APPLICANT NO. _____

ARKANSAS BAR EXAMINATION
JULY, 2003

1 Page
WILLS, ESTATES & TRUSTS

Father has lived in Arkansas all his life. His current wife is Alice to whom he has been married for twenty years. Father adopted Alice's child, Brad. Brad died five years ago and left two children, Carol and David. Father and Alice had two children, Eve and Frank. Eve is living and has triplets, George, Gene and Gary. Frank is living and has no children.

Father writes out the following hand written will which is signed by Father and three witnesses:

> "I Father, Pharaoh of all Egypt, hereby leave my kingdom as follows: I give half of everything in my realm to Queen Alice. I give nothing to Prince Brad because he has no drop of my blood coursing through his veins and because he crashed my favorite chariot in the races last week. I give the remainder of my estate to my only other child, Princess Eve, because she has always been my favorite and told me what to write in this will."

Father dies leaving an estate of $900,000 cash.

Questions:

1. Tell me whether this will is valid and discuss the issues which must be considered when making that determination.
2. Discuss whether each potential beneficiary listed above will receive any of Father's $900,000 cash estate and, if so, tell me how much each beneficiary will receive.

ARKANSAS ESSAY
ANSWER
WILLS, ESTATES & TRUSTS
July, 2003

Validity of the Will

No. Although the form of the will is valid, this will is most likely going to be invalid due to insane delusion and undue influence.

Holographic Wills

The form of the will is valid. At issue is whether a testator may dispose of his property through a hand-written will. Arkansas does allow testators to dispose of their property through a hand written or "holographic" will, so long as the will is in the hand writing of the testator and is signed by the testator. Here, the will is in the hand writing of Father and contains his signature. Arkansas recognized "I Father ... hereby leave" as the signature for holographic wills.

Challenges to the Will

While the holographic form of the will is valid, there are other issues to consider to determine the validity of the will. The following are potential grounds for contesting this will.

Insane Delusion

To challenge the will under insane delusion, the challenger must show (1) testator suffered from an insane delusion, and (2) the delusion was the cause of the particular will provisions. In other words, the delusion caused testator to devise his property differently than if he was not suffering from the delusion. It is clear from the facts that Father suffered an insane delusion that he was the Pharaoh of all Egypt. The delusion does appear to be the cause of at least one disposition - the choice to refrain from leaving anything to his adopted son Brad because Father thought Brad had crashed his favorite chariot in a race last week. This shows the delusion caused his testamentary disposition.

Undue Influence

To challenge the will under undue influence, the challenger must show (1) someone exercised an influence over the testator, (2) the influence overcame the free will of the testator to dispose of his land as he saw fit, and (3) the effect of the undue influence was a disposition of the property that would not have resulted if not for the influence. There will be a rebuttable presumption of undue influence if the person allegedly exerting the influence was in a confidential relationship with the testator, the person participated in the procurement of the will, and there was an unusual disposition of the property.

Here, the presumption may be activated. Daughter Eve was in a confidential relationship with testator because the father-daughter relationship constitutes a confidential relationship. Eve also participated in procurement of the will by telling Father what to write in his will. There is also

arguably an unusual distribution of the property because–although he left property to the natural objects of his bounty (wife and daughter), he excluded two sons. However, even without the presumption, a challenger could still show undue influence because Eve did assert an influence on her father, and the influence also appears to have overcome the free will of the Father and be the cause of a different disposition because Father expressly says in the will that he was writing what Eve told him to put in the will, and he also must have thought his other son Frank was dead, because he referred to Eve as his "only" child other than Brad.

Mistake in the Will

Generally, there is no remedy for a mistake in the will, but if the mistake is apparent from the language of the will, the court may take action. Here, the will shows that Father mistakenly believes his son Frank is dead. However, it does not clearly state that if Frank weren't dead, he would leave property to Frank. The statement is more ambiguous, saying only that he gives his property to his "only other child." Therefore, there will probably be no remedy under this argument.

Disposition of the Estate if Will is Invalid

If the court does find the will is invalid (as it probably will), the beneficiaries will take under the intestacy laws of Arkansas.

