July 2019

New York State
Bar Examination

MEE & MPT Questions

MEE QUESTION 1

Testator's handwritten and signed will provided, in its entirety,

> *I am extremely afraid of flying, but I have to fly to City for an urgent engagement. Given that I might die on the trip to City, I write to convey my wish that my entire estate be distributed, in equal shares, to my son John and his delightful wife of many years if anything should happen to me.*
> *January 4, 2010*
> *Testator*

When Testator wrote the will, he was domiciled in State A, and his son John was married to Martha, whom he had married in 2003. Testator had known Martha and her parents for many years, and Testator had introduced Martha to John. At the time John and Martha married, Martha was a widow with two children, ages five and six. Following their wedding, John and Martha raised Martha's children together, although John never adopted them.

Two years ago, Martha was killed in an automobile accident.

Six months ago, John married Nancy.

Four months ago, Testator died while domiciled in State B. All of his assets were in State B. The handwritten will of January 4, 2010, was found in Testator's bedside table. Testator was survived by his sons, John and Robert, and John's wife Nancy. Testator was also survived by Martha's two children, who have continued to live in John's home since Martha's death.

State A does not recognize holographic wills. State B, on the other hand, recognizes "wills in a testator's handwriting so long as the will is dated and subscribed by the testator."

Statutes in both State A and State B provide that "if a beneficiary under a will predeceases the testator, the deceased beneficiary's surviving issue take the share the deceased beneficiary would have taken unless the will expressly provides otherwise."

How should Testator's estate be distributed? Explain.

MEE QUESTION 2

On February 1, a woman began serving a 60-day sentence in the county jail for operating a motor vehicle under the influence of alcohol. On February 4, a detective from the county sheriff's department took the woman from her cell to an interrogation room in the jail building. He informed her that she was a suspect in a homicide investigation and that he wanted to ask her some questions. The detective then read the woman the state's standard Miranda warnings:

> You have the right to remain silent. Anything you say can be used against you in court. You have the right to an attorney. If you cannot afford an attorney, one will be appointed for you. If you decide that you wish to speak with us, you may change your mind and stop the questioning at any time. You may also ask for a lawyer at any time.

The detective asked the woman if she understood these rights. When she replied, "Yes, and I want a lawyer," questioning ceased immediately, and she was returned to her cell.

On March 15, the detective removed the woman from her cell and took her back to the same interrogation room. The detective told her that he wanted to ask her questions about the homicide because he had new information about her involvement. The detective read her the same Miranda warnings he had read on February 4 and asked her whether she understood her rights. She said, "Yes."

The woman then asked the detective, "If I ask you to get me a lawyer, how long until one gets here?" The detective replied as follows:

> We have no way of getting you a lawyer immediately, but one will be appointed for you, if you wish, if and when you go to court. We don't know when that will happen. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering questions until a lawyer is present.

The detective's statement accurately characterized the procedure for appointment of counsel. The woman then said, "I might need a lawyer." The detective responded, "That's your call, ma'am."

After a few minutes of silence, the woman took a Miranda waiver form from the detective and checked the boxes indicating that the rights had been read to her, that she understood them, and that she wished to waive her rights and answer questions. She then signed the form. After the detective began to question her, she confessed to the homicide.

The woman was charged with murder in state court. Her lawyer filed a motion to suppress the woman's March 15 statements to the detective, alleging three violations of her Miranda rights by the detective:

> (1) Interrogating the woman on March 15 after she had invoked her Miranda right to counsel on February 4.
>
> (2) Incorrectly conveying to the woman her Miranda right to counsel by the statements he made on March 15.
>
> (3) Interrogating the woman on March 15 after she had invoked her Miranda right to counsel on March 15.

This state affords a criminal defendant no greater rights than those mandated by the U.S. Constitution.

After an evidentiary hearing, the trial court denied the motion to suppress on all three grounds raised by defense counsel.

Did the court err? Explain.

MEE QUESTION 3

Parent Inc., a company in the renewable energy business, has several subsidiaries. In all cases, Parent maintains control of its subsidiaries by selecting the members of each subsidiary's board of directors, most of whom also serve as officers and employees of Parent.

One of the subsidiaries, HomeSolar Inc. (incorporated in a jurisdiction that has adopted a version of the Model Business Corporation Act), was acquired three years ago by Parent. Parent owns 80% of HomeSolar's voting shares, with the remaining shares publicly traded on a national stock exchange. HomeSolar manufactures and sells products exclusively for the residential solar power market.

Another subsidiary, IndustrialSolar Inc., is wholly owned by Parent and manufactures products exclusively for the industrial solar power market.

A shareholder of HomeSolar, after making a proper demand on the board to which the board failed to timely respond, brought a derivative suit against Parent, as the controlling shareholder of HomeSolar, making the following allegations:

> (1) HomeSolar has not paid dividends since being acquired by Parent three years ago. In SEC filings, HomeSolar has explained that its no-dividend policy provides funds for its research and development budget as it seeks to develop new products for the residential solar power market in which it operates. Nonetheless, HomeSolar has more than adequate earnings and was obligated to pay dividends to its shareholders.
>
> (2) Since acquiring HomeSolar, Parent has caused HomeSolar to purchase the "rare earth" minerals necessary for the manufacture of its residential solar panels from SolarMaterials Corp., a wholly owned subsidiary of Parent. SolarMaterials was created for the purpose of acquiring such minerals and reselling them to the various renewable energy subsidiaries of the Parent group. The long-term contract under which HomeSolar purchases rare earth minerals from SolarMaterials, however, sets prices significantly higher than the current market prices under similar long-term contracts for such minerals.
>
> (3) After Parent learned about a large government grant to develop industrial-scale solar projects, Parent caused IndustrialSolar to apply for and secure this grant, denying HomeSolar the opportunity to obtain this grant.

1. Did Parent breach any duties to HomeSolar with respect to HomeSolar's no-dividend policy? Explain.

2. Did Parent breach any duties to HomeSolar with respect to HomeSolar's contract with SolarMaterials for the purchase of rare earth minerals? Explain.

3. Did Parent breach any duties to HomeSolar by denying HomeSolar the opportunity to apply for the government grant? Explain.

MEE QUESTION 4

On March 1, a contractor and an owner of movie theaters signed an agreement providing that, no later than August 15, the contractor would install seats in the owner's new movie theater. The agreed-upon price was $100,000, which was less than the $150,000 that other similar contractors would charge for the same work. The agreement required that the owner pay the contractor half the price at the time the work commenced and the other half at completion. The contractor was willing to do the work for less money than its competitors because the contractor was new to the area and hoped to build up a positive reputation.

The agreement further provided that the contractor would start work no later than July 1. On July 1, before beginning the agreed-upon work, the contractor informed the owner that it would not perform its obligations under the agreement because it had obtained a more lucrative installation contract elsewhere. At that point, no payments had been made to the contractor.

The installation of the seats was the last step necessary for the theater to open to the public. The owner, which had anticipated that the contractor would install the seats by the August 15 deadline, had planned and widely promoted a film festival for September 1–10 to celebrate the opening of the new movie theater.

Immediately after learning that the contractor would not install the seats, the owner began to look for a substitute contractor. Despite diligent efforts, the owner could not find a contractor that would agree to install the seats by August 15. Eventually, after an extensive search, the owner found a substitute contractor that agreed to install the seats for $150,000 by September 15. No other contractor could be found who would agree to install the seats at a lower price or before September 15.

Installation of the seats was completed on September 15, the substitute contractor was paid $150,000, and the theater opened a few days later. Because the theater had no seats at the time of the film festival scheduled for September 1–10, the owner canceled the festival.

The owner sued the original contractor for breach of contract, and the parties agreed to a non-jury trial. The judge has concluded that the contractor's actions with respect to the seat-installation agreement constituted a breach of contract by the contractor. In addition, the judge has made the following findings of fact:

- The contractor was unaware that the owner was planning to hold a film festival when it entered into the contract.

- The owner would have made a profit of $35,000 if the seats had been installed in the new movie theater and the film festival had been presented there as scheduled on September 1–10.

- The owner could have relocated the film festival to a nearby college auditorium that was available September 1–10 and, if this had occurred, the owner would have made a profit of $25,000.

1. Do the damages recoverable by the owner include $50,000 for the amount paid to the substitute contractor above the $100,000 price to be paid to the original contractor under the contract? Explain.

2. May the owner recover for lost profits resulting from the cancellation of the film festival? Explain.

3. Assuming that the owner is entitled to recover for lost profits resulting from the cancellation of the film festival, how much should the owner recover? Explain.

MEE QUESTION 5

Twelve years ago, Wendy and Frank were married in State A. One year later, their daughter, Danielle, was born in State A. The couple and their daughter have continued to live in State A.

One year ago, Frank lost his job as a steelworker after suffering a serious back injury. Frank's doctor has said that he will not be able to return to work.

One month ago, Frank filed an action against Wendy seeking spousal support. Frank filed the action after Wendy, a commercial airline pilot whose work frequently necessitates her absence from home, stopped depositing her wages into the couple's joint bank account and refused to pay household bills. Frank's unemployment insurance is inadequate to pay all the household bills.

Danielle's school recently sent her parents a note indicating that Danielle will not be allowed to enroll in school next year unless the parents provide proof of her vaccination. Frank, based

on his personal, nonreligious beliefs, has consistently refused to allow Danielle to receive any vaccinations. Danielle does not satisfy the requirements for a medical exemption. State A has amended its mandatory vaccination law by eliminating all nonmedical exemptions based on "personal beliefs." As amended, the law requires, as a precondition to a child's enrollment in any public school, that "the child's parent or guardian must provide proof that the child has received all vaccinations mandated by the State Department of Health." Frank has brought an action challenging the State A vaccination law under the U.S. Constitution as a violation of his parental rights.

Two weeks ago, Danielle, age 11, with her parents' permission, went to visit her aunt in State B. One week into the visit, the aunt called Frank and Wendy and told them that Danielle did not want to return to her parents' home because "Mom is always traveling, Dad is really depressed since his back injury, and I just can't stand living there anymore." The aunt told Frank and Wendy that "I can't in good conscience send her home, so I'm immediately going to court to seek legal custody."

1. May Frank obtain spousal support from Wendy? Explain.

2. Will Frank's constitutional challenge prevail? Explain.

3. In what state must the aunt file a custody petition? Explain.

4. Is the court likely to grant legal custody of Danielle to her aunt? Explain.

MEE QUESTION 6

Trident Healthcare Inc., incorporated in State X, owns and operates hospitals and clinics in States X, Y, and Z. Medical information for all of Trident's current and former patients is stored on computer equipment housed at Trident's corporate headquarters in State X.

Last December, unknown persons hacked into Trident's computer system and obtained the personal medical information of at least 30,000 Trident patients, including 5,000 patients living in State X, 10,000 patients living in State Y, and 15,000 patients living in State Z. However, there is no evidence that the thieves have used any of this medical information.

The State X Privacy Protection Act imposes an absolute duty on health-care providers, including companies like Trident, to keep patient medical information private. The legislature concluded that the "invasion of privacy" resulting from data breaches causes significant harm to the individuals involved. Thus, the law allows any person whose private medical information is obtained by an unauthorized third party in any manner to recover actual damages from the health-care provider. Further, because such damages are sometimes difficult to quantify, the state law provides that an individual is entitled to a minimum statutory (nominal) damages award of $500 to compensate for this "invasion of privacy." This state law is not preempted by any
federal law.

A man, who is a citizen of State X and whose medical records were stored in the Trident computers, has brought a class action in the federal district court of State X against Trident on behalf of himself and all the persons whose health-care information was taken during the hacking of Trident's computer system. The man is represented by counsel with extensive experience in class actions of this type. The complaint is limited to claims arising out of the hacking of medical information. It seeks no actual damages but does seek statutory damages on behalf of all members of the class pursuant to the State X statute. The complaint alleges the facts detailed above and alleges that the court has jurisdiction based on diversity, pursuant to 28 U.S.C. § 1332. The complaint also alleges that most if not all of Trident's patients are U.S. citizens who are domiciled in the states where they receive their health care.

State X's legislatively adopted Civil Practice Rules provide that "if any statute or law of this state allows for an award of statutory or nominal damages, recovery of such damages may be sought in an individual action but not in a class action."

Trident has moved to dismiss the man's class action brought in federal district court, arguing that (i) the court lacks subject-matter jurisdiction over the state-law claim raised by the class action, (ii) the action fails to allege a claim upon which relief can be granted because of the state law barring class actions to recover statutory damages, and (iii) the man does not have standing to bring a statutory damages claim in federal court.

With respect to each of these arguments, how should the court rule? Explain.

MPT 1 – *American Electric v. Wuhan Precision Parts*

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

MPT 2 – *Estate of Carl Rucker*

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

July 2019

New York State
Bar Examination

Sample Essay Answers

JULY 2019 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. Conflict of law between State A and State B

The first issue is whether the probate court will follow the law of State A, which does not recognize holographic wills, or the law of State B.

When an individual dies testate, the state law which will govern the distribution of their will is the state where the testator was domiciled when the testator died. Domicile is determined by an individual's presence within the state and their intent to remain, which can be shown by ownership of property in the state.

