

Maryland State Board of Law Examiners
JULY 2019 UNIFORM BAR EXAMINATION (UBE) IN MARYLAND –
REPRESENTATIVE GOOD ANSWERS

NOTICE: These Representative Good Answers are provided to illustrate how actual examinees responded to the Multistate Performance Tests (MPT 1 & 2) and the Multistate Essay Examination (MEE 1-6). 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 July 2019 UBE 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

WILLS/ CONFLICT

Under the common law and the Uniform Probate Code, a will is not revoked unless it is destroyed. Therefore, because this will was not torn, destroyed, burned, and was in perfect condition, it is valid. This will states that it was made to convey Testator's property in case he died and was signed. For both holographic and formal wills, testamentary intent must be found. This will states "Given that I might die on this trip to City, I write to convey my wish that ..." It clearly shows testamentary intent to devise his estate. It could be argued that since he did not die on that trip to City that the will is not valid. However, there is no subsequent will that has contradicting terms to invalidate this one. Plus, it was not revoked by the Testator. Instead, it was kept in his bedside table, which can also show evidence of his intent to keep it as his valid will.

If the will was found to be invalid, his estate would go through intestacy, which is the process of distributing an estate when a person dies intestate (without a valid will). In that case, his estate would be divided in equal shares to his two sons, John and Robert. Testator was not survived by a spouse, so his only two issues to inherit through intestacy would be his sons. However, the will is likely valid.

State B has jurisdiction over the matter.

Under the Uniform Probate Code, the state where the testator was domiciled upon death is the state that will have subject matter jurisdiction over the case. The domicile of an individual is where the person was physically present with the intent to remain. Here, the Testator was domiciled in State B. Therefore, State B will have subject matter jurisdiction over this case.

The will should be enforced under State B's laws.

Because State B has subject matter jurisdiction over the case, the laws of State B will be used to decide whether to enforce the will. Under the laws of State B, a will is recognized that is in the testator's handwriting so long as the will is dated and subscribed by the testator. Here, the will is

in the Testator's handwriting, dated, and signed by the Testator. Therefore, the will is enforceable under State B's laws. A holographic will is one that has all material parts of a will handwritten and is signed by the Testator. A holographic will does not require it to be witnessed by two people, like the regular Will's Act Formalities require.

His estate should be distributed, in equal shares, to John and Martha's two children, unless Robert was an omitted child.

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Under the UPC and common law, a testator's wishes can be argued through extrinsic evidence if a term in the will is ambiguous. Here, the devise to "his delightful wife of many years" is ambiguous because it does not specify a person. Nancy could argue that because she is John's current wife that she is the beneficiary. However, through extrinsic evidence it is more likely that a court would find that Testator meant to specifically devise half of his estate to Martha because the phrase "his delightful wife of many years" was more specific than simple "John's wife." John's wife of many years, at the time that the will was written, was Martha. Therefore, Martha was the intended beneficiary.

Because Martha was the intended beneficiary and she predeceased the Testator, her devise would have lapsed. When a devise lapses, the devise goes back to the estate. However, if there is an anti-lapse statute in the jurisdiction, then the devise can be saved. Usually an anti-lapse statute can only be applied if the beneficiary was a blood relative of the testator. However, the specific anti-lapse statute here states "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." Here, although the children are not blood relatives of the testator and John never adopted them to make them legal relatives of the Testator, they will still be the beneficiaries of Martha's share through State B's anti-lapse statute. There is nothing in the statute requiring blood relation to prevent lapsing.

Because John never adopted the children, Martha's share does not automatically go to John. Had John adopted the children, they would be considered his legal children for inheritance purposes and he would have a stronger argument to inherit the full estate through Martha's portion because then the children could inherit from him. However, he never officially adopted them. Therefore, John and Martha's two children will equally distribute the estate.

Robert

Robert could argue that he is an omitted child. Under the UPC, an omitted child is a child that unintentionally left out of a will and can inherit their intestacy share of an estate. To be an omitted child, the will had to have been made before the child was born and the other children that were alive had to be included in the will when it was created. It is unclear how old Robert is. If Robert was born after January 4, 2010, then he can argue that he is an omitted child and deserves his intestacy share because John was included in the will. If Robert was born after the will's execution, then he was intentionally left out of the will and is not an omitted child. In that case, Robert receives nothing.

Representative Good Answer No. 2

1. The issue is whether Testator's holographic will is valid.

Although Testator handwrote his Will in 2010 in State A, which does not recognize holographic wills, when he was domiciled there at that time, he subsequently moved his domicile to State B and died there with the 2010 will in his bedside table. Because State B recognizes "Wills in a testator's handwriting so long as the Will is dated and subscribed by the testator" and all the conditions are met, this Will will be valid in State B. In addition, at the time of his death, all of his assets were in State B, providing another reason to follow State B's law regarding recognition of holographic wills.

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2. The issue is how Testator's estate will be distributed according to his Will, assuming it is valid, and State B's intestacy laws.

2. a. Whether Testator's other son, Robert, who was not named in the Will will receive any share.

The facts do not indicate whether at the time of the Will, 2010, Testator's son Robert was alive. If he was alive and Testator was aware of this, then in virtue of being intentionally omitted from the Will by the Testator, Robert will not be entitled to receive any share. If there is further evidence showing that the Testator's intention was to not provide for Robert because, for instance, Robert is already well off or Robert and Testator had a falling out, then Robert will not receive any share. If, on the other hand, Robert was born after this Will was written, he may have a better chance of claiming a share if the Testator's intent was to provide for all and any children he has and their spouse.

2. b. Whether the share of John's deceased wife Martha will go to Martha's two children, whom John never adopted.

Testator's Will distributes his estate to his son and "his delightful wife of many years," which at the time of the will referred to Martha, with whom Testator had a special, warm relationship (e.g., Testator had known Martha and her parents for many years, and it was Testator who introduced Martha to John.). But before Testator's death, Martha was killed in an automobile accident. Relevant statute provides 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." As Martha predeceased Testator, Martha's surviving issue would take her share unless the Will expressly provided otherwise, which it didn't. The fact that Testator didn't amend his Will after Martha's death, which occurred some two years prior to his own death, lends further support to the idea that the Testator, due to his special, warm relationship to Martha's family, independent of his son's marriage to Martha, Testator intended to leave shares to Martha or, if she were to predecease Testator, to her surviving issue (Testator was well aware of Martha's two children from her previous marriage). Thus, facts support the finding that Martha's two children would split Martha's share of the estate.

2. c. Whether John's current wife Nancy will receive any share.

John's current wife Nancy is not mentioned in Testator's 2010 Will, as she was not his wife at that time, and Testator did not amend his Will to include her when John married her six months ago. Also, there is no fact indicating that Testator's relationship with Nancy was as special, warm as his with Martha was. Thus, the court is more likely to interpret John's "delightful wife of many years," as referring only to Martha. This is so also because of the phrase "of many years"--Nancy has been married to John for only half a year. The court will likely grant no share to Nancy.

2. d. How the shares will be divided.

Assuming that the court finds that Robert was intentionally omitted, the court will divide Testator's share between John and Martha's surviving issue. So, 50% will go to John, and Martha's two children will each split her share, with 25% each.

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MEE 2

Representative Good Answer No. 1

1. The Woman's Interrogation on March 15th

The 5th amendment as applied to the states through the 14th amendment of the constitution requires a criminal defendant be read their Miranda rights and advised of their right to counsel and their right against self-incrimination where the defendant is in custodial interrogation. Custodial interrogation exists where the defendant is being questioned or interrogated, and custody exists where the defendant is in a situation where a reasonable person would not feel free to leave.

On February 4th the detective brought the woman out of her jail cell into an interrogation room to question her about a homicide investigation. This was clearly a situation showing custodial interrogation where the woman was entitled to have her Miranda rights. Here, the detective clearly and correctly gave the woman her Miranda rights and asked if she understood the notice provided. The woman clearly invoked her 5th amendment right to counsel by stating, "Yes, and I want a lawyer." This was a clear, unambiguous, and unequivocal invocation of her right to counsel. However, once this right was invoked, the officer "immediately" ceased questioning and did took the woman back to her cell. The detective's actions here to stop question and return the woman to her cell were sufficient to stop the custodial interrogation.

Generally, interrogation can be reinitiated where the defendant has returned to their normal environment after being removed from custody, and where a sufficient amount of time has passed after the first attempt at interrogation. Here, the fact that the woman was in jail and in a sense remained in custody of the state has no bearing on whether the woman had been removed from a custodial situation in-between the two rounds of questioning. Because the woman was already living in jail while serving a 60-day sentence, the general day to day of jail became her regular environment, but she was removed from the interrogation room and returned from her cell after the detective's first attempt at questioning and had been removed from the custody of interrogation. Therefore, there was a sufficient removal from and preinitiation of the woman back into custody between the two instances of questioning by the detective. Additionally, the detective's action to reinitiate questioning of the woman on March 15th occurred more than a month after this initial interrogation, which is considered a sufficient period of time. The court was correct to deny the motion to suppress on this ground.

2. The Miranda Warnings on March 15th

Generally, the Miranda warnings do not have to be read perfectly as a requirement of due process. The warnings must only be given in a way that correctly advises the defendant of their right to counsel and against self-incrimination as provided by the 5th amendment, as applied to the states through the 14th amendment.

Here, the detective informed the woman that there was "no way of getting her a lawyer immediately," which is not a correct recitation of the Miranda warning regarding a defendant's right to counsel, but it is also not incorrect under the circumstances. Where an attorney is requested by a criminal defendant, there will be a delay in order to contact counsel or to appoint counsel for the defendant. Additionally, the detective was correct to advise the woman to her right to stop answering questions, and to refuse to answer questions until a lawyer is present. However, the detective was incorrect to state that the woman was only entitled to representation "if and when you go to court." A criminal defendant is entitled to counsel during custodial interrogation, which is why the Miranda warnings are supposed to be given before interrogative questioning is made.

