

THESE GENERAL FACTS ARE GIVEN FOR USE IN QUESTIONS 1A -1C and 2:

Don Darby trains Thoroughbred racehorses. One of those horses is “SECRETARIAT, Jr.,” the winner of this year’s Generic County Derby. A hearing is set before the Kentucky Racing Commission (“Racing Commission”) (assume there are no problems with notice of the hearing). A post-race urine sample for SECRETARIAT, Jr., came back from the laboratory with positive tests results for an opiate.

An evidentiary hearing will be held under the rules and regulations of racing and the end result may be disqualification of the horse from the race, forfeiture of the purse money and a suspension of Don Darby’s racing license for “presence of a banned substance in a Thoroughbred racehorse.”

Don insists that he has never used a banned substance. It is his position that the test result is due to accidental contamination of the horse’s feed with poppyseeds.

The Racing Commission is an administrative body created pursuant to state statute. All matters set for hearing before the Commission are first referred to a Hearing Officer. The Hearing Officer sets the matter for an evidentiary hearing, rules on evidentiary and discovery matters, takes evidence and issues Proposed Findings of Fact and Conclusions of Law. A party aggrieved by the Proposed Findings of Fact and Conclusions of Law of the Hearing Officer may challenge them by filing objections with the Racing Commission. The Racing Commission is not bound by the Proposed Findings of Fact or Conclusions of Law of the Hearing Officer, but may adopt or reject them in whole or in part. The Racing Commission does not take new evidence, but rules based upon the evidentiary record established in hearings before the Hearing Officer. A party aggrieved by a ruling of the Racing Commission can file an appeal to the Generic County Circuit Court.

QUESTION 1A -1C:

For purposes of admitting evidence at the evidentiary hearing before the Hearing Officer, the statutes governing practice before the Racing Commission have adopted the most recent form of the Federal Rules of Evidence.

At the hearing, the Racing Stewards, who are members of the executive branch charged with enforcing the racing laws and regulations, plan to introduce the testimony of the State Veterinarian, Kevin Quack, who took the urine sample from SECRETARIAT, Jr., after the Generic County Derby.

Kevin is employed by the Racing Stewards of the Commonwealth of Kentucky to help enforce the racing laws in the Commonwealth. They also plan to introduce the testimony of Fran Forensic, the Chief Chemist at Private Laboratory, Inc., a privately owned testing laboratory that performs urine testing for racehorses under contract for the Commonwealth of Kentucky.

No issues exists as to the scientific accuracy or validity of the testing methodologies or results.

If allowed to testify, Kevin will testify that he personally took the sample from SECRETARIAT, Jr., immediately after the race on May 5, 2001. After taking the urine sample, he confirmed the horse's identity by looking at the unique number every horse has tattooed on the upper lip. He wrote down the horse's name, tattoo number, date and the race on a label and attached that label to the jar containing the urine sample. The jar was then sealed with a seal that would be broken if the jar was opened. He then placed the sample in a locked refrigerator in the test barn with other urine samples taken that day, as well as his lunch. Kevin has the only keys. At the end of the day, he took all urine samples from the refrigerator and had them shipped via UPS, overnight delivery, to

Private Laboratory, Inc.

If allowed to testify, Fran will testify that she received the jars at Private Laboratory, Inc. from the UPS delivery person. She noted the delivery on an “intake log” that includes the information contained on the labels of the jars, the time and date of delivery, the name of the delivery person and the name of the person receiving the samples at the laboratory. She took the delivery and accurately recorded the information on the “intake log.” The date of delivery was May 6, 2001. The information on the label was identical to what the Veterinarian testified he wrote on the jar containing SECRETARIAT, Jr.’s sample and the seal was unbroken. Fran will testify that before it was tested, the jar was stored in an unlocked refrigerator accessible to Fran and 3 laboratory assistants, but in a room locked as to all other people.

Fran will testify that standard procedure for testing urine samples is to remove the jar from the refrigerator and indicate on a “procedure form” the date of the test, the information from the label, whether the seal was intact, the date it was broken and the initials of the employee who broke the seal. In this case, Fran performed the testing and followed this procedure. The date of the test was May 12, 2001. The form indicates that the seal was intact and that the label was the same as the one received by the laboratory and contained the same information originally placed on the jar.

