CONNECTICUT BAR EXAMINATION

27 February 2018

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Selmer & Pierce LLP
Attorneys at Law
412 Valmont Place
Franklin City, Franklin 33703

MEMORANDUM

To: Examinee
From: Anna Pierce
Date: February 27, 2018
Re: State of Franklin v. Clegane

We represent Sarah Karth. Sarah Karth's sister, Valerie Karth, was physically injured and incapacitated last summer when an unsupervised teenager set off fireworks at a neighborhood Fourth of July party. The teenager, a minor, was also injured. Valerie Karth was struck by the fireworks and also suffered economic injury because sparks from the fireworks started a fire that burned her garage to the ground.

The man who sold the fireworks to the teenager, Greg Clegane, was convicted of the felony of unlawful sale of fireworks to a minor. Clegane's sentencing hearing is in two weeks. Sarah Karth wishes to read victim-impact statements at the sentencing hearing both on her own behalf and on Valerie's behalf. She has also submitted a request that Clegane pay restitution for the losses she and her sister have sustained because of his actions.

Last week the prosecution notified Sarah that Clegane's counsel has filed a motion to (1) exclude the proposed victim-impact statements at the sentencing hearing, arguing that Sarah and Valerie are not victims within the meaning of the Franklin Crime Victims' Rights Act (FCVRA); and (2) deny their restitution requests. A copy of Clegane's motion is attached.

I intend to file a brief in opposition to this motion on behalf of Sarah asking that the court include Sarah's and Valerie's victim-impact statements and order Clegane to pay restitution to both of them. Please draft the argument section of our brief. In drafting your argument, be sure to follow the attached guidelines. Make the most persuasive argument possible under the FCVRA and relevant case law.

Selmer & Pierce LLP

OFFICE MEMORANDUM

To: Associates
From: Managing Partner
Date: July 8, 2012
Re: Guidelines for Persuasive Briefs in Trial Courts

The following guidelines apply to persuasive briefs filed in support of motions in trial courts.

I. Captions

[omitted]

II. Statement of Facts

[omitted]

III. Legal Argument

Your legal argument should make your points clearly and succinctly, citing relevant authority for each legal proposition. Do not restate the facts as a whole at the beginning of your legal argument. Instead, integrate the facts into your legal argument in a way that makes the strongest case for our client.

Use headings to separate the sections of your argument. Your headings should not state abstract conclusions, but rather integrate factual detail into legal propositions to make them more persuasive. An ineffective heading states only: "The court should not admit evidence of the victim's character." An effective heading states: "The court should refuse to admit evidence of the defendant's character for violence because the defendant has not raised a claim of self-defense."

In the body of your argument, analyze applicable legal authority and persuasively argue how both the facts and the law support our client's position. Supporting authority should be emphasized, but contrary authority should also be cited, addressed in the argument, and explained or distinguished.

Finally, anticipate and accommodate any weaknesses in your case in the body of your argument. If possible, structure your argument in such a way as to highlight your argument's strengths and minimize its weaknesses. Make concessions if necessary, but only on points that do not involve essential elements of your claim or defense.

The Franklin City Post

Illegal Fireworks Injure Two and Destroy Garage

July 5, 2017

FRANKLIN CITY, Franklin—The quiet neighborhood of Fair Oaks became a nightmare of exploding shells after a 17-year-old set off illegal, professional-grade fireworks during a Fourth of July celebration in a friend's backyard. The fireworks, called Little Devil Shards, sent exploding shells spraying through the yard, striking and injuring a bystander and setting a nearby garage on fire. The minor was also seriously injured.

The minor set off the fireworks to surprise his friends, Franklin City Detective Ralph Guerra said early this morning. It appears that the minor obtained the fireworks the day before the party from Greg Clegane, the proprietor of Starburst Fireworks, which sells fireworks and other party supplies from a storefront in the Third Ward of Franklin City. Clegane has three similar retail operations spread throughout the eastern part of the state. The sale of such powerful fireworks to a minor is a felony in Franklin, punishable by up to five years in prison and a $50,000 fine. The minor's name has not been released. He is a Franklin City resident.

Lena Harley, a local resident, saw the minor igniting the fireworks in the middle of a crowd of guests at the party. She watched as a spray of sparks and exploding shells flew through the air. "It was like a war zone," said Harley.

The victims were transported to an area hospital. Several shells also struck a neighbor's garage, setting it afire. The garage was totally destroyed before firefighters could control the blaze.

Franklin City police are encouraging anyone with information about the incident to contact them.

(Franklin City Associated Press contributed to this report.)

Excerpt from Transcript of Client Interview with Sarah Karth

February 26, 2018

Att'y Pierce: Good afternoon, Ms. Karth.

Sarah Karth: Good afternoon.

Pierce: Can you describe what brings you to the office today?

Karth: Yes. Are you familiar with the fireworks incident over in Fair Oaks last summer?

Pierce: I remember hearing about it on the news right after it happened.

Karth: My sister, Valerie Karth, was one of the people injured that day. Her house is next door to the yard where the fireworks went off, and she was attending the party. Sparks from the fireworks caused her garage to burn down.

I was at the criminal trial of Greg Clegane, who was convicted of the felony of selling dangerous fireworks to a minor. During the trial, the arresting officer testified that Clegane admitted selling the fireworks and that the boy had told him, "I can't wait to show these to my friends—I'm going to give everyone a big surprise." Clegane told the officer that the minor "looked like he was at least in his twenties" and that the boy's statements "didn't raise any red flags."

I want to read victim-impact statements at Clegane's sentencing hearing, one on my own behalf and one on my sister Valerie's. I also want restitution on behalf of both Valerie and myself. Last week, I heard from the prosecutor's office that Clegane's lawyer had filed a motion asking the court to keep me from making the statements and seeking restitution.

Pierce: What do you want to say? What are you asking for?

Karth: I want to make it clear to the judge, and to Clegane, that his illegal sale of dangerous fireworks to a 17-year-old had very personal and life-altering consequences for me and my family.

Pierce: Tell me more.

Karth: Clegane needs to understand that his actions have irrevocably affected our lives and that I am also a victim of his crime. I want to look him in the eyes and tell him that. I want the court to understand how Clegane's actions have ruined my sister's life. Valerie was attending the party when the fireworks went off. She was hit by fireworks and was rushed to the hospital for emergency care. Valerie was seriously injured and was in a

coma for several months. She has just come out of the coma and is still incapacitated. She remains in stable condition in the hospital but cannot come to court.

Pierce: What else do you want to tell the court about Valerie?

Karth: Valerie has always loved life and lived it to the fullest. She is bright, athletic, independent, and strong. She was the first person in our family to graduate from college. She is a rock. She is someone whom you can count on and trust. My father died five years ago, and my mother has been so traumatized by Valerie's injuries that she is too frail to participate in any court proceedings.

Pierce: And what about restitution for Valerie?

Karth: Valerie's out-of-pocket medical expenses so far total $22,000—we've got the bills and receipts to prove it. Her medical providers have concluded that she will incur at least an additional $40,000 in out-of-pocket medical expenses. By the time she is able to return to work, she will have lost $120,000 in salary. The fireworks also destroyed her garage; rebuilding it has cost $17,000.

Pierce: And you want to make a victim-impact statement on your own behalf?

Karth: Yes, I truly believe that I am also a victim of Clegane's crime. Valerie and I are very close and always have been. I'm 35 and she is two years older. The day she was injured was the worst and most shocking day of my life. I spent endless days in the hospital waiting for her to come out of the coma. If not for Clegane, that teenager could not have caused me the trauma that he did. I want the court to give Clegane the maximum sentence possible—five years—so that he knows how many people his actions have harmed and will be held accountable. People think that fireworks are no big deal, but this reckless sale of fireworks has really devastated my family.

