

appeal are filed each year with the Court. The Court is constrained by time, however, and grants permission to hear only a small number of these cases, usually those requiring an interpretation of federal constitutional or statutory provisions, or those requiring the resolution of pressing issues of federal law.<sup>12</sup>

## 2. The state court system

Each of the 50 states, as well as the District of Columbia and the Commonwealth of Puerto Rico, has its own court system. Similar to the federal system, many state court systems are composed of a three-tiered hierarchy consisting of a trial court, an intermediate court of appeals, and the highest court of appeals or the court of last resort. A minority of states with smaller populations, such as Maine, have two-tiered systems only, with trial courts and appellate courts. The names of the appellate courts vary from state to state. For example, California refers to its intermediate court of appeals as the court of appeal and its court of last resort as the supreme court. (See Figure 1-6.) Conversely, New York refers to one of its intermediate courts of appeals as the supreme court and its court of last resort as the court of appeals.<sup>13</sup>

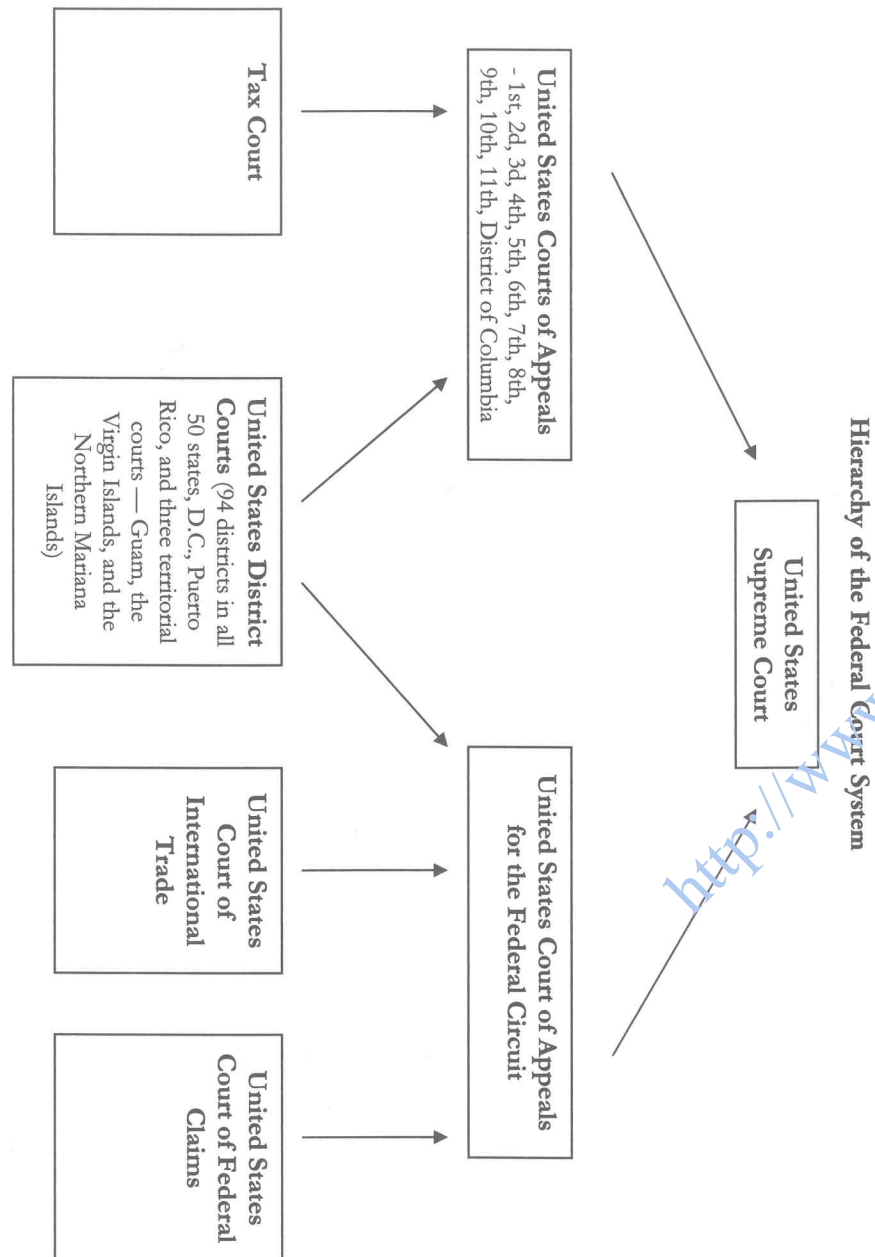
A trial court may be of general or limited jurisdiction. A court of limited jurisdiction can hear only certain types of cases. For example, a small claims court may hear only cases involving claims for small debts, and a state criminal court of limited jurisdiction may hear only criminal cases. Still other courts have specialized roles, such as a juvenile court, which hears matters involving delinquent or dependent children.

Similar to the federal court system, most states allow a right of appeal to the intermediate appellate court.<sup>14</sup> A party that is dissatisfied with the outcome of a civil case decided by a state trial court may ask an appellate court in the state to review the trial court's judgment, order, or decision to determine whether the trial court committed a legal error that requires a reversal, a modification, or a new trial. If there is a third tier to the state court system, a party dissatisfied with the outcome in the intermediate appellate court may appeal the intermediate appellate court's decision

12. The Court receives annually over 8,500 petitions for certiorari per court term but agrees to hear far less. In the 2005 term, for example, only 87 cases were argued before the reviewing Court. United States Supreme Court Chief Justice Roberts, *The 2006 Year-End Report on the Federal Judiciary* 9, <http://www.uscourts.gov/newsroom/yearend06.pdf>.

13. A quick way to determine the names of the courts in the various state jurisdictions is to refer to Table 1 in *The Bluebook: A Uniform System of Citation* (18th ed., Harvard Law Review Assn. 2005) or Appendix 1 in Association of Legal Writing Directors & Darby Dickerson, *ALWD Citation Manual: A Professional System of Citation* (3d ed., Aspen Publishers 2006). The states are listed alphabetically, and as a part of each state entry, the names of the courts in the state that publish decisions are identified along with the names of the reporters in which these decisions are published.

14. There are exceptions: Hawaii and North Dakota, for example, do not provide for a direct right of appeal to the intermediate appellate court. Instead, the state supreme court assigns cases to the intermediate appellate court.



**Figure 1-5**

Source: Administrative Office of the United States Courts, <http://www.uscourts.gov/>  
Note: Military, Bankruptcy, and Veterans Claims Courts are not shown.

retrieval of golf balls to a time when such an issue arises and the court is in a better position to contemplate the particular concerns of that issue.