Despite, this failure to explain the right to counsel prior to trial, the version of Miranda warnings that was provided are most likely adequate.

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The court was correct to deny the motion to suppress on this ground.

3. The Interrogation of the Woman on March 15th

In order to invoke their rights under Miranda, a criminal defendant must invoke in a way that is unequivocal and unambiguous. Here, the woman stated that she "might need a lawyer." This would not be considered an unequivocal invocation of her right to counsel. The woman's statements are required to be more certain which was not shown here.

A valid waiver of Miranda must also be voluntary. This is also clearly shown here as the woman signed a valid waiver of her right to counsel. Additional factors can also be used to determine the woman's voluntariness of her waiver of counsel. The fact that the woman was already in jail for another sentence shows she had some familiarity of the court system. This factor would weigh against her in this determination. This waiver is likely voluntary and the woman's confession should not be suppressed.

The court was correct to deny the motion to suppress on this ground.

Representative Good Answer No. 2

At issue here is (1) whether Miranda warnings given at a past date prevent future interrogation and (2) whether an inaccurate attempt to clarify Miranda rights violates a defendant's constitutional rights, and (3) whether an improper invocation of Miranda rights bars admission of evidence retrieved during interrogation.

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

When conducting a custodial interrogation law enforcement is required to give a detained person notice of the constitutional rights. A person is in custody if they do not have a reasonable belief that they are free to leave. A person's incarcerated status does not vitiate this belief. Although a person who is incarcerated cannot leave the facility, being removed from their home while in the custody of the state in prison and taken to a separate location for interrogation still constitutes them being in custody separate and apart from their incarceration. Interrogation is any questioning that the interrogator would or should reasonably believe would elicit incriminating information from the individual being interrogated. When you conduct custodial interrogation the Miranda warning must be given (1) before the questioning begins (2) be clear and understandable and (3) clearly and accurately convey all the rights afforded to the individual in custody. The onus is on

the individual being interrogated to express their misunderstanding or lack of clarity. If and when they do express that the law enforcement official is required to give an honest answer that does not intentionally deceive the person in custody but any mistake in their own understanding will not negate the effect of an otherwise compliant Miranda warning. If an individual invokes their Miranda rights any questioning must cease immediately, and the interrogator cannot place undue or unreasonably pressure on the individual to continue the interrogation. Each invocation of Miranda rights must be clear and unequivocal and must be invoked at each custodial interrogation. A previously invoked Miranda right will not carry over to later interrogations and a new custodial may begin at some significantly later time. At that time a new warning must be given, and a new invocation must be made.

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The woman was indeed subject to a custodial interrogation. She was removed from her cell, or home, taken to an interrogation room and the detective clearly stated his intent was to question her regarding a homicide. Being taken to the room she had a reasonable belief that she was not able to leave and was in the custody of the detective. Furthermore, the detective made clear his intent to question her regarding the homicide and asked questions that were he knew or should have known would elicit an incriminating information. In fact, he explicitly stated on both occasions that "he wanted to ask her questions about the homicide" either because she was a suspected (February 4) or because he had new incriminating information (March 15). Thus, there was a custodial interrogation and Miranda warnings were necessary. Because of this a violation of Miranda rights would be grounds to bar the subsequent confession the detective elicited from her.

(1) The detective did not violate her Miranda rights on March 15 after she invoked her right to counsel on February 4. The woman was properly Mirandized and questioned on February 4 during the detective's custodial interrogation. The Miranda warning and invocation given on February 4 was only applicable to the February 4 custodial interrogation. When she invoked her rights, the detective stopped immediately. Almost a month later, which is a significantly later point in time, the detective returned to interrogate the woman. He properly Mirandized her again and then began questioning her after she waived her rights. She gave a clear and unequivocal answer that she understood her rights and a clear and unequivocal waiver of her rights when she answered, "Yes" to understanding then executed a document indicating that her "rights had been read to her, that she understood them, and that she wished to waive her rights and answer questions." She also indicated this by signing the form before she confessed. Thus, second questioning on March 15 was not a violation of the February 4 invocation of Miranda rights.

(2) The detective did not violate her Miranda rights by incorrectly conveying to the woman her Miranda right to counsel by the statements he made on March 15. The detective is merely required to inform the person in custody of their rights and do so in a clear and understandable fashion. Further requests for clarification do not fall within the constitutional rights protected by Miranda. Deceitful information and answers intended to mislead the person in custody would be grounds for a Miranda violation. However, the detective's statements do not demonstrate an intent to deceive or mislead the woman. The detective statement although incorrect in his answer were not so deceitful that the woman's rights were misrepresented. Moreover, swift assignment of an attorney by the state is not a constitutional right, nor is a person's selection of an attorney to be provided by the state. It is merely a requirement that an attorney be provided to the accused. Thus, though the detective's misstatement was incorrect it was not intended to deceive and did not rise to the level of violation or misrepresenting her constitutional rights.

(3) The detective did not violate her Miranda rights on March 15 after she had invoked her Miranda right to counsel on March 15. The woman did not make a clear and unequivocal invocation of her rights. the statement "I might need" is her questioning whether she needs a lawyer or expressing doubt as to her need for a lawyer. This is not clear and unequivocal her statement must have made a more definite request for a lawyer before the questioning was required to cease. She needed to make the statement she made on February 4, which was "I want a lawyer." Furthermore, her ability to make that statement on February 4 demonstrates that she understands the need to, how to, and is capable of making that clear and unequivocal statement to stop a custodial interrogation.

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MEE 3

Representative Good Answer No. 1

1. no dividend policy.

Parent did not breach any duty to HomeSolar with respect to the no-dividend policy. The directors of a corporation owe its shareholders a non-delegable duty of care and duty of loyalty. The duty of care requires that the directors act in the same manner as a reasonable director would under the same circumstances. The duty of loyalty requires that the directors act in good faith and in a manner they reasonably believe is in the best interest of the corporation. The directors of a corporation are not the insurers of its success. Generally, under the business judgment rule, business decisions of a corporation's board will be found to be valid unless the plaintiff can prove that a reasonable director under the circumstances would not have made such decisions and that the board failed to reasonably investigate into its decision.

Here, Parent did not breach any duty by not declaring dividends. Parent has control of the board of directors because it has the ability to select the members of the board of directors. A shareholder does not have a right to receive dividends. The board of directors may distribute a dividend if they see fit and if the company can afford it. Here, Parent chose not to distribute dividends and instead to invest those funds into research and development for HomeSolar to develop new products. A reasonable director may choose to reinvest funds instead of issue dividends even if it had more than adequate earnings to do so. There is no evidence that parent did not act in good faith and in a manner in the best interest of the company. Investing in research and development is a normal and productive use of company funds. Such a decision would fall under the business judgment rule. Plaintiff will not be able to establish that parent violated any duty of care or the business judgment rule. A reasonable director under the circumstances may choose to invest funds instead of distribute dividends. Parent was investing the funds properly, into development of new products for SolarHome. Investment into research and development would reasonably make the company more profitable and increase the shareholders' value in HomeSolar. Parent did not breach any duties to HomeSolar with respect to the no-dividend policy.

2. Rare earth materials.

Parent did breach the duty of loyalty to HomeSolar in purchasing rare earth minerals from its own company SolarMaterial. All directors have a duty to the corporation to act in good faith and in a manner they reasonably believe is in the best interest of the corporation. This duty is non-delegable. The duty of loyalty is breached when a director engages in a self-dealing transaction. A transaction is self-dealing when a director makes a deal between the corporation and its own business or himself. A self-dealing transaction may be permitted if (1) the deal is fair to the corporation or (2) the material facts of the deal are provided to the board and the deal is approved by a majority of the disinterested board of directors or shareholders.

Here, the deal between SolarMaterials and HomeSolar was a breach of the duty of loyalty. SolarMaterials is wholly owned by Parent. Therefore, a deal between HomeSolar and SolarMaterials is a self-dealing transaction. The deal between the two was not fair to HomeSolar. HomeSolar was purchasing rare earth materials from SolarMaterials at prices significantly higher than the market price. Additionally, the deal was not voted on and approved by a majority of disinterested shareholders or board of director members. First, even if there was a vote by the board of directors such a vote could not approve this deal because all of the members of the board of directors were employees of Parent, the whole owner of Solar Materials. As such all of the board of directors

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were interested. Second, there was not a vote by the shareholders. The board of directors may be liable to the shareholders for any amounts gained from the self-dealing transaction. The transaction between SolarMaterials and HomeSolar was a self-dealing transaction and was a violation of the duty of loyalty the directors owed to the shareholders of SolarHOe.

3. Opportunity for government grant.

Parent breached did not breach any duty by failing to give HomeSolar the opportunity to apply for the government grant. As stated above all directors owe the shareholders of a corporation a duty of loyalty. A breach of the duty of loyalty can occur when a director takes a corporate opportunity away from the corporation and keeps it for themselves. Such a breach occurs when a director takes an opportunity in the line of business of the corporation or if they take an opportunity which they found on the time of a corporation. A corporate opportunity can be taken by a director if the director first presents that opportunity to the corporation and then only after the corporation has considered it and rejected it may the director then take it for himself.

Here, parent did not violate any duty by giving the grant to Industrial Solar. For there to be a breach of a duty a director must take an opportunity that is in the line of business of the corporation away from it. That is not what happened here. The government grant was for the development of industrial-scale solar projects. Home Solar is a company that makes products exclusively for the residential solar power market. HomeSolar does not make any industrial solar products. Therefore, the grant of funds for the production of industrial scale solar projects was not within the line of business for HomeSolar. As a result, Parent did not breach any duty owed to

HomeSolar by denying it the opportunity to apply to the government grant because the grant was not within HomeSolar's line of business.

Representative Good Answer No. 2

Board members and officers owe fiduciary duties to the corporation. She must act with the care that a reasonable person in her situation would deem appropriate in her situation. A fiduciary gets deference under the business judgment rule for accusations that she has violated this duty of care.