Pierce: And are you requesting restitution on your own behalf?

Karth: Yes, I have incurred $1,500 in out-of-pocket medical bills myself as a result of Clegane's criminal behavior. I've been so depressed and distraught about Valerie's future and how she will be taken care of that I've been seeing a therapist twice a month for the past six months. My insurance has a high deductible, so I've had to bear the cost of the therapist myself. I think Clegane should pay that cost, not me. We've suffered enough.

STATE OF FRANKLIN
DISTRICT COURT OF GLENN COUNTY

STATE of FRANKLIN, **Plaintiff,** **v.** **GREG CLEGANE,** **Defendant.**	**Case No. 2017-CR-238**

DEFENDANT'S MOTION TO EXCLUDE VICTIM STATEMENTS AND DENY RESTITUTION

Defendant Greg Clegane hereby moves the Court to deny the request of Sarah Karth (acting on behalf of Valerie Karth and in her own capacity) to make victim-impact statements at Defendant's sentencing hearing in this case. In addition, Defendant requests that the Court deny the Karths' requests for restitution. In support of this motion, Defendant states:

1. After a jury trial on February 2, 2018, Defendant was convicted of the felony crime of unlawful sale of fireworks to a minor, Franklin Criminal Code § 305. Sentencing is scheduled for March 14, 2018.

2. Pursuant to the Franklin Crime Victims' Rights Act (FCVRA) §§ 55 and 56, Ms. Karth has submitted proposed victim-impact statements regarding injuries she and Valerie Karth suffered as a result of fireworks that were set off at a party in Franklin City on July 4, 2017.

3. It is undisputed that Defendant was not present on that occasion and had no part in the decision to ignite fireworks in an unsafe manner.

4. The fireworks were ignited by a 17-year-old male, who was using them contrary to the instructions on the fireworks' packaging.

5. At the time Defendant sold said fireworks, he had no reason to believe that the 17-year-old was not an adult, or that the fireworks would be ignited under unsafe conditions.

6. Defendant's only connection to the injuries suffered by the Karths is that the minor who set off the fireworks had bought them from Defendant. The Karths do not qualify as crime victims under the FCVRA because they were not "directly and proximately harmed as a result of the commission" of the offense of which Defendant stands convicted: the sale of fireworks to a minor. FR. CRM. CODE § 305.

7. In addition, because the Karths cannot be deemed crime victims under FCVRA § 55(b), the Court must deny their restitution requests. *See* FCVRA § 56.

8. Even assuming that the Karths could be considered crime victims under the statute, the restitution they seek is not supported by the evidence and is excessive, and Defendant does not have the resources to pay the amounts requested. FCVRA § 56(d).

WHEREFORE Defendant asks the Court to deny the victim-impact statements and restitution requests made by the Karths and to grant such other relief as the Court deems just and proper.

Karen Pine

Filed: February 19, 2018

Karen Pine
LAW OFFICES OF PINE, BRYCE & DIAL, LLP
Attorney for Defendant Greg Clegane

Excerpts from the Franklin Crime Victims' Rights Act

§ 55. Rights of Crime Victims

(a) A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime, or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, or sentencing, or at any parole proceeding.

(5) The reasonable right to confer with the prosecution in the case.

(6) The right to full and timely restitution under section 56 of this Act.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.

(b) Definitions—Crime Victim

(1) In general—As used in this Act, the term "crime victim" means a person directly and proximately harmed as a result of the commission of a Franklin criminal offense.

(2) Minors and certain other victims—In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court may assume the crime victim's rights under this Act, but in no event shall the defendant be named as such guardian or representative.

§ 56. Restitution

(a) The court, when sentencing a defendant convicted of an offense, shall order that the defendant make restitution to any victim of such offense.

(b) The order may require that such defendant

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense,

(A) return the property to its owner or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the repair or replacement cost of the property.

(2) in the case of an offense resulting in physical, psychiatric, or psychological injury to a victim,

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense.

(c) A defendant is presumed to have the ability to pay restitution unless the defendant establishes the inability to pay by a preponderance of the evidence.

(d) In determining the amount of restitution, the court shall consider (1) public policy that favors requiring criminals to compensate for damage and injury to their victims; (2) the financial burden placed on the victim and those who provide services to the victim as a result of the criminal conduct of the defendant; and (3) the financial resources of the defendant and the nature of the burden the payment of restitution will impose on dependents of the defendant.

State v. Jones
Franklin Court of Appeal (2006)

The issue in this appeal is whether the trial court erred when it held that the girlfriend of the defendant's cocaine customer was not a "victim" entitled to provide a victim-impact statement at sentencing pursuant to the Franklin Crime Victims' Rights Act (FCVRA). We affirm.

For approximately two years between 2004 and 2006, defendant Iggy Jones was engaged in a conspiracy with others to manufacture and distribute cocaine. Based on information conveyed to an undercover law enforcement officer, the police executed a search warrant of the defendant's home, discovering the remnants of a cocaine manufacturing operation and related paraphernalia. Jones was arrested and subsequently pled guilty to conspiracy to possess cocaine with intent to distribute in violation of the Franklin Criminal Code.

After Jones pled guilty, Gina Nocona, the former girlfriend of one of the defendant's regular cocaine customers, filed a motion claiming that she was a "victim" under the FCVRA and therefore entitled to make a victim-impact statement at Jones's sentencing hearing. She claimed that her former boyfriend, a cocaine user who regularly bought drugs from Jones, "physically, mentally, and emotionally abused" her and that her former boyfriend's "poor judgment was in large part attributable to the drugs Jones had illegally sold him." Nocona asserted that her boyfriend's behavior typically became abusive only when he was under the influence of cocaine. The trial court denied Nocona's motion, ruling that Nocona did not have standing as a "victim" under the FCVRA. Nocona appealed.

Often crime victims do not feel that their voices are heard or that their concerns are properly considered in the judicial process. The Franklin legislature attempted to address these concerns when it passed the FCVRA in 2004. Among the rights this statute specifically gives victims is the right to "be reasonably heard at any public proceeding in the district court involving . . . sentencing." FCVRA § 55(a)(4). Only a "crime victim" is afforded these rights. The FCVRA defines "crime victim" as "a person directly and proximately harmed as a result of the commission of a Franklin criminal offense." *Id.* § 55(b)(1).

In applying this definition, Franklin courts have held that a purported "crime victim" under the FCVRA must demonstrate (1) that the defendant's conduct was a cause in fact of the victim's injuries and (2) that the purported victim was proximately harmed by that conduct.

In *State v. Hackett* (Fr. Ct. App. 2003), the Franklin Court of Appeal interpreted "cause in fact" and affirmed the trial court's order that defendant George Hackett, who pled guilty to aiding

and abetting methamphetamine manufacture, pay restitution to an insurance company for property damage. The damage had been caused when one of Hackett's codefendants started a fire by placing a jar of chemicals used to manufacture methamphetamine on a hot plate. The court found that Hackett had procured the supplies his codefendants used to manufacture methamphetamine, and that he had "knowledge and understanding of the scope and structure of the enterprise and of the activities of his codefendants." The court held that even though there were "multiple links in the causal chain," Hackett's conduct was a cause in fact of the resulting property damage.

In the current case, the facts do not support the same conclusion. Nocona asserts that her former boyfriend was abusive only when he was under the influence of cocaine. If true, such a statement might meet the cause-in-fact prong of the standard, although the court acknowledges that the contention raises complex questions relating to the causes of domestic violence. Nocona offered no expert testimony to support her assertion regarding causation.