Alice

Because Father died with descendants, Alice as wife takes nothing under the intestacy laws. However, Alice is entitled to her right to dower. The amount of property one receives in dower or curtesy depends on whether decedent dies with descendants. Here, Father did die with descendants; therefore Alice takes a life estate in 1/3 of the real property in the estate and 1/3 in fee simple of the personal property. This is in addition to any homestead and personal property exemptions Alice may be entitled to.

Children

Because Father adopted Brad, Brad is treated just as the other children for the purposes of intestacy laws. After expenses and the dower share has been paid, the remainder of the estate (the inheritable estate) is divided among Father's descendants. In Arkansas, descendants take per capita with representation, meaning that the inheritable estate is divided into as many shares as there are descendants at the first level down from the decedent with living descendants. Here, the first level with living descendants are Father's children. Father had 3 children, so the inheritable estate is divided into three equal shares. Because Brad predeceased Father, his share is passed to his children, Carol and David–who each take an equal share of Brad's share. Because Eve and Frank are living they each take their share. Eve's children George, Gene and Gary take nothing.

Disposition of Estate if Will is Valid

Even if the will is upheld, Frank could still receive a portion of Father's estate under the pretermited child statute. In Arkansas, if a parent fails to provide for his child in his will without explicitly stated that it was his intent to do so, the law presumes that the parent inadvertently omitted the devise. In order to remedy this omission, the law allows the pretermited child to take the portion

of the estate he would have received had the parent died intestate. This portion is outlined in the analysis above. Here, Frank is not mentioned in the will and Father does not state a specific reason for failing to include him, as he does regarding his omission of Brad. Therefore, Frank would take under the pretermited child statute.

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2 Pages
EQUITY AND DOMESTIC RELATIONS

Wife asks you to represent her in a divorce action which she wants to pursue against Husband. Wife presents the following facts.

A. Husband and Wife were married in 1990. Wife is 10 years older than Husband and had been married once before her 1990 marriage to Husband.

B. Wife received the house in which she and Husband have lived throughout their marriage in her first divorce property settlement along with $200,000 in cash.

C. Husband is a successful attorney making on average $150,000 per year. Wife is also a lawyer, but has not practiced since her 1990 marriage to Husband. Husband and Wife have accumulated $500,000 in a stock account during their 13 years of marriage.

D. Husband and Wife have one child, a boy, who is ten years old.

E. Wife states that the only reason she wants a divorce is that she no longer loves Husband. Wife plans to go back to work as a practicing lawyer.

Wife asks that you prepare a memorandum discussing the following questions Wife has concerning her divorce action.

A. Does wife have grounds for a divorce action? If so, what are the grounds? If not, how can Wife obtain a divorce?

B. How will Husband and Wife's property be divided? Who will get: The house?; The $200,000 in cash?; and, The $500,000 in the stock account?

C. Will Wife receive alimony? What factors will a court consider in its decision whether to award alimony?

D. Will Wife receive child support? What factors will a court consider in its decision to award child support?

E. What factors will a court consider if both Husband and Wife seek legal and physical custody of the child?

Write a memorandum to Wife advising her of the probable answers to Wife's questions, based upon the applicable facts and law.

ARKANSAS ESSAY
ANSWER
EQUITY AND DOMESTIC RELATIONS
July, 2003

To: Wife

From: Applicant

Re: Wife v. Husband

I have prepared the following memo in answer to the questions that you posed in our meeting the other day. Please let me know if you have any additional questions or concerns.

Grounds for Divorce

There are no immediate grounds for divorce in your situation. In Arkansas, one can only obtain an immediate divorce in the following instances: (1) Adultery, (2) Habitual Drunkenness, Cruelty, and General Indignities, (3) Conviction of a Felony, (4) Where one spouse has been committed for mental infirmity. None of the above grounds apply to your situation because you stated that your reason for seeking a divorce is that you don't love your husband anymore. If there are any other reasons that might fit in the above categories, please let me know and we can discuss this issue further. However, at this time, I must advise you that you must seek a "no fault" divorce.