A fiduciary also must deal with the company according to the duty of loyalty: her actions must be in the best interest of the company. A fiduciary can violate this latter duty by engaging in self- dealing or by usurping a corporate opportunity.

I. Dividends

Parent did not breach any duties to Home Solar with respect to its no-dividend policy. The issue is whether it was within Parent's discretion to withhold dividends even though the corporation could afford to distribute them.

Dividends are entirely in the board's discretion and any decision to distribute or withhold distributions merits the protection of the business judgment rule. This rule gives deference to board decisions so long as they are backed by due diligence and fair dealing. The burden is on an accuser to prove that the accused fiduciary has failed to meet the duty of care.

Here, there is no evidence to suggest that Parent, by selecting board members on Home Solar's board, has violated its duty of care to the corporation. It has offered in SEC filings a reasonable justification for not issuing dividends: The money is being redirected to the company to fund its research and development. This funding will, in turn, enable Home Solar to develop new products and potentially gain greater profits. A reasonable

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person in this situation would deem it appropriate to reroute funds in this way, rather than issuing dividends to shareholders.

Further, any accusation of self-dealing by withholding the dividends would be unfounded. Parent owns 80% of the shares in Home Solar and would benefit more than any other shareholder in a distribution. It would thus appear that Parent is acting against its own interest in its no-dividend policy.

The shareholder will not be able to overcome the business judgment rule and prove a violation of the duty of care.

II. Self-dealing

Parent has engaged in self-dealing and thereby violated the duty of loyalty to Home Solar with respect to its SolarMaterials contract. At issue is whether Parent took the appropriate steps to have the transaction cleansed.

A fiduciary engages in self-dealing where she or someone in close relation to her extracts a benefit in her dealings with the corporation. In this situation, the transaction can only be cleansed if (1) majority of disinterested shareholders ratify the transaction, (2) a majority of disinterested board members do the same, or (3) the transaction is inherently fair. Many jurisdictions require both a showing of fairness and one of the ratification steps addressed above. In breaches of the duty of loyalty, the fiduciary bears the burden of proving that it has not violated the duty.

Parent is the sole owner of SolarMaterials and will thus benefit from any contracts that corporation secures. As it is a fiduciary of HomeSolar, it was required to have the contract between HomeSolar and SolarMaterials ratified either by a majority of disinterested shareholders or board members. Nothing in the facts indicates that the shareholders, excluding Parent (who was obviously interested), were given an opportunity to ratify the transaction. Nor do the facts indicate that the board either (1) had disinterested members—most board members of Parent's subsidiaries also serve as officers or employees of Parent—or (2) that such disinterested members voted to ratify the contract. And even if one of these ratifying steps were taken, Parent would still likely have to prove that the transaction was fair. This it cannot do: The current market price for the materials was significantly lower than the contract price.

Thus, Parent breached its duty of loyalty in entering this contract, on behalf of HomeSolar, with SolarMaterials.

III. Opportunity

Parent has not usurped a corporate opportunity. At issue is whether the government grant was in HomeSolar's line of business.

Usurpation of a corporate opportunity is also a breach of the duty of loyalty. Therefore, the fiduciary bears the burden of proving there was no breach. An opportunity that falls within the corporation's line of business must first be presented to the corporation—it gets a right of first refusal. If the opportunity is not first presented to the corporation, the corporation can recover the opportunity from the fiduciary or seek damages.

Here, Parent appears not to have first presented the opportunity to HomeSolar. Despite this fact, Parent has not breached the duty of loyalty. The opportunity does not fall within HomeSolar's line of business: residential solar power. Indeed, the government grant was for industrial-scale solar projects, which are uniquely in SolarMaterials' ambit. Therefore, Parent did not err in denying HomeSolar the opportunity and was within its rights to cause SolarMaterials to seek and secure the same.

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MEE 4

Representative Good Answer No. 1

(1) Damages

Upon the breach of a valid contract, the non-breaching party is capable of requesting expectation damages or reliance damages, but not both. The general presumption tends to be in favor of expectation damages. The expectation damages following a breach would serve to put the non-breaching party in the same position as he would have been in had the contract been adequately and successfully performed. In this case, the contractor has breached the contract. The contract was for the contractor to install seats in the owner's movie theatre for \$100,000.

After the breach by the contractor, the owner diligently attempted to find a contractor to agree to install the seats by the deadline set pursuant to the contract between the owner and the contractor. Subsequently, the owner entered into another contract to install the seats for \$150,000. The contractor is therefore liable for the \$50,000 difference between the contract price and the actual price dictated by the owner's second contract. Had the owner's contract with the contractor been successful, the owner would have acquired new seats by August 15th for \$100,000. Since the owner ultimately ended up paying \$150,000 after diligent efforts to find a replacement contractor, the contractor who breached the contract must pay the owner \$50,000 to make up for that difference in order to put the owner in the position had the contract been performed in the first place. These would serve as expectation damages for the owner, of which the original contractor is liable for that \$50,000.

(2) In order for the owner to recover lost profits from the Film Festival that he planned and promoted to celebrate the new movie theatre's opening, he must show that it was a foreseeable loss or harm that he suffered under the contract. While the contract makes no mention of the Film Festival, nor does it mention the owner's plans regarding the film festival, it could be argued that it was foreseeable that the owner would have promoted or planned an event for the expected completion date of the new seats of August 15th. It could be seen to be expected that if the two parties contracted to agree to have the new seats installed by a specific date, that the owner would make plans or prepare an opening event upon the completion of the new seats. If this was something that the contractor should have known or if is deemed to be a foreseeable and material aspect of the agreed upon contract, the owner may be able to recover from the contractor for these lost profits as well. The contract did state that it would need to be completed "no later than August 15". This could trigger the idea that the owner had something planned or hoped to showcase an opening event of some kind upon the completion of the new seats by August 15th. However, it is also possible for the Court to determine that since the contractor was unaware that the owner planned to hold a film festival, that he is not liable for these lost profits as a foreseeable and likely harm to be suffered by the owner in the event of a breach by the contractor. This could go either way, but I think it is more likely that the Court would deem this an ancillary or tangential component of the underlying contract and its terms, and therefore, the contractor would NOT be liable to the owner for these lost profits.

(3) However, assuming that the owner is entitled to recover for lost profits from the cancellation of the film festival, it is likely that the Court would reduce the owner's damage award. The non-breaching party has a duty to mitigate its own damages after the breach occurs. In this instance, the facts provide that the owner could have moved the film festival to a nearby college auditorium, and if he had done so, he would have made a profit of \$25,000. Because the owner did not do so, he did not adequately mitigate his own damages, and therefore the lost profit damage award would be reduced by that amount. Since the owner WOULD have made \$35,000 from the festival if the contractor had performed his obligations under the contract, but he did not mitigate his

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damages by relocating the festival to the nearby college, the contractor would be liable to the owner for \$35,000 - \$25,000 = \$10,000.

Representative Good Answer No. 2

1. The owner (O) may be entitled to recover the \$50,000 paid to the substitute contractor above the \$100,000 price to be paid under the original contract with the original contractor (C). When O accepted C's offer to install the seats for \$100,000, he knew all other contractors were charging \$150,000 for the same job. C was new to the area, so C was offering a much lower price in hopes to establish a reputation in the area. When C made that lower offer, C was contracting with O to receive a benefit it deemed worthy of the lower price. When C breached, it put O in a position where O could not find a contractor willing to do the work for that price because all other contractors were established and did not need the benefit conferred upon them in the form of a better reputation. Since C reasonably knew or should have known that O would not be able to find someone to install the chairs at the same price, O can argue C is liable for the \$50,000 difference, since O had a duty to mitigate and did so by finding another contractor, but O is not responsible for paying the steep increase in price as a result of that mitigation. However, O did choose to take the lowest offer with complete knowledge of competitors pricing. O knew that if C did breach, any other contractor would cost \$150,000. Therefore, C would likely argue it does not owe the \$50,000 because the \$50,000 would be punitive and there are no punitive damages awarded for breach of contract.

2. O may recover for lost profits resulting from the cancelled film festival, however for damages to be awarded they must be reasonable, foreseeable, and certain. Here, the judge has concluded that O would have made a profit of \$35,000 should the film festival occurred as planned. The court also found that C was unaware O planned to host the film festival. Since C did not have knowledge of the film festival, C can argue that the damages were not foreseeable and therefore C should not be liable. Although C did not know of the film festival, it is reasonable to assume that a theatre would host something like a film festival. Therefore, O can make the argument that the damages are reasonable and foreseeable, since it is a theatre and film festivals are reasonably foreseeable to take place in theatres. O can argue the damages are certain, since the judge made a determination that a profit of \$35,000 would have been made if the film festival went as scheduled.

3. Assuming O is able to recover for lost profits from the film festival, it is likely only entitled to recover for lost profits in the amount of \$10,000. O is only entitled to \$10,000 and not \$35,000 because O had a duty to mitigate. The duty to mitigate means that O had a duty to reduce damages incurred. Since the judge found that O could have had the film festival at a nearby college and made a profit of \$25,000 instead of the \$35,000 at the theatre, it is likely that only the \$10,000 difference could be recovered. However, O can make the argument that he should not have had to mitigate and that the college auditorium may have brought in profit, but it would not have benefitted him nearly as much as if the film festival had been hosted in the theatre he owned. Since there is no consideration of what O stood to gain from an improved reputation, there is no way for the judge to calculate those potential damages as they are not reasonably foreseeable or certain. If O were able to recover for the lost profits, it is likely he would be able to recover \$10,000.

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MEE 5

Representative Good Answer No. 1

Introduction

Frank may not obtain spousal support from Wendy. Frank's constitutional challenge will not prevail. The aunt must file a custody petition in State A. The court is not likely to grant legal custody of Danielle to her aunt.