Nocona's motion also fails the second prong of the definition of a crime victim under the FCVRA, which requires that this court determine whether the defendant's criminal act proximately harmed Nocona. The concept of foreseeability is at the heart of "proximate harm." The closer the relationship between the actions of the defendant and the harm sustained, the more likely that a court will find that proximate harm exists. *See State v. Thomas* (Fr. Ct. App. 2002).

Nocona is unable to demonstrate that her alleged injuries were a foreseeable consequence of the defendant's drug conspiracy. She has not provided the court with evidence that the drug conspiracy led to her injuries or that the defendant knew about the impact of the drugs on Nocona's former boyfriend. Moreover, while we deplore the many undesirable social effects of drug trafficking, we do not think that the asserted abusive conduct of Nocona's boyfriend toward Nocona falls within the range of reasonably foreseeable harms resulting from the defendant's conspiracy. Nocona is not a "victim" under the FCVRA because she is not a person "directly and proximately harmed" by the criminal act committed by the defendant.

Affirmed.

State v. Berg
Franklin Court of Appeal (2012)

The defendant, Leon Berg, contends that the trial court violated his constitutional rights and the Franklin Crime Victims' Rights Act (FCVRA) in allowing the parents of Carly Appleton to make victim-impact statements at his sentencing hearing. We find that the trial court did not err, and affirm.

The defendant's girlfriend, Sheila Greene, was driving herself and Berg back from Franklin Beach to Franklin State College (FSC) in Berg's car. They offered a ride to Carly Appleton, another FSC student. Greene and Appleton were 19 years old; Berg was 22. The drinking age in Franklin is 21. They stopped at a gas station, where Berg bought a quart of vodka and a six-pack of beer. Berg and Greene drank some of the vodka and then got back into the car. Appleton did not drink anything. Berg knew that Greene had been previously arrested and fined for driving under the influence, but he allowed her to drive anyway. In fact, Berg admitted that he handed Greene a beer while she was driving. Not long after, Greene, driving considerably over the speed limit, crashed the car into a tree. Berg sustained minor injuries; Greene was killed instantly; Appleton died at the hospital four hours later. Greene's postmortem blood alcohol level was well over the legal limit for operating a motor vehicle in Franklin.

Berg pleaded guilty to the felony crime of providing alcohol to a minor resulting in death. Berg was sentenced to six months in prison followed by two years of extended supervision. Appleton's parents each petitioned the court to make victim-impact statements at Berg's sentencing hearing as representatives of their daughter, who they claimed was a victim of the defendant's offense.

We begin with an analysis of who constitutes a "victim" within the meaning of the FCVRA, which defines a "victim" as one who has been "directly and proximately harmed" by a Franklin criminal offense. § 55(b)(1). The FCVRA provides a victim with the right to "be reasonably heard at any public proceeding in the district court involving . . . sentencing." § 55(a)(4). The legislative history of the statute indicates that the term "crime victim" should be interpreted "broadly." (Citation omitted.)

Carly Appleton's life was tragically cut short as a result of the drunk driving and the car crash that occurred. It seems obvious to this court that the defendant's actions caused Greene's intoxication, which affected her ability to handle the car in the conditions leading to the crash. But for the defendant's buying alcohol and furnishing it to Greene, the Appletons' daughter would still

be alive. Thus, there is a direct causal connection between Berg's conduct and Appleton's death. This satisfies the condition that the defendant's action be a cause in fact of the person's injury. *See State v. Jones* (Fr. Ct. App. 2006).

This court must also decide whether Berg's crime proximately harmed Carly Appleton for purposes of the FCVRA. The concept of "proximate harm" is a limitation that courts place upon an actor's responsibility for the consequences of the actor's conduct; it is a means by which courts limit the scope of the actor's liability. The concept reflects ideas of what justice demands or what a court finds administratively possible and convenient. Foreseeability is at the heart of determining if an actor's conduct proximately harmed a victim. *See Jones*. In determining whether the harm was foreseeable, the court looks to whether the resulting harm was within the zone of risks resulting from the defendant's conduct for which the defendant should be found liable.

We conclude that, on these facts, it was reasonably foreseeable to Berg that if he bought alcohol and distributed it to his girlfriend, who he was aware had a history of driving drunk, then his girlfriend might drive drunk, and that her drunk driving might lead to a car crash. There is a natural and continuous sequence of events without which Appleton's death would not have occurred. In other words, there is an intuitive relationship between Berg's conduct and the resulting harm. Berg could reasonably have foreseen that he, Greene, or Carly Appleton could be seriously injured or killed as a result of Greene's drunk driving. Thus, the harm to Appleton that resulted was within the risk of Berg's actions. The loss suffered by Appleton clearly falls within the scope of Berg's conduct. Accordingly, we find that Carly Appleton was a crime victim under the FCVRA.

The trial court correctly allowed Appleton's parents to make victim-impact statements at the defendant's sentencing hearing, as they were the approved representatives of their daughter, *see* § 55(b)(2), who the trial court found was a "crime victim" under the FCVRA.

Affirmed.

State v. Humphrey
Franklin Court of Appeal (2008)

Two issues are raised in this appeal: (1) whether the trial court erred in finding that a mother, acting as the representative for her two sons, whose father had been killed, was qualified to seek restitution on behalf of her sons under the Franklin Crime Victims' Rights Act (FCVRA); and (2) whether the court erred in ordering the defendant to pay restitution under FCVRA § 56. The trial court held that the mother was an appropriate representative for the sons, who were "victims" entitled to restitution from the defendant for the loss of child-support income. We affirm with respect to the first issue and remand for further proceedings on the second.

On April 12, 2006, defendant Ted Humphrey was driving home from a party. He was texting while driving and lost control of his car. The car then skidded into the adjacent bicycle lane and hit Connor Benton, who was riding his bike home from work. Although Humphrey was able to stop his car and call 911, the first responders were unable to revive Benton, who had suffered a traumatic head injury. Humphrey was unharmed.

Humphrey was charged with one count of involuntary manslaughter, to which he pled guilty on October 30, 2006. Connor Benton's ex-wife, Kate Gove, sought restitution from Humphrey for the loss of child-support income on behalf of her two minor sons, then ages 6 and 10. Gove appeared at the defendant's sentencing hearing and testified that Connor Benton had provided critical financial support to her family before his death. The court sentenced Humphrey to 18 months in prison and ordered restitution for the lost child support provided by Connor Benton, citing the FCVRA. The defendant appeals from that decision.

One purpose of the FCVRA is to force offenders to pay full restitution to the identifiable victims of their crimes. The act applies to any "crime victim" and defines that term as "a person directly and proximately harmed as a result of the commission of a Franklin criminal offense." FCVRA § 55(b)(1). The act goes on to provide that "[i]n the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court may assume the crime victim's rights . . . . " *Id.* § 55(b)(2). It is undisputed that Gove, as the mother of Benton's minor children, is their appropriate representative under the Act.

We find that Benton's two young sons are "crime victims" in part because of the loss of financial support from their father. The FCVRA requires only that a person be "directly and

proximately harmed" by an offense. The term "harm" embraces physical, financial, and psychological damage. *See* FCVRA § 56(b)(2).

We now turn to whether the court properly ordered the defendant to pay restitution in the amount of $15,200. Section 56(c) of the FCVRA creates a rebuttable presumption that the defendant is financially capable of paying restitution and places the burden of rebutting the presumption on the defendant.

The defendant did not present any evidence to establish that he was incapable of paying restitution. Apparently relying on § 56, the court ordered $15,200 in restitution for the value of lost child support without any inquiry into the defendant's financial situation and without any findings to justify the restitution order. On appeal, the defendant argues that the restitution statute requires the court to make express findings justifying a restitution order. The defendant's reading of the statute is correct. Section 56(d) identifies three factors that the court must take into account in determining the amount of restitution: (1) public policy that favors requiring criminals to compensate for damage and injury to their victims; (2) the financial burden placed on the victim and those who provide services to the victim as a result of the criminal conduct of the defendant; and (3) the financial resources of the defendant.

