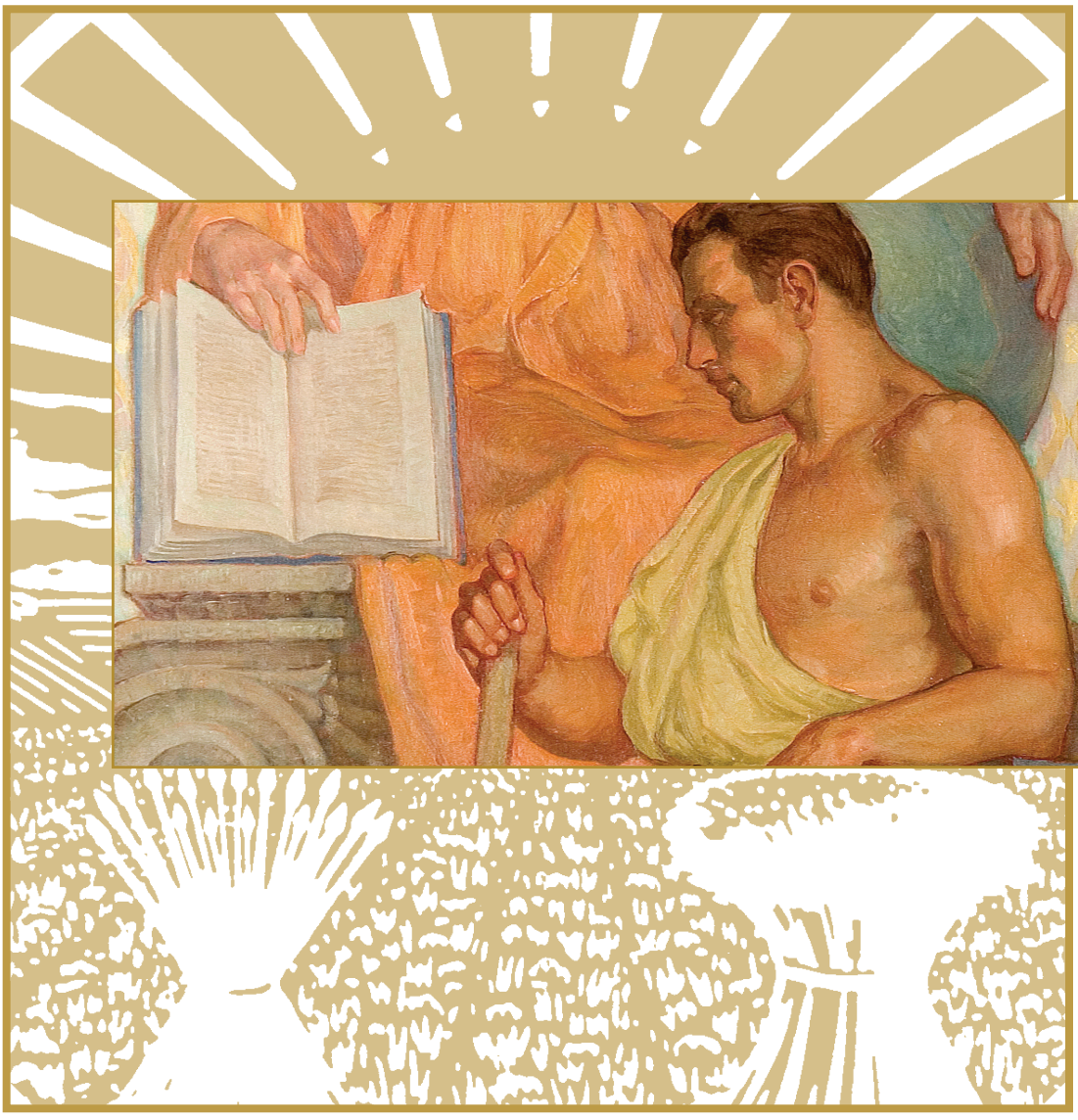
THE SUPREME COURT *of* OHIO

July 2019 Ohio Bar Examination

Essay Questions & Selected Answers

Multistate Performance Test Summaries & Selected Answers



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JULY 2019 OHIO BAR EXAMINATION

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Multistate Performance Test Summaries & Selected Answers

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OHIO BAR EXAMINATION

JULY 2019 OHIO BAR EXAMINATION

Essay Questions and Selected Answers

MPT Summaries and Selected Answers

The July 2019 Ohio Bar Examination contained 12 essay questions. Applicants were given three hours to answer a set of six essay questions. The length of each handwritten answer was restricted to the front and back of an answer sheet. The length of a typed answer was restricted to 3,900 characters.

The exam also contained two Multistate Performance Test (MPT) items. These items were prepared by the National Conference of Bar Examiners (NCBE). Applicants were given 90 minutes to answer each MPT item.

The following pages contain the essay questions given during the July 2019 exam, along with the NCBE's summaries of the two MPT items given on the exam. This booklet also contains actual applicant answers to the essay and MPT questions.

The essay and MPT answers published in this booklet merely illustrate above-average performance by their authors and, therefore, are not necessarily complete or correct in every respect. They were written by applicants who passed the exam and consented to the publication of their answers. See Gov.Bar R. I(5)(C). The answers selected for publication were transcribed as written by the applicants. To facilitate review of the answers, the bar examiners may have made minor changes in spelling, punctuation, and grammar to some answers.

Copies of the complete July 2019 MPTs and their corresponding point sheets are available from the NCBE. Check the NCBE's website at ncbex.org for information about ordering.

QUESTION 1

One afternoon in suburban Anytown, Ohio, Mom was working in her home office when she saw on the screen of her home security camera that a person took from her front porch a small package that was just delivered. Believing the person was a thief (Thief) and had taken the book set that Mom ordered for her 10-year-old daughter (Daughter), Mom grabbed a large stapler from her desk and ran outside to stop Thief and retrieve the package. Mom ran up behind Thief and threw the stapler at him, hitting him in the head, and knocking him to the ground. Mom retrieved the package, then she ran back into her house, and called the police.

After Mom got off the phone, she stood near her front door to wait inside for the police. Mom then saw through the window that Daughter had just gotten off the school bus and was walking toward the house. Fearing for the safety of Daughter because Thief was still outside lying on the ground, Mom grabbed her pistol and went outside to escort Daughter into the house. Seeing Mom approach with her gun pointed at him, Thief grabbed Daughter and threatened to take her in his car if Mom did not let him flee the scene.

Mom continued pointing the gun at Thief and told him to take his hands off Daughter or she would shoot him. Thief simply laughed and continued pulling Daughter toward his car and threatening to take her with him if Mom did not put down the gun and let him leave. Afraid that Thief would follow through on his threat, Mom aimed the gun and shot Thief in the leg. Thief fell to the ground and Daughter was able to run into the house.

Mom then stood over injured Thief, pointing the gun directly at his head. As Thief was calling Mom crazy and pleading for his life, Mom laughed and repeatedly threatened to shoot him in the head. When the police arrived approximately 20 minutes later, they took Thief into custody. Although Thief was charged criminally, he filed a civil tort action against Mom in an Ohio court.

What intentional torts did Mom arguably commit against Thief and what defenses, if any, might Mom reasonably assert against each alleged tort?

Explain fully.

Battery

Under tort law, a battery occurs when a defendant acts with the intent to cause a contact with a plaintiff, the contact actually occurs, and the contact is harmful or offensive to an ordinary person. Here, Mom intentionally acted when she threw a stapler at thief, as evidenced by the facts indicating she intended to strike him. The contact occurred, as the stapler hit him in the head, causing him to fall to the ground. It doesn't matter that Mom herself didn't have physical contact, because the stapler is sufficient contact. Throwing a stapler at someone's head would be considered a harmful contact because it actually causes injury when hit with a stapler. Further, a reasonable person in society would find getting hit in the head with a stapler to be offensive. Therefore, the elements of battery are met.

Mom committed a second battery when she shot Thief in the leg. It is clear that she acted intentionally because she aimed the gun directly at Thief and pulled the trigger, which evidences that she meant to cause the harm. The contact actually occurred, as a bullet hit Thief. Again, it does not matter that Mom didn't actually come into contact with Thief physically, because the bullet hitting him is sufficient contact to constitute a battery. Further, it is clear that getting shot is harmful, and would be offensive to any reasonable member of society. Therefore, as Mom intentionally pointed a gun at Thief and shot him, causing a contact, and the resulting contact was harmful/offensive, the elements of battery are met.

Assault

An assault occurs when a defendant intentionally causes a plaintiff to apprehend the imminent risk of a harmful or offensive contact, and that apprehension of the contact actually occurs. Here, it is clear that Mom acted with intent to cause fear of an imminent contact with Thief, as noted above and as noted in the facts that state she told Thief specifically that she would shoot him. It does not matter that Thief was not afraid and laughed off her threat, because fear is not an element of assault. One must only reasonably apprehend, which means to be aware; therefore, it only matters that he was aware of an imminent harmful or offensive contact. Here, it looks as if he was aware, because in response to her threat he laughed and pulled Daughter closer. Further, as stated above, a shooting would clearly be a harmful or offensive contact. Therefore, the elements of assault are met.

False Imprisonment

False imprisonment occurs when a defendant intentionally causes a plaintiff to be confined in a bounded area for any appreciable amount of time, and that the plaintiff was aware of confinement or harmed by it. Here, Mom caused Thief to be confined when she stood over him with a gun to his head. The fact that Thief was not able to leave will constitute a bounded area for the purposes of false imprisonment. He was actually held there for 20 minutes, which is surely an appreciable amount of time, as courts have found even a few minutes will suffice. Further, it is clear Thief was aware of the confinement because he was pleading with Mom to let him go. Therefore, the elements of false imprisonment are met.

Defense of Property

Under tort law, an individual can use reasonable, never deadly force to regain property wrongfully taken. It is likely unreasonable to throw a stapler at someone's head, and, therefore, this defense will fail.

Defense of Others

An individual is entitled to use the same force to protect someone as they would, which is reasonable and proportionate. Though Mom was the first aggressor, it is likely proportionate because Thief was going to kidnap her daughter and Daughter would be able to assert the defense herself.

Arrest

A private citizen is entitled to arrest an individual in Ohio if a felony has been committed, and theft and attempted kidnapping are felonies, therefore this defense may prevail.

QUESTION 2

On May 30, 2015, on a rural highway in Green County, Ohio, Dawn drove her auto across the center line and collided head-on with an auto driven by Paul. Seconds later, Paul's auto was struck in the rear by a truck owned by Acme Delivery Co., Inc. (Acme), driven by Acme employee, Allen.

The accident report made at the time of the event revealed that Paul was a resident of Green County and that Dawn resided with her father in an adjoining county. Allen also is a Green County resident.

Acme is a Florida corporation whose General Manager and sole shareholder is Frank, a resident of Florida. Acme has a current Ohio agent of record to receive process. Acme leases space in Green County in a small commercial warehouse for overnight parking of its truck and transfer of delivery items. Acme's only business office is in Frank's Florida home. The Green County warehouse address appears on the accident report as Acme's Green County address, although Acme has no office there.

On December 31, 2016, Dawn married Jon Brown, changed her name to Dawn Brown, and moved with her husband to California.

On June 15, 2016, Paul filed a Complaint against Dawn, Allen, and Acme with the Clerk of the Green County Common Pleas Court. Paul filed the requisite copies of the Complaint, each displaying a caption stating names and addresses for all defendants as shown on the accident report.

