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Programa de
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Exámenes
Inglés Nivel III



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Bankruptcy Law

Fuente: Clarkson, et. al., "West's Business Law", West Publishing Group. St. Paul: 2006. Páginas 605 y 606.

Historically, debtors had few rights. Today, in contrast, debtors have numerous rights. Some of these rights were discussed in Chapters 28 and 29. In this chapter, we look at another significant right of debtors: the right to petition for bankruptcy relief under federal law.

5 Article I, Section 8, of the U.S. Constitution gave Congress the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States."

Bankruptcy law in the United States has two goals -to protect a debtor by giving him or her a fresh start, free from creditors' claims, and to ensure equitable treatment to creditors who are competing for a debtor's assets. Federal bankruptcy legislation was first enacted
10 in 1898 and has undergone several modifications since that time.

Bankruptcy law prior to 2005 was based on the Bankruptcy Reform Act of 1978, as amended -hereinafter called the Bankruptcy Code, or more simply, the Code (not to be confused with the Uniform Commercial Code, which is also sometimes called the Code). In
15 2005, Congress enacted a new Bankruptcy Reform Act, which became effective six months after President George W. Bush signed the act into law.¹ As you will read throughout this chapter, the 2005 act significantly overhauled certain provisions of the Bankruptcy Code - for the first time in twenty-five years. One of the major goals of the new act is to require consumers to pay as many of their debts as they possibly can instead of having those debts fully discharged in bankruptcy. The law was passed, in part, in response to businesses'
20 concerns about the rise in personal bankruptcy filings, which have increased every year since 1980 (from fewer than 300,000 to over 1.6 million per year).

Section 1 - Bankruptcy Proceedings

Bankruptcy proceedings are held in federal bankruptcy courts, which are under the authority of the U.S. district courts, and rulings from bankruptcy courts can be appealed to
25 the district courts. Although bankruptcy law is federal law, state laws on secured transactions, liens, judgments, and exemptions also play a role in federal bankruptcy proceedings.

THE ROLE OF THE BANKRUPTCY COURTS

Essentially, a bankruptcy court fulfills the role of an administrative court for the federal
30 district court concerning matters in bankruptcy. The bankruptcy court holds proceedings dealing with the procedures required to administer the estate of the debtor in bankruptcy.

¹ The full title of the act is the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005). The Bulk of the act became effective 180 days after being signed by the president on April 20, 2005. Thus, the new provisions took effect in October 2005. (Bankruptcy petitions that were filed before the act became effective continued to be administered and governed by the 1978 Reform Act, as amended.)

A bankruptcy court can conduct a jury trial if the appropriate district court had authorized it and the parties to the bankruptcy consent.

35 Bankruptcy court judges are federally appointed for fourteen-year terms. The 2005 Bankruptcy Reform Act created a section entitled the Bankruptcy Judgeship Act of 2005, which enlarged the number of bankruptcy judges by twenty-eight (four for the Delaware District).

TYPES OF BANKRUPTCY RELIEF

40 Title 11 of the *United States Code* encompasses the Bankruptcy Code, which has eight chapters. Chapters 1, 3, and 5 of the Code contain general definitional provisions governing case administration, creditors, the debtor, and the estate. These three chapters apply generally to all kinds of bankruptcies. The next five chapters of the Code set forth the different types of relief that debtors may seek.

45 Chapter 7 provides for liquidation proceedings (the selling of nonexempt assets and the distribution of the proceeds to the debtor's creditors). Chapter 9 governs the adjustment of a municipality's debts. Chapter 11 governs reorganizations. Chapters 12 and 13 provide for the adjustment of debts by parties with regular incomes (family farmers and family fishermen under Chapter 12 and individuals under Chapter 13).²

50 A debtor (except for a municipality) need not be insolvent³ to file for bankruptcy relief under any chapter of the Bankruptcy Code. Anyone obligated to a creditor can declare bankruptcy.

SPECIAL TREATMENT OF CONSUMER-DEBTORS

55 To fully inform a consumer-debtor of the various types of relief available, the Code requires that the clerk of the court provide certain information to all consumer-debtors prior to the commencement of a bankruptcy filing. (Recall from Chapter 29 that a consumer-debtor is a debtor whose debts result primarily from the purchase of goods for personal, family, or household use.) First, the clerk must give consumer-debtors written notice of the general purpose, benefits, and costs of each chapter of the Bankruptcy Code under which they might proceed. Second, under the 2005 act, the clerk must provide
60 consumer-debtors with informational materials on the types of services available from credit counseling agencies.