Before imposing restitution, the sentencing judge must make a "serious inquiry" into all three factors. *See State v. Schmidt* (Fr. Sup. Ct. 2003). While the statute places the burden of proof on the defendant to show inability to pay, the court should inquire into the additional factors. This case will be remanded with instructions to the trial court to conduct that inquiry.

Affirmed in part and remanded for further findings consistent with this opinion.

CONNECTICUT BAR EXAMINATION

27 February 2018

PERFORMANCE TEST #2

From the Multistate Performance Test

In re Hastings

FILE

Memorandum to Examinee

Transcript of client interview

Marin County Board of Elections position descriptions

LIBRARY

State of Franklin Constitution Article XII

Excerpts from the Franklin Election Code

Attorney General of Franklin, Opinion No. 2003-9, March 17, 2003

Attorney General of Franklin, Opinion No. 2008-12, February 6, 2008

Attorney General of Franklin, Opinion No. 2010-7, September 5, 2010

Belford & Swan S.C.
Attorneys at Law
6701 San Jacinto Avenue, Suite 290
Marin City, Franklin 33075

MEMORANDUM

To: Examinee
From: Emily Swan
Date: February 27, 2018
Re: Danielle Hastings inquiry

A friend of mine from college, Danielle Hastings, has asked me to look into a legal matter for her. Danielle currently serves on the board of directors for Municipal Utility District No. 12 (MUD 12). MUDs are local government entities, authorized by the Franklin constitution, that provide public water, sewer, drainage, and other services to suburban neighborhoods not served by a city.

Danielle has always been civic-minded, and she is very involved in her community. In addition to being a director for MUD 12, she volunteers at the local library and is a volleyball coach at the local YMCA. She is interested in getting involved in election and voting activities in her community. There are two election-related positions available in her voting precinct: county election judge and precinct chair.

Both positions sound interesting to Danielle. She is not sure which position she would want. Before making any decision, she needs our advice as to whether she is allowed to serve as a county election judge or precinct chair while at the same time remaining a MUD 12 director. I have attached several opinions by the Attorney General of Franklin, which discuss the applicable law.

Please draft a memorandum to me analyzing whether Danielle can apply for and hold the county election judge position or the precinct chair position while simultaneously serving as a member of the board of directors for MUD 12. Address the question for both the county election judge and precinct chair positions. Make sure to discuss all legal issues relating to each position. Do not prepare a separate statement of facts, but be sure to incorporate the relevant facts and legal authorities into your analysis.

Transcript of Client Interview with Danielle Hastings

February 26, 2018

Att'y Swan: Hi, Danielle, it's great to see you. Gosh, it's been a while!

Danielle Hastings: Yes, it has. I think the last time we ran into each other was a couple of years ago at our college class reunion.

Swan: How is everything going? I got your phone message indicating that you wanted my advice on a legal problem, but you didn't say what the problem was.

Hastings: Well, as I think I mentioned at our class reunion, in addition to my day job as a graphic artist, I'm also a member of the board of directors for Municipal Utility District No. 12, which provides water, sewer, and drainage services to my neighborhood, Eagle Springs.

Swan: Yes, I remember your saying you were active on a MUD board in your community. How is that going?

Hastings: Everything is fine. And I love the work I do as a MUD director. But I'm always looking for opportunities to get involved in my community, and frankly, I have higher political ambitions. Recently, I heard about two open positions that sound really interesting and would further my political career.

Swan: Tell me more.

Hastings: Well, a friend of mine who's active in local politics and highly involved in our political party mentioned that there is an open position for county election judge, which would involve supervising elections in my precinct. He also said that our political party is looking for precinct chairs to help reach out to voters and educate them about the candidates in our political party who are running for office.

Swan: What's the process for becoming an election judge or precinct chair?

Hastings: The county election judge is an appointed position, but the precinct chair is an elected position within the political party, which means that I would have to run as a candidate for precinct chair and be elected to the position.

Swan: And both of these positions are for the voting precinct that you live in?

Hastings: Yes. My precinct includes Eagle Springs as well as a handful of adjacent neighborhoods.

Swan: What else do you know about the two positions?

Hastings: Well, I've printed out some information from the Marin County website that compares the two positions. [Printout from website attached.] It's my understanding that if I'm appointed as a county election judge, then I would be the chief election judge for my precinct since the governor is from my political party.

Swan: Do you have a preference between the two positions?

Hastings: No, both sound very interesting, and either position would provide an opportunity to get more involved in the election process, which is something that I've been wanting to do. If you tell me that I can hold either position while remaining on the MUD board, then I would have to decide which of the new positions to pursue. On the other hand, if you tell me that I can't hold either of the positions while simultaneously serving on the MUD board, then I won't need to choose because my decision will be made for me.

Swan: Tell me more about the MUD board. I think that it is important to understand what you do as a MUD director in order to evaluate whether you could hold the position of county election judge or precinct chair while simultaneously serving on the MUD board.

Hastings: As you know, MUDs provide public water, sewer, drainage, and other basic services to suburban residents who are not served by a city. MUD 12 provides these services to residents of Eagle Springs, about 1,500 homes in all. Basically, the MUD owns, operates, and maintains all the facilities necessary to supply water to Eagle Springs residents, collect and treat wastewater from their homes, and collect, store, and drain storm water from land within the MUD's boundaries. This includes a water plant, a wastewater treatment plant, and drainage ditches, all located within Eagle Springs. In addition, the MUD provides trash collection service for our residents, and we also own and operate two public parks within the Eagle Springs community.

Swan: MUDs are political subdivisions of the State of Franklin, right?

Hastings: Correct. MUDs operate independently of county government. I've heard them described as being one of the most fundamental forms of local government because they provide municipal-level services, have elected officials who live in the MUD, and are authorized to charge fees to their residents, assess and collect taxes, and sell bonds in order to pay the costs of constructing and operating the facilities that provide services to their residents.

Swan: Can you tell me more about the MUD board of directors election process? Are your elections handled by Marin County?

Hastings: No. Under state law, MUDs conduct their own elections, which are held in May. MUDs also appoint their own election judges for the MUD elections. The partisan or political elections, like those for governor and state assembly, are held in November, and those are the ones the Marin County election judges oversee.

Swan: So if you were appointed as a county election judge for your precinct, you wouldn't be involved in overseeing any MUD elections?

Hastings: Right, MUD elections are totally separate. MUD boards really aren't all that political in the party sense—they're nonpartisan. Nobody runs for a MUD position as a "Democrat" or "Republican." They run for the MUD board because they live in the MUD, they care about the basic services that are being provided, and they want to be involved in their community and make a difference.

Swan: How long have you served on the MUD 12 board?

Hastings: This is my second four-year term on the board. Our last election was in May 2016, so I am midway through my current term. I want to remain on the MUD board for at least another term or two.

Swan: Okay, I think I have enough basic information to start looking into this issue. I should have answers for you within a week or two, which will give you plenty of time to weigh your options.

Hastings: Great. Thanks.

Printout of

Marin County Board of Elections

Position Descriptions

Source: www.marincountyfranklin.gov

COUNTY ELECTION JUDGE [Summary prepared based on state election law]

What is a county election judge?

County election judges conduct the city, county, state, and federal elections in a precinct during the year. Election judges are the head officials in charge of election-day activities.

What does an election judge do?