The Clerk sent a Summons and Complaint by certified mail to each named defendant, return receipt requested. The Clerk's entries on the appearance docket show "Failure of Service" to Dawn, Allen, and Acme. Notice of failure of service was sent to Paul on July 18, 2016. Paul then filed a written request for personal service of process on all defendants to be completed by the Deputy Sheriff.

The Deputy Sheriff's return of personal service on Dawn at her father's home stated, "Subject not found at this address or in this jurisdiction." The return of service upon Allen recited, "Served this subject by handing summons and complaint to his wife at his home in Green County on August 26, 2016." The Deputy Sheriff's return of service upon Acme's summons recited, "Personal service upon defendant by handing Summons and Complaint to Sam Smith, at his desk in the warehouse office on August 26, 2016." Sam is the warehouse security guard.

Acme's counsel properly filed a notice of limited appearance to file a motion to dismiss the Complaint, alleging that the court lacked personal jurisdiction of Acme, and because of insufficient service on Acme. Upon the court's denial of the motion for dismissal, Acme's counsel moved for a change of venue to the State of Florida. The court also denied the motion for a change of venue.

Allen's counsel, also making a limited appearance, claimed insufficient personal service of process upon Allen by "handing Summons and Complaint to his wife" in Allen's absence. The court denied Allen's motion to dismiss.

Paul learned in June 2017 that Dawn had moved to California. He filed a request with the Clerk of the Common Pleas Court for additional service of process by certified mail to Dawn at her new address in California. Process was sent on June 16, 2017, and return of service was made June 30, 2017, followed by Dawn's motion for dismissal of the action as to Dawn for insufficiency of service of process and lack of personal jurisdiction. The court granted Dawn's motion and dismissed her as a party to the action.

Did the court rule correctly on:

1. **Acme's motion to dismiss?**
2. **Allen's motion to dismiss?**
3. **Acme's motion to change venue?**
4. **Dawn's motion to dismiss?**

Explain each answer fully.

Under the Ohio Rules of Civil Procedure, the Court has jurisdiction over in-state conduct. Out-of-state parties must be subject to Ohio's Long-Arm statute and the suit must comply with due process, meaning it must not offend traditional notions of fair play and substantial justice, which requires defendants to have certain minimum contacts with Ohio before being brought into court here. The Rules require a defendant be served with a summons and a copy of the complaint and the attempt must be reasonably calculated to provide notice.

1) The Court properly denied Acme's Motion to Dismiss for Lack of Personal Jurisdiction, but correctly ruled that service was insufficient.

Ohio has jurisdiction over Ohio corporations or entities maintaining a principal place of business in Ohio. Under Ohio's Long-Arm Statute, the state has personal jurisdiction over entities outside Ohio if: they derive substantial revenue from Ohio; engage in a consistent course of business transactions in Ohio; contract to insure persons in Ohio; or put products into the stream of commerce that may reasonably end up in Ohio and cause injury here. In this case, Acme is a Florida corporation, but it has a warehouse in Ohio and a resident agent here. Also, its driver was involved in the underlying conduct on an Ohio roadway. As such, personal jurisdiction is satisfied.

Personal service was requested after certified mail service failed. Personal service may be made on an incorporated entity at its principal place of business, left with its registered in-state agent or served on a corporate officer in a manner outlined by the service requirements of the jurisdiction where the corporation is subject to service. Here, Acme merely has a building in Ohio – not its office. Service was left with a security guard, not an agent or officer of Acme. Although Paul relied on the address in the report, service was improper. There is time, however, within the statute of limitations for Paul to properly serve the entity, so the dismissal should be without prejudice.

2) Allen was not properly served.

Allen is an Ohio resident. Because certified mail was ineffective, Paul made a proper written request for personal service via the sheriff. Personal service must be made on the named party. It is ineffective when left at that home of the defendant with a person of suitable age/discretion who resides there, as that is *residential*, not *personal* service. Leaving the summons and complaint with Allen's wife was not sufficient and Allen's motion should have been granted. As noted above, Paul still had time to attempt service again.

3) Acme's Motion was properly denied because venue is proper in Green County.

Under Ohio law, venue is proper in the county where the underlying conduct took place, where the defendant lives/operates its business, or is otherwise subject to service, and otherwise where Plaintiff is domiciled. Here, the accident occurred in Green County. Thus, proper venue is Green County Court of Common Pleas (exclusive jurisdiction for claims exceeding $15,000 and not subject to the jurisdiction of the Court of Claims).

When venue is proper, the Court has the *discretion* to transfer to another *in-state* venue based on private (ease of access to parties/witnesses) and public factors. If no in-state venue is proper, the c ourt may stay the proceeding under Rule 3(d) – on moving party's consent to jurisdiction/waiving of statute of limitations – and within 60 days, the court would dismiss. Here, Acme requests an out-of-state transfer. This would be inconvenient for Plaintiff and the witnesses. Additionally, Allen, a co-party, is located in Ohio, and Acme has an agent here to handle process. The court cannot transfer to out-of-state venues, and there is no need to stay the proceeding to allow it to be refiled in Florida.

4) Dawn's Motion to Dismiss should have been granted.

As outlined above, Ohio courts have jurisdiction over conduct occurring in Ohio. Here, the accident was in Ohio and personal jurisdiction exists because Dawn lived in Ohio at the time of the accident. However, under the Ohio Rules of Civil Procedure, service must be made within one year of filing the complaint. Suit commenced in this case on June 15, 2016, and Dawn did not receive notice until June 16, 2017. Service was not timely made, and the court should have dismissed the claim against Dawn.

QUESTION 3

The following events all occurred in Anytown, Ohio.

1. Vets R Us took out a loan from ABC Bank (ABC) and gave ABC a security interest in all of its accounts receivable. Vets R Us subsequently defaulted on the loan from ABC, so ABC sent a notice to all of Vets R Us' customers advising them to pay any monies that they owed to Vets R Us to ABC directly. Zoo, a charitable organization, owed $10,000 to Vets R Us for services rendered. Jim, the accountant for Zoo, received a copy of ABC's notice, but paid Vets R Us instead and sent a note to ABC stating that it had paid Vets R Us. Jim's opinion was that this was solely a matter between Vets R Us and ABC. Shortly thereafter, Vets R Us became insolvent and lost the $10,000 paid by Zoo. ABC has sued Zoo for the money.

2. Bret was the owner of a valuable antique painting, which he used as collateral for a loan from Credit Union. The painting was proudly kept on display in Bret's home. The following events occurred immediately after Bret's default on his loan to Credit Union:

   a. Credit Union sent Hulk Hank, its "repossession specialist," to Bret's home to repossess the painting. Hulk, who is 6'8" tall and weighs 320 pounds, knocked on Bret's door and gruffly announced in a gravelly voice that he was there to pick up the painting. Bret objected at first and said, "I need to call my lawyer." Hulk then said that he did not want to come back and, moreover, that if he had to, he would be "very angry." Bret stepped aside and Hulk went into his home and took the painting.

   b. Credit Union had difficulty valuing the painting, so it decided to offer it at auction to the highest bidder. Credit Union scheduled an auction and sent out a notice to Bret seven days before the auction with the following: a description of the debtor and the collateral, the time and place for the auction, and that Bret could be entitled to, and could receive, an accounting for the unpaid indebtedness and the cost of preparing the auction, after the auction.

   c. The auction was held seven days later and Herb, the President of Credit Union, purchased the painting himself for approximately one tenth of its actual value.

   1. Who should prevail in ABC's action against Zoo?

   2. What defects, if any, existed regarding the repossession of the painting?

   3. What defects, if any, existed regarding the auction of the painting?

   4. What, if anything, can Bret recover from the Credit Union?

Explain your answers fully.

1. ABC should prevail in its action against Zoo. Under secured transaction law, a secured party having a security interest in accounts and/or chattel paper may, upon default, notify account debtors to make payment directly to the secured party rather than the debtor. If, after proper notice, an account debtor fails to do so, the secured party may enforce the right to payment against the account debtor. Here, ABC had a security interest in Vets' accounts receivable. When Vets defaulted, ABC was entitled to notify account debtors, such as Zoo, to make payment directly to it (ABC). Upon receipt of the notice, Zoo should have paid ABC, but it chose to pay Vets instead. Therefore, ABC may now hold Zoo liable for the $10,000 payment it failed to make to ABC directly.

2. The repossession of the painting was a breach of the peace. Under secured transactions law, upon default, a secured party may engage in self-help repossessions to recover the collateral, but may not breach the peace in so doing. A breach of the peace may occur where the secured party or their agent enters the debtor's home, takes the collateral over the debtor's objection, or otherwise uses improper threats, force, trickery, or deceit. Here, Credit Union sent a 6'8, 320-pound repossession expert to Bret's home. Bret initially objected to Hulk taking the painting, but acquiesced after intimidated by Hulk's threat that he did not wish to return and that he would be very angry. Therefore, due to this show of force/threats over Bret's objection, Credit Union breached the peace in repossessing the painting.

3. The sale of the painting was not commercially reasonable. The sale of collateral must be commercially reasonable as to time, place, and manner. Public auctions and private sales are both commercially reasonable. Additionally, notice must be sent within a reasonable time before the sale (10 days in Ohio is presumed reasonable) notifying the debtor of the following: (1) the identity of the secured party; (2) the collateral to be disposed of; (3) the time and place of sale; (4) the debtor's right to an accounting; and, if the collateral is consumer goods (5) a phone number where an accounting can be obtained; and (6) that the debtor may be liable for a deficiency. Consumer goods are goods used for personal, family, or household enjoyment. Finally, a secured party may not purchase the collateral at a private sale, unless the goods are of a kind sold on a recognized market. Here, the public auction of the painting was commercially reasonable because it was difficult to value. Notice was not sent within a commercially reasonable time because it was sent only seven days before the sale (instead of 10 days prior). Further, the painting was a consumer good because it was used by Bret for his personal, family, or household enjoyment, and thus the notice omitted the two additional requirements for consumer goods sales – a phone number and liability for any deficiency. Also, President's purchase of the collateral was improper because the painting was not a type customarily sold on a recognized market because it was hard to value and President purchased it for only a tenth of its fair market value. Therefore, the sale itself and notice of the sale were not commercially reasonable.

4. Bret can recover damages from Credit Union and is entitled to a presumption against a deficiency. If a sale fails to comply with the requirements above, a debtor is entitled to actual damages resulting from the breach, as well as 10 percent of the cost recovered if the collateral is a consumer good. An account debtor is also entitled to a rebuttable presumption that the value obtained at the sale is equal to the amount of any outstanding obligations (and thus is not entitled to pay any deficiency). A debtor may also recover any statutory damages permitted by law.

QUESTION 4

Rosebud School (School) is a private special needs school in the State of Franklin. It receives 85 percent of its funding from the State. To be eligible for tuition funding under state law, the school must comply with a variety of state regulations, many of which are common to all schools. Marco, who is Mexican, but became a United States citizen, teaches at the school. Marco came to School one day wearing a protest button on his shirt objecting to legislation that was being considered by the Franklin General Assembly that Marco believed was anti-immigrant. School has a strict policy against any display of political views and Marco was dismissed for violating the policy.

Marco owned a home that is subject to a private restrictive covenant signed in 1920. The covenant prohibits the sale of the property to anyone who is Jewish. The covenant provides that the restrictions are to remain in effect until January 1, 2030. Marco ignored the covenant and willingly sold his home to Josh, who is Jewish. Neighboring homeowners (Homeowners) subject to the same restrictive covenant sued Marco and Josh in Franklin State Court to enforce the restrictive covenant and restrain Josh from taking possession of the property Josh purchased. The Franklin State Court ruled in favor of Homeowners.