Therefore, the court must carefully draft rules that are neither too narrow or too broad. Ideally, it chooses words that include those groups intended to be affected by the rule and excludes all others. Limiting the landowner's right to enter another's property only to retrieve apples leaves open the question of whether the rule should also apply to retrieving other fruit. Conversely, permitting persons the right to retrieve any of their property from another's land may give rights far beyond those contemplated by the current situation before the court.

Ideally, a judge not only drafts a rule that provides a fair result for the parties in the current case but also provides guidance to potential parties in future cases. The following exercise and those in the remainder of this chapter, inspired by stories from Greek mythology, are designed to give you a sense of a judge's difficult task in creating and developing precedent.

### ● Exercise 2-B<sup>9</sup>

Murder, violence, and plots for power trouble the ancient country of Fairland. In an effort to bring justice and order to the land, the people created a citizens' Assembly and a Court. The Assembly, made up of representatives elected from various regions of Fairland, enacts the laws. The Court, comprising a panel of six judges, interprets and applies enacted laws to disputes between parties. The Court also creates and applies common law to disputes when no enacted law governs the situation. You are one of the judges appointed to the Court. All legal disputes regarding civil matters (involving the private rights of citizens) are submitted to your Court for judgment.

The first case to come before the Court is the following: Nicholas, the commander of Fairland's armies, returned triumphant from a great war. As part of his spoils from the war, he brought home his mistress, Cassandra, a princess from the defeated country. Nicholas's jealous wife, Selena, kills Nicholas and his mistress. Under his Last Will and Testament, created before he set sail for the war, Nicholas had left his entire estate to Selena, if she should survive him. Otis, the son of Nicholas and Selena, argues before the Court that his mother should not have any of his father's estate because she caused his death. Otis claims that, as next in line to inherit, he should receive his father's estate.

Although the Assembly had passed a law providing that one who intentionally causes the death of another may be imprisoned, there are no enacted laws addressing whether a murderer can inherit the property from his or her victim. Selena pled guilty

9. This exercise is loosely based on the triumphant return of Agamemnon, the commander of the Greek armies, from the Trojan War, bringing with him a princess of Troy and invoking the jealous anger of his wife, Clytemnestra.

to intentionally killing her husband and his mistress. The Court must decide whether Selena should inherit Nicholas's estate.

- a. In addition to the argument previously mentioned, are there any additional arguments Otis might use to support his position that he should receive Nicholas's estate?
- b. What arguments might Selena use to support her position that she should inherit Nicholas's estate?
- c. How will you decide this case?
- d. In addition to the parties' arguments, will you be guided by social customs, religious convictions, and/or philosophical ideals?
- e. Draft a rule on which you will base your decision. Make sure that you carefully word the decision-making rule to address Selena's case adequately.
- f. When constructing your rule, were you mindful as to how your rule might have an impact on future cases?

## 2. *The interaction between the common law and other forms of law*

The federal constitution is the supreme law of the land. On the state level, a state constitution follows right behind the federal constitution in level of importance. All other laws—federal and state statutes, regulations promulgated under statutes, and common law—cannot infringe on federal constitutional law. On the state level, a state's statutes, regulations promulgated under state statutes, and common law cannot violate federal or state constitutional law.

Courts, as guardians of the federal and state constitutions, must ensure that constitutional rights and protections are not violated by statutes, regulations, or court decisions. Sometimes legislatures enact a statute that may inadvertently infringe on rights and protections provided under the U.S. Constitution or a state's constitution. In these instances, the court must determine whether the statute violates the constitutional law. If the court finds a statute applied in any circumstance would be unconstitutional, then the statute will no longer be given force and effect. For example, the Washington Supreme Court in a 2003 decision found a Washington statute unconstitutional, and thus unenforceable, because it exempted in-state wine producers from a statute that required out-of-state wine producers to give notice and cause before terminating contracts with distributors in the state.<sup>10</sup> The statute at issue violated the Commerce Clause of the U.S. Constitution<sup>11</sup> because the exemption impermissibly "protect[ed] in-state wine producers and discriminate[d] against out-of-state producers" by allowing in-state producers more flexibility to do business.<sup>12</sup>

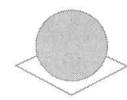
10. *Mt. Hood Beverage Co. v. Constellation Brands*, 63 P.3d 779 (Wash. 2003) (finding § 19.126.040 of the Washington Code unconstitutional).

11. U.S. Const. art. I, § 8, cl. 3.

12. *Mt. Hood Beverage*, 63 P.3d at 786–787.

Mediation and arbitration also are available in some jurisdictions after formal litigation has commenced. In these jurisdictions, courts may order the parties to seek mediation. Alternatively, the parties may ask the court to order mediation or the parties may agree to arbitrate in an attempt to resolve some or all issues before the court. The case remains on the court's docket while mediation or arbitration is pursued. The court is available to issue orders, if necessary, to ensure that the parties continue to participate in the ADR process. If no resolution can be reached, mediation or arbitration may be abandoned and the case resumes moving forward in court.

In the interest of conserving judicial resources in a busy court system, some jurisdictions also may provide for additional ADR mechanisms, such as mini-trials, summary jury trials, and the appointment of a private judge. All parties must agree to the process before any of these options may be used.



### D. Formal Litigation in the U.S. Civil Court System

Sometimes, despite a lawyer's best efforts at negotiating a resolution to the problem, the only way to obtain relief is to bring the matter to court. The following is a brief introduction to aspects of the civil litigation process. See also Figure 3-1, which charts the basic stages in the civil litigation process.

#### 1. Choice of forum

In the preliminary stage of the formal litigation process, the parties must decide in which court to bring the lawsuit. A court must have personal jurisdiction over the parties so the judgment reached by the court will be enforceable over the parties.<sup>3</sup> A court must also possess the power to adjudicate the disputed claims, more commonly referred to as subject matter jurisdiction.<sup>4</sup>

In addition to the personal jurisdiction and subject matter jurisdiction requirements, the parties must give some thought to a variety of venue<sup>5</sup> considerations when deciding which court should hear the controversy. Considerations may include trying the case in a court presided over by a sympathetic judge, in a court that follows more favorable procedural court rules, or in a court situated in a location convenient to the parties, testifying witnesses, or physical evidence.<sup>6</sup>

3. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999).

4. *Id.* (citing Fed. R. Civ. P. 12(h)(3)).

5. "Venue deals with the locality of the suit, that is, with the question of which [c]ourt, or [c]ourts, of those that possess adequate personal and subject matter jurisdiction may hear the specific suit in question." *Japan Gas Lighter Assn. v. Ronson Corp.*, 257 F. Supp. 219, 221 (D.N.J. 1966).