County election judges administer the election procedures set forth in the Franklin Election Code to help ensure that elections are secure, accurate, fair, and accessible to all voters. Responsibilities include handling and securing election equipment and ballots, locating and retaining election clerks to work at their polling location, organizing the setup of the election equipment and the operation of the election, handing out and collecting ballots, setting up and closing down the polling site, and certifying the polling site results.

Election judges also serve on a panel to resolve any voting-related challenges that may arise. Election judges are responsible for following the Franklin Election Code and conducting a fair election. Although each judge is nominated by his or her political party, no display of any party affiliation is allowed during the election.

How do you get to be an election judge?

Election judges are nominated by their respective parties and are appointed by the Marin County Board of Commissioners to two-year terms. If possible, election judges reside in the precinct.

What is a chief election judge?

Two judges, one from each major political party, are appointed for each precinct. The chief election judge is from the party that received more votes in the last governor's election. The second judge works closely with the chief election judge and is responsible for conducting the election in the chief judge's absence. Both judges are required to attend training.

Is election judge a paid position?

Election judges are volunteers. They are reimbursed for the cost of any training, supplies purchased, or other expenses incurred, but are otherwise not compensated.

PRECINCT CHAIR [Summary prepared based on party bylaws]

What is a precinct chair?

A precinct is the smallest political subdivision in Franklin. Franklin counties are divided into individual precincts, each consisting of a collection of adjacent neighborhoods. Precinct chairs are political positions created by their political parties and not by statute. They are the primary political agents for the Democratic and Republican parties in their precincts. They are responsible for contacting, guiding, and organizing voters from their respective political parties in their precincts. Precinct chairs also represent their home precincts on their party's Executive Committee (EC), which conducts the local business of that political party.

What does a precinct chair do?

In addition to serving on his or her party's EC, each precinct chair is the contact person for his or her respective political party in his or her precinct. Organizing and campaigning are important duties of a precinct chair. Precinct chairs are responsible for working with others to mobilize and organize voters and get them to the polls, bridging the gap between voters and elected officials, and promoting their party's candidates and events. This includes organizing phone banks to place telephone calls to voters, organizing block walks (going door-to-door) to distribute campaign materials, and encouraging neighbors to vote in upcoming primary and general elections.

What is the Executive Committee?

Marin County has two Executive Committees: a Democratic EC and a Republican EC. Each party's EC is the governing body of that political party in Marin County and conducts all official party business. Each party's EC usually meets three times a year, sometimes more in election years. Precinct chairs are voting members of their ECs.

How do you get to be a precinct chair?

Candidates for precinct chair are elected to serve two-year terms by voters in their precincts in the respective Democratic or Republican primary election every two years.

Is precinct chair a paid position?

Precinct chairs are volunteers and are not compensated for their service.

STATE OF FRANKLIN CONSTITUTION

ARTICLE XII

§ 25. HOLDING MORE THAN ONE OFFICE; EXCEPTIONS

(a) No person shall hold or exercise, at the same time, more than one civil office of emolument, except for justices of the peace, county commissioners, and officers and enlisted men and women of the United States Armed Forces, the National Guard, and the Franklin State Guard, or unless otherwise specially provided herein.

(b) Exceptions: . . .

(4) a public schoolteacher or retired schoolteacher may receive compensation for serving as a member of a governing body of a municipal utility district (MUD).

Excerpts from the Franklin Election Code

§ 465. Appointment of Election Judges for Each Election Precinct. Election judges shall be appointed by each county for each election precinct in which an election is held.

* * *

§ 471. General Responsibility of County Election Judges.

(a) The chief judge is in charge of and responsible for the management and conduct of the election at the polling place of the election precinct that the judge serves.

(b) The chief judge for each election precinct shall appoint election clerks to assist the judge in the conduct of an election at the polling place served by the judge.

(c) The chief judge shall designate the working hours of and assign the duties to be performed by the election clerks serving under the judge.

. . .

(f) The chief judge shall preserve order and prevent breaches of the peace and violations of this code in the polling place and in the area within which electioneering and loitering are prohibited. In performing duties under this subsection, the chief judge may appoint one or more licensed persons to act as special peace officers for the polling place.

. . .

(h) An election judge may administer any oath required to be made at a polling place.

* * *

§ 480. Ineligibility of Candidate for Office. A person who is a candidate in an election for a contested public or party office is ineligible to serve, in an election to be held on the same day as that election, as an election judge or clerk in any precinct in which the office sought is to be voted on.

* * *

§ 492. Judges for Elections of Other Political Subdivisions. The governing body of a political subdivision other than a county shall appoint the election judges for elections ordered by the political subdivision.

ATTORNEY GENERAL OF FRANKLIN

Opinion No. 2003-9
March 17, 2003

Re: Whether Franklin Constitution article XII, section 25 prohibits a constable from simultaneously serving as a commissioner of an emergency services district

The issue presented is whether article XII, section 25 of the Franklin Constitution prohibits a constable from serving as a commissioner of an emergency services district (ESD) in the same county. We must examine each of the offices at issue.

Article XII, section 25(a) provides that "[n]o person shall hold or exercise, at the same time, more than one civil office of emolument." The constitutional dual-officeholding prohibition applies if both positions (1) qualify as "civil offices" and (2) are entitled to an "emolument."

First, we have previously determined that a constable holds a civil office of emolument. Franklin Att'y Gen. Op. No. 1999-8 (1999); *see also* FRANKLIN LOCAL GOV'T CODE § 453 (defining a constable as a "peace officer" and mandating that constables be paid on a salary basis).

Next, we must examine whether the position of ESD commissioner is also a civil office of emolument subject to article XII, section 25. The determinative factor distinguishing an officer from an employee is "whether any sovereign function of the government is conferred upon the individual to be exercised by the individual for the benefit of the general public largely independent of the control of others." *Morris Indep. Sch. Dist. v. Lehigh* (Franklin Supreme Ct. 1965).

ESDs independently exercise various governmental powers for the benefit of the public, including the power to appoint agents and employees, enter into contracts, purchase and sell property, borrow money, sue and be sued, impose and collect taxes, and perform other necessary acts relevant to providing emergency services. FRANKLIN LOCAL GOV'T CODE § 752. ESD commissioners serve as the ESD's governing board. Based on the broad, independent authority granted to ESDs, we conclude that ESD commissioners meet the *Morris* test and are thus civil officers.

Next we determine whether an ESD commissioner holds an office of "emolument." An emolument is "a pecuniary profit, gain or advantage." *State v. Babcock* (Franklin Ct. App. 1998). If an officeholder is entitled to compensation, his or her office is an "office of emolument" even if the person refuses to accept any compensation. However, the term "emolument" does not include the

legitimate reimbursement of expenses. While the reimbursement of actual expenses does not constitute an emolument, any amount received in excess of actual expenses is an emolument. *Id.* Likewise, an amount received as compensation for each meeting (e.g., a fixed per diem amount) is also an emolument. *Id.*

By statute, an ESD commissioner "is entitled to receive compensation of $50 for each day the commissioner attends a commission meeting," and additionally "may be reimbursed for reasonable and necessary expenses incurred in performing official duties." FRANKLIN LOCAL GOV'T CODE § 775. The $50 per diem compensation qualifies as an emolument.

Because an ESD commissioner receives compensation for his or her services and holds a civil office of emolument, he or she cannot hold another civil office of emolument—here, constable.

SUMMARY

Article XII, section 25 of the Franklin Constitution prohibits a person from simultaneously serving as a constable and an ESD commissioner. Because we conclude that article XII, section 25 prohibits dual service in this circumstance, we need not consider whether simultaneously holding the positions of constable and ESD commissioner would implicate the common law doctrine of incompatibility.