Fran will testify that she performed the testing in strict accordance with the manual that came with the equipment, laboratory procedure and all state rules and regulations. She will testify that the analysis indicated positive results for a small amount of an opiate. Finally, she will testify that after the testing, the jar was re-sealed and placed in a different refrigerator that was locked. She has the only keys. The original test results are then sealed in an envelope and locked in a filing cabinet. Fran has the only keys. The remaining unused sample in the re-sealed jar and the test results will be

brought to the hearing by Fran.

ANSWER EACH QUESTION IN 5 SENTENCES OR LESS.

Question 1A: For purposes of this question, you are the Hearing Officer and are called on to determine admissibility of testimony and documents. Assume that the Racing Stewards plan to call Fran and Kevin to testify, but not the UPS delivery person. Will you admit Fran's testimony on the results of the test? Explain why or why not.

Question 1B: For purposes of this question, you are the Hearing Officer and are called on to determine admissibility of testimony and documents. For purposes of this question, assume that the urine sample was not shipped via UPS, but was hand-delivered to Fran by Harry Helper, an assistant to Kevin, who is also employed by the Racing Stewards of the Commonwealth of Kentucky. After returning from the delivery, Harry filled out a required "Delivery Report" giving Kevin a written report of the delivery of the urine samples that includes all information contained on each label, the date and time of delivery, the names of the people making and receiving the delivery and whether the seals remained unbroken. The written "Delivery Report" contains the same information placed on the label by Kevin, indicates that the seal of the jar was unbroken throughout and that it was personally delivered by Harry to Fran on May 5, 2001 at 6:00 p.m. (Fran's "intake log" indicates the same thing).

The Racing Stewards will call Kevin and Fran to testify. Although Harry is available, the Racing Stewards do not plan to call Harry to testify. They want to introduce Harry's written "Delivery Report". Will you admit that written "Delivery Report?" Explain why or why not.

Question 1C: For purposes of this question, the facts are the same as in Question 1B, except you are not the Hearing Officer, but are a trial judge presiding over a criminal trial of Don Darby for violation of a criminal statute for the same offense. Would you admit Harry's written "Delivery Report" under these circumstances? Explain why or why not.

QUESTION 2:

The Racing Commission is made up of five members. A vote of three Racing Commissioners is required to adopt, reject or modify a Hearing Officer's Proposed Findings of Fact and Conclusions of Law. Three votes is required even in the event one or more Racing Commissioners is disqualified from acting.

The regulations provide that the Racing Commission can suspend the trainer's license for a period anywhere from one week to two years for administration of a banned substance, the horse is disqualified from the race and the runner-up is declared the winner by disqualification and receives a re-distribution of the purse money.

One of the Racing Commissioners was Betty Blueblood. Betty is the owner of the sire (father) of the horse that finished second behind SECRETARIAT, Jr., in the Generic County Derby. Betty does not own any interest in that racehorse and will not receive any of the purse money if SECRETARIAT, Jr., is disqualified. Most breeders of Thoroughbred horses believe that a sire's reputation is enhanced and he becomes more valuable if he produces the winner of the prestigious Generic County Derby, regardless of how that horse is declared the winner. Betty does not think this will be the case if the horse wins only because SECRETARIAT, Jr., is disqualified.

Peter Precedent is another of the Racing Commissioners. Peter has served previous terms on the Racing Commission and has been involved in ten prior cases involving administration of banned substances, including those where the "poppyseeds" explanation was given. In each of those cases, the Racing Commission ruled against the trainer. Peter invariably has voted for the maximum suspension of the trainer's license allowed by law, although the Racing Commission, acting through a majority vote, has given the maximum suspension only one time. As a result, Peter has the

reputation as being “tough on drugs” and “a hard-nosed” Racing Commissioner and his written Opinions in each of these cases indicates a strong anti-drug policy. Each of these prior decisions of the Racing Commission was upheld on appeal by the Circuit Court of Generic County.

Prior to the hearing before the Hearing Officer, Don’s attorney filed a Motion to Disqualify or for the recusal of Betty and Peter as Racing Commissioners deciding Don’s case. The Motion was based on the general right to a fair hearing and on newly-enacted statute as part of the Administrative Procedures Act governing practice before the Racing Commission, which provides:

“A Racing Commissioner shall not participate in any matter in which he or she has a financial interest that will affect his or her unbiased consideration of the matter before the Commission.”

