

February 2022

New York State
Bar Examination

MEE & MPT Questions

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February 2022

MEE

Questions

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MEE Question 1

A man decided to start a business repairing diesel-engine trucks. His mother's farm had a large metal barn that had been used in the past to repair farm machinery. As his mother no longer used the barn for that purpose, she agreed to let the man perform truck repairs in it. The barn contained a large portable welding machine (worth approximately \$25,000) that would be useful for making repairs on large trucks. The mother made it clear to her son that he could use the barn but not her welding machine. Nonetheless, without his mother's knowledge, the man frequently used the welding machine for truck repairs.

On June 1, the man obtained a \$50,000 business loan from a local bank. The man and the bank signed a loan agreement. It contained a provision pursuant to which the man granted the bank a security interest "in all my equipment, including equipment hereafter acquired" to secure his repayment obligation. On the same day, the bank properly filed a financing statement listing the man as the debtor and indicating that the collateral was "all equipment, including equipment hereafter acquired."

On June 10, the man bought some specialized tools used for diesel-engine repair. The man agreed to pay the tool seller \$15,000 for the tools, paying \$1,500 down and agreeing to pay the remaining \$13,500 to the tool seller in monthly installments over a two-year period. The man signed a written agreement granting the seller a security interest in these tools to secure the man's obligation to pay the remaining \$13,500. The next day, the tool seller properly filed a financing statement listing the man as the debtor and indicating that the collateral was "diesel-engine repair tools."

The man has defaulted on his obligations to the bank and the tool seller.

1. Does the bank have an enforceable security interest in the portable welding machine? Explain.
2. Both the bank and the tool seller are asserting interests in the diesel-engine repair tools that the tool seller sold to the man.
 - (a) Does the bank have an enforceable security interest in these tools? Explain.
 - (b) Does the tool seller have an enforceable security interest in the tools? Explain.
 - (c) Assuming that both the bank and the tool seller have such security interests in these tools, whose interest has priority? Explain.

MEE Question 2

A woman runs a gardening and landscaping business in State A. She uses a manual push mower to cut the grass and pruning shears to cut unwanted small branches from trees and large bushes.

Five months ago, the woman was hired to provide common-area mowing and landscaping services to a townhome community in which homeowners own some land commonly and some land individually. She also agreed to accept online service requests from homeowners in the community for individual landscaping jobs.

Last week, the woman was at the community cutting thick brush and small branches using her pruning shears. She finished the work at noon and decided to try to collect an overdue payment from a homeowner who had ordered and received \$100 worth of landscaping services from the woman's business but had never paid for the services. The woman, carrying her pruning shears, walked directly to the homeowner's townhome. When she reached the front door, she was still holding the pruning shears (but down at her side, pointed toward the ground). The woman rang the doorbell, and the homeowner, who was just leaving on an errand, opened the door.

The woman asked bluntly, "Where's the money?" The homeowner did not recognize the woman because the two had communicated only online. Neither the woman's clothing nor her truck bore the name of her landscaping business. Frightened by the woman's cold tone and the pruning shears in the woman's hand, the homeowner immediately pulled five \$20 bills from her purse, held the cash out toward the woman, and said, "Take it. This is all I have!" The woman said, "Fine. That's what I was expecting." The woman put the \$100 in her pocket and walked toward her truck. The homeowner slammed the door and called the police.

On the way to her truck, the woman was still annoyed that it had taken so long for payment. She muttered to herself, "More than three months overdue and not even a tip!" She decided that she was entitled to something extra. She glanced over her shoulder to make sure the homeowner wasn't looking and grabbed a bronze garden figurine from the homeowner's front lawn, put it in her truck, and drove away.

When the woman got back to her workshop, she offered the figurine to her assistant, saying, "I'll sell you this cheap. How about \$10? Just don't ask where I got it." The figurine looked new, and the assistant noticed a \$200 price tag attached to the bottom of the figurine. The assistant quickly handed the woman \$10, saying, "Wow. That's a great deal. These things are in high demand, and I bet I can sell it for a hefty profit."

State A has the following criminal statutes:

Theft: Theft is the unlawful taking and carrying away of property from the person or custody of another, with intent to permanently deprive the owner of the property.

Armed Robbery: Armed robbery is theft of property, when in the course of the theft the offender is carrying a dangerous weapon and either (1) uses force, violence, or assault or (2) puts the victim in fear of serious injury.

Criminal Possession of Stolen Property: A person commits criminal possession of stolen property when the person possesses property that the person knows or reasonably should know is stolen property with intent either (1) to benefit that person or a person other than an owner thereof or (2) to impede the recovery by an owner.

Dangerous Weapon: A dangerous weapon is any (1) firearm, (2) device that was designed for use as a weapon and capable of producing death or great bodily harm, or (3) device that is being used in a manner likely to produce death or great bodily harm.

State A courts have determined that all State A criminal statutes should be interpreted to incorporate common law mens rea requirements.

1. Analyzing all elements of each crime, did the woman commit
 - (a) armed robbery of the \$100 cash? Explain.
 - (b) theft of the figurine? Explain.
 - (c) criminal possession of the figurine as stolen property? Explain.
2. Did the woman's assistant commit criminal possession of stolen property? Explain.

MEE Question 3

Six years ago, Amy and Bill incorporated a craft beer business as Beer Corporation (BC) in State A, whose corporate statute is modeled on the Model Business Corporation Act. Amy and Bill were the corporation's sole shareholders and sole directors at the time it was incorporated, and both of them were employed by BC.

Every fall after incorporation, Amy and Bill traveled to an internationally famous craft breweries trade show held in Germany to learn about the latest in craft brewing. Employees of other craft beer businesses that competed with BC did so as well. BC treated all expenses associated with attending the trade show as "ordinary and necessary" business expenses for accounting and tax purposes, and every year Amy and Bill used the corporate credit card to pay these expenses.

BC was successful, and Amy and Bill wanted to expand the business if they could get a significant capital infusion. Last year, they met Sharon, who agreed to invest in BC. In exchange for her investment, BC issued her new shares in the corporation. Sharon then owned 40% of the outstanding shares of BC. Amy and Bill then each owned 30% of BC's outstanding shares, and they continued to run the day-to-day business. Sharon was elected as the third director of BC.

At the first board meeting after Sharon's election to the board, Sharon questioned the need for Amy and Bill to go to Germany every year at corporate expense. Amy explained, "The trips give us new ideas about ingredients and brewing techniques. And incidentally, while we are there, we can do some sightseeing." In fact, many of BC's competitors covered such travel to Europe for their key employees. Sharon was not convinced about the need for this travel and said, "As far as I'm concerned, the practice must stop!"

At last month's regularly scheduled board meeting, Amy and Bill announced to Sharon that they were planning to travel to Belgium and not to Germany. "We believe that Belgium, not Germany, is where innovations in craft brewing are now happening, and we want to bring back fresh ideas for our business. We expect that the trip will take a full week, and while visiting different breweries we can also take in nearby museums and historic sites. As in the past, we will have BC pay all the expenses for that week."

Sharon objected and said, "If you do this, I'm going to sue!" But Amy and Bill were undeterred, and as a majority of the board, they voted to approve their trip to Belgium at corporate expense. The following week, they traveled to Belgium using BC's credit card. Upon their return, they caused BC to pay the credit card bill.

1. Did Amy and Bill have the authority as members of the board to vote to approve their trip to Belgium at corporate expense? Explain.
2. Did Amy and Bill violate the duty of loyalty by having the corporation pay for their Belgium trip over Sharon's objection? Explain.

3. Assuming that Amy and Bill violated the duty of loyalty by having the corporation pay for their Belgium trip, can Sharon personally recover from Amy and Bill all the expenses for that trip paid by BC? Explain.
4. Assuming that Amy and Bill violated the duty of loyalty by having the corporation pay for their prior trips to Germany, can Sharon bring a derivative claim to recover from Amy and Bill the expenses paid by BC that related to their prior trips to Germany? Explain.

MEE Question 4

Peter planned to open a 50-seat pizza parlor that would also make pizzas for home-delivery service. He asked his sister Angela to make some purchases for his pizza parlor. "First, to fit with the parlor's unique decor, I want you to buy 50 red chairs from the local furniture store, but don't spend more than \$10,000 on the chairs. Second, I want you to buy a new electric bicycle for pizza deliveries, but don't spend more than \$5,000. Finally, I'd like you to buy from the local restaurant supplier a pizza oven for the pizza parlor, but it shouldn't cost more than \$12,000." Angela responded, "I fully understand. Agreed."

That day, Angela went to the local furniture store. She told the salesperson that she wanted to buy 50 red chairs and to spend no more than \$10,000. The salesperson responded that red chairs were in high demand and that 50 of them would cost \$20,000, but that for \$10,000, Angela could buy 50 yellow chairs. Believing that Peter would prefer to stay within the \$10,000 budget, even though the chairs were yellow, Angela signed a written contract in her name alone to buy the yellow chairs from the store at that price. Angela did not mention to the salesperson that she was buying the chairs for anyone other than herself or that she had authority to buy only red chairs.

The next day, Angela went to a local bike shop to buy a new electric bicycle, again without mentioning that she was buying the bicycle for anyone else. The bike salesperson truthfully told Angela that she could get a used cargo bike that was not electric, but that could carry more than an electric bike. Believing that Peter would prefer the greater carrying capacity of the cargo bike, Angela purchased it for \$8,000, paying with her personal check made out to the bike shop. She immediately rode the bike to Peter, who at first was very annoyed with Angela for purchasing a used cargo bike rather than a new electric bike. But two days later, after trying out the cargo bike, he called Angela and said that he would keep the \$8,000 cargo bike because he liked its carrying capacity.

The following day, Peter called the local restaurant supplier in the morning and told the owner, "I am going to open a pizza parlor next month. I have asked my sister Angela to come to your store to purchase a pizza oven on my behalf for the pizza parlor." That afternoon Angela went to the supplier and signed a contract to buy a pizza oven as "Angela, on behalf of Peter." The price for the oven was \$15,000, which was a fair price for the pizza oven. The contract specified that the price was payable in full upon delivery. When the restaurant supplier delivered the oven to Peter, he refused to accept delivery or pay the \$15,000 purchase price, telling the delivery driver, "Take it back; I don't want it. It's too expensive."

Assume that there is an enforceable contract in each case.

1. As to the yellow chairs:
 - (a) Is Peter bound by the contract signed by Angela with the furniture store? Explain.
 - (b) Is Angela bound by the contract she signed with the furniture store? Explain.
2. As to the used cargo bike, can Angela recoup from Peter the \$8,000 that she paid to the bike shop for it? Explain.
3. As to the pizza oven, is Peter bound by the contract signed by Angela? Explain.

MEE Question 5

Ten years ago, Settlor, a widower, established an irrevocable trust. At that time, Settlor had only one child, Daughter, who had two adult children, Ann and Bob.

The trust instrument named Settlor's friend as the sole trustee and stated, in pertinent part:

1. The trustee shall pay all trust income to Daughter, Ann, and Bob, in equal shares.
2. No income beneficiary may alienate or assign his or her trust interest, nor shall such interest be subject to the claims of his or her creditors.
3. Trust principal will be distributed following Daughter's death "as she may appoint by her will, among her heirs at law and in such shares as she, in her sole discretion, may deem appropriate."

Each year after the trust was established, the trustee distributed equal shares of trust income to Daughter, Ann, and Bob.

Two years ago, Settlor remarried. His wife recently gave birth to their twins. Settlor wants to ensure that his twins receive a share of trust principal after Daughter's death. Daughter has agreed to help effectuate this goal.

Last month, the trustee received letters from two of Bob's creditors seeking to have the claims they had against Bob paid from Bob's interest in the trust. One of these creditors, a bank, has a \$20,000 judgment against Bob for a loan that Bob did not repay.

The other creditor is Bob's former wife, who seeks to enforce a \$30,000 judgment against Bob for unpaid child support owed for their five-year-old child.

Since receiving the letters from the two creditors, the trustee has continued to pay trust income to Daughter, Ann, and Bob, but he has refused to pay anything to either of Bob's creditors.

Under the Uniform Trust Code:

1. May the bank reach Bob's interest in present and future distributions of trust income to satisfy its judgment against Bob? Explain.
2. May Bob's former wife reach Bob's interest in present and future distributions of trust income to satisfy her judgment against Bob? Explain.
3. With respect to the power of appointment:
 - (a) What is the proper classification of Daughter's power of appointment? Explain.

- (b) Is it likely that an appointment of trust principal by Daughter to Settlor's twins would be effective? Explain.
- (c) If Daughter fails to exercise her power of appointment, to whom would the trust principal pass upon her death? Explain.

MEE Question 6

Buyer manufactures scarves from various fabrics, including silk. It buys silk from various fabric importers including Seller, from whom Buyer has made over 250 purchases of silk during the last six years. In each of these earlier transactions, Seller delivered the silk to Buyer at no extra charge, and Buyer paid Seller the purchase price at the time of delivery.

On January 9, Buyer and Seller agreed in a telephone call that Buyer would buy 10,000 yards of silk from Seller on February 1 at a price of \$10 per yard. The next morning, Buyer sent a signed note to Seller, stating, "I'm glad that we were able to reach agreement so quickly yesterday on the deal for the 10,000 yards of silk I'm buying from you." Seller received the note two days later, read it, placed it in its files, and did not respond to it in any way. On February 1, Seller did not deliver silk to Buyer's place of business.