In this chapter, we deal first with liquidation proceedings under Chapter 7 of the Code. We then examine the procedures required for Chapter 11 reorganizations and Chapter 12 and 13 plans. (The latter three chapters of the Code are known as "rehabilitation" chapters.).

² There are no Chapters 2, 4, 6, 8, or 10 in Title 11. Such "gaps" are not uncommon in the *United States Code*. This is because chapter numbers (or other subdivisional unit numbers) are sometimes reserved for future use when a statute is enacted. (A gap may also appear if a law has been repealed.)

³ The inability to pay debts as they become due is known as *equitable* insolvency. A *balance sheet* insolvency, which exists when a debtor's liabilities exceed assets, is not the test. Thus, it is possible for debtors to voluntarily petition for bankruptcy or to be thrown into involuntary bankruptcy even though their assets far exceed their liabilities. This may occur when a debtor's cash flow problems become severe.

A. Responder.

1. ¿Por qué la legislación en materia de quiebras en los Estados Unidos es de incumbencia federal?

2. ¿Qué propósitos persigue la legislación de quiebras?

3. ¿Cuándo entró en vigencia la reforma a la ley de quiebras?

4. ¿Qué cambio fundamental introdujo la reforma?

5. ¿Por qué se reformó la ley?

6. ¿Qué debe saber un particular que tiene deudas por consumo antes de presentar quiebra?

B. Decidir si las siguientes afirmaciones son verdaderas o falsas. Justificar la respuesta mediante el subrayado de la parte pertinente del texto.

1. La ley anterior a la reforma data de 1978.

verdadero falso

2. La ley de quiebras es parte integrante del Código de Comercio Federal.

verdadero falso

3. Las apelaciones de sentencias de los tribunales de quiebra tramitan ante juzgados federales ordinarios de primera instancia.

verdadero falso

4. A la quiebra la rigen la ley federal y leyes estatales.

verdadero falso

C. Indicar la opción correcta:

1. El término “equitable treatment”, según el texto significa:

- a- trato acorde a derecho
- b- trato igualitario
- c- trato según las normas de “equity”

2. El término “equitable insolvency”, según el texto es:

- a- estado de insolvencia
- b- la insolvencia en “equity”
- c- cesación de pagos

Nature of Registered Companies

Charlesworth & Morse, Company Law, 15ª edición. Londres. Sweet & Maxwell: 1995.

This book is mostly concerned with registered companies, whether public or private, limited by shares.¹ The term “registered company” means a company incorporated or formed by registration under the Companies Acts. The major Act is the Companies Act 1985, which consolidated the various Acts passed between 1948 and 1983. Although this
5 Act has itself been amended, principally by the Companies Act 1989, and in one area re-consolidated,² it may still be regarded as the principal Act and in this book, unless it is otherwise stated or the context otherwise requires, references to sections and Schedules are to those of the Companies Act 1985 and references to the “Act” are to the Companies Act 1985. This approach is facilitated by the fact that most of the changes made by the
10 1989 Act and subsequent legislation have been effected by the substitution of sections into the 1985 Act.

The Act provides that for the purpose of the registration of companies under the Act there shall be offices (Companies Registration Offices in England and Scotland) at such places as the Secretary of State (for Trade and Industry) thinks fit, and that he may appoint such
15 registrars, assistant registrars, clerks and servants as he thinks necessary for the registration of companies and may make regulations with respect to their duties.

Section 1 (1) enables two or more persons associated for any lawful purpose³ to form an incorporated company with or without limited liability, by complying with the requirements of the Act in respect of registration. As is explained later in this chapter, the
20 requirements are that certain documents be delivered to the appropriate Registrar of Companies and certain fees be paid. Under section 10, for example, a memorandum of association and, usually, articles of association must be delivered to the Registrar, who must retain and register them.

What is a Registered Company?