6. See, e.g., *Goggins v. Alliance Capital Mgmt.*, 279 F. Supp. 228 (S.D.N.Y. 2003).

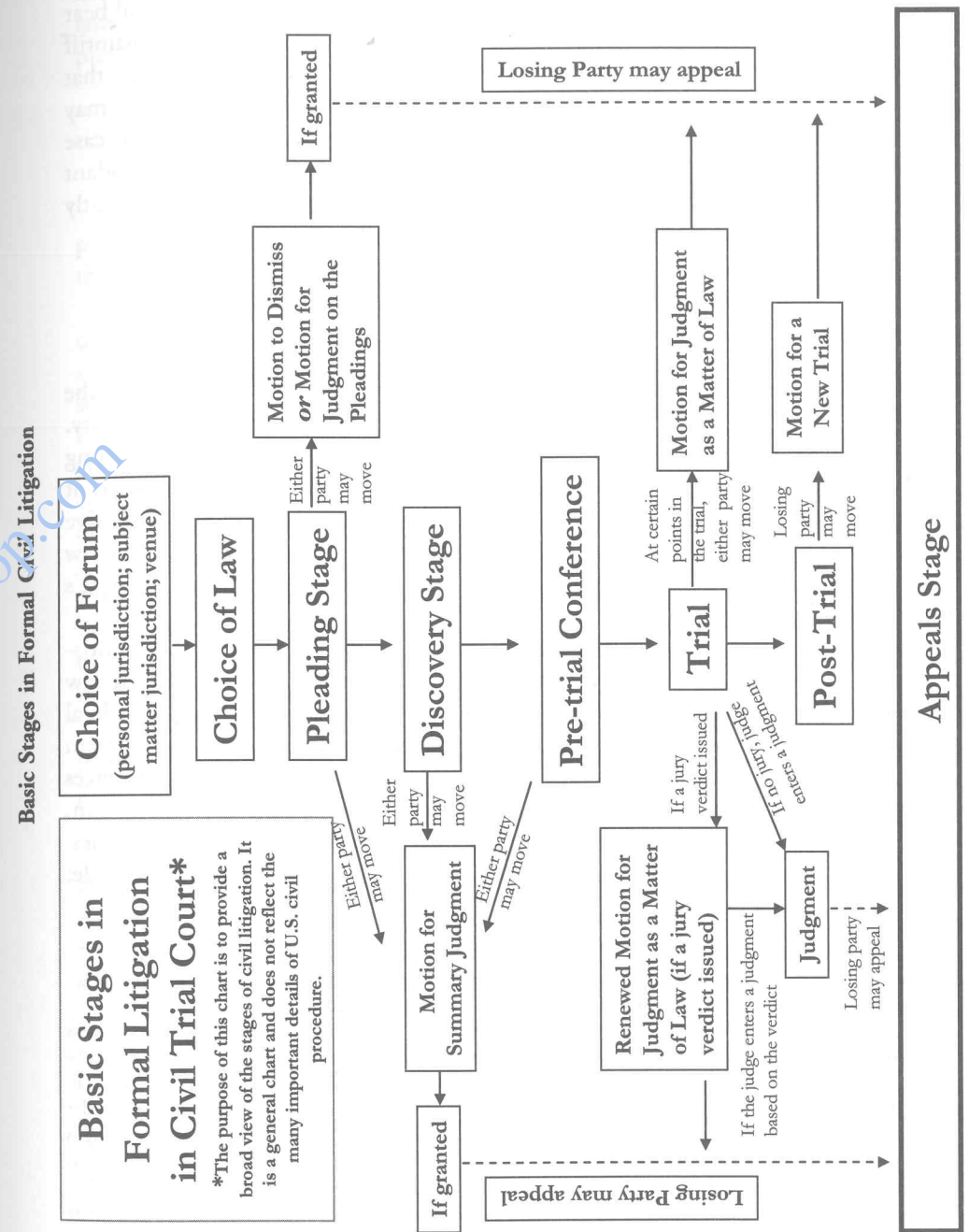
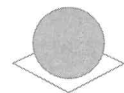


Figure 3-1

rule in their favor. Sometimes the court will want to hear oral arguments from the opposing parties and have an opportunity to ask questions. The court will not hear the testimony of any witnesses.

The decision of the appeals court is issued in the form of a written opinion, explaining the court's reasons for affirming or reversing the trial court's decision and perhaps "remanding the case" (sending the case back to the trial court) for retrial. An appeals court reverses or modifies the trial court's decision only if it finds the trial court committed an error that affected the substantial rights of the parties, meaning that it must have affected the outcome of the case.<sup>67</sup>

The losing party on appeal may request the highest court in the court system to review the case. Except in strictly limited circumstances, the highest court, however, is not required to grant a review. In the event that the highest court in its discretion agrees to review a case, its judgment is final. On appeal, the parties again file briefs in support of their respective positions, and the court may hear oral arguments on the matter. The highest court will issue a written opinion, explaining the reason for its decision.



### E. Res Judicata

Once a claim has been fully litigated and a valid, final judgment on the merits has been issued, the parties cannot relitigate in a subsequent action an issue raised or an issue that could have been raised in this case.<sup>68</sup> The doctrine precluding relitigation of issues is referred to as res judicata.<sup>69</sup>

For example, a golfer (A) sues a homeowner (B) whose land abuts a golf course for injuries sustained when he went on the defendant B's land to retrieve his golf ball and was bitten by the homeowner's dog. This is an issue that has never been decided by a court in defendant B's state. The trial court finds that defendant B owed no duty of care to A to protect him from B's dog. Plaintiff A appeals the case of *A v. B* all the way to the highest court in the state, and the highest court affirms the trial court's decision. The case is now res judicata, which means that plaintiff A can never sue defendant B again for these particular injuries.

Let us say that, after the decision in *A v. B*, another golfer (X) is injured when he is bitten by defendant Y's dog while retrieving a golf ball from Y's property. Plaintiff X pursues his claim to the state's highest court, which, after agreeing to hear the case, decides that its prior decision in *A v. B* does not reflect current public policy and so

67. *Beck v. Haik*, 377 F.3d 624, 634 (6th Cir. 2004) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)); *Crabtree v. National Steel Corp.*, 261 F.3d 715, 719 (7th Cir. 2001).

68. *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

69. Res judicata is based on "the generally recognized public policy that there must be some end to litigation and that when one appears in court to present his case, is fully heard, and the contested issue is decided against him, he may not later renew the litigation in another court." *Heiser v. Woodruff*, 327 U.S. 726, 733 (1946).

overturns the decision by finding that defendant Y owed a duty to plaintiff X to protect him from the dog. Plaintiff A (from the previous case of *A v. B*) cannot bring a new action against defendant B for his prior injuries, even though the law has changed in his state to allow for such an action. It would be possible, however, after the decision in *X v. Y* for plaintiff A to bring an action against defendant B if he is again injured by defendant B's dog while retrieving another golf ball from defendant B's land because res judicata applies only to the injuries alleged in the original dispute.