The next day, Buyer contacted Seller to complain. Seller replied, "This isn't a delivery order. You didn't say anything about delivery when you placed this order last month. Come pick it up—and hurry! Your order is taking up space in our warehouse." Buyer, who did not have a truck large enough to pick up the silk, responded by saying, "Deliver it by tomorrow or I'll see you in court."

Two days later, on February 4, when Seller had not delivered the silk to Buyer, Buyer made a good-faith and commercially reasonable purchase of 10,000 yards of silk of identical quality from Dealer at a price of \$12 per yard, including delivery to Buyer.

Buyer then sued Seller for \$20,000, alleging that Seller had breached its obligations under the January 9 agreement.

1. Is there a contract enforceable by Buyer against Seller arising from the January 9 agreement? Explain.
2. Assuming that there is a contract enforceable by Buyer against Seller arising from the January 9 agreement, does the contract require Seller to deliver the silk to Buyer's place of business? Explain.
3. Assume that there is a contract enforceable by Buyer against Seller arising from the January 9 agreement, that the contract requires Seller to deliver the silk to Buyer, and that Buyer suffered no incidental or consequential damages. Is Buyer entitled to damages of \$20,000 based on Buyer's purchase of substitute silk? Explain.

MULTISTATE ESSAY EXAMINATION DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin.

You may answer the questions in any order you wish. Do not answer more than one question in each answer booklet. If you make a mistake or wish to revise your answer, simply draw a line through the material you wish to delete.

If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions.

Read each fact situation very carefully, and do not assume facts that are not given in the question. Do not assume that each question covers only a single area of the law; some of the questions may cover more than one of the areas you are responsible for knowing.

Demonstrate your ability to reason and analyze. Each of your answers should show an understanding of the facts, a recognition of the issues included, a knowledge of the applicable principles of law, and the reasoning by which you arrive at your conclusions. The value of your answer depends not as much upon your conclusions as upon the presence and quality of the elements mentioned above.

Clarity and conciseness are important, but make your answer complete. Do not volunteer irrelevant or immaterial information.

Examinees testing in UBE jurisdictions must answer questions according to generally accepted fundamental legal principles. Examinees in non-UBE jurisdictions should answer according to generally accepted fundamental legal principles unless your testing jurisdiction has instructed you to answer according to local case or statutory law.

Painter v. Painter (February 2022, MPT-1) This performance test requires the examinee to draft an objective memorandum addressing issues arising in a divorce action. The client, Denise Painter, is filing for a divorce from her husband, Robert Painter. The parties have been married for nine years and have an eight-year-old daughter, Emma. The examinee's memorandum should address whether a court is likely to grant joint legal custody of Emma to both Denise and Robert or sole legal custody to just Denise, taking into consideration the rebuttable presumption in the Franklin Family Code in favor of joint legal custody. In addition, the examinee should determine the proper classification under Franklin law of the couple's property and debt, including how a court would likely allocate the appreciation of the house in which the Painters lived during their marriage and where Denise and Emma continue to reside. The File contains the instructional memorandum, notes from the initial client consultation with Denise and from a conversation with Robert, and a list of the parties' assets and debts. The Library contains excerpted sections of the Franklin Family Code, including the Franklin Community Property Act, and two Franklin appellate cases.

State of Franklin v. Ford (February 2022, MPT-2) In this performance test, the client, Sylvia Ford, has been charged in a three-count indictment with the sale of cocaine, possession of marijuana with intent to sell, and being a felon in possession of a firearm based on a 2015 felony conviction. The alleged drug sales occurred six months apart, under very different circumstances: the cocaine sale occurred at an apartment, and the marijuana and weapons charges arise from a traffic stop. The state public defender is representing Ms. Ford. The examinee is tasked with preparing a persuasive argument in support of a motion to sever the three charges for trial so that Ms. Ford is not tried in a single trial for all three alleged offenses. In doing so, the examinee should make two arguments under the Franklin Rules of Criminal Procedure in support of severance: that the three counts are improperly joined under Rule 8 (Joinder of Offenses or Defendants), and that even if some of the offenses are properly joined, pursuant to Rule 14 (Relief from Prejudicial Joinder) Ms. Ford will be prejudiced by the lawful joinder. The File contains the instructional memorandum, the office guidelines for drafting persuasive briefs, a summary of the client interview, the indictment, two affidavits in support of the arrests, and the motion to sever. The Library contains excerpts from the Franklin Rules of Criminal Procedure and the Franklin Rules of Evidence, which are identical to the federal rules, as well as three appellate cases.

February 2022

New York State
Bar Examination

Sample Essay Answers

February 2022 NEW YORK STATE BAR EXAMINATION

SAMPLE ESSAY ANSWERS

The following are sample candidate answers that received scores superior to the average scale score awarded for the relevant essay. They have been reprinted without change, except for minor editing. These essays should not be viewed as "model" answers, and they do not, in all respects, accurately reflect New York State law and/or its application to the facts. These answers are intended to demonstrate the general length and quality of responses that earned above average scores on the indicated administration of the bar examination. These answers are not intended to be used as a means of learning the law tested on the examination, and their use for such a purpose is strongly discouraged.

ANSWER TO MEE 1

1. The bank does not have an enforceable security interest in the portable welding machine. At issue here is whether the security interest created by the bank attaches to collateral that the man has no ownership rights in. To create a security interest between a secured party and a debtor, all three of the following steps need to be met, in any order, for the security interest to attach: (1) the parties must manifest the intent to create a security agreement, this can be accomplished either by (i) executing a security agreement between the parties describing with reasonable detail, the collateral to be secured, (ii) possession of the collateral, (iii) control of the collateral, (2) the secured party must provide value, and (3) the debtor must have an ownership interest in the collateral. In the case at hand, the man and the bank have entered into a security agreement covering "all equipment, including equipment hereafter acquired". Equipment includes all materials used in conducting the business of the debtor. The security agreement description is sufficient enough to cover an item of equipment such as the portable welding machine because it is used in the course of the debtor's business. The bank also provided value to the debtor in the form of a \$50,000 loan in exchange for the security interest in equipment. The man's mother made it clear that he could not use her welding machine, yet he used it without her knowledge in the course of his business of making truck repairs. As such, the man does not have any ownership interest in the portable welding machine and thus the security interest created between the bank and the man would not attach to the portable welding machine as a result of failing to meet the third element. The bank would not have an enforceable security interest in the portable welding machine as a result.

2. (a) The bank does have an enforceable security interest in the tools. At issue here is whether a security interest attaches to collateral that is acquired after the security interest is created. Security agreements entered into to create a security interest can generally provide a wide array of options for consideration in creating a security interest. One such avenue that is commonly taken by secured parties of undercapitalized debtors is to create a security interest that covers collateral both that is in the possession of the debtor as well as collateral that the debtor will obtain in the future, primarily because the current collateral would not be enough to cover the value provided by the secured party. As such, courts have found that security interests that contain these bargained for exchanges are valid. In the case at hand, the bank has a security interest in "all equipment, including hereafter acquired." That language is a sufficient description of the collateral covered as well as a valid clause that will cover future equipment that comes into the debtor's possession. As opposed to the welding machine, the man actually has ownership interest in the specialized tools. As such, the remaining question is whether the specialized tools are equipment. In line with the definition of equipment above, the specialized tools are to be used in the course of conducting the debtor's business in repairing diesel-engine trucks. The debtor is not in the business of selling specialized tools, so these would not be inventory, and he is not utilizing them for his own home use or consumption, so neither

would it fall under consumer goods. As such, the bank does have an enforceable security interest in the tools that attached upon his receipt.

(b) The tool seller also has an enforceable security interest in the tools. At issue here is whether a security interest is properly created in collateral that the secured party sells to the debtor. When a seller takes a security interest in collateral that is sold on credit to a debtor, the resulting security interest is called a purchase money security interest (PMSI). The same rules of attachment apply as they do in 1 above. The tool seller and man have entered into a security agreement adequately describing "diesel-engine repair tools", value has been given by the bank in the form of a \$13,500 loan for the tools, and the man has an ownership interest in the tools. As such the tool seller has a purchase money security interest in the tools.

(c) The tool seller security interest in the tools takes priority over the banks security interest. At issue here is the priority of competing security interests in the same collateral. A security interest upon attachment, creates an enforceable security interest with respect to the secured party and the debtor. The secured party must take further steps to protect their security interest against competing security interests of third parties. One such method of protecting a security interest is by perfection. Perfecting a security interest in collateral can be accomplished in the following 5 ways, (1) by filing a financing statement, (2) by possession, (3) by control, (4) automatic perfection, (5) temporary perfection. In both cases of the bank and the tool seller, they have both filed financing statements and perfected their security interests. In a competition between competing perfected security interests, the first in time or to file will take priority. Thus, by this analysis the bank would have the first perfected security interest in the specialized tools. But there exists an exception when it comes to PMSI in equipment with respect to priority of competing perfected security interests. A PMSI in equipment will take priority over a competing perfected security interest, even one that came before it, when the secured party perfects its PMSI within 20 days of attachment of the collateral. Here, the tool seller perfected the security interest in the tools the following day, and thus met this criteria for a PMSI super priority. In the competition between a perfected PMSI and regular perfected security interest, the perfected PMSI will take priority and thus the tool seller's security interest has priority.

ANSWER TO MEE 1

1. Enforceable security interest by the Bank in portable welding machine

The Bank likely does not have an enforceable security interest in the portable welding machine. At issue here is whether the man has a right into the portable welding machine.

Under Article 9 of the UCC, a security interest can be attached to a collateral if 1) there is the intent by the debtor to grant his personal property as collateral to a security interest owned by the creditor, and such intent is showed by an authenticated security agreement describing the collateral; 2) the creditor provided value; 3) the debtor has right to the collateral. Once, all of the three elements are present the security interest attaches to the collateral. In this regard, the description of the collateral can be identified as a category of goods under Article 9 of the UCC such as equipment-equipment is whatever is acquired and used for business purposes. Furthermore, a security interest can include an after acquired provision, which indicates that the creditor will have a security interest in subsequent collaterals acquired by the debtor. Lastly, it is necessary that there is perfection. A security interest can be perfected in different ways, including by filing a financing statement with the relevant secretary of state, by describing the collateral.

Here, the Bank and the Man entered into a loan agreement, which was signed by the men and provided a provision that including a security interest in all the equipment of the men thereafter acquired. Furthermore, the bank provided a loan equal to 50,000 therefore there is consideration. Nonetheless, in order for the security interest to attach, it is necessary that the man has a right over the collateral-meaning it has an interest. Here, even though, the portable welding machine could classify as equipment under the categories of good of Article 9, based on the facts it appears that the man does not have any right or interest over the portable welding machine. The portable welding machine was of the mother of the man and mother did not granted consent of the portable machine.

In light of the foregoing, since the man did not have any interest over the portable welding machine, the bank is likely not to have an enforceable security interest over the portable machine.

2. Security interest in the diesel-engine repair tools

a) The right of the Bank

The bank has as an enforceable security interest in those tools. At issue here is whether the security agreement covered after acquired equipment.

As mentioned above, under Article 9 of the UCC, a security interest can be attached to a collateral if 1) there is the intent by the debtor to grant his personal property as collateral to a security interest owned by the creditor, and such intent is showed by an authenticated security agreement describing the collateral; 2) the creditor provided value; 3) the debtor has right to the collateral. Once, all of the three elements are present the security interest attaches to the collateral. In this regard, the description of the collateral can be identified as a category of goods under Article 9 of the UCC such as equipment-equipment is whatever is acquired and used for business purposes. Furthermore, a security interest can include an after acquired provision, which indicates that the creditor will have a security interest in subsequent collaterals acquired by the debtor. And the security interest will attach when the debtor obtains an interest in the collateral. Lastly, it is necessary that there is perfection. A security interest can be perfected in different ways, including by filing a financing statement with the relevant secretary of state, by describing the collateral.

Here, the Bank and the Man entered into a loan agreement, which was signed by the men and provided a provision that including a security interest in all the equipment of the men thereafter acquired. Furthermore, the bank provided a loan equal to 50,000 therefore there is consideration. Furthermore, as mentioned the loan agreement provided any equipment thereafter acquired. Therefore, since the tools are considered equipment and since the man had an interest in such tools when he bought them, the bank had the security interest attached to such tools.

b) Tool seller enforceable security interest in the tools

The tool seller has an enforceable security interest in those tools. At issue here is whether the sale made by the seller is covered by Article 9.

Sale on credits are covered by article 9. A sale on credit subsists when the seller sells the goods to a buyer and reserves a security interest in such good that he sold to the buyer. This is also called purchase money security interest. A purchase money security interest can be perfected in different ways, including filing a finance statement.

Here, the tool seller sold the tools to the man for \$15,000 but he sold them on credit. Indeed, in this case, it is provided that the buyer should pay the seller in monthly installments over a two-year period. Therefore, there are all the elements for a sale on credit. Further, as mentioned the seller provided value, the buyer had an interest in the tools, which are collateral of the security interest obtained by the seller.

In light of the foregoing, the seller has an enforceable purchase money security interest in the tools.

c) Priority among seller and bank

Seller has priority over bank. At issue here, who has priority between the Bank and the seller of the tools.

