

CIVIL PROCEDURE
Mr. Martin
December 10, 2007

Social security no. _____

FINAL EXAMINATION

This is an open book examination. You may use any materials which you have brought with you whether prepared by you or by others. Questions will be weighted in accordance with the amount of time suggested for each question. Question One is to be answered in blanks on this white examination paper. The remaining questions are to be answered in blue books.

Please write legibly, begin each question on a new page, and leave a margin on the left-hand side of the page.

Use only your social security number to identify your blue book and this examination paper. If you use more than one blue book, identify each one ("No. 1 of 2," "No. 2 of 2," etc.), make sure that your social security number is on each one, and insert all others into the first one. Turn in this examination paper along with your blue book or blue books.

The Federal Rules of Civil Procedure apply to all questions. You may assume, if relevant, that any American state has a longarm statute identical to that of Illinois which is printed at pages 723 and 725-6 of your casebook. You may also assume that the courts of any American state follow the Federal Rules of Civil Procedure.

ALL BLUE BOOKS MUST BE RETURNED AT THE END OF THE EXAMINATION.
LABEL ANY SCRAP BLUE BOOK WITH THE WORD "SCRAP."

QUESTION ONE
(suggested time: thirty minutes)

Read Rule 12, then read the fact pattern and answer the questions numbered 1 through 9 in the blanks provided on this examination paper. Each question may be answered in full with the one word, "Yes," or "No," followed by a citation to the pertinent section (and, if appropriate, subsection) of Rule 12. Example: "No-- Rule 12(a)(3)." You may attach explanations to your answers if you wish, but full credit will be given for a correct answer consisting only of the word "Yes" or the word "No," followed by a correct citation.

Hope and Dope, an impoverished elderly couple, sued their financially successful son Chester. Their complaint alleged (a) violation of the Fifth Commandment ("Honor thy father and thy mother"), and (b) breach of an oral agreement by Chester to support his parents in their old age.

Chester responded by filing a timely motion to dismiss the complaint for failure to state a claim on which relief can be granted. The judge agreed that the Fifth Commandment is not part of the common law of the jurisdiction, but ruled that the alleged breach of an oral agreement, if proven, stated a claim on which Hope and Dope could recover. Accordingly, the judge denied Chester's motion to dismiss.

1. Can Chester now move to dismiss for improper venue?

2. Can Chester now moved to dismiss for failure to join an indispensable party? (Assume the existence of an indispensable party).

3. Can Chester now move under Rule 12(e) for a more definite statement?

4. Can Chester include the defense of insufficiency of service of process in his answer?

5. Can Chester include the defense of failure to join an indispensable party in his answer? (Again, assume the existence of an indispensable party).

Assume for the purposes of questions numbered 6 through 9 that, instead of moving to dismiss the complaint, Chester answered in a timely manner denying all material allegations of the complaint.

6. Can Chester later move to dismiss for improper venue?

7. Can Chester later move to dismiss the complaint for failure to state a claim on which relief can be granted?

8. Can Chester three months later amend his answer to include the defense of insufficiency of service of process?

9. Can Chester later move to dismiss the case for lack of the Court's jurisdiction over the subject matter?
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QUESTION TWO
(suggested time: fifteen minutes)

Explain the differences between (1) jurisdiction in personam, (2) jurisdiction in rem, and (3) jurisdiction quasi in rem. Give an example of each.

QUESTION THREE
(suggested time: forty-five minutes)

Mary and John were living together without benefit of marriage in 1988 when Mary discovered that she was pregnant. They were married in January of 1989. In May of 1989 Mary gave birth to a son, Sonny. Soon after that Mary and John split. In 1990 Mary filed a complaint for divorce in the appropriate court. Service of the complaint was duly made upon John. However, John did not appear in connection with the divorce proceedings. A Judgment of Divorce was consequently awarded to Mary by default. The judgment contained a finding that "one child was born of the marriage, namely Sonny." Custody of Sonny was awarded to Mary. John was ordered to pay \$50 per week as child support. John was also ordered to maintain an existing \$50,000 life insurance policy payable upon his death in equal shares to Mary and to "my child or children."

Part A.

In 1992 Mary filed a Complaint for Modification seeking to increase John's child support obligation to \$100 per week. In response, John denied that he was the father of Sonny. John offered blood group evidence to support his denial. Mary moved for summary judgment in her favor on the issue of paternity. Her sole argument for summary judgment was that John was precluded from denying paternity by the 1990 Judgment for Divorce. How should the judge rule on Mary's motion for summary judgment? Why?

Part B.