### ● Exercise 3-A

You recently met with Edina Broward. Ms. Broward has asked your help in obtaining the return of a painting stolen from her home. You taped the interview. The following is a transcript of the interview. Prepare a summary statement of the situation. Include in your summary (1) the identity of the parties, (2) any important "when" facts, (3) any important "where" facts, and (4) all other facts you believe might be relevant.

#### Transcript of the Interview with Edina Broward

**Lawyer:** Good afternoon, Ms. Broward. We have talked about your problem over the phone, but now I'd like to start at the beginning, if you don't mind.

**Edina:** Yes, that would be fine.

**Lawyer:** Good. Let's start by getting your full name and where you live.

**Edina:** I'm Edina Lawton Broward. I live at 303 Forest Drive, in Oak Park, Illinois.

**Lawyer:** And is this the same residence where you lived when the painting was stolen?

**Edina:** Yes. It happened in 1975 when I was moving out of my house. A temporary move, you see. The house was in need of repairs and major renovation. I thought it would be best to move everything out of the house so that the workers could do their job, and I wouldn't have to worry about their ruining my antique furniture and rugs. I inherited the house from my father when he passed away in the 1960s. It's a lovely home; the famous architect Frank Lloyd Wright built it in 1903. Unfortunately, my father didn't keep up repairs during his final years.

**Lawyer:** Before we talk any further, tell me about the painting.

**Edina:** I inherited the painting, too, from my father. He was an attorney, just like yourself, though he practiced law in Chicago. Samuel Bryce Broward IV. He was the founding partner in the firm Broward & Fromm. He loved practicing law, but his real passion was art, especially the sketches and paintings of the Impressionists. The stolen painting was by the American Impressionist James Singer Sargent and had been his pride and joy. It was an oil on canvas of the Rialto Bridge, which Sargent had painted in 1913 during one of his many visits to Venice, Italy.

**Lawyer:** Do you remember when your father acquired it and how much he paid for it?

**Edina:** He kept documents on it. The records show he purchased the painting in 1925 for \$800.

**Lawyer:** Did you ever have the painting appraised for insurance purposes?

3. Here the TC imposed a three-year sentence, not the minimal sentence possible. This sentence suggests that the court considered the son more than minimally responsible. This finding alone supports the conclusion that the son's situation is no different from other regular offenders.
4. The lower court also found that it didn't matter that the son was physically disabled, requiring more finances and arguably more in need of his father's assets. The son could still operate heavy equipment and could work as a mechanic. He still had the potential of making \$40,000-50,000 per year.

The Alaska Supreme Court was concerned, however, that future courts might think that a decision on manifest injustice could depend on the defendant's future financial health. The court made clear that this consideration was not the intent of the legislature.

### i. Concurrence and dissent

In addition to the sections listed above, in some court opinions one or more judges other than the judge writing the majority opinion may choose to write an opinion. This opinion may be either (1) a concurring opinion or (2) a dissenting opinion.

Always include a section that notes the concurring or dissenting opinion, if included in the court's opinion in the casebook. Many concurrences and dissents are the focus of classroom discussion and may be adopted in later majority decisions. Be careful, however, to keep your notes on the concurrence and the dissent separate from the other sections of your case brief. These opinions are not part of the majority's decision.

Judges write concurrences when they agree with the outcome of the case as decided by the majority of the court but do not agree with all or part of the majority's reasoning. The concurrence allows a judge to explain what is wrong with the majority court's reasoning and how the same result can be reached in a different way.

A dissenting judge does not agree with the decision by the majority of the court. The judge may simply say, "I dissent," or the judge may explain why the majority opinion is wrong. Dissenting opinions are especially important when the vote by the members of a court is close, such as a 5-4 decision by the members of the United States Supreme Court. The wise attorney knows that a single change in the membership of an appellate court may affect the outcome in a future case.

### j. Personal comments and reactions

This is the one section of the case brief that does not come directly from the court opinion. In this section, state your own thoughts about the case. You may comment on (1) the validity of the decision, (2) the court's reasoning, (3) how this decision fits with other cases studied in class that address the same legal questions, and (4) anything else that might come to mind when thinking about the case. This section of the case brief is also a good place to note why you believe the author chose to include this case in the

book. For example, you may find that the author included the case (1) because it helps explain the law you are studying, (2) because it is an example of poor or mistaken reasoning by the court, or (3) because it suggests an alternative approach to analyzing a particular legal issue. These notes can be especially helpful when preparing for class discussion and later when studying for exams.

An example of the full case brief for *Blodgett* follows.

*In re Est. of Blodgett*, 147 P.2d 702 (Alaska 2006).

Facts:

- Son Blodgett convicted of the criminally negligent homicide of his father.
- Father had executed a Will.

C/A: Son asked the trial court to award to him his share of his father's estate as stated in his father's Will.

PH: TC: Court applied Alaska's slayer statute and denied son's request because (1) he was convicted for his father's death, and (2) no "manifest injustice" would occur by denying his request.

SI: Under Alaska's slayer statute, which precludes certain killers from receiving the assets of their victims, can a son benefit from his father's Will when the son was convicted of the criminally negligent homicide of his father?

PI: Did the trial court abuse its discretion by denying a son's request for his father's assets under his father's Will?

H: SI: Under Alaska's slayer statute, a son can be precluded from benefiting from his father's Will when he is convicted of criminally negligent homicide of his father.

PI: The trial court did not abuse its discretion by denying the son's request to benefit from his father's Will after the son's conviction for the criminally negligent homicide of his father.

J: Affirmed.

Relevant Rules:

Alaska's Slayer Statute (Alaska Stat. § 13.12.803)

(a) An individual who feloniously kills the decedent forfeits all benefits under this chapter with respect to the decedent's estate. . . .

(k) In the case of an unintentional felonious killing, a court may set aside the application of (a) . . . of this section if the court makes special findings of fact and conclusions of law that the application of the subsection would result in a manifest injustice and that the subsection should not be applied.

Court's Reasoning:

1. The court did not err in ruling that the son did not prove that a manifest injustice would occur if he was prevented from acquiring the assets of his father.
2. The Alaska Supreme Court had not previously defined "manifest injustice." In this case the court adopted the Alaska Court of Appeals' approach,

(whether in an actual library or the library online) to research. It also helps you focus further on the specific legal question within the broad area of law you will need to research. A list of the facts that help explain why the legal issue is in dispute is also helpful. This list of facts will include both facts that help your client's position and facts that help the opposing party's position. You need both to understand the dispute. The more similar your client's facts are to the facts in the cases you find in your research, the better the case will be in your analysis.