Josh and Marco went to Josh's private club (Club) to have drinks and dinner. Club, which is on private property, holds a liquor license issued to it by the State of Franklin. While nearby bars, restaurants, and hotels have liquor licenses issued by Franklin, Club is the only private establishment in a 50-mile radius to hold a liquor license. Pursuant to Club's Bylaws, which limits membership to Jews and service to Jewish guests, Club refused to serve Marco and asked him to leave. When Marco refused to leave, Club called the police, who arrested Marco for criminal trespass.

Marco sued School and Club, for violations of his Fourteenth Amendment rights.

Josh appealed the decision of the Franklin State Court on the basis of his Fourteenth Amendment rights.

1. How should the court rule on each of Marco's claims against School and Club?

2. How should the court of appeals rule on Josh's appeal of the decision of the Franklin State Court?

Explain your answers fully.

A

The 14th Amendment's Equal Protection Clause prohibits discrimination by state actors on the basis of certain suspect and quasi-suspect classes. State restrictions based on race, national origin, or alienage are subject to strict scrutiny. Restrictions based on gender or legitimacy are subject to intermediate scrutiny. Other restrictions (e.g., age, wealth, disability, sexual orientation) get rational basis review.

Generally, only state actors can violate the Equal Protection Clause. However, private actors can violate it under the public function exception or the entanglement exception. The public function exception provides that private actors that are performing activities that are traditionally performed only by governments must comply with the Constitution. Examples include running elections or overseeing cities. The entanglement exception provides that a private actor must comply with the Constitution if the government is sufficiently encouraging, authorizing, facilitating, assisting, or otherwise entangled with the private actor's conduct. Examples of sufficient entanglement include courts enforcing private covenants, the government authorizing and funding particular private conduct, and so on. However, simply providing general permits or licenses usually does not constitute sufficient entanglement.

1) The court should rule in favor of School. School is certainly restricting the symbolic speech of its employees. Generally, governmental restrictions on symbolic speech must be narrowly tailored to an important state interest that is unrelated from mere suppression of the message conveyed by the symbolic speech. However, there is not sufficient government entanglement on these facts. Although School receives 85 percent of its funding from the state and must comply with certain state regulations in order to be eligible for such funding, the Supreme Court has ruled before that less-than-100- percent government funding, by itself, does not establish the type of entanglement or government encouragement needed to find state action. Marco can try to argue that the State of Franklin implicitly condones this behavior by requiring School to comply with many regulations, but not a regulation prohibiting such suppression of speech. However, this will probably not prevail. If a state officially approved or authorized this policy, there would be state action. But that is not shown on these facts. Thus, there is no state actor here.

The court should rule in favor of Club. By refusing to serve non-Jews, Club is certainly committing conduct that would be violative of the Equal Protection Clause (discriminating based on ethnicity or national origin). But again, there is not sufficient entanglement on these facts. The Supreme Court has found before that merely granting a liquor license or other similar permit to a private entity does not itself constitute sufficient government involvement with respect to how that entity decides to use that permit. Here, Franklin simply issued a liquor license to Club. That is the extent of the state's involvement. The state does not oversee the Club's operation, the state does not officially or unofficially authorize the Club's activities, the state does not otherwise encourage or suggest that Club act the way it does. Thus, there is no state actor here.

2) The court should rule against Homeowners. Unlike the above two scenarios, there is sufficient state action here. Whenever a court enforces a racial covenant, there is sufficient state involvement to trigger the entanglement exception. Here, the Franklin State Court enforced the racial covenant prohibiting the sale of land to Jews. This is state action and a violation of the Equal Protection Clause. Thus, the court should side with Marco.

QUESTION 5

Paula Plaintiff (Plaintiff) was walking in a crosswalk in Anytown, Ohio and was hit by a car driven by Dan Defendant (Defendant). Walter Witness (Witness) was standing near the scene of the accident and saw the collision. Plaintiff was injured in the accident and was taken by ambulance to Anytown Hospital, where she was hospitalized for three days. Plaintiff suffered injuries to her back and both legs, and was treated by Dr. Steven Surgeon, an orthopedic surgeon. Plaintiff was off work for six weeks after her surgery.

Plaintiff filed suit against Defendant in the Court of Common Pleas of Anycounty, Ohio seeking damages for the injuries that she suffered in the accident. The parties were unable to settle the case and trial commenced. At trial, counsel for Plaintiff called several witnesses. Plaintiff first called Witness and he testified that he saw that Plaintiff was hit while in a crosswalk by a car driven by Defendant. Witness also testified that Plaintiff likely would not be able to walk normally in the future as a result of the accident.

Plaintiff's counsel then called Jane Johnson (Johnson), the Director of Human Resources at Anytown Aluminum, the employer of Plaintiff. As Director of Human Resources, Johnson supervises the payroll department at Anytown Aluminum. Johnson testified that, at the time of the accident, Plaintiff worked 40 hours per week at an hourly rate of $20. Johnson also testified that Plaintiff was off work for six weeks after the accident and that Plaintiff incurred lost wages of $4,800. Johnson further testified that it was necessary for Plaintiff to be off work for that amount of time because of the injuries that she suffered in the accident.

Counsel for Defendant objected to the testimony of both Witness and Johnson on the grounds that their testimony constituted expert opinion and neither was qualified as an expert witness. The court overruled the objections and allowed the full testimony of both to be admitted into evidence.

Dr. Surgeon was then called by Plaintiff and qualified as an expert witness. Dr. Surgeon testified that he treated Plaintiff for her injuries and that it was his opinion, to a reasonable degree of medical certainty, that Plaintiff suffered injuries to her legs and back as a result of the accident, that she would likely need additional surgery on her legs within the next three years, and that she would likely have back pain for the rest of her life.

Counsel for Defendant objected to the testimony of Dr. Surgeon because the doctor did not personally see the accident and because his testimony constituted the ultimate issue in the case. The court also overruled these objections.

Did the court rule correctly on:

1. **The objection to Witness's testimony?**
2. **The objection to Johnson's testimony?**
3. **The objection to Dr. Surgeon's testimony?**

Explain your answers fully.

(1) **Objection to Witness's Testimony**. The court ruled correctly as to Defendant's objection concerning the Witness's testimony about Plaintiff being hit while in a crosswalk. However, the court ruled incorrectly regarding Witness's testimony about Plaintiff's ability to walk normally in the future. As a lay witness (someone without expertise), Witness is competent to testify as to matters that are relevant and that he has personal knowledge of. Here, Witness's first statement – that he saw that Plaintiff was hit while in a crosswalk by a car driven by Defendant – is admissible testimony. Witness was standing near the scene of the accident and personally saw the collision. Thus, Witness was competent to testify as to these events, because he had actual, personal knowledge of the car accident.

Further, lay witnesses are permitted to provide opinions as to facts and circumstances, as long as the opinion does not require some level of expertise, knowledge, or training. For example, a lay witness is able to give an opinion that somebody appeared drunk or unconscious; however, a lay witness may not give an opinion about a medical diagnosis. Here, Witness's second statement was inadmissible, because it was an opinion about medical diagnosis. Such an opinion must be given by an expert witness. When Witness stated that Plaintiff likely would not be able to walk normally in the future as a result of the accident, Witness provided an opinion as to Plaintiff's medical diagnosis. In other words, Witness's statement relates to Plaintiff's physical condition and the related injuries, an opinion that must be reserved for an expert witness. There is no evidence that Witness is being used as an expert witness, and is not a medical professional. Thus, this statement is inadmissible.

(2) **Objection to Johnson's Testimony**. The court was correct in part, and incorrect in part, when it ruled on the objection to Johnson's testimony. As Director of Human Services, Johnson supervises the payroll department at Anytown Aluminum. Thus, Johnson has personal knowledge of how employees are paid, their pay rates, and the amount of time an employee works. Therefore, Johnson's testimony that Plaintiff works 40 hours per week at an hourly rate of $20 is admissible because she has actual, personal knowledge of these facts. Further, Johnson had actual, personal knowledge that Plaintiff was off work for six weeks due to the accident, and incurred lost wages of $4,800. However, Johnson's testimony regarding the amount of time Plaintiff will be forced to miss is inadmissible, for similar reasons described above. This opinion would require Johnson to have expertise as to Plaintiff's injuries and the physical limitations that these injuries present. Again, Johnson is not an expert witness, nor does she have any medical training that would qualify her to make such an opinion. Therefore, this testimony is inadmissible.

(3) **Objection to Dr. Surgeon's Testimony**. The court correctly ruled on the objection to Dr. Surgeon's testimony. Here, Dr. Surgeon is an expert witness. An expert witness's role is to assist the trier of fact by providing specialized expertise, knowledge, or training in a way that the trier of fact can understand. Expert witnesses are permitted to give opinions as to ultimate facts based on evidence the expert perceives in court or through a personal examination. For example, Dr. Surgeon testified it was his opinion that Plaintiff suffered injuries as a result of the accident, she would likely need surgery, and she would have back pain the rest of her life. Because of Dr. Surgeon's expertise, such an opinion is admissible. Further, because Dr. Surgeon personally treated Plaintiff, he has adequate knowledge of the facts that are sufficient for him to have an opinion as to this issue. Therefore, Dr. Surgeon's testimony is admissible.

QUESTION 6

Aunt Susan had three nieces, Ashley, Kate, and Mary. When each niece reached her 18th birthday, Aunt Susan sent each a letter making the following offers:

To Ashley: I will pay you $5,000 if you refrain from smoking cigarettes, drinking alcohol, and getting a tattoo until after you have graduated with a degree from a 4-year college or university.

To Kate: I will pay you $5,000 if you refrain from shoplifting or any other criminal activity until after you have graduated with a degree from a 4-year college or university.

To Mary: I will pay you $5,000 if I determine that you have succeeded at a 4-year college or university.

Each niece replied in writing that she accepted Aunt Susan's generous offer. Thereafter, each niece took out a student loan in reliance upon Aunt Susan's promise of $5,000.

Ashley barely graduated from the local four-year college. Throughout that time, she refrained from smoking cigarettes, drinking alcohol, and getting a tattoo. Aunt Susan, claiming she was unhappy with Ashley's performance in school, refused to pay the $5,000.

Kate graduated from the local four-year college; however, two nights after her graduation, Kate was accused of shoplifting a six-pack of beer on her way to a graduation party. Upon learning of the allegation, Aunt Susan refused to pay the $5,000.

Mary graduated from The Ohio State University with a 3.2 grade average; however, Aunt Susan believed that Mary could have done better and refused to pay the $5,000.

Each of the nieces then sued Aunt Susan for breach of contract.

Who should prevail in each case, and should the fact that each niece took out a student loan in reliance upon Aunt Susan's promise have any bearing on the court's decision?

Explain fully.

A

Contract law is governed by common law, generally, unless it involves the sale of goods, in which case it is governed by the UCC. An enforceable contract requires an offer, acceptance and consideration. Acceptance requires a return promise to perform or the performance itself. Consideration is a bargained-for exchange that results in the detriment of both parties and can include a promise to refrain from something one is legally permitted to do, or to do something one is not legally obligated to do.

Ashley

Aunt Susan's offer to pay Ashley $5,000 was an enforceable contract for which Ashley should prevail.

