

EXAMINERS' ANALYSIS OF QUESTION NO. 4

1. Generally, the party asserting an affirmative defense has the burden of proving it. *Lima Dap v Bateson*, 302 Mich App 483, 495 (2013). Thus, Phil has the burden of proving that the money Debbie paid for his rent over the past few years was a gift instead of a loan. A valid gift requires the following 3 elements: (1) an intent by the donor to pass title "gratuitously" to the donee; (2) either actual or constructive delivery of the gift; and (3) acceptance of the gift by the donee. *Buell v Orion State Bank*, 327 Mich 45, 55 (1950). If the gift benefits the donee, there is a legal presumption that it has been accepted. *Id.*

In the instant case, it was Phil, the purported donee, who solicited money from Debbie. Although seemingly without hesitation Debbie agreed to pay Phil's portion of the rent and was not concerned about repayment even when Phil repeatedly offered, both parties acknowledged that repayment was anticipated. Phil attempted each time to repay, and while Debbie did not accept the repayment when offered, she continued to suggest that she would accept repayment from Phil at a later time when needed. Thus, donative intent regarding covering the rent appears to be missing, and therefore Debbie would be entitled to collect on the debt when she was ready. Phil could argue that the elements of a gift are established because (1) the significant passage of time between Debbie's payment of the rent and her demanding repayment only after the relationship fractured, supports a donative intent at the time of delivery; (2) the money was constructively delivered when Debbie paid the landlord Phil's portion; and (3) Phil accepted the gift when he did not continue to attempt to pay her back. However, it is likely that Phil's gift defense would fail because Debbie never completely extinguished her interest in being reimbursed.

2. Similarly, Debbie has the burden of proving her affirmative defense of abandonment. *Lima, supra*, 302 Mich App at 495. See also, *Ambs v Kalamazoo County Road Commission*, 255 Mich App 637, 652 (2003). To prove that Phil abandoned the luggage set, Debbie must establish 2 elements: (1) that Phil intended to relinquish the luggage; and (2) an external act by Phil that manifested that intention. *Emmons v Easter*, 62 Mich App 226, 237 (1975). "Nonuse alone is insufficient to prove abandonment." *Sparling Plastic v Sparling*, 229 Mich App 704, 718

(1998). Debbie would likely succeed on this affirmative defense. Phil's intent to relinquish control over the luggage is inferred by his taking of all of his personal belongings except the luggage when he vacated the apartment. Moreover, according to the facts, Phil never even used the luggage all those previous years. Additionally, the intent to abandon the luggage was effectuated when Phil continuously ignored Debbie's repeated requests to remove it, and never made any attempt to recover it. An argument could be made that Phil did not abandon the luggage, but was merely taking his time to retrieve it from the apartment. However, Phil never expressed any previous desire to retain the luggage. Moreover, the passage of time after repeated requests to recover luggage that he had never used anyway, supports the notion that Debbie will likely succeed on her abandonment affirmative defense to Phil's counterclaim.