The exercises in Chapter 2 address whether a killer could receive a benefit, such as money or property, from a deceased victim. The preliminary issue statement for Exercise 2-C might look like this.

**Legal Question:** Under the East Carolina statute that precludes one who caused the death of another from benefiting from the victim's death, will a nephew receive the assets of his two uncles following their deaths

**Facts:** when the nephew, in fear for his life, killed his uncles after they started a fight with the nephew and one uncle cut the nephew's shoulder with a spear?

If you already know about this area of law and understand the importance of self-defense in analyzing the specific legal question, above, you would likely include self-defense in your legal question.

◀ *For example:*

**Legal Question:** Under the East Carolina statute that precludes one who caused the death of another from benefiting from the victim's death, can Stephen prove he acted in self-defense and therefore still receive the assets of his two uncles when . . .

When you combine the relevant law and your client's facts, you can then focus on the legal issues that must be addressed in analyzing your client's case. In Exercise 2-C, the outcome of the case depends on whether the nephew, Stephen, can avoid the slayer statute by showing he acted in self-defense. The statute referred to earlier in the first example above ("slayer statute") does not address what might happen when a killer acts in self-defense. Through the merger of the law and facts, you would realize that the court's decision will depend more on how the statute is interpreted, which is a law-based rather than a fact-based question.<sup>8</sup> The court could decide that the words only of the statute are what matters, so acting in self-defense is not an excuse since it's not mentioned in the statute; alternatively, the court might recognize self-defense as

8. The analysis of a law-based issue is discussed in detail in Chapter 14.

a way to avoid the slayer statute and still take the assets of the victim. This focus on how to interpret the statutory language would change the legal question.

◀ *For example:*

**Legal Question:** Is a court likely to create an exception to the statutory provision that prevents anyone who intentionally causes the death of another from benefiting by that death when the killer acts in self-defense?

*b. Researching the legal issue*

Your goal when researching is always to access the relevant primary authority. Primary sources of authority include constitutions, statutes, cases, and administrative regulations authorized through a statute. Binding primary authority includes constitutional provisions, statutes, and court decisions from higher courts addressing the same legal issues in the controlling jurisdiction.

If you do not know anything about the legal issue, you may choose to research secondary sources first. Secondary sources are not binding authority. These sources are best used to become more familiar with an area of law so your research for primary authority is more focused. Secondary sources will also refer you to useful primary authority. Typical examples of secondary sources include restatements of law, law review articles, encyclopedias, and treatises.

This book does not include research instruction. Numerous books explain all the research sources available to those researching law in the United States.<sup>9</sup>

As an effective researcher, you will want to keep careful notes of your research. By taking careful notes, you avoid looking unnecessarily at the same materials again. Even when researching carefully, however, you may be uncertain when you have researched thoroughly and can stop with confidence. Consider the "backwards and forwards" method. When you have read all the relevant cases cited in the key cases, the "backwards" research, or historical perspective, is likely complete. And when you find that your key cases are the only ones continually cited in the more recent cases, the "forwards" research is likely also complete.<sup>10</sup>

*4. Analyze the law*

The first step in analyzing the law is to brief the relevant cases. You don't need to fully brief the entire case in detail, only that portion of the case relevant to the

9. Examples of good research texts include Christina Kunz et al., *The Process of Legal Research* (6th ed., Aspen Publishers 2004), and Amy Sloan, *Basic Legal Research* (3d ed., Aspen Publishers 2006).

10. Credit for the "backwards and forwards" method goes to Andrew Solomon, Associate Professor, South Texas College of Law.

**Relevant Rules:**

1. CNCs are strictly construed against the party seeking enforcement.
2. A CNC will be enforced if it is reasonable.
3. East Carolina courts use a three-pronged test<sup>1</sup> when determining whether a CNC signed in connection with the sale of a business is unreasonable: "(1) the covenant must not be broader than necessary for the protection of the covenantee's<sup>2</sup> legitimate business interest; (2) the covenant cannot have an adverse effect on the covenantor<sup>3</sup>; and (3) the covenant cannot adversely affect the public interest." Quoting *Mats Transport*, 824 S.E.2d at 1468.
4. A CNC is unreasonable "as matter of law" if it fails any of the prongs of the test.
5. When determining whether a CNC is broader than necessary to protect the buyer, the court will consider "the extent of the territory restricted." *Mats Transport*, 824 S.E.2d at 1468.
6. The CNC represents the seller's goodwill, which represents the value of the relationship between the seller and its customers.

**Court's Reasoning:**

CNCs are strictly construed against the party seeking to enforce them because CNCs restrict trade and undermine the free market system on which the U.S. economy is founded.

Because the CNC failed the first prong of the test—that the covenant was broader than necessary to protect the buyer—the court did not address the other test prongs.

When the seller sold its trucking business to the buyer, the parties knew that the seller's trucking business operated in a limited geographic area, yet the CNC restrained the seller as though its business was a national enterprise with a market, offices, and a fleet of trucks that operated in all states. Because the territorial scope of the CNC exceeded the protection of the buyer's legitimate interests, the CNC was unreasonable as a matter of law.<sup>4</sup>

1. The terms *legal principle*, *rule*, and *test* are synonymous and used interchangeably in this text.

2. The covenantee is the party for whose benefit the CNC is made.

3. The covenantor is the party who agrees not to compete.

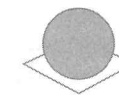
4. Always be aware of the procedural state of the case at the time the court issued its holding. See also Chapter 4, discussing procedural posture in the context of writing a case brief. In this instance, the matter was before the court on a motion for summary judgment by the defendant. Under the East Carolina Rules of Civil Procedure (taken from the Federal Rules of Civil Procedure), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." E.C. R. Civ. Proc. 56(c). In *Mats Transport*, the court found that the CNC was unreasonable as a matter of law; therefore, judgment was entered in favor of the seller.

As you analyze the law found during the research process, you are likely to identify statutes and rules favorably applied by courts in decisions that relate to your client's legal question. You should organize the relevant law and use it to further refine the issue statement for your client.

For instance, in your research of CNCs, you did not find any relevant statutes. The rules applied by the court in *Mats Transport*, however, may lead you to revise your issue statement. After researching, you realize that the territory restricted by the CNC relates to the first prong of the test for reasonableness—whether the CNC is broader than necessary to protect the buyer's interest. Also, the court in *Mats Transport* looked at the size of the business at the time of the sale to determine whether the scope of the restraint in the CNC exceeded the buyer's legitimate business interests. Perhaps other facts that relate to the size of Hart Fitness Center's business may be relevant. Also, the fact that the buyer and seller were partners may be an important factor in determining whether the CNC was broader than necessary for David's protection. Therefore, you may revise the issue statement to more closely reflect what the court in *Mats Transport* focused on when addressing the issue.