Aunt Susan was willing to give Ashley $5,000, something she was not legally obligated to do, in exchange for Ashley's refraining from smoking cigarettes, drinking alcohol, and getting a tattoo – all actions Ashley was legally permitted to do. Ashley accepted Aunt Susan's offer in writing. Because these promises were supported by consideration, contained a valid offer and acceptance, there was a legally enforceable contract. Ashley performed her part of the contract and is entitled to the $5,000. Aunt Susan's claim that she was unhappy with Ashley's performance in school is immaterial because it was not part of their agreement. Thus, Aunt Susan must pay Ashley in performance.

Recovery in a contract action typically is based in restoring the party to the condition they would have been had the breaching party not breached. Reliance damages are awarded in a contract recovery when it is impossible to restore the non-breaching party to its pre-contract state and the non-breaching party relied on the promise and sustained losses. Here, the fact that Ashley refrained from doing many legal actions she could have done, and took out a student loan in reliance on the promise, the court will likely find that if the contract was unenforceable. Ashley detrimentally relied on Aunt Susan's promise and should recover the $5,000 anyway. However, because the promise was enforceable, Aunt Susan should pay the $5,000 without proof of Ashley's reliance.

Kate

Aunt Susan's offer to pay Kate $5,000 was not an enforceable contract and Aunt Susan should prevail.

Aunt Susan was willing to give Kate $5,000, something she was not legally obligated to do, in exchange for Kate's refraining from shoplifting or any other criminal activity – all actions Kate was NOT legally permitted to do. Promises to refrain from doing illegal activity are not valid consideration because they are not a detriment to the party. Kate is not suffering some loss by agreeing not to commit crimes. Thus, although Kate accepted Aunt Susan's offer in writing, because Kate's promise to refrain from illegal activity was not valid consideration, there was no legally enforceable contract.

Even though Kate thought her contract was enforceable, she cannot claim reliance by refraining from illegal activity. Damages will not be awarded to a person for not breaking the law. Thus, her reliance on the $5,000 cannot be supported in any damages claim.

Mary

Aunt Susan's offer to pay Mary $5,000 was not an enforceable contract and Mary should prevail. Aunt Susan was willing to give Mary $5,000, something she was not legally obligated to do, in exchange for Aunt Susan's determination that Mary succeeded at a four-year college. This is an action Mary was NOT legally obligated to do. However, Aunt Susan's promise is illusory and thus not valid. An illusory promise involves an action that may be revoked by the offeror based on some action or inaction at the promisor's determination. Aunt Susan's determination of Mary's success is illusory because she can get out of this promise at any time by just determining that Mary was not successful. There is no objective standard of performance. Thus, this is not an enforceable contract.

However, Mary detrimentally relied on Aunt Susan's promise and should recover.

QUESTION 7

David rode the same bus as Vanessa every day in Anytown, Ohio. Vanessa was a young, attractive executive and David often tried to sit next to her. David developed a powerful physical and mental attraction to Vanessa. However, David thought that Vanessa would never have the same attraction to him, as she ignored him completely.

One day David followed Vanessa home to her gated community. He followed Vanessa past the gates and watched her enter her townhome. Overwhelmed by his attraction to Vanessa, David decided that he would wait until late in the evening and then gain entry to her home. He planned to quietly enter her bedroom and place a pillow over her face until she passed out. He would then engage in sexual intercourse with her, kiss her goodnight, and leave.

Later, David entered Vanessa's home and executed his plan. However, after he had intercourse with her and pulled the pillow from her face, he realized that she was not breathing. In a panic, David began to administer CPR. Although he tried, she was dead, and he could not resuscitate her.

Unknown to David, Vanessa had a roommate, Rachel, who had awakened and opened her bedroom door, seeing David. David pulled out a gun and ordered Rachel out of her bedroom. David forced Rachel into the kitchen. David aimed his gun at Rachel's head and pulled the trigger; however, the gun misfired. David then hit Rachel over the head with the gun until she was unconscious. David then walked into Vanessa's bedroom again to say goodbye. As David left the room, he slipped a wallet-sized framed photo of Vanessa into his pocket.

What crime or crimes should David be charged with committing, and what elements must be proven for each?

Explain your answers fully.

David is guilty of criminal trespass. One is guilty of criminal trespass if they knowingly enter land or remain on land without the owner's consent.

Here, David committed criminal trespass. He did not have Vanessa's consent to enter her house. He knowingly entered her home when he entered it to commit his plan. Thus, he is guilty of criminal trespass. However, this criminal trespass will merge with the below crime of burglary.

David committed burglary. Burglary is trespassing into an occupied structure with the intent to commit a crime therein. Ohio eliminated the common law nighttime requirement.

As mentioned above, David committed trespass when he knowingly entered Vanessa's home without her consent. The structure was occupied because both Vanessa and Rachel were present. He entered with the requisite intent because he intended to commit the crime of rape while trespassing inside the house, as discussed below. Thus, he is guilty of burglary.

David is guilty of rape. Rape is sexual intercourse achieved by force, threat, or deception without the consent of the victim. Ohio has made rape gender-neutral and eliminated the spousal exception to rape.

Here, David committed rape when he had sexual intercourse with Vanessa while she was sleeping. Because she was sleeping, she was unable to consent. Further, he used force by placing the pillow over her. Thus, he is guilty of rape.

For the death of Vanessa, David is guilty of aggravated murder. Ohio does not have degrees of murder. Aggravated murder is Ohio's equivalent of first-degree murder. In Ohio, one is guilty of aggravated murder if he or she purposely causes the death of another with design and prior calculation, or knowingly commits murder while committing a dangerous felony. Felony murder makes a killing during any of the following felonies aggravated murder: robbery, rape, burglary, kidnapping, escape, arson, terrorism.

Here, David is guilty of aggravated murder. Although he did not have the prior design or calculation to commit murder, he is guilty because the killing occurred during one of the above enumerated felonies. In this case, the killing occurred during the violent felonies of rape and burglary. David had the requisite intent of knowing because it was practically certain that covering Vanessa with a pillow would result in her death. Thus, he is guilty of aggravated murder.

David could be guilty of unlawful restraint of Rachel. Unlawful restraint requires that the Defendant cause the victim to be restrained in a bounded area with no reasonable means of escape.

Here, David pointed a gun at Rachel and ordered her into the kitchen. She had no reasonable means of escape because she could have been shot if she moved. For these same facts, David could also be charged with aggravated menacing, which requires that the defendant knowingly cause the victim to feel a reasonable apprehension of serious harm or uses a deadly weapon. Here, he used a weapon and caused Rachel apprehension by pointing it at her.

David also is likely guilty of attempted murder of Rachel. In Ohio, an attempt requires the specific intent to commit the crime. The defendant must make a substantial step toward committing the crime.

Here, David pointed the gun at her head. Thus, he likely had the specific intent to kill her. Pulling the trigger was a substantial step.

David is also guilty of felonious assault. One is guilty of felonious assault if they knowingly cause physical harm with a deadly weapon. Here, David bashed Rachel over the head with the gun.

David also is guilty of theft. A defendant is guilty of theft if they knowingly obtain control of another's property with intent to deprive thereof without consent, or by force, threat, or deception.

Here, David took Vanessa's picture without her consent. Thus, he is guilty of theft. Because he possessed a gun, he also could be guilty of robbery.

QUESTION 8

Fred and Maria were married in 1988 and were life-long residents of Ohio. Fred and Maria had two children, David and Bart. Both David and Bart moved out of state in 2010.

Fred died unexpectedly in 2011. Maria was devastated and sought assistance from David and Bart. Neither of them was willing to move back to Ohio and thereafter they only had occasional contact with Maria. As a result, Maria relied heavily upon her cousin, Eddie. Over the next several years, Eddie was a tremendous help to Maria, and, as a result, Maria drafted a letter in 2014 (2014 Letter) that provided as follows:

"Since you have provided so much care and friendship to me since Fred's death, I will give you $20,000 upon my death."

Maria signed and dated the 2014 Letter and gave a copy of the same to Eddie.

In 2015, Maria contacted an attorney to draft more formal estate planning documents. Maria gave the attorney the original 2014 Letter. The attorney drafted a Will (2015 Will), which provided as follows:

1. I incorporate the terms of my 2014 Letter regarding my cousin, Eddie.
2. I give my Oak Street house to David.
3. I give any vehicles and the rest and residue of my property to Bart.
4. I appoint my cousin, Eddie, to serve as the Executor of my estate.

Maria executed the 2015 Will in full compliance with Ohio law.

In early 2018, Maria's health took a turn for the worse. Eddie quit his job and provided assistance to Maria over the next six months. Eddie called both David and Bart to ask them to help care for Maria; however, both declined. Eddie told both David and Bart that they should be ashamed of their actions and that he would tell Maria of their refusal to help. Eddie also told Maria of his discussion with both and mentioned to Maria that "neither should inherit anything."

When Maria's health continued to deteriorate, Eddie contacted hospice to assist Maria. Maria asked Eddie to arrange for the sale of her car. A buyer was found and Maria transferred the title to the buyer and had Eddie deposit the $10,000 proceeds into her account at State Bank. A week before her death, Maria drafted the following document:

1. I give my Oak Street house to Eddie.
2. All the other terms and provisions of my 2015 Will are ratified and affirmed.

Maria signed the document (2018 Document) below the dispositive provisions. Two days later, two hospice nurses (Nurses) came to Maria's house. Maria stated to the Nurses that she wanted to revise her 2015 Will to provide more for Eddie. Maria showed the Nurses the 2018 Document and acknowledged that the signature on the 2018 Document was her signature. She asked the Nurses to sign the 2018 Document as witnesses. The Nurses signed and dated the 2018 Document below Maria's signature. Maria passed away several days later.

Eddie has filed the 2014 Letter, the 2015 Will, and the 2018 Document with the Probate Court. Both David and Bart have asserted that the provisions regarding Eddie are not valid and that they should receive all assets of Maria's estate. The Nurses are willing to testify Maria appeared competent on the day they signed the 2018 Document as witnesses.

At the time of her death, Maria owned her Oak Street residence, and $25,000 in her State Bank account. Assume all debts have been paid.

1. **What objections might David and Bart assert to the provisions regarding Eddie in the 2014 Letter, the 2015 Will, and the 2018 Document, and are they likely to prevail?**
2. **Who is entitled to:**

   (a) Maria's house on Oak Street;

   (b) The $25,000 State Bank account?

   Explain your answers fully.

A

(1) David and Bart's Objections

First, David and Bart may object to the 2014 Letter by arguing that it was not incorporated into Maria's 2015 Will. To incorporate a prior writing by reference into a will, the incorporating provisions must (1) identify the prior document, (2) describe the prior document, (3) the contents of the prior document must match the terms of the description in the incorporating will, and (4) the incorporating will must conform to Statute of Wills requirements. Here, Maria properly incorporated the 2014 Letter in her 2015 Will. She identified it as the 2014 Letter in the will provisions, appropriately described it as a letter concerning her cousin Eddie, and the letter matches the description provided in the will. Furthermore, Maria's 2015 Will conformed to Statute of Will requirements.

Second, David and Bart may object to the 2018 Document on a few grounds. They may argue that the later document did not conform to the statute of wills and is not enforceable. The Statute of Wills requires that a will be (1) in writing, (2) signed at the end of document, (3) by the testator or a testator's agent at her express direction, and (4) witnessed by two disinterested witness who can attest to, subscribe to, and acknowledge the testator's signature. Here, the 2018 writing meets these requirements. Maria made the document in writing, she signed at the physical end of the document, and two disinterested witnesses signed, attested to and acknowledged Maria's signature of the will in Maria's presence.