25 A registered company, *i.e.* a company incorporated by registration under the Companies Acts, is regarded by the law as a person, just as a human being is a person. This artificial or juristic person can own land and other property, enter into contracts, sue and be sued, have a bank account in its own name, owe money to others and be a creditor of other people and other companies, and employ people to work for it. The company's money and
30 property belong to the company and not to the members or shareholders, although the members or shareholders may be said to own the company. Similarly, the company's debts are the debts of the company and the shareholders cannot be compelled to pay them, although if, for example, the company is being wound up and its assets do not realise a sum sufficient to pay its debts, a shareholder whose liability is limited by shares is liable
35 to contribute to the assets up to the amount, if any, unpaid on his shares. A company, of course, can only act through human agents, and those who manage its business are called directors. The directors are agents of the company and transact business, etc., on behalf of the company. They may authorise other agents to act on the company's behalf, *e.g.* the

1 In general terms commercial companies.

2 This is the area of insolvency and liquidation generally.

3 A private company may be formed by one person only.

40 company secretary. The company will be bound by any transaction entered into on its behalf if the agent is acting within his authority. The company is also liable for torts⁴ and crimes committed by its servants and agents within the scope of their employment or authority. This concept of the company as a corporation, *i.e.* a person separate and distinct from the other persons who are its members and directors, is the fundamental principle of company law.

45 Companies Limited by Shares, Companies Limited by Guarantee and Unlimited Companies

A registered company may be-

- a company limited by shares, in which case the liability of a member to contribute to the company's assets is limited to the amount, if any, unpaid on his shares; or
- 50 a company limited by guarantee, in which case the liability of a member is limited to the amount which he has undertaken to contribute *in the event of its being wound up*; or
- an unlimited company, in which case the liability of a member is unlimited: section 1(2).⁵

55 The vast majority of registered companies are companies limited by shares. Such companies must have a share capital, whereas unlimited companies may or may not have a share capital. Companies limited by guarantee cannot have a share capital if they were formed after December 22, 1980 and are instead supported by subscriptions or fees paid by the members: section 1(4).

Unlimited companies

60 A company may be registered as an unlimited company, in which case there is no limit on the members' liability to contribute to the assets: section 1(2)(c). In the years immediately preceding 1967 comparatively few such companies were formed, although they are the oldest class of registered company, but the exception from publication of accounts given by the 1967 Act, made them more popular.

65 An unlimited company is exceptional in that its members may be associated on the terms that they may withdraw in the mode pointed out by the memorandum and articles, so as to be free from liability in the event of a winding up and it seems that such a company may validly provide by its memorandum and articles for a return of capital to its members, *i.e.* without the consent of the court. Similarly an unlimited company may
70 purchase its own shares if its constituent documents authorise it to do so.

4 Or, in Scots law, delicts.

5 This section provides the statutory rules for the liability of the members of a company for its debts. The common law position is that there is otherwise no liability at all.

A. Responder según el texto.

1. ¿A qué hace referencia el término “registered company”?

2. ¿Qué ley es, según el texto, el referente en esta materia?

3. ¿Por qué?

4. ¿Qué pasos deben seguirse para el proceso denominado “registration”?

5. ¿Qué facultades posee lo que se denomina “registered company”?

6. ¿Qué responsabilidad le cabe a estas personas jurídicas en relación con quienes las representan?

7. ¿Qué se entiende por “corporation” en el texto?

C. Completar con información relativa a las características de:

Company limited by shares:

Company limited by guarantee:

Unlimited company:

Chapter 14

Remedies

A. Liability Of Personal Representative

Devastavit. If a personal representative commits any breach of the duties of his office, causing a loss of assets, he is said to commit a *devastavit*, *i. e.* a wasting of the assets of the deceased's estate. A personal representative is personally liable to the deceased's creditors and beneficiaries for any loss caused by his *devastavit*.

(1) *Nature of a devastavit.* Occasionally, the duties of the office of personal representatives are termed "trusts" and a breach of those duties is referred to as a "breach of trust". The will of a testator may contain a gift of his residuary estate to his executors "upon trust" to carry out one or more of those duties, *e.g.* to pay the testator's expenses and debts. However, it is sometimes essential to distinguish between a *devastavit* and a breach of any trust created by the testator's will. For instance, a personal representative by virtue of his office has a duty to pay the debts of the deceased with due diligence, having regard to the assets in his hands which are properly applicable for that purpose. This duty may be modified by the testator's will as against the beneficiaries, but not as against the creditors. If the personal representative commits a breach of his duty, he is liable to the creditors for any loss suffered by them as a result of his *devastavit*, irrespective of his liability under any trust or power contained in the testator's will.