◆ *Example of a revised issue statement:*

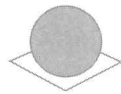
Under East Carolina law, is a CNC, signed by a business partner in connection with the sale of a health and exercise club to a co-partner, broader than necessary to protect the interests of the buyer and thus unreasonable when (1) the CNC prohibits the seller from engaging in the same business in locations where the business being sold is not currently located but where the club had planned to expand in the next three years; (2) club members usually use the clubs closest to their homes or workplaces; and (3) the CNCs required when the club purchased other clubs in the past were limited to the counties in which those businesses were located at the time of the sale?<sup>5</sup>



### E. Step Five: Organize the Law

Once you understand the law that is relevant to your client's case, you are in a position to organize the law. Because this chapter addresses a single issue with a single case, there is no need to further organize the law. (How to organize the law

5. If an issue statement contains several facts, numbering the different facts can make the statement clearer and easier to read.



### C. Organizing the Law and Applying It to the Client's Case (Steps Five and Six)

Once you have analyzed the relevant law, you are ready to organize and apply the law to the facts of your client's case. First, understand that there is no one way to use the relevant case law. Let your sense of logic guide your decisions every step of the way. You will need to make four decisions:

- (1) which cases provide the relevant rules at issue in your client's case;
- (2) which cases are needed to explain how the relevant rules have been applied to facts in prior cases (rule explanations);
- (3) which cases are most helpful in supporting each party's position when applying the law to the facts of your client's case (the analysis); and
- (4) based on your choice of cases in 1, 2, and 3, where is the best place to explain the cases so they will be most helpful to your reader.

#### 1. Choosing which cases provide the relevant rules at issue in the case

In deciding from which cases you will draw the relevant legal principles or rules of law, consider the following.

##### a. Is the case binding or persuasive precedent?

Address binding authority first, where it exists. As discussed in Chapter 2, binding authority includes (1) any relevant constitutional provision in your case's jurisdiction, (2) any relevant statutory law from your case's jurisdiction, and (3) any case law that is relevant and was decided by the same court or by a higher court within the controlling jurisdiction.<sup>1</sup>

In contrast, persuasive authority includes (1) any primary authority originating from another jurisdiction; (2) any nonbinding case from your own jurisdiction, including a case decided by a lower court within your own jurisdiction or a decision by another intermediate appellate court decision in your own jurisdiction, such as a state court decision from another intermediate appellate court in the state; and (3) any secondary authority that may be helpful, such as a restatement provision or a law review article.

If persuasive authority is helpful, introduce it only after discussing the binding authority. In the CNC case, both *Mats Transport* and *Hanson* were decided by a court in the controlling jurisdiction, East Carolina. Therefore, both are binding, primary authority.

1. In a few states, such as Indiana, there are no defined regions for each immediate appellate court, so all intermediate appellate court decisions are binding on all intermediate appellate courts in Indiana.

##### b. Is the case from an intermediate appeals court or from the highest court within the controlling jurisdiction?

Prefer a decision from a state's highest court over an intermediate level appellate court, a United States Supreme Court case over a federal court of appeals case, and both state and federal intermediate appellate court cases over a federal or state trial court case. In the CNC case, both *Mats Transport* and *Hanson* were decided by the intermediate court of appeals. This may happen when the highest court of the jurisdiction has not yet considered this issue. Therefore, these two cases are from the same level court.

##### c. What is the age of each case?

Consider the date of each court's decision. If two cases provide the same information and are from the same level court (for example, both are from the intermediate appellate court or both are from the highest appellate court), the more recent case is likely to be more helpful. Some cases, however, are considered landmark cases<sup>2</sup> and are often cited for that reason. Landmark cases are important and should probably either be included or at least mentioned in a footnote.

Consider also whether the legal issue you are addressing has been treated differently over time or is one where the law is changing. If you identify a trend where the law is changing, the more recent cases will likely better reflect that trend.

In the CNC case, *Mats Transport* was decided in 1992; *Hanson* was decided in 1989. Since the two cases were decided three years apart, neither would be more important than the other based solely on age. Presuming *Mats Transport* represents the most recent case from the highest court in East Carolina that has addressed this issue, you would cite to *Mats Transport* for the three-pronged test used to determine the reasonableness of CNCs in East Carolina.

##### d. Are the general explanations and definitions of the relevant rules different among the various cases?

Rules change as rules are applied.<sup>3</sup> Thus, as courts apply case precedent to a new set of facts, the court may further define what the former common law rule means in light of the facts in the new case. The synthesis of the prior rule with the holding in the new case becomes a part of the new common law rule to be applied in future cases. Sometimes you may find it necessary to synthesize the rules from multiple cases into a single rule, as discussed in Chapter 10.

For example, the court in *Mats Transport* describes the goodwill of a business as that "which represents the value of the relationship between the seller and its customers." *Mats Transport v. ABC corp.*, 824 S.E.2d 1467, 1468 (E.C. App. 1992). *Hanson* provides a bit more information by adding, "The goodwill of a business is

2. Landmark cases are those in which a court creates new law, such as when the United States Supreme Court decided that legislative decisions were supreme over all court decisions except those deciding the constitutionality of legislative enactments. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

3. Edward H. Levi. *An Introduction to Legal Reasoning* (U. of Chicago P. 1948).

statute to individual cases). Figure 10-1 illustrates inductive and deductive reasoning based on the three cases in this chapter.

The resulting common law rule in this example, as developed through the three cases, becomes the following.<sup>9</sup>

A person who kills another

- a. *may not* share in the distribution of the decedent's estate as an heir by way of the statute of descent and distribution or as the beneficiary who collects the proceeds under a policy of insurance on the decedent's life when the homicide is felonious and intentional;
- b. *may* share in the distribution of the decedent's estate as an heir by way of the statute of descent and distribution, or as one who would otherwise take under the decedent's will, and *may* collect the proceeds as a beneficiary under a policy of insurance on the decedent's life when the homicide is unintentional, even though it is the result of such gross negligence as would render the killer criminally guilty of involuntary manslaughter.

#### ● Exercise 10-A

Read the following case excerpts and write the common law rule applied in each case. Then write the common law rule that would apply in a future case in determining whether a landowner could be liable in negligence for injuries to a trespasser on the landowner's property. To complete this exercise, the rules applied in the cases must be synthesized into one single common law rule.

