JULY 2018 MICHIGAN BAR EXAMINATION
EXAMINERS' ANALYSES

EXAMINERS' ANALYSIS OF QUESTION NO. 1

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

1. The February 2, 2015 document that Mattie signed constituted a valid will. All valid wills require that the testator be at least 18 years old and have "sufficient mental capacity." MCL 700.2501(1). The facts state that at the time that document was created, Mattie was age 52 and had the mental capacity to execute it. Therefore, those requirements were met.

In addition, generally a will must be (a) in writing, (b) signed by the testator, and (c) signed by at least two persons who witnessed either the signing of the will by the testator or the testator's acknowledgment of the signature or of the will. MCL 700.2502(1)(a)(b)(c). The facts reflect that each of these requirements were met. The document was typewritten, signed by Mattie the testator, and signed by both Serena and Anna. Even though Serena and Anna are the only two witnesses to the document and are the only persons designated to take under the will, the will is not rendered invalid as a result. According to MCL 700.2505, "[t]he signing of a will by an interested witness does not invalidate the will or any provision of it."

2. Mattie's subsequent statement and writing over a year later, would have no bearing on the 2015 document. Although her statements were testamentary in nature, Mattie had already suffered a closed head injury at the time she made them. The facts indicate that her memory was "severely impaired" as a result of the injury. Additionally, Mattie articulated that she did not know what personal or real assets she possessed. As

noted above, individuals must have sufficient mental capacity in order to create a will. MCL 700.2501(1). According to EPIC, a person's mental capacity is sufficient only if each of the following are satisfied:

(a) The individual has the ability to understand that he or she is providing for the disposition of his or her property after death.
(b) The individual has the ability to know the nature and extent of his or her property.
(c) The individual knows the natural objects of his or her bounty.
(d) The individual has the ability to understand in a reasonable manner the general nature and effect of his or her act in signing the will. MCL 700.2501(2).

Under these requirements, the effects of Mattie's head trauma, including confusion about what assets she had to distribute, would render her mental capacity insufficient to enable her to make a valid will of any sort, whether traditionally (MCR 700.2502 (a)-(c)); holographically (MCR 700.2502 (2)), or by other clear and convincing evidence (MCR 700.2503)).

EXAMINERS' ANALYSIS OF QUESTION NO. 2

1. **Conveyance to Amos**. Cooper owned five properties with his wife as tenants by the entirety. A tenancy by the entirety is a category of estate that is reserved solely for husbands and wives who jointly own property. The characteristics of this tenancy are that

> . . . each spouse is considered to own the whole and, therefore, is entitled to the enjoyment of the entirety and to survivorship. When real property is so held as tenants by the entireties, neither spouse acting alone can alienate or encumber to a third person an interest in the fee of lands so held. Neither the husband nor the wife has an individual, separate interest in entireties property, and neither has an interest in such property which may be conveyed, encumbered or alienated without the consent of the other. *Rogers* v *Rogers*, 136 Mich App 125, 134 (1984).

Accordingly, Cooper had no legal authority to convey his interest in the property to Amos. Doris and Cooper's informal marital separation had no effect on the joint tenancy relationship between the two. A tenancy by the entirety may be terminated in only particular instances including by death or divorce under common law, (*Tkachik* v *Mandeville*, 487 Mich 38 (2010)) or statutorily "by a conveyance from either one to the other of his or her interest in the land so held." MCL 557.101. None of the contingencies include an informal separation of the couple. Therefore, Cooper's conveyance of the property to Amos is invalid.

2. **Conveyance to Lydia**. The facts state that Cooper and Kent held their joint real property as tenants in common.

> Tenants in common are persons who hold land or other property by unity of possession. When two or more persons are entitled to land in such a manner that they have an undivided possession, but separate and distinct freeholds, they are tenants in common. Not only is the possession of one the possession of all, but the tenants respectively have the present right to enter upon the whole land, and upon every part of it,

and to occupy and enjoy the whole." [*Merritt* v *Nickelson*, 80 Mich App 663, 666 (1978)].

Accordingly, each tenant in common has the right to sell his own undivided interest in the real property without knowledge or permission of the other cotenant(s). *Albro* v *Allen*, 434 Mich 271, 282 (1990). Thus, Cooper's sale to Lydia of his interests in the properties that he shared jointly with Kent was valid.

3. **Kent's Desire to Evict**. Kent wishes to evict a month-to-month rental tenant from one of the properties that he owns. His stated reason for the eviction of wanting the property to rent to his daughter is legitimate. "A tenancy from month-to-month, which is to last for an uncertain duration, is a tenancy at will and is terminable at the desire of either party upon the tender of sufficient notice." *Frenchtown Villa v Meadors*, 117 Mich App 683, 688-689 (1982). According to MCL 554.134(1), an at will tenancy generally "may be terminated by either party by giving 1 month's notice to the other party."

Thus, Kent must first serve on the tenant a notice to quit to recover possession of the property which demands that the tenant move from the property at least 1 month from the date of service. If the tenant fails to move by that date, Kent may institute summary proceedings in the district court to secure a judgment of possession in his favor. MCL 600.5714(c)(iii). If a possession judgment is entered by the court, and the tenant fails to move by the date indicated in the judgment, Kent may seek an order of eviction from the court that can be executed by a court officer to remove the tenant's items from the property and restore possession to Kent. MCL 600.5741; 600.5744.

