CONNECTICUT BAR EXAMINATION

27 July 2021

PERFORMANCE TEST #1

From the Multistate Performance Test

Winston v. Franklin T-Shirts Inc.

FILE

Memorandum to Examinee.....1

Winston v. Franklin T-Shirts Inc., Agreed Statement of Facts.....2

LIBRARY

United States Copyright Act – 17 U.S.C. § 101 *et seq.*.....5

Brant v. Holt, U.S. District Court for the District of Franklin (1998).....6

Allen v. Rossi, U.S. District Court for the District of Franklin (2015).....9

Klavan v. Finch Broadcasting Co., U.S. District Court for the District of Franklin (2017).....12

Chambers of the Hon. Joann Gordon
United States District Court for the District of Franklin
120 N. Henry Street
Centralia, Franklin 33705

MEMORANDUM

TO: Examinee
FROM: Hon. Joann Gordon
DATE: July 27, 2021
RE: *Winston v. Franklin T-Shirts Inc.*, Case No. 21-CV-0530

As you know from the conference in my chambers that you attended as my law clerk, the defendant in this copyright infringement case will make a motion for summary judgment, arguing that its use of the plaintiff's photograph was fair use under the federal copyright statute, 17 U.S.C. § 107. The parties agree that, in the absence of a finding of fair use, the defendant infringed the plaintiff's copyright. While I must await and consider the arguments of the litigants before I rule, I would like your preliminary analysis of the issue.

I am attaching relevant materials. The statute includes illustrative introductory language and calls for the application of four factors in determining whether a particular use qualifies as fair use.

Please prepare a memorandum to me analyzing the possible fair use claim. Do so by applying the statute, including an analysis of each of the statute's four factors. Note that the factors are not applied mechanically; the court has considerable discretion to consider the weight to give each factor in reaching its conclusion. Although you do not yet have the benefit of reviewing the litigants' arguments, be sure to discuss the arguments that the plaintiff and the defendant will likely make for each factor. After that analysis, state your conclusions for each of the four factors and for the overall claim of fair use.

Do not include a separate statement of facts, but be sure to refer to the relevant facts in the record in analyzing the fair use claim.

Winston v. Franklin T-Shirts Inc.
AGREED STATEMENT OF FACTS (record citations omitted)

1. Since 1979, the "Franklin Fun Fair" has been an annual "street fair" type of event in Riverside, Franklin. Riverside is a small town with a population of 15,000.

2. The fair's organizers state that the fair is intended to "poke fun at the powers that be and let everybody have a good time."

3. On occasion, various individuals and groups have used the event to make political statements.

4. In 1985, Jim Barrows, a student at Franklin State University, joined in a political demonstration at the event and was arrested for and convicted of disorderly conduct.

5. Plaintiff Naomi Winston is a professional photographer and was the only professional photographer on the scene that day.

6. Winston took a picture of the police leading a sneering Barrows away from the demonstration in handcuffs (the "Photograph").

7. Winston's Photograph of Barrows was the only pictorial record of the arrest.

8. The photographer, Winston, registered the copyright in the Photograph with the United States Copyright Office and is the owner of the copyright in the Photograph. (Barrows has no copyright interest in the Photograph whatsoever, as he is not the "author" of the Photograph.)

9. As copyright owner of the Photograph, Winston granted a single-use license to the *Riverside Record*, a local newspaper, allowing it to publish the Photograph accompanying a story about the political demonstration.

10. Winston received a fee of $500 for the *Record*'s use of the Photograph.

11. In 1992, Winston licensed the Photograph and 72 other pictures she had created to the publisher of a coffee-table book of her photographs, entitled *Franklin in the 1980s—A Pictorial History* (the "Book"), which retailed for $40. She received a one-time license fee of $10,000, plus a 7% royalty for each copy sold.

12. After selling 3,500 copies, the Book went out of print in 1995. Winston's royalties amounted to $9,800. Winston has not received any revenues from uses of the Photograph since 1995.

13. There have been no other uses of the Photograph to date; Winston has received no other income from any use of the Photograph.

14. In 2020, Barrows, now a prominent businessman, unsuccessfully ran for mayor of Riverside. After he lost the election, Barrows completely withdrew from public life, retired from his businesses, and moved to the neighboring state of Olympia.