##### **Case One: McClain v. Painter, 439 S.E.2d 555 (E.C. 1976)**

On October 15, 1974, Sarah McClain was walking to school when she saw an apple tree on her neighbor's property, full of apples ready to be eaten. Since she had not eaten breakfast, she went through the neighbor's gate, climbed the tree, and began shaking the limbs so apples would fall to the ground. As she was stretching out for some apples above her, the dead limb she was sitting on gave way, causing Sarah to fall to the ground with the apples, breaking her arm. Sarah's parents brought a negligence claim on behalf of Sarah against Jack Painter, owner of the property with the apple tree. Painter moved to dismiss the case, which was granted by the trial court and affirmed on appeal. The McClains have appealed, and we affirm.

It has been a long-standing rule that landowners owe no duty to trespassers. In this case there is no doubt that Sarah was not invited through the gate, up the tree, and onto the ground where she eventually landed.

##### **Case Two: Sanders v. Kona Exports, Inc., 452 S.E.2d 1040 (E.C. 1978)**

Kona Exports owns a coal mine in Salem, East Carolina. Seven-year-old Johnny Sanders lived in a housing development situated near the coal mine. Kona Exports left

9. *Ford v. Ford*, 512 A.2d 389 (Md. 1986).

on its property equipment that was necessary to the mining business, including mining cars used to bring the coal out from the depths of the mine. The cars had brakes and locks that would disable the cars, preventing them from being moved. Unfortunately, the coal mine workers set the brakes but habitually failed to lock the cars at the end of each day.

Johnny and his friend, Tim Rider, would often go over to the mine and play on the equipment left on the property. When the cars were locked the boys would get inside the car and play around; on a couple of occasions, however, the children were there when the cars were unlocked, and they would take off the brake and push one another around. Mine supervisors saw children trespassing near the cars and other equipment; sometimes they told the children to leave, and other times they did not.

On April 24, 1980, Johnny and his friends went onto the property and found the cars unlocked. Johnny climbed into one of the cars, and his friends rolled him around and into the mine. While they were inside a mine wall collapsed, and Johnny died. Johnny's parents, Jim and Cady Sanders, filed a negligent wrongful death claim against the mine owners. The trial court dismissed the case, relying on the general rule that landowners owe no duty to trespassers. After the court of appeals affirmed the trial court's decision, the Sanders appealed.

Courts have long held that landowners are not liable to trespassers on their land. *McClain v. Painter*, 439 S.E.2d 555, 555 (E.C. 1976). However, Kona Exports keeps on its land machinery that is known to be dangerous, machinery that could be safeguarded. The landowner was also aware that children trespassed onto the land. Due to the nature of the condition and the knowledge by the landowner that children trespass on the land, a jury may find the landowner liable in negligence. The trial court's dismissal of this case is reversed, and the case is remanded for trial.

##### **Case Three: Vinson v. Hirokawa Imports, 530 S.E.2d 12 (E.C. 1980)**

Susie Vinson is 14 years old. She and her friends rode their skateboards onto a construction site of Hirokawa Imports, located in Spring Valley, East Carolina. Hirokawa was building a warehouse to hold its goods. Workers neatly stacked the construction materials for the warehouse. Because some of the workers had seen children in the area before, the supervisor placed signs at multiple locations, instructing trespassers to stay off the construction site.

Susie decided to try and ride her skateboard across the top of the stacked construction materials. The construction materials were steel beams that were being used to build the main structure of the warehouse. The top of the stacked beams was approximately ten feet from the ground. Susie began climbing up the side of the stacked beams when they broke loose, falling down on top of Susie, who was seriously injured.

At trial the jury found for the plaintiff and awarded the Vinsons \$100,000, which was affirmed by the court of appeals. We granted the appeal of Hirokawa Exports, Inc., and now reverse.

In this case the general rule that landowners owe no duty to those trespassing on their land applies. *McClain v. Painter*, 439 S.E.2d 555, 555 (E.C. 1976). A 14-year-old teenager who is of normal or above intelligence has the capacity to understand the danger that exists in going onto construction sites and playing on the materials left by the workers. These workers had no choice but to leave the materials on site, and they

<b>Topic/thesis:</b>	Factor #2
<b>Rule:</b>	Any definition and explanation of factor #2
<b>Rule explanation:</b>	Any case law relevant to explain how the courts have analyzed factor #2 in different factual situations
<b>Analysis:</b>	Application of the law to the client's facts to assess the strengths and weaknesses of factor #2
<b>Conclusion:</b>	Regarding factor #2 only

Weighing/balancing factors #1 and #2 to determine whether, collectively, they support finding that the legal issue had been met.

**Conclusion:** Regarding the legal issue

Again, remember that the suggested organizational scheme above is not an absolute formula that you must follow in all cases. You may decide, for example, to combine factors, or, if the number of factors is small and the analysis is straightforward, to address all factors together.

Determining the most logical structure is best achieved by reviewing the document from the reader's viewpoint. If you find that the draft is difficult to follow because you have combined factors, rewrite it, separating one or more factors. If, conversely, you find that the factors are introduced separately in a way that makes the final weighing of the factors difficult to follow, rewrite it, combining one or more factors.

A good source in determining this structure is, again, the relevant court opinions. If you find that binding courts tend to separate the factors, do that as well. If, however, binding court opinions tend to group factors together, this is likely the best approach in your own discussion. The final decision may also depend on whether the factor is or is not disputable.

### 3. Balancing test

Some legal issues involve balancing the opposing parties' positions to determine which is stronger. This test is often used when assessing the validity of a constitutional claim. For example, let's say that a citizen is prohibited from protesting on a courthouse lawn. To determine whether the citizen's First Amendment right to free speech under the U.S. Constitution has been violated, a court must weigh the government's interest in maintaining a peaceful environment on public, governmental property against an individual's right to speak her own political thoughts. An example of the need to balance interests in a criminal case may occur when a police officer stops a suspect, searches him, and finds drugs in his pocket. Since the police officer does not have a warrant, the defendant might move to suppress introducing the evidence of drugs in court. The court must balance the governmental interest in bringing to justice criminals against the individual's right under the Fourth Amendment to be free from unwarranted governmental intrusions.

Balancing tests exist in state law issues as well. In a state nuisance action, for example, the court must weigh a plaintiff homeowner's complaint that the defendant neighbor's actions are intruding on the homeowner's right to the peaceful enjoyment of his property against the neighbor's right to use and enjoy her own property.

The structure of a balancing test might look like the following.

<b>Topic/thesis:</b>	Legal question (such as nuisance) that is based on a balancing test
<b>Rule:</b>	Statement of the balancing test
<b>Rule explanation:</b>	Description of relevant case law where courts applied the same balancing test in a similar factual situation (case law may also be introduced when the weaker position is introduced)
<b>Analysis:</b>	Application of the law to the facts Support for the stronger position Support for the weaker position
<b>Conclusion:</b>	Why, when weighing one party's interest against the other, the first position is stronger.

