

CONTRACTS

Midterm Examination
Santa Barbara College of Law
Fall 2001
Instructor: Craig Smith

Time Allotted - Two Hours

An answer should demonstrate your ability to analyze the facts presented by the question, to select the material from the immaterial facts, and to discern the points upon which the case turns. It should show your knowledge and understanding of the pertinent principles and theories of law, their relationship to each other, and their qualifications and limitations. It should evidence your ability to apply the law to the facts given, and to reason logically in a lawyer-like manner to a sound conclusion from the premises adopted. Try to demonstrate your proficiency in using and applying legal principles rather than a mere memory of them.

An answer containing only a statement of your conclusions will receive little credit. State fully the reasons that support them. All points should be thoroughly discussed. Although your answer should be complete, you should not volunteer information or discuss legal doctrines that are not necessary or pertinent to the solution of the problem.

Unless a question expressly asks for California law, it should be answered according to legal theories and principles of general application.

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QUESTION 1

Bert and Ernestine were newlyweds. It was the second marriage for each. One week after their marriage Bert, who had a history of heart problems, suffered a stroke and thereafter required round the clock nursing care. Unhappy being cared for by strangers in a rehabilitation center, Bert verbally promised to transfer certain real property (which is undisputedly his separate property) to Ernestine upon his death in exchange for her taking care of him at home for the duration of his illness. This verbal promise was overheard by a disinterested witness. In response to this promise, Ernestine immediately began to take care of Bert at home. Two weeks later, Bert told Ernestine that he had "changed his mind" about transferring the property to her.

However Ernestine continued to care for Bert at home and continually did so until he died exactly one year and one day after making the promise and without ever recovering from his illness.

The executor of Bert's estate, Bert's brother, is refusing to transfer the subject real property to Ernestine. The state where all this occurred has two laws on the books: Civil Code section 5132 states: "A married person shall support the person's spouse while they are living together." Civil Code section 5100 states that: "Husband and wife contract toward each other obligations of mutual respect, fidelity, and support."

Discuss fully whether or not Bert's promise to transfer the real property should be enforceable in an action by Ernestine.

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QUESTION 2

Moe is an independent service station operator. He purchases the gasoline which he sells from Stooze Oil Co. (Stooze) When Moe got an opportunity to purchase a second service station he asked Stooze if it could help him. He proposed to Stooze that if they would give him the down payment of \$30,000, in return he would agree to purchase the gasoline he needed from Stooze and only from Stooze for the next 10 years.

Moe told Stooze that he would need a competitive allowance for the length of the 10 year agreement to make his cash flow adequate to meet his payments on the new station. Stooze agreed to give Moe and additional 1.4 cents per gallon discount off the price of gas it sold to him.

Moe was aware that Stooze's standard form agreements had a boilerplate clause which allowed Stooze to terminate the discount at any time. Moe advised Stooze's authorized representative that he would not go ahead with the deal if Stooze could revoke the discount at any time, and demanded assurances that no such revocations would occur. Stooze's authorized representative gave him such an assurance.

One week later Moe telephoned Stooze's authorized representative to find out what was happening with the proposal he had made to Stooze. The representative informed Moe of Stooze's approval and told Moe that he had a check for him. Three days later, the representative delivered to Moe a manila folder containing the \$30,000 check and numerous contract documents. Included was the discount provision with the standard form permitting termination of it. The representative did not call this form to Moe's attention.

Once Moe completed the purchase of the second station, Stooze afforded him the benefit of the 1.4 cents per gallon discount and continued to do so for 13 months. Stooze then informed Moe by letter that it was forthwith terminating the discount.

Moe immediately filed a lawsuit for breach of contract.

- A. Is there a contract between Moe and Stooze?
- B. Assuming that there is a contract what are the terms of it?

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MODEL ANSWER TO QUESTION 1

Only two things could stop Ernestine from enforcing the promise: The preexisting duty rule and the statute of frauds. Let's address the less difficult of the obstacles first.

Enforcement of the promise to convey the land may be barred by the **statute of frauds**. The statute of frauds is a collective term that refers to the fact that certain types of contracts must be evidenced by a note or written memorandum signed by the party to be charged. Among such contracts are **promises not to be performed within the lifetime of the promisor, contracts not to be performed within one year from the making thereof, and promises to convey any interest in real property.**

Here, although actual performance took more than one year the terms of the contract could have been completely fulfilled in less than a year. (Bert's illness could have lasted less than a year.) Only when the terms of the contract expressly preclude a complete performance in less than a year does this provision of the statute of frauds apply. Enforcement will not be barred under this provision.