David and Bart also may argue that Maria lacked testamentary capacity to create the 2018 Document. Testamentary capacity requires that the testator (1) be aware that she is creating a will, (2) know the nature and extent of her property, (3) know that names and identities of the persons who have natural claims to her bounty, and (4) appreciates her relationships with her family members. It appears that Maria had testamentary capacity to make the 2018 Document. Although Maria's health was deteriorating, there is nothing to indicate she didn't know what she was doing, the nature and extent of her property, who had claims to her property, and who her family was. Furthermore, the hospice nurses confirmed that Maria appeared competent when she made the document. Thus, this argument will likely fail.

Finally, David and Bart may argue that Eddie exerted undue influence over Maria. To challenge on undue influence grounds, a party must show that (1) the testator had a susceptible mind, (2) the person had the opportunity to exert undue influence over the testator, (3) the person did exert undue influence, and (4) the result of the undue influence is reflected in the will. This argument may be more successful as Maria's health was deteriorating and Eddie did encourage her to remove Bart and David's inheritance, which was reflected, to some extent, in the will. However, this is rebutted by the fact that David and Bart refused to care for Maria and, further, they still took some proceeds from the will.

(2) Estate Proceeds

Eddie is entitled to the house on Oak Street. As described above, 2018 Document was a proper revocation of certain provisions of the 2015 will. Here, 2018 Document gives the house to Eddie, while the 2015 Will gives the house to David. Where the terms of two writings are inconsistent, the later writing controls so long as it complies with the Statute of Wills, which the 2018 writing does. Thus, Eddie takes the house.

Eddie also will take the first $20,000 from the State Bank Account and Bart will take the remaining $5,000. Eddie's $20,000 was properly incorporated by reference in the 2015 Will, as described above. As a general gift, it has precedence over Bart's residuary interest. Further, Bart's specific gift of the car adeemed when Maria sold it. Accordingly, he will only to take the remaining $5,000.

The answers printed in this booklet were selected because they were among the better answers written at the exam. They are not model answers and are not necessarily complete or correct in every respect.

QUESTION 9

Artist engaged Agent to sell or lease Artist's studio and to sell seven paintings painted by Artist that were at the studio and one painting by Artist on loan to Museum. Agent was instructed that the paintings must be sold to individuals and that the minimum price for the paintings at the studio was $1,000 each and the minimum price for the painting on loan to Museum was $10,000. Agent was to sell or lease the studio at a price and upon terms subject to Artist's approval. Agent sold six paintings to Dealer for $8,000 and one painting to Interior Designer for $100 and the painting at the Museum for $9,000 to Collector. Agent sent Artist a check for $17,100 as the proceeds of the sale, together with a listing of the amount received for each painting. Artist cashed the check.

Artist maintained a portfolio of stocks and bonds (Portfolio) managed by Banker. Artist directed Banker to sell the entire Portfolio if the net proceeds from such sale would equal $1,000,000.

Artist engaged Broker (a licensed real estate broker) to purchase a 10-acre farm at a price of not more than $100,000 per acre.

While Agent was selling the paintings at the studio, Agent found a wood carving by Carver and sold it to Dealer for $1,000 and sent Carver a check for that amount, which Carver deposited into his bank account.

Banker sold one-half of the Portfolio for $900,000 and intended to sell the remainder of the Portfolio in the next few days. Banker immediately transferred the $900,000 to Artist and sent Artist a notice that one-half of the Portfolio had been sold. Artist did nothing in response to the notice. The market changed, and the remainder of the Portfolio was worthless.

Artist engaged Broker to purchase a farm from Farmer. Broker, on Artist's behalf, offered Farmer $1,000,000 for the Farmer's 10 acres of land. Farmer accepted Artist's offer on the condition that Farmer retain the rights to the oil and gas from the land. Without Farmer's consent, Broker did oil and gas testing on the land and found that there was no oil or gas. Broker informed Artist that there was no oil or gas on the land and recommended that Artist accept the counter-offer. Artist approved Broker's acceptance of the counter-offer.

The following has occurred:

1. As soon as Artist learned that seven paintings had been sold to Dealer and Interior Designer, Artist demanded the return of the six paintings sold to Dealer.

2. One year after the sale to Interior Designer, Artist demanded the return of the painting sold to Interior Designer.

3. Thirty days after the sale of the painting to Collector, Artist told Collector that the lower price of $9,000 was acceptable, but a few days after telling Collector that the price was acceptable, Artist decided to demand a purchase price of $10,000 or the return of the painting.

4. Two years after Carver received the payment for the carving, Carver demanded the return of the carving.

5. Artist demanded that Banker pay for the loss in Artist's Portfolio in the sum of $900,000 since Artist will not be able to pay for the farm.

6. Farmer demanded that Artist purchase the farm, but Artist refuses to complete the purchase because Artist could not pay the purchase price.

7. Farmer sued Artist for Broker entering upon the farm without Farmer's consent.

State whether each demand will be successful and the reasons therefor.

Under agency law, an agency relationship is created if a principal manifests assent to an agent, the agent works on the principal's behalf, subject to the principal's control, and the agent manifests assent or otherwise consents to the relationship. Through the agency relationship, the Agent is permitted to enter into contracts and bind the principal if they have been authorized to do so through actual authority, implied authority, apparent authority, ratification, or acquiescence. Further, Agents owe their principals a duty of care and loyalty.

1. The demand for the return of the six paintings will be successful. Agent had the authority to sell the paintings only to individuals and only for certain prices. When he sold the paintings to Dealer, he exceeded the scope of his authority. Though it seems that Artist ratified the decision to sell to Dealer because he cashed the check, he was not aware of the material terms of the deal when he ratified it, and, therefore, the ratification is invalid and Artist is entitled to the return of the six paintings.

2. The demand for the return of the painting from Interior Designer will fail. Although Agent exceeded the scope of his authority by selling the painting to Interior Designer for $100 instead of $1,000, Agent ratified the agreement by cashing the check. Further, as Agent didn't return the check within 90 days of its deposit, or demand return of the painting within the same time, his ratification for this particular transaction will be valid.

3. The demand for the $10,000 purchase price or the painting to be returned should be denied. Not only can a principal ratify an agreement to an agent, but the principal also can ratify the agreement to the third party and it also will be valid. Here, Artist ratified the deal with Collector when he told Collector that the $9,000 was enough after knowing of the material terms of the deal. Because the original deal was ratified, Collector was discharged from any additional amount owing for the painting and is not required to return it.

4. The demand for the return of the carving will be successful. Under the duty of loyalty, an Agent must agree to work for the principal on their behalf and not take any personal profit or make any side dealings without the principal's approval. Here, the painting was found while Agent was selling paintings in the studio for Artist. As he was subject to Artist's control, he was not allowed to enter into this transaction on Carver's behalf and would not be allowed to distribute any money from said deal. Because Agent violated the duty of loyalty, Carver will prevail.

5. Artist's demand that Banker pay for the loss in the portfolio will fail. As mentioned above, a principal can be bound if the Agent takes an action and the principal later acquiesces to the action. Here, though Banker exceeded the scope of his authority by selling the portfolio in pieces for less than the original deal with Artist, he informed Artist of the material terms and Artist did not take any action to respond. Therefore, Artist acquiesced to the action and will not recover.

6. Artist will be required to purchase the farm. Under agency law, if the principal is disclosed, the parties to the contract are only the principal and the other party, excluding the agent. Here, Broker disclosed to Farmer that he was working for Artist on his behalf as an agent. Therefore, the parties to the contract are Artist and Farmer. Further, broker acted with actual authority given by Artist, and, therefore, Farmer will prevail.

7. Artist will be liable. Usually a principal is not liable for intentional torts of their agent unless it was within the scope of the relationship, motivated in part to benefit the principal, and is the kind of work Agent is hired to perform. Here, the testing was within the scope and what he was hired to do, and it was motivated to help Artist.

QUESTION 10

Alice ordered a chair for her den from Bob, one of the furniture builders at Chairs-for-Less. Chairs-for-Less is an international company that hires local craftsmen to build custom furniture. Alice selected a wood-framed chair with four legs and blue-and-gold fabric. Bob decided to include a free upgrade of the fabric and produced a chair exactly as Alice ordered, but with scarlet-and-grey fabric.

The chair was delivered to Alice, who was appalled by the change in fabric. She immediately filed suit against Chairs-for-Less in the Anytown, Ohio Municipal Court seeking damages of $1,000. Before Chairs-for-Less could answer, Alice had a change of heart, embraced the upgraded fabric, and voluntarily dismissed her action.

The next week, her college classmates met at her apartment for lunch. They hated the chair and she agreed. The next day, Alice refiled the same complaint against Chairs-for-Less in the Anytown Municipal Court seeking damages of $1,000. Chairs-for-Less moved to dismiss on the grounds of res judicata. The trial court denied the motion and, following a trial, awarded $1,000 to Alice.

A week later, Alice sat in the chair, and the legs collapsed. Alice fell to the floor and sustained injuries. Alice sued Chairs-for-Less in the Anytown Common Pleas Court, seeking damages for personal injuries in the amount of $20,000. Chairs-for-Less moved to dismiss, arguing that she was barred from raising this claim, again on the grounds of res judicata.

Larry and Mel jointly owned the apartment building where Alice rented her apartment. Larry learned about the broken chair and inspected the formerly pristine hardwood floor in the den, which was now covered with scratches caused by the chair's collapse. Larry sued Bob for $50,000 for building a defective chair. Bob defended the action and prevailed.

Two months later, Larry discovered the cause of the defective chair. Bob had used termite-infested wood in building the frame and legs of the chair. Those termites had now spread to the apartment building, which had to be closed for weeks to rid it of termites and make it structurally sound. Larry sued Bob seeking damages of $100,000 for damage caused by the termites. Bob moved to dismiss, arguing that he had prevailed in the prior action and this action was barred because of res judicata.

Mel, who had not been involved in the earlier actions, filed his own cause of action against Bob seeking $25,000 for damages to the hardwood floor. Bob moved to dismiss, asserting the action was barred by collateral estoppel.

1. Did the Anytown Municipal Court properly deny Chairs-for-Less's motion to dismiss Alice's action for $1,000?

2. How should the Anytown Common Pleas Court rule on Chairs-for-Less's motion to dismiss Alice's second action for $20,000?

3. How should the Anytown Common Pleas Court rule on Bob's motion to dismiss Larry's action?

4. How should the Anytown Common Pleas Court rule on Bob's motion to dismiss Mel's action?

Explain your answers fully.

Chairs-for-Less Motion to Dismiss Alice's First Action: Chairs-for-Less will not succeed in its motion to dismiss the first action. A plaintiff may voluntarily dismiss a case once without prejudice. In federal court, the plaintiff must file to dismiss before the defendant files an answer. In Ohio (as we are in for this case), however, the plaintiff has up until trial to file for a voluntary dismissal. Regardless of timing, Alice has timely dismissed as she filed a motion for voluntary dismissal before Chairs-for-Less could respond.

Res judicata or claim preclusion, applies to bar a prior claim where the same plaintiff sues the same defendant on the same claim in which the first court entered a final judgment on the merits. A final judgment on the merits operates with prejudice, and does not include final judgments that are not on the merits, such as voluntary dismissals or dismissals for a lack of personal jurisdiction or venue. Here, Alice voluntarily dismissed the claim in the first court, and thus the first court did not enter a final judgment on the merits. Accordingly, Alice's second claim is not barred.