Assume that the judge granted summary judgment to Mary and increased John's child support obligation to \$100 per week, regardless of your actual answer to Part A of this question. John did not appeal but, in retaliation, ceased altogether to make child support payments. Mary was obliged to seek support from the Aid to Families with Dependent Children program ("AFDC") which is administered by the Welfare Department. As a condition on receiving AFDC benefits, Mary was obliged to, and did, assign to the Welfare Department her right to collect child support from John. The Welfare Department sued John for his arrearages. John responded with the same denial of paternity and offer of proof. The Welfare Department sought summary judgment in its favor on the issue of paternity, asserting (as did Mary) that John was precluded from denying paternity by the 1990 Judgment for Divorce. John

argued that the Welfare Department could not assert preclusion against him because it was not a party to the divorce. How should the judge rule on the Welfare Department's motion for summary judgment? Why?

Part C.

In 1994 John was killed in an automobile accident. Mary sought payment of the \$50,000 life insurance policy from Old Faithful Life Insurance Company ("Old Faithful"). Old Faithful paid Mary her share of the policy proceeds, \$25,000, but denied the claim on behalf of Sonny on the grounds that Sonny was not John's child. Old Faithful insisted that its liability was limited to returning, to John's estate, 50% of the premiums paid by John. Mary sued Old Faithful as guardian ad litem for Sonny. She made a motion for summary judgment to which was attached the 1990 Judgment of Divorce. She asserted that Old Faithful was precluded from relitigating the issue of Sonny's paternity by the Judgment of Divorce. How should the judge rule on Mary's motion for summary judgment? Why?

Part D.

In 1996 Mark, another man with whom Mary had been sexually intimate, filed an action to establish that he was Sonny's father and seeking parental and visitation rights. This action named Mary and Sonny as defendants. Attached to Mark's complaint were certified results of DNA tests which, Mark claimed, established

that he was Sonny's father. Mary answered for herself and, as Sonny's guardian ad litem, for Sonny, denying that Mark was the father of Sonny. She filed a motion for summary judgment against Mark. In support of the motion for summary judgment she attached a certified copy of the 1990 Judgment for Divorce. She argued that the Judgment for Divorce conclusively established the paternity of Sonny and that Mark was therefore precluded from contesting this issue. How should the judge rule on Mary's motion for summary judgment? Why?

Part E.

Assume that the judge granted Mary's motion for summary judgment in Part D of this question, regardless of your actual answer to Part D, and Mark did not appeal. It is now 2007. Sonny is eighteen years old. Mark recently died, intestate (i.e. without a will), but wealthy. Mark never married, and left no children with the possible exception of Sonny. Sonny now seeks to be appointed as administrator of Mark's estate for the purpose of claiming it, on the basis that he is Mark's child and heir. In support of his application, Sonny submits to the Court the same DNA evidence that Mark attempted to use to establish paternity in Part D of this question. Sonny's application is opposed by distant cousins of Mark who will, in the absence of any child of Mark, inherit Mark's estate. The cousins make a motion for summary judgment accompanied by a certified copy of the summary judgment

rendered in Part D which, say the cousins, precludes Sonny from now claiming that Mark is his father. How should the judge rule on the cousins' motion for summary judgment? Why?

[NOTE: No knowledge of domestic relations law is required in order to answer this question. For preclusion purposes, you should treat the 1990 Judgment of Divorce as no different from any other judgment of a court].

QUESTION FOUR
(suggested time: forty-five minutes)

Borrowwatch Co. ("Borrowwatch"), a management consulting firm, first employed Graham Crocker ("Crocker") in 1991. Borrowwatch designs and installs management and operational skills systems which help businesses increase productivity. Borrowwatch maintains that these specially designed systems are confidential information and are Borrowwatch's exclusive property. Borrowwatch is a Delaware corporation with its principal office in Palm Beach County, Florida.

Crocker, who has been at all relevant times a citizen and resident of Missouri, was initially hired as a staff technician. Upon his first promotion, he was required to sign an employment agreement. The employment agreement prohibits Crocker from accepting employment with a competitor of Borrowwatch for two years after termination of his employment. The agreement also prohibits Crocker from using Borrowwatch's confidential information. It further provides that, upon termination of his employment, Crocker must return to Borrowwatch, at its principal office in Florida, all

documents and other information in his possession concerning Borrowwatch's business or belonging to Borrowwatch. Finally, the employment agreement contains the following language:

Employee acknowledges that any violation of this agreement may subject employee to liability for damages, and also to court enforcement of the specific terms of this agreement. Employee consents to be subject to the jurisdiction of the federal or state courts located in the state of Florida in any suit against employee by the company for violation of this agreement.

