ARKANSAS BAR EXAMINATION
JULY, 2002

2 Pages
WILLS, ESTATES & TRUSTS

In 1993, Jim Smith paid $19.95 for a publication called "The American Legal Will Kit" (valid in all 50 jurisdictions) by mail order after hearing a commercial for it on his local radio station in Tuffnut, Hardrock County, Arkansas.

Using the kit as a guide, he then typed out his own will on his old Underwood upright typewriter. The dispositive section of that will provided:

I give, devise, and bequeath all my property, be it real, personal, or mixed, to the following persons in the following shares:

1. To my son, Rex Smith, $50,000.00;

2. To my son, King Smith, $50,000.00;

3. To my former business partner, Jack Spratt, my business building in Tuffnut, Arkansas **[you may presume that this is a proper description to pass title under a will];**

4. To my good friend, Jack "The Snake" Hardin, $150,000.00; and

5. All the rest, remainder, and residue of my estate and property to Sally Smith, my devoted wife.

The Will was properly executed and witnessed by Jim's neighbors, Bill Iron and Jake "The Snake" Hardin.

At the time he wrote the will, Jim had two living sons, Rex Smith, 51 years old and King Smith, 49 years old. He also had two grand children, Edward Smith and Frank Smith, children of his deceased son, Mark.

In 1996, Jim mortgaged his business building to Community First Bank to secure a note in the sum of $75,000.00, divorced Sally and married Laura.

When Jim died on December 30, 2001, he was survived by his son King, Mark's two children, and Rex's descendants. Rex had died a year earlier, survived at Jim's death by two daughters, Gloria and Helen, and three grand children, Irene, Jackson, and Kenneth, who are the children of Rex's third daughter, Lavern, who predeceased Rex. Jim was also survived by his new wife, Laura.

At his death, Jim's estate consisted of his home on 40 acres in rural Hardrock County, Arkansas, valued at $250,000.00, household furnishings, the business building valued at $40,000.00, and cash and negotiable securities worth $600,000.00.

Question Number 1: Jack Spratt comes to you and says "that old building ain't worth more than $40,000.00 and is subject to a mortgage of $65,000.00; shouldn't I just tell Jim's kids 'thanks but no thanks'? I can't make the payments on that thing." What is your advice to Jack?

Question Number 2: What are the interests in the estate of:

A. Sally, the divorced wife;

B. Laura, the new wife;

C. Mark's two children;

D. Rex's two living children, and his grand children, the children of his third child, Lavern; and,

E. Jake "The Snake" Hardin.

Succinctly explain your answers.

[You may assume that the document was sufficiently executed and witnessed to allow it to be admitted to probate as the will of Jim Smith. You should ignore any estate tax issues you see in the fact situation.]

ANSWER
ARKANSAS ESSAY
WILLS, ESTATES & TRUSTS
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Question 1: Jack Spratt's interest in the building.

Under Arkansas probate law, there is a provision which allows for exoneration of all property which is given to a person through a validly executed will. While there is a problem with the fact that a person who is taking under the will witnessed the will, it is still valid regarding the dispositive portions of the will except to the person who signed the will ... this will be discussed later.

Under the Exoneration statute, any property that is subject to a mortgage at the time of the disposition will be paid off, exonerated, when they take the property under the will. This means that the estate will pay off the $65,000.00 mortgage that is on the property that Jack was to receive. It is important to note that the portion of the estate that pays off such items is in reverse order from the residue first, then from general devises, then from specific devises proportionally. Therefore from this remainder of the estate that is left, the $65,000 will come out of it first. Judging on the size of the estate there should be enough money to handle this and not affect the others who will take from the remainder of the estate.

It is important to note that this depends on the mortgage that was taken out on the property by Jim. If the mortgage does not allow for exoneration, then the property would have to come to Jack subject to the mortgage, if at all. If this is the case, then Jack would want to exercise his option to waive his portion of the estate, his specific devise Jim left him. The process for this is simply to repudiate the portion of the estate that Jack was to receive and then the estate must keep the devise, and treat Jack as if he had predeceased Jim, and it goes to the remainder of the estate.

Question 2: Interests of separate parties.