In Arkansas, a spouse may be granted a no fault divorce by proving 18 months separation without sexual relations. Under this theory, the only proof that will need to be shown is that you or your husband have lived in Arkansas for a least 60 days and have remained separated for the entire 18 month period. Although you must wait 18 months to obtain your divorce, that does not mean that you have to sit around and do nothing. During the interim we can begin devising a property settlement and working out issues such as child support and child custody.

Property Division

Arkansas follows the equitable distribution method of property division. Under this plan, each spouse is entitled to keep what is known as separate property and the marital property is divided on an equitable basis. Separate property is anything that one spouse owned prior to the marriage. Here, you stated that you owned the house that you and your husband lived in prior to marriage. Therefore, you will be able to keep the house because it will be deemed separate property. The $200,000 cash that you brought into the marriage would also be considered separate property. However, you should know that you could have difficulty taking the entire amount of this sum if it has been commingled or mixed in with your marital property. In other words, if the $200,000 has been kept in a bank account with both you and your husband's name on it, there is a possibility that a court would determine that amount to have been translated into marital property.

The $500,000 stock account will be considered marital property because it was acquired during marriage. This amount will be subject to equitable distribution. In Arkansas, there is a presumption that each spouse will get 50% of the marital property unless equity requires otherwise.

In making a property distribution, a court will evaluate things such as each spouse's ability to earn income, sources of income, debts, responsibilities and the like. There is no need for you to worry that you will get less in the property settlement because you are filing for divorce. In Arkansas, property division is not made on fault basis.

Alimony

Alimony is money awarded to one spouse that allows a continued income stream for each spouse to maintain their standard of living as best as possible after the divorce. The factors that a court will consider are the needs of the requesting spouse and the other spouse's ability to pay. The purpose of alimony is to keep a financially dependant spouse from becoming a charge of the state. As with property distribution, alimony is not awarded on a fault basis.

Courts in Arkansas have awarded less alimony in recent years. This is mostly because couples now have more marital property that can be divided. There are different types of alimony that can be used for different reasons. [periodic, temporary, lump sum reimbursement]. It is not likely that a court would award you periodic alimony payments.

Although you have not worked in several years, you stated that you want to go back to work. Since you have the professional skills to be able to support yourself, such an award is probably not appropriate. However, we may be able to convince a court to order your husband to make temporary alimony payments until you can get back on your feet. Here, your husband has a steady source of income and would be able to pay temporary alimony payments until you were able to get back into the workforce.

Child Support

Assuming that you are granted custody of your ten year old son, you will be awarded child support. In Arkansas, both parents have an equal duty to support their children. Therefore, the noncustodial parent must make payments to the custodial parent for support of the child. In awarding child support a court will look at factors such as the specific needs of the child and the parents ability to pay. However, child support is most often set by the child support statute in Arkansas. Under this chart, a custodial parent is awarded up to 15% of the noncustodial spouse's income in the case of one child and 21% for two children.

Child Custody

If you and your husband both seek custody of your son, the court will look to the best interests of the child in making its decision. Under this test, a court will consider a number of factors such as the child's relationship with each of the parents, each parent's sincerity in wanting custody, the child's emotional stability, the parent's moral fitness, etc... Arkansas law states that in determining an award of child custody, no consideration will be given to the age or sex of the child. Therefore, there is no longer a presumption that a young child should be placed with his mother. If the court decides that both parents are equally fit, it will award custody to the primary caregiver. The primary caregiver is the parent who has the most interaction with the child on a daily basis. From what you told me, it looks as though you have acted as your son's primary caregiver since you have not been the working parent.

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3 Pages
PROPERTY

I. Betty Brown, a widow, bought 30 acres of land in Benton County in 1987. Betty had one son, Billy. Ten years later, in 1997, Betty conveyed an interest in that property to Billy who was then 22 years old. The conveyance included language indicating that there was a right of survivorship.

Betty's neighbor to the west is Jim Green. There is a small triangular strip that abuts the northwest corner of both the Green and Brown properties. It is flat and grassy.

Betty planted wild flowers on the strip in 1989. In 1999 she held a flea market on the strip. She has mowed and bush hogged the strip 3-4 times since 1987.

Jim Green mowed the property numerous times prior to Betty buying her property in 1987. In 1980, Green had the property leveled and operated a mobile home business on it for 6 years. He also stored some personal property on it from 1981 - 1988. From 1987 through 1991, Green allowed the Church of "What's Happening Now" to locate a sign on the disputed tract.