Issue 1: Frank's Spousal Support Claim

The first issue is whether Frank may obtain spousal support from Wendy. If spouses choose to divorce, the court may issue a decree order one spouse to pay spousal support to another. There are three main types of spousal support. The first type is periodic spousal support, in which the paying spouse pays the receiving spouse a certain amount on a regular basis, usually a monthly payment. The support continues until the receiving spouse dies or remarries (or, in some states, cohabitates with another), and sometimes may be modified in light of an unforeseen and material change. The second type is lump sum, in which the paying spouse pays the receiving spouse a specified amount, either all at once or in installments. The third type is rehabilitative spousal support, in which the paying spouse pays the receiving spouse for a limited time for a particular reason. For example, if one spouse has stayed home with the children and out of the workforce for a number of years, the spouse who has worked may pay that spouse rehabilitative support for a time until the receiving spouse can obtain an additional degree, update the necessary credentials, etc. The court considers a number of factors in allocating spousal support, including the age and financial position of the parties, the length of the marriage, the number of children, etc. But, if the spouses are not divorcing, the court will not even look into the issue of spousal support. Under Supreme Court precedent, there is a strong right to privacy in the marital relationship in the home, and the court will not interfere in the couple's financial decisions in the absence of divorce proceedings. Here, Frank objects to Wendy's financial decisions because Wendy, who works as a commercial airline pilot and consequently travels frequently, has stopped depositing her wages in the couple's joint bank account and has declined to pay the household's bills. Frank, who lost his job as a steelworker a year ago and is unable to return to work due to his serious back injury, only receives unemployment insurance that does not cover all of the household's bills. But, even though Wendy is in a better financial position than Frank and Wendy is refusing to use her income to pay for the household's bills, the court cannot make any decisions as to spousal support because Frank and Wendy are still married and do not seem to be contemplating divorce. Therefore, Frank may not obtain spousal support from Wendy, unless he seeks a divorce from Wendy.

Issue 2: Frank's Constitutional Challenge

The second issue is whether Frank's constitutional challenge to the State A vaccination law will prevail. As indicated above, the Supreme Court has decided that under the United States Constitution, people have a right to privacy as it relates to family matters. More particularly, custodial parents have strong constitutional rights in determining the care and upbringing of the children: where they go to school, what religion they practice, etc. But, the state also has a strong right under its police powers to enact laws to protect the health, safety, and welfare of its citizens. Here, Frank has refused to allow Danielle to receive any vaccinations and, upon receiving the note from her school that she will not be allowed to enroll next year without proof of her vaccination, has argued that State A's vaccination law is unconstitutional. State A has a mandatory vaccination law that provides that, in order for a child to qualify for enrollment in a public school, "the child's parent or guardian must provide proof that the child has received all vaccinations mandated by the State Department of Health." The only

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exception to the law is for the children who qualify for a medical exemption. Frank and Wendy's child, Danielle, does not qualify. But, Frank objects to Danielle being vaccinated under his personal, nonreligious beliefs.

The Supreme Court has upheld parents' rights on religious grounds: it has allowed Amish parents to remove their children from public school at a younger age pursuant to their religious beliefs.

But, Frank's beliefs are religious and not personal. Moreover, State A has a strong interest in protecting the health and safety of children at public school by requiring that all students be vaccinated, unless they cannot be for medical reasons. It is not clear what standard of scrutiny the court would use in evaluating the constitutionality of the law: strict scrutiny, because the fundamental right of the parent is at issue, or rational basis, because the law is a nondiscriminatory law of neutral application. Either way, the law probably will survive, due to the strong interest of the state and Frank's nonreligious beliefs. Therefore, Frank's constitutional challenge to the State A vaccination law will not prevail.

Issue 3: Jurisdiction of the Aunt's Custody Petition

The third issue is which state the aunt must file a custody petition. The majority of states have adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The UCCJEA helps to determine which court has jurisdiction over claims involving children. Under the UCCJEA, the court that usually has jurisdiction is the court of the child's home state. The child's home state is where the child is domiciled. The child is domiciled in a state if she (or a parent or guardian) has lived there for at least 6 months preceding the matter, and a substantial part of the evidence involved in the case exists in that state. Here, the aunt wants to file a custody petition to obtain custody of Danielle. Under the UCCJEA, she must file the custody petition in Danielle's home state. It is true that Danielle has been staying with the aunt in State B for 2 weeks. The aunt might argue that this gives State B jurisdiction over the case. However, Danielle was born in State A 11 years ago, and has lived there with Frank and Wendy, her parents, ever since. Also, her parents currently have custody of her, and the evidence pertaining to her life with them is in State A. Accordingly, under the UCCJEA, State A is Danielle's home state. Therefore, the aunt must file a custody petition in State A.

Issue 4: Merits of the Aunt's Custody Petition

The fourth issue is whether the court is likely to grant legal custody of Danielle to her aunt. As indicated above, custodial parents have strong constitutional rights to continued custody of their children. This is particularly true in terms of third parties who want to obtain even visitation rights to the child, much less custody of the child. Also, under the UCCJEA, the court typically is obligated to follow adopted guidelines when resolving custody disputes involving children. There are many factors to consider, but the overriding factor is the best interest of the child. The child's wishes can become an important factor, but usually only if they are 12 or older. Here, the aunt wants to obtain custody of Danielle. Danielle, age 11, claims to want to live with her aunt. She says that her mom Wendy travels too much, her dad Frank is depressed because of his injuries, and she "just can't stand" to live with them anymore. Because she is younger than 12, her wishes probably will not be considered. Also, despite her parents' current troubles, she has lived with them since birth, for 11 years, and the court likely will find that it is in her best interest to maintain her current custody with her parents. Also, Wendy and Frank's rights as custodial parents are much stronger than those of the third-party aunt's. Therefore, the court is not likely to grant legal custody of Danielle to her aunt.

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Representative Good Answer No. 2

I. Can Frank obtain a spousal support award from his current spouse?

Will the court order Wendy to pay spousal support to Frank, her current spouse? Generally, a court only will issue a spousal support award, or other support award, if the parties are divorcing. The courts generally refrain from exercising jurisdiction over matters between currently-married spouses. Such intermarital disputes are viewed as wholly private that should be adjudicated by the courts.

Here, Wendy and Frank were married twelve years ago in State A. The couple continues to cohabit in State A. Frank's recent injury on his job has caused him to not be able to work, and now Wendy will not deposit her wages in the couple's joint bank account or pay household bills. While this may be an inconvenience to Frank, because he and Wendy are still married, the court will not issue a spousal support award to him. The court will stay out of inter-marital disputes until the parties seek a dissolution of their marriage through divorce.

II. Does Frank's constitutional right to raise his child trump the State A statute requiring vaccination?

Can Frank properly bring a constitutional challenge against the State A statute requiring vaccination? Part of the right to privacy, as guaranteed to citizens by the Due Process Clause of the Fourteenth Amendment, provides parents the right to raise their children as they see fit without government intervention. This right is especially protected when the parent is acting pursuant to their sincerely held religious beliefs. However, the right to make parental choices is not. When a parent refuses to provide medicine based on religious beliefs, the state may require that a child be provided with certain medical services when it is necessary to save the child's life in emergency circumstances. If the parent is not acting pursuant to a religious belief, then the state has more latitude to legislate, as long as the law is necessary to further a compelling interest.

Here, State A has enacted a statute that requires a parent to have their child all vaccinations mandated by the State Department of Health before they can enroll in school in the State. Frank has a "personal, nonreligious belief" that causes him to "consistently refuse" that his child, eleven-year old Danielle, receive vaccinations. Just because Frank has the right to make decisions about his child's medical care does not allow him to place other children's health in danger as a result. The state has a compelling reason to require vaccinations - to prevent other children from contracting deadly illnesses in school - and the law is narrowly tailored to fit that end. Allowing exemptions would drastically undercut the interest at play. Thus, Frank's constitutional challenge will likely fail.

III. Where must Aunt file her custody petition?

Must Aunt file her custody petition in State A or State B? The UCCJEA governs which courts have jurisdictions to issue child custody orders. The first state that has jurisdiction over a child custody dispute is the child's home state, which is the state where the child has resided with at least one parent for the last six consecutive months. If there is no such home state, then the next state that has jurisdiction is the state that has the most significant connections with the child. Finally, if there is no state with the most significant connections, then the state that has the most connections to the child (whether significant or not) has jurisdiction.

Here, Danielle was born to Frank and Wendy eleven years ago in State A. The three of them continued to live in that state since her birth. Despite the fact that Danielle went to visit her aunt in State B for two weeks, State A remains her home state. Danielle did not go to State B with the intent of moving there permanently; instead, she went there only to visit her aunt. While there, she formed the intent to stay there, but this is not enough to

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deprive State A of home state jurisdiction, because Danielle has not taken any steps to move there permanently other than to say that she does not want to go home. Because State A is the state in which Danielle has resided for the past six months, it has exclusive jurisdiction over a custody dispute over her. The aunt should file her custody petition in State A court.

It should be noted that even if State A was not Danielle's home state, it likely still has jurisdiction over the custody matter as the state with the most significant connections to her because both of her parents continue to reside there and that is where she has gone to school all of her life, whereas she has only two weeks' worth of connections to State B.

IV. Will the aunt prevail in her custody dispute on the merits?

Is it in Danielle's best interests to award her aunt custody as opposed to her marital, biological parents? Legal custody refers to the right to make the impactful, broader decisions about a child's life generally (as compared to physical, which gives the right to only make decisions about the child's day-to-day life). When presented with a custody dispute, courts will generally award custody to the party that would be in the child's best interests to have custody. Courts will consider a host of factors, such as the child's wishes if she is mature enough to express those wishes, the ability of the biological parents to provide for the child, whether there has been any abuse, and all other relevant factors.

In determining a custody dispute between a non-parent and a parent, however, the court must give "special consideration" to the biological parent's views, because they have a constitutional right to be a parent, and it cannot be taken away unless the circumstances clearly indicate that they do not serve the child's best interests.