15. During Barrows's mayoral campaign, at a news conference he gave, a reporter for the *Record* raised the topic of Barrows's 1985 arrest, compared it to his current "law and order" stance, and asked if he had any comment.

16. Barrows said, "I was young and foolish and impetuous back then, and my arrest was justified. Now, I'm older and wiser, and I recognize the virtues of law and order."

17. Defendant Franklin T-Shirts Inc. is a purely commercial company that manufactures and sells T-shirts. Its owner is active in Riverside politics and was a strong supporter of Barrows's opponent in the mayoral election.

18. During the mayoral campaign in 2020, Franklin T-Shirts Inc. took a copy of the Photograph from the Book and reproduced it in its entirety on a T-shirt. The words "Arrested & Convicted" were stamped in red over the Photograph, and the caption "BARROWS IS A HYPOCRITE!" was printed below the Photograph. Reports of Barrows's arrest and conviction, and publicity surrounding them (including the widespread appearance of the T-shirts), were seen by analysts as significantly contributing to his defeat.

19. Because Franklin T-Shirts Inc.'s owner opposed Barrows's election, he sold the T-shirt at cost, for $4.00, and sold around 2,000 units.

20. Purchasers of the T-shirts were overwhelmingly supporters of Barrows's opponent in the mayoral election.

UNITED STATES COPYRIGHT ACT – 17 U.S.C. § 101 *et seq*.

[Excerpted provisions]

§ 106 Exclusive rights in copyrighted works

Subject to sections 107 through 122 [specifying limitations on rights], the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

. . .

§ 107 Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section[]106 . . ., the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use[,] the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Brant v. Holt
United States District Court for the District of Franklin (1998)

Plaintiff Barbara Brant is a songwriter and the copyright owner of the song "Onward and Upward" (the "Song"). The Song achieved considerable popularity last year, and reached number four on the *Billboard* charts, a standard measure of music popularity based on sales. The Song is an upbeat, inspirational composition, with lyrics that espouse hope and triumph over adversity.

Defendant Ken Holt is a candidate for governor of the state of Franklin seeking his party's nomination in the upcoming primary election later this year.

In the course of his campaign, Holt has repeatedly had the Song publicly performed at campaign rallies and had it reproduced and publicly performed as background in television and radio commercials, all without Brant's authorization. Brant has objected to Holt's use of the Song in his campaign. She sent Holt a "cease and desist" letter, demanding that Holt immediately stop using the Song in any fashion. When Holt ignored the demand, Brant brought an action for copyright infringement and filed this motion for a preliminary injunction to bar any such use.

Holt has claimed that the use of the Song is "fair use" under 17 U.S.C. § 107. For the reasons stated below, we conclude that it is not fair use; the relevant undisputed facts are set forth as appropriate in our analysis.

Overview

[Analysis of standard for granting a preliminary injunction omitted; the court concluded that the standard was met.]

Fair use is an affirmative defense to a claim of copyright infringement. In cases finding fair use, the use in question (absent any other valid defense) would constitute infringement. But the copyright statute excuses acts that would otherwise be infringements if they fall within the limits of the fair use provision of the Copyright Act, 17 U.S.C. § 107. Hence, we must analyze the facts based on the criteria set forth in that statute.

The introductory language of § 107 sets forth some general, illustrative, and non-exhaustive bases for a claim of fair use. Holt correctly notes that his use of the Song was "comment," one of those bases. However, this is not dispositive. The statute requires a fact-specific analysis under four factors to determine if the unauthorized use is excused.

Factor 1: Purpose and Character of Use

The first factor requires an analysis of the purpose and character of the use, including whether it is "of a commercial nature or . . . for nonprofit educational purposes." Here, the use is for neither—it is for a political purpose. In that regard, Holt claims that he is using the uplifting message of the Song to parallel his political agenda. He argues that political discourse is and should be encouraged in our society, and that his use of this particular song does so. We agree that political discourse is vital to the essence of our democracy, and uses for that purpose should, absent other factors, weigh heavily in favor of fair use. But that is not the end of our inquiry here, for there are many songs that convey that uplifting message. There was no need to use this particular song to do so. Further, Holt is not using the Song to make any specific comment on his political agenda—it is more of a generalized feeling that all candidates espouse. This factor cuts slightly in favor of the copyright owner and against fair use.