This statute has never before been invoked before or interpreted by any court or state commission. The Racing Commission interpreted the above statute to require recusal only where the Commissioner has a “direct financial stake in the outcome,” which, they believe, means the Commissioner “will receive” money “immediately traceable” to the decision, such as where that Racing Commissioner owns another horse in the race.

In a unanimous decision, the Commission found that there was no evidence that Peter or Betty “would receive” money directly from the decision. Therefore, they were not disqualified and did not recuse.

Don Darby loses in a unanimous decision before the Racing Commission; SECRETARIAT, Jr., is to be disqualified; the purse money is to be re-distributed; and Don’s trainer’s license is to be suspended for one month for presence of a banned substance.

Assume that there are no other potential errors committed by the Hearing Officer or Racing Commissioners. You are the Judge in the Generic County Circuit Court. You must rule in an appeal

from the decision of the Racing Commission and the sole grounds for the appeal concern the failure of the Racing Commissioners to recuse or be disqualified pursuant to the statute or the right to a fair hearing. There is no statute in Kentucky setting forth specific standards of review of administrative agency decisions, but Kentucky courts generally defer to federal decisions on these issues.

IN TWENTY SENTENCES OR LESS, please give your opinion on the standard of review of the decision of the Racing Commission, tell how you will rule on the matter as to Peter and Betty, whether or not you would reverse the decision and explain the reasons for your decision.

QUESTION NO. 3

On Friday, January 13, 2001, Henry Beck, age 17, led police officer, Guy West, on a low speed chase which lasted for approximately eighteen miles and terminated at the home of Beck's parents in Warren County, Kentucky. West recognized Beck from prior encounters and was generally familiar with Beck's propensity for criminal activity. Beck smelled strongly of marijuana upon exiting the vehicle, and a pat down search revealed a small pipe, \$4,000 in cash, and a small caliber pistol on Beck's person.

Beck's mother and step-father, Charles Lockett, exited the home in order to investigate the disturbance. West explained the situation and requested permission to search Beck's living quarters (which he maintained in a bedroom accessible not only through the main hallway in the home, but also which had its own door to the outside from which Beck would routinely come and go). Beck strenuously objected to such a search; however, Lockett had "had a gut full" of his step-son's shenanigans, and he informed West that it would be permissible to proceed with the search. The search subsequently conducted by West revealed quantities of marijuana, cocaine, and methamphetamine; West also discovered \$11,000 more in cash. West then requested to search a strong box underneath Beck's bed. Beck again objected, but Lockett again gave

permission. The strong box contained two automatic weapons along with 300 rounds of ammunition. Beck was taken into custody on all appropriate charges.

His grand jury proceeding was a bit of an enigma. The foreperson, Tom Reynolds, informed the Commonwealth Attorney that he had two years of law school and had seen, literally, every episode of "*Perry Mason*" so that he could preside over the grand jury without the necessity of the Commonwealth Attorney's assistance. While he did his best under the circumstances, Reynolds simply was unfamiliar with the legal standard for the issuance of an indictment; he also did a remarkably poor job in questioning West regarding the details of the arrest and subsequent search. As a result, the grand jury failed to indict Beck on all charges, with the exception of simple possession of the marijuana which West detected in the initial pat down search.

Address the following issues:

- (1) May a homeowner give valid consent to the search of the quarters of one of the occupants of the home, over the objection of the occupant, without the necessity of obtaining a warrant?
- (2) May a homeowner give valid consent to the search of a strong box/safe of one of the occupants of the home, over the objection of the occupant, when the homeowner admittedly does not own said strong box/safe or otherwise has no key, combination, or other means of access?
- (3) Given the grand jury's failure to indict, may the Commonwealth Attorney take this matter back in front of a second, separate grand jury for purposes of again attempting to obtain an indictment against Beck?

QUESTION NO. 4

On November 19, 2000, Cassius Clem of X County, Kentucky consults with you at your office and related the following:

Cassius' father was Julius Clem and his mother was Calpurnia Clem. Both were lifelong residents of X County, Kentucky. The only real property ever owned by Julius and Calpurnia was a 500 acre farm situated in X County, Kentucky which they owned as tenants in common. Cassius had 14 brothers and sisters.