Here, Danielle's aunt wants custody over the objection of Danielle's married, biological parents. The court will consider Danielle's wishes, given that she is 11 years old. It will consider the fact that she does not like her home because "Mom is always traveling, Dad is really depressed, and [she] just can't stand living there anymore." However, there are no facts indicating that Frank and Wendy can no longer provide for Danielle financially. There are no facts indicating that the home her parents make is unfit for her to live in, and there is nothing showing that the aunt would be any better at providing for Danielle's needs than Frank and Wendy. Considering the "special weight" that must be given to a biological parent's views on custody, it is likely that the court will deny aunt's petition.

MEE 6

Representative Good Answer No. 1

1. Does the court have subject matter jurisdiction over the state law claim raised in the class action?

Subject matter jurisdiction can be either diversity jurisdiction or federal question jurisdiction.

Is federal question jurisdiction? Federal question jurisdiction is when there is a federal issue at stake. In this case, the complaint from the man alleging that his medical records were stolen by a hacker/thief out of trident's database alleges that the court has diversity jurisdiction pursuant to 23 USC 1332. Although State X has a law allowing any person whose private medical information is obtained by an unauthorized third party in any manner to recover actual damages from the health care providers, there is no federal law in question. Because there is no federal law in question, there is no federal question jurisdiction.

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Is there diversity jurisdiction? diversity jurisdiction is when the plaintiff and defendant are completely diverse from each other, meaning they are domiciled in different states, and the amount in controversy is over \$75,000. in this case, the plaintiff man is domiciled in state X and is a citizen of state X. Plaintiff wants to bring an action against defendant trident in state X. Trident has its corporate headquarters in State X. there is no diversity between the plaintiff and defendant so there is no subject matter jurisdiction in federal district court. If the named representative plaintiff was diverse from the defendant, meaning not domiciled in state X, then there would be subject matter jurisdiction in this class action. You can assume with plaintiff class that has 30,000 patients affected by the breach, that their recovery for \$500 per each 30,000 would be well over the amount requirement of \$75,000. If the named representative plaintiff was diverse with the defendant, then there would be diversity because the amount in controversy is met. Otherwise, there is not diversity jurisdiction.

2. Does the action fail to allege a claim upon which relief can be granted because of the state law barring class actions to recover statutory damages?

In this case, the state law in state X does not allow recovery of damages for a complaint like this unless the complaint is filed by an individual, not in a class action. The man filed a class action so he cannot recover damages as a class action. The man could file individually. Because the state law of X does not allow recovery for claims in the nature of the complaint filed by the plaintiff. there is not relief that can be granted and the 12(b)(6) motion will most likely be granted.

3. Does the man have standing to bring a statutory claim in federal court? Standing requires injury, causation, and redressability.

Is there an injury? Injury is measured by a concrete injury. the injury cannot be moot (not a live controversy) or overripe. In this case, the man has a concrete injury because his medical records were stored in Trident computers. Although there is no evidence that the thieves have used any of this stolen medical information, laws impose a duty on health care providers to keep patient information private. The laws claim that the invasion of privacy from the data breach causes significant harm to the individuals involved so any person whose private medical information is obtained by an unauthorized third party in any manner may recover actual damages from the healthcare provider. There is most likely an injury here because last December, an unknown person hacked into trident's computer system and obtained the personal medical data that is meant to be private information. The man bringing the suit is one of the people whose medical information was stolen.

It could be argued that there is no injury because other than stolen data, there is no evidence that thieves used any of the medical data. Opponents could argue that the case is not ripe yet because no actual concrete injury as occurred. I think that this counter argument would fail because I think the invasion of privacy itself is the injury.

Is there causation? the injury must be directly caused by the action of the defendant. to be the cause, there must be some sort of causal connection between the injury and the act. in this case, the plaintiff is injured by the stolen medical information from Trident because there is now an invasion of privacy of his personal information that a hacker/thief is now in possession of. there is a connection between plaintiff's injury and the defendant.

Is there redressability? redressability means there must be a way to fix the damages. the claim must be able to be remedied. in this case, a remedy is available because the state statute provides that individuals are entitled

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to a minimum statutory damage award of \$500 to compensate them for the invasion of privacy. this award of damages to compensate those affected constitutes redressability.

There is standing here.

But the issue is if there is standing in federal court. Standing in federal court in a class action suit is lawful when the plaintiffs have. Erie is when you bring a state claim in federal court. this would be governed by federal procedural law and federal substantive law. in this case here is not standing because the federal law does not even mention this issue. the law is not outcome determinative because the state law does not allow recovery of class actions with this type of complaint. there is no standing in federal court.

Representative Good Answer No. 2

I. Subject Matter Jurisdiction Over a Class Action

Federal subject matter jurisdiction requires either a question of federal law involving the cause of action or complete diversity of citizenship of the parties. Under diversity jurisdiction, all plaintiffs must be domiciled in different states than all defendants. Further, the amount in controversy must be over \$75,000. Generally, one plaintiff must have a good faith claim to damages of over \$75,000 to claim diversity jurisdiction and other plaintiffs can join under supplemental jurisdiction. In class actions, some of these requirements are less strict. Instead of complete diversity, the rule requires that no named plaintiffs to the class action be domiciled in the same state as any of the defendants. Supplemental jurisdiction applies to all of the class members with claims under \$75,000 so long as at least one member has a claim of over \$75,000. An individual's domicile is determined by the state in which the person resides and intends to reside; an individual can only have one state of domicile. Corporations may have up to two states of domicile, which include the state of incorporation and the state where the corporation's headquarters are located, often referred to as the nerve center

More recently a federal statute was created that allowed federal jurisdiction in class actions with a minimum claim requirement of \$500, which also requires only minimum diversity of parties. Minimum diversity only requires that some plaintiffs be diverse from all defendants. To meet this statutory exception, the total amount in controversy for the class must exceed \$5 million in total claims.

Based on these facts, the requirements for federal subject matter jurisdiction have been met. There are class members from state x, state y, and state z. Trident Healthcare is incorporated in state X and headquartered in state X; therefore, state X is Trident's only state of domicile.

Minimal diversity has been met by the members of state Y and state Z, joined in the class. The total amount in controversy is \$15 million and each member has a claim for \$500, which meets the statutory requirement for federal jurisdiction over the class action (30,000 members * \$500 = \$15 million).

II. Federal Procedural Law

In diversity cases, federal courts must employ state law on issues of substantive law and federal procedural rules. Generally, a court should deny Trident's motion to dismiss for failing to allege a claim based on the state law barring recovery statutory damages because a bar on statutory damages would be considered a procedural rule rather than a substantive law. In this case, the federal court might have to make an exception based on the governmental interest approach to conflict of laws. State A could make a claim that the statute is in place to protect state A citizens from violation of their privacy rights and the class action bar similarly acts to protect state citizens and businesses from incurring excessive statutory penalty payments from out of state class

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action interests. The state government has a legitimate interest in this case because if the state rule barring class action claims were overcome by federal procedural rules, it could defeat the purpose of the statute and force the state government to repeal the privacy protection statutory penalty outright. Thus, this likely fits into an exception where the federal court might abide by the state procedural rule, since it has a state substantive purpose.

III. Standing

The man may not have standing to bring the statutory damages claim in federal court because it is based on diversity jurisdiction. The man himself, would not have subject matter jurisdiction because he is a citizen of state x, but the federal class action statute allows him to join his claim with members from states Y and Z creating minimal diversity. The man's claim can be joined as a matter of supplemental jurisdiction which applies to a party that suffered injury from the same nucleus of facts as another party who may have standing under diversity jurisdiction. Based on this issue, likely a member of the class from state Z or Y would have to bring the claim and the man could join under supplemental jurisdiction. Federal diversity jurisdiction exists to prevent state court bias in favor of in-state parties. Arguably this principle is in conflict with a diversity claim based on a statutory penalty.

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MPT 1

Representative Good Answer No. 1

MEMORANDUM

This memorandum addresses two key issues: (1) based on contradicting facts, whether or not Wuhan Precision Parts Ltd. ("WPP") will succeed in vacating the default judgment due to improper service under the Federal Rules of Civil Procedure ("FRCP") and the Hague Convention. and (2) if there are any grounds to challenge the attorney's fee award.

1) It Is Unclear If WPP Will Successfully Vacate the Default Judgment Due To Improper Service Of Process Because The Standards For Vacating For That Purpose Differ And This Case Presents Facts That Favor Both Arguments

It is difficult to gauge whether or not the default judgment entered against WPP in its case versus American Electric Distribution Inc. ("AE") because district courts in Franklin have used different legal standards to review these types of decisions. Based on the present facts, the type of standard that the court decides to use will likely determine the outcome decision.

Applicable Standard: First and foremost, FRCP 4(f)(1) states that an individual in a foreign country may be served "by an internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention." FRCP 4(h)(2) allows for this type of service to apply to foreign corporations as well (such as WPP). For servicing a party in China, the Hague Convention requires that the serving party translate the documents in Mandarin Chinese and deliver the documents to the Chinese Central Authority, which then effectuate the service. (EduQuest Digital Corp. v. Galaxy Productions Inc.).

However, FRCP 4(f) also contains language that this formal process is not required when the person (or corporation) waives formal service. Districts courts in Franklin have shown that one such way that this formal process requirement is formerly waived is by agreeing to an arbitration proceeding within the United States. By agreeing to arbitrate in the United States, while also agreeing to a provision allowing court judgments to be entered, a foreign entity is deemed to have waived formal process outlined in the Hague Convention and could be served in another form.

In determining if formal service via FRCP 4(f) is waived and another form of service is proper, courts in the 15th Circuit have used different standards in measuring fair notice.