A. Sally, the Divorced Wife

Sally will not take anything under the will. By operation of law, specifically a statute under the probate code that specifically does not allow for a former spouse to take under a valid will any property unless the testator specifically mentioned the former spouse and left a devise to the former spouse even though they are no longer married. Here, Sally, a divorced wife, cannot take any property unless there is specific mention in the devise that the testator wanted the former spouse to take under the will despite the fact that they are no longer married. Here there was no such language, therefore the portion of the will that

left the remainder to Sally is invalid by operation of law.

B. Laura, The new Wife

Laura would like for the probate court to insert her name where Sally's name was mentioned and receive the remainder of the estate, but she will not be that lucky. She will be treated as a Pretermitted spouse, or a spouse that was not mentioned in the will. It will be treated as a mistake by the testator, and she will only be allowed to take her portion that she would take if Jim had died intestate.

The portion of the estate that she is allowed to take is set out by statute. Because she was married to Jim for more than 3 years, she is able to take her dower interest in the estate, a life estate in 1/3 of the property that Jim was seized of during their marriage, and 1/3 of the personal property outright, because there are surviving children of the deceased. This will come out of the estate before others are allowed to take from the estate, so it will cause problems with the specific devises if there is a problem with the amount of money available for the devises. If it turns out that there will not be enough money to give out the devises to all of the persons named in the will, then each person will have to take a pro rata reduction in the amount of their devise.

Because she was married to Jim for more than 3 years, and Jim has descendants living, her share of the dower is a life estate in 1/3 of the property he owned, and 1/3 of the personal property that he owned at the time of his death. She also has a statutory right of homestead according to the probate code, and therefore I would check the statutes on this before giving any advice on what is available to anyone under this situation.

The fact that Jim has a new wife does not make it such that the will will be invalid, but it does add a lot of headache to the probate attorneys and the probate judge.

C. Mark's two children

Because Mark, and his descendants were not mentioned at all in the will, they will be allowed the statutory protection of Pretermitted children status, and take their share of what they would have taken had Jim died intestate. Arkansas has a modified Per sterpes distribution rule for intestate succession, therefore to figure out what portion of the estate that the children would receive, it is important to figure out what the intestate succession would be.

Here to figure this out you must count the number of children that Jim had, 3, and see whether or

not any are still living, which one still is. Therefore the estate to the children, after the dower and homestead to the wife is take out, would be split into 3 equal shares. Once this is figured out, then you must give the 1/3 portion that goes to Mark, one of the 3 children, equally to his descendants, therefore splitting the 1/3 into 1/6 of the heritable estate, to Mark's two children. Whatever this figure is, the two children will receive it.

D. Rex's 2 living children and Grandchildren of his 3rd child.

Here, because of the operation of the Anti-Lapse statute in the Arkansas code, the portion of the estate that Rex would have received under the will will pass to his descendants in the same manner as if he had died intestate. Therefore, the $50,000 devise would be split into 3 parts. 1/3 will go to Gloria, 1/3 to Hellen, and other 1/3 will be split equally between 3 children of Rex's third child Lavern, therefore they each get 1/9th of the $50,000.

Here because there was a specific mention of Rex in the will, the Children will not take the same portion they would have received intestate as Mark's children would, but instead they must take a modified per sterpes portion of the estate.

E. Jake "the Snake" Hardin

Mr. Hardin is going to be out of luck in this Probate matter. Under Arkansas law, any person who is to take under a valid will cannot be a person who witnesses the execution of the will. While they may be present, if they sign as a witness as Mr. Hardin did, their portion of the estate that would have been devised to them is invalid, and they will not take under the will.

Therefore Mr. Hardin will take nothing under the will.

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TORTS

On Monday, March 1, 2002, Betty Smith meets with you at your law office in Smalltown, Arkansas. She tells you she wants to hire you to sue everyone you can on her behalf. She says that on January 1, 2001, she was in the Stop and Go, the local convenience store. She bought some beer from the Manager, Jim Jones. While still inside the store, she slipped in some spilled milk, fell on the floor, and landed on her rear end. She was able to drive herself to her doctor. She has incurred $3,000.00 in medical bills and missed work on a few occasions to go to the doctor. Smith has written Stop and Go asking it to pay, but never received a response to her letter.

Three friends have told her that Jones has told them that Smith was drunk when she was in the Stop and Go and that Smith was not hurt when she left. Jones further said to them that Smith is trying to "bankrupt" his store. Jones is an elder in the local Baptist church and an active Elks Club member.