EXAMINERS' ANALYSIS OF QUESTION NO. 3

1. **Return of Money**. Marcia is likely legally entitled to recover the $600 from Krissy. The three elements of a valid gift are: (1) an intent by the donor to pass title to the donee; (2) delivery of the gift, either actual or constructive; and (3) acceptance of the gift by the donee. *In re Handelsman,* 266 Mich App 433, 437-38 (2005). If the gift benefits the donee, the law presumes that it has been accepted. *Id.* at 438. Marcia gifted the jacket to Krissy as all the elements establishing a gift of that item are met. However, there does not appear to be a gift of the hidden money in that jacket. Marcia clearly did not intend to relinquish control of the cash to Krissy, as the facts indicate that at the time of delivery, Marcia had forgotten that the money was in the jacket. Similarly, Krissy didn't know about the cash in the jacket either, and could not have accepted it specifically. These facts would overcome any legal presumption of acceptance based upon the benefit of the money to Krissy. As such, not all the elements of a gift of money were met. Marcia's delivery of the cash to Krissy was a mistake, not a gift.

2. **Return of Chairs**. It appears that Marcia abandoned the wooden chairs. Personal property is deemed abandoned when the owner (1) intends to relinquish all rights to the property and (2) carries out an external act which effectuates that intent. *Emmons* v *Easter*, 62 Mich App 226, 237 (1975). *See also, Sparling Plastic Indus* v *Sparling*, 229 Mich App 704, 717 - 718 (1998). As indicated in the facts, Marcia was undertaking spring cleaning by getting rid of some of her possessions. She acted on that intention by placing items, including the subject chairs, on the curbside of her home specifically for scheduled disposal by the city. That act reflected her desire to permanently part with the chairs, and an indifference as to what would later happen with them. There are no statutory or other legal proscriptions with respect to a private party who finds abandoned property of that nature. Therefore, as a (non-governmental) private party finder of this abandoned property under these circumstances, Reggie acquired full ownership interests in the chairs once retrieved. He may legally keep the chairs despite Marcia subsequently learning of their true value. The abandonment of the chairs forecloses any arguments by Marcia of subsequent entitlement to that personal property.

EXAMINERS' ANALYSIS OF QUESTION NO. 4

1. Legal standards regarding piercing the corporate veil.

A corporation and its shareholders are distinct legal entities, *Kern v Kern-Koskela*, 320 Mich App 212, 227 (2017), and, as such, stockholders are generally not liable for corporate obligations. *Klager v Robert Meyer Co*, 415 Mich 402, 411 (1982); *Flickema v Henry Kraker Co*, 252 Mich 406, 409 (1930).

Despite this general rule, under some circumstances the courts will hold the shareholders individually liable for corporate obligations. This is known as "piercing the corporate veil." As an equitable remedy, "there is no single rule delineating when the corporate entity may be disregarded. . ." *Florence Cement Co v Vettraino*, 292 Mich App 461, 469 (2011). Rather, the entire spectrum of relevant facts is considered to determine whether the corporate form has been abused. *Id.* In order for "a corporate veil to be pierced, the corporate entity (1) must be a mere instrumentality" or alter ego of the shareholders, "(2) must have been used to commit a wrong or fraud, and (3) there must have been an unjust injury or loss to the plaintiff." *Id.*

2. Whether, based on the facts of this case, Ron's Roofing is likely to prevail in its effort to hold Larry, Moe and Curly liable.

a. Corporation used as a mere instrumentality.

The facts show that defendants used PPI as a mere instrumentality and did not treat PPI as a separate legal entity. Moe acquired parcels of property, which he turned over to PPI without a formal deed transfer. Moe incurred expenses, and then simply had PPI reimburse him directly. Larry and Moe borrowed an additional $500,000 to "loan" to PPI without the benefit of a promissory note. Moreover, distribution checks were issued to Moe and Curly, however, whenever PPI needed capital, the money was borrowed from the bank. Money was borrowed either in defendants' own names or as guarantors for PPI. Thus, defendants treated their personal liabilities to the bank as PPI's liabilities. Lastly, while PPI had no duty to make Larry and Moe's loan payments, PPI made payments directly to the bank on Larry and Moe's behalf.

Because defendants made no distinction between their own debts and PPI's debts, defendants did not treat PPI as a separate entity. Therefore, PPI was the mere instrumentality or alter ego of Larry, Moe and Curly, which is a hallmark of a claim for piercing the corporate veil.

b. Whether the corporate entity was used to commit a wrong or fraud.

The facts also show that defendants used PPI to commit a wrong or fraud. Larry falsified the sworn statement that he submitted to Alpha Bank for the remaining loan proceeds. Larry's sworn statement indicated that of the total amount PPI owed Ron's was $50,000. However, the actual amount owed was $150,000.00, which Larry well knew because he had signed the contract with Ron's on behalf of PPI. Thus, Larry knowingly falsified the sworn statement, which amounted to fraud. Therefore, PPI was used to commit a wrong or fraud. Additionally, PPI was severely undercapitalized. It had roughly two million dollars in debt and capital contributions of only $2,400. As a result of the $100,000 in distributions to Moe and Curly, PPI was unable to pay its debt to Ron's Roofing when the debt became due; this points to fraudulent intent.

c. Unjust injury or loss to Ron's Roofing.

Finally, Ron's Roofing suffered a significant loss as a result of Larry, Moe and Curly treating PPI as a mere alter ego of themselves and deliberately undercapitalizing PPI. Ron's Roofing lost $100,000 for roofing work that was undisputedly performed.

Applying the above factors, Ron's Roofing is likely to prevail in its effort to pierce the corporate veil of PPI, meaning that Larry, Moe and Curly would be held liable for the $100,000 shortfall.

EXAMINERS' ANALYSIS OF QUESTION NO. 5

I. SETTING ASIDE THE DEFAULT:

"Michigan law generally disfavors setting aside default judgments that have been properly entered." *Barclay v Crown Bldg & Dev, Inc*, 241 Mich App 639, 653 (2000). Under MCR 2.603(D)(1), a trial court may set aside a default judgment as follows:

> A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.