In Pennsylvania Coal Co. v. Bulgaria Trading and Transport Co., Ltd., the court stated that when a foreign corporation agrees to participate in arbitration proceedings in the United States, it cannot expect to participate in the arbitration decision and then avoid any consequences stemming from the decision. However, this court also recognized the importance of weighing the expectation of the parties to an arbitration against the right of fair notice. The court states where "parties have consented to arbitration, actual notice of the proceedings can be sufficient as long as it is fair and no injustice results." Those who try serving parties in good faith have a fair shot of prevailing if the notice given is fair.

However, in Eduquest Digital Corp. v. Galaxy Productions Inc., the court stated that the Penn. Coal standard was too loose. The court stated that if the parties to the underlying contract agreed to the provision in the arbitration clause that allowed court judgments to be entered, then the foreign corporation waived formal service of process. The court interpreted this provision to mean that the parties of the contract consented to be served by

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actual notice that satisfies the general principles of due process. It is important to note, however, that this case explicitly says that its findings are limited to the specific facts of the case.

Facts Supporting A Decision To Vacate: In the present matter, there are certain facts that seem to indicate that vacating the default judgement due to improper service is the correct decision. First of all, WPP is a foreign corporation, so FRCP 4(f, h) states that it needs to be served in a way that in compliance with the Hague Convention, unless that service is deemed waived. It is possible that the service is deemed waive and if that is the case, it would be beneficial for the sake of WPP if the Penn. Coal standard was used.

The facts indicate that WPP received the summons via email to a company employee, who left the company shortly after. The summons was not translated in Mandarin Chinese and there are no facts that indicate AE even attempted to formally serve process by Hague Convention principles in good faith. WPP had to take an extensive amount of time to translate the summons. Also, since the employee who received the summons left, it is arguable that WPP was really on "actual notice." The summons was also sent by email even though WPP states that most of the communications between the parties was by fax and telephone (although, it is worth mentioning that the arbitration process was communicated via email.)

Also, there is not any evidence that WPP has itself acted in bad faith and attempted to avoid all liability. They have already paid some of the arbitration judgment, despite having cash flow issues. Likewise, the harsher standard imposed by Eduquest is limited to its facts, where the corporation was actually acting in bad faith.

Facts Undermining A Decision To Vacate: The most important fact undermining this decision is WPP agreeing to arbitrate the decision in the United States and also its willingness to have a judgment entered by any court with jurisdiction thereof. WPP also took nearly nine months to respond to the summons, implying that perhaps they ignored the summons. The employee who received it was properly designated by WPP beforehand as well.

Furthermore, while they were in China and the Hague Convention requires a Mandarin Chinese translation, WPP agreed to arbitrate in English, perhaps showing its willingness to and acceptance to receive documents in Chinese.

2) There Are At Least Two Grounds to Challenge The Award Of Additional Attorney Fees

There are two grounds that WPP could use to challenge the additional attorney fees imposed by the court.

Additional Attorney Fees Are A "New Claim For Relief:" Under FRCP 5(a)(2) a new claim requires service that complies with the FRCP and the Hague Convention. Under the Hague Convention, the party raising a new claim must deliver a copy of that claim to the foreign governing authority (Penn. Coal).

The additional amount of attorney fees in the present matter where not mentioned in the complaint or the summons. Because of this, a new claim of relief was issued and that cannot be properly done without formal service of process.

There Is No Reference To A Judicial Remedy Regarding Attorney Fees In the Arbitration Clause: The court in Penn Coal states that courts are careful to defer all substantive decisions to the arbitrators. The court applies fairness principles in trying to ensure that both parties are fully aware of their rights. The court further explains that these fairness principles cannot be used to open up the door to claims, like requests for attorney's fees, that were not previously raised with the arbitrators.

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Here, the arbitration clause does to provide for a judicial remedy for attorney fees if the arbitration decision is entered by a court having jurisdiction. Furthermore, there is nothing in the complaint asking for additional attorney fees.

Under these two theories, the award of additional attorney fees may be vacated.

Representative Good Answer No. 2

ATKINSON & CARLTON LLP
Attorneys at Law
3 Civic Center Plaza
Franklin City, Franklin 33812

To: Alexandra Carlton From: Examinee Date: July 30, 2019

Re: American Electric v. Wuhan Precision Parts Ltd.

Alexandra,

You wrote me to request that I draft a memorandum centering options to dispute confirmation of an arbitration award and associated attorney's fees for our client Wuhan Precision Parts Ltd. (WPP). The following memorandum addresses the two questions you requested I answer in your initial email.

MEMORANDUM

Introduction

This memorandum assesses the strengths and weaknesses of WPP's claims against enforcement of the June 14, 2019 Order Entering Default Judgment in the United States District Court for the District of Franklin. Though WPP will likely remain responsible for payment of the original arbitration award, WPP has substantial grounds on which to dispute the default judgment against it. Claims concerning vacating the judgment and challenging attorney's fees are addressed in turn.

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

WPP seeks to vacate the default judgment due to improper service of process under the Federal Rules of Civil Procedure and the Hague Convention. This claim is a matter of first impression for the Federal District Court for the District of Franklin and the Order Entering Default Judgment has already ruled against WPP. Decisions in the federal courts of Olympia and Columbia provide substantial grounds on which to pursue this claim and WPP's chances of relief will improve substantially if it has the opportunity to present facts which were not in the record during the default judgment proceedings.

An order confirming an arbitration award is not valid if service of process was improper under the Federal Rules of Civil Procedure and the Hague Convention. The Federal Rules of Civil Procedure incorporate the Hague Convention by reference in Rule 4(f)(1): "an individual . . . may be served at a place not within any judicial district of the United States . . . by any internationally agreed means of service that is reasonably calculated to give

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notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents." Federal Rules of Civil Procedure Rule 4(f)(1). Though the language is framed permissively, the Supreme Court has admonished "that compliance with the Hague Convention is 'mandatory in all cases to which it applies.'" *Pennsylvania Coal Co. v. Bulgaria Trading & Transport Co., Ltd.* (D. Olympia 2001) (citing *Volkswagenwerk AG v. Schlunk*, 486 U.S. 694, 705 (1988)). As here, where both the United States and China are signatories to the Hague Convention, service in accordance with the Hague Convention is presumptively mandatory.

However, in two cases with similar procedural dispositions, federal courts in Olympia and Columbia have denied motions to vacate default judgment to confirm arbitration awards even where service of process did not conform with the Hague Convention. As such, WPP will either need to argue that its case is distinguishable from those cases if the Federal District Court for the District of Franklin adopts either approach or offer an alternative under which its motion to vacate the default judgment is likely to be granted.

a) Under the standard in *Pennsylvania Coal Co. v. Bulgaria Trading & Transport Co., Ltd.*, WPP may succeed in its motion to vacate because service of process by AE did not constitute fair notice.

Though the Supreme Court's admonition that application of the Hague Convention is mandatory seems to establish the formal requirements for proper service of process under these circumstances, the court in *Penn Coal* held that "strict adherence to the Hague Convention is not required" when the serving party complies with the Hague Convention in good faith by delivering the pleadings to the appropriate governmental authorities and when the party to be served has consented to and participated in arbitration "pursuant to an agreement contemplating the award's confirmation in court." *Penn Coal*. After establishing those preconditions were present in the record before it, the court proceeded to consider whether notice was fair. *Id.* In essence, the court adopted the following test:

If the serving party has tried in good faith to comply with the Hague Convention by filing its pleadings with the appropriate government authorities and the party to be served consented to arbitration by an agreement contemplating judicial enforcement of any resulting arbitration award then only actual notice and fairness must be satisfied.

On the facts available, the first two conditions are satisfied. The Order Entering Default Judgment found that AE had filed its pleadings with the appropriate Chinese government authorities and no basis for assuming bad faith on this point exists in the record. Order Entering Default Judgment. WPP does not dispute that it consented to arbitration and that the arbitration agreement contemplated judicial enforcement of an arbitration award.

Under the third factor, WPP did receive actual notice, but the date by which the receipt of notice should be measured is not the same as those offered by the court in the Order Entering Default Judgment. The Order Entering Default Judgment characterized WPP as acting in bad faith. The court noted that WPP refused to appear despite being served by email, which "was used during the arbitration pursuant to the procedural rules governing arbitration." Order Entering Default Judgment. It further noted that the motion for default judgment was served by mail, that the complaint was served in November 2018, that the default motion was served in March 2019, and that at the time of the issuing the Order, eight months had elapsed since the complaint was served and 90 days had elapsed since the default motion was served. *Id.* The court even cast doubt on whether the failure to serve the default motion in Mandarin Chinese should justify delay because "those pleadings were short and straightforward." *Id.*

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However, if Shao Wen "William" Li's account of events is accurate, WPP is on strong factual footing to contest this characterization. WPP contends that it "did not receive anything from the Chinese government" and that it never received actual notice by email because the email was sent to WPP's Vice President of Manufacturing who quit within one week of receipt of the email and "did not forward the email or notify anyone about it." Letter. Furthermore, though the service of the default motion by mail was sent on March 8, 2019, WPP contends that it did not receive it until April 15, 2019 "because the Wuhan government post office delayed delivery." Id. WPP contends further that by the time it translated the default motion, it had already learned of the default judgment. Id.

Under the standards in Penn Coal, a more complete factual record is likely to tip the balance of these factors in favor of WPP. In Penn Coal, BTT (the party to be served) allowed nine months to elapse between service of process and entry of the judgment. Penn Coal. The court noted that, unlike WPP, BTT raised no issues regarding translation, offered no explanation for failure to respond to email service despite using that form of communication during arbitration, and BTT was served by mail and personally. Id.. In contrast, WPP can dispute that it ever received actual notice by email because of the misconduct and resignation of its VP of Manufacturing and that the time between actual notice by mail was significantly less than 90 days because of delay by the Wuhan government post office.

As such, a court applying the Penn Coal factors is likely to find that WPP received actual notice much later than the court did in the Order Entering Default Judgment and that notice was not fair because events out of WPP's control denied it reasonable notice.