Factor 2: Nature of the Copyrighted Work

This factor usually does not significantly figure in most fair use analyses. Most cases see its application as favoring the use of published as opposed to unpublished works, and scientific or factual works as opposed to those that are creative and expressive. We do not think this factor has much weight here and is neutral in this case.

Factor 3: Amount and Substantiality of Use

The statute requires us to analyze both the quantitative ("amount") and qualitative ("substantiality") use of the work. Here, the analysis is simple—the entire work was used, repeatedly, and without modification. While there are circumstances where use of the entire work can nevertheless amount to fair use (e.g., when the entire work is necessary for a commentary or a news report), this is not one of them. This factor cuts against fair use in this case.

Factor 4: Effect on Potential Market or Value

The fourth factor, which some cases (but by no means all) have said is of great importance, is the effect of the use on the market for, or value of, the copyrighted work. One of the purposes of copyright is to protect the economic interests of the copyright owner. Brant has stated in deposition that she fears Holt's use of the Song will make the Song permanently identified with him and his political views and erode its popularity with members of the public who do not agree with Holt's political viewpoint. In addition, Brant has stated in deposition that she has publicly opposed the political agenda that Holt espouses and that his use of the Song will undermine her

reputation with her fans. Further, Brant notes that she has not licensed the Song for use in advertising of any sort. We note that the statute speaks not merely of actual harm, but also of harm to the "*potential* market for or value of the copyrighted work" (emphasis added). We find Brant's testimony compelling in this regard. This factor cuts strongly against a claim of fair use.

Conclusion

For the reasons stated, we hold that Holt's use of the Song is not fair use, and we grant the preliminary injunction.

Allen v. Rossi

United States District Court for the District of Franklin (2015)

In this copyright infringement case, defendant Stephanie Rossi has moved for summary judgment, claiming that her use of part of plaintiff Martin Allen's photograph in a collage was fair use. We agree.

Facts

The facts are not in dispute. Allen is a noted wildlife photographer. He took the work in question (the "Photo") in 2005; it depicts a scene at a watering hole in Africa. Clustered around the watering hole are various animals—a giraffe, a water buffalo, a rhinoceros, and several others. The Photo was published in 2005 in a book of photographs by many different photographers; Allen received a one-time payment of $100 for this use of the Photo. He has not made any other sales of the Photo in the 10 years since he took it.

Rossi is a graphic artist whose work is known for espousing social causes. One of those causes is the protection of endangered species. Last year, she created a photographic collage in which she took photographs of many endangered species and placed them in juxtaposition. She took a copy of the Photo, clipped from the book in which it had been published, cut out the picture of the rhinoceros, and then included it in the collage with excerpts of 13 other photographs from various sources, all depicting endangered species of animals. She made the collage into museum-quality poster-sized prints, which she is selling for $450 each, the proceeds to benefit nonprofit organizations devoted to protecting endangered species.

Analysis

The Copyright Act requires that, to determine if a particular use is a fair use, we analyze four factors.

Factor 1: Purpose and Character of Use

Rossi has testified that her purpose in using the excerpt from the Photo was to draw attention to the plight of endangered species. She hoped, in her juxtaposition of pictures of all the animals in the collage, to educate the public on the beauty of the various animals and the danger they face. She said that she could only do this by showing all the animals together, so as to depict in an overwhelming way the many species at risk. By taking only a part of the Photo and using it to make a comment on a social issue, Rossi has transformed the original aspect of the Photo. The

courts, up to and including the Supreme Court, have made such transformative use one touchstone of fair use analysis.

> Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (citations omitted). Although Rossi is selling copies of the collage—a commercial use—we note that the proceeds are going for noncommercial educational purposes, a use endorsed by the statute.