In 1999, Green entered into a billboard contract with a company and erected a sign on the strip. The sign was located very near where the old church sign had been located. He received $2000 from the company. Betty and Billy objected and asserted that they owned the property. A 1999 survey showed that the property was part of the land that Betty had purchased in 1987. Green ignored Betty and Billy and mowed the property and stored his old rusty tractors on it.

Betty comes to you for help. She wants to get rid of the billboard and wants Green to stop mowing her wildflowers.

A. Discuss the type of ownership Betty and Billy have in the 30 acres.

B. Explain what rights, if any, Betty and Billy have in the strip of property.

C. What action should Betty and Billy take, if any?

D. Does Green have any defense to any actions brought by Betty? If so, explain in detail, applying the facts to the applicable law.

II. Sam Black and his brother Bob did not get along. Sam is married to Mary. Mary and Sam live in a house on some property that adjoins Bob's land. Their land had originally been owned by the Black grandfather and they bought it from him in 1976. Mary and Sam built a pond on the property and had a vegetable garden beginning in 1980. They erected a fence in 1982 between their property and Bob's land.

In 1999, Bob had a survey of the property done and discovered that the fence, the garden, and the entire pond was really on his property. He told Mary and Sam that and tempers flared. Mary refused to give up her garden and the fence remained as it was.

One night in 2000 Bob donned his "camo" clothes and under cover of night tore down the fence. The next day, Mary and Sam bought a video camera. The next night they video taped Bob destroying their vegetable garden. Sam wrote Bob a letter the next day and advised him that he would shoot him if he came on his property again. Then, he and Mary installed a new fence.

Three weeks later Mary was sitting on the porch and noticed movement by the fence. She grabbed the video camera and filmed Bob tearing down the new fence.

Mary and Sam come to you for advice.

A. What action, if any, can they take? Explain your rationale.

B. To what relief, if any, are they entitled? Explain your rationale.

III. In 1996 Bobby Red conveyed a deed for timber on his property to We Love Trees. The deed was recorded. In 1997 Red conveyed a warranty deed for the same property upon which the trees stood to Missionary Baptist Church. That deed was also recorded.

The owner of We Love Trees comes to see you and asks for advice. He has seen some construction crews out at the site and some of the bigger trees that he has not yet harvested have markers on them.

A. Which of the parties has the right to the timber on the property and why?

B. What rights to the property does the Church have? Explain your rationale.

C. What action, if any, should your client take? Explain your rationale.

ARKANSAS ESSAY
ANSWER
PROPERTY
July, 2003

I.

A. Betty and Billy have a joint tenancy with a right of survivorship, because the facts state Betty conveyed an interest in the 30 acres with a "right of survivorship." Under Arkansas law, this is sufficient to create a joint tenancy because Arkansas does not require the untity of title to create such an interest. Thus, the survivor of Billy or Betty will take the 30 acres in fee simple upon the first to die.

B. Their rights will depend on whether Jim has acquired title to the strip by adverse possession. Under this doctrine, Jim will require title if his use of the strip was open and notorious, hostile to the true owners, and continuous throughout the required seven year statutory period. It appears Jim may be able to meet this standard. He continuously used the disputed strip from 1981-1988 to store personal property, which alone meets the seven year statutory period. His other uses included a mobile home business from 1980 to 1985 (i.e. for six years) and the rental of a sign from 1987-1991. This establishes a continuous hostile use for 11 years. It does not matter that Betty bought the property in 1987, which may have been in the middle of his adverse use, because periods of adverse possession are enforceable against new owners. However, Jim did not bring an action to recover in 1991, where his rights would likely have been established. From the period of 1991-1999, it is not clear what if any use he made of the property. If he abandoned the property during this time, the seven year clock will restart. If Jim cannot establish adverse possession, they have fee simple ownership in the property.

C. Assuming Betty and Billy own the disputed land, they should bring an action to eject Jim as a trespasser to their land. If successful, they should be able to recover the fair rental value for his use of the land as a trespasser, which would include the $2,000 received from the sign rental. Their claim should also request an injunction barring further trespass.