ATTORNEY GENERAL OF FRANKLIN

Opinion No. 2008-12
February 6, 2008

Re: Whether an individual may simultaneously serve as director of a municipal utility district and member of the city zoning commission

The issue presented is whether an individual who serves as a member of the board of directors for Montgomery County Municipal Utility District No. 6 (MUD 6) may also serve as a member of the Planning and Zoning Commission (PZC) for the City of Waterford. We conclude that one person is barred from holding both offices by the common law doctrine of incompatibility.

Civil office of emolument

Article XII, section 25(a) of the Franklin Constitution provides that "[n]o person shall hold or exercise, at the same time, more than one civil office of emolument," subject to exceptions that are not relevant in this situation. MUD directors are entitled to receive compensation for serving on the MUD board—specifically, a $150 per diem payment as compensation for attending MUD board meetings or engaging in other MUD-related activities. FR. WATER CODE § 46. In contrast, members of the PZC serve without compensation. Because PZC commissioners do not receive compensation, they are not civil officers of emolument. Therefore, article XII, section 25 of the Franklin Constitution does not bar a person from serving on the PZC and holding another office.

Common law doctrine of incompatibility

The common law doctrine of incompatibility may, however, prevent this dual service, whether or not a member of the PZC receives compensation for that position, because compensation is not relevant to determining whether offices are incompatible. The common law doctrine of incompatibility bars one person from holding two civil offices if the offices' duties conflict. *Spencer v. Lafayette Indep. Sch. Dist*. (Franklin Ct. App. 1947). The doctrine has three aspects: self-appointment, self-employment, and conflicting loyalties. Self-appointment and self-employment are only implicated if the responsibilities of one position include appointing or employing the second position. Here, the MUD does not appoint or employ members of the PZC and vice versa. Therefore, the only inquiry is whether the two positions involve conflicting loyalties.

The opinion in *Spencer* held that the offices of school trustee and city council member were incompatible because the boundaries of the school district's and city's jurisdictions overlapped, and the city council had authority over health, quarantine, sanitary, and fire prevention regulations applicable to school property. The court reasoned that if a person could be a school trustee and a member of the city council at the same time, school policies could be influenced or even controlled by the city council instead of the school trustees. *Id.*

As a threshold matter, in order for the conflicting-loyalties prong to apply, each position must constitute a "civil office." Therefore, we must first consider whether directors of MUDs and members of the PZC are civil officers. The Franklin Supreme Court has articulated the following test for determining whether an individual holds a civil office: "The determining factor which distinguishes a civil officer from an employee is whether any sovereign function of the government is conferred upon the individual to be exercised by the individual for the benefit of the general public largely independent of the control of others." *Morris Indep. Sch. Dist. v. Lehigh* (Franklin Supreme Ct. 1965).

Municipal utility districts provide water, sewer, drainage, and other services to suburban communities. They are local (as opposed to state or county) government entities authorized under the Franklin Constitution and are subject to the Franklin Water Code. They are governed by a board of directors, who are elected to four-year terms. FRANKLIN WATER CODE § 35. A MUD board is responsible for "the management of all the affairs of the district" (*id.* § 37) and may levy and collect a tax for operation and maintenance purposes, charge fees for provision of district services, issue bonds or other financial obligations to borrow money for its purposes, and exercise various other powers set out in the Franklin Water Code (*id.* § 39). A director of a MUD is a civil officer within the test stated by the Franklin Supreme Court in *Morris* based on the number of independent functions delegated to MUD boards under the Water Code, several of which are discussed above.

We next consider whether members of the Waterford PZC are civil officers. Cities such as Waterford have zoning authority and are authorized to appoint a zoning commission. If the Waterford PZC exercises governmental powers delegated by the city council, its members will be civil officers.

The Waterford PZC consists of nine citizens of Waterford who are appointed by the city council for a term of two years. The Waterford PZC is responsible for final approval of plats for residential development in the City. In our opinion, members of the Waterford PZC exercise a

sovereign function of the government "for the benefit of the general public largely independent of the control of others" within the *Morris* test and are therefore civil officers.

Our next consideration is whether members of the Waterford PZC have powers and duties that are incompatible with the powers and duties of a MUD director. During the plat approval process, the PZC requires submission of preliminary utility plans identifying the nature and location of water and sewer services such as water and sewer plants. A PZC member who is also a director of a MUD may have divided loyalties when the proposed development is located within the MUD on whose board the PZC member serves. In this situation, the PZC is able to control and impose its policies on the MUD by determining the manner and placement of the MUD's facilities.

We conclude that the two civil offices are incompatible, and that a member of the PZC who also serves on a MUD would have divided loyalties in facing decisions that affected his or her MUD. We conclude that the common law doctrine of incompatibility prevents a member of the Waterford PZC from serving simultaneously as a director of a MUD with territory within the zoning authority boundaries of Waterford.

SUMMARY

A MUD director holds a civil office, as does a member of the PZC of the City of Waterford. Because the duties of those two offices are in conflict where the offices have overlapping jurisdictions, the common law doctrine of incompatibility bars one person from simultaneously holding both offices.

ATTORNEY GENERAL OF FRANKLIN

Opinion No. 2010-7
September 5, 2010

Re: Whether a member of a school district board of trustees may simultaneously hold the office of county treasurer

The issue presented is whether a trustee of an independent school district may simultaneously hold the office of county treasurer. For the reasons explained below, we conclude that she may do so. In the situation presented, the individual was elected for a three-year term on the board of trustees of Winfield Independent School District. Subsequently, she was appointed by the Board of Commissioners of Winfield County to fill the balance of a four-year term as the Winfield County Treasurer.

Civil office of emolument

When we consider article XII, section 25 of the Franklin Constitution and our Opinion No. 2003-9, we conclude that an individual is not barred by article XII, section 25 from simultaneously holding the offices of school trustee and county treasurer. Section 384 of the Franklin Education Code requires that trustees of an independent school district "serve without compensation." Because the office of school trustee is therefore not an "office of emolument," it follows that an individual is not barred by article XII, section 25 from simultaneously holding the offices of school trustee and county treasurer.

That does not end our inquiry, however.

Common law doctrine of incompatibility

Common law incompatibility is independent of article XII, section 25. The three aspects of the doctrine are self-appointment, self-employment, and conflicting loyalties. Self-appointment and self-employment are not implicated here because the county treasurer neither appoints nor employs members of the school board of trustees. Nor does the school board of trustees appoint or employ the county treasurer.

The third aspect of common law incompatibility, conflicting loyalties, bars the holding of simultaneous civil offices that would prevent a person from exercising independent and disinterested

judgment in either or both positions. It most often arises when one person seeks to be a member of two governing boards with overlapping jurisdictions. If, for example, two governmental bodies are authorized to contract with each other, one person may not serve as a member of both.

Conflicting loyalties

Based on these principles, we must determine whether there are any duties ascribed to the office of county treasurer that would render its holding incompatible with that of school district trustee. The county treasurer is the chief custodian of county funds and is responsible for accounting for and managing all money belonging to the county, including depositing funds received by the county and disbursing county funds to pay county debts as required by law. FRANKLIN LOCAL GOV'T CODE § 411.

A number of statutes peripherally relate to the duties of the county treasurer with respect to school funds, but all of these appear to prescribe purely ministerial duties or duties that do not apply in this circumstance, such as collecting debts and maintaining the original financing records for schools in counties that do not have any independent school district. In this case, Winfield County has its own independent school district (i.e., Winfield Independent School District). The school district is a separate, distinct governmental entity with separate authority to acquire and hold real and personal property, sue and be sued, and maintain its own funds. FRANKLIN EDUC. CODE § 1251.