1. Analyze what possible cause(s) of action Smith might have against Stop and Go.
2. Analyze what possible defense(s) Stop and Go might raise.
3. Analyze what possible cause(s) of action Smith might have against Jones.
4. Analyze what possible defense(s) Jones might raise.

ANSWER
ARKANSAS ESSAY
TORTS
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1. Smith v. Stop and Go

Negligence. Smith has a possible negligence action against Stop and Go. As an initial point, it should be noted that the statute of limitations has not run on this claim. The limit for negligence is typically three years, and it has just been over one year since the accident in question occurred. To prevail in a negligence action, the plaintiff must prove that the defendant had a duty of care to her, that the defendant breached the duty of care, that the defendant's breach of that duty was both a cause-in-fact and proximate cause of her injury, and that she was in fact injured.

Duty of Care. One has a duty of care to everyone within the foreseeable zone of danger. As Judge Learned Hand explained, where the burden of preventing the risk is less than the probability of harm occurring multiplied by the amount of potential harm, one's duty of care exists. Here, it is clear that Stop and Go had a duty of care to Smith. She was a customer in its store and was therefore within the zone of danger when milk is left on the floor.

The next step is to determine exactly what Stop and Go's duty of care was. A business invitee is one who enters another's property for the commercial benefit of the owner of the property. The duty of care owed to an invitee is that the owner must use reasonable care in notifying the invitee of, or making safe from, dangerous conditions that the invitee is unlikely to discover and that the owner knows or should know of. Here, Smith was in the store for the commercial benefit of Stop and Go; therefore, she is a business invitee and Stop and Go had the requisite duty.

Breach of Duty. Whether a defendant has breached a duty of care to the plaintiff is usually a question for the fact-finder. In many jurisdictions, but not Arkansas, a plaintiff can apply the doctrine of res ipsa loquitur (i.e., that an injury by defendant usually does not occur in the absence of negligence, that the item was in the defendant's exclusive control, and the injury was not caused by the plaintiff) in slip and fall cases. Therefore, Smith will bear the burden of proving by a preponderance of the evidence that Stop and Go breached its duty. Primarily, she should argue that Stop and Go's employee should have examined the store periodically for items in the floor. It might be possible to discover whether Stop and Go had a written policy requiring their employees to check the store periodically.

Causation.

Cause-in-Fact. The plaintiff must prove that her injuries would not have occurred but for the defendant's negligence. Here, if Smith can prove that she did in fact slip and then immediately receive care at the local hospital for those injuries, she should not have a difficult time proving cause-in-fact.

Proximate Cause. Proximate cause goes to whether the injury was too far removed in time or geographic location from the alleged negligent act and whether they injury was a foreseeable result of the alleged act. Here, Smith's injury occurred at the same location where the milk was left on the floor and it is a foreseeable result that a customer might slip on spilled milk. Therefore, Smith can prove proximate cause.

Injury. Smith should not have difficulty proving her injuries. She drove herself to the hospital after she fell. She has $3,000 in medical bills and she has missed work, most likely resulting in lost income. Clearly, she has incurred injuries.

If Smith proceeds with the lawsuit, she should ask for compensatory damages. (It is unlikely that punitive damages would be available for the slip and fall since there is no evidence that the spilled milk was anything other than negligence.) Compensatory damages includes both special and general damages. These damages include her $3,000 in medical bills, her lost income due to the doctor visits, her pain and suffering, her future medical bills, and loss of consortium that the accident may have caused, if she is married.

As a final point, it should be noted that even if Stop and Go, as a company, was not negligent, it is vicariously liable for the negligent acts of its employee (Jones) committed in the course of his employment through the doctrine of respondeat superior.

2. Stop and Go Defenses

Arkansas is a comparative negligence jurisdiction, which means that a plaintiff can recover if the defendant is more than 50% at fault for the plaintiff's injuries. Here, Stop and Go might argue that Smith was more than 50% at fault for her injuries because she should have been paying more attention. This argument might be especially effective if Smith was indeed drunk when she came into the store.

Stop and Go might also argue that the milk had recently been spilled; therefore, it had not breached its duty to Smith, because its employees did regularly check the floors for liquids and other items. As discussed above, it would be helpful if they had a written policy and/or its employees kept a chart showing

when they checked the floors.