Under Article 9 of the UCC, between two perfected creditors, whoever filed or perfected first has priority. However, there is an exception. In the event there is a purchase money security interest in goods other than livestock and inventory, then the holder of the purchase money security interest has priority over other creditors that have an interest in the same collateral, if he perfect upon delivery of the goods to the debtor or within 20 days.

Here, Bank had a perfected security interest, since it filed a financing statement, which covered the equipment (and the tools are the equipment). However, even though it filed a financing statement over the equipment, seller will have priority. As mentioned above seller has a purchase money security interest in the tools. He filed a financing statement covering the diesel-engine repair tools, one day after the delivery of the tools to the man. As mentioned, the diesel-engine repair tools are equipment, since they are bought and used for business purposes. Having a PMSI and having perfected by filing a financing statement the day after the man (debtor got deliver) the seller has a priority over the buyer.

In conclusion, Seller' purchase money security interest in the tools will have priority over bank.

ANSWER TO MEE 2

Did the woman commit armed robbery of the \$100 cash?

The woman did not commit armed robbery of the \$100 cash. Armed robbery is defined as "theft of property, when in the course of the theft the offender is carrying a dangerous weapon and either (1) uses force, violence, or assault or (2) puts the victim in fear of serious injury.

Theft of Property

The first element of the offense of armed robbery is the theft of property. Theft is defined as "the unlawful taking and carrying away of property from the person or custody of another, with the intent to permanently deprive the owner of the property". In this case,

the women did not have the intent to permanently deprive the owner of the property. The homeowner owed the woman \$100, and the woman reasonably believed the \$100 was given to her in repayment of this debt. Therefore, there was no theft of property.

Dangerous Weapon

The second element of the offense of armed robbery is the carrying of a dangerous weapon by the offender. A dangerous weapon is defined as "any (1) firearm, (2) device that was designed for use as a weapon and capable of producing death or great bodily harm, or (3) device that is being used in a manner likely to produce death or great bodily harm". Pruning shears are not a firearm or a device that was designed for use as a weapon and capable of producing death or great bodily harm. The pruning shears were also not used in a manner likely to produce death or great bodily harm. Therefore, the pruning shears are not a "dangerous weapon"

Force/Fear of Injury

The final element of the offense of armed robbery is that the offender must either (1) use force, violence, or assault or (2) put the victim in fear of serious injury. In this case, the woman did not use force, violence or assault. All she did was ask where the money was. It also did not put the homeowner in fear of serious injury. The homeowner was frightened by the woman's "cold tone" and the pruning shears, but she does not appear to have been in fear of serious injury.

Conclusion

The woman did not commit armed robbery of the \$100 cash, as her actions do not meet any of the elements of the offense.

Did the woman commit theft of the figurine?

Yes, the woman committed theft of the figurine. Theft is defined as the "unlawful taking and carrying away of property from the person or custody of another, with intent to permanently deprive the owner of the property".

Unlawful taking and carrying away of property

The first element of the offense of theft is the unlawful taking and carrying away of property. The woman unlawfully took the figurine from the homeowner's front lawn and drove away with it in her truck, so her actions satisfy the first element of theft.

From the person or custody of another

The second element of the offense of theft is that the property was taken from the person or custody of another. The figurine was not taken from the homeowner's person, as she was not holding or touching it at the time, but a court is likely to find that an object on a person's front lawn qualifies as being in that person's custody, as it is on that person's property. Therefore, the second element of the offense of theft is satisfied because the figurine was taken from the homeowner's property.

With the intent to permanently deprive the owner of the property

The third element of the offense of theft is that the offender must have the intent to permanently deprive the owner of the property. This element is clearly satisfied in this case because the woman felt she was "entitled to something extra" and the woman proceeded to sell the property.

Conclusion

The woman committed theft of the figurine because all three elements of the offense are satisfied.

Did the woman commit criminal possession of the figurine as stolen property?

Yes, the woman committed criminal possession of stolen property. A person commits criminal possession of stolen property when the person possesses property that the person knows or reasonably should know is stolen property with intent either (1) to benefit that person or a person other than an owner thereof or (2) to impede the recovery by the owner.

Possession

The first element of the offense is that the offender be in possession of the property. Here, the woman was clearly in possession of the property for the period of time between when she took it from the homeowner's lawn and when she sold it to her assistant.

Knowledge

The second element of the offense is that the offender either know or reasonably should know that the property is stolen. Here, the woman had actual knowledge because she is the person who stole the property.

Benefit

The final element of the offense is that the offender must have the intent to benefit themselves or a person other than the owner thereof or impede recovery by the owner. Here, the woman clearly intends to do both. The woman (i) benefitted herself by selling the figurine for \$10, (ii) benefitted her assistant for selling the figuring at a below-market price and (iii) intended to impede recovery by the owner by selling the figurine to a third party.

Conclusion

The woman committed criminal possession of stolen property because all elements of the offense are satisfied.

Did the woman's assistant commit criminal possession of stolen property?

Yes, the woman's assistant also committed criminal possession of stolen property.

Possession

The first element of the offense is that the offender be in possession of the property. Here, the woman's assistant was clearly in possession of the property after she purchased it from the woman.

Knowledge

The second element of the offense is that the offender either know or reasonably should know that the property is stolen. The assistant reasonably should have known that the property was stolen. The assistant was aware that the figurine was worth much more than \$10 because she saw the \$200 price tag. The woman also said "just don't ask where I got it" and the assistant made no further inquiries. Therefore, the assistant was willfully blind and should have known that the property was stolen.

Benefit

The final element of the offense is that the offender must have the intent to benefit themselves or a person other than the owner thereof or impede recovery by the owner. Here, the assistant intended to benefit herself by selling the figuring for a large profit.

Conclusion

The woman's assistant committed criminal possession of stolen property because all elements of the offense are satisfied.

ANSWER TO MEE 2

(1) (a) The woman did not commit armed robbery of the \$100 dollar cash. In State A, armed robbery is "theft" of property, when in the course of the theft, the offender is carrying a "dangerous weapon" and either uses force, violence, or assault or (2) puts the victim in fear of serious injury. First, the woman did not commit a theft. In State A, theft is the unlawful taking and carrying away of property from the person or custody of another, with the intent to permanently deprive the owner of the property. Here, the woman did not unlawfully take the property of another because the homeowner handed the woman the money and the woman did not threaten or force the homeowner to hand over the money. The facts indicate that the women merely asked "where's the money?" and that the woman was holding the pruning shears down at her side and pointed toward the ground. The homeowner was freighted because she did not recognize the woman and because neither the woman's cloths nor truck bore the name of the woman's landscaping business. \1\while the woman had a cold tone and pruning shears in her hand, the facts do no indicate that the women yelled, threatened the homeowner or raised the shears. While the woman did carry away the 100 dollars (as the facts indicate she walked towards her truck) and even if the woman did unlawfully take the money, she did not have the specific intent to permanently deprive the owner of the property. The woman lacked this intent because she was collecting the \$100 on the grounds that this money was owed to her since she performed \$100 of landscaping service for the women but was never paid for it. Accordingly, the women believed she was entitled to the money and when the homeowner handed her the money she likely thought the money was hers due to the debt she was owned. Since the woman believed she was taking her money she could not form the specific intent to permanently deprive the homeowner of the homeowner's property. Second, the woman was not carrying a dangerous weapon. A dangerous weapon is any firearm, any device that is not designed for use as a weapon and capable of producing death or great bodily injury, or a device that is being used in a manner likely to produce death or great bodily injury. The facts indicate that the woman was holding a pruning shear during the alleged armed robbery and that none of the three definitions of a dangerous weapon is met. Pruning shears are not a firearm. While pruning shares are capable of producing death or great bodily injury, they are not designed for use as a weapon. They are designed to cut bushes and small branches. The woman was not using the pruning shears in a manner likely to produce death or great bodily harm, as the facts indicate that she had the pruning shears down at her side and pointing to the ground. Finally, while the facts indicate that the woman put the homeowner in fear of serious injury or harm (as the homeowner was frightened by the woman's cold tone and pruning shears in the woman's hand), this is only one of the elements of armed robbery. Since the other elements mentioned above were not satisfied, the woman cannot be convicted of armed robbery.

(1) (b) The woman committed theft of the figurine. In State A, theft is the unlawful taking and carrying away of property from the person or custody of another, with the intent to permanently deprive the owner of the property. Here, the woman satisfies all the elements of theft. The woman unlawfully took the figurine because she took it without the homeowner permission from the homeowner's property. She grabbed the "grabbed the figurine" from the homeowner's lawn. The woman carried the figurine away because the facts indicate that she put it in her truck and drove away. The figurine was in the custody of another person because the figurine was on the homeowner's property. Finally, the woman had the intent to permanently deprive the homeowner of the woman of the figurine and that it was not the woman's property. The facts indicate that the women thought she was entitled to something extra. The facts also indicate that the woman glanced over her shoulder to make sure the homeowner was not looking when she grabbed the figurine. Furthermore, the woman offered to sell, and indeed did sell, the figurine to her assistant. These facts demonstrate that the woman had the specific intent to permanently deprive the homeowner of her property.

(1) (c) The woman committed criminal possession of the figurine as stolen property. In State A, criminal possession of stolen property is committed when that person possess property that she knows or reasonably should know is stolen property with the intent either to benefit that person or a person other than an owner thereof or to impede the recovery an owner. Here, the women knew she possessed stolen property because the woman stole the property. She had actual notice of the stolen property. As mentioned above, the facts indicate that she knew the figurine belonged to the homeowner and that she took it without the homeowner's permission. Finally, the woman possessed the figurine to benefit herself. The facts show that the woman took the figure because she thought she was something extra for the long delay in payment. Moreover, the woman sold the figurine for some extra money. Clearly, the woman possessed the figurine to benefit herself and she indeed benefited herself by selling the figurine.

(2) The woman's assistant committed criminal possession of the figurine as possession of stolen property. In State A, criminal possession of stolen property is committed when that person possess property that she knows or reasonably should know is stolen property with the intent either to benefit that person or a person other than an owner thereof or to impede the recovery an owner. Here, while the assistant did not actually know that the figurine was stolen, she should have reasonably known that the figurine was stolen property. The facts indicate that (i) the woman told the assistant "Just don't ask where I got [the figurine from]", (ii) the woman sold the figurine for \$10, (iii) the figurine looked new, and (iv) the assistant noticed a \$200 price tag attached to the bottom of the figurine. In light of the statements by the woman to the assistant, the cheap price of the figurine, and the price tag on the figurine, the assistant should have reasonably known that the figurine was stolen property. Finally, the assistant possessed the property with the intent to benefit herself, as the facts indicate that the woman thought she could sell the figurine for a "hefty profit."

ANSWER TO MEE 3

1. Amy and Bill had the authority to vote to approve their trip to Belgium at corporate expense. The board of directors is responsible for day-to-day management of the company. Amy and Bill are shareholders and directors of their company BC. In close corporations, which have few shareholders and is not publicly traded, shareholders may act as directors. Articles of incorporation may change most default terms of the management of a corporation. Directors may take action in two ways. One way is to have unanimous written consent by all directors. The other way for directors to act is to meet with a quorum present and vote. A quorum is present if a majority of directors are present. Once there is a quorum, action takes a majority vote of the directors. There are three directors here. Amy, Bill, and Sharon are all directors on the board. All three directors were present at the meeting. There was a quorum in place. Voting on an act required two votes to be successful. Sharon disagreed, but both Amy and Bill voted in favor of the trip. As directors, Amy and Bill acted appropriately to approve a board action.
2. Amy and Bill's acts are beneficial to them, but this does not give rise to a violation of the duty of loyalty. The duty of loyalty requires directors to act in the best interest of the company and refrain from self-dealing and usurping corporate opportunities. Neither of those are present here. The benefits to Amy and Bill are incidental to the benefits to the company gained from their trips. These trips are not exclusively for their own self-interest. Amy and Bill go sightseeing and do other activities unrelated to the company's business. They have BC pay for all expenses on the trips. The trips started as trips to go to a trade show. Other brewing companies and businesses went to the trade shows. This year, they decided to go to Belgium instead of Germany. They decided on this switch because Belgium has more innovations in craft brewing. BC is a craft beer business. Amy and Bill go abroad to seek out new ideas about ingredients and brewing techniques for their craft beer business. Many of their competitors cover the same type of travel for their employees. Amy and Bill are not usurping any corporate opportunities. In fact, they are creating new opportunities for the expansion of the business by incorporating new and diverse flavors and types of beer.
3. Sharon may not personally recover for the expenses of Amy and Bill on their Belgium trip. Sharon owns 40% of the outstanding shares of BC. Amy and Bill each own 30%. Sharon is the majority shareholder, but together Amy and Bill are the controlling shareholders. Amy and Bill are using corporate funds to pay for the Belgium trip. While Sharon is a shareholder, she may not personally recover for these expenses. Sharon disagrees with the travel. She is not convinced that the travel is beneficial for the company. She has explicitly stated that the traveling must stop. However, she has no

standing to bring suit on behalf of herself. She is suffering no personal harm by Amy and Bill going abroad and using company money.