We believe, as the Supreme Court has instructed and as many other courts have found, that the transformative nature of the use is crucial in this case. There may be cases where the reproduction of the entire work is transformative, by making a new work different in character and meaning from the original. But, as a general matter, simply reproducing the copyrighted work, even in another medium, is not the "transformation" that would justify a finding of fair use. *See Rodgers v. Koons*, 960 F.2d 301 (2d Cir. 1992) (reproduction of photograph into three-dimensional sculpture was not fair use). That type of use simply treads on the copyright owner's right to make derivative works, 17 U.S.C. § 106(2). On the other hand, using an element of a copyrighted work in combination with other creative expression, for a different purpose than the copyright owner's and to make a different social commentary, changes—transforms—the use and argues for fair use. *See Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006) (use of a portion of a copyrighted photograph in a collage, which in total made a comment on the materiality of commercialism, constituted fair use). That is what happened here, and we see this factor as favoring fair use.

Factor 2: Nature of the Copyrighted Work

Although photographs are intrinsically creative works (weighing against fair use), the Photo here is arguably more informative than artistic. Further, it has been published, weighing in favor of fair use. And that its artistic merit is limited is reflected by the fact that it has been utilized only once in the 10 years since it was taken. On balance, this factor slightly favors fair use.

Factor 3: Amount and Substantiality of Use

Rossi has used only a small portion of the Photo ("amount"). Further, she has not taken the heart of the Photo, as the depiction of the rhinoceros was but one of many animals in the Photo ("substantiality"). This factor cuts in favor of fair use.

Factor 4: Effect on Value

We see no substantial effect of Rossi's use on the actual or potential value of the copyrighted work. Allen has sold the rights to the Photo but once, for a mere $100, and has not made any further sale in 10 years. In addition, no one seeing the collage would, we believe, have the slightest notion that the picture of the rhinoceros came from Allen's picture. The use would in no way affect any possible market for the Photo in the future. This factor, too, cuts in favor of fair use.

Conclusion

Based on our analysis, we find that Rossi's use of the Photo was fair use. Summary judgment granted.

Klavan v. Finch Broadcasting Co.

United States District Court for the District of Franklin (2017)

Plaintiff Amanda Klavan is a professional videographer. She has brought this action against Finch Broadcasting Co. (Finch) alleging that Finch's broadcast of a portion of a video she made was unauthorized and hence copyright infringement. Finch has moved for summary judgment, claiming that the broadcast was "fair use."

Facts

The facts are not in dispute. Klavan had just finished making a video for the host of a private party in Franklin City, and was walking home with her camera, when an altercation involving two men occurred in front of her. One of the men was Murray Freed, the Speaker of the Franklin City Council. The dispute became nasty, with profane name-calling on both sides, and Freed took a piece of wood that was lying on the sidewalk and repeatedly struck the other man with it. Klavan captured the whole event on her video camera and owns the copyright in the video. There were no other bystanders, and her video, running 14 minutes, was the only visual record of what transpired. She sent a copy to Finch's local television station, noting that she owned the copyright in the video and offering to license the broadcast of the video for $5,000. Without responding to her offer, Finch took an eight-second excerpt of the video, showing Freed's assault with the piece of wood, and aired the excerpt in its nightly news broadcast reporting on the incident. Klavan then brought this action for copyright infringement.

Analysis

Finch's use of the video excerpt, absent any valid defense, would constitute infringement. Finch's only defense is that the use falls within the fair use provision of the Copyright Act, 17 U.S.C. § 107. Hence, we must analyze the facts based on the criteria set forth in that statute.

At the outset, we note that one of the uses, which the statute explicitly states may be fair use, is "news reporting." That is the case here. But our analysis cannot end there; rather, we must look at the four factors that the statute requires of every fair use analysis.

Factor 1: Purpose and Character of the Use

Finch's purpose in using the excerpt of the video was to report the news to its viewers. While the use was commercial—Finch operates the television station for profit—that does not mean that the use cannot be considered fair. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). Here, the news story at issue was one of significant importance to the populace of Franklin

City—it showed something about the Speaker of the City Council that reflected on his character and temperament. Application of the first factor weighs in favor of fair use.

Factor 2: Nature of the Copyrighted Work

Although this factor usually does not figure in most fair use analyses, we believe it is of great importance here. We recognize that one of the frequent applications of this factor turns on whether or not the work has been published. Klavan's video was unpublished, which weighs against fair use, for the creator and copyright owner should have the right to first divulge the work to the public in the manner she desires. But we note that the last sentence of § 107 states, "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." Thus, while we must take into account the unpublished nature of the video, that does not end our inquiry.