Here, the testator was domiciled in state B when he died, and his assets were located in State B. Therefore, even though he lived in State A when he wrote his will, the probate court will follow the substantive law of State B in distributing his estate because he was domiciled in State B when he died.

In conclusion, the court will apply State B's law regarding holographic wills.

2. Execution of the holographic will and testamentary intent

The second issue is whether the Testator's will was a properly executed holographic will.

In order for a will to be properly executed, a testator must have present intent to execute a will, must have testamentary capacity, and must comply with the required formalities. A testator has present intent to create a will if they execute a will with the intent to present execute the document, not to create the will in the future. A holographic will is generally defined as a will in which the material portions are written in the Testator's own handwriting and which is signed. The State B statute additionally requires the will to be dated in order to be valid.

Here, the Testator did have present intent to create a will, and that will did comply with the formality requirements of holographic wills in State B. The testator created the will prior to flying to City for an "urgent engagement" so that, if something were to occur during the trip, his estate would be distributed according to his wishes. He therefore had the present intent to create a will which would be in effect immediately, were he to pass away on the upcoming trip. The will was also handwritten, signed, and dated. Therefore it satisfies State B's requirements for a holographic will.

In conclusion, the will is a validly executed holographic will.

3. Omission of Testator's child Robert

The next issue is whether the will, which did not distribute property to Testator's son Robert, should be interpreted to provide any devise to the omitted child.

A probate court should follow the terms of the will and distribute the testator's property accordingly. The UPC and most courts attempt to limit the possibility of an accidental disinheritance by allowing for a child who is born after the execution of a will to take in equal share to the other children included in the will. However, if a child was born before the execution of the will, the probate court should assume follow the face of the will and omit the children from distribution unless it is clear that the omission was accidental.

Here, the testator's will specifically divided his entire estate to "my son John and his delightful wife". If Robert had been born after the execution of the will, then he would likely take in equal share to John. However, assuming that Robert was not born after the execution of the will -- given the presumed ages of the sons -- Robert will not take any share under the will. The court will assume that the testator intentionally left Robert out of the will.

In conclusion, Robert does not receive any share under the will.

4. Introduction of extrinsic evidence to determine whether Nancy or Martha receive shares

The next issue is whether the will leaves half of Testator's estate to Martha, John's former wife, or to his current wife Nancy.

When interpreting a will, a court is only permitted to consider extrinsic evidence when the terms of a will are ambiguous. Upon a finding of ambiguity, a court may consider both direct and circumstantial evidence in an effort to best determine the intent of the Testator.

Here, the Testator's will was executed in 2010 and left his estate in equal shares to John and "his delightful wife". However, since John's had been married twice -- first to Martha, then to Nancy -- and the will does not specific which wife receives the share, the phrase "his delightful wife" is ambiguous. Since there is ambiguity, the court will be permitted to look at extrinsic evidence to determine which wife the testator intended to provide for. In this instance, the testator wrote the will while his son John was married to Martha, whom he had introduced to his son. Therefore, extrinsic evidence will show that the testator intended to refer to Martha, not Nancy.

Therefore, the will should be interpreted as leaving the Testator's estate, in equal shares, to John and Martha.

5. Lapse of Martha's share of the estate and State B's Anti-Lapse statute

The final issue is what effect Martha's death has on the distribution of the will, and whether her children are entitled to her shares.

When a beneficiary to a will predeceases the testator, the beneficiary's devise will lapse into the residuary of the will or, in the absence of a residuary, into the intestate estate. As an exception to the harshness of this general rule, most states have enacted Anti-Lapse statutes, which permit a beneficiary's heirs to take the beneficiary's share of the estate. State B has enacted such a statute, which provides that "the beneficiary's surviving issue take the share the deceased beneficiary would have taken unless the will expressly provides otherwise."

Here, Martha passed away one and a half years before the Testator died. Therefore, absent an anti-lapse statute, her share would have passed through the intestate estate, since there is no residuary estate in the will. However, under State B's anti-lapse statute, her children are entitled to her share of the estate. Her children will split her share in equal parts. This is true even though John never adopted Martha's children as his own; they take their shares solely by nature of being Martha's heirs to her devise.

In conclusion, the Testator's estate should be distributed as follows: one half of his estate passes to his son John, and one quarter each of his estate will pass to Martha's two children.

ANSWER TO MEE 1

Validity of a Holographic Will

The first issue to resolve is whose law governs the validity of the testator's will. State A does not recognize holographic wills while State B does. Therefore, if State A law is applied, the will would be invalid and the testator's property would pass through intestate succession, while if State B law were applied, the holographic will would be enforceable. The probating of a testator's will is governed by the law of the testator's domicile upon death, save with respect to real property located in other states, which would be governed by the law of those states. Here, the testator was domiciled in State B when he died, therefore, the law of State B is applied to disputes about his will, and the court would likely uphold it as a valid holographic will.

For a holographic will to be valid, it must be in writing, signed by the testator, and material portions of the will have to be in the testator's handwriting, and the testator must have had the capacity and intent to execute a will. Here, the will was signed by the testator, and handwritten by him, therefore those requirements are satisfied. Moreover, the language of the will indicates a present intent to create a will by saying "I write to convey my wish that my entire estate be distributed [to his son and the son's wife] if anything should happen to me." Lastly, there is no indication that the testator was mentally lacking in capacity when he executed the will, nor that he was under 18, the requirement for legal capacity, since he had a married son when he wrote the will.

Lastly, an issue may arise as to whether the testator's holographic will remains valid even though it was written specifically in anticipation of the testator's flight to City. The parties challenging the will may argue that it ceased to be valid because it was written for that particular context. Although a will can be made conditional on some condition precedent, the language of the current will fails to reflect such an intent. While the testator does say he was prompted to write the note because of his fear of flights, the note does not state that the conveyance will no longer be valid should "anything happen" to him under some other circumstances. It is not clear that the testator's intent was to create a conditional will. Moreover, the testator's failure to take action to draft a different will in the 9 subsequent years may indicate he did not feel that it needed to be changed. Therefore, the court is likely to treat the will of January 4, 2010 as valid.

Whether Martha's sons or Nancy inherit under this will

The issue here is whether Martha was sufficiently defined as a beneficiary under the will to inherit even though John married Nancy after her death. A will can be challenged for patent or latent ambiguity. In this case, the ambiguity is latent, as it is not clear that the provision is ambiguous on its face; however, there are two potential wives that the will could be referring to. Where a will is ambiguous, the court will admit extrinsic evidence of the testator's intent.

Here, the will conveys to John and "his delightful wife of many years." The latter provision can be somewhat ambiguous because his wife of many years, Martha, is not mentioned by name, and John has subsequently married Nancy after Martha's death. The court may hold that the "of many years" language is sufficient to identify that the testator had Martha in mind. But they will likely look to extrinsic evidence to resolve the ambiguity since Martha is not specifically named. Testator introduced Martha and John and had known Martha and her parents for many years. Thus, it is just as likely that he was motivated by his connection to Martha as he was by Martha's status as John's wife. Martha and John were married for many years, while he has only been married to Nancy for 6 months as of the date of the probate, which further weighs in favor of the testator's intent that Martha inherit.

Thus, extrinsic evidence weighs in favor of a finding that the testator intended for Martha to inherit.

Under the laws of State B, "if a beneficiary under a will predeceases the testator, the deceased beneficiary's surviving issue take the share the deceased beneficiary would have taken unless the will expressly provide otherwise." Here, Martha predeceased the testator and has two surviving sons, her issue. The will does not contain the express intent for her not to inherit because she predeceased the testator. Therefore, Martha's two children will get Martha's share, and will share equally the property with John.

Meaning of "equal shares"

Where the type of joint estate is not specified, the modern trend for the default is a tenancy in common. At common law it was a joint tenancy. In assessing the type of interest created, the court would look to the way the interest is divided, whether there is a right of survivorship, and other clues to the testator's intent. Here, the will states simply that John and his wife take in "equal shares." This could be an indication of either a joint tenancy or a tenancy in common. There is no mention of a right of survivorship. Due to the lack of clear intent, the default rule would be to find that a tenancy in common was created.

Conclusion: John will take 50% of the property as a tenant in common with Martha's two children, who will share the other 50%.

Intestate Succession: Should the court apply State A law and invalidate the will, the testator's estate would pass through the laws of intestacy. The specific rules depend on State B's intestacy scheme. However, across various schemes, where a testator dies survived by his children and no wife as heirs, the children will inherit in equal shares. Thus, if the estate were to pass through intestacy, **John would inherit in equal part with his brother Robert.**

ANSWER TO MEE 2

The court did not err in denying the motion to suppress on all three grounds raised by defense counsel.

The 5th Amendment of the US Constitution, as applied to the states through the 14th Amendment, establishes the right not to incriminate oneself. To protect this right, the Supreme Court has held that individuals in custodial interrogation by the police are

entitled to be warned of their right to remain silent and their right to counsel (*Miranda* warnings). The *Miranda* warnings need not be stated verbatim as the Supreme Court did; any clear and accurate summary of the rights conveyed to the individual will suffice. This 5th Amendment right applies when an individual is in custody by the police, meaning she would not feel she has the freedom to leave, and interrogation occurs when the police directly question or act in such a way that is likely to lead the individual in custody to make incriminating statements. To invoke the right to counsel, the individual must be unambiguous and unequivocal. The police have no obligation to clarify an ambiguous statement. If the right to counsel is invoked, the police may not resume questioning for the duration of that individual's time in custody and for 14 days after her release. After that time has passed, the police may give the individual her Miranda warnings again and reinitiate the custodial interrogation. If the individual does not invoke her right to counsel or her right to remain silent, she may waive her rights so long as it is a knowing and voluntary waiver.

Individuals also have a 6th Amendment right to counsel. Unlike the 5th Amendment right to counsel, which attaches once the individual is under custodial interrogation, the 6th Amendment right to counsel applies only once formal judicial proceedings have commenced (i.e., once charges have been filed). Also, the right is offense specific, unlike the 5th Amendment. Therefore, if a defendant has been charged for one crime and her 6th Amendment right to counsel has attached, if she is then investigated for another crime, her 6th Amendment right to counsel does not remain. Here, it should be noted that the woman did not have a 6th Amendment right to counsel. She was serving a sentence for operating a motor vehicle under the influence of alcohol, and so any proceedings or events related to that charge would trigger her right to have counsel present. When the woman was questioned regarding the different crime of homicide, however, she did not have the 6th Amendment right to counsel as no charges had been filed.

Any rights to counsel the woman may have had would fall under the 5th Amendment. On both February 4 and March 15, her 5th Amendment rights would have been invoked as she was under custodial interrogation. The detective from the county sheriff's department brought her to an interrogation room in the jail building and asked her questions. Therefore, she was due *Miranda* warning. On both occasions, the detective properly informed her of her rights to remain silent and to have an attorney. The woman said that she understood her rights both times. The issue is whether the detective violated her Miranda rights subsequent to his reading her rights.

1. Interrogating the woman on March 15 after she invoked her Miranda right to counsel on February 4.

The issue on the first motion is whether the detective was permitted to reinitiate interrogations on March 15 after the woman invoked her right to counsel on February 4.

The conclusion is that he did. On February 4, the woman invoked her right to counsel when she unambiguously and unequivocally said, "I want a lawyer." The detective properly ceased questioning immediately and returned the woman to her cell. She was not brought back in for counseling until over a month later, exceeding the 14 day requirement to abate custodial interrogation following an invocation of the right to counsel. Although the woman was released back to her cell and was in that sense still in the custody of the state, she was not in custody for the purposes of her 5th Amendment right when under custodial interrogation. She was in jail on another charge and was returned to her jail cell; this constitutes a release from custodial interrogation by the police. It was more than 14 days when the detective brought her back in for questioning. He was therefore entitled to interrogate her again if he gave her new *Miranda* warnings, which he did. As a result, the detective did not violate the woman's *Miranda* rights by interrogating her on March 15.

2. Incorrectly conveying to the woman her Miranda right to counsel by the statements he made on March 15.

The issue on the second motion is whether the detective violated the woman's right to counsel when he answered her question regarding how long it would take for her to get a lawyer. The detective did not. He properly Mirandized her when he told her that she had the right to an attorney and if she could not afford one, one would be appointed for her. He also said she may ask for a lawyer at any time. When the woman then asked how long it would take a lawyer to get there if she asked him to get her one, the detective accurately characterized the procedure for appointing counsel. The fact that his information conveyed it would take some time before a lawyer would appear does not by itself violate the woman's *Miranda* rights. She was informed of her right to counsel, she conveyed that she understood her right to counsel, and even after the procedure for appointing counsel was conveyed to her she said, "I might need a lawyer," indicating that she did not understand the detective's statements to mean that she did not have the right to counsel. The detective therefore did not violate the woman's right to counsel by his statements on March 15.