(b) Under the standard in EduQuest Digital Corp. v. Galaxy Productions Inc., WPP is less likely to succeed in vacating the default judgment because it would be deemed to have waived any right to formal service and its post-award conduct will not excuse its failure to appear.

The United States District Court for the District of Columbia in EduQuest simplified the test set out in Penn Coal by holding that agreement to arbitrate constitutes a "'deemed waiver' of formal Hague Convention service in connection with confirmation of an arbitration award." EduQuest Digital Corp. v. Galaxy Productions Inc. (D. Columbia 2005). As such, because WPP entered into such an agreement with AE, a court using the EduQuest standard would ignore WPP's post- award conduct entirely and simply consider whether the notice it received was reasonable and sufficient.

Instead of considering whether the actual notice received by WPP was fair, a court using this standard would likely conclude that AE's efforts were reasonable and sufficient because AE attempted Hague Convention-compliant service in good faith, used an established medium for communication arising from the arbitration proceedings (email), and served the default motion by mail. To avoid applying this standard, WPP should attempt to renew the argument made by Galaxy Productions in EduQuest that such a standard virtually eliminates any protection the Hague Convention would provide to parties to such arbitration agreements.

(c) WPP would succeed under a more formalistic standard requiring that only Hague Convention- compliant service of process can be proper to confer jurisdiction.

Though the courts in Olympia and Columbia adopted looser requirements, the original admonition of the Supreme Court about Hague Convention service of process was airtight. Because this is a matter of first impression, WPP can argue that the United States District Court for the District of Franklin should stick as closely

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as possible to the intent of the Supreme Court in adopting that rule and accept no substitute for Hague Convention-compliant service of process. On the facts presented, because the Chinese government never served WPP, it would prevail under such a standard.

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

Though the courts in Penn Coal and EduQuest disagreed on the first question, they both agreed that awarding attorney's fees in cases such as the one between WPP and AE is improper. Rule 5(a)(2) of the Federal Rules of Civil Procedure requires Rule 4-compliant service of process for "a new claim for relief." Federal Rules of Civil Procedure Rule 5(a)(2). In Penn Coal, the court characterized the attorney's fees as a new claim for relief which must be submitted in accordance with the Hague Convention. Penn Coal. Further, the court in Penn Coal required a return to arbitration to obtain any such attorney's fees. The EduQuest court adopted the Penn Coal court's reasoning on this claim in whole.

If the court adopts the standards set forth in those cases, which are a relatively straightforward application of the relevant Federal Rules of Civil Procedure and statutory law governing arbitration, WPP will prevail in challenging the attorney's fee award in the Order Entering Default Judgment. AE did not include the claim until it filed its motion for default judgment and only filed

its pleadings, not the motion, with the Chinese government. Order Entering Default Judgment. As such, WPP can succeed by arguing that the appropriate forum for litigating any such fees is by returning to arbitration and that the award should be vacated because AE did not serve this new claim in accordance with the Hague Convention.

Conclusion

Ultimately, WPP has a range of options on which to seek vacatur of the default judgment entered against it. These alternative bases for relief should provide the court substantial guidance in approaching these issues of first impression. Given WPP's particular aversion to paying the additional \$90,000 in attorney's fees, the persuasive legal authority of neighboring federal district courts should provide strong grounds to challenge that award.

Best, Examinee

MPT 2

Representative Good Answer No. 1

To: Dana Carraway

Re: Carl Rucker

In order to achieve Mr. Rucker's stated goals of 1) assuring that Mrs. Rucker may live in the house on Cherry Tree Road for the rest of her life and 2) to assure that his two sons receive the house after she dies, and 3) to minimize the risk of litigation between them, the best course of action is for him to create a life estate in Mrs. Rucker and a remainder in Mr. Rucker's two sons, by deed and during his lifetime. The following are the reasons that support this recommendation. As stated, the client is not interested in creating a Trust.

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By creating a life estate in Mrs. Rucker, she will have the absolute and exclusive right to possess and use the property during her lifetime. Walker's Treatise on Life Estates. As a life tenant (LT), Mrs. Rucker (W) will be entitled to possession of the property during her life and her rights will automatically expire upon her death. As the life tenant, she will be responsible for real estate, taxes, insurance, and maintenance costs related to the property. Id. (More on these expenses below) As a life tenant, W may sell or otherwise transfer her interest, however, any transferee from a life tenant can only have the estate for only as long as the LT lives. In other words, her life is the measuring life of the interest. Similarly, if she mortgages her interest, that mortgage will expire upon her death automatically. Id. Therefore, she will not be able to sell the home or otherwise transfer her interest in the home to a third party, e.g., donating to charity, without the interest expiring upon her death.

For Mr. Rucker's sons, Mr. Rucker can create a remainder interest, which can be created in more than one person. As remainder owners, his sons will become the owners of the home immediately upon the death of W. As remainder owners, they will also have no right to use the property or income the property during the W's lifetime. Id. The remainder owner cannot affect the LT's interest in the property while she is alive. Neither of his sons, or their creditors, will be able affect the W's possession as long as she's alive. However, if W neglects or harms the property in some way, the remainder owners can sue the LT for the damage in an action for waste. Therefore, if the W, out of spite, decides to neglect or harm the property later in life, they will have recourse to seek remedy.

Mr. Rucker should create the life estate while he is alive. This can be accomplished by executing a new deed to the life tenant (his wife) and the remainder owners (sons), He should be informed that once a decision is made to transfer a property to a life estate, it is almost always irreversible. Id. Therefore, if he should change his mind for some reason, he cannot reverse this grant without the consent of all the life tenants and remainder owners. In other words, his wife and two sons must all consent should he decide to reverse his decision after a new deed has been executed. In addition, if he decided to sell the house, for example, or sign a mortgage to borrow money against the home for major repairs, etc., the life estate and remainder holders must all agree and sign. This can also severely restrict marketability of the property and make it nearly impossible to borrow money using the home as collateral. Id.

If the life estate and remainder interest is created during Mr. Rucker's life (vs. in a will upon his death), the home will automatically belong to W and then, upon her death, will automatically belong to his sons, with no need for probate of the property, which will avoid any risk of litigation and costs and delays related to probate. Id. The risk of litigation is higher if a life estate is created instead by will. In addition to the time and costs associated with possible litigation, there is a risk that the court may award the monetary value of the life estate to the LT instead of possession of the property (which goes against his goals). Id. Transferring the property by deed minimizes these risks.

There are some issues related to creating a life estate for a spouse:

Elective Share

Franklin law permits a surviving spouse to claim a percentage of the deceased spouse's "augmented estate", which is the deceased spouse's probate estate increased by, among other things, lifetime gifts to the surviving spouse. Recent case law has clarified that the value of such a life estate should be included in calculating the elective share of the surviving spouse. In re

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Estate of Lindsay 2008 Franklin is not a community property state and in Franklin a spouse who has sole title to a residence may transfer a life estate to anyone without the other spouse's consent. Walker Treatise.

In addition to the home, client also owns certificates of deposit totaling \$200,000, which he plans to bequeath to W upon his death. Otherwise, he has stated that he has no other property, e.g. retirement accounts, as he will be relying on social security. He has also stated that W has no other assets or property and will also be relying on social security. Franklin law states that spouse is entitled to claim an elective share equal to 50% of the "augmented estate" or in alternative

what was bequeathed in a will. Franklin Probate Code 2-202. The value of a life estate should also be included in the augmented estate, in addition to the assets passing by will, when determining the elective share. In re Estate Lindsay. The percentage of the surviving spouse's share depends on the length of time the surviving spouse had been married to decedent. Id.

Since they have been married 18 years already, W will be entitled to 50%. Id.

An augmented estate includes the following: 1) the net assets held in probate estate, 2) assets transferred by decedent to the spouse before death, 3) surviving spouse's own assets and pre- death transfers (Franklin Probate Code). Using these provisions, the calculated value of the augmented estate as of today is \$280,000 (\$80,000 value of life estate present day + \$200,000 in deposits). W will be entitled to 50% of that amount should she opt to take elective share. However, since client plans to bequeath the total \$200,000 to W in his will, this is moot.

If the client decides to try and enter into a contract with his wife to achieve his wishes, there are many risks with going this route. They may execute a joint will that leaves W all of his property if she survives him then all of the property including property transferred to surviving spouse from first spouse to transfer to a third party, in this case the client's two sons. However, W will be free to revoke any will after his death. The issue is whether W will have any contractual obligation to H arising from the joint will. An individual who receives an unrestricted bequest under a will has complete freedom to dispose of property she receives. Manford v. French. There are two methods to accomplish a restriction of these rights. Id.

First, spouses may enter into a contract to make a will, one that restricts the right of surviving spouse to alter an agreed upon testamentary disposition. Id. A contract to make a will requires survivor not to change terms of an already agreed upon will, but it does not prevent survivor from transferring the property during her lifetime. Id. In this case, the W could sell or otherwise encumber the property with debt without breaching the contract. Kurtz v. Neal.

Second, spouses can restrict the rights of the survivor through a joint will that reflects a contractual obligation between them. Id. A joint will is one will, signed by two or more testators that deal with distribution of the property of each testator. Any contract to make a will or not to revoke a will must be in writing and may be established only by 1) provisions of a will stating material provisions of the contract, 2) an express reference in a will to a contract and extrinsic evidence proving terms of the contract, 3) a writing signed by the decedent evidencing the contract. Id. and Franklin probate code 2-514

There must be some written evidence of the existence and terms of such a contract. This assures that the parties' intentions can be determined and minimizes risks of future litigation. Breach of contract offers two possible remedies: 1) specific performance or money damages. More importantly, "the execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills." Id.

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In other words, the fact that such a contract or will is executed does not create an obligation that W may not revoke it and make a new and different will.