On February 4, 1995, Julius Clem executed a will devising his real property to Calpurnia for her life with remainder to the 15 children "share and share alike." On the same date, Calpurnia executed a will devising her real property to Julius for his life with remainder to the 15 children "share and share alike". These two wills contained identical and reciprocal provisions and were executed at the same time at the home of Julius and Calpurnia Clem with 12 of the 15 children, including Brutus and Cassius Clem, gathered around the parents in a circle 7 or 8 feet away. The reciprocal wills were executed pursuant to a verbal agreement between Julius and Calpurnia to so execute them, and neither will referred to the other.

By 1989 all 15 children were grown and had left their parents' home.

Julius Clem died on December 9, 1995. Following his death, the February 4, 1995 will of

Julius Clem was duly probated on January 10, 1996.

Calpurnia Clem died on July 30, 2000. Following her death the February 4, 1995 will of

Calpurnia Clem was duly probated on August 10, 2000. At the time of her death

Calpurnia Clem was survived by all 15 children

On August 20, 2000 a later will of Calpurnia Clem, dated April 8, 1997, was probated

and an order was entered setting aside the previous order of August, 10, 2000 probating

Calpurnia's 1995 will. The most recent will named Brutus Clem executor and sole

beneficiary.

On January 1, 1990, Brutus Clem had married Livia Blake and the couple resided in

Louisville for 6 months. In late 1990, having failed to find suitable employment in

Louisville, Brutus and Livia moved back to X County into the home of Julius and

Calpurnia Clem. In 1993 Brutus and Livia moved into a tenant house on the farm within

sight of the dwelling occupied by the parents of Brutus. Brutus and his family continued

to reside in the tenant house until after Calpurnia's death.

At the time of execution of the most recent will on April 8, 1997 Calpurnia was 73 years

old and had suffered from ill health for several years. Her medical history included that

fact that in August 1989 she had been taken to a local hospital where she was confined for

one week after experiencing blacking out spells, periods of confusion and loss of

memory. In September, 1994, at age 71, Calpurnia had also suffered a stroke which was

accompanied by paralysis, impediments of speech, and periods of apparent confusion.

The effects of the stroke persisted, and in 2000, at age 76, Calpurnia was in and out of the

hospital 5 times, beginning in March 2000, and culminating in her death on the fifth trip

to

the hospital. Diagnosis of the attending physician during those five visits included arteriosclerotic heart disease, senility, auricular fibrillation, and congestive heart failure. After Calpurnia's heart condition had begun several of the brothers and sisters of Brutus and Cassius had noticed that Calpurnia wandered in her conversation, repeated herself, confused her children with one another, complained of dizziness, was forgetful, weak, nervous, upset and would lose her temper whenever business was mentioned. In cold weather, Calpurnia would sit on the front porch.

On April 8, 1997, it was Brutus who brought Calpurnia to the office of the attorney who prepared the will executed on that date. On May 1, 1997, Brutus had in his possession the will of April 8, 1997, and exhibited it to his brother, Augustus Clem, while the two were engaged in a conversation on the farm. After 1990 whenever any of Brutus' brothers or sisters would visit their mother, Brutus or Livia would stop work, come to the house and "stay there until you left." None of the other children were able to have a private conversation with Calpurnia after 1990. Moreover, on such visits Brutus and Livia were unfriendly and seemed to discourage the visits. Brutus and Livia constantly made derogatory remarks to Calpurnia about the other 14 children. For example, Brutus told Calpurnia, that Cassius and Augustus were going to have her declared incompetent and placed in a rest home. After the death of Julius Clem, Brutus managed, operated and controlled the farm, and Livia bragged about having handled all of Calpurnia's business affairs for five years preceding her death. Livia did all of Calpurnia's banking. Cassius had heard his mother say many times that she wanted all her children to share equally in

her estate. In May 1999, Brutus told several of his brothers and sisters they would be greatly surprised upon the death of their mother because “I’ve got things fixed.” In 1995 Brutus had attempted to persuade his parents to deed him the farm, and they refused. Cassius and the 13 other brothers and sisters of Brutus want to contest the will of April 8, 1997, what is your advice and why?

QUESTION NO. 5

Plaintiff is a resident of Pike County, Kentucky. She has automobile insurance from a Delaware insurance company, which provides full coverage, specifically including \$100,000 in under-insurance (UIM) coverage. While traveling to Myrtle Beach, South Carolina, Plaintiff was involved in a serious automobile accident in Grundy, Virginia. Defendant was wholly at fault in the accident. Defendant is a resident of Johnson City, Tennessee, and was in Grundy because he is a full time student there at the Appalachian School of Law. Defendant has liability insurance from an Illinois insurance company with coverage in the amount of \$100,000.