### 4. Shifting burdens of proof test

Sometimes deciding a legal issue includes both procedural and substantive components. For example, in a lawsuit where a female plaintiff is fired and sues her former employer for sexual discrimination the plaintiff employee bears the initial burden to show that the employer fired her for a discriminatory reason based on her gender. If the employee meets this initial burden, the burden shifts to the defendant employer to prove a nondiscriminatory reason for firing the employee. If the employer is able to meet its burden, the burden shifts again back to the employee, who then has an opportunity to prove that the employer's stated reason for firing the employee is really a pretext (or false reason) for the actual, discriminatory reason.<sup>1</sup> The structure of the analysis would follow the structure of the shifting burdens test, as follows.

<b>Topic/thesis:</b>	Re: legal issue being addressed
<b>Rule:</b>	Statement of the shifting burdens of proof test
<b>Rule explanation (optional):</b>	Any case law descriptions where courts have applied the same test to similar factual situations
<b>Analysis:</b>	

1. The burdens of proof for indirect employment discrimination claims have been established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and later clarified in *Tex. Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

**Court of Appeals of  
Indiana,  
First District.  
Berry Altmeyer, Appellant  
(Defendant Below)  
v.  
State of Indiana, Appellee  
(Plaintiff Below).  
No. 1-1285A308.  
Sept. 2, 1986.**

496 N.E.2d 1329

Robertson, Presiding Judge.

Appellant/defendant Berry Altmeyer (Altmeyer) appeals his convictions of three counts of child molesting and one count of attempted child molesting.

We remand.

The facts pertinent to our preliminary disposition of this appeal are summarized as follows: Altmeyer was charged with the child molesting of his nieces J.M. and D.M.,<sup>12</sup> who are sisters, and of A.M., Altmeyer's niece and cousin of J.M. and D.M. The victims were age 12 or under at the time of the offenses in the late summer of 1983.

In October 1984, Charles Perkins, an Indiana state trooper, and Lisa Berry, a caseworker in the county welfare department, questioned A.M. about the incidences of sexual abuse, recording her statements on videocassette tape. On the prosecutor's motion and after a hearing, the trial court ruled that although the three victims were competent witnesses, A.M. was unavailable to testify at trial because her participation would be a traumatic experience for her, and that her videotaped statement was admissible in lieu of her testimony. In so ruling, the court stated on the record that it had found the statements bore sufficient indications of reliability. No transcription of A.M.'s videotaped statement appears in the record. After the State presented evidence corroborating the acts of which Altmeyer

was charged, including testimony of J.M. and D.M., the jury viewed the videotape. Altmeyer was found guilty on all four counts.

On appeal, Altmeyer raises several points of error. Because we remand, we will address only these issues: I. Whether A.M. was unavailable to testify at the trial; and

\*1330 II. Whether the videotape of A.M.'s statements was admissible hearsay under Ind. Code 35-37-4-6.

\*\*\*\*

**Issue I**

Altmeyer contends that the statute as it applies to him deprived him of his right to cross-examine A.M. He argues that I.C. 35-37-4-6 impermissibly expands the meaning of unavailability because it does not require the State to make a good faith effort to produce the child witness where a psychiatrist certifies that testifying at trial would be a traumatic experience for the child. I.C. 35-37-4-6(c)(2)(i).

\*\*\*\*

Altmeyer declares that I.C. 35-37-4-6 is unconstitutional on its face because it denies the defendant his right to confront his accusers. He has failed to persuade us that we decided incorrectly *Hopper v. State*, (1986) Ind.App., 489 N.E.2d 1209 in which we held the child hearsay statute constitutional. In *Hopper*, we determined that I.C. 35-37-4-6 met the requirements of *Ohio v. Roberts*, (1980) 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 because it provided that the hearsay statement must bear sufficient indications of reliability and that the child declarant must either testify at trial or be found unavailable.

\*\*\*\*

\*1331 In the instant case, a psychiatrist certified to the court that any participation by A.M. in the trial would be a "severe traumatic experience" for A.M. After hearing the

12. To protect the children, the court refers to them using initials rather than their actual names.

psychiatrist's testimony, the court found A.M. unavailable. We hold that Altmeyer has not shown error with respect to the trial court's determination.

**Issue II**

When a hearsay declarant is unavailable, his statement may not be admissible unless it bears adequate indicia of reliability. *Ohio*

*v. Roberts, supra*, 448 U.S. at 66, 100 S. Ct. at 2539. Where the evidence falls within a firmly rooted hearsay exception, its reliability may be inferred. *Id.* If the evidence cannot be admitted within a hearsay exception, then it may be admitted only upon a showing of "particularized guarantees of trustworthiness." *Id.*

\*\*\*\*



**Court of Appeals of Indiana,  
Third District.  
Michael Brady, Appellant  
(Defendant Below)  
v.  
State of Indiana, Appellee  
(Plaintiff Below).  
No. 71A03-8809-CR-266.  
June 21, 1989.**

540 N.E.2d 59

\*\*\*\*

\*62 Staton, Judge. Michael Brady was convicted by a jury in the St. Joseph Superior Court of Child Molesting, a class C felony. IC 35-42-4-3(b). He was sentenced to seven years in prison and fined \$1,000.00. . . . Brady presents 28 issues for appellate consideration, which we restate as:

I. Whether the statute authorizing and the procedures used to videotape a child witness's testimony violated Brady's right to confront his accusers?

\*\*\*\*

Affirmed.

The marriage of Carla Myers and Michael Brady was dissolved in 1983. Carla received custody of their daughter, T.B.<sup>13</sup> (born

June 22, 1982), subject to Brady's visitation rights.

\*\*\*\*

The evidence most favorable to the verdict discloses that on Friday night, April 4, 1986, Brady collected T.B., who was now three years of age, for her first weekend visit pursuant to a revised visitation order.

\*\*\*\*

As per the visitation order, Brady returned T.B. to Carla at approximately 6:00 p.m. on Sunday, April 6.

On the following morning, April 7, 1986, Mark Myers, Carla's present husband, received a telephone call from a teacher at T.B.'s school informing him that T.B. had been found hiding in the closet of the school's bathroom.

\*\*\*\*

\*63 During an interview in October of 1986, T.B. demonstrated with "anatomically correct" dolls how "Daddy Mike" (Brady) had hurt her. [This out-of-court testimony was elicited in T.B.'s home by Detective Sergeant Elaine Battles, and Brady's attorney was present. Brady sat in the garage and watched the interview on a television monitor.]

\*\*\*\*

13. To protect the child, the court refers to the child using initials rather than the actual name.