3. Interrogating the woman on March 15 after she had invoked her Miranda right to counsel on March 15.

The issue on the third motion is whether the woman invoked her right to counsel on March 15, and the conclusion is that she did not. Therefore, the detective's subsequent interrogation of the woman was legal. The woman's two statements on March 15 in response to her Miranda warnings were, "If I ask you to get me a lawyer, how long until one gets here?" and "I might need a lawyer." These are not an unambiguous invocation of the right to counsel, as required by the law. These statements are a clarifying question about the procedure for receiving a lawyer and then an equivocating statement. The detective had no obligation to clarify whether she was invoking her right to counsel, though he nevertheless responded, "That's your call, ma'am." The woman then waived

her Miranda rights and answered the detective's questions. This was a knowing and voluntary waiver of her rights, as she indicated both orally and on the waiver form that she understood her rights. Therefore, the detective's interrogating the woman was proper as she had not invoked her right to counsel but rather had waived it.

ANSWER TO MEE 2

The court did not err in denying the motion to suppress based upon the first ground. As mandated by the 5th amendment, a person must be read their Miranda rights prior to custodial interrogation by the police. Whether a suspect is in custody is determined objectively by whether a reasonable person in the suspect's position would have felt free to terminate the encounter with the police. Furthermore, a court will look to whether the interrogation contains the same inherently coercive atmosphere of a standard station house questioning. Interrogation is any statement or conduct by the police that is reasonably expected to elicit an incriminating response. The Miranda warnings that a suspect must be given include the following: right to remain silent, the fact that anything you say can be used against you in court, the right to counsel, and the right to have counsel appointed if you are indigent. Once a suspect receives Miranda warnings, they may either do nothing, waive them, or invoke their right to counsel or to remain silent. A waiver must be voluntary and knowing, and generally answering questions without invoking your rights will waive your rights. Remaining silent does not waive or invoke your rights.

To properly invoke the right to silence or to an attorney, the suspect must make an unambiguous statement to that effect. If the suspect invokes the right to counsel, the police must immediately cease all questioning. Questioning can only be reinitiated if the suspect initiates conversation with the police (thus waiving her right to counsel) or is provided with counsel, or 14 days after the suspect is released from custodial interrogation. Generally, statements made in violation of Miranda rights are suppressed in court for the prosecution's case in chief.

Here, the woman was clearly subject to custodial interrogation. She was taken by the police to an interrogation room in the jail building, and the police officer told her he wanted to question her in regard to a murder investigation. She clearly was not free to leave, and this is precisely the type of coercive situation in which Miranda rights must be honored. Furthermore, she was going to be interrogated about the murder, so she was due Miranda rights. Following the detective's delivery of the Miranda warnings, which comply with constitutional requirements, she properly invoked her right to a lawyer by unambiguously asserting this right, and the detective acted appropriately in ceasing

questioning. The woman's invocation of her right to an attorney on February 4, however, did not prevent the detective from questioning her on March 15 because more than 14 days had passed since she was released from custodial interrogation. It does not matter that she was merely returned to her cell in jail to continue to serve her term. The 14 day requirement refers to release from custodial interrogation for Miranda purposes. It does not refer to custody in general, and returning to a general prison population suffices as being released from custodial interrogation. Therefore, the 14 day deadline has passed, and the detective could question her once again despite her February 4 invocation of Miranda.

The court also did not err in denying the motion of the second ground.

The detective did not incorrectly convey to the woman her right to counsel. Police are not obligated to stick directly to the wording of traditional Miranda warnings so long as they correctly convey the essence of these warnings. Here, the detective did actually convey to her the precise Miranda warnings that people are usually given, and the she was given on February 4, so this will clearly suffice for conveying to her a right to an attorney. The issue is whether his subsequent reply somehow retroactively interfered with his conveyance of proper Miranda warnings. In short, it did not, because he correctly described to her, in response to her question, how the process would go for getting her an attorney. This referred in large part to the technical process in getting her an attorney, and it has no effect on the constitutionality of the correct warnings he already gave. His words did not contradict or undercut his previous message. Therefore, his response is not grounds for suppressing her statements, because they did not interfere with her Miranda warnings.

Finally, the court did not err in denying the motion upon the third ground.

The issue here is whether the woman invoked her right to counsel. She did not. As discussed above, a request for an attorney must be direct and unambiguous. Fuzzy or uncertain statements do not suffice, and the police may continue questioning. Her statement that she might need a lawyer is not sufficient under this standard to invoke the right to counsel, and the detective was entitled to continue questioning her. Furthermore, her waiver by signing the form seems to suffice for a voluntary waiver of her Miranda rights, given that she has been provided the warnings multiple times, appeared to fully understand them, and there was no evidence of undue coercion. Thus, her waiver was voluntary and proper, and her subsequent confession was therefore admissible.

ANSWER TO MEE 3

No-Dividend Policy

The issue is whether Parent breached any duties to HomeSolar with respect to HomeSolar's no-dividend policy.

A shareholder who controls the majority of share of a corporation owes fiduciary duties to the minority shareholders. Fiduciary duties include the duty of care and duty of loyalty. The duty of loyalty requires the controlling shareholder, officers, or directors to act as a reasonable business person would in similar circumstances. The Business Judgment Rule provides a presumption that a controlling shareholder's actions are reasonable. Officers make decisions on the day-to-day running of the corporation and the directors make decisions about the corporation's governance. Shareholders have no right to dictate the day-to-day running of the corporation or the corporation's governance, other than through voting for the directors to be named to the Board of Directors. The decision to issue dividends solely belongs to the directors. A controlling shareholder has no obligation to direct directors to issue dividends as long as the decision to not issue dividends affects each shareholder in the same way.

Here, Parent is a controlling shareholder in HomeSolar since it owns 80% of HomeSolar's voting shares, and it in fact selects the members of HomeSolar's board, most of whom are officers and employees of Parent. As such, Parent owes minority shareholders the same fiduciary duties owed by officers and directors. Parent's actions are presumed to be reasonable under the Business Judgment rule and Parent has no obligation to declare a dividend. Parent also justifies its decision by reinvesting the additional money into developing new products for the market in which it operates, likely increasing HomeSolar's profitability even further down the road. It would be different if Parent declared an obligation to itself but not to the other shareholders, but since each shareholder is being treated equally, there is nothing wrong with refusing to declare a dividend.

Thus, Parent did not breach any duties to HomeSolar with respect to HomeSolar's no-dividend policy since it treated each shareholder equally and did not have an obligation to declare a dividend.

Contract with SolarMaterials

The issue is whether Parent breached any duties to HomeSolar with respect to HomeSolar's contract with SolarMaterials for the purchase of rare earth minerals.

The duty of loyalty requires: that the controlling shareholder, officers, or directors prefer the corporation's interests over its own interests, and that they do not engage in any self-

dealing that harms the corporation. When the duty of loyalty is breached, the burden is on the controlling shareholder, officer, or director to prove that the transaction was fair. A controlling shareholder, officer, or director can avoid having to prove that the transaction is fair if they have a majority of disinterested directors or a majority of disinterested shareholders approve the transaction.

Here, Parent caused HomeSolar to enter into a contract with SolarMaterials Corp., a wholly owned subsidiary of Parent. SolarMaterials was created for the purpose of acquiring the "rare earth" minerals and reselling them to the various renewable energy subsidiaries of the Parent group, including HomeSolar. The contract between HomeSolar and SolarMaterials sets the price of these rare earth minerals significantly higher than the current market prices under similar long-term contracts for such minerals. As a result, Parent will profit off the transaction (through its subsidiary) in a way that the minority shareholders of HomeSolar will not since they do not own shares of SolarMaterials. Thus, Parent is engaged in self-dealing or giving preference to its own interests over those of HomeSolar and of the minority shareholders by forcing HomeSolar to enter into a bad contract that is only beneficial for SolarMaterials. Since Parent is giving itself a benefit that the minority shareholders cannot get, it has breached its duty of loyalty. Since the transaction was not approved by a majority of the disinterested directors or disinterested shareholders, the Parent's actions are invalid unless they can prove that the contract was fair, which the facts state they are not since the contract cost HomeSolar more than the market price.

Thus, Parent breached its duty of loyalty to HomeSolar with respect to HomeSolar's contract with SolarMaterials.

Denying Opportunity to Apply for Government Grant

The issue is whether Parent breached any duties to HomeSolar by denying HomeSolar the opportunity to apply for the governmental grant.

The rules for the fiduciary duties of care and loyalty are stated above. The duty of loyalty also prevents the usurpation of a corporate opportunity. Whether something is a corporate opportunity is determined by several factors, one of which being whether the corporation is in the same line of business as the opportunity.

Here, HomeSolar is not in the same line of business as the government grant applied for by IndustrialSolar. HomeSolar manufactures and sells products *exclusively* for the residential solar power market. IndustrialSolar Inc. on the other hand manufactures products exclusively for the industrial solar market. The government grants at issue were for the development of industrial-scale solar projects. Thus, they were within the same line of business as IndustrialSolar and not HomeSolar.

Thus, Parent did not breach its duty of loyalty to HomeSolar since it did not usurp a corporate opportunity.

ANSWER TO MEE 3

I. The issue is whether Parent owes any fiduciary duties to HomeSolar.

The directors and officers of a corporation owe fiduciary duties to the corporation and its shareholders. While shareholders do not typically owe fiduciary duties to the corporation or each other, controlling shareholders do. This is because their size enables them to have effective control over the corporation's activities through the ability to appoint directors and approve extraordinary measures. Here, Parent Inc. has over 80% of HomeSolar's voting shares while the remaining shares are widely dispersed. Therefore, Parent Inc. is the controlling shareholder of HomeSolar and owes the fiduciary duty of care and loyalty to the corporation and its other shareholders. Further, the overlap and unity of interest between Parent's officers and employees and the board of directors of its subsidiaries, including HomeSolar, further support the finding that Parent owes these duties.

II. The issue is whether a shareholder is entitled to a dividend from HomeSolar.

The right to a dividend is held by a shareholder and not by the corporation. Therefore, there can be no claim of a breach of duties to the corporation for failure to pay a Dividend. Further, even shareholders do not have a right to compel a dividend from the board of directors. There are exceptions. Shareholders have been successful in bringing suit against a board for failure to issue a dividend in cases in which improper motive can be demonstrated. This is most often when a dividend is not issued in order to harm a minority shareholder or because instead of issuing a dividend, the board is increasing director salaries or the like.

Here, shareholder will not be able to show that Parent breached any duties to HomeSolar by failing to pay a dividend. First, HomeSolar, as the corporation, does not have a right to a dividend as that is held by its shareholders. Therefore, this is not an appropriate claim for a derivative suit, but more proper for a direct suit. Even if the shareholder had brought a direct suit, Parent breached no duty because there is no duty to issue a dividend and no improper purpose can be shown. The SEC filings for HomeSolar give proper notice to shareholders that the no-dividend policy is meant to provide increased funding for research and development. This decision will be protected by the Business Judgment Rule, which states that absent a finding of fraud, illegality, or self-dealing, the good-faith decisions of the board will not be set aside by the court. Here there is no evidence of

fraud, illegality, or self-dealing. HomeSolar's R&D may benefit some of Parent's other subsidiaries, but it also benefits HomeSolar and therefore there is no duty of care violation. Finally, there is no evidence that this is a special case requiring the court to compel a dividend. There is no evidence of improper motive or animus toward the minority shareholders. Therefore Parent will not be found to have breached a duty to HomeSolar with respect to the no-dividend policy.

III. The issue is whether Parent breached its duty of loyalty to HomeSolar by engaging in a self-dealing transaction between HomeSolar and SolarMaterials.

The duty of loyalty protects shareholders from a director, officer, or controlling shareholder who seeks to gain an improper benefit from the corporation. The typical case is "self-dealing," which occurs when the interested party stands on both sides of the transaction and thus is able to extract value at the expense of the shareholders. When self-dealing occurs, there is a safe harbor available, which requires that the interested party make a full disclosure to the corporation and then that either the majority of disinterested board members or majority of disinterested shareholders vote to approve the transaction. Additionally, the transaction must be fair to the corporation.

As the controlling shareholder of HomeSolar and the sole owner of SolarMaterials Corp., Parent stands on both sides of any transaction between the two corporations. Therefore, a violation of the duty of loyalty can be found. Parent will need to show that the contract was approved by the majority of the disinterested directors (if there are any) or by the disinterested shareholders (which is unlikely given that shareholder is bringing this suit). Additionally, Parent will need to show that the contract is fair to HomeSolar. If shareholder's allegation that the SolarMaterials price is "significantly higher than the current market prices under similar long-term contracts for such materials," Parent will be unable to show fairness and Parent can be found to have breached its duty of loyalty.

IV. The issue is whether Parent breached its duty of loyalty to HomeSolar by having IndustrialSolar usurp a business opportunity from HomeSolar.

The duty of loyalty may also be breached for the usurpation of a business opportunity. The safe harbor described above is applicable. However, an additional element must be shown, which is that the business opportunity must be something that is within the range of possibilities for HomeSolar and that HomeSolar was positioned to respond to take that opportunity. Otherwise, the decision not to engage in that opportunity would be judged under the duty of care and protected by the Business Judgment Rule as within the range of decisions available to a board of directors.