The case was tried to a jury in the United States District Court for the Western District of Virginia. The jury returned a verdict of \$1,000,000, which included \$200,000 for past and future medical expenses, \$500,000 for past and future lost earnings, and \$300,000 for past and future pain and suffering. The Defendant’s Illinois insurance company immediately paid its policy limits of \$100,000.

Thereafter, Plaintiff filed an action in the United States District Court for the Eastern District of Kentucky, Pikeville Division, based upon diversity, demanding that her insurance

company immediately pay her the limits of her UIM coverage. The Delaware insurance company maintains that there is no payment due.

The matter has been submitted on cross-motions for summary judgment. Assume for the purposes of this question, regardless of your personal knowledge or the actual law from any jurisdiction, that the law in Delaware allows an insured to recover under their UIM policy, provided that their damages exceed the amount of the Defendant's liability policy and that the amount of UIM coverage is greater than the amount of the Defendant's liability policy; the law in Kentucky allows an insured to recover under their UIM policy, provided that their damages exceed the amount of the Defendant's liability policy; the law in Tennessee does not provide for UIM coverage; and the law in Virginia allows an insured to recover under their UIM policy, provided that their damages exceed the amount of the Defendant's liability policy and that the amount of UIM coverage is greater than the amount of the Defendant's liability policy.

What law does the United States District Court for the Eastern District of Kentucky apply to determine the coverage issue? Explain.

QUESTION NO. 6

Maple Treebark is an 83-year-old widow who lives on a tree farm. All her life she raised trees. With those trees came squirrels. All the squirrels living in Maple's trees loved her because she cared for them like they were her house pets. She taught them how to sit, stay, roll-over, beg for treats, and even line dance. Maple fed and watered them twice a day. She bought them toys and sewed clothes for them in the winter. She even named them. At times, they acted like guard dogs. Many people were treated for bites to the ankles and legs if the "guard-squirrels" didn't recognize them as one of Maple's acquaintances. Knowledge of Maple's farm and her peculiar pets were known throughout the county. News of her talented squirrels even reached Hollywood. Her furry friends have appeared in many cereal commercials and were slated to appear in a feature film starring Eddie Murphy.

On a Spring day, about a year ago, Spalding Nogood, the county imbecile, decided to go fishing on one of the ponds on Maple's farm. Maple didn't know Spalding and neither did her squirrels. Spalding hopped the split-rail fence and proceeded to walk under a grove of trees. Just before he reached the clearing, five of Maple's "guard-squirrels" pounced on him. Before Spalding could run away, he suffered bites to the head, face, legs and ankles.

That very same day, Maple fell off a ladder and broke her hip. Physically unable to take care of herself, let alone a tree farm and a bunch of squirrels, Maple moved into the Purgatory Home for the Aged. While there, she entered into a contract with Ima Shmuck. Ima was to care for her tree farm and squirrels while Maple convalesced in Purgatory. In return

for his services, he was to live in the house and receive a salary of \$1000.00 per month.

Well, Ima was indeed a Shmuck who knew an opportunity when he saw one. The week after he took over Maple's farm, Spalding Nogood, still sore from the squirrel injuries, hatched a scheme to seek revenge against the squirrels. Spalding and Ima decided to kill the "tree rats" (as they affectionately called them) for their pelts. Spalding would do the killing and Ima would get the profits from the pelts.

Maple recovered from the fall in a few months and left the nursing home. She was eager to see her home and her pet squirrels. She made them each winter hats and gloves and bought them some trail mix. When she arrived at the house, there were no squirrels to greet her. She wondered if they had forgotten about her. She walked around the back of the house, looking for her pets. Instead of squirrels, she found Ima in a luxurious fur coat and Spalding in a fur cap. They were obviously surprised to see her. She could tell they were trying to hide something. Fearing the worst, she pushed them both aside and discovered a cage of baby squirrels in shackles and an adult squirrel in a stockade. Maple suffered a heart attack. She was hospitalized for three weeks and is currently seeking counseling for her aversion to clothing made from fur.

Maple contacts you for advice. Does she have a civil cause of action against Spalding and Ima? Under what theory and/or theories (please do not discuss breach of contract)?