To: **Spring 2019 Property students**
From: **Professor Ford**
Re: **Midterm exam**

Congratulations on completing the midterm exam, and on being almost done with your first year of law school! This memo discusses the scoring and substance of the midterm. The exams were scored out of 20 possible points, with an average score of 12.4, a median score of 13, and a high score of 18.

My goal with the midterm is for it to be a learning opportunity more than an evaluation tool, which is why it accounts for a relatively small portion of the course grade. Accordingly, if you would like to discuss your exam, I am very happy to do so; please email me to set up a time to talk. If your score was significantly below the median score for the class, I especially encourage you to do so, so we can figure out what is working for you and what could be changed to improve things before the final exam.

A few notes on the mechanics of grading: In grading a large number of exams, there will inevitably be some small discrepancies between different exams. To minimize this, I graded each question separately: I graded all of question 2 on every exam before I moved to question 1, and I did all of part (a) of question 1 before turning to part (b). I used a detailed rubric, with rules for partial credit that I applied as consistently as I could. I also started grading each question at a different point in the stack to counteract any "drift" over the course of grading a question. Still, there will inevitably be small inconsistencies from exam to exam; the good news is that in nearly all cases, a one- or two-point change on the exam score wouldn't affect your course grade either way—especially since the midterm exam is worth a small fraction of the course grade.

What follows are some notes on each question. These were not the only ways to receive credit for each of the questions; rather, this is a guide to the key issues I was looking for and some of the trends I saw reading your responses.

Question 1

This question considered the doctrine and policy of the law of gifts.

Part (a): Doctrine. This question asked you to apply the common law of gifts, as we discussed in connection with *Newman v. Bost* and *Gruen v. Gruen.*

Courts classify gifts as *inter vivos* or *causa mortis,* with the latter made in contemplation of the giver's imminent death. Since we have no indication that anyone in the problem is dying anytime soon, this is a potential gift *inter vivos*

—which matters because one difference between the two is that gifts *causa mortis* are revocable if the giver doesn't die, while gifts *inter vivos* are not. Since one potential resolution here would be Enloe revoking the gift, the fact that gifts *inter vivos* are irrevocable matters for answering Tang's question.

Deciding if a gift had been made requires analyzing three elements of gifts *inter vivos:* intent, delivery, and acceptance.

Intent is the most difficult issue and requires analyzing, from incomplete circumstantial evidence, what Enloe's intention was. We have facts pointing in both directions. Three major facts point in favor of finding the requisite intent:

- The invitation offers "free gift[s]": a cruise and "more great surprises" (presumably the coffee items). This suggests that Enloe intended those things to be gifts, since, after all, he called them that.
- Enloe's assistant gave Tang a gift bag when they arrived at the seminar, containing those items, which suggests they were gifts.
- Enloe had reason to give the gifts, since he wanted to attract potential clients to his seminar.

But other facts point against finding that Enloe intended to make a gift to Tang:

- Enloe appears to have intended to send the invitation to Robin Trencheny, not Jessy Tang, suggesting that while he might have intended to give Trencheny the gift, he had no such intention when it comes to Tang.
- Tang isn't in what Enloe perceives to be the target demographic for his seminars. (Enloe may be acting stupidly, as one of you pointed out, since it's never too early to start saving for retirement. But what matters is his intention, not whether that intention is smart.)
- Enloe's actions are consistent with not intending to give Tang the gifts, since as far as we can tell, the first time he was asked if he wanted to do so, he said no. The earlier interactions were with his assistant.

In the end, both possibilities are plausible. Maybe the best evidence is that Tang registered for the seminar under their own name, showed up, and successfully collected the gift bag. This suggests that one of two things must be true: either Enloe did not intend to limit the gift to those who were targeted with the mailers, or Enloe and his assistant were really sloppy handing out expensive cruises.

(Several exams discussed whether a gift with an attached condition subsequent is a gift in the first place. This would matter if Tang's claim was that the gift was formed when they received the invitation, but we don't have to worry about that issue because the gift bag was delivered when Tang showed up for the seminar. So we can assess whether there was a binding gift at that point without worrying about whether there was one earlier in time.)

Delivery is more straightforward. The coffee items were manually delivered, which is always sufficient. The cruise was not, since the gift bag did not (and could not) contain the actual cruise. But it was either symbolically delivered or constructively delivered; the difference might depend on whether the voucher gave its bearer the ability to obtain access to the cruise (for instance, if it had a coupon code that could be redeemed with the cruise line). When manual delivery is impossible, constructive delivery is sufficient, and as we saw in *Gruen,* the modern trend is that symbolic delivery is also sufficient.

Acceptance is also required, but is usually presumed, especially when (as here) the recipient wants to enforce the gift.

Part (a) of question 1 was worth 10 points: 1 for noting that gifts *inter vivos* are irrevocable, 4 for intent, 4 for delivery, and 1 for acceptance. The most successful responses were those that (1) demonstrated a clear understanding of the legal rule governing gifts *inter vivos* and (2) dug into the facts to explore the nuances of intent and delivery rather than just stating an outcome.