The party seeking to set aside the default bears the burden of demonstrating good cause and a meritorious defense. *Saffian v Simmons*, 477 Mich 8, 15 (2007). To establish "good cause," the moving party must establish: "(1) a procedural irregularity or defect, or (2) a reasonable excuse for not complying with the requirements that created the default." *Barclay*, 241 Mich App at 653. The trial court has discretion to determine whether a "defendant's excuse for failing to timely answer the complaint was reasonable." *Saffian*, 477 Mich at 16. "Manifest injustice is *not* a third form of good cause that excuses a failure to comply with the court rules where there is a meritorious defense." *Barclay*, 241 Mich App at 653.

The stronger the meritorious defense the easier it is to show good cause.

> When a party puts forth a meritorious defense and then attempts to satisfy 'good cause' by showing (1) a procedural irregularity or defect, or (2) a reasonable excuse for failure to comply with the requirements that created the default, the strength of the defense obviously will affect the 'good cause' showing that is necessary. In other words, if a party states a meritorious defense that would be absolute if proven, a lesser showing of 'good cause' will be required than if the defense were weaker, in order to prevent a manifest injustice. [*Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 233-234 (1999).]

A. MERITORIOUS DEFENSE

In *Brooks Williamson & Assoc v Mayflower Constr Co*, 308 Mich App 18, 29 (2014), the court stated the following:

> In determining whether a defendant has a meritorious defense, the trial court should consider whether the affidavit contains evidence that:
>
> (1) the plaintiff cannot prove or defendant can disprove an element of the claim or a statutory requirement;
>
> (2) a ground for summary disposition exists under MCR 2.116(C)(2), (3), (5), (6), (7) or (8); or
>
> (3) the plaintiff's claim rests on evidence that is inadmissible.

Jones' affidavit does not set forth a meritorious defense, as a dispute regarding the amount owed does not constitute a meritorious defense under the court rule. *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 393-394 (2011) ("Rather, defendant simply asserted that he had a meritorious defense because he disputed the amount of the debt owed to plaintiff. Merely contesting the amount of liability does not establish a meritorious defense."). Although the resolution of the meritorious defense issue would normally end the inquiry, the applicants were asked to analyze both criteria for deciding a motion to set aside a default judgment.

B. GOOD CAUSE

Even if Jones Inc. had established a meritorious defense, its motion would still not succeed because it has not established good cause. Nothing in the facts suggests that there was any procedural irregularity or defect that resulted in entry of the default or default judgment. It is also true that a corporation cannot be represented in court by a non-lawyer. *Fraser Trebilcock Davis & Dunlap, PC v Boyce Trust*, 497 Mich 265, 277-278 (2015) referencing *Detroit Bar Assoc v Union Guardian Trust Co*, 282 Mich 707, 711 (1938). As for a reasonable excuse for not complying with the rules that resulted in the default, Jones Inc.'s argument will not prevail. Jones Inc., through Jones, was served with the lawsuit and took timely action in an attempt to answer the complaint. The only

shortfall was Jones' ignorance of the law regarding representation of corporations. But that ignorance of the law does not constitute good cause to set aside the default judgment. *Reed v Walsh*, 170 Mich App 61, 65 (1988) ("[W]e agree with the trial court that a lay defendant's lack of knowledge of the law and its consequences will not necessarily provide a reasonable excuse and good cause to set aside a default.").

II. FAILURE TO PROVIDE JURY TRIAL

The final issue is whether Jones Inc. was entitled to a jury trial on the damages OSI claims entitlement to, and which the judge made part of the default judgment. The facts show that OSI filed a jury demand, and Jones Inc. filed what was essentially a notice that it was relying on OSI's jury demand. Although in default, and unable to defend on the merits, Jones Inc. is entitled to have a jury determine whether, and to what extent, OSI is entitled to damages. "A default does not constitute a waiver of a jury trial in a civil action." *Mink v Masters*, 204 Mich App 242, 246 (1994), citing *Wood v DAIIE*, 413 Mich 573, 583-584 (1982). Accordingly, even though Jones Inc. did not establish a meritorious defense or good cause, the judgment must be vacated so that a jury can determine the amount of damages to which OSI is entitled.

EXAMINERS' ANALYSIS OF QUESTION NO. 6

The question requires discussion about the three different nuisance claims brought by Paul against Smith. Though there is some room for debate on the nuisance in fact claim, ultimately Paul cannot maintain any nuisance claim against Smith.

1. PRIVATE NUISANCE

A private nuisance comprises both nuisance-in-fact and nuisance per se, *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 269 n 5 (2008), and "is a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Adkins v Thomas Solvent Co*, 440 Mich 293, 302 (1992). An actor is subject to liability for a private nuisance if

> (a) the other has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion results in significant harm, (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct. [*Id.* at 304.]

A. NUISANCE IN FACT

Nuisance in fact is an act that becomes a nuisance "by reason of the circumstances and surroundings." *Ypsilanti Charter Twp*, 281 Mich App at 269 n 5. Under the facts presented, Paul can establish some of these elements, but not all. First, Paul had property rights to the use and enjoyment of his property. Second, Paul will have a tough argument that the invasions caused by Smith, the noise and smoke, resulted in significant harm to him. Smith can reasonably use his property as he sees fit, although he cannot do so if it causes significant (rather than de minimis) harm to an adjoining property owner. *Adkins*. at 310. The harm to Paul-not being able to use his yard at all, and losing sleep because of the constant and excessive noise-is de minimis, and it appears to be

temporary. Since Smith has removed all his trees, he will no longer be cutting trees with the tractor. And, presumably, he will no longer be burning the cut down trees 24 hours a day. Lacking a degree of permanence, Paul will have difficulty proving this element. *Id.* at 308. Third, Smith clearly caused the invasion, and it was intentional, particularly after Paul informed him of the damage it was causing to his enjoyment of his property. Fourth, and finally, Paul can establish that Smith was acting unreasonably because of continuing to burn the wood, and run the tractor, on a virtually 24 hour a day period, as his conduct interfered with Paul's use and enjoyment of the land. Paul will be unsuccessful on his nuisance in fact claim. Because this is a factually based, and somewhat subjective determination, an answer that covers the proper factors but comes to a different conclusion should receive the same credit.