The following are instances of a breach by a personal representative of the duties of his office, which, if it causes loss to the deceased's creditors or beneficiaries, renders the personal representative personally liable for a *devastavit*:

- (i) any breach by a personal representative of his duty to collect and get in the deceased's estate with reasonable diligence, *e.g.* undue delay in commencing an action against a debtor of the deceased, which enables the debtor to escape payment by pleading limitation;
- (ii) any breach of his duty to take reasonable care in preserving the deceased's estate;
- (iii) any breach of his duty to deal properly with the assets of the deceased's estate, *e.g.* improperly converting the assets to his own use;
- (iv) any breach of his duty to pay the debts of the deceased with due diligence, *e.g.* failing to pay a debt, though he has the assets in hand properly applicable for that purpose;
- (v) any breach of his duty to protect the estate against unenforcible claims, *e.g.* paying a debt which he need not pay;

35 (vi) any breach of his duty to administer the deceased's estate, if it is insolvent, in accordance with the statutory rules as to the payment of debts, e.g. failing to observe the order of priority of debts; and

(vii) any breach of his duty to distribute the estate to the persons properly entitled under the deceased's will or intestacy.

40 (2) *Devolution of personal representative's liability for a devastavit.* If a personal representative commits a *devastavit*, and dies, his liability for the *devastavit* devolves on his personal representative to the extent of his available assets.

(3) *Effect of acquiescence in devastavit.* If a creditor or beneficiary acquiesced in a *devastavit*, the personal representative is not, in general, liable to him. The same principle applies if a person acquiesced in a breach of trust. The onus of proving acquiescence in the *devastavit* lies on the personal representative. In order to satisfy this onus, the personal representative must show that the creditor or beneficiary acquiesced in the *devastavit* with full knowledge of all the facts. However, there is no hard and fast rule that he must also have had knowledge of the legal consequences of those facts; the court considers all the circumstances of the acquiescence in order to decide whether it is fair and equitable for him to succeed against the personal representative for his *devastavit*.

Acquiescence by one creditor or beneficiary does not affect the rights of any other person who has not acquiesced. If the personal representative is liable for his *devastavit* to any other person, then, under section 62 of the Trustee Act 1925, the court may, in its discretion, impound all or any part of the interest of a beneficiary who has instigated, requested, or consented in writing to the breach of duty by the personal representative, by way of indemnity to the personal representative. The court does not impound the interest of a beneficiary under this section unless the beneficiary knew the facts which rendered what he was instigating, requesting, or consenting to in writing, a breach of duty by the personal representative, though the beneficiary need not know that those facts amounted in law to a breach of duty.

Liability to account. As already explained, a personal representative has a statutory duty to exhibit on oath a full inventory of the estate, and render an account of the administration of the estate, when required to do so by the court. He must also keep clear and accurate accounts and permit the interested parties to inspect them free of charge. By this means they may ascertain how the personal representative has carried out the administration.

70 But in equity the liability of the personal representative to account does not merely provide the interested parties with information as to how the personal representative has carried out the administration. It also provides a means of remedying many breaches of duty by a personal representative in the conduct of the administration. A personal representative may be ordered by the court to account in an administration action or (alternatively) in an action for specific relief. A personal representative generally has to account for (1) his receipts and (2) his payments.

A. Indicar con una X la opción correcta.

1. El término “devastavit” se entiende como:

a	administración devastadora
b	prodigalidad
c	dilapidación
d	todas las anteriores
e	ninguna de las anteriores

2. Por “personal representative” puede entenderse:

a	representante
b	albacea
c	agente
d	todas las anteriores
e	ninguna de las anteriores

3. La palabra “he” (renglón 49) hace referencia a:

a	personal respresentative
b	creditor
c	beneficiary
d	b y c
e	b o c

B. Responder según el texto. De ser pertinente, incluir en las respuestas los equivalentes que se deriven de la actividad A.

1. ¿A qué obligación se alude en el primer párrafo?

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2. ¿Qué ejemplo provee el texto respecto de los deberes de los “personal representatives”?

3. ¿De qué modo puede un testamento alterar dichos deberes?

4. ¿A qué obligación se alude en el apartado “Liability to account”?

5. ¿Cómo funciona el concepto anterior en el sistema de “Equity”?