We believe this factor militates in favor of fair use for two reasons: First, it is a visual record of a significant newsworthy event, and so is more vivid and revealing than a mere description would be. Second, and more significantly, it is the *only* visual record of the significant newsworthy event. Thus, Finch cannot turn to any other source for a comparable visual report. In this regard, we find *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968), instructive. That case involved a book's use of line drawings made from single frames of the only motion picture capturing the moment of the assassination of President John F. Kennedy, for the purpose of illustrating the author's theory concerning the assassination. Thus, the case involved the use of the only visual record of an event of transcendent national importance. The court deemed it fair use. Although that case was brought before the current Copyright Act was enacted, at a time when the fair use doctrine was uncodified and entirely judge-made, we find it persuasive.

Factor 3: Amount and Substantiality of the Portion Used

In absolute terms, the amount of the video used by Finch—eight seconds of a 14-minute work—was minimal. The question of the substantiality of the portion used, however, is closer. It might be argued that the most significant portion of the video—the part showing Freed wielding the piece of wood—was used. But there were other portions of the video of similar significance—for example, the argument leading up to the altercation, the profanity-laced back-and-forth, and so on. At best, we see this factor as neutral as far as fair use goes.

Factor 4: Effect of the Use on the Potential Market for and Value of the Work

It could be argued that, should fair use be found, Klavan may lose a potential market for the eight seconds of the video that Finch used. We do not agree. There are many uses of that portion of the video that differ from Finch's use and that could be licensed. Further, there is an untouched market for the entire video, and for other portions of it. We note that Finch argues that its use actually *enhances* the value of the video, by bringing it to the public's attention and, arguably, creating a market for it. We do not agree with or credit this argument in reaching our conclusion. Rather, it is for the copyright owner, not the user, to determine what may enhance the work's value. Nonetheless, for the reasons given above, we find this factor tilts in favor of fair use.

Conclusion

For the reasons given, we find Finch's use to be fair use. Motion for summary judgment granted.

CONNECTICUT BAR EXAMINATION

27 July 2021

PERFORMANCE TEST #2

From the Multistate Performance Test

In re Canyon Gate Property Owners Association

FILE

Memorandum to Examinee 1

Interoffice memorandum re: opinion letters to clients 2

File memorandum re: meeting with Jane Mendoza 3

ACC denial letter re: home improvement requests 5

Excerpts from Canyon Gate Property Owners Association Covenants, Conditions, and Restrictions 6

File memorandum re: Association Covenants, Conditions, and Restrictions defined 8

LIBRARY

Excerpts from Franklin Property Code, Chapter 400 9

Foster v. Royal Oaks Property Owners Association, Franklin Court of Appeal (2017) 10

Powell v. Westside Homeowners Association Inc., Franklin Court of Appeal (2019) 14

FAWCETT & BRIX LLP
Attorneys at Law
425 Lexington Ave., Suite 100
Hayden, Franklin 33054

MEMORANDUM

TO: Examinee
FROM: Deborah Fawcett
DATE: July 27, 2021
RE: Canyon Gate Property Owners Association

Our client, Canyon Gate Property Owners Association, needs legal advice regarding a home improvement application. As you know, a property owners association is an organization in a subdivision or condominium building that makes and enforces rules for the properties and their residents. The Canyon Gate Association's rules are set forth in its Covenants, Conditions, and Restrictions (deed restrictions). The deed restrictions are enforced by the Association's architectural control committee (ACC).

Charles and Eleanor Stewart live in Canyon Gate. Last month they submitted an application to make certain improvements to their property. The Association's ACC denied the Stewarts' application on the ground that the requested improvements (a structure and a fence) would violate the Association's deed restrictions. The Stewarts will be attending the next Association board of directors meeting to appeal the ACC's denial of their application.

The board has asked our opinion whether the ACC properly denied the Stewarts' application so that the board can then take appropriate action. Please draft an opinion letter to the board analyzing and evaluating

(1) whether the board should uphold the ACC's denial of the Stewarts' application for a structure and a fence; and

(2) if the board affirms the ACC's denial and the Stewarts sue the Association, what outcome is likely and what potential remedies are available.