Chairs-for-Less Motion to Dismiss Alice's Second Action: Chairs-for-Less will not succeed in its motion to dismiss the second action. As stated above, res judicata requires that the first court enter a final judgment on merits on the same claim that the same plaintiff raises against the same defendant in a second court. Here, Alice is still the plaintiff and Chairs-for-Less is still the defendant. The first court also entered a final judgment on the merits, awarding $1,000 to Alice. The claim, however, is not the same as the one Alice asserts in the second court. Two tests apply when determining the same claim. The majority test asks whether the second claim arises out of the same transaction or occurrence as the first. The minority test asks whether the second claim presents a different injury than the first. Under either test, the claim is not the same. The second claim arises out of facts regarding a defective product, not aesthetic appeal. The second claim also presents a different injury – personal injury damages – as opposed to the property damages raised in the first. Accordingly, t=e second claim does not merge with the first claim.

Bob's Motion to Dismiss Larry's Action: Bob will succeed in his motion to bar Larry's second action. The same res judicata principles discussed above apply. Here, the same plaintiff (Larry) brings a claim against the same defendant (Bob). The court issued a final judgment on the merits in the first, ruling in Bob's favor. Lastly, the claim is the same under either the majority or minority test. Both claims present property damages (satisfies minority test) and both claims arise out of the facts related to defective design or construction (satisfies majority test). Accordingly, the first claim bars the second claim.

Bob's Motion to Dismiss Mel's Action: Bob will not succeed in his motion to dismiss. Collateral estoppel or issue preclusion, requires preclusion on issues fully litigated in a previous action in which the issues are essential to judgment. To satisfy due process concerns, issue preclusion may not be asserted against a party that was not a party or in privity with a party to a prior action. Because Ohio does not relax its rules on mutuality, issue preclusion may only be asserted by a party who was a party or in privity in a prior action. Here, Mel was in privity with Bob as a joint owner of the apartment building. Further, the issues related to defective design were fully litigated and essential to judgment in the first action. Accordingly, Bob can assert issue preclusion to successfully dismiss Bob's action

QUESTION 11

Randy and Betty own adjacent single-family homes in Anytown, Ohio. Randy owns and occupies Redacre, and Betty owns and occupies Blackacre. Randy has owned Redacre since 1979. Betty acquired title to Blackacre in January 1990 from Fencer.

The backyard of each property is fenced; a chain-link fence was erected between the two properties in 1983 by Fencer, who was the owner of Blackacre at the time, approximately two feet inside the property line into Blackacre's backyard. Because of the fencing, two feet of Blackacre's backyard appeared to be on Redacre's side of the fence. Fencer, Betty, and Randy have always referred to this two-foot area as the "Strip."

In 2018, Betty began to relocate the fence closer to the property line between the two properties thereby placing the Strip on her side of the fencing. Randy objected, stating that he is rightfully the owner of the Strip. He refused Betty entry onto the Strip to relocate the fence.

With each claiming ownership of the Strip, Betty filed an action in January 2019 against Randy, in the proper court, seeking quiet title to the Strip against any claim or interest of Randy. Randy filed a countersuit for quiet title against Betty, asserting that he is the owner of the Strip and demanded a judgment declaring that the fence erected in 1983 is now the property line between the two properties.

At trial, the presiding judge admitted the following testimony and evidence:

A. Fencer testified that the fence was placed where it was for aesthetic reasons only, and not for the purpose of changing the property line. He further testified that Randy always was aware of the true property line;

B. Betty and Fencer both testified that during the time of their respective ownership of Blackacre, they each maintained the fence, that the fence never was treated as the property line with Randy's property, and that they never intended to cede to Randy ownership of the Strip. They stated that neither of them ever had any discussions with Randy regarding the property line, and neither had agreed, consented, thought, or otherwise acquiesced in any way, that the location of the fence was the property line between the two properties. Betty and Fencer also both testified that Randy never engaged in landscaping, planted any greenery, built any structures or permanent fixtures, paid any real estate tax, or maintained insurance for the Strip. Betty and Fencer both admitted that since the fence was erected, Randy had always mowed the grass on the Strip and, when he treated Redacre's grass for weeds and grub worms, he also treated the Strip. They also both admitted that they never prohibited Randy from mowing or treating the Strip;

C. Betty presented a stipulated certified survey showing that the Strip has always been part of Blackacre; and

D. Randy testified that Fencer located the fence separating the Strip from Blackacre knowing where the property line was and, therefore, Fencer knowingly ceded ownership of the Strip to him. Randy also testified that Betty waited too long to now try to claim ownership to the Strip. Randy testified that he has cut and treated the grass of the Strip for more than 30 years and that makes him the rightful owner of the Strip. Randy admitted that he never told either Fencer or Betty that he was claiming the Strip as his property until Betty tried to relocate the fence in 2018.

Who is likely to prevail on the claim of ownership of the Strip?

Explain fully.

Under Ohio property law, adverse possession is a method to acquiring title of property through means other than purchase, gift, or devise. In order to acquire title by adverse possession, the possession must be actual, hostile, open and notorious, exclusive, and continuous for the statutory period.

1. **Actual**. Actual possession under Ohio means that that the possession is physical and literal; it is not just a claim that one owns the property, but there has been physical occupation and use of the disputed land. Here, Randy did make actual use of the property by physically stepping onto it by mowing the grass and treating it. This would barely qualify as actual as no improvements or other use was made of the property. It is likely, however, that since actual is a low threshold, a court would find mowing to be sufficient actual possession.
2. **Hostile**. There are two jurisdictional views to the hostile requirement, but Ohio has rejected the bad-faith view that one must have a specific mindset about taking possession. Instead, Ohio requires that the possession simply be adverse to the title holder's possession, and non-permissive. Here, Betty and Randy both knew where the true property line was and they both knew that Randy was mowing the lawn, meaning that Betty permitted him to mow the lawn while still knowing that she owned that strip of land. Further, though there was no actual discussion between Betty and Randy as to ownership, Randy never asserted any claims or acted in any way that would be adverse to Betty's interest in the land, such that Randy was acting in a way that demonstrated he owned the land, as he never told Fencer or Betty that he was claiming ownership. Therefore, a court would likely hold that Randy's possession was not hostile.
3. **Open and Notorious**. This requirement means the possession must be open and notorious, such that it would put a reasonable person on notice that they were possessing the land. Here, Randy's only possession was mowing the lawn, although, if a reasonable person walked by and saw him mowing his lawn, it would appear as though he was mowing his own lawn as he was going up to a fence line. Therefore, though again, it is a weaker argument, mowing the grass on this strip is likely enough to be open and notorious.
4. **Exclusive**. This requirement simply means that possession cannot have been shared with the title owner. Here, as the fence was erected around Betty's remaining property, there are no facts to indicate Betty ever entered the strip itself, but just that they both shared in maintaining the fence. As the fence is not the land and not subject to the dispute, Randy was the only one to actually possess the strip. Therefore, Randy does satisfy the exclusivity requirement.
5. **Continuous**. This requirement means that the use and possession of the land must have been continuous and uninterrupted (within reason, such as a small vacation or small leave of the property) for the statutory period, which in Ohio, is 10 years. This element would be harder for Randy to satisfy, as, though he claims he possessed the land for 30 years (which would satisfy the statutory period), it is questionable whether his possession of mowing and treating the grass would be considered continuous possession. There were no physical improvements or structures to constitute continuous possession, and one does not treat and mow grass every day, but more likely, once a week. It is arguable, however, that since the possession was mowing, and mowing is only reasonably done every so often, that for the purposes of mowing, this would have been continuous. However, it is likely that a court would not find mowing to be a continuous enough activity such that it met this requirement.

As Randy does not meet the hostile and continuous requirements as his possession of the land was permissive and merely mowing, Betty would prevail.

QUESTION 12

1. Stanley is an Ohio lawyer who operates his office in his home. When he acquires enough clients to generate sufficient cash flow, he plans to rent an office. To protect the privacy of his family and present a more traditional lawyer image, his letterhead and his website identify his practice as "The Stanley Law Group" with a post office box and an email address.

   To simplify his record keeping and keep costs down, Stanley has two online bank accounts. One is a joint personal checking account with his spouse and the other is a trust account titled, "The Stanley Law Group Trust Account." Stanley scans and electronically deposits all legal fees, earned or unearned, into the trust account and pays business expenses by electronic transfer directly from that account. From time to time, he transfers earned fees to the joint personal account. He reviews the accounts daily by logging on to the bank's online site, making sure that he never transfers funds to pay expenses or for cash withdrawal that exceed his earned fees. Because all of his law practice financial activity is immediately accessible online, he saves money and storage space by not downloading or printing the trust account records.

2. Bob is an Ohio criminal defense lawyer. While representing Dr. Larry, M.D., who was accused of fraudulent billing to Medicaid and Medicare, Bob fell in love with Dr. Larry's wife, Betty. When Dr. Larry was convicted and began his prison term, Bob continued to represent Dr. Larry on the appeal of his conviction. Betty and Bob began texting each other, at first to discuss progress on her husband's appeal, which then evolved into personal flirtatious messages with attached selfies featuring nudity and simulated sex acts. When Bob's wife found the texts on his phone and threatened divorce, Bob ceased communicating with both Betty and Dr. Larry.

   1. What Ohio Rules of Professional Conduct, if any, has Stanley violated?

   2. What Ohio Rules of Professional Conduct, if any, has Bob violated? Explain your answers fully.

   It is not necessary to recite rules verbatim or specify the rules by number, but, to receive credit, you must apply a rule to specific stated facts that constitute a violation.

1. Stanley is violating ORPC by the use of his home office and identification information. Stanley has a home office, which he is allowed to do if he has the proper procedures in place to protect his clients' confidentiality. He should be sure to keep any and all client information separated from any of his home materials. If he does not keep privileged and confidential information stored in a secure place it easily could be accessed, even accidentally, by a family member wandering into his office or scattered around his house. Stanley also is misrepresenting himself through the use of his firm name. The name "The Stanley Law Group" implies that there is more than one lawyer in the firm; however, Stanley is the only one. Stanley also improperly uses a PO Box instead of his physical address. Although this may be helpful for family privacy reasons, it is improper representation to a client who may be unable to locate his attorney physically by not having an appropriate address. The use of this information on his letterhead and website is improper.

   Stanley further violates the ORPC by his use of bank accounts and record keeping. A lawyer may not commingle funds or share funds with a nonlawyer, unless for retirement benefits or with a non-profit in certain situations. Here, Stanley is sharing his earned fees with a non-lawyer by transferring them into a joint bank account he shares with his wife. A lawyer also must not commingle funds and must keep a separate client trust account for all unearned fees. Additionally, a lawyer may not pay business expenses with client funds. Stanley is commingling funds in the trust account he has created where he deposits all his legal fees. He is further violating the rule by using that trust account to pay business expenses. A lawyer must immediately transfer any earned fees from the client trust account, which he is not doing as he only does this from time to time, not when they are payable. Stanley also is responsible for keeping a current record of client funds. It says that he reviews the accounts daily, but his methods make it impossible to determine which client funds belong to and which are earned and unearned. Stanley should keep physical records and follow the procedures to ensure that he is properly handling client funds.