4. Sharon may not bring a derivative claim with respect to the expenses paid by BC for Amy and Bill's trips. The expenses for the past Germany trips were expended prior to Sharon joining. In order to bring a derivative claim, the corporation must have been harmed in some way. The director wishing to bring the claim must make a demand on the corporation to sue. If denied, the director may bring suit naming the corporation as a defendant. A director will not be compensated for the suit unless they are successful on the merits. If so, the director will be entitled to attorney's fees and court costs.

ANSWER TO MEE 3

1. The issue is whether the directors of the corporation may vote to approve a business trip for the directors.

The board of directors is the corporate body in charge of overseeing the management of the corporation and taking strategic decisions for its business. The board of directors may be comprised of any number of individuals, as appointed by the shareholders meeting. The board of directors may have special or regular meetings. In order to take valid decisions, a minimum quorum must be met during such meetings. Unless provided otherwise by the articles of incorporation or the bylaws, a majority of the directors being present in the meeting is sufficient. Under the Model Business Corporations Act (MBCA), the presence requirement is met if the directors are able to talk and hear one another. Once the quorum requirements are met, decisions are generally valid by a majority vote of the directors, unless the governing documents of the corporation provide otherwise.

Here, the BC board of directors is comprised of three individuals, Amy, Bill and Sharon. The three of them were present at the board meeting where the trip to Belgium was decided and nothing in the facts suggest that they were not "present" for the purposes of the MBCA. Because the decision was taken by a majority vote, and nothing in the facts suggest that the governing documents of BC provide otherwise, it is likely that the decision to have a trip to Belgium was validly taken.

2. The issue is whether Amy and Bill violated their breach of loyalty for having the corporation pay their trip expenses.

A director of a corporation has a duty of loyalty towards the corporation. Such duty requires the director to avoid conflict of interests. A conflict of interests arises where the decision taken by the director would reasonably be influenced by a material financial interest of the director. The duty of loyalty requires the director to avoid self-dealing with the corporation or to obtain a benefit from it. However, under the safe harbor rule, a self-dealing transaction may not breach the duty of loyalty if either (i) the director materially discloses all the information and the majority of disinterested directors or shareholders approves the decision, or (ii) the transaction is procedurally and substantively fair. In addition, the directors owe a duty of care to the corporation. Under the business judgment rule, decisions taken by the board are presumed to have been taken in good faith and for the benefit of the corporation.

Here, Amy and Bill voted in favor of having BC pay their trip to Belgium for the main purpose of learning about new ingredients and brewing techniques that BC could use in its business. Because BC would be paying for the trip expenses, it is likely that the transaction qualifies as self-dealing and thus a potential breach of the duty of loyalty. However, it is debatable whether such financial interest of Amy and Bill on the trip is material because it is predominantly a business trip and the amounts are not likely to be substantial considering that BC is a successful venture. In addition, under the safe harbor rule, it is likely that the transaction is procedurally and substantively fair. It would be procedurally fair because both Amy and Bill explained during the meeting why the trip was needed (to learn about new innovations in the field). It would also likely be substantively fair because it is a fact that BC's competitors send their employees to similar fairs and events in the region. In addition, under the business judgment rule, for the same reasons the trip is likely to have been done in good faith and for the purposes of benefitting BC.

Therefore, it is unlikely that Amy and Bill have violated their duty of loyalty.

3. The issue is whether Sharon may personally recover from Amy and Bill the expenses for their trip to Belgium.

A shareholder may initiate a lawsuit in its own name against the corporation or the directors for either (i) exercising her shareholder's rights, or (ii) causes of action that are unrelated to the shareholder as such. For example, under the first point the shareholder may bring a lawsuit to compel the directors to have access to business records or to vote. Under the second point, the shareholder may bring lawsuit against the corporation for torts committed by the corporation against the shareholder or breach of contract between the corporation and the shareholder.

Here, violating the duty of loyalty by Amy and Bill for their trip to Belgium has no relationship with Sharon's rights as a shareholder. Neither such trip involves a tort committed against her by BC or by Amy and Bill, nor a contractual breach. Therefore, Sharon is not likely to be able to personally recover from Amy and Bill all their expenses for that trip to Belgium.

4. The issue is whether Sharon may bring a derivative action against Amy and Bill for causes of action that arose while Sharon was not a shareholder.

A shareholder is entitled to bring lawsuit as a derivative action on behalf of the corporation against a third party or the directors. However, the shareholder must adequately represent the interests of the corporation. In addition, the shareholder must have been a shareholder during the time that the cause of action arose and at the time of bringing the lawsuit. The shareholder will also be able to comply with this last requirement if the shareholder acquired the shares by operation of law and the previous owner of the shares was a shareholder by the time the cause of action arose.

Here, Sharon intends to bring a derivative lawsuit against Amy and Bill regarding trips to Germany that happened while Sharon was not a shareholder of BC. Sharon joined BC's capital last year and Sharon has only been a shareholder during Amy and Bill's last trip to Belgium. In addition, it is questionable whether Sharon adequately represents BC.

Therefore, Sharon will be barred from bringing a derivative action against BC for Amy and Bill's past trips to Germany.

ANSWER TO MEE 4

1. (A) The issue is whether Peter is bound by the contract signed by Angela with the furniture store, with regards to the yellow chairs.

An agency relationship exists when there is a principal and an agent and the agent acts on behalf of the principal and subject to the principal's control. An agent can act with actual authority or apparent authority. Actual authority can be express or implied. Express actual authority exists when the principal expressly gives the agent authority to act on his behalf. Implied actual authority exists when the agent reasonably believes she has authority to act and that belief can be from conduct on the principal's part or past course of business between the principal and the agent. Apparent authority exists when two elements are satisfied: first a third party reasonably believes that the agent has authority, and second, the belief is due to an act on the principal's part or due to a neglect to act on

the principal's party. A principal will be liable on a contract if the agent entered into the contract with actual or apparent authority. An agent will be liable on a contract if the agent entered into the contract with no actual or apparent authority. In addition, an agent will be liable on a contract if the agent entered into a contract and the principal was undisclosed (the third party did not know the agent was acting on behalf of a principal), or if the principal was partially disclosed (the third party knew the agent was acting on behalf of a principal but did not know the identity of the principal).

Here, Peter is the principal and Angela is the agent. Angela had no actual or apparent authority to enter into the contract for yellow chairs. With respect to express actual authority, Peter expressly told Angela he wanted 50 red chairs and did not want to spend more than \$10,000 on them. Angela instead bought 50 yellow chairs. With respect to implied actual authority, Angela could make an argument that she reasonably believed that she had the authority to buy 50 yellow chairs (perhaps based on conduct or past course of business between the two) but there is no evidence of these kinds of facts and so Angela most likely did not possess implied actual authority. In addition, Angela did not possess apparent authority. The furniture store did not believe that the agent had authority to act and Peter did not provide the furniture store with any reason to believe that Angela has authority to act on his behalf. She signed the contract in her name alone and did not mention that she was buying the chairs on behalf of anyone other than herself. Under these facts, Peter will not be bound by the contract signed by Angela with the furniture store with respect to the yellow chairs.

(B) The issue is whether Angela is bound by the contract she signed with the furniture store.

An agent will be liable on a contract if the agent entered into the contract with no actual or apparent authority. In addition, an agent will be liable on a contract if the agent entered into a contract and the principal was undisclosed (the third party did not know the agent was acting on behalf of a principal), or if the principal was partially disclosed (the third party knew the agent as acting on behalf of a principal but did not know the identity of the principal).

As the agent here, Angela will be bound by the contract she signed with the furniture store. When she signed the contract (in her own name and without mentioning that she was buying the chairs on behalf of anyone), Angela became liable because the principal, Peter, was undisclosed. The furniture store did not know that Angela was acting on behalf of anyone and had no reason to. Therefore, she will be bound by the contract she signed with the furniture store and will be liable to the furniture store.

2. The issue is whether Angela can recoup from Peter the \$8,000 that she paid to the bike shop for the cargo bike.

A principal can ratify an act or contract of an agent that they otherwise did not authorize (one that the agent enters into without actual or apparent authority). Ratification can be express, when the principal expressly agrees to the contract or tells the agent that they will accept the act or contract that the agent entered into. It can also be implied when the principal does nothing and instead accepts the benefits of the contract. As the agent Angela will be able to recoup the \$8,000 from Peter because although she entered into the contract without actual or apparent authority and Peter, the principal was wholly undisclosed to the bike shop, Peter thereafter ratified the contract and Angela's acts. Ratification was shown when Peter called Angela and told her he would keep it and liked it, thereby accepting the benefit of the contract and expressly agreeing to it.

3. The issue is whether Peter will be bound by the contract signed by Angela with respect to the pizza oven.

Apparent authority exists when two elements are satisfied: first a third party reasonably believes that the agent has authority to act on behalf of the principal, and second, the belief is due to an act on the principal's part or due to a neglect to act on the principal's part. A principal will be liable on a contract if the agent entered into the contract with actual or apparent authority.

Here, the local restaurant supplier reasonably believed that Angela had the authority to act on behalf of Peter and this belief was due to an act on Peter's part, specifically Peter called the supplier beforehand, advising the supplier that Angela would be there to get a pizza oven on Peter's behalf. Angela did so, signing the contract as "Angela, on behalf of Peter". Angela acted with clear apparent authority and as such Peter as the principal will be liable on and bound to the contract signed by Angela.

ANSWER TO MEE 4

1. The issue is whether Peter is bound by the contract signed by Angela with the furniture store?

Agency is a fiduciary relationship between a person, the agent, who is going to act on behalf of another person, the principal.

The principal is bound by the contract entered into by the agent if the agent has authority to contract on behalf of the principal.

An agent has actual authority when he reasonably understands and believes that the principal gives him the authority to act on his behalf. There is an express authority when the principal expressly give authority to the agent to act in the scope of the authority he gave him. Implied authority for the necessary execution of the duty of the agent and in the scope of the needs of the principal.

Apparent authority is when the principal holds the agent out, to the third party, as having authority to act on his behalf and there is the principal manifestation to give this apparent authority to the agent.

Here, Peter, the principal, asked his sister Angela, as an agent to make some purchases for his pizza parlor. He asked her "First, to fit with the parlor's unique decor, I want you to buy 50 red chairs from the local furniture store, but don't spend more than \$10,000 on the chairs". Then, Peter gave to Angela actual authority and Angela reasonably understood the authority that Peter gave her because she replied "I fully understand. Agreed". That day, Angele went to the local furniture store. She told the salesperson that she wanted to buy 50 red chairs and to spend no more than \$10,000. The salesperson responded that red chairs were in high demand and it would cost \$20,000 but that for \$10,000, Angela could buy 50 yellow chairs. Believing that Peter would prefer to stay within the \$10,000 budget, even though the chairs were yellow, Angela signed a written contract in her name alone to buy the yellow chairs from the store at that price. Peter gave her authority to buy only red chairs for no more than \$10,000, then Angela did not have actual authority to buy the yellow chairs for \$10,000. In addition, Angela did not mention to the salesperson that she was buying the chairs for anyone other than herself or that she had authority to buy only red chairs. There is no apparent authority because neither Peter manifest his intent to holds out Angela as having apparent authority neither expressly nor orally to the salesperson and Angela did not disclose the principal identity to the salesperson. Then no actual neither apparent authority for Angela.

Therefore, Peter is not bound by the contract signed by Angela with the furniture store.

2. The issue is whether Angela is bound by the contract she signed with the furniture store?

An agent is liable and bound by the contract entered into by himself when he lacks authority (act outside of the scope of the authority that has been given to him) and did not disclosed or partially disclosed the principal to a third party. The third party knew or should have known that the agent lacks authority and relies on the agent.

Here, Angela did not mention to the salesperson that she was buying the chairs for anyone other than herself or that she had authority to buy only red chairs. There is no apparent authority because neither Peter manifest his intent to holds out Angela as having apparent authority neither expressly nor orally to the salesperson and Angela did not disclose the principal identity to the salesperson. Then no actual neither apparent authority for Angela. The salesperson did not even know the existence of the principal or the fact that Angela lacks authority.

Therefore, Angela is bound by the contract she signed with the furniture store.

3. The issue is whether Angela can recoup from Peter the \$8,000 that she paid to the bike shop for it?

The general rule is when the agent lacks authority, the principal is not bound and liable for the contract entered into by the principal. Unless there is ratification by the principal. The principal ratifies the contract by knowing the agent acted without the authority and the principal either pays or accepted the conduct or the contract made by the agent without authority.

Here, Angela went to a local bike shop to buy a new electric bicycle again without mentioning that she was buying the bicycle for anyone else. The bike salesperson truthfully told Angela that she could get a used cargo bike that was not electric but could carry more than an electric bike. She purchased it for \$8,000 paying with her personal check made out to the bike shop. Peter gave Angela actual authority to buy a new electric bicycle for pizza deliveries for no more than \$5,000 but she bought a non-electric bicycle for \$8000, she lacks authority for this contract. In addition, she did not have apparent authority because Peter did not hold her out for the bicycle salesperson as having authority and Angela did not mention the principal's identity neither. However, Peter who at first was very annoyed with Angela for purchasing a used cargo bike but then two days later after trying out the cargo bike he called Angela and said that he would keep the \$8000 cargo bike he liked it's carrying capacity. He ratified the lack of authority of Angela by accepting and consenting to the contract and to keep the bicycle.

Therefore, Angela can recoup from Peter the \$8000 that she paid to the bike shop for it.