This is an oral promise to transfer real property. The enforceability of this promise depends upon compliance with the writing requirement of the statute of frauds. However, since Ernestine has completely performed her part of the bargain, many courts would hold that the promisor is **estopped** to assert the statute of frauds as a defense. To avoid injustice, the oral promise will be enforced. (Rest.2d § 139; Monarco v. LoGreco) Also, the promise to convey might arguably be one not to be performed within the lifetime of the promisor. However, a close examination of the facts reveals that the terms of the bargain were that Ernestine was to take care of Bert for the duration of his illness, not the rest of his life.

For these reasons, enforceability of the promise should not be barred by the statute of frauds.

A more formidable obstacle would be the **preexisting duty rule**.

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That rule states that doing that which one is already legally obligated to do is not consideration because one has not incurred detriment. The statutes in the jurisdiction make it clear that each spouse owes a duty of support to the other. Arguably, support is synonymous with caring for. Perhaps Ernestine will argue that personally caring for a spouse is not within the realm of "support." After all, she could have hired someone else to do it and still "supported" Bert. Also, many courts will find no violation of the preexisting duty rule where the performance rendered varies slightly from the performance the promisee was legally obligated to perform. This would be analogous to the "bonus" cases where an employees extra efforts are found to be supported by consideration.

The fact that Bert attempted to revoke the promise should not bar enforcement. The offer Bert made looked towards the formation of a **unilateral contract**. In other words he was bargaining for a completed performance, not a mere promise to perform. Once an offeree begins to perform in response to an offer that looks towards formation of a unilateral contract an **option contract** is formed. The offer becomes irrevocable for a reasonable period of time to allow the offeree the opportunity to complete performance. (Rest.2d § 45.) Once Ernestine began to perform the offer could not be withdrawn.

For the foregoing reasons Ernestine should be able to enforce the promise to convey the property.

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MODEL ANSWER TO QUESTION 2

A. Is there a contract between Moe and Stooge?

Yes. Moe's promise to buy his gas only from Stooge constituted legal **consideration**. This was not an **illusory promise** (a promise conditioned upon the whim of the promisor) but rather, by promising to buy gas only from Stooge, Moe was giving up his legal right to buy gas elsewhere. This is a classic "requirements" contract and constitutes legal consideration.

Moe's offer included a term that the discount not be subject to termination. Stooge's form, sent in confirmation, included a clause that permitted Stooge to unilaterally terminate the discount. At common law, this purported acceptance would run afoul of the **"mirror image rule"** and operate as a rejection and counteroffer. The mirror image rule states that a purported acceptance which varies from the terms of the offer in any way, no matter how trivial or insignificant, is ineffective as an acceptance. However, the contract was for goods (gasoline) and is subject to the more liberal provisions of the UCC. **UCC 2-207** provides that a definite and seasonable expression of acceptance operates as such notwithstanding the fact that the acceptance or a confirmation thereof, contains additional or different terms. Stooge's representative verbally accepted and the confirmation did not prevent the verbal acceptance from operating as such.

B. What are the terms of the contract?

The termination clause is not a term of the contract. Subdivision 2 of UCC 2-207 provides that additional or different terms are treated as proposals for addition to the contract. Between merchants they become part of the contract unless they materially alter it, notice of objection is timely given or the original offer limited acceptance to the original terms. "Merchants" are defined as those who deal regularly in goods of the kind or who hold themselves out as having special expertise. Both Moe and Stooge would surely qualify under this definition with respect to gasoline. One is a gas station operator and the other is a wholesaler of gasoline. Here the additional term materially altered the contract. A material alteration is one that results in surprise or hardship. That was the case here. Moe after being assured termination would not be part of the contract would have been surprised to find out that it was. Furthermore he would have trouble making his payments if he did not receive the discount, thus it worked a hardship on him.

Furthermore, Moe indicated that unless the termination clause were

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excluded there would be no offer. Thus acceptance was limited to the terms of the original offer. Even if the writings of the parties were not sufficient to establish a contract, the parties went ahead and began to perform. Hence, a contract was formed by conduct (UCC 2-204) and the terms of the contract were those terms upon which the writings of the parties agreed together with any gap filler provisions of the code. (UCC 2-207(3).) The termination clause would not be a term of the contract under this scenario.