2. Bob created a conflict of interest with the representation of Dr. Larry. When a conflict arises the lawyer must inform the client of the conflict, how it could be harmful to them, and get informed consent to continue the relationship. Bob has not informed Dr. Larry of any of the conflicts he has created by the relationship he initiated with Dr. Larry's wife. A lawyer may not have sexual relations with a client, unless it occurred prior to representation. Here, Bob has not entered into a relationship with a client, but has begun a relationship with his incarcerated client's wife, while representing him on appeal. A lawyer is a lawyer 24/7 and is held to high moral standards. Here, Bob clearly is impacting his ability to represent Dr. Larry effectively by going behind his back and impacting his relationship with his wife and involving himself in improper selfies. Bob and Betty further communicate about the appeal without mention of husband's consent. A lawyer should not discuss client matters with another without his explicit consent. If it is just general information, that could be acceptable, but noting the relationship Bob and Betty started, it could be violating the attorney-client privilege by sharing confidential communications with Betty.

   A lawyer does not have to represent any client, but he must inform the client of the termination of the relationship. Here, Bob ceased all communication with Dr. Larry in the middle of his appeal. This could cause extreme detriment to Dr. Larry's case. He would need to ask leave of the court to effectuate the termination.

MPT 1

American Electric v. Wuhan Precision Parts

In this performance test, the client, Wuhan Precision Parts (WPP), is a Chinese corporation that manufactures gear motors for dishwashers. WPP wants to know its likelihood of success in vacating a default judgment entered against it by the Unites States District Court for the District of Franklin. The default judgment arises from an earlier arbitration between WPP and American Electric (AE). Although WPP agreed to arbitrate its contract dispute with AE in Franklin, it now seeks to vacate the default judgment that (1) confirms the arbitration panel's award of damages to AE and (2) awards additional attorney's fees to AE related to the federal court proceeding. WPP's hopes turn on the effect, if any, of improper service under the Hague Convention and the Federal Rules of Civil Procedure when the resulting default judgment arises from an arbitration proceeding and award. The File contains the instructional memorandum, an email from a WPP executive, and the court order entering the default judgment. The Library contains excerpts from Rules 4 and 5 of the Federal Rules of Civil Procedure and cases from two neighboring jurisdictions, Olympia and Columbia, which discuss alternative approaches to deciding when strict compliance with the Hague Convention Rules of Service will be excused by the courts.

A

MEMORANDUM

To: Alexandra Carlton

From: Examinee

Date: August 6, 2019

Re: American Electric v. Wuhan Precisions Parts Ltd.; analysis of motion to vacate & attorney's fee challenges

Our client Wuhan Precisions Parts Ltd. (WPP), a Chinese manufacturing company, seeks to vacate a federal default judgment entered against it by the U.S. District Court for the District in Franklin. The court proceedings arose from an earlier arbitration between American Electric Distribution Inc. (AE) and WPP, which took place in Franklin. Based on the applicable law outlined below, WPP can succeed in vacating the default judgement if we can convince the court to adopt the approach taken to service defects by the District of Olympia, and the additional award of attorney's fees can be successfully challenged.

1. WPP will succeed in vacating the default judgment due to improper service under the Federal Rules of Civil Procedure and the Hague Convention if Franklin adopts the "good faith" standard in evaluating service defects held by other nearby jurisdictions.

The Federal Arbitration Act governs the service of petitions to confirm arbitration awards, but it does not provide a method of service for a foreign party who is not a resident of any district in the United States. To bridge that legal gap, the Federal Rules of Civil Procedure state that service on international parties must occur in compliance with the Hague Convention. Fed. R. Civ. P. 4(f)(1). Because both China and the United States are parties to the Hague Convention, formal Hague Convention service calls for service by the Chinese authorities upon WPP. Although AE attempted to comply with the Hague method of service, such service was not received by WPP until after the default judgment had already been rendered against it.

There is a split in authority between nearby districts as to what standard to apply to address defects in service of process in cases arising from arbitration proceedings. In the district of Olympia, the relevant standard arises from *Pennsylvania Coal Co. v. Bulgardia Trading & Transport Co., Ltd.* (US. District Ct., 2001). Under the rule of *Pennsylvania Coal Co.*, in cases arising from arbitration proceedings, defects in service of process may be excused where considerations of fairness so require. Where parties have consented to arbitration, actual notice of the proceedings can be sufficient as long as it is fair and no injustice results. Under this authority, because AE tried in good faith to comply by delivering its motion for default judgment to the Chinese authorities in March and because WPP consented to and participated in a Franklin arbitration pursuant to an agreement contemplating the award's confirmation in court, strict adherence to the Hague Convention is not required; actual notice and fairness are the standards. Despite strict adherence not being required, this approach would still favor WPP because actual notice was never received, and it would not be fair to hold WPP to a judgment that subjects them to additional penalties when the notice was delayed through no fault of their own.

The notice was not fair in this case, even after balancing the equities, because WPP never received actual or even constructive notice. AE will argue that they attempted to accomplish service with a diligent good faith effort, and therefore they should not be punished for actual notice on behalf of WPP being delayed by factors out of their control; they will argue that the relaxed standard in Olympia is actually in their favor because they tried to effectuate reasonable service. However,

while personal service and U.S. mail service are recognized forms of service under the Federal Rules of Civil procedure, email service is not typically authorized unless the parties normally communicate by email. Here, the parties did not typically communicate via email, and instead relied on phone calls and faxes to speak to each other. Because the service AE attempted to serve on the Vice President was in the form of an email and the parties did not typically communicate in that manner, AE could not conclude that such email service was reasonably calculated to provide sufficient notice to WPP. In fact, it could be called into question why AE resorted to an unusual method of communication to serve legal correspondence; the argument could be made that they were attempting to avoid WPP receiving actual notice. The email service is even less fair when considering the fact that the Vice President terminated his employment only 7 days after receiving the email. The Vice President did not inform anyone at WPP about the email. Additionally, the motion papers were in English and not translated to Chinese Mandarin as is required by the court. *See EduQuest.* Although the court noted in its order that the parties always communicated in English, the translation requirement does not look at the course of conduct among the parties; it is a strict rule requiring translation of pleadings for Chinese parties.

The District of Columbia has expressly declined to follow the "fairness" standard outlined in Penn Coal Co. because it views a standard that focuses on balancing the equities as too loose to serve as a guide as to when courts can excuse noncompliance with the Hague Convention and Federal Rule of Civil Procedure 4 when confirming arbitration awards. Instead, the District of Columbia follows the rule stated in *EduQuestDigitial Corp. v. Galazy Productions Inc.*, which states that, by agreeing to arbitrate in Columbia and participating in those proceedings, the parties to the underlying contract agreed to the provisions allowing court judgments to be entered. By so agreeing, the international party is deemed to have waived formal Hague Convention service in connection with confirmation of an arbitration award. Under this authority, by agreeing in the 2014 Supplier Agreement to arbitrate any dispute that should arise in Franklin, WPP is deemed to have waived the right to possess formal service, and notice is sufficient if reasonable. Under this approach, the fact that actual notice was not received by WPP until after the default judgment will not be as material to the case because AE relied on methods they believed were reasonable to reach WPP, who had waived its right to receive formal notice in conformance with Hague. WPP can argue that the court should not adopt this approach because it significantly lessens the valid protections granted by the federal government under the Hague Convention, and it also opens the door to uninvited judicial proceedings.

If the Franklin court adopts the approach from Olympia, principles of fairness and a lack of actual notice will help WPP relieve itself from the judgment.

2. The attorney's fee award can be successfully challenged despite the split in authority as to defects in service because both lines of cases agree that a request for attorney's fees constitutes a new claim for relief.

Despite the differences in opinion of the jurisdictions of Olympia and Columbia as to the proper analysis to address a defect in service, both jurisdictions agree that a request for fees for litigating before a court is a new claim for relief that requires service that complies with the Federal Rules of Civil Procedure and the Hague Convention. Under Rule 5 of the Federal Rules of Civil Procedure, it states that while no service is required on a party who is in default for failing to appear, a subsequent pleading that asserts a new claim for relief against such a party must be service on that party under Rule 4 of the Federal Rules of Civil Procedure. Rule 4 incorporates service authorized by the Hague Convention as service that is reasonably calculated to give notice. Under the Hague Convention, the party raising a new claim must deliver a copy of that claim to the foreign governing authority, which will then deliver it in accordance with local judicial process. *See Penn Coal. Co; EduQuest.* Here, the complaint sent by AE and never received by WPP was an attempt to enforce the arbitration award. If AE wanted to pursue additional damages, they should have treated the attorney's fee request as a new

claim for relief and served it via the method prescribed by the Hague Convention. Instead, AE relied on personal mail delivery.

Additionally, when a case has been previously arbitrated, courts are generally careful to defer all substantive decisions to arbitrators. *See Penn. Coal Co.* Here, while the arbitration panel granted AE's request for attorney's fees which tied to the arbitration proceeding, they only granted the request as to 1/3 of the amount requested by AE ($110,000) because the panel concluded that AE had overstated its case in several material respects that caused both sides to incur unnecessary fees and costs. Despite the fact that the arbitration panel believed AE's request for attorney's fees was in bad faith, the Franklin district court awarded AE $90,000 in additional attorney's fees, basing its award on WPP's failure to respond.

Finally, although the agreement does contemplate attorney's fees, the actual agreement does not contain a reference to judicial remedies in that regard. Accordingly, AE's fee request should be pursued by returning to arbitration.

The answers printed in this booklet were selected because they were among the better answers written at the exam. They are not model answers and are not necessarily complete or correct in every respect.

MPT 2

Estate of Carl Rucker

This performance test requires examinees to evaluate two estate planning approaches that the client, Carl Rucker, could take regarding his main asset – his house. Rucker's dilemma is that while he is certain that he wants his wife, Sara, to be able to continue living in the house after his death, she does not get along with his two sons from his first marriage, and Rucker wants his sons to eventually inherit the house. In addition to identifying the advantages and disadvantages of the two possible approaches (a life estate or a contract to make a will (or not to revoke a will)), examinees are to make a recommendation about which approach will better serve Rucker's goals – to ensure that the house ultimately belongs to his sons and to minimize the risk of litigation over the estate. The File contains the instructional memorandum, a transcript of the client interview, and an appraisal for the house. The Library contains excerpts from *Walker's Treatise on Life Estates* and two cases from the Franklin Court of Appeal: *In re Estate of Lindsay*, addressing the impact of a life estate on the calculation of a spouse's elective share, and *Manford v. French*, discussing the requirements for creating a valid contract to make a will (or not to revoke a will).

A

To: Dana Carraway

From: Examinee

Date: 7/30/19

Re: Carl Rucker Estate Options Memo

Ms. Carraway,

Please find below my memo addressing Mr. Rucker's concerns and his available options to deal with his property distribution upon his death. If you have any questions please feel free to ask.

Signed,

Examinee

Introduction

Mr. Rucker is a 67-year-old man who is looking to form an estate plan to ensure that his home is passed to his current wife, Mrs. Rucker ("Sara") for the remainder of her life, and then to his two sons from a previous marriage. Sara and his sons do not get along and Mr. Rucker fears litigation and believes fights will ensue if his estate is not planned to ensure that Sara will be able to live in it for her life, but will not be able to stop the sons from receiving it upon her death. Mr. Rucker is fearful of trusts and, therefore, these will not be discussed. As requested, below is discussion of forming a life estate in Sara with remainder to Mr. Rucker's sons and a discussion of forming a contract with Sara to enforce a will. Both options will be explained and fully analyzed for both advantages and disadvantages. A recommendation will close out the memorandum.