4. The issue is whether Peter is bound by the contract signed by Angela regarding the pizza oven?

See the rules for actual and apparent authority above.

Here, Peter gave actual authority to Angela that she understood and agreed for buying a pizza oven for the pizza parlor for no more than \$12,000. In addition, the following day, Peter called the local restaurant supplier in the morning and told the owner "I am going to

open a pizza parlor next month. I have asked my sister Angela to come to your store to purchase a pizza oven on my behalf for the pizza parlor. Peter holds Angela out as having apparent authority and manifest the intent to give her apparent authority by calling the local restaurant supplier and tell him. However, Angela paid \$15,000 rather than the \$12,000 for which she had authority. The third party did know that Angela has apparent authority but did not know that Peter authorize her only to pay \$12,000. the restaurant relies on the authority and sell the oven to Angela for \$15,000.

Therefore, Peter is bound by the contract signed by Angela regarding the pizza oven.

ANSWER TO MEE 5

1. At issue is whether a judgment creditor can reach trust principal governed by a spendthrift clause

Under the UTC and common law, a spendthrift clause is a valid clause in a trust that prohibits alienation or assignment of the beneficiary's interest and may not be reached by creditors with the exception of child support judgments, or creditors tending to the necessities of the beneficiary. A trustee working under a spendthrift clause may not (unless otherwise granted by the trust) use the trust principal to pay off creditors.

At present, the trust is an income trust. The Trustee is to pay income derived from trust properties (money or real property or stocks or otherwise) to the beneficiaries. Here, one of Bob's creditors has a judgment against Bob for a loan that Bob did not pay. Here, this falls squarely within the prohibitions of a spendthrift clause and therefore the creditor will not be able to satisfy its judgment against Bob with present and future distributions of trust income. The Bank may, however, seek the sums given under the trust after Bob has received them.

2. At issue is whether a judgment for child support can reach trust property governed by a spendthrift clause.

The law above with regards to a spendthrift clause is repeated.

At present, Bob's former wife has a judgment for child support. This is a permitted exception to the spendthrift clause under the UTC/common law. The rationale is that public policy favors the timely and complete payments of child support payments rendered in a judgment of a court. Therefore, Bob's former wife can reach Bob's interest in present and future distributions of trust income to satisfy her judgment against Bob.

3.(a) At issue is whether the clause is a general or specific power of appointment.

The UTC and common law provide that beneficiaries may have a power of appointment when granted under a trust. A power of appointment allows the beneficiary to direct the principal at her discretion to whoever listed as permissible under the trust. A power of appointment may be general, where it gives the power holder a free choice to choose who is to receive the trust principal, or it may be specific, where the trust provides that there are only a category of persons whom the power holder may give the trust principal to.

Here, it is contended that the power of appointment is a specific power of appointment, since it says that she may "appoint by her will, among her heirs at law" that may receive the trust principal. This therefore restricts Daughter to only distribute trust principal to her "heirs at law", and thus forming a specific power of appointment.

3.(b) At issue is whether the Settlor's twins are the Daughter's heir at law

Under the UTC, language and labels under trust may have significant outcomes. The terms heirs, issue, and beneficiary, are not used interchangeably and each has a specific meaning. Issue are direct descendants or descendants from a common grandparent. Heirs are persons who will take an intestate share upon one's death, and beneficiaries are understood to be persons entitled a trust interest.

At present, the wording used is heirs at law, and it is submitted that the Settlor's twins from a second wife will not be the Daughter's heirs at law. This is because the Daughter's heirs at law are Ann and Bob, her two children, as they will be the ones who will take an intestate share of Daughter's property. Therefore, it is unlikely that an appointment of trust principal by Daughter to Settlor's twins would be effective.

3.(c) At issue is whether the failure to exercise a power of appointment will result in a lapsed gift.

Under the UTC, the failure to exercise a power of appointment will result in the relevant principal to go back to the Settlor, since it will have been treated as lapsed. The Settlor will have a resulting trust over the property/principal under the unexercised power of appointment.

However, a minority rule is that if the power of appointment was not exercised, it is essentially treated as a lapsed gift where the power holders' heirs take in place of the power holder.

At the present case, therefore, the trust principal would likely pass back to the Settlor (and in the event of his death to the remainder of his estate) under the UTC. If the minority rule is followed, it will go to Ann and Bob.

ANSWER TO MEE 5

- 1) Bank may not reach Bob's interest in the present and future distribution of trust income to satisfy its judgement against Bob. The issue here is that the trust contains a valid "spendthrift" clause that specifically states "no income beneficiary may alienate or assign his or her trust interest, nor shall such interest be subject to claims of his or her creditors". This effect of this provision is to prevent creditors from having the right to reach into the trust for distributions of trust income to require the trustee to make distributions the creditors to satisfy their judgement. However, if the trustee decides to make such distribution, the creditors may make claim once Bob is in receipt, but the spendthrift clause prevents them from reaching into the trust and requiring the trustee to make such distribution to their benefit in satisfaction of the debt.
- 2) Bob's former wife may reach Bob's interest in the distributions to satisfy her judgement against Bob. The key here is that the wife's judgement relates to unpaid child support owed to their minor child. Unlike bank creditors, there is a specific public policy exception regarding trust property subject to spendthrift clauses where the action relating to the judgement relates to child support, as is the case here. Accordingly, Bob's interest would not be protected from his former wife.
- 3) (a) The Proper Classification is a specific power of appointment. Because the power of appointment grants Daughter to distribute the trust principal as she may appoint, among her heirs and in such shares as she, in her sole discretion, may deem appropriate, the Daughter discretion's regarding distribution of the trust principal is restricted to her heirs, rather than a general power of appointment where she would be free to distribute the property in her will as she see fit with unfettered discretion (e.g. to her own residual estate).

(b) An appointment of trust principal to the Daughter to Settlor's twins would not be effective. As discussed above, the Daughter is restricted in the trust power to distributing principle among her heirs. Her heirs currently would only be Anne and Bob and would not include Settlor's new children. As such, she would not be entitled to distribute trust principal to the twins.

(c) If the daughter fails to exercise her power of appointment, the trust principal shall be distributed to her heirs. The failure to exercise the trust power will be treated as a silent distribution, which leads to her heirs taking the trust property in equal shares.

ANSWER TO MEE 6

I. Contract Formation

Whether the contract entered into on January 9, is enforceable despite violating the Statute of Frauds thanks to the merchant's confirmatory memo exception.

A contract is formed where there is an exchange of consideration and a meeting of the minds (offer followed by acceptance). Oral contracts are normally enforceable. However, the Statute of Frauds provide that a contract for the sale of goods of \$500 or more must be in a writing signed by the party to be charged. If not, the contract remains formed but is unenforceable. However, under UCC Art. 2, there is the merchant's confirmatory memo exception to this provision of the Statute of Frauds. It applies where both parties are merchants, they reach an oral agreement, then one sends a memo signed indicating the existence of an agreement and the quantity terms, and the other does not object within 10 days. In such a case, the contract will be enforceable. A merchant is one who deals regularly in goods of the kind.

Here, both parties were merchants. Buyer manufactures scarves and regularly buys silk from importers to make them. Seller regularly sells silk to customers. On January 9, they reached an oral agreement over the phone. They agreed for the sale of goods (10,000 yards of silk) by Seller on February 1 at a price of \$10 per yard. The total value is \$100,000, thus more than \$500. This contract should have been in writing. But Buyer sent a confirmatory memo on the following day in which he expressed the agreement and indicated the quantity (10,000 yards of silk). This note was signed by Buyer. Seller never objected saying no agreement had been reached. He read it, placed it in his files and ignored it.

Therefore, there is an enforceable contract between Buyer and Seller pursuant to their agreement reached on January 9.

II. Terms of the Contract

Whether the party's course of dealing allows inference of a term of delivery at Buyer's place of business.

The terms of a contract for the sale of goods are determined first by their express terms. UCC 2 provides gap fillers in case of silence of the parties. Usually, between merchants, delivery occurs at the seller's place of business, so that the buyer has to go there to pick physical delivery. However, UCC 2 provides that terms in a contract can be implied from the party's course of performance under the particular contract, their course of dealing (performance under previous contract, and customs of trade, in that order of importance). Course of dealing is relevant where it exhibits a clear practice between the parties as to a particular term.

Here, the contract does not provide expressly for delivery of the silk at the Buyer's place of business. The parties only said that delivery was to occur on February 1, without saying where. There is however a long-established course of dealing between the parties to can fill that gap. The parties entered into 250 contracts for the sale of silk in the last 6 years. In each of these contracts, they provided that Seller would deliver the silk to Buyer at no extra charge at his place of business. And in these contracts, Buyer was paying the price at the time of delivery. It is reasonable to infer that the parties intended the same in this case.

Therefore, the contract requires Seller to deliver the silk at Buyer's place of business.

III. Measure of Damages

What is the appropriate measure for the damages caused by Seller's breach of the delivery term.

The general principle for contract damages is expectation, i.e. damages must be the party in the position he would have been but for the breach. UCC 2 provides rules where the contract is for the sale of goods. Where the seller breached, a buyer is entitled to cover by buying goods in substitution. If cover is reasonable and done in good faith, buyer will be entitled to claim the difference between the contract price and the price to cover. If cover is not reasonable or in bad faith, damages will be the difference between the contract price and the market price. In every case, the non-breaching party is also entitled to incidental damages.

Here, Seller breached the contract for the sale of goods by refusing to deliver the silk. Because Buyer does not own a large truck, he could not come pick delivery. Therefore, he did not breach his duty to mitigate damages by going picking up. Then, Buyer covered in good faith and bought goods to cover at a commercially reasonable price that included delivery, as provided under the original contract. The goods were of an identical quality. Buyer is thus entitled to claim the difference between the contract price (\$100,000) and the price for covering (\$120,000), that is, \$20,000.

Therefore, Buyer is entitled to claim damages of \$20,000 based on Buyer's purchase of substitute silk.

ANSWER TO MEE 6

1. Contract is Enforceable

The issue is whether there is an enforceable contract between the Buyer and Seller following the January 9 agreement.

The UCC governs the sale of goods. For a contract to be enforceable there must be an offer, acceptance, and consideration. An offer is an outward manifestation of intent and signal that acceptance will conclude the deal. Acceptance requires a communication of acceptance and under the UCC there is no mirror image rule requiring like terms. Consideration is a bargained for exchange. Typically, a contract is enforceable regardless of if it is oral or written. However, under the Statute of Frauds, contracts regarding marriage, future land-sale, contracts unable to be performed within one year, executors of decedent's debts, guaranties for a third-party debt, and sales of goods for \$500 or more are required to be in writing. The UCC allows for the statute of frauds to be met in five ways: (1) a writing signed by the party against whom enforcement is sought; (2) Merchant confirmation; (3) judicial admission; (4) custom goods; or (5) part performance. A merchant confirmation can satisfy the Statute of Frauds when a buyer drafts up a memo explaining the agreed upon oral terms and sends it to the seller. If the seller does not object within a reasonable time, the contract is considered valid under the Statute of Frauds. The only required term for a sale of good contract under the UCC is quantity.

Here, the Buyer and Seller had a telephone call on January 9, where they agreed that the Buyer will buy 10,000 yards of silk from the Seller for \$10 per yard. There is no indication that the contract is unenforceable for a lack of offer, acceptance, or consideration. Since the contract was for the sale of goods and is more than \$500, the contract would be required to be in writing under the Statute of Frauds. Since the two parties are merchants, the UCC governs. Here, after the phone call, the Buyer typed up a memo stating the agreement of the terms and signed the statement and sent it to the seller. Although the memo did not include the price, it did include the quantity, which is the only requirement for the UCC. Upon receiving the memo, the Seller read it and placed it in his files. The Seller made no objections to the Buyer's memo. Since there were objections made, the Seller is deemed to have agreed to the contents of the memo, since the Seller agreed to the memo, the statute of frauds requirement is met.

Therefore, there is an enforceable contract as the Buyer's memo satisfies the Statute of Frauds.

2. FOB Buyer

The issue is whether the contract requires the Seller to deliver the silk to the Buyer's place of business.

When a contract is silent as to terms, the UCC will fill in terms with gap-filers. Typically, when a contract is silent as to the place of delivery, the UCC determines that the place of delivery is the seller's place of business. However, course of dealings, meaning the manner in which contracts were carried out in the past between the same parties, can be a more suitable gap filler.

Here, the contract was silent as to the place of delivery. Therefore, it is likely to be determined that the place of delivery was the seller's place of business. However, the Buyer and Seller had 250 previous purchase contracts in the last six years. In all of these earlier transactions, the Seller delivered the silk to the Buyer at no extra charge. Given the prior business dealings between the parties, it is likely the contract was meant to have the place of delivery to be the Buyer's place of business, not the seller's. Therefore, the contract should be interpreted using the terms carried out in the prior course of dealings rather than the standard UCC gap-filler.

Therefore, the contract should require the Seller to deliver the silk to the Buyer's place of business.

3. Buyer is entitled to damages

The issue is whether the Buyer is entitled to damages.