Given the risks associated with creating a joint will or mutual will with W, and the inherent risks of litigation that comes with that option, it is recommended that client be advised to create a life estate in W and remainder in his two sons by deed during his lifetime. Then to bequeath the \$200,000 to his wife in a validly executed will.

Representative Good Answer No. 2

To: Dana Carraway

From: Examinee Date: July 30, 2019

Re: Carl Rucker property disposition

You have asked me to consider which manner of property disposition is best for Mr. Rucker in his situation. Mr. Rucker is a 67-year-old Franklin resident and lives with his current (and second) wife, Sara, who is 65 years old. Mr. Rucker has two adult sons from his prior, now deceased, wife - Fred, who is 47, and Andy, who is 45. According to Mr. Rucker, Sara and the two sons do not get along well, and their differences appear irreconcilable. (See Rucker interview transcript).

Mr. Rucker has asked us for advice as to the best way to dispose of his residential property located at 1513 Cherry Tree Road in Middleburg, Franklin. Its current value is approximately \$250,000. (Appraiser Memo). Mr. Rucker wants to find a way to ensure that his wife lives in the residence if he predeceases her, and then want the property to go to his sons. You have asked me to consider whether it is more preferable for Mr. Rucker to either deed his wife a life estate in the property, or to make a contract with his wife to write wills that leave the house to his sons. Each is considered in turn.

I. What are the benefits and drawbacks should Mr. Rucker grant his wife a life estate in the property, with a remainder to his sons?

Mr. Rucker could execute a deed transferring his fee simple interest to both himself and his wife as life-tenants. As an initial matter, Mr. Rucker's property is unencumbered, and his previous spouse as died; accordingly, under Franklin law, he is entitled to transfer a life estate to anyone. See Walker's Treatise on Life Estates (hereinafter Walker's Treatise).

A life estate creates an absolute right in the life tenant to absolute and exclusive possession of property for the duration of their life. See Walker's Treatise. In addition, the life tenant may rent or lease the property. Id. The life tenant may also sell her interest, but the transferee's interest will last only for the life of the transferor life tenant. Id. While in possession, the life tenant is responsible for all real estate taxes, insurance, and maintenance costs. Id.

The remainder holders are those who take possession of the property immediately following the life tenant's death. The remainder owner does not have the right to use the property, nor do they have the right to a portion of the property's income during the life tenant's possession. Id.

These various rights give rise to both positive and negative implications with regards to Mr. Rucker's situation. I address the negatives first, and then turn to the positive.

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A. Negative Aspects of Creating a Life Estate in Mrs. Rucker

First, Mr. Rucker should be aware that under Franklin law, his deed of a life estate to both himself and his wife Sara could not be revoked at any point during his life, unless all parties – including his sons as remaindermen - consent to the revocation. Given that the sons want Mrs. Rucker to have no interest in the property at all, this may prove troublesome and could lead to familial strife and potentially litigation.

Second, and relatedly, while a life tenant can obtain a mortgage against her life estate interest, Mrs. Rucker would not have the unilateral right to sign a mortgage to borrow money secured by the full value of the property. See Walker's Treatise. This could prove problematic for Mrs. Rucker. Mr. Rucker indicated to us that Mrs. Rucker will likely be living off of only her Social Security income, should Mr. Rucker predecease her. (See Rucker Interview). Mr. Rucker fears that Mrs. Rucker will not be able to afford emergency or expensive improvements on her own income and might need to borrow against the house. *Id.* If this were the case, Mrs. Rucker would be limited in the amount of money she could mortgage. As of now, her life estate would only be about \$80,000, which would appear to be the cap on the amount of money she could borrow to pay for repairs. (Appraiser Memo). Were Mrs. Rucker to not be able to afford the payments, then Mr. Rucker's sons might be able to bring an action against her for damages. See Walker's Treatise. This again would create a potential for litigation between Mrs. Rucker and the sons.

Third, such a transfer of a life estate would impact Mrs. Rucker's elected share, should she decide to take that as opposed to what Mr. Rucker devises to her. Franklin law permits a spouse to take a forced, elective share of 50% of their deceased spouse's augmented estate in lieu of what the surviving spouse is devised. Fr. Probate Code § 2-202. However, when a surviving spouse receives a life estate from the decedent spouse *inter vivos*, the value of the life estate is added to the decedent spouse's augmented estate. In *re Estate of Lindsey* (Fr. Ct. App. 2008). Then, after this, the 50% cut is taken, and then the value of the life estate already received is deducted from that cut. *Id.* Here, Mrs. Rucker appears to be set to inherit Mr. Rucker's only assets, \$200,000 in certificates of deposit. See Fr. Probate Code § 2-204. Were she to take an elective share, her life estate (\$80,000), would be added to this augmented estate, and then the 50% cut would be taken out, making the estate worth \$280,000. See *Lindsey*. From her 50% cut (\$140,000), the value of the life estate would be added, leaving her with only \$60,000 in assets inherited. See *id.* She should be advised under this option to not take a forced share.

Finally, were Mr. Rucker to give Mrs. Rucker a life estate via will as opposed to deed, he should be aware that his sons could petition a court to award Mrs. Rucker the monetary value of the life estate in probate proceedings as opposed to possession under the terms of the will. See Walker's Treatise. This concern is avoided, however, if he creates the life estate by deed. *Id.*

B. Positive Implications

The first positive aspect of creating a life estate by deed is that Mr. Rucker's property will automatically pass to his sons once Mrs. Rucker passes away. See Walker's Treatise. There will be no need for litigation, and no need to even probate the property. *Id.* This will significantly reduce the need to incur costs in disposing of the property once Mr. and Mrs. Rucker are deceased.

The second positive aspect is that even if Mrs. Rucker decides to transfer the home, then the transferee's possessory interest will only last as long as Mrs. Rucker is alive. See Walker's Treatise. Mr. Rucker is concerned that, given the chance, Mrs. Rucker will transfer the property to charity, both because of her distaste for the sons and because of her active participation in charity. (Rucker Interview). However, even if Mrs. Rucker does

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so, as indicated, the charity would only have a possessory interest as long as she is alive. See Walker's Treatise. There would be little litigation concerns, as long as the transferee kept the property in reasonable condition for the sons to inherit, and the sons would still obtain possession rights immediately upon Mrs. Rucker's death.

Finally, under this approach, Mrs. Rucker's possession of the home would be undisturbed, as long as she maintained the property in reasonable condition. See Walker's Treatise. The sons could only come after her in litigation if there was some waste. *Id.* Given that Mrs. Rucker can mortgage her life estate interest during her lifetime, it seems that she would have the funds to make such emergency repairs, despite Mr. Rucker's concerns about her finances. See Walker's Treatise; Rucker Interview. More importantly, if this mortgage is created, then it will die with Mrs. Rucker, as a life tenant's mortgage of her life estate does not pass to the remaindermen.

II. What are the benefits and drawbacks should Mr. Rucker contract with his wife to write wills devising the property to his sons?

A. How is the contract created?

Mr. Rucker could also contract with Mrs. Rucker to create a testamentary disposition of the property in two ways. First, Mr. and Mrs. Rucker could contract to make a joint will that restrict the right of the surviving spouse to alter the agreed-upon testamentary dispositions. *Manford v. French* (Fr. Ct. App. 2011). Second, Mr. and Mrs. Rucker could enact mutual wills that make "mirror-image" dispositions of each testator's property. *Id.* In either scenario, for the contract to be valid, there must be either some express provision in the will, or a separate writing, indicating the spouses' intent to create such a contract. Fr. Probate Code § 2-514. Just because an implied will is executed does not give rise to a presumption that a contract to make wills, or a contract not to revoke wills, has been created. *Manford v. French*. Mr. Rucker should be advised of the strict requirements to create this; the court will not accept extrinsic evidence alone in finding the contract to make a will. See *id.*

B. What are the negative implications of this approach?

First, and most significantly, Mr. Rucker should be aware that just because a joint will, or a contract to make/not revoke wills, has been executed does not mean that the surviving spouse cannot sell property devised in the will. See *Kurtz v. Neal* (Fr. Sup. Ct. 2005). Thus, even if the contract was validly executed and both Mr. and Mrs. Rucker devised the home to the sons, Mrs. Rucker could still sell the house to a charity and deprive the sons of future ownership. See *Kurtz*. In this situation, there would be nothing for the sons to do; the gift would merely be addeemed, and they would take nothing.

Second, as implicated in the discussion above, in order for a contract to make a joint will (or a contract to not revoke a will) to be valid, both spouses must execute a separate agreement indicating their intent for there to be a joint will or a contract to not revoke a will. See *Lindsey*; Fr. Probate Code § 2-514. Given that Mrs. Rucker seems to harbor ill feelings towards Mr. Rucker's sons at this point (see Rucker Interview), it is not at all clear that Mrs. Rucker would agree to such an arrangement.

C. What are the positive implications of this approach?

The main positive aspect to this approach is that Mrs. Rucker, as the presumed fee simple owner of the home, could freely mortgage the property without needing the sons' consent. Compare with Walker's Treatise. This approach would also ensure that Mrs. Rucker has free, uninterrupted possession of the home, without fear that the sons will try to remove her from the property.

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III. Recommendation

Based on the foregoing considerations, I would recommend to Mr. Rucker that he create a lifetime deed that grants both Mrs. Rucker and himself a life estate in the property. First, like a contract to make wills, this will ensure that Mrs. Rucker can live in the home for her lifetime. Second, and more importantly, it does a much better job of ensuring that his sons will have the right to possess and own the home after she dies. Finally, this approach has the least amount of litigation potential. Though there is certainly a chance that the sons will litigate over waste issues, those issues will likely not arise, because Mrs. Rucker and still mortgage her life estate interest (valued at \$80,000) and use those funds to pay off the mortgage. Importantly, that mortgage will die once she does, too. There is, however, a significant risk of litigation under the contracts approach, because Mrs. Rucker could freely sell the property during her lifetime, and there's nothing the sons could do about it. Thus, I believe that the life estate approach is best.