Be sure to follow the firm's guidelines for drafting opinion letters when preparing the letter. Do not include a separate statement of facts, but be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect your analysis.

FAWCETT & BRIX LLP
Attorneys at Law

INTEROFFICE MEMORANDUM

TO: All attorneys
DATE: January 6, 2020
RE: Opinion letters to clients

The firm follows these guidelines in preparing opinion letters to clients:

For each question presented:

1. State the question.
2. Provide a concise one-sentence answer.
3. Identify and analyze all issues raised by the question, including the strengths and weaknesses of the client's position where applicable. Be sure to discuss the relevant facts and law that support your conclusions.

Because this is an opinion letter, analyze each theory or issue and all elements or factors of each issue.

An opinion letter should be written in a way that clearly addresses the legal issues but also allows the client, who is not a lawyer, to follow your reasoning and the logic of your conclusions.

FAWCETT & BRIX LLP
Attorneys at Law

FILE MEMORANDUM

FROM: Deborah Fawcett
DATE: July 26, 2021
RE: Canyon Gate Property Owners Association; meeting with Jane Mendoza

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Today I met with Jane Mendoza, the chair of the Canyon Gate Property Owners Association Board of Directors. The Association needs legal advice regarding a home improvement application submitted by homeowners Charles and Eleanor Stewart. This memorandum summarizes the interview.

- Canyon Gate is a small residential subdivision in northwest Hayden consisting of 45 single-family homes on lots that range in size from one to five acres.
- The Association has appointed an Architectural Control Committee (ACC) to oversee approvals and enforcement of the Association's Covenants, Conditions, and Restrictions (deed restrictions).
- The Stewarts have lived in Canyon Gate for approximately seven years. They own a 3,000-square-foot home located on a two-acre lot.
- On June 11, 2021, the Stewarts submitted an application to the ACC, along with plans and specifications, seeking approval for two home improvements: (1) construction of a new Structure to be located adjacent to their existing home and (2) installation of an eight-foot-tall Fence to be erected behind the Structure.
- The Structure would be located approximately 12 feet to the right of the existing home and set back 50 feet from the street.
- The Structure would be connected to the existing home by a roof-covered walkway without walls (a "breezeway"). The breezeway's roof would extend from the edge of the Structure's roof to the existing roof on the Stewart house.
- The Stewarts' application states that Mrs. Stewart's 72-year-old mother, Estelle, intends to move into the Structure so that she can live with them.

- The application states that the purpose of the Fence is to create an enclosed backyard for the Structure to prevent Estelle's dog from roaming the entire two-acre Stewart property and possibly getting lost or injured.
- According to the plans submitted by the Stewarts, the Structure will be 600 square feet (30 feet wide by 20 feet deep) and will contain a large living/sleeping area and a bathroom.
- The Structure would be the first of its type in Canyon Gate; there are no other lots in the subdivision that contain a guesthouse or other similar separately walled living area in addition to the originally constructed residence.
- In the past, the ACC has approved the construction of sheds and barns that comply with the requirements for outbuildings set forth in the deed restrictions.
- The ACC has never formally approved the installation of fences that are over six feet tall or that otherwise do not meet the requirements in the deed restrictions.
- A few homes in the community have some type of fencing that is noncompliant with the deed restrictions with regard to fence height, color, and/or material. Ms. Mendoza is not sure how many homes have nonconforming fences, but she did say that the nonconforming fences exist because of lax enforcement of the fencing requirements. For example, one former ACC member built a nonconforming fence on his lot without approval while serving on the ACC.
- On July 16, 2021, the ACC denied the Stewarts' requests to build the Structure and install the Fence.
- Following the denial, Ms. Mendoza received a call from Mrs. Stewart. Mrs. Stewart insisted that the ACC misapplied the deed restrictions with regard to the Structure and that a variance should have been granted for the Fence.
- The Stewarts have now requested a hearing before the Association's Board of Directors at its meeting on August 10, 2021.
- Ms. Mendoza and her fellow board members are concerned that if the board upholds the ACC's denial of the Stewarts' application, the Stewarts may challenge the decision in court.

