divorce. -- The court may decree an absolute divorce on the following grounds:

(1) adultery;

(2) desertion, if:

(i) the desertion has continued for 12 months without interruption before the filing of the application for divorce;

(ii) the desertion is deliberate and final; and

(iii) there is no reasonable expectation of reconciliation;

(3) voluntary separation, if:

(i) the parties voluntarily have lived separate and apart without cohabitation for 12 months without interruption before the filing of the application for divorce; and

4 (ii) there is no reasonable expectation of reconciliation;

(4) conviction of a felony or misdemeanor in any state or in any court of the United States if before the filing of the application for divorce the defendant has

(i) been sentenced to serve at least 3 years or an indeterminate sentence in a penal institution; and

(ii) served 12 months of the sentence;

(5) 2-year separation, when the parties have lived separate and apart without cohabitation for 2 years without interruption before the filing of the application for divorce;

(6) insanity if:

(i) the insane spouse has been confined in a mental institution, hospital, or other similar institution for at least 3 years before the filing of the application for divorce;

(ii) the court determines from the testimony of at least 2 physicians who are competent in psychiatry that the insanity is incurable and there is no hope of recovery; and

(iii) 1 of the parties has been a resident of this State for at least 2 years before the filing of the application for divorce;

(7) cruelty of treatment toward the complaining party or a minor child of the complaining party, if there is no reasonable expectation of reconciliation; or

(8) excessively vicious conduct toward the complaining party or a minor child of the complaining party, if there is no reasonable expectation of reconciliation.

Based on the facts, the only grounds Peg could remotely allege are those listed in subparagraphs 7 and 8 – cruelty or excessively vicious conduct.

There are insufficient facts to support either of these provisions. Mere firing of the nanny does not constitute cruelty of treatment or excessively vicious conduct. At most, Peg can allege that Al treated her in a horrible manner. However, any action by Al that renders the marriage "intolerable" is not sufficient justification for a divorce on the grounds of cruelty. _Ricketts v. Ricketts,_ 393 Md. 479 (2006) Accordingly, Peg may not be able to show cruelty or excessive vicious conduct and will have to wait until the requisite time periods for voluntary (12 months) or involuntary (24 months) separation to occur before the two can be divorced.

## QUESTION 10

a. Equitable title passed, under the doctrine of equitable conversion, to Husband and Wife at contract signing. Therefore, the judgment lien does not affect title. *(See* Coe v. Hays 328 Md. 350, 614 A. 2d 576 (1992))

b. Deed of trust constitutes a lien which encumbers the title and it must be paid prior to or from proceeds of sale if sufficient to satisfy the lien; otherwise A, B and C must provide additional funds to satisfy the lien.

c. The lawsuit is for the payment of personalty to be used on Blackacre, and it does not affect title to Blackacre as it is not *a lis pendens* action. Also, it was not reduced to judgment prior to the execution of the contract.

d. The Survey:

1. The unpaved driveway may constitute an easement that may affect title and would affect the use of Blackacre by Husband and Wife. Additional factual inquiry would be required to determine the nature and extent of the easement and whether it is acceptable to Husband and Wife. The easement is not an express easement because it was neither recorded nor revealed in the title search.

2. The shed area does not affect the title to Blackacre. However, A, B and C (as well as Husband and Wife as facilitated by tacking) may have the right to file suit for adverse possession for the shed area provided the owners of Whiteacre did not give their consent for the shed to be constructed or installed across the property line and the other requirements are fulfilled.

3. Husband and Wife are on notice that there is a tenant in possession of a portion of Blackacre so Husband and Wife may be required to take title subject to the rights of the tenant in possession, which would include the harvest of the corn. Real Prop. Art. §§ 2-115 (Implied Warranty of Quiet Enjoyment) and 3-101(b) (Purchaser takes with notice of valid lease). Leases for a term of less than seven years do not require recording under Real Prop. Art. § 3-101.