B. NUISANCE PER SE

"[A] nuisance per se is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings," *Ypsilanti Charter Twp v Kircher*, 281 Mich App at 269 n 4. See, also, *Capitol Properties Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422, 427 (2009). The burning of wood and running a noisy tractor is not under all circumstances a nuisance, as it would likely not be a nuisance or disturbance under these facts were it not occurring next to a populated subdivision. For example, if it occurred in a sparsely populated agricultural setting it would not rise to that level. Thus, because it is the location in which the activity is occurring that makes it a nuisance, it is not a nuisance per se. *McKee v Dep't of Transportation*, 132 Mich App 714, 724 (1984).

2. PUBLIC NUISANCE

A public nuisance was described in *Cloverleaf Car Co v Phillips Petroleum Co.*, 213 Mich App 186, 190 (1995), as "an unreasonable interference with a common right enjoyed by the general public." Additionally, the Court outlined what criteria to consider when determining if specific conduct constitutes an "unreasonable interference:"

> The term "unreasonable interference" includes conduct that (1) significantly interferes with the public's

> health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights. A private citizen may file an action for a public nuisance against an actor where the individual can show he suffered a type of harm different from that of the general public. [*Id.* (citation omitted).]

Paul will not be able to prevail on his public nuisance claim. Although he can prove that he suffered a harm different than those in the general public, nothing in the facts reveal that the noise or smoke interfered with the general public health, safety, peace, comfort or convenience. In cases where the offending action only impairs the enjoyment of one property owner, a public nuisance will not be found. Nor is there anything in the facts indicating a "permanent or long-lasting" effect on Paul's enjoyment of his property. Presumably once the last tree was cut, the noise and smoke ended.

For these reasons, the best answer is that Paul will not succeed on any of his nuisance claims.

EXAMINERS' ANALYSIS OF QUESTION NO. 7

Article 2 of the Uniform Commercial Code (UCC) applies because this transaction is a sale of goods. MCL 440.2102. Goods are all things moveable at the time of the sales agreement. MCL 440.2105(1). Pipes are moveable and therefore "goods." There is clearly the requisite offer, acceptance, and consideration to create a contract between the parties.

1. With respect to the first question, Michigan's UCC statute of frauds provision says a contract for the sale of goods for the price of $1,000 or more is not enforceable without a writing signed by the party against whom enforcement is sought. MCL 440.2201(1). SSP signed nothing evidencing the existence of a contract. The price of the goods exceeds $1,000 (250 pipes x $25/ea= $6,250). And, SSP is the party against whom enforcement may be sought. Therefore, under the general rule the contract would not be enforceable. However, because both parties are "merchants," an exception to the statute of frauds' writing requirement may apply. MCL 440.2201(2). A "merchant" is one who deals in a particular type of good and has special knowledge of the goods involved in the transaction. MCL 440.2104(1). Here, both PSI and SSP regularly engage in selling and purchasing plumbing goods and have special knowledge of pipes. Therefore, the merchant exception is triggered.

The merchant exception provides that where both parties are merchants, one merchant may send written confirmation of the agreement within a reasonable time to the other merchant. MCL 440.2201(2). If the other merchant receives the confirmation and knows its contents, there is an enforceable contract, unless the merchant objects to its contents in 10 days. *Id.* Here, PSI sent a signed written confirmation reciting the terms of the agreement to SSP the day after their conversation. SSP received the confirmation, read its contents, and did not timely object to it. Therefore, there is an enforceable contract.

2. With respect to the second question, where a buyer rejects a delivery for non-conformance with the contract and the time for performance of the contract has not yet expired, the

seller may seasonably notify the buyer of its intent to cure the error within the contract's time limit and make a conforming delivery. MCL 440.2508(1). Here, after SSP notified PSI of the non-conformance, PSI has the right to cure its error by making a conforming delivery before expiration of the contract's deadline. PSI has timely expressed its intent to do just that and possesses the right to cure.

3. With respect to the third question, if PSI is unable to cure its error by the contractual deadline, SSP is not obliged to pay for the 200 white pipes that were delivered. If goods or tender of delivery fail in any respect to conform to the contract, the buyer may reject the whole order, accept the whole order, or accept some and reject the rest of the order. MCL 440.2601. Rejection of goods must be within a reasonable time after delivery; the buyer must notify the seller of the rejection. MCL 440.2602(1). And, the buyer must hold the delivered items for the seller's removal or further instruction. MCL 440.2602(2)(b); MCL 440.2603(1). Here, the delivery did not conform to the contract. SSP timely notified PSI of that fact on the day of delivery and told PSI it had no use for black piping. SSP told PSI to remove the shipment or advise of other disposal instructions. Therefore, PSI is not correct in insisting that SSP pay for the 200 white pipes that were delivered, should PSI be unable to rectify its error by the contractual deadline. SSP can reject the entire shipment, assuming PSI does not cure.

EXAMINERS' ANALYSIS OF QUESTION 8

Motions to change custody awards are governed by statute. Under MCL 722.27(1)(c), a court may revisit a prior custody award on a showing of proper cause or a change of circumstances. Michigan case law has interpreted this language as limiting a court's ability to re-evaluate a prior custody award.