- C. Completar el siguiente cuadro con los tipos de conducta que encuadran bajo la denominación de “devastavit”, utilizando los equivalentes derivados de las actividades anteriores.

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- D. Decidir si las siguientes afirmaciones son verdaderas o falsas. Justificar las respuestas indicando claramente el renglón de referencia.

1. Un testamento puede ordenar que se paguen las deudas del causante aunque se afecten los derechos de otros acreedores de la masa del sucesorio.

verdadero falso Renglón de referencia: _____

2. Una vez fallecido quien resulte responsable por un acto que encuadre en la conducta “devastavit”, se extingue todo tipo de obligación.

verdadero falso Renglón de referencia: _____

3. Ante un caso de “devastavit” el consentimiento de los beneficiarios o acreedores liberan de responsabilidad al “personal representative”.

verdadero falso Renglón de referencia: _____

4. En ese caso la carga de la prueba recae en quien consiente.

verdadero falso Renglón de referencia: _____

5. El consentimiento de una parte no produce efectos respecto de quienes no consintieron.

verdadero falso Renglón de referencia: _____

The Application of Assets in Payment of Debts

Chapter 9

When a testate deceased dies solvent (which, fortunately, happens frequently) and the estate is large enough to pay all debts and expenses and still leave assets for distribution to the beneficiaries, it is necessary to determine which of the assets are to be used in payment of the debts and expenses. As we stated in Section 3.2., sometimes, when an estate is to be distributed, there are not enough assets in the estate after payment of the debts and expenses, to satisfy all the gifts the testator makes in her will. This chapter deals with which beneficiaries are to suffer and in what order. The question does not arise in relation to intestate estates, because the rules of intestate succession refer to the balance of the estate after all debts and expenses have been paid.

- 5
- 10 Estate duty (now abolished) was in a special position, but it is now of only academic interest.¹

The sum required for payment of debts and expenses in a testate estate will not necessarily be spread rateably over all the assets of the estate, but instead its source will be determined either by the terms of the will or by certain recognised rules. This will be of great importance to the beneficiaries, because the amount received by a beneficiary may be considerably reduced if the assets left to him are charged with payment of debts.

Similar comments can apply to the payment of pecuniary legacies, where assets may have to be sold to pay the legacies.

- The attention of this text is focused on the rules for determining which assets are to be applied in payment of debts. The salient points may be summarised as follows:

- 20
1. When a testator has left specific gifts of real or personal property (or a residuary gift of real property) without making provision for payment of debts and legacies, it can be assumed that she did not intend the specific gifts to be charged with such payments so long as there are other assets in the estate not specifically bequeathed or devised. In

¹ By the Estate Duty Abolition Act 1993, estate duty is abolished in the estates of persons who died on or after 17 December 1992. The rules relating to payment of debts, which have been built up largely by case law, did not apply to payment of estate duty. Estate duty was in a special position. Prior to 1993, the testator could, and frequently did, direct that a specific part of his estate (usually the residuary estate) be charged with payment of estate duty, or he directed that certain bequests or devices should be taken free of estate duty. Such directions were effective.

However, if the will did not include directions on the payment of estate duty, or if the provisions for the payment of estate duty made by the testator were insufficient, under the provisions of ss 54 and 55 of the Estate and Gift Duties Act 1968, duty, or the remainder of duty, respectively, was payable out of the gifts received by each beneficiary in proportion to the value each gift bore to the total value of the estate. In other words, each person who succeeded to property had to pay a proportionate share of the outstanding estate duty.

25 other words, it may be assumed that the testator intended that the beneficiaries should receive their specific gifts intact, so far as this is possible.

The law proceeds on this assumption and, consequently, it is the residuary estate that is first charged with payment of debts and pecuniary or general legacies. The law favours real property at the expense of personal property, and so it is the *residuary personal*
30 *estate* that is looked to as the primary source for payment of debts and legacies. This will be of practical importance if the testator has left her residuary real estate to one person, and her residuary personal estate to another. It will then be the residuary legatee who suffers a reduction in what he receives, and not the residuary devisee.

2. The testator may direct that a particular part of her personal estate shall be charged
35 with payment of debts and legacies, for example, the proceeds of a particular life insurance policy. In such case, this will be the primary source, but only if the residuary personal estate has been effectively disposed of under the will. If the residuary personal estate has not been disposed of, or if the disposition fails, the residuary personal estate will be regarded as the primary source, and particular assets of her personal estate that
40 have been specifically bequeathed but have been charged with payment of debts and legacies will not be resorted to unless the residuary personal estate is inadequate.