Canyon Gate Property
Owners Association
www.cgatepoa.com

July 16, 2021
Charles and Eleanor Stewart
1401 Tanglewood Circle
Hayden, Franklin 33058

HOME IMPROVEMENT REQUESTS

Dear Mr. and Mrs. Stewart:

Thank you for submitting the Home Improvement Requests described below to the Canyon Gate Property Owners Association. After careful consideration, review of the plans and specifications submitted, and an on-site meeting with you to inspect the proposed location of the improvements, the Architectural Control Committee (ACC) has made the decisions noted below.

Request #1: Outbuilding

Decision: Disapproved

Reason: Per Section 5C of the Canyon Gate Covenants, Conditions, and Restrictions, the square footage of the proposed exterior building exceeds the maximum allowable limit per acreage.

Request #2: Eight-foot-high fence

Decision: Disapproved

Reason: Per Section 7A of the Canyon Gate Covenants, Conditions, and Restrictions, fences taller than six feet are not permitted.

Please email the ACC if you have any questions. If you wish to appeal either denial, you may request a hearing before the Association Board of Directors.

Sincerely,

Canyon Gate Architectural Control Committee

Excerpts from Canyon Gate Property Owners Association
Declaration of Covenants, Conditions, and Restrictions
(Adopted April 12, 1985)

SECTION 1. INTRODUCTION

The Canyon Gate subdivision is intended to embody superior standards of single-family housing. For the purpose of creating and carrying out a uniform plan for the improvements to lots within the subdivision, the following restrictions upon the use of said property are hereby established and shall be made a part of each and every contract and deed executed.

SECTION 2. ARCHITECTURAL CONTROL

A. Approval Required: No building, fence, wall, or other structure shall be constructed or maintained . . . until the construction plans and specifications for same shall have been submitted to and approved in writing by an Architectural Control Committee (ACC) composed of three or more representatives appointed by the Board.

B. Enforcement/Damages: These restrictions are for the benefit of each and every property owner in the subdivision, and may be enforced by the Association . . . , which shall be allowed to recover from a violating party all costs, attorney fees, and out-of-pocket expenses incurred in enforcement of any covenants herein whether by judicial means or settlement.

SECTION 3. GENERAL REQUIREMENTS FOR RESIDENCES

A. Minimum Square Footage: The living area (air-conditioned space) of a residence shall be a minimum of 2,800 square feet, excluding porches and garages, and shall be set back at least 30 feet from the front street right-of-way.

B. Residential Use Only: All lots shall be known and described as lots for residential purposes only. Said lots shall not be used for business purposes of any kind nor for any commercial, manufacturing, or apartment house purposes. Only one family residence may be erected, altered, placed, or permitted to remain on any lot.

***

SECTION 5. CRITERIA FOR BUILDINGS OTHER THAN RESIDENCES

Minimum standard for outbuildings: . . .

C. Size Restrictions: The maximum allowable square footage of all outbuildings shall not exceed 100 square feet per acre of a homeowner's lot.

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SECTION 7. FENCE CRITERIA

A. Height Limits: Fences are limited to a maximum height of six feet. No fence having a height greater than six feet shall be constructed or permitted to remain in the subdivision.

***

SECTION 10. VARIANCES

Variances to the design standards and development criteria shall be granted only for a compelling reason and only if the general purposes and intent of the covenants and design standards are substantially maintained.

FAWCETT & BRIX LLP
Attorneys at Law

FILE MEMORANDUM

FROM: Deborah Fawcett
DATE: July 26, 2021
RE: Association Covenants, Conditions, and Restrictions defined

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I have researched the common meaning of certain terms and concepts contained in the Association's Covenants, Conditions, and Restrictions. Below are my findings:

Residential Building

- a building which is used for residential purposes or in which people reside, dwell, or make their homes, as distinguished from one which is used for commercial or business purposes. The phrase "residential purposes" does not mean only the occupying of a premises for the purpose of making it one's "usual" place of abode; a building is a residence if it is "a" place of abode.

20 AM. JUR. 2D *Covenants* § 179 (2018).

Outbuilding

- [a] detached building (such as a shed or garage) within the grounds of a main building.

BLACK'S LAW DICTIONARY (11th ed. 2019).