(One final note on part (a): Nearly all the exams wrongly assumed the gender of at least one character—and sometimes more than one. A few exams also misspelled their names. Consistent with the question text, Enloe and Goolsbee use male pronouns, Trencheny uses female pronouns, and Tang uses gender-neutral pronouns. There is no quicker way to offend your client than to misspell their name or disregard their gender identity. And these characters are all named after real people, which made it especially hard to read exam responses that misidentified them.)

Part (b): Policy. This question asked you to consider the policy rationale for the law to recognize gifts and discuss whether that rationale makes sense in the context of a commercial "gift" like the one here.

In class, we discussed several different reasons that the law might recognize gifts: because they can provide givers a marginal incentive to create wealth; because they can redistribute wealth to recipients in greater need; because people expect the law to recognize them, so it would needlessly upset

expectations if it did not; because it would be trivial to evade a rule that did not recognize gifts, for instance by forming a "contract" to sell the gift for $1.

How do these concerns apply to commercial gifts like the ones in the question? I think the better answer is that these concerns don't necessarily apply to commercial gifts like the ones in the question, while other concerns exist that might be better addressed by a legal regime designed for commercial gifts. For instance, the law might want to help deter consumer fraud or unfair bait-and-switch offers. Most of you agreed that another doctrine would be a better fit. But answers pointing in the other direction could, and did, receive substantial credit; one of the few perfect scores on this question was for a response that argued that the law of gifts was a good policy fit for this scenario.

Part (b) was worth 4 points. As with any policy question, many answers were possible and many different answers received credit. As the question itself rather explicitly hinted, the best responses were those that focused on the principles discussed above. Several exams, though, considered at length how a different legal regime would play out, analyzing the problem under the law of contracts or promissory estoppel or found property. These responses tended to get less credit since they were not directed to the policy issues that were the focus of the question.

Question 2

This was a moderately complicated future-interest problem.

"To A for life": A has a life estate.

"Then to A's children and their heirs": Each of A's three living children has a vested remainder in fee simple subject to divestment and subject to open. It's a remainder because it is an interest that is capable of becoming possessory at the expiration of A's life estate (indeed, it will do so unless something changes). It is vested because no condition precedent has to happen for the interest to vest, other than the end of A's life estate; if nothing changes, it will necessarily become possessory. It is subject to divestment because of the executory interest discussed below, and it is subject to open because A can have more children.

Since A can have more children, A's not-yet-born children have a contingent remainder in fee simple, contingent upon being born (and subject to the same executory interest). It's not a "contingent remainder subject to divestment and subject to open" since those complications are folded into "contingent," though I did not take off points for this redundancy.

"But if any of A's children ever smoke cigarettes on Greyacre, then to B and her heirs": B has a shifting executory interest in fee simple, contingent upon any of A's children smoking cigarettes on Greyacre.

[Update 4/22/19: Since posting this memo, I have concluded that the grant is ambiguous with respect to B's interest. The ambiguity turns on this question: If one of A's children smokes cigarettes on Greyacre while A is still alive, is A's life estate cut short, so B takes possession immediately, or would B only come into possession after A's life estate ends? If the latter, then B's interest could be characterized as a contingent remainder in fee simple instead of a shifting executory interest, since B's interest would be capable of becoming possessory at the natural end of A's life estate, a prior interest created in the same instrument. Whether B's interest could divest A is ambiguous: the word "ever" suggests that B might take possession even before A's life estate ends; alternatively, the second "then" might suggest that B's interest, like A's children's interest, follows A's life estate. Many courts, resolving ambiguous conveyances like this, apply a presumption against interpretations that can result in the forfeiture of an interest, which would suggest A's interest is not divested. Joseph William Singer's wonderful treatise, Property *(4th ed.), has a discussion of this point in § 7.6.1. The majority of other professors I asked, though, thought that executory interest is the better answer, since B's interest would divest A's children's interest; there is a similar example on page 199 of Sprankling's* Understanding Property Law *(4th ed.), which concludes that the interest is an executory interest. Under this approach, the critical point is not whether B's interest is capable of becoming possessory at the natural end of a prior estate created in the same instrument; instead, by definition or convention, an interest that divests a prior vested interest is classified as an executory interest. But this is a nuanced corner case that I did not discuss in class or intend to test, so I have updated the exam scores to give credit for either answer.]*

A's children's heirs and B's heirs have nothing; the references to them are just words of limitation telling us that the intended possessory interest is a fee simple. O also has nothing since there is no scenario in which each interest conveyed in the grant expires and it would return to O. (If A's children die without heirs or devisees, and B does not take, then the fee simple held by A's children would escheat to the state. If B takes pursuant to the executory interest, and then dies without heirs or devisees, same thing.)

Question 2 was worth 6 points: 1 for A's life estate, 3 for the interest held by A's living children, 1 for the interest in A's unborn children, and 1 for B's interest.