Conceivably, a county treasurer could initiate actions to recover funds owed to Winfield County by the Winfield Independent School District. However, the county treasurer's authority is not exclusive. The Board of Commissioners, as the executive head of the county, is vested with authority to determine when suits or other actions should be instituted to recover funds belonging to the county and can separately sue to collect debts owed to the county. If it were determined that funds were owed to Winfield County by the Winfield Independent School District, the Board of Commissioners would be the proper party to sue to recover those funds. Therefore, in our opinion, the county treasurer's non-exclusive authority to sue to recover funds owed by the school district to the county does not rise to the level of incompatibility contemplated by the common law doctrine of incompatibility.

Because a county treasurer's authority to sue an independent school district is limited to the recovery of funds owed by the school district to the county, and because even that limited authority is not exclusive, we conclude that conflicting-loyalties incompatibility is not, as a matter of law, a bar

to an individual's simultaneously holding the offices of county treasurer and trustee of an independent school district located within his or her county.

SUMMARY

A county treasurer is not, as a matter of law, barred either by article XII, section 25 of the Franklin Constitution or by the common law doctrine of incompatibility from simultaneously holding the office of trustee of an independent school district located within her county.

CONNECTICUT BAR EXAMINATION

27 February 2018

QUESTION #1

From the Multistate Essay Examination

In 2012, David and Meg had a baby girl, Anna. At the time of Anna's birth, David and Meg were both 21 years old. For the next four years, they lived separately. David and Anna lived with David's mother (Anna's grandmother). The grandmother cared for Anna while David worked. David cared for Anna most evenings and weekends. During this period, Meg attended college in a distant city; she called weekly but visited Anna only during school breaks and for one month each summer.

In 2013, David bought an auto repair business with money he had saved. The grandmother continued to care for Anna while David was working in his auto repair business.

In 2016, David and Meg were married in a small wedding held at the grandmother's house. One week before their wedding, David surprised Meg by asking her to sign a premarital agreement prepared by his attorney. The agreement provided that, in the event of a divorce,

1. all assets owned by each spouse at the time of the marriage would remain the sole property of that spouse;
2. neither spouse would be entitled to alimony; and
3. the spouses would have joint physical custody of Anna.

Attached to the proposed agreement was an accurate list of David's net assets (his personal possessions, the auto repair business, a used car, and a small bank account), a list of his liabilities, and his tax returns for the past three years.

David told Meg that he would not proceed with the marriage unless she signed the agreement. Meg believed that the marriage would be successful, and she did not want to cancel or postpone the wedding. She therefore signed the agreement and appended a list of her own debts (student loans); she correctly indicated that she had no assets other than her personal possessions.

Since the wedding, David, Meg, and Anna have lived together and the grandmother has continued to provide child care while David and Meg are at work. Meg has worked full-time as a computer engineer, and David has continued to work full-time in his auto repair business. Their incomes are relatively equal.

They have the following assets: (a) the auto repair business (owned by David); (b) stocks (owned by Meg, which she inherited last year); and (c) the marital home (purchased by David in his name alone

shortly after the wedding). The down payment and all mortgage payments for the marital home have come from the couple's employment income.

Last month, David discovered that Meg had been having an affair with a coworker for the past year.

David wants a divorce. He also wants to obtain sole physical custody of Anna; he believes that Meg's adultery should disqualify her as a custodial parent. His plan is to live with the grandmother, who would provide child care when he is unavailable.
This jurisdiction has adopted a statute modeled after the Uniform Premarital Agreement Act.

1. May either spouse successfully enforce the premarital agreement in whole or in part? Explain.

2. Assuming that the premarital agreement is not enforceable, what assets are divisible at divorce? Explain.

3. Assuming that the premarital agreement is not enforceable, may David obtain sole physical custody of Anna based on (a) Meg's adultery or (b) other factors? Explain.

CONNECTICUT BAR EXAMINATION

27 February 2018

QUESTION #2

From the Multistate Essay Examination

A defendant, age 25, is charged in State A with armed robbery. According to the indictment, on June 1, the defendant went into a store, pulled out a gun, and said to a cashier, "Give me all your money or I'll shoot you!" The cashier gave the defendant $5,000. The police arrived as the defendant was driving away. The police car followed the defendant, who was driving over 80 mph. The defendant crashed his car into a tree and suffered a serious head injury, losing consciousness. He was taken by ambulance to a hospital, where he regained consciousness on June 8. On June 15, he was discharged from the hospital. On July 1, he was arraigned on the armed robbery charge and released on bail. Over the next few months, the defendant recovered full physical mobility, but he continued to show symptoms of cognitive impairment resulting from brain trauma suffered during the car crash.

Police interviews with the defendant's family and friends have revealed that, in the months preceding the robbery, the defendant had experienced financial and emotional difficulties. According to the defendant's best friend, the defendant had recently started a new business, which was struggling. A month before the robbery, the defendant told his best friend, "I cannot attract customers because the United Nations has organized a secret boycott of my new business." On the day before the robbery, the defendant texted his best friend: "I've been a victim for too long. I've decided to start making up for my losses. If you read about me in the papers tomorrow, I'll already be far away, so delete this text and tell the police you never knew me."

In December, as the state began preparing for trial, two court-appointed psychiatrists evaluated the defendant and prepared the following joint report to the court:

> Before the robbery, the defendant had a slightly above-average IQ. The defendant had completed a community college program in business administration and had recently opened his own business, which he owned and managed at the time of the robbery. A few months before the robbery, the defendant's business was struggling, and he began experiencing some mental health difficulties. His mental health difficulties apparently did not impair his relationships with his family and friends or his ability to manage his everyday life and operate his business. The defendant never sought mental health treatment.
>
> On the day of the robbery, during the crash, the defendant sustained brain trauma that has impaired his cognitive functioning. The defendant has not returned to work, and there has been no cognitive improvement to date. When questioned about the pending criminal charge, the defendant typically responds, "My mother told me I did something bad, but I

can't remember what." He is unable to remember anything about the robbery. When asked about his appointed counsel, the defendant usually says, "She's nice" or "She comes to see me and helps me." He describes the judge as "the guy in charge," but when asked to explain what happens in court he responds, "I don't know what they are talking about." During repeated interviews, we have seen no evidence that the defendant currently understands abstract language and concepts. We have also seen no evidence that he is feigning or exaggerating his cognitive impairment.

State A uses the *M'Naghten* not guilty by reason of insanity (NGRI) test and requires that the affirmative defense of NGRI be proved by a preponderance of the evidence.

Defense counsel has requested a hearing to determine whether the defendant is competent to stand trial (in some jurisdictions, this is called "fitness to stand trial") and has informed the court that, if the trial proceeds, the defendant will argue that he is NGRI.

Based on all the information presented above, including the information in the psychiatrists' report:

1. Should the prosecution be suspended because the defendant is currently incompetent to stand trial? Explain.

2. If the defendant is found competent to stand trial and the prosecution proceeds, will the jury likely find that, with respect to each element of the *M'Naghten* test, the defendant has met his burden of proof? Explain.

CONNECTICUT BAR EXAMINATION

27 February 2018

QUESTION #3

From the Multistate Essay Examination

A woman whose hobby was making pottery wanted to improve her pottery skills both for her own enjoyment and to enable her to create some pottery items that she could sell. Accordingly, she entered into negotiations with an experienced professional potter about the possibility of an apprenticeship at his pottery studio.

The negotiations went well, and after some discussion, the woman and the professional potter orally agreed to the following on May 1:

- The woman would be the potter's apprentice for three months beginning May 15. During the apprenticeship, the potter would provide education and guidance about the artistry and business of pottery. The woman would pay the potter $4,000 for the right to serve as the potter's apprentice, payable on the first day of the apprenticeship.
- The potter would supply the woman with equipment and tools that she would use during the apprenticeship and would be entitled to take with her at the conclusion of the apprenticeship. On or before May 8, the woman would pay the potter $5,000 for the equipment and tools.
- The woman would be provided with a private room in the potter's studio in which to stay during the apprenticeship.