3. The testator may charge her real estate or some part of it with payment of debts and legacies, but this will not be effective unless also the residuary personal estate is specifically exempted, and effectively disposed of, by her.

45 4. The presumption favouring real property at the expense of personal property will be negated if the testator has clearly created in her will a 'mixed fund' of realty and personalty by directing that certain parts of her real and personal property be sold and the resulting fund applied in payment of debts and legacies. Such a specific direction is quite effective.

50 5. If the residuary personal estate, or the particular part of the estate designated as the primary source described in 2., 3., and 4. above, is inadequate, then other assets in the estate may be drawn upon. If necessary, the whole estate can be made available in set of categories of priority. Very briefly, these remaining categories of priority are:

(a) Real estate undisposed of by will, in other words, real estate (if any) in respect of
55 which there has been an intestacy.

(b) Real estate (devised but) charged with payment of debts, in cases where the testator did not also specifically exempt, and effectively dispose of, residuary personal estate.

(c) General legacies.

(d) Devises, and specific legacies.

60 (e) Real estate and personal estate appointed by will under a general power of appointment.

(f) Donatio mortis causa.

Within each category gifts abate rateably.

A. Responder.

1. ¿Según el primer párrafo, ¿qué tema se tratará en este capítulo?

2. ¿Por qué afecta sólo a la sucesión testada?

3. ¿Qué podía hacer el testador respecto del pago de “Estate duty” antes de 1993?

4. ¿Qué ocurría si el testamento no contenía disposiciones específicas a este respecto?

5. ¿Qué presume la ley cuando el testador efectúa legados específicos y no hay disposiciones testamentarias respecto del pago de las deudas?

6. ¿Según el párrafo 6, ¿cómo se aplica y distribuye el remanente del acervo hereditario?

7. Según el párrafo 7, ¿qué disposiciones puede incluir el testador para el pago de deudas y distribución a legatarios? ¿Qué sucede cuando no existen disposiciones para el remanente de bienes muebles?

8. ¿Cuándo se pueden afectar los bienes inmuebles a los fines precedentes?

9. ¿Qué orden de prelación se aplica supletoriamente?

Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror

[...]

The Agency and Common Law Models

Courts can adopt quite different methodological stances in resolving the questions presented in habeas corpus cases. Here, we sketch more fully the contrasting approaches of the Agency Model and the Common Law Model.

- 5 1. *The Agency Model*. – In slightly caricatured form, one judicial stance is that of an agent striving to carry out as precisely as possible the mandate of a principal, which might be the Constitution’s Framers or the Congress that enacted particular legislation. The Agency Model assumes that judges, insofar as possible, should apply rather than make law. This model can embrace a variety of specific views about
10 constitutional and statutory interpretation, including originalist, intentionalist, and textualist methodologies, and it does not necessarily lead to “liberal” or “conservative” outcomes. But in determining, for example, whether the Executive has unilateral power to which the judiciary should defer, or whether unilateral executive power is limited but executive action authorized by Congress should rarely
15 be overturned, this model would instruct judges to presume that an answer can be found in sources thought to constrain judicial latitude. Overall, the Agency Model reverberates with mistrust of any dynamic or creative judicial role.

A range of normative commitments underlies this model. With respect to constitutional issues, a central premise is that judicial review is legitimate only
20 when decisions are attributable to choices made by the Founders rather than the Justices. With respect to statutory issues, adherents of the Agency Model stress that legislation may reflect compromises necessary to ensure passage and that courts must respect what was, and was not, enacted by constitutional processes. More flexible interpretive approaches are said to confer excessive latitude on politically
25 unaccountable judges and to invite Congress improperly to leave difficult questions to the courts, rather than to shoulder the responsibility for resolving them. This problem is compounded, adherents say, insofar as judges seek to further what they take to be general statutory purposes, for such purposes can be difficult to ascertain and are likely to be multiple, conflicting, and capable of being described at varying
30 levels of generality.