D. Jim, as discussed above, could bring an action to quiet title by adverse possession.

Jim can also bring a number of equitable defenses to the action by Betty and Billy. Jim could assert laches, because Betty and Billy waited until after he built the sign on his property in 1999 to assert any claim. Alternatively, the court could allow Jim to recoup his cost for constructing the 1999 sign. Jim could also argue implied consent, because of his use of the property from 1987-1999, without objection. However, this is unlikely because Billy and Betty did not know they owned the property in 1999, and implied consent may destroy his claim for adverse possession.

II.

A. They should take action to quiet title by adverse possession. They should meet the requirements because they have continuously, and hostile to Bob's interest in the disputed real property, used the disputed land for at least 17 years (whereas the minimum time is seven years). The building of the fence in 1987 and the pond and garden in 1980 was open and notorious, hostile to Bob, and continuous from at least 1982-1999.

They should also sue Bob for trespass and damages caused to their property, and request an injunction from further trespass.

B. The court should quiet title in their name and award them damages for Bob's trespass. Also, the court is likely to issue the injunction, because of Bob's continued trespass and likelihood of causing further harm to the property.

III.

A. We Love Trees has rights to the trees. Bobby's conveyance to We Love Trees was properly recorded before his transfer to Church. Thus, We Love Trees has the right to enter and harvest the timber on the land.

B. The church as a fee simple absolute interest and may use the property accordingly; however, its rights are subject to the interest held by We Love Trees. If the church wishes to remove timber to make use of the land, it must notify We Love Trees and either turn over the profits from a reasonable sale of the removed timber or allow We Love Trees to remove the timber. Church cannot argue its interest is superior to We Love Trees as a bona-fide purchaser, because Church had constructive notice via the recording. Church may have an action against Bobby if the conveyance to We Love Trees violated the warranty deed.

C. On a practical level, the Church may be unaware of We Love Tree's interest. Thus, We Love Trees, should contact the Church to try and work out the issue amicably. If this is not possible, We Love Trees should being an action to enjoin the Church from removing the trees or to order the Church to harvest the trees, sell the trees in a commercially reasonable manner, and turn the proceeds over to We Love Trees. If We Love Trees does not take immediate action and allows the Church to remove the trees, the court could bar any recovery on the grounds of laches.

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1 Page
CRIMINAL LAW AND PROCEDURE

Larry Larcen was charged with murder by criminal information on January 15, 1999. The law in 1999 required that a person convicted of murder was eligible for parole after serving one fourth (1/4) of the sentence. The case was set for trial June 10, 2000. Larcen did not request any continuances from the date of his charge to the date of his trial. Larcen was convicted of murder by a jury and sentenced to 40 years in prison. At the time of Larcen's conviction, on June 10, 2000, the legislature had passed a law that required a person convicted of murder be eligible for parole after serving one half (1/2) of the sentence. At the conclusion of sentencing, Larcen's lawyer moved to dismiss Larcen's conviction due to a violation of Larcen's right to a speedy trial. The speedy trial rule required that a person charged with a crime be tried within one year after charges are filed.

You have been hired to appeal Larcen's case.

Identify the issues for appeal and state the relevant law.

ARKANSAS ESSAY
ANSWER
CRIMINAL LAW AND PROCEDURE
July, 2003

On appeal, potential issues in Defendant's case involve the violation of defendant's right to a speedy trial, the potential ex post facto violation of the change in parole eligibility, and a potential ineffective assistance of counsel claim.

I. Speedy Trial

The right to a speedy trial is guaranteed under the Fifth Amendment of the United States Constitution, which has been incorporated through the Fourteenth Amendment to apply to the states. The United States Supreme Court has declared no specific time limit by which the case must be tried to avoid a speedy trial claim but has held times in excess of one year to be constitutional. Arkansas allows greater protection for defendants than is required by the Constitution in that sets a specific time of one year for the person to be tried after charges are filed. If charges are not filed within that time, charges against a defendant musts be dismissed, regardless of how strong of a case that prosecutors have against a defendant.