In *Baker v Baker*, 411 Mich 567 (1981), the Michigan Supreme Court explained that the portion of the Child Custody Act pertaining to modifications was "intended to minimize the prospect of unwarranted and disruptive change[s] of custody . . ." *Baker*, at 576-577. In *Vodvarka v Grasmeyer*, 259 Mich App 499 (2003), the Court of Appeals took the concept a step further, focusing on the language in the statute salient to modification motions in MCL 722.27(1)(c): "...the court may modify or amend its previous judgments or orders for proper cause shown or because of a change of circumstances..." See *Vodvarka*, at 499 (emphasis added). *Vodvarka*, relying on other Michigan precedent, concluded "if the movant does not establish proper cause or change in circumstances, then the court is precluded from holding a child custody hearing." *Vodvarka*, 259 Mich App at 508. See *Rossow v Aranda*, 206 Mich App 456, 458 (1994); *Killingbeck v Killingbeck*, 269 Mich App 132, 145-146 (2005), applying *Vodvarka*. Therefore, for a court to even entertain a request to change custody, the movant must demonstrate a change of circumstances or proper cause.

The grounds presented by Oscar do not amount to a change of circumstances or proper cause to re-evaluate the prior custody award. A child's change in custody preference, while certainly a factor in the best interest constellation, is not controlling in the threshold analysis. That the children have grown older and become more desirous of including their father in their school sports is certainly a development in their lives but not one that "could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Vodvarka*, 259 Mich App at 511 (emphasis added). As *Vodvarka* added, not any change will do, and those attendant to normal life changes will not suffice. A remarriage and expanded family unit would likely be considered insufficient. See *Vodvarka*, 259 Mich App at 513.

Yes, the answer may be different if Oscar were simply seeking additional parenting time instead of a custody change. Changes in parenting time do not carry with them the destabling effects of changes in custody. See *Shade v Wright*, 291 Mich App 17 (2010). In this regard, normal life changes could warrant a hearing where the best interest of the child would be considered in determining any modifications to a prior parenting time award. *Shade*, 291 Mich App at 25-29. In short, while a child growing older and wanting greater involvement with a parent related to school and extracurricular activities would not warrant proper cause or a change in circumstances nor warrant re-evaluation of a custody award, these changes may nevertheless warrant re-evaluation of a parenting time award. See *Shade*, 291 Mich App at 25-29. See in accord, *Lieberman v Orr*, 319 Mich App 68, 83 (2017).

In sum, to obtain a hearing on a motion to change custody, the movant must establish that proper cause or a change in circumstances has occurred. The grounds presented by Oscar do not meet that threshold. A more relaxed standard could be employed, had his request simply pertained to additional parenting time.

EXAMINERS' ANALYSIS OF QUESTION NO. 9

This question calls for a Michigan choice-of-law analysis. Under Michigan law, Daisy is immune from liability because there is no indication that it committed an act or omission in "willful or wanton" disregard for Paige's safety. But under Florida law, there is an argument that by failing to warn Paige that Cosmo had just recently reared up on someone, the Daisy employee did not act as a "reasonably prudent person would . . . under the same or similar circumstances."

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

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

Here, the only connection with Florida is that Paige is a resident there. "[T]he plaintiff's residence, with nothing more, is insufficient to support the choice of a state's law." *Sutherland v Kennington Truck Serv, Ltd*, 454 Mich 274, 287 (1997) quoting *Allstate Ins v Hague*, 449 US 302, 313 (1981). Michigan, on the other hand, has a strong interest in having its law applied. The incident occurred in Michigan, Daisy resides in Michigan, and the Michigan legislature has enacted a statute that directly applies in determining Daisy's liability. Under the facts of this case, Michigan has an interest in regulating "conduct within its borders," *Frydrych*, 252 Mich App at 364, that clearly outweighs Florida's minimal interest. As a result, Michigan law applies, and Daisy's motion for summary disposition should be granted.

EXAMINERS' ANALYSIS OF QUESTION NO. 10

The 14th Amendment to the United States Constitution states in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The right to a fair trial is a fundamental liberty secured by the 14th Amendment to the United States Constitution. *Estelle v Williams*, 425 US 501, 503 (1976). An integral component in that fair trial is that the accused is presumed to be innocent. Courts must be vigilant in the administration of trials to guard against undermining that presumption and in turn what its abrogation has on the fairness of the accused's trial.

Being obligated to stand trial in jail or prison garb is precisely one of those, at the very least, insidious undermining factors. *Estelle*, 425 US at 504. While an accused may choose to be so attired for trial, infringement of his trial right springs from compulsion, not his election.

An additional reason, emanating from the 14th Amendment's call for equal justice for preventing the accused from being required to wear jail garb, concerns the unequal footing those in jail endure from those on bond. By mere detention, one obligated to wear jail garb comes from the jail to the trial because of a financial inability to post bond, the inmate has foisted upon him or her a condition vitiating his or her presumption of innocence not attendant to his out-on-bond counterpart. As stated in *Estelle*, "To impose the condition on one category of defendants, over objection, would be repugnant to the concept of equal justice embodied in the *Fourteenth Amendment.*" *Estelle*, 425 US at 505-506, citing *Griffin v Illinois*, 351 US 12 (1956).

Applying the foregoing to the facts at hand yields the conclusion that Dapper has a significant issue on appeal for a

number of reasons. First, in contrast to *Estelle*, defense counsel forcefully pressed the issue of Dapper's attire, not once but twice. Voicing an objection likely would have prompted a different result than *Estelle* and certainly pursuant to post-*Estelle* cases in Michigan. See *People v Lee*, 133 Mich App 299, 300-301 (1984); *People v Turner*, 144 Mich App 107, 109-111 (1985), citing *People v Shaw*, 381 Mich 467 (1969) and *Estelle*, 425 US 501, all standing for the proposition that, where the accused makes a timely request not to appear before his or her jury in jail or prison garb, it is error to reject that request.