2. *The Common Law Model*. – A contrasting view, also overdrawn but heuristically useful, sees courts as retaining many of the prerogatives of common law judges in construing constitutional or statutory language in light of history and current needs. Under the Common Law Model, courts remain agents, but agents with more leeway.
35 The model’s underlying assumption is that those who adopted open-ended constitutional or statutory provisions, aware of their limited foresight, would not

have wanted to bind the courts or the country too rigidly. In the case of statutory interpretation, courts play the role of junior partners to Congress by fleshing out legislative enactments and sometimes presuming that Congress would not have
40 wanted to run up against possible constitutional prohibitions. Courts following this approach, as we understand it, may also refuse to interpret statutes as trenching on traditionally recognized but not constitutionally absolute rights unless Congress makes its intent to do so unmistakably clear. Nevertheless, when Congress wants the last word, it can have it by enacting a more specific statute – provided, of course,
45 that the question is solely one of statutory interpretation. In the constitutional domain, the Common Law Model emphasizes that much of the Constitution was written in vague language and intended to be adaptable to crises in human affairs. More generally, the Common Law Model views constitutional interpretation as appropriately dynamic.

50 Although the Common Law Model requires courts to make judgments of fairness, policy, and prudence, it does not incorporate clear standards that courts ought to follow in making those judgments. It dictates no choice between substantive approaches to terrorism-related issues that are deferential to claims of executive authority and those that are libertarian, nor does it embrace or reject the equally
55 familiar view that courts should look skeptically at executive unilateralism but routinely uphold executive responses to perceived emergencies that enjoy congressional authorization. As a result, by itself, the Common Law Model cannot resolve many of the central judicial questions raised by the war on terror. Rather, a court within the Common Law Model must make case-by-case judgments that are
60 subject to evaluation on moral, pragmatic, and prudential grounds. In view of the importance of context and exigency, courts proceeding within the Common Law Model will frequently, although not always, want to decide issues narrowly and leave interpretive options open for future cases. The Common Law Model also includes a Burkean preference for gradual rather than dramatic change.

A. Responder a las siguientes preguntas basándose en el texto precedente:

1. ¿Qué objetivo se proponen los autores en este texto? ¿Por qué?

2. ¿En el Modelo “Mandato”, ¿Quiénes serían las partes? ¿sobre qué premisa se basa tal modelo?

3. ¿Qué opinión tienen quienes adhieren al Modelo “Mandato” respecto de las cuestiones de constitucionalidad y de las cuestiones legislativas?

4. ¿Qué crítica se les hace a los enfoques más flexibles?

5. ¿Qué rol tienen los tribunales en el modelo “Common Law”?

6. ¿Cuál es la hipótesis de base de este modelo?

7. En este modelo, ¿qué rol cumplen los tribunales en lo atinente a la interpretación de la ley?

8. ¿Qué facultad tiene el Congreso para limitar la interpretación judicial?

9. ¿Cuál es la deficiencia del Modelo “Common Law” con respecto al tema planteado en el título del texto? ¿Cuáles son sus derivaciones?

Fuente: Cretney, S. M.: *Elements of Family Law*. 2ª Edición, Sweet and Maxwell.
Londres: 1992

Legitimacy and Illegitimacy

The question of terminology: “illegitimate” or “born to parents who were not married to one another”

The Law Commission was concerned to minimise the need for continued use of the expression “illegitimate”, with its connotations of unlawfulness and illegality; and in its 1982 Report presented draft legislation which would have substituted the term “marital” for “legitimate” and “non-marital” for “illegitimate”. However it
5 was subsequently suggested that to “attach labels” to children in this way would perpetuate discrimination against the “non-marital”; and the Law Commission, having reconsidered the matter, decided that it would indeed be preferable to frame the legislation so that the relevant distinction would depend on whether the child's parents were married to each other at the time of the child's birth. The
10 Family Law Reform Act 1987 adopts that drafting technique, as does the Children Act 1989, and most other subsequent legislation. In effect, the policy is that it should be the parents rather than the child who are labelled; and the legislation accordingly now draws a distinction between cases in which a “child's father and mother were married to each other at the time of his birth” on the one hand, and
15 cases in which the child's father and mother were not so married on the other.

It might be thought that these words are plain words of plain English, which can easily be understood. But in fact the Family Law Reform Act 1987 requires these plain words to be interpreted in a special way; and the student who wishes to understand the legislation should understand, first, why it was thought necessary
20 to give the words a special meaning; and secondly, what that special meaning is.