When there is a breach of contract, a non-breaching party may be awarded expectation damages, reliance damages, and restitution damages. Expectation damages are damages that would put the non-breaching party in the position they would be in if the contract went through without a breach. Reliance damages put a party in the position they would be in if the contract was never formed. Restitution damages provide the non-breaching party with the money they spent on the breaching party. Expectation damages are easily determinable. When a breaching party fails to perform, a non-breaching party is able to sue for damages resulting out of the difference between the contract price and the cost to cover for the breach. If a non-breaching party does not cover the breach, then they are entitled to damages equal to the fair market value minus the contract price.

Here, the Seller breached the contract by not delivering the silk to the Buyer by February 1. Therefore, in response to the breach, the Buyer bought 10,000 yards of silk from

another party for \$12 per yard, a \$2 increase from what his contract with the Seller was for. Buyer purchased the new silk in good-faith and the price was reasonable and not an excessive cover price from what was required under the original contract. Therefore, Buyer had to cover for the Seller's breach, which cost him an additional \$20,000. Since the Seller breached, and the Buyer was unable to obtain the silk he needed, Buyer spent \$20,000 more than needed if the Seller did not breach the contract.

Therefore, the Buyer is entitled to \$20,000 of damages based on Buyer's purchase of substitute silk.

ANSWER TO MPT 1

To: Harold Huss

From: Examinee

Date: February 22, 2022

Re: Denise Painter, Custody and Property Divorce Analysis

QUESTION ONE: CUSTODY

Is the court more likely to award joint legal custody of Emma to Robert and Denise or sole legal custody to Denise?

SHORT ANSWER

Because she likely will not be able to rebut the presumption of joint legal custody, the court is unlikely to award Denise sole legal custody of Emma.

ANALYSIS

Under the Franklin Family Code (FCC), "legal custody" is the right to make decisions about a child's medical care, education, religion, and other important issues regarding child. FCC Sec 420. "Sole legal custody" is an order of the court awarding legal custody of the child to one parent, whereas "joint legal custody" is an award to two parents. Importantly, joint legal custody does not imply an equal division of the child's time between the parents. *d.* Legal custody is distinguished from "physical custody", in which a parent has the right to have the child live with a parent all or part of the time.

The court will determine legal custody of a child based on the "best interests of the child." FCC Sec 421. To discern the child's best interests, the court will consider various factors: agreement or lack of agreement of the parents on joint legal custody; past and present abilities of the parents to cooperate and to make decisions jointly; the ability of the parents to encourage the sharing of love, affection, and contact between the child and the other parent; and the mental and physical health of all individuals involved. */d.* Importantly, there is a rebuttable presumption that joint legal custody is in the best interests of the child; thus, the parent seeking sole legal custody must overcome the presumption.

Denise requests sole legal and physical custody of Emma. She recognizes that Robert will want joint legal custody. Robert does not oppose Denise's request for sole physical custody of Emma, and he is not requesting sole legal custody, either. Robert does request that he be more involved in Emma's spiritual needs, and he would like regular visits with his daughter, though he has no proposal for what that conduct would look like.

Agreement

To be effective, joint legal custody requires that the parents be willing and able to communicate. *Sanchez v. Sanchez* (Fr. Ct. App. 2010). The requirement is not that the parents have a totally amicable relationship but that there be an equal exercise of authority by parents who share the responsibility of making important decisions regarding their child. *Sanchez*, citing *Ruben v. Ruben* (Fr. Sup. Ct. 2004).

In *Sanchez*, the Franklin Court of Appeal reversed a district court's ruling of joint custody for both parents. *Sanchez v. Sanchez* (Fr. Ct. App. 2010). The Court of Appeal found that there was not substantial evidence to support the district court's finding that joint legal custody is in the child's best interests. *Sanchez*. As such the presumption of joint legal custody was rebutted. *Sanchez*. In *Sanchez*, the parents were unable to cooperate in decisions concerning major aspects of child-rearing. *Sanchez*. Expert witnesses agreed that the mother remained hostile toward the father and refused to directly communicate with him, instead relaying messages to the father's mother. *Sanchez*. Experts further agreed that the mother's feelings of anger toward the father inhibited rational communication required for decision-making about the child. The communication was so acrimonious that the trial court ordered the parties to exchange the child at the public library. *Sanchez*.

Here, Denise and Robert do not effectively communicate: Robert does not reply to Denise's voicemail messages, and Denise does not reply to Robert's text messages. Their communication struggles, however, do not rise to the level seen in *Sanchez*. While ideally the parents would be able to speak or at least communicate using the same medium, this does not seem to be an impenetrable block for the court. Additionally, there is no clear party at fault in failure to communicate as between the spouses. While Robert does not

communicate freely with Emma, that communication is not what the court seeks under this factor.

Past or Present Abilities to Cooperate

Here, Denise and Robert have a history of cooperation, if not during their period of separation definitely for the seven preceding years. They jointly made decisions about Emma's child care, schooling, extracurricular activities, and medical care. For seven years, Denise and Robert had a positive and loving relationship and were both very involved with Emma on a day-to-day basis.

Cooperation challenges arose a year ago when Robert began drinking heavily. Ten months ago, Robert forgot to pick up Emma from school because he was intoxicated; a week later he was arrested for DUI. Denise immediately demanded that Robert move out. Since then, they have not cooperated extensively, but there has been little opportunity to do so.

Ability of Parties to Encourage Relationship with Other Parent

Under this factor, the court will analyze the ability of the parents to encourage the sharing of love, affection, and contact between the child and the *other* parent. FCC Sec 421. Denise seems open to allowing and encouraging some contact between Robert and Emma, which signals that she could be awarded sole legal custody. There are no other facts here to signal that either parent is inhibiting the other from engaging with Emma toward her best interests.

Mental and Physical Health

To rebut the presumption of joint legal custody on the ground of mental condition, there must be a nexus between the parent's condition and the parent's ability to make decisions for the child. *Sanchez*, citing *Ruben and Williams v. Williams* (Fr. Ct. App. 2005) (holding that *untreated* drug addiction was a legitimate factor in rebutting the presumption of joint legal custody).

Here, Robert is in outpatient treatment for his alcohol addiction. He has not consumed alcohol for the past four months and gets tested regularly by his rehab program. He says that he has been working on his alcohol dependence for more than six months and has made progress in becoming a more reliable parent. Unless Robert relapses, it seems unlikely that his treated alcoholism would rise to the level of rebutting the presumption of joint legal custody.

CONCLUSION

Ultimately, there are insufficient facts to conclude that Denise will be able to rebut the presumption of joint legal custody.

QUESTION TWO: PROPERTY ALLOCATION

Of the legal assets that Denise and Robert share, which are separate or community properties and debts?

SHORT ANSWER

Each spouse will be able to retain their vehicles, and the improvements to the house will be divided in some way, depending on more facts. Ultimately, Denise will retain the house as separate property, and the marital property that remains will be divided equally between the two spouses.

ANALYSIS

As a community property state, at divorce, Franklin will divide "community property" equally between the spouses. FCC Sec 433. While the division may be equal, the court may exercise discretion in awarding specific property and debt to each spouse to reach an equal distribution. /d.

"Community property" is that which is acquired by either spouse or both spouses during the marriage, which is not separate property. FCC Sec 430. Separate property is acquired before the marriage or after a decree of divorce; acquired by a spouse through gift, bequest, devise, or descent; or designated as separate property by written agreement between the spouses. /d. Debt functions similarly. FCC Sec 431. Property acquired and debts incurred by either spouse or both spouses during the marriage are presumed to be community property or debt. /d.

Where an asset that is a mix of separate and community property increases during the marriage, the increase may be community property. For purposes of appreciation, community property includes all income and appreciation on separate property due to the labor, monetary, or in-kind contribution of either spouse during the marriage. *Barkley v. Barkley* (Fr. Ct. App. 2006).

In *Barkley*, the Court of Appeals upheld the district court's ruling that the increase on retirement funds as a result of appreciation of the separate property contributions before marriage were not, in fact, marital property. *Barkley*. Because the wife made no showing that the increases were the result of "reinvestment of dividends that could have been

disbursed" or were "related to any labor or monetary or in-kind contribution on the wife's part", the court correctly found the increases to be separate property.

Home Improvement

In *Barkley*, the Court of Appeals upheld the district court's ruling that in the absence of an analysis of the property value increase, a court may award a credit to the party who paid for improvements to the property. *Barkley*. Such a credit can constitute up to 50% of the total cost of the improvements. *Barkley*. In *Barkley*, the spouses owned separate houses prior to marriage, and the husband moved into the wife's home after marriage and made improvements to the property. *Barkley*. Because the upgrades were incorporated into the wife's house, which she continues to own, the court treated the husband's expenditures during the marriage as community property, crediting him one-half of the value of the improvements. *Barkley*.

Here, Denise's uncle, Sam Golden, gifted her the marital home before the couple was married. As such, the home is separate property not subject to division at divorce. Denise would like to remain in the home, and Robert seemingly does not contest that; he would like to get his fair share of the house, mainly the money invested in both the garage and the deck. During the marriage, Robert and Denise paid \$5,000 to install a deck in 2016 and \$5,000 to install a detached garage on the property. As such, these improvements are marital property subject to division.

Additionally, the home value increased from \$215,000 in 2013 at the time of marriage to \$245,000 currently. This increase may be subject to division as marital property, so long as it is not deemed to be "passive income", which is "income acquired other than as a result of the labor, monetary, or in-kind contribution of either spouse." *Barkley*, quoting *Chicago v. Chicago* (Fr. Ct. App. 2001). Here, to demonstrate that the increase is marital property, Robert would need to show that the increase related to labor or monetary or in-kind contribution on his part. *Barkley*. He will be able to do so for the \$10,000 improvements, but we do not have enough facts to predict about the other \$20,000. The court will award Robert at minimum \$5,000 for the improvements, if not more depending on his testimony about contribution toward the house's improvement.

Vehicles

Robert wants to keep the motorcycle and his pickup truck. The pickup truck was a gift to Robert from his father; that is separate property. The pickup truck was purchased in 2019, so that is marital property subject to division. Its current value is \$17,000, with a loan for \$5,000, making its value for purposes of division \$12,000.

The couple owns another vehicle, the 2014 Ford Explorer acquired in 2017; this is also marital property that Denise would like to keep.

Other Property

In addition to the house and Explorer, Denise would like to keep certain property, which is all marital property acquired during the marriage: the bedroom set at \$500 and the dining set at \$500. She does not seek to keep the television at \$500, the leather couch and loveseat at \$500, or the truck or motorcycle.

Debts

The other debts are all marital debts: the Best Buy credit card at \$1,000 and the Target credit card at \$4,000.

Total

Apart from the house, Denise would like to keep \$8,000 in marital property. Robert would like to keep \$12,600 in marital property; we are not sure if he would like the \$1,000 in TV and furniture.

Additionally, the couple's debts must be allocated equally; after the car loan, that would be \$2500 from each spouse.

CONCLUSION

Depending on the facts that are produced regarding the increase in value of the house, the Denise and Robert will be able to retain their vehicles and marital property of their choice, so long as the division is equal in monetary amount.

ANSWER TO MPT 1

To: Harold Huss

From: Examinee

Date: February 22, 2022

Re: Denise Painter divorce

I. Introduction

This memo will analyze two issues: whether (a) Franklin's courts are more likely to award joint legal custody of Emma to both of her parents or sole custody just to Denise, and (b) whether each of Robert and Denise's assets and debts are community or separate property, and whether certain of those assets have appreciated in value or been enhanced. For the below reasons, as to (a) the court is more likely to award joint legal custody of Emma to both parents and (b) all assets besides the house and motorcycle are community property. Denise's house appreciated by \$30,000 over the course of the marriage, which is separate property, but reduced by the \$10,000 enhancement that the couple jointly made which was community property.

II. Statement of Facts [omitted]

III. Analysis

- a. The court is more likely to award joint legal custody of Emma to Robert and Denise. This determination turns on several issues.
 - i. The presumption under FFC 422 that joint legal custody is in the best interests of the child is not rebutted here.

The issue at hand is whether Robert's alcoholism has rebutted the presumption that joint legal custody between Robert and Denise of Emma is in her best interest. "Legal custody" is defined as "the right to make decisions about a child's medical care, education, religion, and other important issues regarding the child" under FFC 420(a). FFC 421 sets out various factors by which a court may determine whether legal custody is in the best interest of the child, including but not limited to the agreement or lack thereof of the parents on joint legal custody, the past and present abilities of the parents to cooperate and make decisions jointly and the mental and physical health of all individuals involved. Under FFC 422, it is presumed that joint legal custody between both parents is in the best interest of the child unless that presumption is rebutted. Franklin's Supreme Court has determined certain evidence related to the mental condition of a parent may rebut the presumption of joint legal custody being in the best interest of the child, and that there must be a nexus between the parent's condition and his or her ability to make decisions for the child.

Given the facts at hand, it does not seem that Robert's mental condition--his alcoholism--will affect his ability to participate in decision making for Emma. In *Ruben v. Ruben*, the presumption favoring joint custody was rebutted by the fact that the mother had been diagnosed with a mental condition that affected her ability to participate in decision making for the child. This differs from the facts here, where despite Robert's past alcoholism, he has voluntarily participated in an outpatient rehab program for alcohol addiction for the past 6 months. He has evidently been working on his alcohol dependence consistently in the months leading up to now and has been sober for the past

four months. Robert's past alcohol dependence thus does not seem to have a sufficient nexus to his ability to make decisions for Emma, since he is now voluntarily sober and has been consistently in the recent past. Further distinguishing Robert's situation from *Williams v. Williams*, in that case the parent's untreated drug addiction was a legitimate factor in rebutting the presumption of joint custody. Here, Robert's addiction has been voluntarily treated and seems to have been reasonably successful.