The intertwined concepts of the presumption of innocence, the right to a fair trial, and equal protection under the law necessitate the conclusion Dapper has merit to his claim.

EXAMINERS' ANALYSIS OF QUESTION NO. 11

Neither of David's defenses have much chance of success.

One charged with a crime certainly may defend against such a charge by claiming self-defense. To be lawful self-defense, the evidence must show that (1) a defendant honestly and reasonably believed that he was in imminent danger; (2) the feared danger was death or serious bodily harm; (3) the action taken appeared at the time to be immediately necessary; and (4) generally speaking, the defendant was not the initial aggressor. See *People v Guajardo*, 300 Mich App 26 (2013) and *People v Riddle*, 467 Mich 116 (2002). Moreover, under Michigan statutory self-defense, an accused may not be "engaged in the commission of a crime." See MCL 780.972(1) (2).

Statutory Self-Defense

Taking the statutory defense first, it is clear David was engaged in the commission of a crime when - as a convicted felon - he armed himself with a pistol and was armed on Mel's doorstop. Moreover, he entered Mel's home through force and without permission, thereby committing home invasion in some degree. The statutory defense on its face, therefore, is not open to David.

Common Law Self-Defense

David fares no better on the common law defense based on the elements stated above. Indeed on virtually every element, his defense fails. First, no evidence exists supporting David's belief that he could have honestly and reasonably believed he was in imminent danger. At the doorstop, Mel did not threaten David, nor was he armed. When David bull-rushed his way in, he was not afraid; he was angry. Fear controls self-defense, not anger. Second, even assuming some fear of danger, it hardly amounted to fear of death or great bodily harm. Mel was quickly subdued and was taking a beating. Relatedly, when David shot at Mel, Mel was fleeing his own home trying desperately to get away (he was shot in the back). This hardly bespeaks David needing to take the action he did (shooting an unarmed man as he ran

away) to avoid being harmed himself. Fourth, it is clear that David was the first aggressor.

Claim of Right

One accused of a theft or theft-related crime may defend through a claim of right or entitlement to the property in question. This defense is not open to David. Neither home invasion nor assault with intent to murder necessarily involve larceny. Claim of right is grounded in negation of the intent to steal integral to theft offenses. *People v Shaunding*, 268 Mich 218 (1934) and *People v Cain*, 238 Mich App 95 (1999).

David's defense fails for many reasons, principle of which is that he was not charged with a property-theft crime and he did not forcibly retrieve the cell phone from Mel. Indeed, he didn't even broach the topic. Accordingly, not charged with a property crime, a claim of right defense does not obtain and the attendant facts undercut such a defense. See Michigan Criminal Jury Instructions 7.5.

In sum, David's defenses have no merit.

EXAMINERS' ANALYSIS OF QUESTION NO. 12

The 4th Amendment to the United States Constitution provides in pertinent part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." Clearly, the Amendment delineates with some precision the places and things protected: persons, houses, papers, and effects. *Oliver v United States*, 466 US 170, 176 (1984).

At issue initially in the factual scenario is whether Matheny's "house" was involved, given that police did not enter his home but that they remained on the lawn or, in the case of Collins, on the porch with Dante. This first issue is easily answered affirmatively.

While police did not physically enter the premises, nevertheless Collins and Dante were on the home's back porch. The home, under the 4th Amendment jurisprudence, is a first among equals. "At the Amendment's 'very core' stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Florida v Jardines*, 569 US 1, 6 (2013), citing *Silverman v United States*, 365 US 505, 511 (1961). The so-called curtilage of the home enjoys similar high level protection under the 4th Amendment. A porch at the back door of a home is "intimately linked to the home, both physically and psychologically, and is where privacy expectations are most heightened." *Jardines*, 569 US at 7 (internal citations omitted) citing *California v Ciraolo*, 476 US 207, 213 (1986).

Because Collins was on Metheny's side door porch, he intruded on the curtilage of Metheny's house. Having done so, Metheny's 4th Amendment protections were implicated, despite no entry into the home proper.

A further analytical step is necessary, however, to determine whether Metheny's 4th Amendment rights against unreasonable search and seizure are involved. Did the police activity amount to a "search?"

The People would contend no, that the police may do what is "no more than any private citizen might do" (*Kentucky v King*, 563 US 452, 469 [2011], and that, in the factual scenario, they did just that. Police are certainly free - as are most people - to walk up to the door of a house and knock on that door. No trespass occurs because an implicit license to do so exists because people of all walks - solicitors, peddlers, salespeople - may customarily seek the attention of the homeowner in this innocent fashion. *Beard v Alexandria*, 341 U.S. 622, 626 (1951).

However, Metheny would counter that, while such approaches to the door of a home are tolerable - by anyone - the surrounding circumstances here fall far away from those tolerable scenarios. The very reason officers were there was to follow up on a tip involving drug manufacturing at the house. Multiple drug unit officers came to the home with surveillance equipment and a drug detecting dog. The front door was eschewed for a side door through which a salient scent could emanate more easily. By all accounts, police were there to investigate and to gather evidence and information for the purpose of detecting the presence of drugs.

Florida v Jardines, supra, supports Metheny's position and calls for suppression. The facts as presented clearly establish this was no house call, where police wish to knock and talk. The use of a drug dog, the time of night, the possession of surveillance equipment, the preference for a side door - together - bespeak action significantly unfamiliar to the general citizen's approach of a neighborhood home. The facts do not indicate that police actually did knock on any door to talk to Metheny, further betraying the purpose of their visit and underscoring the action amounted to a search - and an unreasonable one at that.

Metheny's motion should be granted.

EXAMINERS' ANALYSIS OF QUESTION NO. 13

1. Evidence of the trait of aggression is admissible per MRE 404(a)(2).

MRE 404(a)(2) provides:

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: . . . [w]hen self-defense is an issue in a charge of homicide, evidence of a trait of character for aggression of the alleged victim of the crime offered by the accused, or evidence offered by the prosecution to rebut the same. . . .