On May 2, the woman and the potter signed a document titled "Memorandum of Agreement." It contained the terms orally agreed to the day before, except that it did not refer to the woman's living in a private room in the potter's studio. The last sentence of the document stated, "This is our complete agreement."

On May 8, the woman went to the potter's studio and paid him the $5,000 called for in the agreement for the equipment and tools. While she was there, the potter said that he had decided that the $4,000 price was too high for the right to serve as his apprentice and proposed lowering it to $3,500. The woman happily agreed, and they shook hands on this new arrangement.

On May 15, the woman arrived at the potter's studio to begin the apprenticeship and move into the room she would occupy during that time. The potter refused to let her move in, however, and said that their deal did not require him to provide lodging for the woman. When the woman protested that they had agreed to the lodging arrangement, the potter took the signed Memorandum of Agreement out of his pocket and pointed out to her that it contained no reference to the woman's living in his studio. He then said, "If it's not in here, it's not part of the deal."

The woman then said, "At least you were reasonable in agreeing to change the price for the apprenticeship to $3,500. Saving that extra five hundred dollars means a lot to me." In response, the potter pointed to the Memorandum of Agreement again and said to the woman, "That's not what this says. This says that you'll pay me $4,000 today. Even if I agreed to lower the price, I didn't get anything for that, so why should I be bound by it?"

The woman is quite angry about this turn of events and is considering suing the potter.

1. If the woman sues the potter about the disputes relating to the apprenticeship, will those disputes be governed by the common law of contracts or by Article 2 of the Uniform Commercial Code? Explain.

2. Assuming that the common law of contracts governs, is the oral agreement concerning the woman's lodging binding on the parties? Explain.

3. Assuming that the common law of contracts governs, is the oral agreement lowering the price for the apprenticeship binding on the parties? Explain.

CONNECTICUT BAR EXAMINATION

27 February 2018

QUESTION #4

From the Multistate Essay Examination

A developer acquired a 30-acre tract of land zoned for residential use. The developer thereafter marked out 60 building lots. The developer granted various utility providers appropriate easements to install underground sewer and utility lines. These utility easements were promptly and properly recorded.

Subsequently, the developer contracted with a man to build a home for the man on one of the 60 lots. The contract provided that, at closing, the developer would convey the home and lot to the man by a warranty deed excepting all easements and covenants of record. The home was completed nine months later.

At the closing, the developer conveyed the home and lot to the man by a valid warranty deed containing the six title covenants. Notwithstanding the language in the contract, the deed contained no exceptions to these six covenants. The deed was promptly and properly recorded.

Two months later, following a heavy storm, the man discovered rainwater in the basement level of his home. Three bedrooms were located on this level, and the influx of rainwater made all of them unusable. An expert determined that the cause of the rainwater influx was a defect in the construction of the home's foundation.

The man contacted the developer, who denied any responsibility for the influx. Rather than argue with the developer, the man contacted a plumber, who concluded that the problem could be solved by installing a sump pump in the basement. The plumber accurately told the man that the usual cost of installing a sump pump was $750, but that the location of the sewer lines coming into the home created more work, raising the installation cost to $1,500. The man told the plumber to install the pump.

Thereafter, the man sued the developer for $5,000 in damages for the cost of the sump pump, its installation, and damage to the floors and carpeting in the basement. He also sought additional damages for breach of one or more title covenants.

1. Which present title covenants, if any, did the developer breach with respect to the utility easements? Explain.

2. Assuming that there was a breach of one or more of the present title covenants, can the man recover damages from the developer for the breach? Explain.

3. May the man force the utility company that installed the underground sewer lines to remove them from the land? Explain.

4. May the man recover the $5,000 in damages from the developer? Explain

CONNECTICUT BAR EXAMINATION

27 February 2018

QUESTION #5

From the Multistate Essay Examination

While speeding down a rural highway in State A, the driver of a moving van lost control of the van and struck a car. A passenger in the car was seriously injured.

The passenger filed suit in the federal district court for the district in State A where the accident had taken place. She sought damages for her injuries from the driver of the van and the moving company that employed him. Among other allegations, the complaint alleged that

- the driver and the moving company are citizens of State A;
- the driver resides in the federal judicial district where the suit was brought;
- the accident occurred in the federal judicial district where the suit was brought;
- the passenger is a citizen of State B;
- the amount in controversy exceeds $75,000;
- venue is proper in the federal judicial district where the suit was brought;
- the driver was employed by the moving company and was acting in the course of his employment at the time of the accident;
- the driver of the moving van was negligent; and
- the passenger suffered serious injuries as a result of that negligence.

The defendant driver and the defendant moving company were both represented by an attorney who was a partner in a 30-lawyer law firm. The attorney was retained and received a copy of the complaint only four days before an answer was due. The attorney was conducting another trial at the time. Rather than ask another lawyer in the firm to answer the complaint, the attorney personally prepared and filed a timely answer to the complaint on behalf of the defendants.

The answer to the complaint, which was signed by the attorney, read simply: "General Denial: Defendants Hereby Deny Each and Every Allegation in the Complaint."

Two months later, the plaintiff (the passenger) properly served Requests for Admission on the defendants, requesting admission of each allegation in the complaint. Responding to the Requests for Admission, the defendants (still represented by the attorney) denied the allegations concerning the driver's negligence and the plaintiff's injuries, but admitted all other alleged facts.

The plaintiff then served on the defendants' attorney a motion for sanctions on the ground that the general denial in the answer was inappropriate. The plaintiff requested that the defendants withdraw

their original answer and file an amended answer admitting the allegations that the defendants had admitted in their response to the Requests for Admission.

One month later, after the defendants had failed to withdraw or amend their answer, the plaintiff filed the motion for sanctions in court. The plaintiff's lawyer submitted evidence that his customary billing rate is $300 per hour and that he had spent seven hours preparing the motion and corresponding with the defendants' attorney about the answer, for a total of $2,100.

1. May the court properly grant the plaintiff's motion for sanctions? Explain.

2. If the court grants the plaintiff's motion for sanctions, (a) what sanctions are appropriate and (b) against whom should the sanctions be ordered? Explain.

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27 February 2018

QUESTION #6

From the Multistate Essay Examination

A man and a woman were equal partners in a neighborhood natural-foods store. The store had been at the same location for many years and had developed a loyal following. Under their informal arrangement, the man had managed the business and the woman had supplied capital to the business as needed.

They leased the building in which the store was located and had regularly sought to purchase the building for the partnership, but the landlord had always refused. Six months ago, however, the landlord called the man and said, "I thought you would want to know that I'm planning to sell the building." The next day, the man sent the woman an email: "I am leaving our partnership. I will wind up the business and send you a check for your half share." Without informing the woman, the man then contacted the landlord and offered to buy the building. The landlord accepted, and the two entered into a binding purchase agreement. One month later, the man took title to the building.

Three months ago, the man sent the woman a check for half of the store's inventory and other business assets. Instead of cashing the check, the woman sent the man an email stating that she regarded the partnership as still in existence and demanded that the man convey title to the building to the partnership. The man replied that their partnership was dissolved and that he had moved on. He then began to operate the store as a natural-foods store with a name different from that of the original store, but with the same product offerings and the same employees.

The woman has sued the man for withdrawing from the partnership and for breaching his duties by buying the building from the landlord.

1. Did the man properly withdraw from the partnership? Explain.

2. Assuming that the man's withdrawal was not wrongful, what was the legal effect of the man's withdrawal from the partnership? Explain.

3. What duties, if any, did the man breach by purchasing the building? Explain.