The last sentence of the foregoing term of the agreement is an example of a forum selection clause. There is not complete agreement in this country as to the validity of forum selection clauses. The modern trend is clearly to treat them as enforceable, and the United States Supreme Court has sustained a forum selection clause in an admiralty case (Carnival Cruise Lines, noted at casebook p. 835), citing the desirability of giving effect to the freely-bargained expectations of the parties. The older view is that parties should not be able, simply by making an agreement, to oust the jurisdiction of a court otherwise competent to adjudicate a dispute between them. Some American states still hold that forum selection clauses are unenforceable. One of these is Florida. The Florida Supreme Court reaffirmed that forum selection clauses are unenforceable in Florida in a 1987 case, McRae v. J.D./M.D., Inc., 511 So.2d 540.

The employment agreement also contained a term which provided that it (the agreement) should be governed in all respects by the

law of the state of Florida.

Crocker, who spoke fluent Spanish, spent most of his time working out of Borrowatch branch offices in Latin America. When in the United States his base of operations was at his home in Missouri. Two or three times a year he would be summoned to a meeting at Borrowatch's principal offices in Florida. He reported on his activities to a vice president in Florida, weekly, by mail or telephone. He sent travel expense vouchers to Florida where they were approved for reimbursement.

In May, 2007, in consequence of reorganization and downsizing at Borrowatch, Crocker was let go. He immediately contacted woman-owned MissManagement Resources ("MMR"), a competitor of Borrowatch based in California, and began work there in June of 2007 where he is performing work similar to that which he had performed at Borrowatch. Borrowatch believed that Crocker's new employment was in violation of the non-competition covenants in his employment agreement. Borrowatch also believed that Crocker was disclosing or using proprietary Borrowatch information in his employment with MMR. Borrowatch demanded that Crocker return, to its principal office in Florida, all of Borrowatch's documents and information that he had in his possession. When Crocker refused, Borrowatch filed suit against him in a Florida state court.

Crocker removed the case to federal court in Florida and moved to dismiss it for lack of personal jurisdiction. He argued that

the requirements of Florida's longarm statute had not been satisfied. Borrowwatch opposed the motion by contending that Crocker waived any jurisdictional objections that he may have had by consenting to Florida jurisdiction in the employment agreement.

The district court granted the motion to dismiss. The district court both refused to enforce the forum selection clause, and also found that the requirements of Florida's longarm statute were not satisfied. (As noted in your instructions, Florida's longarm statute is identical to that of Illinois which is printed at pp. 723 and 725-6 of your casebook).

Borrowwatch now appeals to the United States Court of Appeals for the Eleventh Circuit. What arguments will Borrowwatch make in the Court of Appeals?

QUESTION FIVE
(suggested time: forty-five minutes)

Federal courts observe a rule called the "final judgment rule" with respect to appeals. The final judgment rule provides that, with limited exceptions, no appeal may be taken to the circuit court of appeals until there has been a final judgment in the district court. Rulings and orders by the district court judge prior to final judgment (called "interlocutory orders") can, of course, be the subject of an appeal once the case has gone to final judgment, but cannot be appealed piecemeal before the final judgment is entered.

Part A.

The final judgment rule has been rigorously maintained by the United States Supreme Court and the circuit courts of appeal. Identify two reasons of policy why this rule is favored.

Part B.

Summary judgment I. When a district court grants summary judgment on all claims in a case, this is a final judgment which can be appealed. But what if summary judgment is denied, the case goes to trial, and the movant loses before the jury as well? Can the movant raise the denial of summary judgment as an issue on appeal? Generally, appellate courts will not review the denial of a motion for summary judgment after a trial on the merits. Why? Give two reasons.

Part C.

Summary judgment II. Consider a different scenario: where summary judgment is denied but the movant ultimately prevails on the merits. Can the movant, even after winning the case, appeal on the grounds that summary judgment should have been granted? Explain why the appellate court would ordinarily disfavor such an appeal, giving two reasons.

Part D.

Police raided an adult bookstore in Springfield, Mass., seizing 355 books alleged to be obscene. Pursuant to a state law, the District Attorney commenced a civil action against the

bookstore's owner seeking forfeiture of the books. The defendant denied that the books were obscene and moved for summary judgment on the grounds that the state statute was unconstitutional under relevant First Amendment decisions of the United States Supreme Court. The judge denied summary judgment, and the case went to a jury. The jury found the books not to be obscene. Judgment was entered for the defendant bookstore owner.

Why might the bookstore owner want to appeal the denial of summary judgment, even though the bookstore owner prevailed on the merits?

Part E.

In the case described in Part D, should the appellate court make an exception to the usual rule that denial of summary judgment is not appealable? Why or why not?

END OF EXAMINATION