As above, Parent stands on both sides of this decision and could be found to have directed HomeSolar not to apply for the government grant in order to reduce IndustrialSolar's competition. Full disclosure to the board and the vote of the disinterested

directors (if there are any) or disinterested shareholders would have sheltered the decision from any duty of loyalty concerns. However, in the absence of the safe harbor, it is unclear whether HomeSolar was either interested in the business opportunity or in a position to take it. The government grant was to develop industrial-scale solar projects. HomeSolar develops new products for the residential solar power market in which it operates unlike IndustrialSolar, which manufactures exclusively for the industrial solar power market. Therefore, HomeSolar was not even in competition for the grant because it is outside of its business market. Therefore, Parent did not breach its duty of loyalty to HomeSolar here.

ANSWER TO MEE 4

I. Sum Paid to Substitute Contractor

At issue is whether the owner may recoup the additional $50,000 it spent on a substitute contractor to have the seats installed. When a party breaches a contract, the non-Breaching party is entitled to the full benefit of their bargain in the form of expectation damages. Expectation damages are utilized to restore the non-breaching party to the position it would have been in if the contract had not been breached. One frequently used measure of expectation damages is the difference between the market price for the work and the contract price. Here, the contract price was $100,000 and the market price, as demonstrated by the prices charged by other contractors, was $150,000.

The contractor will likely argue that the market price for its work was $100,000 because it did not have the reputation or market presence that its more expensive competitors did, making its work different in kind from that of its competitors. This argument is likely to fail because the owner was only able to cover by enlisting a different contractor. Moreover, the facts indicate that the other contractors were similar.

For these reasons, the owner will be able to recover $50,000 in expectation damages.

II. Lost Profits

At issue is whether the owner's lost profits from the cancellation of the film festival were reasonably foreseeable. When a contract is breached, the non-breaching party is entitled to the full benefit of their bargain in the form of expectation damages, including consequential damages where such consequential damages are reasonably foreseeable.

Here, the court has found that the contractor was unaware that the owner was planning to hold a film festival when it entered into the contract. This is not wholly determinative, however, as the proper inquiry is whether these damages were foreseeable rather than specifically expected by the breaching party.

In determining what was reasonably foreseeable, the court will likely examine what a contractor of ordinary experience would have expected. The contractor's lack of experience will be unlikely to render the lost profits unforeseeable. When entering into a contract to construct seats in a theater, it is in fact foreseeable that there will be engagements scheduled in the theater, even if a film festival may not be specifically expected. The contractor will likely argue that a film festival is a special engagement for a movie theater and that only the running of ordinary films is reasonably foreseeable. This argument could have merit, but it is reasonably foreseeable that that theater will have a special engagement for its opening.

Courts are generally hesitant to award consequential damages of lost profits unless they can be proven by a reasonable degree of certainty. Here, however, the court has determined that there is $35,000 of lost profits, and this will not be a concern.

Because it was reasonably foreseeable that the owner would need to delay the opening of the theater based on the contractor's breach and that the owner would have had engagements scheduled for each day that the theater was forced to delay its opening, lost profits from the film festival are available.

III. Amount of Lost Profits

Assuming that lost profits are available, at issue is whether the owner is entitled to the full $35,000 of profit that he would have obtained if the theater had been able to open, or only $10,000 because of a duty to mitigate by relocating to a nearby college auditorium. Where a party breaches a contract, the non-breaching party has a duty to mitigate their damages. When the non-breaching party fails to mitigate their damages, the court can award damages in the amount that the loss would have been that the non-breaching party properly mitigated. Therefore, the relevant issue is whether the owner had a duty to mitigate by holding the festival in the auditorium.

Non-breaching parties are only expected to mitigate their damages when doing so is reasonable. The non-breaching party is not expected to mitigate by engaging in wholly different conduct than that which was contemplated. The proper inquiry is whether reasonable efforts to mitigate were made.

Here, full damages for lost profits would be $35,000. But if the owner had mitigated by holding the film festival in a nearby college auditorium, there would only be $10,000 of lost profit attributable to the contractor.

The court will likely find that the owner was not required to mitigate by holding the festival in a college auditorium. As an owner of movie theaters, an important part of the film festival was to celebrate the opening of the new theater. If the festival were moved elsewhere, the owner would be losing out on one of the primary motivations for entering into the contract in the first place.

Because relocating the film festival to a nearby college auditorium is not likely to be found necessary as part of the owner's reasonable duty to mitigate, the owner is entitled to $35,000 in lost profit, assuming he is entitled to lost profits at all.

The court could, however, make further findings of fact that found that the owner failed to mitigate in other ways, such as moving the festival to a different date, if doing so would be reasonable. Further findings of fact would be needed on this issue.

ANSWER TO MEE 4

This is a contracts case. Contracts law is governed either by the UCC, when the contract is for a sale of goods, or by the common law, where the contract is for services. Where a contract includes both goods and services, the law applied is the law of the dominant purpose of the contract. Here, the contract is for services and is governed by the common law, as the owner was to pay the contractor for installing seats in a movie theater. No facts indicate that the owner was also paying for the seats themselves; however, if the owner was also paying for the seats, the dominant purpose of the contract was likely still for installation rather than for the seats themselves, and therefore the common law is still applied.

$50,000 Damages

The owner's damages include the $50,000 more that the owner had to pay to the substitute contractor over the price of the contract with the original contractor. The issue is whether damages should be based on the contract price or on the market price. In general, contract damages are "expectation damages"--that is, they are the amount of money necessary to put the nonbreaching party in the position they would have been in, had the contract been properly performed, to the extent that such amount is reasonably ascertainable. This measure of damages awards the nonbreaching party the "benefit of the bargain," and is based on the contract price--*not* the fair market price of the services or goods that the nonbreaching party was supposed to provide under the contract. The theory is that the nonbreaching party should not be penalized just because the other party has breached, and should obtain their benefits under the contract. In construction

contracts, where the contractor breaches before performing any work, the measure of damages is generally the amount of money required to pay a substitute contractor, but may include other damages as well (as discussed below).

Here, the owner should receive the $50,000 over the contract price that the owner had to pay the substitute contractor. The owner's "benefit of the bargain" was to receive all seats required for the owner's movie theater for $100,000. The owner was instead required to pay $150,000 to another contractor. The owner should therefore receive the difference of $50,000 in damages. It is irrelevant that the fair market value of the seats was always $150,000--the owner should still get damages over the contract price, which in this case is $50,000.

Lost Profits

Lost profits are likely recoverable. The issue is whether lost profits damages are either speculative, or were not reasonably foreseeable at the time of contracting.

Where performance under a contract is delayed, proper expectation damages generally include lost profits resulting from any delay. Otherwise, the nonbreaching party would not be afforded all benefits under the contract. Where a new business is involved, however, lost profits damages are generally *not* obtainable because they are too speculative--they cannot be determined with reasonable certainty. If the new business can show that expectation damages are reasonably definite, they can still be awarded. However, lost profits damages might also not be awarded if they were not reasonably foreseeable. Lost profits damages can constitute a kind of consequential damages--damages resulting from a party's particular circumstances--and in such a case can be only awarded if either (i) the damages were reasonably foreseeable; or (ii) the breaching party knew that such damages would result.

Here, owner can likely claim lost profits. Although owner's movie theater is a new business, the trial court has made a finding of fact that the owner would have made a profit of $35,000 if the seats had been installed in the new movie theater before September 1. The damages are therefore not speculative and can be awarded. However, the lost profits damages arguably constitute consequential damages because it was only as a result of the owner's particular circumstances--that the owner was planning on holding a film festival--that the owner suffered lost profits in the amount of $35,000. Additionally, the trial court found that the contractor had no actual knowledge that the owner was planning to hold a film festival. Still, however, owner's damages were likely reasonable foreseeable by the contractor. Although the contractor did not know exactly how owner planned to utilize their movie theater, it was reasonably foreseeable that owner would not be able to operate the theater at all without seats, and that an inability to open the theater would result in damages to the owner, particularly during the owner's first few weeks of operation. Moreover, the owner had been marketing the film festival

heavily; although the contractor had not seen the advertising, the fact that the advertising was occurring made the festival itself more foreseeable. It was also reasonably foreseeable that owner would be unable to procure substitute chairs by September 1, particularly considering that the original contractor failed to notify the owner of the breach until July 1 (and where work would take one and a half months to complete). Therefore, lost profits can also likely be claimed under a consequential damages theory.

Mitigation of Damages

Assuming the owner can recover lost profits damages, the owner should recover the full $35,000. The issue is whether the owner was under a duty to mitigate damages. Generally, nonbreaching parties are under a duty to mitigate damages under the common law--they must not increase damages, and they also must obtain reasonable substitute performance if possible. However, where the substitute performance is not of the same kind or quality as the original performance, the nonbreaching party may not be under a duty to mitigate. Here, the owner's duty to mitigate did not include relocating the film festival to the nearby college auditorium. Although the owner could have put on the festival there and apparently still made a profit, the owner is in the business of owning a movie theater--not of putting on the film festival. Moreover, the film festival was intended to promote the new theater, and putting the festival on at the college would likely not have had the intended promotional effect. Requiring the owner to obtain substitute performance at the auditorium would have been substantially different than if the original contractor had performed, and the film operator was not required to mitigate damages by relocating to the college. The owner can therefore claim the full $35,000 in lost profits damages, if lost profits damages are available.

ANSWER TO MEE 5

1. The issue is whether Frank may obtain spousal support from Wendy.

Spousal support is available to a dependent spouse in the event of the termination of a marriage. When a marriage is still intact, courts are disinclined to interfere in a couple's private affairs, even if there is evidence of marital strife. Absent an annulment or divorce, a court will not award spousal support in the face of a valid marriage.

Wendy and Frank have been married for 12 years. There is no indication the couple has terminated their marriage. Assuming they are still legally married, a court will not intervene in the couple's private affairs and award Frank spousal support from Wendy. It

is regrettable that Frank was injured and lost his job, and that his salary is insufficient to pay the household bills. However, spousal support is an inappropriate remedy here.

2. The issue is whether Frank's constitutional challenge will prevail.

The Constitution's substantive due process rights include a fundamental right to privacy. This right includes the rights of parents to raise their children as they see fit; this right may be limited by reasonable state legislation. Because privacy is a fundamental right, any regulation impacting a privacy right must satisfy the Strict Scrutiny standard. This standard requires a law to be necessary in order to achieve a compelling state interest. The standard is extraordinarily hard to overcome and most challenges under strict scrutiny fail. States are permitted to legislate for the general welfare under their "police" powers. This power includes legislating for the health and safety of the public.

The state law at issue requires a child's parent or guardian to provide proof of vaccinations that are mandated by the State Department of Health in order to permit a child to enroll at any public school. The state has an exceedingly compelling interest in ensuring the health and safety of students in its schools. An unvaccinated child poses significant risks of disease to other children. The means by which the legislation achieves this compelling interest are necessary: the law requires proof of vaccinations before a child is permitted to enroll in public school. Therefore, the state's vaccination standard for public school satisfies the strict scrutiny standard and is constitutional. It does not violate Frank's parental rights, and a court is highly unlikely to strike it down as unconstitutional.

3. The issue is in what state must the aunt file a custody petition.

Under the Uniform Custody Jurisdiction Enforcement Act, a custody petition must be filed in a state with appropriate jurisdiction. The preferred jurisdiction is a child's home state, which is defined as the state in which the child has lived the past six months. If the child has been absent from their home state for the last six months, a state will still have home state jurisdiction if a parent of the child remains in the state. If no state has home state jurisdiction, a court in a state with "significant connections" to a child may exercise jurisdiction. Significant Connection jurisdiction requires a child and at least one parent to have significant ties to a state or for there to be substantial evidence of a child's case present in a state.

Danielle's Aunt should file her custody petition in State A. Danielle's home state is State A. She was born there and continues to live there. Danielle has only been absent from the state for two weeks, and therefore State A remains her home state. In addition, both her parents still live in State A. Therefore, there is no bar to State A's home jurisdiction and the appropriate place for Aunt to file her custody claim is in State A.

4. The issue is whether the court is likely to grant legal custody of Danielle to her aunt.

A court makes custody decisions by considering the best interest and welfare of the child. Courts highly disfavor involuntarily parental termination and are loathe to involuntarily terminate a fit parent's rights in the absence of evidence of abuse or neglect. Parents are free to raise their children as they wish, and a parent's choices as to how they raise their children will not cut against a fit parent's custodial rights unless those choices are substantially and adversely neglectful or abusive towards a child. While a child's preferences may be taken into account if the child is mature enough to express an independent preference, a child's preference is not dispositive. Rather, the best interests of the child are paramount, as well as a fit parent's right to custody over their children.

A court is highly unlikely to grant legal custody of Danielle to her aunt. Danielle has two living parents, both of whom are fit parents. There is little evidence of abuse or neglect rising to the level that would merit involuntary termination of either Frank's or Wendy's parental rights. Due to Frank's injury, Frank is unable to work. Therefore, he is essentially available to be a stay at home parent. There is no indication Frank is not willing to take on parental duties and responsibilities. By contrast, Frank has taken an active role in Danielle's medical care (e.g. by refusing to allow her to receive any vaccinations). Aunt may argue that Frank's refusal to vaccinate Danielle is evidence of abuse or neglect. However, since parents are permitted to make choices about their children's upbringing, an anti-vaccination belief by Frank will not be sufficient to overcome his basic fitness as a parent. Aunt might also cite that Wendy is a pilot who is frequently absent and that her recent financial decisions have placed Danielle in an unstable home environment. Lots of airline pilots have children; a court will not take away a parent's custodial rights simply because they are in a profession that requires them to occasionally be absent from home, especially when the child is left in the care of the child's other parent. In addition, there is no evidence that Wendy's financial actions have detrimentally affected Danielle to a level meriting involuntary termination of parental rights. While Frank's unemployment insurance may be inadequate to pay all the household bills and Wendy has refused to pay any household bills, a court may require Wendy to support her child (as is her right) without going as far as terminating Wendy as Danielle's mother. While Danielle has expressed a preference to stay with Aunt and her preference indicates a mature understanding of her home situation, this also will not be enough to overcome Frank's and Wendy's parental rights. Looking at all of the factors together as a whole, Danielle has two fit parents. They might be going through a rough patch in their marriage, but nothing suggests they have abdicated their parental responsibilities in such a way that merits terminating their parental rights. Ultimately, it is in Danielle’s best interests to be a part of an intact family. Granting custody of Danielle to her aunt will not achieve this, and will not be in Danielle's best interests.

Therefore, a court is unlikely to involuntarily terminate Wendy's and Frank's parental rights and to grant aunt custody of Danielle.

ANSWER TO MEE 5

Frank's Spousal Support Award

Frank cannot obtain spousal support from Wendy. At issue is whether they divorced and whether Frank is entitled to monetary support.

Spousal support, also referred to as alimony, is available upon divorce or legal separation. Divorce is a formal decree from a court terminating the marriage; legal separation similarly creates a formal separation, but does not end the marriage per se. Spousal support is compensation to the dependent claimant spouse from the other spouse. Spousal support may be in the form of permanent lump sum payments, periodic payments, rehabilitative support to gain employment skills, or reimbursement support. The amount of spousal support is generally based on the needs of the dependent claimant spouse, and the financial ability of the paying spouse. Generally, one spouse is liable to third parties for the necessary expenses of the other spouse. The doctrine of necessaries includes shelter, food, and medical expenses. It is an implied in law quasi contract relief that enables third parties to get paid.

Here, Frank cannot obtain spousal support from Wendy. Most importantly, Frank and Wendy are still married and neither has filed any divorce or legal separation proceeding. The facts also indicate that "the couple" still live together with their daughter in State A. Thus, as spouses, both are under a duty to support the other. If Frank wants to obtain spousal support from Wendy, he will mostly likely be required to file for divorce or legal separation. Upon this filing, he can request permanent or periodic spousal support since he is no longer able to work. He may also be entitled to rehabilitative support to teach him new skills, since he can no longer work as a steelworker after suffering a serious back injury. Under the doctrine of necessaries, however, Wendy is obligated to pay for necessities for Frank. This duty applies even though Wendy is frequently absent from home. Wendy's refusal to stop paying household bills is also improper, because the doctrine of necessaries includes shelter. Failure to deposit wages into the joint bank account, on its own, is likely not sufficient to compel the granting of spousal support. Therefore, even though Frank cannot obtain spousal support from Wendy, Wendy is liable to third parties for Frank's necessities until they obtain a divorce or legal separation.

Frank's Constitutional Challenge

Frank will not prevail on his constitutional challenge to the state law because the law satisfies strict scrutiny. At issue is whether the law infringes on a fundamental right and whether the law satisfies the requisite standard of scrutiny.

The Due Process Clause of the Fourteenth Amendment applies to states. The due process clause protects the rights and liberties of state citizens. One such liberty that has been constitutionally recognized is the right to privacy. The right to privacy is a fundamental right and liberty. The right to privacy encompasses the rights of parents to direct and control their children's upbringing, care, custody, and education. Because the rights of parents has been deemed a fundamental right, any state law infringing upon that right is only upheld if it is necessary to achieve a compelling government interest. The state has the burden of proof to demonstrate that the standard has been met. The law must also be narrowly tailored, such that it is the least restrictive means of achieving the compelling government interest. This level of scrutiny is referred to as strict scrutiny.

Here, the state law at issue will be upheld because it is necessary to achieve a compelling government interest. The State A vaccination law requires, as a precondition to enrollment in a public school, that "the child's parent or guardian must provide proof that the child has received all vaccinations mandated by the State Department of Health." As noted above, the state has the burden of proving that strict scrutiny has been satisfied. The compelling interest at issue is the health of public school children. This has previously been held to constitute a compelling government interest because the public school system wants to ensure that the health of children is not endangered when they are attending public school. The state law at issue will be upheld because it is also narrowly tailored to achieve the interest. The law only applies to public schools and it only mandates vaccinations that are required by the State Department of Health. Frank will argue, however, that State A should have a medical exemption for personal, nonreligious beliefs. This argument will fail, however, because the law is a generally applicable standard that does not punish or discriminate against a religious group under the First Amendment, as applied to the states. The Constitution does not merely protect "personal beliefs," thus the State A law is not invalid for failing to have such an exception.

Therefore, Frank's constitutional challenge will fail because his fundamental right to care, custody, and control of his child has not been infringed by the State A Law.

Custody Petition Filing

The aunt must file a custody petition in State A because it is the child's home state. At issue is whether the aunt must file it in the child's home state or where the child is currently located.

The UCCJEA is a uniform act that governs jurisdiction in child custody proceedings. It has been adopted in almost every state. Jurisdiction is appropriate in the child's home state. The child's home state is the last place the child resided for at least six consecutive months prior to the commencement of proceedings. Home state jurisdiction is also appropriate if it is the last place where the child resided for at least six consecutive months and at least one parent or guardian still remains in the state. If no jurisdiction is deemed to satisfy the home-state standard, then jurisdiction is appropriate in the jurisdiction where there is substantial evidence related to the custody dispute and there is a significant connection between the parties. If no such state exists or if the court defers jurisdiction, then any state may have jurisdiction. A court may decline jurisdiction if it is an inconvenient forum. The initial court entering the custody order will have continuing exclusive jurisdiction.

Here, the aunt must file the custody petition in State A. State A is the child's home state. The child has lived in State A her entire life. For the six months preceding the filing, she will have lived there for the last six months consecutively. State B does not have jurisdiction because the child has only temporarily been in the state for a week. Even though the daughter is temporarily out of state, both of her parents continue to live in State A and State A was the last place of residence for six consecutive months. Jurisdiction may be appropriate in another jurisdiction, not the home state, in some circumstances where the child is subject to abuse or if the child faces imminent harm. The facts here however do not suggest that the daughter Danielle or either of her parents is subject to abuse or face imminent harm.

Therefore, the aunt must file the custody petition in State A because it has home state jurisdiction.

Grant of Custody to Aunt

The court is unlikely to grant legal custody of Danielle to her aunt. At issue is whether the parents are considered fit to care for Danielle.

The primary overriding concern in determining custody is the best interests of the child. Where a third party seeks custody, however, special weight must be given to the opinion and wishes of the parents if the parents are deemed to be fit parents. A parent is unfit if they have mental health issues such that they are incapable of caring for the child, or if they have neglected or abandoned the child. Furthermore, the court can consider other factors like geographic proximity, adjustment of the child, ability of the third party to care for the child, needs of the child, and the child's relationships with others. If the child is over the age of 12, the court also gives great weight to the preference of the child.

Here, the aunt is a third party seeking custody of Danielle. The aunt is likely not entitled to custody because it is not in the best interests of the child. The parents' custody rights

are generally not terminated unless they are an unfit parent. The facts here do not suggest that either Wendy or Frank is an unfit parent. Wendy's frequent traveling for work does not mean that she has fully abandoned the child. Frank's depression since his back injury is also unlikely to deem him an unfit parent. The child's preference will also not be given significant weight because the daughter is only 11 years old. Also, the daughter's brief statement during a temporary stay with her aunt is insufficient to award custody to a third party. Danielle has also lived in State A her entire life, while her aunt lives in State B. The geographical distance and dissimilarity do not weigh in favor of granting custody. Moreover, the adjustment of the child factor also weighs against awarding custody because of her permanent residence in State A.

Therefore, the court is unlikely to grant legal custody of Danielle to her aunt because her parents are both fit parents and special considerations of the parents weigh in favor of them retaining custody.

ANSWER TO MEE 6

(1) Subject-matter jurisdiction over the state law claim raised by the class action

The court should deny the motion to dismiss the class action on the grounds that the federal court lacks subject- matter jurisdiction over the claim. Ordinarily, to bring a claim in federal court, subject matter jurisdiction is required which must rest on either diversity or federal question jurisdiction. Federal question jurisdiction requires a federal issue raised as a part of plaintiff's well-pleaded complaint. Here, there is no federal question presented, as the only claim is brought under a state statute for damages provided for under that statute - no federal question is involved. There is also no diversity jurisdiction. Diversity requires diversity of citizenship between plaintiffs and defendants, and an amount in controversy exceeding $75,000. For class actions, the diversity requirement generally is that all named plaintiffs must be diverse from all defendants. Here, the named plaintiff is the man who is a citizen of State X. The defendant is Trident Healthcare, Inc., which is incorporated in State X and has its corporate headquarters in State X. A corporation is considered a citizen of anywhere it is incorporated and the place where it has its principal place of business. Here, although Trident has offices in States X, Y, and Z, its principal place of business is its headquarters in State X, and it is therefore a citizen only of State X. This means there is no diversity, as the man and Trident are citizens of the same state.

However, the man may still get into federal court under the Class Action Fairness Act (CAFA) which permits certain class action lawsuits to be brought in federal court so long

as there is diversity between the defendant and any named plaintiff, and the amount in controversy exceeds $5,000,000. Here, because the class includes citizens of States X, Y, and Z, the minimal diversity requirement is met, and because the complaint requests statutory damages in the amount of $500 per person, and there are at least 30,000 people whose personal medical information was obtained in violation of the state's privacy statute, and because the man has brought suit defining the class as being everyone whose medical records were stored in Trident's computers, the amount in controversy is $15,000,000. Therefore, this suit meets the requirements of CAFA and may be brought in federal court despite failing the diversity and federal question tests.

(2) Failure to allege a claim upon which relief can be granted because of the state law barring class actions to recover statutory damages

The court should deny the motion to dismiss on the grounds that the state law barring class actions from recovering statutory damages means the action has failed to state a claim upon which relief can be granted. The issue is whether State X's Civil Practice Rule should apply in federal court to bar the suit for statutory damages. The general rule in federal court sitting in diversity jurisdiction is that it will apply the substantive law of the state in which it sits, but apply federal procedural law. When it comes to determining whether an issue is procedural or substantive, the court must first ask whether there is a relevant federal law on point - if there is, such as in the Federal Rules of Civil Procedure, and such rule is constitutional (which the FRCP always are, because they are sent by the Supreme Court to be vetted by Congress before being promulgated), it will apply. If there is no federal law on point, the court will then go on to evaluate whether the issue is outcome-determinative or likely to result in forum-shopping, to determine whether the issue is substantive or procedural. Here, the court does not need to go this far, because the Federal Rules of Civil Procedure already address the issue and are directly on point, permitting class actions in federal court and governing their use; therefore, the State X Civil Practice Rule will not apply, the federal rule will apply, and the suit will be allowed to go forward.

(3) Standing to bring statutory damages claim in federal court

The court should deny the motion to dismiss on the grounds that the man lacks standing to bring the claim for statutory damages in federal court. At issue is whether the man has standing to bring the claim in federal court. The general requirements for standing are an injury in fact, causation, and redressability. The injury in fact must be concrete and particularized, not remote or speculative, and the case may not be moot or unripe. Here, the injury in fact is created by the statute, which creates a right to data privacy which was violated by the data breach. Causation is also clearly present, because it is alleged that Trident's failure to adequately keep private its patients' medical data is what caused the injury and redressability is also provided by the statute in the form of nominal damages to compensate for the statutory injury. Because the man had his privacy violated by the data

breach in violation of the statute, he is an appropriate plaintiff under the statute to bring suit, and therefore has standing.

It is also important, however, to examine the requirements for bringing a class action lawsuit to see if the suit is appropriate to be certified as a class action, and whether the man is an appropriate named plaintiff. The requirements for certification of a class action are numerosity, commonality, typicality, and adequacy of representation. Here, the class is sufficiently numerous - over 30,000 people - that bringing individual suits (especially for only $500 each) would clog up the court system and be inefficient, making class action appropriate. The class claims are all essentially the same, as everyone had their data stored in Trident's system and had their data breached, and are all claiming the same statutory damages from the same incident creating a breach of the state statute. The man, as named plaintiff, has claims typical of the entire class, as he is making the same claim for statutory damages from the same data privacy breach as the rest of the class. And, finally, the man is likely to provide adequate representation for the class, as his injuries are the same as everyone else and he has hired counsel with extensive experience in this type of litigation, meaning he will likely be effective in representing the class and appropriately litigating everyone's claims. Therefore, because the requirements for certification of a class action are met, the man is appropriate to represent the class.

ANSWER TO MEE 6

1. Subject Matter Jurisdiction

The court should dismiss the man's class action claim because the federal court has diversity jurisdiction under CAFA, which is permitted under 28 USC 1332.

Federal courts are courts of limited (subject matter) jurisdiction. The main ways to obtain subject matter jurisdiction in federal court is through federal question jurisdiction or diversity jurisdiction. In federal question jurisdiction, a question involving federal law must arise from the face of the plaintiff's complaint. In diversity jurisdiction, the ordinary rule requires complete diversity, where no plaintiff is a citizen of the same state as any defendant. In a class action, jurisdiction is judged by the named plaintiff. Diversity jurisdiction has an amount in controversy requirement where the claim must exceed $75,000 dollars. A corporation is a citizen of all of its states of incorporation and the one state where it has its principal place of business.

Here, there is no federal question jurisdiction because the class action claim is under state law, not federal law. There is also no diversity jurisdiction under the traditional rules.

Trident is a citizen of State X because it is incorporated in State X and its principle place of business (its corporate headquarters) is in State X. The named plaintiff is also a citizen of State X, which defeats complete diversity.

However, the district court would still be able to exercise diversity jurisdiction under the Class Action Fairness Act (CAFA). Under CAFA, a claim may be brought in diversity when it meets the following requirements: (1) Minimal diversity, where any plaintiff is of a different state from any defendant, (2) the aggregate amount in controversy across all claims is greater than $5,000,000 and (3) the controversy is not a "local controversy" where greater than 2/3 of plaintiffs are from the same state as the "primary defendant." Here, the case meets all the requirements of CAFA. First, Trident had its data breached for citizens of State X, Y, and Z, and all those citizens could seek $500 from damages under the State X statute, so minimal diversity is met. Second, the amount in controversy is definitively over $5,000,000 because Trident has at least 30,000 patients who can claim $500 in damages, and 30,000 * $500 = $15,000,000 > $5 million. Third, the principal defendant Trident is a citizen of State X, but only 5,000 of the 30,000 patients (less than 1/3 even, where CAFA jurisdiction is not discretionary) are citizens of State X. Because there is jurisdiction under CAFA, the court should not dismiss the class action for lack of subject matter jurisdiction (and if CAFA is not part of 28 USC 1332, then the plaintiffs should amend their complaint).

2. Failure to State a Claim

The court should deny Trident's motion for failure to state a claim. The issue is whether the Federal Rules of Civil Procedure apply over state rules in federal court.

Under the *Erie* doctrine there is no general federal common law. Instead, a federal court sitting in diversity applies the substantive law of the state in which it sits but applies federal procedural law. The difference between substantive and procedural is judged by many standards. Where a Federal rule is "arguably procedural," and constitutional, it will govern. Notably, the Federal Rules of Civil Procedure (FRCP) is nominatively procedural and is drafted by the Supreme Court and passed by Congress; all of its rules have been applied in federal court. Another test is whether a federal court applying the state "procedural" law would leave to forum shopping.

Here, there is a State X Civil Practice Rule that denies a class action to any action for statutory damages. However, FRCP Rule 23 governs class actions in federal court exhaustively and makes limited exceptions for claims not subject to class action (like securities claims); it does not have an exception for statutory damage claims. Were State X's Civil Practice Rules to govern here, Defendants would seek to get sued only in State X, which could lead to them engaging in sweet-heart deals with plaintiffs who only bring the class action in State X.

3. Standing

The court should not dismiss the claim because of lack of standing. The issue is whether a state providing a statutory damages provision can provide an injury in fact for Article III purposes.

Federal courts are limited by Article III's cases and controversies requirement, where each plaintiff in federal court needs standing. Standing requires that a plaintiff have 1) an injury-in-fact, that is 2) caused by the challenged action, and that is 3) redress able by a court. An injury-in-fact is certainly a common law economic injury claim, but may also include novel injuries. Because standing is a requirement in the Constitution, states and Congress may not expand "injury in fact" by legislating that standing exists for certain injuries. However, legislatures can create new rights leading to injuries that create standing.

Here, there is no question that the man satisfies the second and third standing elements because his invasion of privacy was caused by Trident failing to keep information private and Trident can pay him $500 for that harm. The $500 statute by the legislature also constitutes an injury in fact; it is a claim that the legislature provided in statute as an estimate of the harm felt from the invasions of privacy. This is no different than a legislature enacting a statute setting dollar amounts for workmen's compensation. Invasion of privacy is even a common law tort action. As such, the man has injury in fact and article III standing.

ANSWER TO MPT 1

To: Alexandra Carlton
From: Examinee
Date: July 30, 2019
Re: American Electric V. Wuhan Precision Parts Ltd.

1. Will WPP succeed in vacating the default judgment due to improper service under the Federal Rules of Civil Procedure and the Hague Convention?

As you know, this is an issue of first impression in our courts. However, both the Olympia Court and the Columbia court have analyzed this issue and found that formal Hague Procedures do not need to be followed to enforce all arbitration agreements. But, they disagree on the standard that should be used. Below is a summary of Olympia's test and then Columbia's test and an analysis of what these means for our client.

a) Olympia Court test: Fairness standard

In Auto Dealers Ass'n v. Peason (15 Cir. 1996), the Court held that entry into an agreement to arbitrate in a particular jurisdiction constitutes consent to PJ and Venue. However, In Penn Coal, the Olympia Court was deciding an issue of first impression: does consent to arbitrate in Olympia also relay the service of process requirements of the Hague Convention? In addressing this issue, the court in Olympia pointed out that it was weighing two considerations. The first consideration was that "[w]hen a foreign corporation . . . agrees to participate in an arbitration proceeding in the US, it cannot expect that it can consent to an Olympia arbitration, participate in it, and then, in the event that it loses, s*eek refuge in the protections of the Hague Convention to avoid facing any consequences in Olympia*." Pennsylvania Coal Co. v. Bulgaria Trading & transport Co Ltd. United State District Court for the District of Olympia (2001). Essentially, the court was hesitant to rely on the Hague Convention when used as a shield to enforcing arbitration proceedings that were entered in good faith by both parties. The court went on to state its second consideration: "this court recognizes that judicial proceedings are different from arbitration proceedings and that the expectation of parties to an arbitration must be balanced against the right of fair notice."

Because the Federal Arbitration Act was silent on the issue, the Olympia court decided to follow a line of cases from arbitration proceedings where "defects in service of process may be excused where considerations of fairness so require. Where parties have consented to arbitration, actual notice of the proceedings can be sufficient as long as it is fair and no injustice results. "Pennsylvania Coal Co. v. Bulgaria Trading & transport Co Ltd. United State District Court for the District of Olympia (2001).

Penn coal was an American company who was doing business with BTT - a Bulgarian company. When applying this "fairness" test to the Penn Coal case, the court found that Penn Coal tried in good faith to comply by delivering its pleading to the Bulgarian authorities, as required by Hague Convention. The court continued by stated BTT clearly received notice - an email with the complaint sent by Penn Coal to the BTT executive who was the contact for arbitration. Although Email is not typically authorized by the Federal Rules of Civil Procedure - the court found because it was s the means by which the parties communicated during the arbitration. - Service via email was a reliable means of delivering the complaint to BTT and was reasonably calculated to give BTT actual notice and the arbitration agreement was enforced. Pennsylvania Coal Co. v. Bulgaria Trading & transport Co Ltd. United State District Court for the District of Olympia (2001).

In our case AE is going to try to draw on the similarities in service of Penn Coal and in our case at hand. Specifically, AE will likely argue that they too served the same executive, via the same email used throughout the arbitration proceedings. Moreover, according to AE and the default judgment, AE did try some means of serving process

through the Chinese government, as required by Hague and similar to Penn coal. However, there are a few distinctions we can emphasize, 1) the executive that they emailed wound up quitting without forwarding the email to anyone - although that is not AE's fault, it also is not WPP's fault and could be argued negates actual notice. 2) the Hague Convention requires the Complaint be translated into Mandarin Chinese when served. Since WPP never received anything from the Chinese government, it has not been shown that the complaint was in Chinese as well. Further, the complaint was not in Chinese when sent directly to WPP at all, and that contributed to the delay of the mail service getting to the right person. 3) Although email was used for the arbitration, when doing regular business AE and WPP communicated by fax and phone. AE did not use any of these channels to communicate with WPP through this process. In fact, WPP said if they had this would thing would have been resolved way quicker.

However, the court did not find that Penn Coal's good faith effort was enough on its own. They went on to analyze the defendant's actions in response to the arbitration award and the civil judgement. The court stated specifically that, the lengths to which BTT went to evade its contract obligations and avoid accountability for the arbitrators' award cannot be rewarded. - i.e. their moving of assets that could have been used to satisfy the arbitration awards and claiming the Penn Coal's equipment was defective - is highly relevant and must be considered. Pennsylvania Coal Co. v. Bulgaria Trading & transport Co Ltd. United State District Court for the District of Olympia (2001). It is vital we distinguish WPP from the BTT in this regard. First, WPP had begun to pay some of the arbitration agreement. According to our client, they had paid half of the $500,000 damages award for the breach of contract claim on the motors. They have no paid the $25,000 award for royalties or the $110,000 for attorney's fees but that was not due to shifting assets or trying to delay or deny paying. In actuality, there was an economic down turn that resulted in a cash flow problem.

Ultimately, the court in Olympia held that The Hague Convention is not designed to be a roadblock to those who act in good faith. If the Franklin court adopts this approach, it may find that AE acted in good faith and thus WPP cannot use the Hague Convention as protection. However, due to the substantial differences between how BTT acted compared to our client, WPP, we also have a strong argument that there was good faith on WPP's side. Moreover, we should argue that failure to 1) have the complaint be written in Chinese at any point and 2) failure to fax a copy of the complaint or pick up a telephone shows that AE was not actually acting in good faith. If the court weighs all the facts as laid out, and applies this Olympia test, it could come out either way. It will be essential to rely on Supreme Courts admonition that compliance with the Hague Convention is "mandatory in all cases in which is applies" Volkswagonwerk AG v. Schlunk, 486 U.S. 694 705 (1988). However, our client does have a good argument that AE did not entirely act with good faith and that WPP acted completed different then BTT - as such - fairness does not require abandoning the Hague Convention.

b. Columbia Court test: Deemed Waiver

The Columbia courts were the next courts to decide this issue. When making its determination on similar facts to Penn Coal, the court cited Penn Coal and stated fairness is too loose to serve as a guide as to when courts can excuse noncompliance with Hague Convention and federal rules of civil procedure 4. The Columbia court held that agreeing to the underlying contract provision allowing court judgments to be entered serves as a deemed waiver of formal Hague Convention Service in connection with confirmation of arbitration award. Essentially, the court read the parties' contract as consenting to service by actual notice that satisfies the general principle of due process and the federal rules rather than the strict formality of the Hague convention. Deemed waiver approach should be available to protect good faith litigants like EQ who attempted formal Hague convention service. EduQuest Digital corp. v. Galaxy Productions Inc. U.S. District Court for the District of Columbia (2005).

In Eduquest, Galaxy was a company based in Beijing china and Eduquest was a company based in Columbia. Eduquest filed the Hague Convention requirements by translating the documents in to Chinese and serving them on the gov. However, once they heard nothing back they provided service by personal delivery upon a Beijing agent of Galaxy and service by international mail. The Columbia court found that the contract agreeing to arbitration serves as a deemed waiver of formal Hague Convention Rules. Thus the actual notice Galaxy received was reasonable and sufficient.

If the Franklin Court Follows this rule, this would be harder for WPP because their conduct would not be considered here. Again they should point to a lack of Chinese translation even being served. Additionally, they should draw a strong distinction between personal services on an agent in Beijing (Eduquest) vs. email to an agent. However, ultimately, it will definitely be a harder argument - due to not analyzing WPP's good faith.

As such, we should strongly argue in opposition to this test while anticipating that AE will argue for it. However, if this is the test the court goes with, it is unlikely our client will get a favorable result. The presumption of deemed waiver by signing an arbitration agreement is hard to overcome.

2. Are there any grounds to challenge the attorney's fee award?

Although the first issue was split, both Olympia and Columbia agreed on how to handle additional attorney's fee awards in cases where the court is asked to put in a civil judgment for a previous arbitration award. In the case at hand, the default judgment added $90,000 dollar in attorney fees to reimburse AE's attorney fees for filing the judgment in civil court. Similar to our case, in Penn Coal, the plaintiff asked the court for an additional $75,000 in attorney's fees to reimburse them for the court proceedings to

affirm the arbitration agreement. Similarly, in Eduquest, plaintiff's asked for an additional $95,000 in attorney's fees to reimburse them for the court proceedings to affirm the arbitration agreement.

In Penn Coal, which was decided first, the court denied the additional attorney's fees on two grounds. They held that 1) the request for fees for litigating before this court is a "new claim for relief". A new claim requires services that comply with the FRCP and the Hague Convention. (see FRCP 5(a)(2). under Hague convention, the party raising a new claim must deliver a copy of that claim to the foreign governing authority which will then deliver it in accordance with local judicial process, which Penn Coal did not do. And 2) the arbitration agreement allows for prevailing party to obtain attorney's fees but contain no reference to judicial remedies in that regard. Thus this must go back to arbitration to pursue. Especially appropriate given that this court employed "fairness" principles when upholding the judgment confirming the arbitration award. Pennsylvania Coal Co. v. Bulgaria Trading & transport Co Ltd United State District Court for the District of Olympia (2001). The court in EduQuest agreed with the Penn Coal court that the fee request is a "new claim for relief" and under Rule 5(a)(2) formal government service under the Hague Convention is required. Both courts denied the plaintiff's award for attorney's fees.

Unfortunately, WPP will not be able to challenge with additional attorney fees under the 2nd rational of the Penn Coal court - because their arbitration agreement contained a clause stating "the prevailing party shall be entitled to recover its costs and expenses (including reasonable attorney's fees) incurred to enforce the terms of this agreement. As such, they would not need to go back to arbitration as the Penn Coal court decided.

However, WPP will still be able to challenge the attorney's fee award by challenging whether formal Hague Convention service was followed by American Electric Distribution. "When Chinese entities are involved, the Hague Convention requires that the serving party translate the documents into Mandarin Chines and deliver the documents to the Chinese Central Authority which will effectuate service through its provincial courts." EduQuest Digital corp. v. Galaxy Productions Inc. U.S. District Court for the District of Columbia (2005). In the default judgment in the case at hand, the court mentions that AE did try formal Hague Convention Service but received no communication. However, from what our client tells us, they did not receive anything from the Chinese government. Specifically, in the order entering a default judgment, the court states that "AE's subsequent motion for a default judgment which added a request for $90,000 in attorney's fees was served on WPP by mail. As such, although the court made reference to an attempted formal Hague Convention service of its pleadings - our client has two arguments: 1) there is no proof that any formal service through Hague Convetion standards was actually served on our client and 2) more specifically, the additional motion with the $90,000 in attorney's fees was only served through mail to WPP - which is not correct under the Hague Convention at all. Moreover, there is no

indication that any of these documents were served on the Chines Government or our Client in Mandarin Chinese, which is also required.

This is a strong argument against imposing additional attorney's fees for our client and also was their most important issue - so we will likely be able to deliver them some good news.

ANSWER TO MPT 1

To: Alexandra Carlton
From: Examinee
Date: July 30, 2019
Re: American Electric v. Wuhan Precision Parts Ltd.

MEMORANDUM

This memorandum explores whether our client Wuhan Precision parts Ltd. (WPP) will be held liable for a default judgment entered against it by the United States District Court for the District of Franklin in favor of American Electric Distribution Inc. (AE) pursuant to an arbitration award. This memorandum first looks at whether the default judgment may be vacated due to insufficient service of process, then determines whether there are any grounds to challenge the attorneys fee award issued by the District Court.

(1) Will WPP succeed in vacating the default judgment due to improved service under the FRCP and the Hague convention?

The Federal Arbitration Act does not provide a method for service of process of petitions to confirm arbitration awards for foreign parties. EduQuest Digital Corp. v. Galaxy Prod. Inc. (D. Columbia 2005). The Federal Rules of Civil Procedure require service of process for international parties to comply with the Hague Convention. Penn. Coal Co. v. Bulgaria Trading & Transport Co. (D. Olympia 2001) (citing Fed. R. Civ. P. 46(f)(1)). The Hague Convention requires that a party serve process upon a general governmental authority, which in turn will affect service of process upon its own entities or citizens. *Id.* The Supreme Court has stated that compliance with the Hague Convention is "mandatory in all cases to which it applies. Volkswagen AG v. Schlunk, 486 U.S. 694, 705 (1988). Additionally, generally, if a party is not properly served, subsequent judgments founded upon that improper service are void and must be vacated. *See, e.g.*, In re Int'l Media Services Inc. (15th Cir. 1998). However, in some circumstances, a judgment rendered

after deficient service of process as dictated by the Hague Convention may still be upheld. *See* Penn. Coal Co.

Courts are divided as to when defects in service of process in cases arising from arbitration proceedings should lead to vacation of default judgments. Some courts follow a "fairness" approach, which balances the equities to determine whether failure to follow Federal Rule of Procedure 4 and the Hague Convention should bar enforcement of a default judgment. Penn. Coal Co. Other courts find that agreeing to arbitrate in a given district and participating in arbitration proceedings there is a "deemed waiver": in such instances, a party waives "formal Hague Convention service in connection with confirmation of an arbitration award." EduQuest. Such courts find that actual notice is enough to satisfy service of process requirements.

This memorandum will go on to examine the facts that support vacating WPP's default judgment and those and undermine such a vacation under both the fairness and deemed waiver approaches.

(a) Fairness

Courts following the fairness approach balance the expectations of the parties to the arbitration agreement against the right to fair notice. Penn. Coal Co. These courts have found that, when a party has consented to and appeared in an arbitration proceeding in the US, strict adherence to the Hague Convention is not required. *Id.* Rather, "fairness" is considered. When considering fairness, the court will look to whether the foreign party had actual notice. *Id.* They will also look to the means used to effectuate service, and whether those means were "reliable" and "reasonably calculated to give . . . actual notice." *Id.* Additionally, the court will look to the conduct of the party looking to vacate the judgment and whether they appear to be trying to evade a valid arbitration judgment. *Id.*

(i) Facts that support

(1) Email service

Here, AE served the summons and complaint to WPP through email to the VP of Manufacturing. American Electric Distribution Inc. v. Wuhan Precision Parts Ltd., CV 13-199- SJK (D. Franklin June 14, 2019). Generally, email service is not authorized. Penn. Coal Co. However email service will be deemed sufficient when it is reasonably calculated to give actual notice. *See id.* Here, however, we have a strong argument that email service was not reasonably calculated to give actual notice. The parties did not normally conduct their business through email. Rather, through their regular course of business, they communicated through fax and calls. Therefore, a strong argument is that

AE should have used those channels of communication to give actual notice, and that e-mail was therefore not reasonably calculated to give actual notice.

(2) WPP's Conduct

A party's conduct in trying to evade an arbitration award is "highly relevant." Id. In Penn. Coal, the party seeking to vacate an arbitration award took great steps to avoid paying the arbitration award, including moving assets. Id. Here, WPP is not a bad actor. In fact, they have already paid part of the arbitration award to AE. Therefore, we will be able to point to these facts to distinguish our case from that of Penn. Coal. A court would not be "rewarding" WPP in trying to evade an arbitration award, because WPP has not been trying to evade said award.

Additionally, a court will look to whether WPP was acting in good faith throughout the process of the enforcing the arbitration award. We can point to facts supporting WPP's good faith: the VP who received notice of the summons and complaint left the company and did not tell anyone about it. Therefore, WPP has not been acting in bad faith.

(3) Service by Mail

AE served their motion for default judgment by mail. This motion was in English, and not translated into Mandarin Chinese. We can make an argument that this service was not reasonably calculated to give actual notice, as it was not in the language used by WPP. This is shown by the fact that WPP had to send the motion to a translator upon receipt, and did not immediately know what the document said.

(ii) Facts that undermine

(1) Email in Arbitration

Notwithstanding the discussion of email above, a court may still deem the email service of process as adequate because the parties used email in their arbitration proceedings. Penn Coal Co.

(2) WPP Received Email

As discussed in further detail below, WPP did receive notice of the summons and complaint by waiver. Even though the employ who received the summons and complaint quickly left the company thereafter, a court could still find that WPP did have actual notice of the summons and complaint.

(b) Deemed Waiver

Under the deemed waiver approach, a party waives the requirements of the Hague Convention when it has actual notice. In order to succeed under this approach, we will have to argue that WPP did not have actual notice of the summons and complaint.

Facts supporting WPP's lack of actual notice are that the VP who received the summons and complaint left the company shortly after receiving the summons and complaint and did not tell anyone else about it before he left. Therefore, we will have to argue that this was not actual notice. A court, however, may find that this is enough to count as actual notice.

We will also have to argue that the other means to effectuate service used by AE did not constitute actual notice either. AE tried to effectuate service through the government of China.

However, the government did not give WPP actual notice of the summons and complaint before entering default judgment.

(2) Are there any grounds to challenge the attorney's fee award?

The attorney's fees may be challenged on the ground that they are a "new claim of relief." When attorney's fees are sought in conjunction with enforcement of an arbitration agreement, they are a "new claim for relief" that is distinct from the arbitration award. *See* EduQuest. Because they are separate from the arbitration award, the Federal Rules of Civil Procedure require that service of process meet the standard set out under the Hague Convention. Fed. R. Civ. Pro. 5(a)(2). Therefore, while the arbitration may be enforced without service of process meeting the Hague standards, an award for attorney's fees must be. Therefore, because AE did not meet the Hague standards (no service of process through the government of China was effectuated), AE is not entitled to a new award of attorney's fees.

We may also argue that AE may only receive attorney's fees through arbitration, not by order of a court. That is because, when an arbitration agreement does not specify attorney's fees may be sought through a judicial remedy, attorney's fees must be sought through arbitration. See Penn Coal Co. Because the arbitration agreement signed by WPP did not say that attorney's fees may be sought as a judicial remedy, only attorney's fees may be awarded by an arbitrator. However, this course of action would require us to go to arbitration with AE on the issue of attorney's fees.

ANSWER TO MPT 2

Buckman & Carraway
Attorneys at Law
240 West End Highway
Middleburg, Franklin 33905

MEMORANDUM

To: Dana Carraway
From: Examinee
Date: July 30, 2019
Re: Carl Rucker

Introduction

Mr. Rucker seeks advice as to how to best dispose of his assets upon death. He ideally would like to maximize three goals: (1) to ensure that his wife, Mrs. Rucker, can remain in their current home for the remainder of his life; (2) to ensure that his son's from his first wife, Fred and Andrew, will receive the house after she dies (as opposed to its value in cash); and (3) to minimize the risk of litigation between Mrs. Rucker and his two sons, given the bad blood between them. In light of these factors, the below analysis will review the advantages and disadvantages of the two primary options Mr. Rucker has - a life estate in Mrs. Rucker, or a contract to make a will with Mrs. Rucker - as well as each option's effect on the elective share that Mrs. Rucker may choose to take if Mr. Rucker predeceases her, regardless of the manner in which Mr. Rucker chose to dispose of his assets. Finally, the analysis will conclude with a recommendation as to the best method for meeting Mr. Rucker's goals.

Approach 1: Life-Estate for Mrs. Rucker with remainder to sons

Overview

The owner of real property can create an interest in a person currently entitled to possession for such person's life; this is known as a life estate, and the person who receives the interest is a life tenant. *See* Walker's Treatise of Life Estates ("Treatise"). A life tenant has absolute and exclusive right to use of the property in the life estate during his or her lifetime. *Id.* The rights of a life tenant expire automatically upon the death of the life tenant, after which the remaindermen will be entitled to take possession. *Id.*

Advantages

(1) A life tenant can sell or transfer his/her interest, but the transferee can only have the estate for as long as the life tenant lives. *Id.* The same is true for any mortgage the life tenant places on the property. *Id.* This would prevent Mrs. Rucker from encumbering or selling the property to the extent that it would deny Fred and Andrew's future enjoyment. While she can use the property as she wishes during her lifetime (such as to take out a mortgage on it for necessary repairs that she cannot otherwise afford), the mortgage will not carry over to Fred and Andrew, burdening them unreasonably.

(2) If a life estate is made inter vivos by deeding and transferring the interest, upon the life tenant's death, their interest will pass automatically to the remainder owners without the need for probate. *Id.* Since there is no bar in Franklin on one spouse transferring title to property titled solely in his/her name without the consent of the other spouse, *id.*, this would be an option for Mr. Rucker. This would avoid the potentially aggressive litigation that could arise between Mrs. Rucker and the two sons in a probate situation, where the two compete for assets.

Disadvantages

(1) Though a life tenant is entitled to full possession of the property during his or her life (or to rents from the property should the life tenant rent it to another), life tenants are responsible for real estate taxes, insurance, and maintenance costs related to the property. *Id.* Given that Mrs. Rucker does not have a pension or retirement account, and would be relying entirely upon Social Security payments after her impending requirement, *see* Transcript of Client Interview with Mr. Rucker ("Transcript"), it may be difficult for her to manage to afford repairs after Mr. Rucker's death.

(2) Remainder owners have no right to use the property or income from the property during the life tenant's lifetime. *Id.* Fred and Andrew would not be allowed to use the house at all during Mrs. Rucker's life if she so precludes this. Given their emotional attachment to the house, *see* Transcript, this could be a very difficult thing for them to accept, and it might fuel tensions.

(3) Life estates made inter vivos are hard to revoke, and such revocation cannot occur absent the consent of all life tenants and remainder owners. *Id.* The consent of all such owners is also required for a sale or a mortgage of the property's full value. *Id.* Therefore, if Mr. Rucker executes an inter vivos life estate deed/transfer and comes to regret his decision due to a change in family dynamics or some other change in circumstances, it will not be as easy to revoke as would, say, a will.

(4) If a life tenant's actions or neglect harm the property, the remainder owners can sue the life tenant or his/her estate for damage in an action for waste. *Id.* Thus, if Mrs. Rucker

were to cause waste to the property, the risk of litigation that Mr. Rucker hopes to avoid could still present itself.

(5) Life tenancies created by will (as opposed to inter vivos) can add costs of litigation, and there is a risk that the life tenant (and ultimately remaindermen) get monetary value of the estate as opposed to possession, defeating a testator's wish to have the life tenant live in the residence. *Id.* Thus, were Mr. Rucker to pursue this option, he should probably do so through an inter vivos transfer to ensure that Mrs. Rucker can remain in the house during her lifetime as opposed to receiving money (this would also allow Fred and Andrew to take the house once their possessory right becomes present).

Effect on elective share

Spouses, upon their spouse's death, can claim an elective share as opposed to whatever is devised to them - this is the elective share. *Id.* Spouses married for 15 years or more are entitled to 50% of an estate as the elective share. *See* In re Estate of Lindsay (Franklin App. Ct. 2008) ("Lindsay"). The value of a life estate is included in calculating the elective share of the surviving spouse (regardless of whether it is an inter vivos or testamentary life estate). *See* Treatise. The elective share calculated from the augmented share, which includes three categories of assets: (1) the net assets in the probate estate; (2) assets transferred by the decedent to the decedent's spouse before death; and (3) the surviving spouse's own assets and pre-death transfers (*Lindsay*, citing the Franklin Probate Code §§ 2-204, 206-07).

Since the value of the augmented estate includes both the probate estate and the life estate, id., a life estate transfer to Mrs. Rucker would include such value in calculating elective share. However, the full fair market value is not the correct figure to calculate the value of the life estate. *Id.* Instead, it is a separate value, which has been calculated here to be $80,000 (versus the fair market value assessment of $250,000). *See* Appraisal. Therefore, in a life estate situation, Mrs. Rucker's elective share would be less. She could only receive half (since she and Mr. Rucker have been married more than 15 years) of the total of $280,000 (which includes Mr. Rucker's long-term certificates of deposit).

Approach 2: Contract with Mrs. Rucker to leave the house to Mr. Rucker's sons after he dies

Overview

Contracts can be made to restrict bequests made by another person under will. *See* Manford v. French (Franklin App. Ct. 2011). The first option is to enter into a contract to make a will, requiring a survivor not to change the terms of an already-agreed-upon will. *Id.* The second option is to create a joint will to reflect a contractual agreement between the two joint testators. id. A joint will is one signed by two or more testators that deals

with the distribution of property of each testator. *Id.* A contract to make a will (including joint wills) must be in writing, and can only be established by provisions of a will stating material provisions of the contracts; an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or in writing signed by the decedent evidencing the contract. *Id.* citing Franklin Probate Code § 2-514.

Advantages

(1) If there is, in fact, written evidence of a contract to make a will or a joint will, this helps reduce the risk of future litigation.

(2) A proper contract to make a will or a joint will shall preclude the survivor from making changes to the will. *Id.* However, if Mrs. Rucker (as the survivor) still sought to make changes anyways, that would still result in the sons having to take her to court.

Disadvantages

(1) A contract for a will does not prevent a survivor from transferring property during the survivor's lifetime. *Id.* The survivor can sell or encumber property without breaching the contract, as long as the agreed-upon will remains the same (*Id.*, citing Kurtz v. Neal, Franklin Sup. Ct. 2005). This could frustrate an important aim of Mr. Rucker's in ensuring that his son's get the house. Mrs. Rucker could easily pass it to her charity, which Mr. Rucker is worried about. *See* Transcript.

(2) The execution of a joint will alone does not create a presumption of a contract not to revoke the will or wills. *Id.* citing Franklin Probate Code § 2-515. Mr. Rucker would have to be careful to ensure that he meets the writing requirements of the probate code.

Elective share

Considering the above analysis, Mrs. Rucker would take a higher elective share under a joint will or a contract to make a will. The value of the real estate would be the full fair market value of $250,000, since there is no life estate involved. Thus, Mrs. Rucker would take half of $450,000, which is much greater.

Recommendation

Overall, an inter vivos life estate is the best approach. It ensures that Mrs. Rucker can live in the house during her lifetime and cannot sell or encumber it beyond her tenancy. As an inter vivos life estate, it would also practically ensure that Mr. Rucker's sons get the remainder as opposed to money (though they would). There is still a risk of litigation in the case that Mrs. Rucker is to commit waste, but it would be hoped that her and the sons could come to an understanding regarding this. The reduced value of the elective share

probably will not matter if Mrs. Rucker is specifically devised the amount of money that Mr. Rucker has in certificates of deposit as well.

ANSWER TO MPT 2

Buckman & Carraway
Attorneys at Law
240 West End Highway
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To: Dana Carraway
From: Examinee
Date: July 30, 2019
Re: Carl Rucker

In response to your July 30 memo, I have prepared a memorandum discussing two possible approaches for making sure that Mr. Rucker's house can be lived in while Mrs. Rucker is alive, and that it will be guaranteed to pass to Mr. Rucker's two sons upon Mrs. Rucker's death: (1) creating a life estate in the house for Mrs. Rucker while she is alive, with the remainder to Mr. Rucker's sons; and (2) contracting with his wife to write wills that leave the house to his sons after both he and Mr. Rucker have died. In considering these two options, I have put special emphasis on trying to eliminate or lessen the risk of litigation between Mrs. Rucker and the two sons, given that they do not get along.

After considering these two options, I think the best recommendation for Mr. Rucker is that he enter into a valid, written contract with Mrs. Rucker that she be obligated to give the house to Mr. Rucker's sons upon her death. This option will require carefully complying with the formalities of such a contract under Franklin law, but it is most likely to eliminate unnecessary litigation following Mr. Rucker's death. It will also give Mrs. Rucker title to the house during her life, which may give her greater flexibility in financing, should she need additional money. However, there are benefits to both choices, and I will address each in turn. Additionally, per your instructions, I will address the effect of each on Mrs. Rucker's elective share under Franklin law, should she choose to exercise that.

I. Life Estate to Mrs. Rucker Followed by a Remainder to Mr. Rucker's Two Sons

As a preliminary matter, Mr. Rucker has the legal right to transfer to Mrs. Rucker a life estate in the house on Cherry Tree Road either during life or in a will. In Franklin, there

is no limitation on the ability of a sole spouse who has sole ownership over a residence to transfer title to that residence. *Walker's Treatise on Life Estates* (*Walker*). Thus, since Mr. Rucker holds sole title to the residence, (*see* R. at 3.), he has the right to transfer ownership in the residence as a life estate for Mrs. Rucker with a remainder for Mr. Rucker's sons.

a. Benefits of the Life Estate Approach

The first benefit to the life estate approach over the contract-to-will approach is that life estates transferred during the grantor's life are almost always irreversible under Franklin law. *Walker*. Thus, once the transfer of the life estate is affected, Mr. Rucker can be sure that it will go through precisely according to the terms of the deed. In addition, if Mrs. Rucker predeceases Mr. Rucker, rights in the house will revert to Mr. Rucker without a probate process. *Walker*. So Mr. Rucker will not have to be concerned that granting a life estate to Mrs. Rucker will cause extra costs in the event that Mrs. Rucker predeceases Mr. Rucker.

Second, as the holder of the life estate, Mrs. Rucker will be entitled to absolute sole possession of the life estate during her life. *Walker*. Mr. Rucker's sons will have no action to evict Mrs. Rucker from the property as remaindermen, so Mr. Rucker can rest assured that Mrs. Rucker will maintain the right to live in her house during her lifetime.

Third, Mr. Rucker mentioned in his interview that he is concerned that Mrs. Rucker may not be able to pay for the costs associated with the property without taking out some sort of mortgage on the house. Mrs. Rucker, as the life tenant, will be required to pay real estate taxes, insurance, and maintenance costs related to the property during her life. Mr. Rucker mentioned that the property taxes alone are around $1,700 a year. Ordinarily, all parties involved in a life tenancy, including the remaindermen, must consent to a mortgage on the life estate. *Walker*. However, under Franklin law, if the life estate is transferred in a deed, the deed can empower a life tenant to sell or mortgage the property from which the life estate is carved without the consent of the owners of the remainder interest. Thus, if Mr. Rucker conveys the house to Mrs. Rucker by deed and explicitly empowers Mrs. Rucker to take out mortgages on the property, she will be able to achieve the financing she may need in case of any emergencies. Moreover, if the deed does *not* empower Mrs. Rucker to sell the house, she will be required to obtain the consent of the remaindermen before she does so (unless the deed states otherwise). So if the life estate is transferred by deed, Mr. Rucker can exercise a fair degree of control over how it is used.

b. Drawbacks to the Life Estate Approach

The major drawback with the life estate approach (aside from its effect on the elective share, discussed below), is that it may expose Mrs. Rucker to an unnecessary risk of litigation regarding waste of the property. Remaindermen can bring actions against a life

tenant to require the life tenant to make necessary payments and to prevent waste. *Walker*. Even if Mrs. Rucker does not let the house fall into disrepair, Mr. Rucker's sons, if they are truly litigious, could harass Mrs. Rucker with waste litigation for ameliorative waste (if Mrs. Rucker improves the property), or with assertions that she is not making necessary repairs or paying for them (as she is required to do as the life tenant). Thus, the life estate approach exposes Mrs. Rucker to a serious risk of litigation after Mr. Rucker's death.

The other major drawback, as alluded to above, is that Mrs. Rucker will be required to pay all property taxes, real estate taxes, and maintenance costs related to the property. While she will likely be obligated to pay the first two even if the property is transferred by will, being a life tenant also obligates Mrs. Rucker to make necessary repairs. Mr. Rucker's sons could compel her to do this even if she couldn't afford it.

c. Effect on Elective Share

Another drawback to the life-estate approach is that the value of the life estate will be carved out of Mrs. Rucker's elective share, should she choose to exercise it. Since the life estate is valued at $80,000 according to the appraisal, this means that $80,000 will be taken out of the value of Mr. Rucker's augmented estate, if Mrs. Rucker chooses to exercise her elective share. Since Mr. and Mrs. Rucker have been married for 18 years, under Franklin law, Mrs. Rucker will be entitled to 50% of Mr. Rucker's augmented estate upon his death, should she choose to pursue the elective share option. *In re Lindsay*. Since Mr. Rucker's only real assets upon death (since he has no retirement or pension) are the $200,000 in certificates, this means that his augmented estate will be $280,000. Mrs. Rucker will then be entitled to only $140,000 under the elective share approach, *minus* the value of the life estate, so she will end up with only $60,000 under the elective share approach. It is unlikely that Mrs. Rucker will elect this approach, given that Mr. Rucker is planning on giving her $200,000 outright, but should the opportunity arise, Mrs. Rucker will be severely disadvantaged under the life estate approach.

II. Contract to Make a Will

In Franklin, parties can make a contract before death such that a will must be written in a certain way. To form such a contract to make a will, there must be (i) provisions in a person's will that reference the material provisions of the contract; (ii) an express reference in a will to a contract and any other extrinsic evidence providing terms of the contract; and (ii) the contract must be in writing signed by the decedent. *Manford.* Moreover, the execution of a joint will between parties is insufficient to form a binding contract to make a will. Thus, if a husband and wife execute a joint will, and the husband dies, the wife can revoke the terms of the joint will in a subsequent will. *Manford.* However, if the formalities of a contract to make a will are complied with, the surviving spouse must comply with that contract in their will. *Manford*.

a. Benefits to the Contract Approach

The major benefit to the contract approach, over the life estate approach, is that Mrs. Rucker will own the house outright during her lifetime, and Mr. Rucker can require her to give the property to his sons after Mrs. Rucker's death. This means that Mr. and Mrs. Rucker will have to enter into a writing signed by both of them to guarantee that Mrs. Rucker will leave the house to Mr. Rucker's children in the will. This may create some acrimony between Mr. and Mrs. Rucker now, but it will provide assurances that the property will be devised exactly as Mr. Rucker wants. Mr. Rucker can then either transfer the house to Mrs. Rucker *inter vivos* or in his will, without concerns that his children will not eventually get the house after Mrs. Rucker's death. It must be noted, however, that the writing *must* be complied with, and Mr. Rucker's will must explicitly reference the writing, so that Mrs. Rucker will be bound. If they merely agree orally, or simply enter into a joint will, Mrs. Rucker could enter into a subsequent will revoking the joint will. Thus, I would recommend that the Ruckers enter into a joint will to leave the property to Mrs. Rucker upon Mr. Rucker's death, then to Mr. Rucker's sons after Mrs. Rucker's death, and that they also enter into a signed writing that can be enforced stating that Mrs. Rucker may not transfer the house and that Mr. Rucker's sons are to receive it upon her death.

The other major benefit to this approach is that Mr. Rucker's sons will have no remainder rights during Mrs. Rucker's lifetime. This means that they cannot harass her regarding maintenance or asserting waste.

b. Drawbacks

The only major drawback regarding the contract-to-make a will approach is that all formalities must be strictly complied with, or Mrs. Rucker might be able to cut the sons out of receiving the house.

c. Effects on Elective Share

The contract to will approach will not affect Mrs. Rucker's elective share. She will take half of the augmented estate, which will be $200,000 (value of house plus certificates). Again, she is unlikely to exercise this approach.