The time allowed for speedy trials is tolled for all periods for which a defendant asks for continuances, for which a defendant is unavailable for trial because of illness, escape, or flight, for which a defendant waives his right to speedy trial, and for any other reason for which it is defendant's fault for not holding the trial within one year. Prosecutors can request additional time for which to bring a defendant to trial, but Arkansas courts are extremely reluctant to grant prosecutors any additional time.

Here, Defendant appears to have a valid basis for claiming on appeal a speedy trial violation. Defendant did not request any continuances from the date of his charge to the date of his trial. The facts do not indicate any other reason of Defendant's fault for tolling the speedy trial period. Thus, unless his attorney is deemed to have waived Defendant's right to speedy trial by not objecting to the violation of Defendant's right to speedy trial until the conclusion of sentencing, Defendant should be able to have his conviction reversed based on the Arkansas right to speedy trial.

II. Ex Post Facto

The ex post facto clause of the United States Constitution means that the law applicable at the time a defendant commits a crime is the applicable law for charging and punishing a criminal defendant. Thus, a defendant cannot be 1) charged with a subsequently enacted crime that did not exist when he did the act constituting the crime; 2) given a subsequently enacted greater punishment; or 3) required to conform to more difficult procedural rules.

Here, the law at the time Defendant committed the murder stated that a defendant convicted of murder was eligible for parole after serving one-fourth of his sentence. At the time of Defendant's

conviction, the legislature had increased the time that a defendant had to serve before being eligible for parole. Although this seems to be a greater punishment or an otherwise eligible situation for applying the ex post facto clause of the United States Constitution, the United States Supreme Court has held that changes in parole eligibility do not constitute a basis for applying the ex post facto clause of the Constitution because parole eligibility depends on factors independent of time served, including good behavior in prison, Defendant's acceptance of guilt and remorse for the crime he has committed, and other factors showing Defendant has "served his time" and has been reformed. Thus, although the legislature had passed a law requiring Defendant to spend more actual time in prison before being eligible for parole, this will not be a valid basis for appealing his conviction or requiring that he be subject to the old parole law.

III. Ineffective Assistance of Counsel

Criminal defendants on appeal almost always claim ineffective assistance of counsel, which is a violation of a defendant's Sixth Amendment right to counsel. Under the Sixth Amendment, a criminal defendant charged with an offense where imprisonment is imposed has the right to counsel. The United States Supreme Court has held that ineffective counsel violates Defendant's Sixth Amendment right to counsel where Defendant can show that the outcome of his criminal case would probably be different if not for the ineffective assistance. Such ineffective assistance could be found in a defense attorney's failure to interview alibi witnesses, failure to adequately investigate the case and all potential defenses, failure to make essential objections at trial, failing to seek severance when trying co-defendants together would likely prejudice the co-defendants, and other errors that substantially affected Defendant's right to a fair trial. However, the bar is high for a defendant claiming ineffective assistance of counsel in that an attorney's judgment will generally be deferred to if the attorney can articulate a basis for his decision to act or not to act in a certain way. Thus, ineffective assistance claims have failed where 1) an inexperienced attorney offered as the basis for his not waking up the more experienced but elderly co-chair attorney who slept through the majority of the trial that he decided not to wake the other attorney on the basis that maybe the jury would pity his client for having an attorney who slept through trial and 2) an attorney can proffer a strategic reason for not making proper objections, such as that he did not want to annoy the jury.

Here, the facts indicate that there may be a basis for claiming ineffective assistance of counsel if the speedy trial violation is deemed to be waived by Defendant's attorney failing to raise the issue until sentencing because raising such an objection would result in charges being dismissed against Defendant. Although the facts do not indicate other bases for ineffective assistance, and although the bar for claiming ineffective assistance is high, the trial record should be scrutinized for any bases for the claim and the issue should be raised on appeal.

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ARKANSAS BAR EXAMINATION
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2 Pages
TORTS

On June 1, 2003, Son was home from college after his sophomore year when his Dad bought a new BMW sports car. It had a five speed standard transmission and was very fast. Although Son had often used his Dad's old car with permission, Dad did not want Son driving this fast sports car because Son had received two speeding tickets. Dad hid the car keys. Son, being a bright college boy, found the keys, took the new car that day without Dad's knowledge, and gave his Girlfriend a ride.

As they were returning to Girlfriend's house, Son shifted to a lower gear, "popped the clutch," and gave it the gas in an effort to impress the Girlfriend. He lost control of the car and narrowly missed striking his Girlfriend's Mother who was working in a flower bed along the street. The car struck a telephone pole and Girlfriend was seriously injured. She had numerous cuts on her face and upper body and complained of abdominal pain. Mother was frightened at seeing the accident develop and observing her daughter bleeding profusely, but she was not physically injured.

Girlfriend was taken to the hospital where Doctor determined that she had injured one of her kidneys and he operated on her to remove it. He determined from talking to Girlfriend that she had been wearing her seatbelt loosely, not in the proper manner, and this caused the injury to her kidney.

For several weeks thereafter, Girlfriend complained of pain in her abdomen. An x-ray revealed there was a surgical clamp in her abdomen near where her kidney had been removed. The clamp was removed in further surgery from which Girlfriend spent a considerable amount of time recuperating.

Following the accident, Mother developed a severe depression. In January 2003, Mother commenced an action against Son alleging the foregoing facts to recover damages for her emotional distress caused by having witnessed her Daughter (Girlfriend) being injured in the wreck. Son moved to dismiss Mother's complaint on the ground that it failed to state a cause of action. The Court granted Son's motion. (1)

In March 2003, Girlfriend commenced an action against Dad and Doctor to recover damages for her injuries alleging the foregoing facts. Dad moved to dismiss the Complaint on the grounds that he could not be held liable for the negligence of Son in the operation of the car. The Court denied Dad's motion. (2)

At trial, Girlfriend has offered proof that a surgical clamp was found inside her abdomen, that the clamp was of the type used by the Doctor during the operation, and that she never had any surgery prior to the accident. Doctor has denied leaving the clamp inside of Girlfriend and has offered proof by the surgery nurses and the written records that all clamps were accounted for following the surgery. Girlfriend has asked the Court to instruct the jury that they can infer negligence on the part of the Doctor from the evidence presented.

Dad has offered proof that Girlfriend was not wearing the seatbelt properly at the time of the accident and that her kidney would not have been injured if she had been wearing the seatbelt properly. Dad has asked the Court to instruct the jury that they can consider her failure to wear the seatbelt properly on the issues of negligence and damages.

Were the numbered rulings of the Court correct? Why or why not?

Should the Court instruct the jury as requested by Girlfriend as to Doctor's negligence; and, as requested by Dad as to Girlfriend's failure to wear the seatbelt properly on the issues of negligence and damages? Why or why not?

ARKANSAS ESSAY
ANSWER
TORTS
July, 2003

I. Did the court properly grant Son's motion to dismiss Mother's complaint on the ground that it failed to state a cause of action?

Yes. At issue is whether a plaintiff in Arkansas may recover where her sole damages are emotional distress, where defendant did not intend to inflict emotional distress on the plaintiff.

A Plaintiff has three options for recovering for emotional distress. First, plaintiff may recover for emotional distress on a negligence claim if and only if there is an accompanying physical injury. Second, plaintiff may recover for emotional distress for the tort of Intentional Infliction of Emotional Distress ("IIED"). Third, plaintiff may generally recover for emotional distress for Negligent Infliction of Emotional Distress if and only if there is an accompanying physical injury. Because Arkansas does not recognize a claim for Negligent Infliction of Emotional Distress, the third option is not relevant here.

To recover for IIED, the plaintiff must prove that defendant acted extremely and outrageously, beyond all the bounds of the decency standards of society, intending to cause severe emotional distress, and that severe emotional distress resulted. Here, Mother cannot prove these elements because Son did not act intending to cause her severe emotional distress. He was driving negligently and unintentionally lost control of his car. Because son did not direct any actions toward Mother, her only hope would be to argue Son was liable to her as a bystander. Some jurisdictions allow a bystander to recover for intentional infliction of emotional distress where the bystander is a close family member of the victim (as the mother is here) and the actor was aware or reasonably should have been aware of the bystander's presence (not clear here whether son saw mother). Unfortunately for Mother, however, Arkansas does not allow bystanders to recover under a claim of IIED. Therefore, because mother's sole injuries are emotional distress and because mother cannot recover under IIED as a bystander, she has failed to state a claim upon which relief can be granted, and the Court correctly granted Son's motion to dismiss.

II Did the court properly deny Dad's motion to dismiss the complaint on grounds he could not be liable for the negligence of his Son?

No. The court should have granted Dad's motion to dismiss. At issue is whether a parent may be held liable for the negligence of his son or for his own negligence when son is not a minor and the parent has not entrusted the son with the car.

As a general rule, parents are not responsible for the negligence of their children. However, Arkansas does have a statute that states parents will be liable where their minor children negligently operate a motor vehicle, where the parent either signed the minor's drivers license application or

allowed the child to drive. Here, it appears that this statute would not apply because Son is most likely not a minor. The facts indicate he has completed his sophomore year of college, which means son is probably 19 or 20 years old. If however, son had finished high school and gone to college early, the statute will apply if son is still a minor.

Assuming son is not a minor and is rather the normal age of a college sophomore/soon to be junior, Father's only potential liability would be for negligent entrustment of his vehicle to another. Negligent entrustment is not limited to parent-child scenarios. Any time a person negligently allows another person to drive their car, the tort will apply. To establish negligence, plaintiff must prove a duty, breach of the duty, legal and proximate causation, and damages. Here, Father does have a duty to protect those in the foreseeable zone of danger from the harm that could result from allowing someone with an unsafe driving record or tendencies to drive his car. Here, Son would meet this description because he had received two speeding tickets, showing a tendency to break the traffic laws. However, there is no evidence that Father breached his duty. Father did not give Son permission to take his car; he did not "entrust" his son with the car. In addition, Father even took steps to prevent his son from taking the car by hiding the keys.

Assuming son is not a minor, there is no Arkansas statute or general negligence standard that Father has violated. The court improperly denied Dad's motion to dismiss.

III Should the Court instruct the jury that they can infer negligence on the part of the Doctor?

Yes. The jury should be instructed that they can infer negligence on the part of the doctor under the doctrine of Res Ipsa Loquiter. At issue is the burden of proof upon the plaintiff in a negligence action.

The doctrine of Res Ipsa Loquiter allows jury to presume negligence from circumstantial evidence, where no direct evidence of negligence exists. The elements are as follows: (1) the injury is the kind that does not normally occur without negligence, (2) the injury was more likely than not caused by the defendant, and (3) the injury was not caused by the plaintiff's own negligence. While Arkansas limits the use of res ipsa loquiter in some claims, Arkansas does allow the use of res ipsa loquiter in medical malpractice actions.

Here, the injury of a piece of surgical equipment being left in a patient's body is definitely the type of harm that does not normally occur without negligence. Leaving a "foreign object" in a patient after surgery is one of the clearest examples of the type of injury required for res ipsa loquiter. In addition, the injury was probably caused by Doctor because the clamp was of the type used by Doctor during the operation and Girlfriend had never had any surgery prior to the accident that shows an alternative source of the clamp. Finally, the injury was not caused by plaintiff's own negligence. While plaintiff may have contributed to her initial injury by failing to wear her seatbelt properly, she did not cause the Doctor to leave a foreign object behind after her surgery. Therefore, because plaintiff meets the elements of res ipsa loquiter and because Arkansas allows the use of res ipsa loquiter in medical malpractice cases, the court should instruct the jury that they may infer negligence on the part of the Doctor.

IV Should the court instruct the jury that they can consider her failure to wear the seatbelt properly on the issue of negligence and damages?

Yes. At issue is the proper treatment of Plaintiff's contributory negligence.

At common law, a plaintiff's negligence was a complete bar to recovery. However, modern jurisdictions, including Arkansas, have adopted comparative fault standard. Under Arkansas's modified comparative fault standard, Plaintiff can recover only if her negligence was less than the negligence of a sole defendant, or less than the liability of all defendants added together (the unit rule). Here, Plaintiff acted negligently. In order to recover despite her negligence, the jury must find that her liability is less than Dad and Doctor's negligence together. In addition, even if Plaintiff is allowed to recover, her damages should be reduced by the percentage of her own fault, as determined by the jury.