The Michigan Supreme Court explained in *People v Harris*, 458 Mich 310, 315-316 (1998):

> It is now widely accepted that a defendant may show a pertinent trait of character of the alleged victim that bears on whether the victim committed an act of aggression on the particular occasion in conformity with that trait. 1A Wigmore, Evidence (Tillers rev), § 63, p 1350. This is so because, when a controversy arises regarding whether the deceased was the aggressor, a jury's persuasion may be affected by the character of the deceased because it will shed light on the probabilities of the deceased's action. *Id.* The sole purpose for which evidence of this type is admissible is, from the victim's general turbulent or violent character, to render more probable the evidence that tends to show an act of violence at the time he was killed.

Bob's testimony that Victor had a reputation for aggressive behavior is offered in support of Daniels' theory of self-

defense that Victor was the aggressor and Daniels was defending himself before Victor could again shoot the lethal weapon at Daniels. Therefore, this proffered testimony falls precisely within the exception set forth in MRE 404(a)(2). Similarly, the sister's testimony that Victor once pulled a gun on her in a fit of anger might be considered evidence of a character trait for aggression under MRE 404(a)(2). It, however, fails under MRE 405, as explained below.

2. Reputation evidence is admissible under MRE 405 but specific acts evidence is not.

MRE 405 governs the methods by which a character trait, such as aggression, may be proved:

> **(a) Reputation or Opinion.** In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into reports of relevant specific instances of conduct.
>
> **(b) Specific Instances of Conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Because Bob is to testify only as to Victor's reputation for aggression - an admissible character trait under MRE 404(a)(2) - his testimony is allowable under MRE 405(a). He may not testify on direct examination concerning specific instances of Victor's conduct, however, as the aggressive character of the victim is not an essential element of self-defense pursuant to MRE 405(b). Bob could, however, be cross-examined by the prosecutor about relevant specific instances of conduct rebutting Victor's alleged aggressive character.

As to Victor's sister, Daniels intends to call her for the sole purpose of testifying to a specific act of aggressive behavior - Victor pulling a gun on her. Daniels cannot question

her about a specific act of aggression on direct exam, since it is not an essential element of Daniels' defense.

The court should overrule the objection to Bob's testimony and sustain the objection to the sister's testimony under MRE 405.

EXAMINERS' ANALYSIS OF QUESTION NO. 14

1. Buddy's claim

Unambiguous contracts must be interpreted and enforced as written.

> Absent an ambiguity or internal inconsistency, contractual interpretation begins and ends with the actual words of a written agreement. When interpreting a contract, our primary obligation is to give effect to the parties' intention at the time they entered into the contract. To do so, we examine the language of the contract according to its plain and ordinary meaning. If the contractual language is unambiguous, courts must interpret and enforce the contract as written . . . . [*Innovation Ventures, LLC v Liquid Mfg, LLC*, 499 Mich 491, 507 (2016) (quotation marks and citations omitted) (ellipses in original).]

See also *Bank of Am, NA v First Am Title Ins Co*, 499 Mich 74, 85-86 (2016) (same). "[A]n unambiguous contract reflects the parties' intent as a matter of law." *Phillips v Homer (In re Egbert R. Smith Trust)*, 480 Mich 19, 24 (2008) (footnote omitted).

Buddy's contract with Farmer unambiguously gave Buddy an irrevocable option to purchase.

The plain language of the contract between Farmer and Buddy demonstrates the parties' intent that Buddy had an irrevocable option to purchase the farm for $100,000 between January 1 and March 31, 2018. Buddy timely exercised his option by informing Farmer on February 1 that he wished to purchase the farm for $100,000. The fact that Farmer made other plans for the farm, and that Farmer informed Buddy of such plans before Buddy exercised his option, is irrelevant in interpreting the plain language of the contract.

Some applicants may raise an issue of consideration for Buddy's option. However, this is not the correct analysis.

This question raises no issue of consideration. Because Farmer and Buddy had a "valid" contract, the contract was supported by consideration. Consequently, Farmer should not argue that the contract lacked consideration. Moreover, the question asks applicants to evaluate Buddy's and Farmer's arguments, and Farmer did not raise lack of consideration for the option as an argument. Answers that make such an argument thus do not receive full credit on this issue.

The court should grant Buddy specific performance of the contract:

"Land is presumed to have a unique and peculiar value, and contracts involving the sale of land are generally subject to specific performance." *Phillips*, 480 Mich at 26 (footnote omitted). Consequently, "[o]ptions for the purchase of land, if based on valid consideration, are contracts which may be specifically enforced." *Bd of Control v Burgess*, 45 Mich App 183, 185 (1973). "In order to be entitled to the remedy of specific performance of an option contract, the option must be accepted unequivocally in order to convert the option into a binding contract for the sale of the subject property. 71 Am Jur 2d, p 188." *Bowkus v Lange*, 196 Mich App 455, 460 (1992), *rev'd on other grounds*, 441 Mich 929 (1993).

> [T]he power to grant specific performance rests within the sound discretion of the court. The court, however, is not justified in withholding a decree for specific performance merely because of the exigencies of a case. . . . [S]pecific performance of a contract for the purchase of real estate may not be arbitrarily refused, but in the exercise of sound legal discretion should be granted, in the absence of some showing that to do so would be inequitable. [*Zurcher v Herveat*, 238 Mich App 267, 300 (1999).]

See also *Wilhelm v Denton*, 82 Mich App 453, 455 (1978); *Foshee v Krum*, 332 Mich 636, 643 (1952).