The court may also consider the fact of the lack of agreement between Denise and Robert as to joint legal custody since she wants sole and he wants joint. This is doubtfully going to be a determinative consideration, however, and will not be enough to rebut the presumption of joint custody without more. Franklin's courts will also consider the past and present abilities of the parents to cooperate and make decisions jointly, as discussed below.

ii. There is little evidence showing that Denise and Robert are unwilling and unable to communicate and cooperate with each other and reach agreement on issues regarding the child's needs.

The issue here is whether the parents here are willing and able to communicate with each other and agree on issues concerning the child. Joint legal custody requires that the parents be willing and able to communicate as above. *Sanchez v. Sanchez*. Under FCC 421, the past and present abilities of the parents to cooperate and make decisions jointly may be considered. This does not require, however, that the parents have a completely amicable relationship. *Sanchez*. Under Ruben, the parents must just be able to cooperate in decisions concerning major aspects of child-rearing. Joint legal custody should not be awarded unless there is a record of mature conduct by the parents showing an ability to effectively communicate about the child's best interests, and only when there is strong potential for such communication in the future. *Sanchez*.

In *Sanchez*, the parents were clearly not willing or able to communicate with each other or agree regarding the child's best interests. the facts show that one parent was very hostile to the other and refused to communicate with him altogether, contacting him only through third parties. The parties had practically no ability to communicate with each other rationally due to this hostility, and in fact had such acrimonious relations that exchange of the child were required to occur in a public setting. Although it seems that Denise and Robert have some minor issues regarding communication, their relationship and ability to communicate certainly does not rise to the level of the couple in *Sanchez*. Robert and Denise have talked on the phone regarding Robert visiting Emma and reached an agreement on those occasions. This evidences a record of mature conduct by both that they are able to effectively communicate over Robert's visitation frequency. Even if Robert and Denise have had inconsistent communication through text and voicemail, they have shown a history of being able to communicate effectively over Emma's interests. Robert texts Denise and Denise calls Robert back. Although they cannot agree on a

proper manner to communicate, they have shown an interest and willingness to communicate with each other through some means, as opposed to the parents in Sanchez who had such an acrimonious relationship that they barely were on speaking terms. There is strong potential for Denise and Robert to communicate effectively in the future given their past record of such, and the fact that their lack of communication recently seems to be on the basis of disagreement about means of communication and not just outright hostility. Thus, the court will probably find that Robert and Denise are willing and able to communicate and agree on issues concerning Emma, which will work towards the court's presumption that joint custody is in Emma's best interest.

b. Robert's and Denise's assets and debts can be categorized as the following. Further, the house

i. All of the assets and debts of the parties are community property besides the house and the motorcycle.

This is a straightforward assessment. The issue is whether all of the couple's assets and debts are either community or separate property. Community property is property acquired by either spouse before marriage or after entry of divorce that is not separate property. Separate property is property acquired by one spouse before marriage or after divorce, or which was acquired through gift or devise, or was designated as separate by written agreement. FFC 430. All of the assets and debts besides the house were acquired after 2013 when Robert and Denise were married. Besides the motorcycle, all of these assets and debts are community property because they were acquired during the marriage and do not fit the definition of separate property under FFC 430. There has been no written agreement by the spouses that any of the assets or debts were to be designated as separate. The house is also separate property because it was acquired, albeit shortly, before the marriage.

ii. As to the motorcycle, Robert will be awarded it alone as separate property.

The issue is whether Robert's motorcycle is separate property. The rule regarding separate property under FCPA 430(a)(2) is that property acquired by either spouse by gift, bequest, devise, or descent is separate property. The worksheet unequivocally shows that the motorcycle was a gift to Robert from his father. Although the motorcycle was acquired during the course of the couple's marriage, Robert's motorcycle still qualifies as separate property under this definition.

iii. As to the house, it was appreciated by \$20,000 naturally and by \$10,000 by enhancements made jointly by the couple during the marriage.

The issue is how the enhancements to and appreciation of Denise's house will be evaluated by the court. Separate property includes personal and real property acquired by

one spouse prior to the marriage. Separate property includes passive income and appreciation acquired from separate property by one spouse during the marriage. Community property, conversely, includes all income and appreciation on separate property due to the labor, monetary, or in-kind contribution of either spouse during the marriage. *Chicago v. Chicago*. Denise's house is undeniably community property as discussed above. The house appreciated by \$30,000. The facts show that \$10,000 of that appreciation was due to two enhancements installed by the couple during the marriage--the garage and the deck. This means that \$20,000 of the enhancements were due to the house's appreciation on its own without the result of the labor, monetary, or in-kind distribution of either Denise or Robert. This \$20,000 will go to Denise alone as separate property under the Chicago rule.

The enhancements both parties made to Denise's house will be considered community property since they were made by either spouse during the marriage. Because the \$10,000 was incorporated into Denise's house, the court will treat the expenditures as community property as in *Barkley v. Barkley*. Under FFC 430, this money will pass to Denise and Robert 50/50. Note that the court will have discretion in awarding specific property and debt to each spouse to reach an equal distribution under FFC 433.

IV. Conclusion

In conclusion, the court will probably not award Denise sole custody of Emma, and all of the couple's property is community besides the house and motorcycle, which are separate property. Denise's house increased in value by appreciation in the amount of \$20,000 during the marriage which will be awarded to her separately, and by \$10,000 due to enhancements made to the property jointly, which will pass in community property equally to both spouses after divorce.

ANSWER TO MPT 2

To: Lucas Pines, Deputy Public Defender

From: Examinee

Date: February 22, 2022

Re: Motion to sever in *State v. Ford*, 2021 CF 336

Statement of the Case: [omitted]

Statement of Facts: [omitted]

Argument:

I. The counts should be severed pursuant to Franklin Rules of Criminal Procedure 8 because the offenses charged are not of the same or similar character, not based on the same act or transaction, and are not connected with or constitute parts of a common scheme or plan.

Pursuant to Fr. R. Crim. Proc. 8(a), joinder of offenses is appropriate where the offenses charged are of the same or similar character, based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan. Defendant bears the burden of establishing the impropriety of the joinder. *State v. Saylers* (Fr. Ct. Ap. 2013). As well, the court should generally limit itself to the facts contained in the indictment, but may look to other documentary evidence, such as affidavits in support of arrests or affidavits in support of search warrants, that further clarify the connection between the counts, if any. *Sayler*. In Defendant's case, none of these three considerations permitting joinder are present.

1. The offences charged are not of the same or similar character.

In *Saylers*, Defendant was charged with one count of robbery and one count of attempted robbery. The trial court joined the two counts in one trial, pursuant to Fr. R. Crim. Proc. 8(a), finding that the offenses charged were of the same or similar character as a result of both being "robbery" related charges. The Court of Appeal disagreed, holding that two charges having "robbery" in their titles is not a sufficient basis upon which to join charges in a single indictment. Instead, the court described key differences between the robberies which distinguished their character. First, they were not offences of the same kind, as one was an attempt and one was a completed crime. Second, the circumstances surrounding each differed, as one was a robbery of a convenience store and the other was an attempted robbery of a hiker. Taken together, the court reversed and remanded for new trials.

Here, Defendant is charged with three materially different offenses. Count 1 involves the knowing selling of cocaine, Count 2 involves the intent to sell marijuana, and Count 3 involves the knowing possession of a handgun in circumstances of having previously been convicted of the felony of assault with intent to commit murder. Count 3 is most materially of a different or dissimilar character from the other counts, as it involves possession of a weapon while the other two counts are drug offences. Yet Counts 1 and 2 are also dissimilar, as they involve different drugs (cocaine versus marijuana) and different circumstances (knowingly selling versus intent to distribute). As well, Count 1 is 10 grams of cocaine, whereas Count 2 is 4000 grams of marijuana. The proportionate considerations further lend credence to these being counts of a very different nature.

Taken together, failing to sever these three counts would be contrary to Fr. R. Crim. Proc. 8(a). In particular, failing to sever Counts 1 and 2 would run contrary to the decision of Saylers, and would lead the court into the same error committed by the trial court in Saylers. Although Counts 1 and 2 are drug offences, they are materially different in kind and in circumstance, as were the robbery of a convenience store and attempted robbery of a hiker in Saylers.

2. The offences charged are not part of the same act or transaction.

Count 1 occurred on April 17, 2021, whereas Counts 2 and 3 occurred on October 24, 2021. The passage of time between Counts 1 and 2, as well as the circumstances between Counts 2 and 3, suggest that joinder is not appropriate in this case. In *Sayler*, the court held that the crimes occurring two years apart was a factor that supported severing the counts, in addition to those factors mentioned above. Here, Count 1 occurred approximately six months prior to Counts 2 and 3. While it is not clear that the passage of time needs to reach a specific threshold, the language of "same act or transaction" in Fr. R. Cr. Proc. 8(a) suggests that any break in the natural course of acts or transactions will differentiate the acts. Thus, Count 1 should be severed from Counts 2 and 3 on this basis.

In addition, Counts 2 and 3 should be severed based on the locations of the marijuana and the handgun was found in the car driven by Defendant. As described in Saylers, the court may turn to affidavit evidence to better evince the existence of any connection between the counts, or lack thereof. Here, the affidavit in support of arrest filed by Officer Amanda Carter stated that the marijuana and drug paraphernalia was located in the backseat of the car, while the handgun was found in the trunk. The physical seclusion of each item from the other suggests that they were not being used as part of the same act or transaction. If Defendant were distributing marijuana out of the car, for example, Defendant would have no access to the handgun located in the trunk. This separation further supports finding that Counts 2 and 3 are not part of the same act or transaction and should therefore be severed.

3. The offences charged are not connected with or constitute parts of a common scheme or plan.

As described in Saylers, the court may turn to affidavit evidence to better evince the existence of any connection between the counts, or lack thereof. Here, in the affidavit in support of arrest, Officer Kevin Diaz confirmed that the drugs exchanged pursuant to Count 1 were done between an undercover officer and another man, with Defendant present but not involved. As well, the affidavit in support of arrest filed by Officer Amanda Carter stated that the handgun and the car were registered to a James Litton. Taken together, the only commonality among these three Counts are the presence of Defendant while others around her own, possess, and transmit illegal substances and

firearms. There is no evidence of any common scheme or plan in relation to any of the three Counts, further necessitating that the counts be severed.

II. The counts should be severed pursuant to Franklin Rules of Criminal Procedure 14 because Defendant will be prejudiced by the trial of any of these three offenses with any of the others

Pursuant to Fr. R. Crim. Proc. 14(a), even where joinder of offences is otherwise appropriate, relief may be provided where joinder would prejudice Defendant or the government. The court has a power to order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires. Fr. R. Crim. Proc. 14(a). In *State v. Ritter* (Fr. Ct. App. 2005), the court outlined three types of prejudice that may occur if separate offences are joined: propensity reasoning, admissibility of evidence pursuant to one count that would be inadmissible pursuant to a separate count, and defendant wishing to testify on one charge but not another. The court emphasized that these types of prejudice are particularly pervasive where the counts are merely those of a similar character not arising out of a single transaction.

1. Defendant would be prejudiced by propensity reasoning.

Where the jury would consider the defendant a bad person and find him or her guilty on the basis of being charged with numerous offences, prejudice may result, however this is rarely a sufficient basis on which to justify severance. *Ritter*. Nonetheless, it is an important consideration in the grand scheme of prejudice against Defendant in this case. Defendant is charged with knowingly selling cocaine, intending to distribute marijuana, and possession of a handgun as a previously convicted felon. The jury would be provided with a series of different drug and weapon charges, involving different drugs, which would encourage them to convict Defendant on the basis that they are a bad person whose criminal acts have finally caught up with them. To combat this prejudice, severance is necessary in this case.

2. Defendant would be prejudiced by evidence inadmissible as to some counts becoming admissible against all counts.

In *Ritter*, Defendant claimed that evidence of each of the charged offenses, both being possession of heroin with intent to sell, would not have been admissible in the trial of the other. Pursuant to Franklin Rules of Evidence 404(b), the court explained that evidence of another act may be admitted where it is introduced for a purpose other than to prove propensity, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Fr. R. Ev. 404(b)(1)-(2). In *Ritter*, the court found that evidence of each count would have been admissible in each trial against the other, since it demonstrated a common scheme or plan, pursuant to selling heroin from the same area, from the same vehicle, and in the same period of time. Further, that

even without that conclusion, the Fr. R. Ev. 403 exclusionary rule was "unavailing", since there was a high probative value to two very similar drug transactions, contrary to the prejudice which was not within the ambit of "unfair prejudice" as defined by Rule 403. Accordingly, the court affirmed the denial of severance.

Here, Defendant would be prejudiced by admission of evidence in each count that would be inadmissible as to other counts. In specific, Count 3 depends on the handgun having been possessed in relation to Defendant's prior conviction for assault with intent to commit murder. Defendant's 2015 felony conviction would be very likely to be introduced in a trial on the weapons charge, in order to demonstrate an element of the offense. To the contrary, the felony charge would not be admissible as substantive evidence on Count 1, but would be admissible only to impeach Defendant. This runs the risk of confusing the jury, contributing to the prejudice warranting exclusion under Rule 403. Although the jury could be given a limiting instruction, as was done in Ritter, it is difficult to concretely assert at this preliminary stage that such an instruction would suffice to combat the evidence prejudice evinced by the prior assault conviction. This will be further elaborated upon below.