2. Creating a Life Estate in Sara with Remainder in Mr. Rucker's Sons.

A. Life Estate Explained

A life estate can be created by either will or deed transfer inter vivos. A life estate grants the holder the right to exclusive possession and use during the holder's lifetime. They can be granted to one or more persons and upon the death of the holder (or holders), the estate automatically is transferred to the remainder interest holders. Because the transfer to the remainder holder is automatic, the life estate avoids probate and the associated costs that go with it. *See Walker's Treatise on Life Estates*. The remainder holder has no interest to possess, use, or receive rents from the life estate holder while they are alive. The life estate can be fully destroyed if all parties, the life estate holder and all remainder holders, agree to sell all the interests as a fee simple. The remainder either can sell their interest to the life holder, merging title, or all parties can agree to sell their interest to a third party who would take in fee simple.

The life estate, if created by deed, cannot be revoked or changed without consent of all interest holders. However, one created by will can be altered by changing the will and complying with the formalities. This could affect Mr. Rucker's choice if he values the ability to revoke the transfer.

B. Advantages

Life estates have several advantages for Mr. Rucker's case. First, they ensure exclusive possession and control to the life estate holder. In this case, this allows Sara to remain living in the house for the remainder of her life and the sons cannot disturb her possession. Sara also would be entitled to sell or transfer interest in the property, including granting a mortgage; however, the interest she can transfer is limited to her life interest. Therefore, she only can sell an interest that lasts as long as she lives. If she sold the house to the charity, as Mr. Rucker fears, the charity would only have an interest until Sara dies and the sons then would take it. The requirement that all interest holders agree to a full sale to benefit Mr. Rucker's goal of ensuring Sara will not unilaterally deprive the sons of the home because a life estate restricts the transferability of the home. Further, the sons cannot affect Sara's interest in the home and she would have complete and total control during her lifetime. If Mr. Rucker creates a life estate in his will, he also can revoke this gift if circumstances change and he decides to alter his plan.

However, if he transfers inter vivos by deed, the transfer is not subject to later challenges that could allow a court to grant money damages as opposed to specific performance. *See Walker's Treatise.* A life estate by deed protects against later litigation and Mr. Rucker prefers to avoid litigation.

C. Disadvantages

A life estate has several disadvantages. Most notably is the restriction on marketability that affects the holder's value of her interest. A life estate holder, since they only can transfer what they have, cannot sell the property outright, but only the right to possess during her life. This means that Sara can only sell a life estate interest, which according to appraisal is worth only $80,000, as opposed to $250,000. *See Jill Baker Memo.* If Sara encounters financial trouble during retirement, she is significantly limited in her ability to borrow against the house. This could lead to difficulty in paying expenses and upkeep. As a life tenant, Sara is required to maintain and pay taxes on the house. Therefore, a life estate, because of its limited marketability, may disadvantage Sara in her possession of the home.

As mentioned above, a life estate can be created by will or deed. A transfer by will has the disadvantage of later challenges and litigation that could lead to high cost, as well as court orders for selling the property and awarding money damages. If this occurs, it drastically impacts Mr. Rucker's stated goals to avoid litigation and ensure the house, not its value, is passed down. Further, the sons' remainder interest allows them to sue Sara if she neglects the property or does not pay the taxes. Life tenants owe a duty to the remainder holders not to commit waste and if Sara cannot afford repairs or property taxes because of the restricted value discussed above, then the sons would be able to sue for money damages. This would not affect Sara's interest in the house, but it would lead to costly and ugly family litigation – a major event that Mr. Rucker desperately wants to avoid.

D. Impacts on Sara's Elective Share

Franklin Law has clarified the impact of a life estate on a surviving spouse's elective share. Franklin Law allows a surviving spouse to take an elective share instead of the gifts under the testator's will when the elective share is greater than that granted. An elective share gives the surviving spouse a percentage of the testator's augmented estate. This augmented estate is calculated by adding net assets in probate, the assets transferred by the testor to the spouse, and the surviving spouse's own assets and transfers. *In Re Estate of Lindsey* (Franklin Court of Appeal 2008) (citing Franklin Probate Code Section 2-204). Any transfer already given to the spouse is credited against her entitled portion of the augmented estate.

In *In Re Estate of Lindsey*, the court clarified that under Franklin Law, a life estate that is transferred prior to the testator's death is included in accounting for the augmented estate and the surviving spouse's elective share. The testor owned a house prior to the second marriage and transferred a life estate to her husband prior to her death. There, the surviving spouse argued that the prior transfer should not be included and he should, therefore, be able to take his elective share and keep the life estate, without the life estate impacting the value of his elective share. The court disagreed and held that the value of the inter vivos life estate transfer is included in calculating the elective share, and, in addition, the value of the life estate is included, not the fair market value of the property. *Id.*

Here, this means that a life estate transfer to Sara by deed would be included in the probate court's determination of her elective share. The $80,000 appraisal, *See Jill Baker Memo*, along with Mr. Rucker's $200,000 Certificate of Deposit assets would give him an augmented estate of $280,000 (unless other assets are acquired before death or have been left out by Mr. Rucker in your meeting). Since Sara and Mr. Rucker have been married for 18 years she would be entitled to 50% of the augmented estate. *In Re Estate of Lindsey* (citing FPC Section 2-202). Sara would, therefore, be entitled to $140,000 of the estate, including the $80,000 life estate. However, Mr. Rucker stated he intends to leave the total balance of the CDs to Sara to pay for her retirement and upkeep of the house. Since Sara will receive the entire estate, she would not elect to take an elective share. The impact only occurs if Mr. Rucker fails to leave the CDs to Sara in his will as he stated he will.

3. Contract to write wills leaving the house to the Sons.

A contract to write a will with specific provisions and to restrict the revocation or revision of those provisions is enforceable in Franklin. *See Manford v. French* (Franklin Court of Appeals 2011). The contract would, therefore, be enforceable against Sara and prohibit her from revoking her will or revising it after Mr. Rucker's death to change the disposition. However, the contract cannot prevent the surviving spouse, here Sara, from transferring the property during her lifetime. This means that Sara could be prohibited from writing a new will, but if Mr. Rucker predeceases her and leaves the house to her she would be able to sell the house in fee simple and stop the sons from taking it. *See id* (citing *Kurtz v. Neal* (Franklin Sup. Ct. 2005). The contract only limits her ability to revoke or rewrite her will; it does not limit her control and interest in the property. Therefore, if she sells the house, the gift to the sons would be adeemed by extinction and they would take nothing and have no recourse. This is a serious disadvantage for Mr. Rucker.

Further, the breach of a contract to write a will, and not revoke, leads to damages under the contract, which can be granted in specific performance or money damages. This means that if Sara breached the contract, then a court could enforce her breach by only requiring payment. This would not ensure Mr. Rucker's wishes as it would not give the sons the home, but merely money damages.

The contract to make a will and not revoke or alter its provisions must be in writing to be enforceable. *Id.* The advantages for Mr. Rucker in taking this route would be to allow Sara more freedom in marketability and transferability in her interest. If she needs money to upkeep the house, then she could borrow against the entire fair-market value, since she would own in fee simple. This also does not allow the sons to sue Sara during her life for waste since they have no interest in the property as mere potential heirs. Their interest is a mere expectancy and they, therefore, would have no ability to control or impact Sara's possession or use.

If a contract to create a will is used by Mr. Rucker, there will be no impact on Sara's elective share. Since an elective share is determined by calculating the augmented estate and the augmented estate includes the probate transfers, then the transfer of the house to Sara in Mr. Rucker's will would be included in the Augmented estate. Further, as mentioned above, Mr. Rucker intended to leave all his assets to his wife Sara and, therefore, she would have no benefit in electing her share as it would be half of what she would get under the will.

To eliminate the above problem that Sara can comply with the contract to make a will, yet fully transfer the interest and deprive the sons of anything, Mr. Rucker alternatively could create a joint will with Sara. The joint will is a contractual agreement that serves as the will for both parties. Included in this joint will can be a provision that contractually binds both parties not to revoke or make another will. *See Manford.* While this alleviates some problems, it does not ensure that the sons will receive the house as the damages for breach of the contract included in the joint will can lead to money damages, instead of specific performance. Id. It is important to note that the contract must be in writing, clearly expressing the intent to be contractually bound, and be signed by both parties. *See Manford* (citing FPC Section 2-514).

Ultimately, a contract to make a will, to not revoke a will, or to be bound by a joint will leads to significant risk that Sara can stop the sons from receiving the house upon her death. Because this is a major goal of Mr. Rucker's, it is not advised.

4. Mr. Rucker should transfer the property using a life estate.

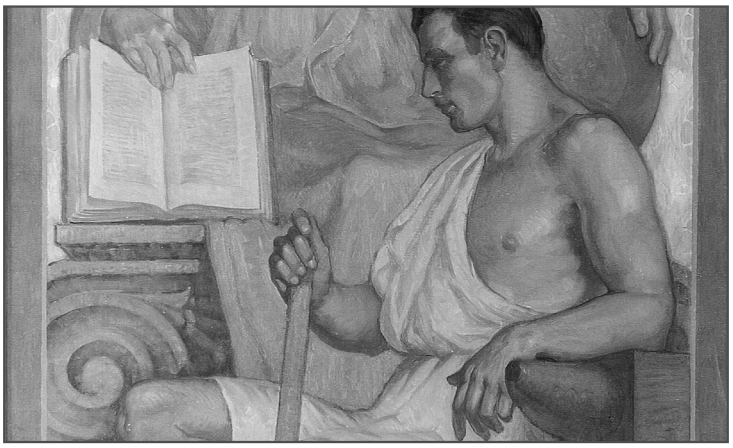
Mr. Rucker's three goals are to ensure that Sara can live in the house during her lifetime, ensure the sons take the house after Sara dies, and minimize the risk of any litigation between Sara and his sons. These three goals most likely are accomplished by using a life estate to transfer the interest to Sara during her life and then to the sons as remainder upon her death. As mentioned above, this

most likely ensures that Sara can keep the house during her life and the sons will get it upon her death. A contract to create a will does not prevent Sara from selling the property and completely depriving the sons of any benefit. *See Manaford* (citing Kurtz). Although a life estate can lead to litigation by Sara, it still is only a possibility. If Mr. Rucker bequests his entire estate to Sara, she hopefully will be able to maintain the property and avoid all disputes.

Further, the life estate should be transferred to Sara and remainder to the sons by a deed. This does not allow Mr. Rucker to change the transfer or revoke it without consent of all the parties, but ensures that the transfer will be upheld and any challenges by the sons won't result in a selling of the property and dividing of the proceeds. *See Walker's Treatise on Life Estate*. If Mr. Rucker chooses to transfer it by will, then he will keep the ability to revoke the transfer, but will increase the risk that his sons challenge the will and the court forces a sale of the property. He must consider what he values more, but considering his statements in the interview, it appears he cares more about the sons receiving the actual house as opposed to keeping the ability to revoke his transfer. He currently does not see a reason why his distribution would change.

5. Conclusion

Mr. Rucker most likely will have his three goals served if he elects to transfer a life estate interest to his wife with remainder interest to his two sons. Whether he does so by will or deed will determine if he values the right to revoke the contract or more assurances that litigation will not occur and the house will go to the sons.



On the cover:

Detail from the Thomas J. Moyer Ohio Judicial Center Law Library Reading Room Mural 7, which depicts the availability of knowledge in printed books.

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