Here, Buddy unequivocally accepted the option on February 1, thereby converting the option into a binding contract for the sale of the farm. Because the contract created an "irrevocable" option, it is irrelevant that Farmer notified Buddy of her

intention to sell to her niece before Buddy informed Farmer that he was exercising his option; or that market conditions changed during the option period; or that Farmer preferred to keep her farm in the family. Buddy contracted for the option to purchase any time before March 31, and when he exercised that option on February 1, it became a binding sale of the farm.

There is no showing that a grant of specific performance under these circumstances "would be inequitable." Consequently, the court should grant specific performance and order Farmer to sell the farm to Buddy for $100,000.

2. Mover's claim

Under the doctrine of anticipatory breach/repudiation, Mover has a valid claim against Farmer for breach of contract:

"Under the doctrine of anticipatory breach, if a party to a contract, prior to the time of performance, unequivocally declares the intent not to perform, the innocent party has the option to either sue immediately for the breach of contract or wait until the time of performance." *Paul v Bogle*, 193 Mich App 479, 493 (1992) (quotation marks omitted); see also *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 555 (2017) (same). "Regarding oral repudiation, 'a party's language must be sufficiently positive to be reasonably interpreted to mean that the party will not or cannot perform' . . . ." *Paul*, 193 Mich App at 494 (quoting Restatement (Second) Contracts § 250 cmt. b).

Here, Farmer told Mover on February 2 that she no longer needed Mover's services and would not pay for them. This oral repudiation was given prior to the time of performance (March 1) and unequivocally indicated Farmer's intent to breach the contract. See *Woody v Tamer*, 158 Mich App 764, 771 (1987) (stating that "a breach of contract occurs when a party fails to perform its contractually required duties" and that "anything short of full performance is a breach" (quotation marks omitted)); see also *Bd of Trs of Pontiac Police v City of Pontiac*, 309 Mich App 590, 607 (2015), *vacated on other grounds*, SC: 151717, 2016 Mich LEXIS 877 (May 18, 2016). Consequently, Mover had the option to either sue Farmer immediately for breach of contract or wait until March 1 to bring suit.

A court should grant Mover $200 for Farmer's breach:

"The remedy for breach of contract is to place the nonbreaching party in as good a position as if the contract had been fully performed." *Corl v Huron Castings, Inc*, 450 Mich 620, 625 (1996) (footnote omitted). See also *Frank W Lynch & Co v Flex Techs*, 463 Mich 578, 586 n 4 (2001) ("Damages awarded in a common-law breach of contract action are 'expectancy' damages designed to make the plaintiff whole."). "Under the rule of *Hadley v Baxendale*, the damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made." *Kewin v Mass Mut Life Ins Co*, 409 Mich 401, 414 (1980) (citation omitted). See also *Frank W Lynch*, 463 Mich at 586 n.4 (same).

Here, the remedy is to place Mover, the nonbreaching party, in as good a position as if the contract had been fully performed. Under the contract, Mover would have received $1,000 to perform services that would have cost $800 to perform, giving Mover a profit of $200. Consequently, a court should grant Mover $200 for Farmer's breach of their contract.

EXAMINERS' ANALYSIS OF QUESTION NO. 15

This question presents legal issues concerning the relationship of principals and agents. An agency is "a fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions." *Logan* v *Manpower of Lansing, Inc*, 304 Mich App 550, 559 (2014) (citations omitted). The authority of an agent to act on behalf of a principal such that the principal is bound by those actions, is either (1) actual or (2) apparent/ostensible. *Meretta* v *Peach*, 195 Mich App 695, 698 (1992). "Actual authority may be express or implied. Implied authority is the authority which an agent believes he possesses." *Id.*

On the other hand, apparent authority may be found "when acts and appearances lead a third person reasonably to believe that an agency relationship exists." *Id.* at 698 - 699. While "all surrounding facts and circumstances" must be examined in determining whether an agent has apparent authority to engage in an act that binds the principal, "[a]pparent authority must be traceable to the principal and cannot be established by the acts and conduct of the agent." *Id.* at 699. Moreover, a principal can be estopped from challenging the authority of an agent "[w]henever a principal has placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in assuming that such agent is authorized to perform in behalf of the principal the particular act, and such particular act has been performed". *Id.* at 699-700.

In the instant case, Andre clearly had no actual authority – express or implied – to bind Piper to the contract with Rocket Footwear. While the facts state that there once was an express agency relationship between the two, that agency ended prior to Andre's signing of the Rocket deal. Additionally, there is no factual suggestion that Andre reasonably believed he still had the authority to act on Piper's behalf after October 2017. It appears that Andre was merely taking advantage of a signing commission under the Rocket contract. Thus, there was no implied authority.

However, Rocket may be able to argue that Piper is bound by the contract because of Andre's apparent authority to act on her behalf. Considering the surrounding facts and circumstances, Piper and Andre had a public and widely known agency relationship. It would be reasonable for third parties like Rocket to believe that Andre still had such authority.

> [T]hree elements are necessary to establish the creation of an ostensible agency: (1) the person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one, (2) the belief must be generated by some act or neglect on the part of the principal sought to be charged, and (3) the person relying on the agent's authority must not be guilty of negligence. [*Vanstelle v Macaskill*, 255 Mich App 1, 10 (2003) citing *Chapa v St Mary's Hospital of Saginaw*, 192 Mich App 29, 33-34 (1991).]

The actual dissolution of the agency was not publicized at all according to the facts, but accomplished "quietly." Piper's failure to announce the parting either publicly or in business circles, following such a shared knowledge of the relationship, helped to fuel the perception that the agency remained intact. Further, the Rocket contract was consummated within a month after the agency agreement was actually dissolved. There was nothing to suggest to others that Andre's routine of signing contracts for Piper had been disrupted. Accordingly, Piper would likely be legally committed to the Rocket contract. *Id.*