The reason why it was thought necessary to define plain words so that they actually have a very different meaning from that which the uninitiated reader would expect stems from the fact that the law had come to recognise the process of legitimation (whereby the child of a marriage *after* the birth was recognised as
25 legitimate) and the concept of the putative marriage (whereby the child of a couple who had in law *never* been married was entitled to be treated as legitimate). Since there may still be circumstances in which a child who can claim legitimate status will enjoy legal advantages denied to the illegitimate (for example, in relation to citizenship), it was evidently thought desirable to preserve
30 the favoured legal treatment of legitimated children and of children of a putative marriage. But, by definition, the parents of such children were *not* married to each other at the time of the child's birth. (If they had been, the child would have been legitimate and issues of legitimation could not have arisen.)

The solution to this problem put forward by the Law Commission in its Second Report on Illegitimacy (1986) was for statute to provide that references to a person “whose father and mother were married to each other at the time of his birth” should include references to a person who is treated as legitimate by virtue of the putative marriage doctrine, and to a person who is legitimated, or is adopted, or is “otherwise treated in law as legitimate”: Family Law Reform Act 1987, s. 1(3).

This technique is undoubtedly ingenious; but in the result there may be something of a trap for the unwary user of the statute book:

Suppose, for example, that a question arises about whether a 15-year-old boy has a parent with parental responsibility for him (a matter which could be relevant to issues of guardianship, for example). In fact, the boy's parents only married when the mother was on her death bed, some few weeks ago. The answer to the question whether the father has parental responsibility for him depends on whether the parents were married to one another “at the time of his birth” CA 1989, s. 2(3). Manifestly, they were not, but section 1 of the 1978 Act requires the parents of a legitimated child to be treated (contrary to the truth) *as if they were* married to one another at the time of the child's birth.

The statute book has thus been made to exemplify the principle laid down by the author of *Alice in Wonderland*:

“... any writer ... is fully authorised in attaching any meaning he likes to any word or phrase he intends to use. If I mind an author saying ... Let it be understood that by the word black I shall always mean white ... I meekly accept his ruling, however injudicious I may think it.” (C. Dodgson, *Symbolic Logic*, p. 165)

The reader must judge whether the perversion of language now embodied in the statute book achieves any sufficient compensating advantage in terms of social utility. What the legislation means is that the expression “child whose parents were married at the time of his birth” is to be interpreted as “child who was born legitimate, was subsequently legitimated, or is otherwise entitled to be legitimate.” The Law Commission's First Report proposed using the formula “marital child” to describe such a child; and this inelegant word manifestly required reference to the further definition to be found in the relevant section of the legislation. In contrast the words “married to each other at the time of birth” are not such as to cause the unwary reader to seek any further definition.

The words “legitimate” and “illegitimate” continue to be used in this book in the interests of clarity and accuracy -the latter of which could only otherwise be obtained by elaborate periphrases such as “a child whose parents were married to each other at the time of the child's birth, or a child whose parents were not so married but are required to be treated as having been so in accordance with the statutory formula embodied in the Family Law Reform Act 1987.”

A. Responder:

1. Según el primer párrafo, ¿qué debate se suscitó respecto del uso del término “ilegítimo” en relación con los hijos?

2. ¿Qué repercusión tuvo este debate en las leyes sancionadas en 1987 y 1989?

3. ¿Qué contradicción subyace en el uso de ciertas palabras en las leyes?

4. ¿Cuál es la razón para atribuir significados especiales a ciertas palabras en la Ley de Reforma del Derecho de Familia de 1987?

5. ¿Qué aporte hizo la Comisión en 1986?

6. ¿Qué problema podría plantear esta postura en la práctica?

7. ¿Qué postura toma el autor?

A. Decidir si las siguientes afirmaciones son verdaderas o falsas. Justificar la respuesta en cada caso.

1. A partir de 1982 la ley pone fin a la diferencia entre hijos “nacidos dentro del matrimonio” y “nacidos fuera del matrimonio”.

Verdadero Falso

Justificación:

2. Las soluciones propuestas para los casos de hijos legitimados y los nacidos de un matrimonio putativo crean una ficción jurídica.

Verdadero Falso

Justificación:

3. Las leyes mencionadas en el texto finalmente no cumplen con el objetivo de borrar las diferencias entre hijos “legítimos” e “ilegítimos”.

Verdadero

Falso

Justificación: