Maryland State Board of Law Examiners

OCTOBER 2020 REMOTE BAR EXAMINATION IN MARYLAND – REPRESENTATIVE GOOD ANSWERS

NOTICE: These Representative Good Answers are provided to illustrate how actual examinees responded to the Multistate Performance Test (MPT) and the Multistate Essay Examination (MEE 1-3) in October 2020. The Representative Good Answers are not "average" passing answers nor are they necessarily "perfect" answers. Instead, they are responses which, in the Board's view, illustrate successful answers written by applicants who passed the October 2020 Remote Bar Exam in Maryland. These answers are reproduced without any changes or corrections by the Board, other than to spelling and formatting for ease of reading.

MEE 1

Representative Good Answer No. 1

I. Aldo's Purchase of All-Electric Garbage Truck

a. Partnership bound by K

The partnership is bound on the purchase contract for the garbage truck. At issue is whether a single partner may bind the entire partnership to a contract without express authority from the other partners and when the purchase constitutes an ordinary purchase based on the type of partnership business. Partnerships are recognized as distinct legal entities that can be legally bound to contracts based on the actions of its constituent partners. Because there is not a governing partnership agreement, it can be inferred that the default rules of partnership under RUPA will govern (notwithstanding any jurisdictional specific rules not mentioned in the fact pattern). Under RUPA, partners act as typical agents of a partnership, which serves as principal. There does not need to be any explicit agreement for partners to act unilaterally in binding the partnership to a contract as long as the partners act with properly recognized authority. There is both actual authority, which arises from express authorization (not at issue here because the other partners forbid the purchase) or implied authority which arises from the agent's perception of the principal (i.e partnership) conduct. If a purchase is attendant to the natural course of business for a partnership, then it can be inferred that the contract will be impliedly authorized even without express permission from the other partners.

Here, the partnership is in the trash collection business in state A. Their business revolves around their ability to collect garbage. The purchase of a garbage truck falls within the normal course of garbage business because it is a necessary instrument in the collection of trash--the fundamental revenue generator for the partnership. Admittedly, a 100,000 dollar purchase of an electric vehicle is an expensive purchase, and RUPA does require unanimous partner consent when the partnership undergoes significant transactions that may change character of partnership (see below). However, the facts make clear that other trash collection businesses have been purchasing electric garbage trucks because they are more efficient in the long term, therefore it makes the upgrading of their garbage truck seem like a reasonable purchase in line with normal operation. Moreover Aldo has been entrusted by his other partners to be responsible for the day to day operation, so it would seem even more reasonable from Aldo's perspective that he has implied actual authority to make the purchase. Therefore, because the purchase seems within the natural scope of business of garbage collection, Aldo acted within implied actual authority and binds the partnership for the purchase.

b. Assuming bound, is Carlos liable for any unpaid purchase price

Yes. Carlos is liable for any unpaid purchase price, although not immediately. At issue is whether partners are directly liable for contracts imputed to the partnership and if so, when and how much they are liable. Under RUPA (discussed above), outstanding liabilities are imputed to the partnership. That means the partnership is

first liable to use its own funds as a distinct entity to cover any creditors' outstanding payments. Carlos expresses fear about dwindling funds. Nevertheless, whatever the amount of partnership funds is at the moment, that will be allocated first to the outstanding balance of purchase price. Any left over funds are then deducted personally from the partners. Partners are personally liable on partnership debts as secondary debtors, whether or not they personally disagreed with the purchase in the first instance. However, partners are jointly and severally liable for partnership debts.

Here, the partnership funds will first cover the 70,000 deficit. Then Carlos will be jointly and severally liable or pro rata responsible for the outstanding debt. He will thus be liable for his pro rata share of the debt as distributed among the three partners.

c. Assuming bound, is Aldo entitled to reimbursement for downpayment

Yes. Aldo is entitled to reimbursement for downpayment. At issue is whether Aldo can seek reimbursement from partnership funds or even contribution from partners even if the other partners personally disagreed as to the purchase. While it may seem like a harsh result in this instance, RUPA's default rules allow partners to seek compensation for partnership property purchased in the name and for the partnership. A partner can seek direct contribution from the partnership or even the partners themselves. The latter is more likely here because of the low balance of partnership funds.

Here, Aldo purchased the garbage truck in the name of the partnership. This raises a presumption under RUPA that it was purchased as partnership property and thus is owned by the partnership not Aldo. This makes the partnership liable for the upfront payment. Since it is in the partnerships name, Aldo may seek pro rata contribution from Belinda and Carlos for the purchase, assuming the partnership funds cannot first cover any liability.

II. Aldo entitled to be paid value for all/part of services to partnership?

No. Also is not entitled to be paid for value of his services. At issue is how should payment be made to partners when there is no governing agreement. Under RUPA, a partnership is a business entity between 2 or more people designed to carry on a business for profit. Since there is an established partnership stipulated in the facts, it is presumed under default rules that there is an equal profit and loss sharing distribution among the partners. Merely because Aldo does two times more work towards the business may not be enough to overcome this presumption. Moreover, courts are not inclined to substitute their judgement for that of private business entities because it's plausible that Belinda's accounting and Carlos' land ownership might be equally valuable. Therefore, without more evidence about the profit and revenue sharing arrangement between the partners, it will be presumed that Aldo is entitled to an equal one-third share for the value of his services under the partnership.

III. Is Partnership bound on sales K for land?

No. The partnership will not be bound. At issue is whether a partner has unilateral authority to make a significant, partnership nature-changing decision when he lacks apparent authority. Apparent authority is when a third party believes an agent has authority to bind the principal (partnership) on contract based on the manifestations of the principal/partnership. Here, the landowner knows the partnership is engaged in a

different business altogether in a different state, therefore it would be unreasonable for the landowner to conclude that the purchase would be approved.

This leaves the possibility of actual authority (note there's no ratification either). While a partner may act unilaterally to bind partners in the normal course of business, under RUPA, it will require unanimous partner agreement in order for one partner to engage in a contract that fundamentally changes the partnership. Here, the business is engaged in trash collection. The speculative land deal falls outside the parameters of garbage collection because it enters a completely different type of business--real estate. This fundamental change in partnership business requires unanimous consent which was lacking here from Carlos. So even a majority agreement from Belinda and Aldo is insufficient to bind the partnership to the contract.

Representative Good Answer No. 2

1a. Yes, the partnership is bound on the purchase contract for the all-electric garbage truck because Aldo had implied actual authority and/or apparent authority to purchase the truck.

A partnership exists when multiple individuals agree to co-own a business for profit. Under a general partnership, partners are jointly and severally liable for obligations incurred for the partnership. Additionally, partners generally serve as agents for the partnership and have the implied authority to take actions that are reasonably within the scope of the partnership's business, which can be measured by industry customs. If a partner takes an action under implied authority, this is binding on the partnership, even if the other partners disagree or did not provide express authority.

Here, the partnership is a trash collection company. Aldo purchased an all-electric garbage truck from a dealership that had previously sold trucks to Aldo for the partnership. Aldo purchased the truck in the partnership's name, even though he used his own personal funds. Finally, the use of electric garbage trucks are common in the trash collection business and are more fuel-efficient than gas-powered trucks. Thus, Aldo-- as a partner-- had implied authority to purchase this truck, even though Carlos objected and felt as if it was a waste of money. The purchase of the truck was within the partnership's ordinary course of business and was common within the industry. Therefore, because Aldo had implied actual authority and reasonably believed that he was acting in the best interests of the business, Aldo had the power to bind the partnership to the purchase of the electric contract.

Moreover, even if Carlos argued that Aldo did not have implied authority to buy the electric truck because 1) fuel costs were not a problem for the partnership and 2) the purchase was not in the business's best interests because the business did not have sufficient funds to pay for the truck, Aldo's purchase would still be binding because Aldo had apparent authority to act on behalf of the partnership. Apparent authority exists when a third party reasonably believes that the partners is acting on behalf of the partnership, even if the partner is in fact going against the partnership's wishes. Here, the truck dealership that sold Aldo the truck had previously sold Aldo trucks for the partnership. Aldo purchased the truck in the partnership's name. And there were no indications to the truck dealership that Aldo was acting without authority. Thus, even if Aldo did not have implied authority, the partnership would still be bound to the contract because Aldo was acting with apparent authority.

1b. Assuming the partnership is bound, Carlos would be personally liable for any unpaid balance of the purchase price if 1) the truck dealership secured a judgment against both the partnership and the partners and 2) the partnership's assets were insufficient to satisfy the judgment.

Partners in a general partnership are jointly and severally liable for obligations incurred by the partnership. However, before a partner can be personally liable for a partnership's debts, the party seeking the liability must 1) secure a judgment against both the partnership and the individual partners and 2) show that the partnership's assets are insufficient to satisfy the judgment. If the party only gets a judgment against the partnership or if the partnership's assets are sufficient, then the partners are not personally liable.

Here, Carlos is a general partner in the partnership. Thus, he is jointly and severally liable for the purchase of the truck, even if he did not agree with the purchase, because Aldo had authority to bind the partnership. Additionally, based on the facts, it seems that the partnership would not have sufficient assets to pay for the truck. Thus, if the dealership secured a judgment against both the partnership and the partners, Carlos would be personally liable for any remaining unpaid balance of the purchase price.

1c. Yes, Aldo is entitled to reimbursement from the partnership for the down payment he made-- though not if the dealership sued for the purchase price and the partnership had no remaining assets.

Partners are entitled to reimbursement from the partnership if they purchase an asset for the partnership using the partner's own personal funds. However, if a partnership has outstanding obligations to other parties, the partnership must first satisfy those obligations before distributing assets to its own partners.

Here, Aldo did purchase the truck for the partnership because it was in the partnership's name. Thus, ordinarily, Aldo would be entitled to reimbursement for assets purchased for the partnership. But if the partnership is unable to pay the dealership for the truck, Aldo cannot seek reimbursement from the partnership until the dealership is paid. Partnerships are bound to pay their outstanding obligations to other creditors before they can make distributions to their own partners. Thus, if the partnership really was unable to pay the purchase price of the truck, then Aldo would not be entitled to reimbursement.

2. No, Aldo is not entitled to be paid the value of his services to the partner because, unless a partnership agreement indicates differently, a partner is only entitled to compensation through distributions and sharing in the profits of the partnership.

Generally, partners are not entitled to compensation from the partnership for the services that they provide, unless the partnership agreement says otherwise. Instead, a partner is entitled to receive distributions and share in the profits of the partnership. Partners are generally entitled to equal distribution of the profits, if the partnership agreement does not say otherwise.

Here, Aldo, Belinda, and Carlos's partnership does not have a written partnership agreement. Additionally, there is nothing in the facts to indicate that the partnership had a custom of compensating its partners for the value of their services or contributions (i.e., Belinda does not receive compensation for her services in keeping the books and records and Carlos does not receive compensation for the partnership's use of his landfill). Thus, Aldo is not entitled to compensation for the value of his services. However, because Aldo spends about twice as much time conducting the partnership's business as Belinda and Carlos, Aldo might be able to argue that this entitles him to a greater percentage of distributions than the other partners. But because there is no written partnership agreement and this is a general partnership, a court will presume that the partnership intended to share distributions equally, without any modifications for how much a partner contributes to the business.

3. No, the partnership is not bound by the sales contract for the land because Aldo was acting with neither actual nor apparent authority.

As stated above, a partner can bind the partnership if they act with actual (whether express or implied) or apparent authority. Express authority comes from the partnership and gives the partner specific instructions as to what actions are authorized. Implied authority allows the partner to take actions they reasonably believe are in the best interests of the business and within the ordinary scope of the business. Apparent authority is based on a third party's reasonable belief that the partner had authority to act on behalf of the partnership.

Here, Aldo's purchase of the 500 tract of land in State B was without any of these types of authority. Aldo did not act with actual authority because Carlos had not agreed to the sale of the land, and therefore there was not consent on the part of the partnership because extraordinary decisions outside the ordinary course of business require unanimous consent of the partners (ex: it didn't matter that both Belinda and Aldo consented to the sale). Aldo did not act with implied authority because selling a tract of land in a different state, when the partnership was a trash collection business in State A, would not be within the ordinary course of business. Finally, Aldo did not act with apparent authority because the developer knew that the partnership only operated a trash collection business in State A and did not operate business in State B. Thus, it was unreasonable for the developer to believe that Aldo had authority to bind the partnership, given the extraordinary nature of Aldo's actions and how far they were outside of the partnership's course of business. Thus, because Aldo did not act with any type of authority, the partnership is not bound by the sales contract for the land.

MEE 2

Representative Good Answer No. 1

1. The judge should allow the bartender to testify to what he heard the owner saying on the phone. In general, hearsay is an out of court statement offered for the truth of the matter asserted. Hearsay is generally inadmissible. However, there are hearsay exemptions in which statements made out of court may be brought in substantively for their truth. The statement of a party opponent.

Here the bar owner is on trial for arson. As the defendant and therefore party opponent, the Prosecution may bring his statements in as hearsay exemption. Therefore, the Judge should allow the bartender to testify.

2. The Judge should allow the Waiter's statements. As provided in the statement above, hearsay is generally inadmissible. In addition to hearsay exemptions, which will not be considered hearsay at all, there are also hearsay exceptions. Hearsay exceptions are hearsay but of a nature that the court deems them sufficiently reliable enough to allow them in substantively. A statement against interests is a hearsay exception. A statement against interest may be admitted if the statement the declarant makes against his interest in a legal or pecuniary matter. The Declarant must also be unavailable. Unavailability can established through a privilege assertion, or where the declarant has disappeared and cannot be contacted despite reasonable efforts and means of contact have been exerted by the Party offering the statements.

Here, the Waiters statement opens him up to criminal liability. Not only do his statements show an agreement to perform the arson, it also opens him up to criminal liability to past arsons. Additionally, the Waiter ran away overseas, and the court is unable to compel him to attend trial or testify making the Declarant unavailable.

Therefore, because it is a statement against interests and the Declarant is unavailable, the Waiter's statements may come in through the hearsay exception of a statement against interest.

III. (a). The Judge should not allow the Statement in as it is hearsay without an exception. As explained above, hearsay exceptions may bring in otherwise inadmissible hearsay. One exception is the Public Records exception. Any document that is made in the ordinary course of the public duties may be admissible. However, there is an exception for police reports and documents made with intent of preparing for trial.

Here, the police arson investigation was prepared to assist in determining the cause of the fire and developing evidence for the prosecution of the owner. This may not be bring in substantively as it's essentially a law enforcement police report made for the prosecution of the defendant. Police reports are strictly inadmissible and the public records exception will not apply to it, unless the defense wishes to bring in the report. This is to avoid a *trial by paper.*

Therefore, the judge should not allow the report in because it does not fit under the public records document and is inadmissible hearsay.

(b) Tee Judge should sustain the owner's constitutional objection. The confrontation clause states that otherwise admissible hearsay and testimony may not be allowed where the Defendant is unable to confront his accuser. Whether a statement or report is subject to whether the statement is testimonial. Testimonial evidence will usually violate the confrontation clause unless the declarant is unavailable and testified at a prior hearing where the Defendant was allowed and incentivized to cross examine the witness on the subject of the testimony. Testimonial evidence is statements made for purposes of investigation. However, statements made to aid or assist an ongoing emergency would not be.

Here, the Arson Detective is unavailable as he is dead. He did not testify at any prior formal hearing to which the defendant could cross examine him. The new arson does not have personal knowledge of the making of the report and cannot testify to what the dead arson reporter actually observed. Furthermore, the report is investigative in nature, as the arson was conducting the report to find evidence about the fire to prosecute the owner.

The report should be excluded by the judge because it violates the defendants' rights under the confrontation clause.

Representative Good Answer No. 2

The Judge should allow the bartender to testify regarding the owners statements. The issue here is whether the bartender's statements are hearsay. Hearsay is an out of court statement that is being used to prove the truth of the matter asserted. Usually hearsay will not be allowed in court, but there are a few exceptions. there are also a few instances where a statement being offered to prove the truth of the matter asserted is non-hearsay. One of the examples of non-hearsay is when a party is offering a statement made by the party opponent. Additionally, the evidence that is being brought in must be relevant and material. Here, the owners statements are relevant, as they show that the owner was willing to do something drastic to get some money from the restaurant. Moving on to the issue of hearsay. The owners comments here are non-hearsay. It is being offered by the prosecution, and it was a statement made by the owner, a party opponent. This statement is not hearsay.

The statement made by the waiter will also be allowed in. The second issue here is whether the statement of the waiter will be allowed into evidence as proof of the truth of the matter asserted. When a declarant is unavailable, there are a few exceptions to hearsay that will still allow the statement to prove the truth of the matter asserted. One of these hearsay exceptions are statements made against interest. Furthermore, if the opposing party in a case adopted a statement that will be considered a statement made by the opposing party. Here, the statement made by the waiter was definitely against his interest at the time he made it. It was a statement of the waiter agreeing to be part of a crime and an admission that he had done this before. Therefore, it will be allowed in a s the hearsay exception of statements against interest. Alternatively, the statement should also be allowed in as statement of the opposing party. It seems from the fact pattern here that the owner was

quiet when the waiter agreed to the arson. Any reasonable person who did not plan on committing arson would have at least somewhat vocally disagreed to such a statement. Here, the owners lack of protest may be considered as adopting the statement. Therefore, it will be allowed in under the non-hearsay rule of a statement by a party opponent offered against that party. The Judge here should allow the statement in.

The last issue here is whether the report should be allowed in under a hearsay exception and whether the report is testimonial. Reports made pursuant to a public duty will usually be allowed into evidence even if they are hearsay under the Public Records exception. Only police reports against a criminal defendant will not be allowed in. Furthermore, statements made that are testimonial in nature will not be allowed into evidence if the declarant is unavailable to cross by the defendant. Here, the Public Record exception does not apply because it is a police report being used against a criminal defendant. So the hearsay objection should be sustained. Furthermore, the declarant is unavailable and the statements are testimonial in nature as they are about the prosecution of the defendant. Therefore, they will violate the confrontation clause of the constitution and should not be allowed in.

Maryland State Board of Law Examiners

OCTOBER 2020 REMOTE BAR EXAMINATION IN MARYLAND – REPRESENTATIVE GOOD ANSWERS

MEE 3

Representative Good Answer No. 1

1) Yes, State B is required to enforce the State A child support order. A judgement entered in one state will be given full faith and credit if the court that issued the judgement had jurisdiction and a that court made a final judgement (meaning that the court has nothing left to decide) on the merits (meaning that the decision was not procedural in nature). Child support payments such as this are always modifiable, so they fail under this traditional full faith and credit test. However, Congress has passed a uniform child support enforcement act that requires states to enforce child support obligations that are entered by a state a sister state with jurisdiction over the parties. A court will have jurisdiction to issue a child support claim if the child lives in the state and has a substantial relationship to the state and evidence pertaining to the facts of the case is readily available in that state. (Note - the child support jurisdictional test is slightly different than the Home State child custody test). Here, State A had proper jurisdiction over the child support claim because at the time of divorce, both the mother, father and the children were domiciled in State A and the children had a substantial connection to the state. It is absolutely incorrect to say that the State A court order is no longer effective against the father simply because he moved to State B. Federal law requires State B to enforce.

2) The State B court does not have jurisdiction to modify the father's child support obligation. The court that issued the child support order will have continuing and exclusive jurisdiction over the matter until neither the child nor a parent live in the state and there is no evidence pertaining to the matter in state. Because the children and their mother still live in state A, State A retains continuing and exclusive jurisdiction over the case.

3) In determining how child support should be allocated a court will look to the statutory guidelines governing child support in the state. In issuing child support the court will look to A) the number of children, B) their age, C) any special needs they may have, and D) the financial ability of the payor-parent to pay the support. The court has very little discretion in making the award (unlike a change in spousal support) and must adhere to the statutory guidelines. A child support order is not modifiable unless there is a substantial change in circumstances. The father losing his job and thus losing the ability to pay does constitute a substantial change in circumstances that could cause the court to reevaluate the child support payments. However, the court will consider his $75,000 severance and the fact that he is likely to get a new job in making the order. It is unlikely that the court will reduce payment at this time. A child support obligation can never be retroactively reduced, so this aspect of the father's request is entirely without merit and will be rejected.

4) The court should only modify the spousal support award if the court believes that there is a substantial change in circumstances that warrants a modification. There are four kinds of spousal support permanent periodic support, temporary/rehabilitative spousal support, lump sum awards, and reimbursement award (offered when one spouse supported another while that spouse was receiving an education. The first two kinds are modifiable, while the later two are not. When a court makes a spousal support decision, it will consider factors such as the a) the skills, background, education of the parties, b) the parties earning potential/the ability of the payor-spouse to pay, c) contributions the spouses made to the home (including homemaker's contributions), d) the duration of the marriage, e) the standard of living during marriage, f) the way that property is divided, g) the custody arrangements for the children etc. Here, the spousal support orders the father to pay the mother $3,000 per month for five years. This is a temporary or rehabilitative spousal support payment designed to help the dependent spouse get back up on her feet while she looks for new work or improves her skills so as to make her a more qualified job applicant. It is modifiable based on a substantial change in circumstances. It seems that circumstances have substantially changed. When the order was first entered, it was plausible that wife would

be able to return to work full time. However, five months after the divorce, she had a heart attack. On doctor's orders, she can't simultaneously work full time and take care for her children at home because of her medical condition. Therefore, the court will reassess the situation using the factors outlined above. Given that the father received a $75,000 severance and is likely to begin working again soon and the mother's condition is deteriorating, the court will likely approve of an increase in spousal support.

Representative Good Answer No. 2

1) Is State B required to enforce the State A child support order?

The issue is whether State B is required to enforce an order that was made in State A court. Under the Full Faith and Credit Clause as well as the UIFSA, an order for child support that is made in one state must be given effect in other states. Therefore, State B is required to enforce the State A child support order under the Full Faith and Credit Clause and UIFSA.

2) Does the State B court have jurisdiction to modify the father's child support obligation?

The issue is whether the State B court has jurisdiction to modify the child support obligation. The court must have personal jurisdiction over the parties and subject matter jurisdiction. Personal jurisdiction exists when a party is domiciled in the state--that is, when a party is present with an intent to remain in a state. The father is now domiciled in State B because he has moved there and has an intent to remain as evidenced by his looking for jobs in State B and transferring all of his bank accounts to State B. Therefore, the court has personal jurisdiction over the father. Personal jurisdiction also exists on the basis of consent. The mother filed the action in State B, so she consented to jurisdiction there. Therefore, the State B court has personal jurisdiction over the parties.

The issue is whether the State B court has subject matter jurisdiction over the modification of this child support order. Under the UCCJEA, the initial court that determined the child support order has exclusive continuing jurisdiction. Any modifications must be made through the court of exclusive continuing jurisdiction. A court other than the initial court can modify the order if the initial court is located in a state that is no longer the child's home state. A home state is the state where the child has resided for the past 6 months. The mother and the child continue to live in State A, which was the initial court that created this order. Because State A continues to be the home state of the child, State A has exclusive continuing jurisdiction and State B does not have subject matter jurisdiction to modify the order.

3) Without regard to jurisdictional issues, how should a court rule on the father's requests to reduce his child support obligation and to make the reduction retroactive?

The issue is when child support can be modified. The father requested that the support be modified because he has lost his employment. The standard for changing obligations is whether there has been a material change of circumstances and whether the change is in the best interests of the child. A voluntary job change that results in a lower salary does not qualify as a material change in circumstances, but an involuntary loss of employment or job change does qualify. In this instance, the father lost his job due to budget cuts. This is an involuntary job termination, which generally would qualify as a material change in circumstances. However, the husband's previous salary was $150,000. He likely has savings from this employment. Additionally, he received a lump sum severance payment of $75,000, which is equivalent to half a year's salary. Therefore, the court will likely find that the husband has not had a material change of circumstances because, at least for the next six months, he is still receiving the same payment as he would have received prior to his job termination. Additionally, the job market is such that the husband is likely to find another comparable job. Thus, the court should not reduce the child support payments.

The father requests that the reduction in his obligation be retroactive. A court cannot retroactively modify child support obligations. It may only prospectively modify child support obligations. Therefore, the court should deny the father's request for retroactive reductions and should require him to pay the amount that he has refused to pay over the past few months.

4) Without regard to jurisdictional issues, how should a court rule on the mother's request for an increase in an extension of the spousal support obligation?

The issue is whether the mother has a material change in circumstances, which would qualify her to a modification of spousal support. The mother has lost her job due to poor health and cannot resume full-time employment. She has had a reduction in her salary of almost $20,000. Spousal support is given when one party's salary alone would not be sufficient to support that party. Here, the mother has lost her job and will not be able to support herself on $7,000 per year. Therefore, the court should increase the monthly payment to the mother, as least for the initial term of five years, because she has had a material change in circumstances and cannot support herself on her salary alone.

The next issue is whether the mother is entitled to spousal support extending beyond five years. A court will look to the length of marriage, the education and work history of the parties, and other obligations in deciding whether spousal support should be long-term. Here, the couple was married for 12 years, which is a medium length marriage. The mother has a college degree and has worked in the past throughout her marriage, which weighs against extending the period of spousal support. The mother worked while she was married, rather than staying home to raise the children, which shows that she did not forego career advancement opportunities in order to support the husband's career. A court will likely find that because this was a medium length marriage and the mother has opportunities to support herself, that the extension of the spousal support beyond five years is not warranted.

It is not clear whether the mother is requesting that the property division be modified. If she is, she will not prevail in this request because property divisions are non-modifiable.

Maryland State Board of Law Examiners

OCTOBER 2020 REMOTE BAR EXAMINATION IN MARYLAND – REPRESENTATIVE GOOD ANSWERS

MPT 1

Representative Good Answer No. 1

Law Offices of Bunke & Huss
600 Center Street, Suite 210
Franklin City, Franklin 3313

Memorandum
To: George Bunke
From: Examinee
Re: Janet Klein Matter

Under the Franklin Tort Claims Act (FTCA), local and state governmental entities are only liable within the strict limitations of the FTCA. Section 41-4. When bringing a claim under the FTCA, there are three requirements that must be satisfied. First, the plaintiff must show a state employee was acting within the scope of her employment, such that her negligence may be imputed to the state, and the negligence occurred on the governmental entity's property. Here, both requirements are satisfied since we are assuming that Mr. Small, the supervisor, was negligent and acting within the scope of his employment, and we have confirmed that NashTel Arena, the fairgrounds, and the surrounding parking lots are owned by the State of Franklin. Second, the plaintiff must show, under Section 41-6, that the entity is not entitled to immunity. Third, the plaintiff must provide either written notice or actual notice to the head of the governmental entity in question. Section 41-16. If these requirements are not satisfied, the governmental entity can successfully file a 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted. *Farrington v. Valley County* (Fr. Sup. Ct. 2015).

Under this paradigm, it is likely that the State of Franklin cannot claim sovereign immunity protection for the incident in question, and that Ms. Klein has given actual notice to Mr. Small to satisfy the requirements of Section 41-16.

1. Sovereign Immunity Protection

The legislative purpose of the FTCA is to ensure that local and state governmental entities are only liable within the limitations of the TCA. Under Section 41-6, the plaintiff must prove that she suffered "bodily injury, wrongful death, or property damage[that] is caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building or public park." 41-6 has been interpreted to only refer to "operation" or "maintenance" that results in a condition creating a risk of harm. *Arthur v. Custer County* (Fr. Ct. App. 2008). That is, the employees' "negligent performance of those duties [must] result in a dangerous or defective condition in a public building or public park.. The claim cannot be based solely on negligent supervision." *Rodriguez v. Town of Cottonwood* (Franklin 2018). However, section 41-6 does contemplate waiver where, due to the alleged negligence of public employees, an injury arises from an unsafe, dangerous, or defective condition on property owned and operated by the government." *Farrington v. Valley County* (Fr. Sup. Ct. 2015). "[T]he Franklin Legislature intended to ensure the safety of the general public by imposing on public employees a duty to exercise reasonable care in maintaining the premises owned and

operated by governmental entities...[there is] no intent to exclude from waiver liability for injures arising from defective or dangerous conditions on the property...*or on the grounds surrounding the buildings*." *Id.* Thus, so long as the defective condition results from the employee's negligent supervision, section 41-6 applies and sovereign immunity is waived. *See, e.g., Williams v. Central School District* (Fr. Sup. Ct. 2008) (failure to properly install windows so they would not fall out); *Schleft v. Board of Education of Terry* (Fr. Sup. Ct. 2010) (electrical systems negligent maintenance led to a fire); *Farrington v. Vally County* (Fr. Sup. Ct. 2015) ("failure to keep residents safe from roaming dogs on the common grounds of a county housing project).

The Court highlighted the distinction between mere negligent supervision and negligent supervision resulting in a dangerous condition in *Rodriguez v. Town of Cottonwood* (Franklin 2018) and *Farrington v. Vally County* (Fr. Sup. Ct. 2015). In *Rodriguez*, the Court considered whether municipality employees' inadequate supervision of children at a playground satisfied the requirements for section 41-6. The Court held that because the playground itself was safe for children, and the slide which contributed to the child's injuries, was safely constructed, the injured child could not recover despite the employees' lack of adequate supervision. *Id.* The Court distinguished this case from its other ones where it waived sovereign immunity principally because the employees' negligent supervision did not create a dangerous condition on the playground itself. *Id.* On the other hand, in *Farrington*, the court considered whether dogs roaming on common grounds of a local governmental housing project created a "dangerous condition" within the meaning of section 41-6. There, the court held that the requirements were satisfied because "'maintenance of any building' includes keeping the grounds of a public housing project safe from unreasonable risk of harm to its residents and invitees," which in theory could include dangerous dogs roaming the grounds. *Id.* The Court remanded to have the lower court determine "[w]hether the Housing Authority exercised reasonable care in maintaining the common grounds...[noting that it] would depend on what it knew or should have known about loose dogs in common areas, whether those dogs should have been foreseen as a threat to the safety of residents and invitees, and the means available to the Housing Authority to control the presence of those dogs." *Id.*

Here, Ms. Klein could likely argue that Mr. Small's negligence--maintaining only one exit--is more analogous to *Farrington* than *Rodriguez* because his negligence created an unsafe condition on the property itself. First, Mr. Small and his team could have opened up a separate exit onto Central Avenue instead of maintaining only Lomas Boulevard. The report notes that the Central Avenue exit is barricaded, but the employees could have lifted the barricades since they were not affixed to the ground. Unlike *Rodriguez*, Mr. Small's negligence here is not due to the *supervision* of traffic leaving the park, it is due to the lack of opening up another exit on the grounds of the parking lot. Thus, Ms. Klein could likely argue that the nexus between Mr. Small's negligence and the structures on the park are distinct from the mere negligent supervision of the employees in *Rodriguez* because the condition that caused the injury in *Rodriguez*--the park itself--was safe and distinct from the employee's negligent supervision. Mr. Small's negligence is much more similar to *Farrington*. Like the dogs roaming the property, the mere one exit on the property created massive traffic congestion and made an accident much more likely to happen. Franklin may argue that it was merely Mr. Small's negligence and failure to supervise that resulted in the dangerous condition, but so long as there is a nexus between his negligence and a dangerous condition on the property, then the requirements of section 41-6 are satisfied.

If Ms. Klein is able to prove that Mr. Small's negligence here caused the defective condition, she still must show that Mr. Smalls "knew or should have known about [the defective condition], whether [the defective condition] should have been foreseen as a threat to the safety of residents and invitees, and the means available to the [defendant to remedy the defective condition]." Ms. Klein likely has the evidence to show all these elements

are satisfied. First, there is ample evidence to suggest that employees had made Mr. Smalls aware of the lack of exits available and that his employees, like Emma Moore, had repeatedly told him to open up the Central Avenue exit. Not only was Mr. Smalls on notice, but it was also foreseeable that there would be a multi-party crash like the one on May 23 because of only one exit being available. With 5,000 vehicles and only one exit, it was possible that an accident could happen regardless of the diligence of the car drivers. Finally, Mr. Smalls had the means to remove the condition by opening up the Central Avenue exit.

2. Notice Requirements

Not only is Ms. Klein able to satisfy the substantive requirements for waiving sovereign immunity under the FTCA, but she likely can satisfy the notice requirements of the statute as well. Under section 41-16(a), plaintiffs must "present the Risk Management Division for claims against the State, to the mayor or a municipality for claims against the municipality, to the superintendent of a school district for claims against the school district, to the county clerk of a county for claims against the county, or to the administrative head of any other local governmental body against such local governmental body, within 90 calendar days after an occurrence giving rise to a claim." Moreover, under section 41-16(b), if notice is not satisfied under the statute, then the Court is deprived of jurisdiction. Notice can be satisfied through two means: written notice or actual notice. "The statute contemplates that the governmental entity must be given notice of a likelihood that litigation may ensue, in order to reasonably alert it to the necessity of investigating the merits of a potential claim against it. *Beck v. City of Poplar* (Fr. Sup. Ct. 2013). That is, within 90 days, the governmental entity must have notice of the nature, time, and location of the accident, and be appraised that the plaintiff will be bringing suit against the governmental entity. *See Beck v. City of Poplar* (Fr. Sup. Ct. 2013)

Here, even though Ms. Klein sent a letter to the Risk Management Division, cc'ing Mr. Smalls, notifying the agency and Mr. Smalls about the nature of the accident and when it occurred, her written notice of the accident was sent more than 90 days after the incident. That is, her letter was dated on August 30, 2020, whereas the incident occurred on May 23, 2020. This is more than the 90 days allotted under the FTCA.

However, Ms. Klein could still argue that Mr. Smalls had still received actual notice of the lawsuit. In *Beck*, the court considered "whether the City traffic department's receipt of an accident report in this case is 'actual notice' under the Act." The Court held that "[a] report can serve as notice 'where the report contains information that puts the governmental entity allegedly at fault on notice that *there is a claim against it*. The statute contemplates that the governmental entity must be given notice of a likelihood that litigation may ensue, in order to reasonably alert it to the necessity of investigating the merits of a potential claim against it." That is, the report must both apprise the government of the details of the accident/condition *and* that the plaintiff will be bringing litigation against the governmental entity. In *Beck*, the plaintiff had failed to apprise the government that he would be bringing litigation. While Mr. Smalls had also received a report shortly after the accident, that report did not, like *Beck*, notify that Ms. Klein would be bringing a lawsuit. However, Ms. Klein could still argue that Mr. Smalls had actual notice of the incident because he admitted to knowing that the incident occurred, and noticed that the members involved in the accident yelled that "the State would pay for this." Mr. Smalls also noted that Ms. Klein herself had threatened to sue the state in his email correspondence with Ernest Thomas. As the Court said in *Solomon v. State of Franklin* (Fr. Sup. Ct. 2012), a phone call is enough that described the facts and told the official litigation would be commenced. If a phone call suffices, it is probable that Ms. Klein could argue that Mr. Smalls was on actual notice the day of the incident itself.

Conclusion:

It is likely that Ms Klein can satisfy the requirements of the FTCA and that Franklin will not be able to claim sovereign immunity. Moreover, it is likely that Franklin was on actual notice of litigation.

Representative Good Answer No. 2

Memorandum

To: George Bunke
From: Examinee
Re: Janet Klein

Statement of Facts

[Omitted per instruction]

Analysis

The State of Franklin Is Not Protected from Liability in This Case by Sovereign Immunity.

The issue is whether the State of Franklin is Protected from Liability by the Torts Claims Act regarding an accident that occurred at the exit of a parking lot it operates, and whether the State was negligent in its operation of the parking lot.

Generally, any state and local governmental entity and any public employee acting within the scope of employment are granted immunity from liability for any tort. § 41-4 Fr. Torts Claims Act. The Statute provides an exception from liability in instances where injuries and property damage caused by negligence of public employees acting within the scope of their duties in operating or maintaining the public building or park. §41-6 Fr. TCA.

Franklin Courts has interpreted this to "refer only to 'operation' or maintenance' that results in a condition creating a risk of harm." *Rodrigues v. Town of Cottonwood* (Fr. Ct. of App. 2018). The statute is designed to protect the safety of the public, and would include areas on the property surrounding a public building. *Farrington v. Valley County* (Franklin 2015). This requires "negligent performance of those duties resulted in a dangerous or defective condition in a public building or public park." *Rodriguez.*

Inadequate supervision is not covered by this exception of the TCA. *Id.* However, when the government is operating and owes a duty to those who are on the property, it can be liable if the government fails to exercise reasonable care when it knew or should have known about a danger in the area, and it has the means available to control the presence of the danger. *Farrington* at 10.

Here, the parking lot falls within the definition of public building or park because the lot is of an area that is in the control of the government, and that property is adjacent to a public building (the Arena). State owned the fairgrounds, the arena, and the surrounding parking lots. The State operates and manages the parking lot of the fairgrounds, as evidenced by the employment of the staff who manage the lot. The state also had control of the exits. This is evidenced by the steel barriers, which could be removed by the employees of the lot if they chose

to do so. Evidenced by one of the employees, Ed Cranston, who informed his supervisor Randy Small that the barriers to the second exit Central Ave should be moved so that the exit can be used.

Furthermore, the government has the means available to control the presence of a danger in the area. Akin to the facts of *Farrington*, where the housing authority knew of dangerous dogs roaming the grounds of the housing complex it operates. Here, the staff at the parking lot knew of the dangerous condition by keeping only one exit open at the parking lot. Different staff have commented that the second exit should be used and that there are safety concerns as a result of the lack of use of it.

The failure to remove the barriers from the second parking lot exit, which led to a safety concern, can be viewed akin to the failure to rectify a prison layout that prohibited guards' ability to monitor the prisoners, which led to limiting the guards' ability to protect prisoners from attacks from other prisoners. *See Rodriguez*, citing *Callaway v. Franklin Dep't of Corrections* (Fr. Ct. App. 2011). The dangerous condition here was not because the staff's negligence in overseeing the premises, but rather, the dangerous condition was that there was only one exit to the parking lot, and the negligence was from the staff's negligence in not removing the dangerous condition.

As a result, it is likely that the state is not protected by sovereign immunity and Ms. Klein will be able to bring her claim against the state.

The State of Franklin Received/Did not Receive Sufficient Notice As Required By The Franklin Torts Claims Act.

The issue is whether the State of Franklin has received notice in accordance to the requirements of §41-16 of the TCA, or "Actual Notice" from Ms. Klein through the reception of the accident report, where Ms. Klein threatened litigation in her statement given to the police at the scene of the accident.

Generally, the plaintiff must provide notice to the listed officials who can receive notice on behalf of the government. A written notice is required to be provided within 90 days after the cause of action, and it must state time, place and circumstance of the loss or injury. §41-16 Fr. TCA.

The August 30 letter sent by certified mail was not sufficient to provide notice to the government, as it falls outside of the 90 days period from the date of the accident (May 23), as requirement of the TCA.

Another way to meet the notice requirement is through actual notice. Id. Actual notice, according to the Franklin court, means the government must be given notice "of a likelihood that litigation may ensue." *Beck v. City of Poplar* (2013). Actual notice must also be given within 90 days. *Id*.

The copy of the traffic collision report may be sufficient for "actual notice." It does fall within the 90 days period. Here, the report describes the accident at the parking lot, including the details of the parties involved and the injury, as well as the statement from Ms. Klein that "The State will pay for this!" in a traffic collision report, which was received by Mr. Small a week after the accident.

Compare the facts of this case with those of *Beck*, where the accident report only listed the date, time, and location of the accident, information about the parties involved, and the fact that the plaintiff suffered an injury. *Beck* at 11. The report in *Beck*, unlike the instance at hand, did not include any information that could lead to the city to believe that it may be subject to litigation.

There is a good argument that Ms. Klein's statements to the police, "The State will pay for this," combined with the admission by Mr. Small in the email that he remembered Ms. Klein was "threatening to sue the State" shows

that Mr. Small, as the government agent, knew of a likelihood that the litigation may ensue due to Ms. Klein's statements.

On the other hand, unlike in *Solomon v. State*, where the plaintiff informed the state that he hired a lawyer to litigate against the state, Ms. Klein's statement at the scene of the accident did not carry the same implication, as she did not state she was hiring a lawyer. It can be argued that Ms. Klein's statement was somewhat vague, and did not inform the state that it may be subject to a lawsuit.

For the reasons stated above, it is more likely than not that the State received Actual Notice, as allowed by the TCA, of the claim from Ms. Klein.