3. Smith v. Jones

Negligence. Smith might first have a cause of action against Jones for negligence. She could argue that Jones should have examined the store's floors more frequently. In essence, the negligence claim against Jones would follow the same path that it would against Stop and Go, except for a few minor variations. The primary variation would probably be that because Jones was only the manager, not the owner of the Stop and Go, Smith is not an invitee to Jones. In any event, Jones would still be required to exercise the amount of reasonable care that an ordinarily prudent person to prevent foreseeable risks. Here, leaving milk on the floor is a foreseeable risk.

The changes are that Jones is not wealthy or insured for a great deal of money. Therefore, he might ultimately be dropped from the lawsuit. Nevertheless, he should be included in Smith's lawsuit.

Defamation. Under the common law, a cause of defamation exists where a false statement is injurious to the plaintiff, of and concerning the plaintiff, which is published and which causes damage to the plaintiff. The united States Supreme Court has modified the requirements for defamation, but only primarily with regard to public figures. Here, Smith is clearly not a public figure; therefore, her claim would be evaluated under much of the common law doctrine, except for changes specifically adopted by Arkansas.

First, Smith must prove falsity (unlike at common law where falsity was presumed) of Jones's claims that she was drunk and that she is trying to "bankrupt" Stop and Go. The most likely witnesses for proving this are people she was with immediately before she went to the store and the medical personnel at the hospital. The "bankrupt" claim might be more difficult to prove, because it goes to her intent.

Second, Jones' statements are clearly of and concerning Smith.

Third, Jones' statements may or may not be injurious to Smith. Under Arkansas law, the doctrine of presumed damages is no longer recognized. In other words, plaintiff's must prove special damages, which typically means pecuniary damages. The facts do not indicate that Smith has incurred any special damages.

Fourth, publishing involves telling someone else the falsehood. Hence, if Jones did in fact tell others that Smith was drunk and was trying to bankrupt his store, that would equal publication.

4. Smith Defenses

Negligence. Jones' defenses as to negligence will most likely be identical to the Stop and Go defenses discussed above.

Defamation. First, Jones is likely to focus on the truthfulness of the assertion that Smith was drunk. If so, this is an absolute defense to the claim of defamation. As to the claim that Smith is trying to bankrupt his store, Jones would need to find other evidence besides this single instance by Smith.

Second, and perhaps more importantly, the Arkansas Code should be consulted to see if the statute of limitations has run on claims for slander (i.e., verbal defamation). If so, Smith can assert this defense.

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PROPERTY

In 1990, Adam and Bart, both married men, purchased undivided one half interests in 40 acres of land on which they deer hunt. A creek bisects the property dividing the land into a 30 acre tract north of the creek and a 10 acre tract south of the creek. Carl owns property adjacent to Adam and Bart. Carl's property abuts the 10 acres south of the creek. When Adam and Bart purchased the 40 acres, Carl told them that he owned all the property up to the creek, including the 10 acres described in Adam and Bart's deed. Carl said he had always considered the property south of the creek his, had hunted it for 10 years before Adam and Bart bought the property, and had told Adam and Bart's predecessor in title that the property was his. This year, Adam and Bart had a falling out. Adam gave a quitclaim deed of his interest in the 40 acres to Dan. Dan has come to your office to have you explain exactly what he owns.

1. Explain what interest Bart has in the 40 acres.

2. Explain what interest Carl has in the 40 acres.

3. Explain what interest Dan has in the 40 acres.

ANSWER
ARKANSAS ESSAY
PROPERTY
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1. Bart's interest is the land was as a tenant in common with Adam. Any interest transferred to two people who are not married is presumed to be as a tenancy in common. The property is held together and both parties have a right to possession and a right to have the property partitioned if they so desire. In this case both Adam's and Bart's interest, who at this point is a tenant in common with Adam's transferee (Dan), are subject to their wives dower interest, since both were seized of this property during marriage and it is an estate of inheritance.

Therefore Dan owns an undivided 1/2 interest in the 40acres, subject to his wife's dower interest, and possibly subject to a claim by Carl, as discussed below.

2. Carl may have a claim on the 10 acres south of the creek through adverse possession.

If he can establish that his possession of the 10 acres was open and notorious to the public, with anyone able to see that he controlled the land, and that his possession had lasted more than 7 years, as it has here, he could make a claim of ownership over the 10 acres as an adverse possessor. He would have to establish his possession, in addition to being open for all to see and lasting from 1980 to the present, he must show that no other person had possession. His exclusive possession can be based on what the true owner did or didn't do. If the previous owner(s) of the 40 acres did nothing to establish control over the 10 acres, and allowed Carl to remain in possession, the 7 year continuous would be satisfied even before they took possession in 1990. In addition, Carl's chances of claiming an interest in the 10 acres is bolstered by the fact that as a neighbor with color of title to his own adjoining land, if he has paid taxes on his own land for 7 years and he has been adversely possessing, then he will be able to claim the 10 acres.

Also, if the area of the 40 acres and Carl's property is wild and unenclosed, he can obtain the land even without the color of title if he has paid the taxes for 15 or more years. But the payment of taxes would have to be on the record at the county courthouse for this to apply.

Either Bart's predecessor or Bart would have had to interrupted the possession of Carl by doing some act to restrict his entry of the ten acres before the seven years had run. If the adverse possession is clearly established, the court will quiet title in the land with respect to Carl. Whether he establishes the

possession was open, notorious, and continuously exclusive will be a matter for the court to decide. If granted, his adverse possession could reduce Bart's interest to 1/2 of the remaining 30 acres.

3. Dan, by taking under a quitclaim deed has only the (interest) rights that Adam had. Adam makes none of the warranties associated with a warranty or special warranty deed. Therefore, Dan would take a 1/2 undivided interest in the 40 acres (or 30 acres if Carl's claim of adverse possession is successful). He has a right to possession of the whole, with a right to partition the 40 (30) acres. But his right is also subject to the dower claims of Adam's wife. If however, he holds the land for 7 years without Adam's wife making a claim, this dower interest will be extinguished.

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1 Page
CRIMINAL LAW AND PROCEDURE

Responding to a report radioed from police headquarters that David Loser had violated a "no contact" domestic violence protective order and might be armed, Officer Ready found Loser at the home of Herman Hermit. As Ready drove into Hermit's driveway, both Loser and Hermit came outside the house. Ready performed a pat-down search on Loser. As other officers arrived at the scene, Ready asked them to take Loser and Hermit to the squad cars and interrogate them.

Ready then saw Lovely Lady, who appeared to be "under the influence," standing just inside the doorway of Hermit's house. Ready told Lady he wanted to talk with her. Without comment, Lady opened the door and stepped back. Interpreting her gestures as an invitation to come into the house, Ready stepped inside and immediately smelled a strong order of recently burned marijuana. Ready asked Lady, "where's the marijuana?" Lady then pulled out a tray that contained marijuana and related materials. Ready then asked Lady whether she lived in the residence. She replied, "no, but Hermit does and the marijuana is his."

Ready then went outside the house, found Hermit, read the Miranda rights to him and asked for a consent to search his home. Hermit signed the consent. Armed with the consent, officers entered the house and seized butts of smoked marijuana cigarettes, marijuana seeds, and a small amount of suspected methamphetamine. When Hermit reported later that additional methamphetamine was in the refrigerator the officers seized it also.

Hermit was charged with possession of methamphetamine and possession of marijuana. His attorney moved to suppress all the items recovered by the officers.

As the sitting trial court judge, how do you rule and why?

ANSWER
ARKANSAS ESSAY
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The Fourth Amendment of the U.S. Constitution prohibits the execution of illegal search & seizure. This is to protect individuals with a privacy right from the privacy invasion that occurs under a warrantless search and the seizure of evidence that results from that search. In order for Hermit to avail himself of that right, it must be determined if the search was indeed a warrantless search and if any exceptions would apply that would make the search lawful.

Hermit did indeed have a right to privacy from the unlawful search of his home. Officer Ready was responding to a violation of a domestic violence protective order and did not have a warrant to search Hermit's home. The order violation was against David Loser and not against Hermit. Ready was allowed to conduct a "pat and search" of Loser and of Hermit in order to determine if they posed any threat. The report that Officer Ready was responding to also mentioned that Loser was armed which gave him further justification for the pat-down search. Any evidence of marijuana or methamphetamine could legally have been seized by this type of search.

Ready could also have legally entered the premises if the owner of the property had given consent to do so. In this case, Hermit was the owner of the property and thus he was the only one who could give consent to the search. Officer Ready might have obtained Hermit's consent prior to his initial search if he had bothered to ascertain who Lovely Lady was and if she had a property interest in the home. Instead, Officer Ready implied consent to search the home by Lovely Lady's actions. Officer Ready told Lovely Lady he wished to speak with her but she never responded and merely made an attempt to re-enter the house. Because he was responding to a domestic disturbance call, Officer Ready was within his rights to enter the home to check on Lovely Lady's condition and to question her. The fact that she appeared "under the influence" reinforces that position. Once inside, however, Officer Ready must respect Hermit's privacy right and obtain his consent to search the premises. The facts tell us that Ready smelled a strong order of marijuana once inside the house. That doesn't excuse Officer Ready's actions but only reinforces the position that Ready had a reason to suspect illegal activity and should have sought Hermit's permission to search or obtained a warrant.

An exception to the right of privacy that Hermit enjoyed in this situation is the "plain view

exception." In this situation, Ready would be entitled to seize the marijuana. However, the facts state that Lovely Lady "pulled out a tray of marijuana" which leads to the conclusion that the marijuana was not in plain view. Further, Officer Ready himself had to ask Lovely Lady "where's the marijuana" which only proves the fact that the plain view exception would not apply in this case. Unfortunately, Officer Ready waited until this moment to ask Lovely Lady if this were her house. At this point it was too late because even if it were, Ready should have requested consent to conduct the search.

Ready tried to cure his procedural error by going outside and reading Hermit his rights. After reading those rights, Officer Ready then sought to obtain consent to search his home. Under Arkansas law, however, the consent is ineffective because it was granted after the fact of Officer Ready conducting the initial search. In order for Officer Ready to have arrested Hermit and Mirandized him, he must have had a reasonable suspicion that drug use was occurring on the premises. If he had sought Hermit's consent after immediately smelling the marijuana, he would have been justified. However, Ready proceeded with the search before consent and then arrested Hermit after his search bore fruit. Thus, the search and arrest were unjustified and illegal. The marijuana butts, the seeds, and the small amount of amphetamines should be excluded from evidence.

The methamphetamine that was discovered after Hermit's arrest presents a more difficult question. Hermit had been informed of his rights but still reported that additional methamphetamine was on his property. However, this evidence should be excluded as well. Just because a defendant is stupid does not deprive him of his rights to due process. This amphetamine was obtained after an admission by Hermit who thought he had been lawfully arrested. This was not the case. The whole justification for the arrest was Officer Ready's initial search of this home without Hermit's consent. Since that search fell into no exception provided by the law, any evidence seized based on that initial search should be excluded. Hermit should have never been arrested and the home should have not been searched. The "fruit of the poisonous tree" doctrine prohibits the introduction of the second methamphetamine evidence and it should be suppressed.

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2 Pages
EQUITY AND DOMESTIC RELATIONS

Megan Jones is the 4-year-old daughter of 20-year-old Mother Jones. The putative father of Megan Jones is 26-year-old John Smith. Mother Jones and John Smith were never married and legal paternity with respect to Megan has never been established. John Smith has always informally acknowledged that Megan was his daughter. The maternal grandmother of Megan is 40-year-old Grandma Jones.

Mother Jones left her mother's home at the age of 15 and took up with John Smith. At the age of 16, Mother Jones gave birth to Megan. Mother Jones and John Smith lived together for the first two years of Megan's life, during which time John Smith was the sole means of financial support for the family. There were reports of domestic disturbances between John Smith and Mother Jones. The police were called to their trailer for various disturbances on a few occasions, but no one was ever arrested or charged. John Smith left Mother Jones when he got fed up with her continuous use of illegal drugs and her unwillingness to get a job. When John Smith moved out, he wanted to take Megan with him, but Mother Jones threatened to ruin his life if he made any effort to take Megan. Since John Smith was an over the road truck driver, who could be away from home for several days at a time, he simply left Megan with his mother. Even though he was concerned that Mother Jones might use his support money to buy drugs, John Smith decided that he would give Mother Jones $50 a week for the support of his child. After separating from Mother Jones, John Smith did manage to visit with Megan at least once a month. Megan has always had a good relationship with her father.

After Mother Jones and John Smith separated, Mother Jones took up with a man named Michael Meth, and the couple have lived together ever since.

Approximately one year after separating from Mother Jones, John Smith got married to Mary Smith and the couple have had a stable marital relationship so far. John Smith is still an over the road truck driver, but his work schedule does allow him to be home on most weekends. Mr. Smith has sufficient income such that his wife does not have to work and she stays at home with their 3-month-old son.

A few weeks ago, the Pulaski County Sheriff's Department raided the home of Mother Jones and

Michael Meth and found an operational meth lab in the home. Mother Jones and Michael Meth were both arrested and each was charged with: possession and manufacture of a controlled substance (crystal meth) with intent to distribute; maintaining a drug premise; possession of drug paraphernalia; and, child endangerment with respect to the presence of Megan at the subject premises. After their arrest, the sheriff's department placed Megan with Grandma Jones until Mother Jones could get out of jail.

Due to the chemicals and processes involved in the manufacture of crystal meth, meth labs carry an extreme risk of fire, explosion, and environmental pollution/contamination.

Even before her daughter's latest trouble, Grandma Jones has kept Megan on several occasions when her daughter requested it. Megan has also had a good relationship with Grandma Jones.

In light of Mother Jones' arrest and pending charges, both John Smith and Grandma Jones are concerned about Megan remaining in the legal custody of her mother. Within two weeks of the mother's arrest, John Smith files a petition to establish paternity and for custody of Megan. Grandma Jones timely intervenes in John Smith's paternity action and she too seeks legal custody of Megan. For her part, Mother Jones wants to keep custody of Megan and she strongly opposes the respective requests for custody filed by both John Smith and Grandma Jones.

There are two parts to this question and you must answer both parts. Part A will count for 70% of your answer and Part B will count for 30% of your answer.

PART A [70%]: Assume that you are the attorney for John Smith. Assume further that the issue of paternity will not be contested. What is the best legal and factual argument that you can make in support of John Smith's request for custody?

PART B [30%]: Assume that you are the judge in this case and that you have properly concluded that Megan needs to be removed from her mother's custody. In a custody dispute between John Smith and Grandma Jones, which of these two adults will be awarded custody of Megan? State the legal and factual basis for your decision.

ANSWER
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(A) Once John Smith's paternity is established he is no longer the putative father but is the father, period. Mother Jones has custody of the child pursuant to an arrangement of convenience between Mother Jones and John Smith. No court ever issued a custody order. This is extremely important because had there been an order by the court John Smith would be required to prove that there was a material change in circumstances. And if he wanted to divest her of her parental rights he would be required to prove her unfit.

Instead, there has been no custody order entered. All John must do is prove that it is in the best interest of the child for John to have custody because it is an original custody matter.

The facts that weigh heavily on John's side are many. In regard to John's situation: He is home most weekends; Megan is under school age and could surely come with him on over the road trips. He doesn't condone the use of illicit drugs (he left Mother because she used drugs) and apparently doesn't use them. He has married and has a stable home in which he can support a stay at home mother for his kids. Most importantly - he has always maintained a good relationship with his daughter and has always supported her voluntarily.

In regard to Mother Jones the facts againsts her are many. She is a drug user and has been for years. She has not and does not have a job or anyway to support herself or Megan. She is living with a man out of wedlock, subjecting her daughter to an immoral life style. Although not convicted she is charged with a Class Y drug felony and other drug related felonies as well as child endangerment. She has allegedly put her child at risk of explosion, fire and chemical contamination. Even her mother, Grandma, doesn't want Megan in Mother's custody!

So there are the facts. The court must decide what the best interests of the child are. It has wide discretion and can exercise its equitable power to make its decision. By weighing the oposing facts and situations and taking into account the nature and quality of the child's relationship with each parent it can fashion an equitable solution.

Megan is only 4 years old. Used to there was a tender years presumption for the mother. That

no longer exists. Now, the court looks to all factors including who the primary caregiver of the child is. While Megan's primary caregiver is Mother, apparently that care is not adequate. The court still has sound discretionary power to award custody to the non-primary caregiver.

Although he doesn't have to prove Mother unfit (clear and convincing evidence required) because of the procedural posture of this particular case, i.e., original custody award, he probably could.

As the court has the power to balance the equities and determine the best interest of Megan, I believe that there is strong evidence for an award of custody to John. Especially in light of the fact that the award may be modified later upon a change of circumstances that show the best interest of Megan would be to be with her Mother.

(B) John Smith will be awarded custody. First, he is the biological father. Arkansas presumes that it is in the best interest of the child to be with her parent. Absent a showing that John Smith is unfit as a parent the grandmother cannot prevail. She cannot make that showing.

John Smith has at all times, and does now, treated Megan as his daughter. He has maintained contact with her and maintained support of her - voluntarily. He has a steady job and a stable home-life. He and his daughter have a good relationship. In light of all these facts and in light of the presumption in favor of the parent, custody must be awarded to John Smith.