In addition, the presence of a handgun in the car driven by defendant upon being arrested with marijuana in the car would prejudice the Count 2 trial, as it would encourage the jury to find intent to distribute marijuana simply because a handgun in the car may have been used to carry out such distribution. While Rule 404(b)(2) permits evidence to be admissible for proving a plan, it is not clear that Count 2 intent to distribute marijuana would be furthered by presence of a handgun, nor is it clear that the jury would be able to extricate the handgun charge as it relates to a previous assault conviction (Count 3) from the marijuana charge (Count 2). This runs a high risk of confusing the jury and engaging in prohibited reasoning with respect to the assault charge and the handgun's presence, collectively warranting severance of the counts.

Further support for the conclusion to sever the counts is found in *State v. Pierce* (Fr. Ct. App. 2011), where the court held that, but for the joinder of the counts, the jury would have no reason to know of the existence of one piece of evidence vis-a-vis the other charge, and vice versa. The same applies here, where the jury would have no reason to know of Defendant's past assault conviction in the Count 1 and possibly Count 2 trials, and no reason to know of the handgun in the Count 1 trial. These serious concerns of prejudice warrant severance.

3. Defendant would be prejudiced by not being able to testify as to some but not other charges.

Defendant would like to testify in her own defense. If she does so, the prior assault conviction would potentially become admissible to impeach her credibility, as outlined above. Notwithstanding the possibility of a limiting instruction, as was done in Ritter, it is difficult at this stage to know that the jury will properly refrain from engaging in

propensity reasoning as a result of hearing about the prior conviction in the context of the two drugs charges, Counts 1 and 2. In Ritter, the court required a convincing showing that Defendant has both important testimonies to give concerning one count and strong need to refrain from testifying in the other. Although Defendant in the instant case is interested in testifying on all counts, the fundamental crux of Ritter rings true here as well. That is, Defendant will be limited in her defense as to all counts by testifying in a trial on all counts joint together, since the assault conviction will weigh unfavorably upon her credibility such that it will prejudice her on all counts. She has important testimony to give with respect to the circumstances of each charge, as described earlier, wherein she was a mere bystander caught at the wrong place and time. However, if she testifies as to the counts in a joint trial, the assault conviction will likely be usable to impeach her credibility on all counts, thereby limiting her defense on the drug charges notwithstanding the assault conviction being predominantly related to Count 3's possession of a handgun.

Taken together, Defendant has demonstrated a serious need to sever the counts and, in the alternative if joinder is found proper, an immense degree of prejudice that will result, thereby necessitating a discretionary joinder of the counts.

ANSWER TO MPT 2

Office of the Public Defender for the State of Franklin

County of Hamilton

805 Second Avenue

Centralia, Franklin 33705

MEMORANDUM OF LAW

To: Lucas Pines, Deputy Public Defender

From: Examinee

Date: February 25, 2022

Re: Motion to sever in *State v. Ford*, 2021 CF 336

Statement of the Case: [omitted]

Statement of Facts: [omitted]

Argument:

1. The motion to sever should be granted because the charges do not warrant joinder under Rule 8a due to not meeting the statutory requirements of similarity or connection.

The motion to sever should be granted under FRCP 8a because these offences are not of the same or similar character, are not based on the same act or transaction, and are not connected with and do not constitute parts of a common scheme or plan. In deciding whether charges have been improperly joined, the trial court should generally limit itself to facts contained within the indictment, but if the indictment does not provide sufficient facts to clarify the connection between the courts, the trial court may look to other documentary evidence in the case such as affidavits in support of arrests or affidavits in support of search warrants. *State v Saylers*. In *Saylers*, the appellate court found that the trial court only looked at the facts contained in the indictment and that the charges at hand were improperly joined because the court did not look beyond the face of the indictment, which alleged robbery of different types on two separate occasions, when these two instances were not, on their face based on the indictment alone, sufficiently similar or connected.

In this case, the indictment alone is insufficient to tie each offence charged together in joinder; the indictment merely states what the defendant has been charged with and does not provide background information that would be relevant to proving that these acts are based on the same act or transaction, are not part of a common scheme or plan, and are not of similar character. Even beyond the indictment, in other documents that the court is allowed to consider, such as the arrest warrants, there is not sufficient evidence to state that the three charges were part of the same act or transaction, plan, or common scheme. The charges the defendant is being indicted for, on their face, do not constitute a common scheme or plan due to being extremely different in nature, not close in time or place of offense, and the third count is unrelated to the first two, as is the first count unrelated to the second and third. The *Sayler* court stated that 'Simply because the two charges have robbery in their titles is not a sufficient basis on which to join the charges in a single indictment'. This applies to the two alleged drug offenses at hand; the similarity on the face of the charges (possession, selling, intent to distribute drugs) is not sufficient to warrant joinder. "Additionally, as the facts provide, a court will recognize a sufficient gap in time as a factor in deciding whether or not two crimes are related, as the court in *Saylers* did. In *Saylers*, the alleged crimes occurred two years apart and the trial court had only reviewed the indictment, not the affidavits, to support their claim to proper joinder. In this case, the alleged drug related crimes happened 6 months apart.

2. The motion to sever should be granted because under FRCP 14, the defendant would be improperly prejudiced by the trial of any one of the offenses in conjunction with any of the others.

Under the FRCP, Rule 14 states that if the joinder of offenses or defendants in an indictment, and information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendant's trials or provide any other relief that justice requires. This rule operates despite FRCP rule 8a, which allows for joinder of offenses if they are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common plan or scheme; the prejudicial effect of the joinder is still considered even if counts are joined under 8a. Furthermore, the franklin rules of evidence state that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Additionally, evidence of other crimes, wrongs, or acts are prohibited and inadmissible if used to prove a person's character in order to show that they acted in accordance with that character on a particular occasion, but are permitted for another purpose such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

In *State v. Ritter*, the defendant tried to raise issues on appeal about the joinder of counts against him for possession of heroin with intent to sell. He argued that pursuant to rule 14 the trial court should have severed the counts for trial because he was prejudiced by the lawful joinder. The court declined to rule favorably for his appeal, and posited that there are three types of prejudice that may occur if separate offenses are joined, particularly if they are merely of similar character and do not arise out of a single transaction. Ritter. "First, the defendant could be prejudiced because the jury could consider the defendant a bad person and find him guilty of all offenses simply because he is charged with more than one offense...it is rarely a sufficient basis on which to justify severance. Second, prejudice may occur if proof of the defendant's commission of one of the illegal acts would not otherwise have been admissible in the trial for the other offense...prejudice may occur when evidence that the defendant is guilty of one offense is used to convict him of another offense even though the evidence would have been inadmissible at a separate trial...Third, prejudice may result if the defendant wishes to testify in his own defense on one charge but not on another. Severance of counts is warranted when a defendant has made a convincing showing that he has both important testimony to give concerning one count and a strong need to refrain from testifying on the other." Ritter.

Ritter argued that each of the counts would not have been admissible in the trial of the other due to FRE 403, where evidence of other acts may be excluded if the prejudicial effects of admission substantially outweigh the probative value under 403. However, the court states that the probative value of the two drug sales was relatively high because they permitted an inference of a single plan to sell drugs, and the prejudice that would occur is not the kind of unfair prejudice covered by 403. Ritter. The court also stated that

in regards to Ritter's possession of a weapon charge, the court did not err in permitting evidence of such offense because carrying a weapon is highly correlated with the intent to sell drugs, similar to the possession of baggies or scales, and Ritter was charged with possession with intent to sell. The state has the burden of proving the defendant's intent beyond a reasonable doubt, and therefore this evidence was allowed under 404b.

Similarly, in the case at hand, the defendant has been indicted with possession with intent to sell of marijuana on one occasion on October 24, and has been charged with knowingly selling cocaine on April 17th. However, this is not indicative of a common scheme or plan like the two counts that Ritter had, where it was the same drug, and the same neighborhood, and the same manner of selling within the same period of time. Though it would be presumably relevant and probative to introduce both counts at the same time, the prejudicial effect would be outweighed by the probative value of introducing both drug related counts. There are no facts to support that both drug related counts are part of a common plan or scheme because they occurred 6 months apart and in very different manners. There is no inference to support that they are part of a single plan to sell drugs as there was in Ritter.

Furthermore, under the Ritter court's analysis of the type of prejudice that may occur if separate offenses are joined, the defendant would be prejudiced if the third count, possession, was joined with the other two because the jury may simply decide she is a bad person and find she is guilty of all charges based upon the fact that her prior felony would have to be revealed if this charge was introduced with other charges, prejudicing the chances that she would be fairly charged on the unrelated charges. However, the court states that this is rarely a ground to justify severance.

Moreover, assuming the defendant testifies in her defense, the third count for possession of a weapon, as well as potentially the first count for alleged selling of cocaine, would meet the second prong of the prejudice test set by the court because commission of one of the illegal acts would not otherwise have been admissible in the trial for the other offense and prejudice may occur. In the case of the possession of a weapon as a felony charge, this would be unrelated to the second charge even though it arose from the same facts, and would greatly prejudice the defendant if introduced with the second count because even though it has been ruled that possession of a weapon is related to the intent to sell drugs, this would not be admissible in conjunction with the fact that the defendant, as a former felon, is not allowed to have such weapon because of the prior crimes she committed, which are unrelated to the crime at hand. Additionally, in Ritter, the defendant's possession of a weapon was admissible because it was relevant to an issue other than propensity-his intent to sell drugs. Although, similarly to Ritter, the defendant here was in possession of a firearm and accused of selling drugs by having marijuana in the car she was driving, as well as a scale and the firearm in question, this situation is different in that she has not shown intent or common scheme or plan, unlike Ritter. Also, under 403 analysis, the probative value of the evidence of the gun would substantially be

outweighed by the danger of unfair prejudice to the defendant because by admitting the gun, evidence of her prior felony would also have to be admitted, making the weight of the evidence more prejudicial than in Ritter, where the gun is simply used to establish intent to sell.

The third prong of the Ritter court's test is not met in this case because the testimony would only be about the three cases at hand; however, if the defendant does not testify in regards to the drug cases then the prior assault conviction would not be potentially admissible in those cases but would be admissible in the gun case because it's based on the fact that she committed a felony beforehand. Regardless, the charges against the defendant meet the criteria for severability under the umbrella of prejudice set by the Ritter Court and the FRCP.

3. The defendant would be greatly prejudiced if proof of the defendant's commission of one of the illegal acts is admitted that would not otherwise have been admissible in the trial for another offense, in violation of FRCP 14.

Additionally, regarding the second prong of the prejudice test set by the Ritter court, where prejudice may occur if proof of the defendant's commission of one of the illegal acts would not otherwise have been admissible in the trial for the other offense, it has been found by the court of Appeals that a defendant was prejudiced by the introduction of evidence of a prior charge that would not otherwise have been necessary to be admitted regarding the matter at hand. The Pierce court stated that 'when a jury learns of a separate offense committed by a defendant, the jury can be tempted to infer the worst about that defendant'. Pierce. In Pierce, the defendant violated two separate and unrelated orders of protection against two different people, in different time frames, and the charges for violation said orders of protection were joined. Pierce appealed based on prejudice caused by a joint trial, where if the two cases had been tried separately, evidence of the first order would not have been admissible in the trial of violating the second order under FRE 403. Evidence of the existence of the first order was extremely prejudicial to his trial on the violation of the second order.

Similarly, in the case at hand, joining the two drug charges together or with the third charge for gun possession would be extremely prejudicial to the defendant on the trial of each charge. A jury may infer that because there are two drug charges, the defendant has a propensity for dealing drugs, or may simply assume the defendant is a bad person, as per the first prong of the Ritter court's prejudice test under rule 14. The evidence of the gun would also be extremely prejudicial to the defendant in the drug charges not only because of the disclosure of a prior felony, but also because it would show an intent to sell drugs because of the character and nature of having a gun being closely linked with drug sales just like scales are. The evidence of the gun charge and prior felony accompanying it would not be necessary or admissible in the first or second drug charge cases otherwise, and would be highly prejudicial to the defendant. The evidence of either

other drug charge would also not be admissible in the other drug or gun trial; the two alleged drug charges are 6 months apart, do not evidence a common scheme or plan, and the gun charge would be more prejudicial than probative if allowed to be joined to the other charges.

Conclusion

Under the FRE and FRCP, offenses can be properly joined if they are of the same or similar character, are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan. Offenses can be properly severed if they prejudice a defendant and the court may order separate trials of counts, sever defendants' trials, or provide other relief that justice requires. Under the FRE, relevant evidence can be excluded if it is substantially more prejudicial than probative. In the case at hand, the defendant, Sylvia Ford, is entitled to severance of each of the counts she was indicted over because joinder of the counts would be highly prejudicial to the defendant due to a jury's propensity to assume a defendant is a bad person and indict them on all charges if charges are joined, due to the inadmissibility of other counts if the charges were not joined, and due to the general prejudicial nature of joining counts that are not sufficiently related under the law.