- a structure . . . not connected with the primary residence on a parcel of property . . . [including] a shed, garage, [or] barn . . . .

www.definitions.uslegal.com/o/outbuilding/

Excerpts from Franklin Property Code, Chapter 400

§ 401 Definitions

. . .

(d) "Restrictive covenant" means any condition or restriction that runs with the land and limits permissible use of the land.

* * *

§ 403 Construction of Restrictive Covenants

(a) A restrictive covenant shall be reasonably construed to give effect to its purposes and intent.

(b) A restrictive covenant may not be construed to prevent or restrict the use of property as a family home.

(c) This section applies to all restrictive covenants regardless of the date on which they were created.

§ 404 Enforcement of Restrictive Covenants

(a) A property owners' association may initiate, defend, or intervene in litigation or an administrative proceeding affecting the enforcement of a restrictive covenant or the protection, preservation, or operation of property subject to a restrictive covenant.

(b) A court may assess civil damages for the violation of a restrictive covenant in an amount not to exceed $200 for each day of the violation.

Foster v. Royal Oaks Property Owners Association
Franklin Court of Appeal (2017)

The Royal Oaks Property Owners Association (Association) sued Mark and Kathryn Foster to enforce the deed restrictions for the Royal Oaks subdivision after the Fosters erected a fence that violated certain restrictive covenants contained in the deed restrictions. The trial court entered judgment for the Association. We affirm.

Background

The Royal Oaks subdivision, in the city of Hayden, Franklin, is subject to deed restrictions that include specific setback requirements governing the placement of structures on each lot and other restrictive covenants. The Royal Oaks Architectural Control Committee (ACC), a three-member committee appointed by the Association and made up of homeowners in the subdivision, governs approvals of improvements to lots within the subdivision and enforces the subdivision's deed restrictions.

In June of 2015, the Fosters bought a lot at the corner of Eagle Drive and Tremont Road in the subdivision and received ACC approval of plans to build a house. The approved plans included a wrought-iron fence enclosing the backyard along Eagle Drive to be located 25 feet from Eagle Drive (the "Eagle Setback"). Nine months after the plan approval, an ACC member drove by the Foster lot and saw a wrought-iron fence being constructed 10 feet from Eagle Drive and thus significantly outside the 25-foot Eagle Setback. On learning of the fence relocation, the ACC sent a letter to the Fosters advising them to stop construction of the fence because it was too close to the street, in a location that had not been approved by the ACC. The Fosters ignored the letter and completed construction of the fence. They thereafter requested a variance to allow the noncompliant fence.

Discussions ensued between the Association and the Fosters, but no agreement was reached. When the Fosters failed to remove or relocate the fence, the Association sued seeking injunctive relief to enforce the restrictive covenants contained in the deed restrictions, a declaratory judgment affirming the Association's authority to enforce the restrictive covenants, and damages pursuant to § 404 of the Franklin Property Code. The Fosters filed a counterclaim, seeking a declaratory judgment that their fence did not violate the restrictive covenants or, alternatively, that the ACC had been arbitrary, capricious, and/or discriminatory in not granting the Fosters a "variance." Following a bench trial, the court entered judgment in favor of the Association,

granting the Association's requested injunctive and declaratory relief, and awarding $20,000 in damages pursuant to Franklin Property Code § 404, plus attorney's fees and costs.

The Fosters raise three issues on appeal: (1) the trial court misinterpreted the Royal Oaks subdivision restrictive covenants, (2) the trial court erred in upholding the ACC's denial of the requested variance, and (3) the trial court erred in assessing damages under § 404 without evidence of actual injury or harm.

On appeal, we review these Association actions de novo, applying two separate analyses. First, we must determine whether the Association correctly interpreted the restrictive covenant. Then, we must determine whether the Association properly applied the restrictive covenant.

Interpretation of the Restrictive Covenant

Restrictive covenants are a type of deed restriction. They are widely used in many neighborhoods to protect homeowners against construction that could interfere with their use and enjoyment of their property and/or impair property values. Restrictive covenants are a "contract between a subdivision's property owners as a whole and individual lot owners and are thus subject to the general rules of contract construction." *Coleman LLC v. Ruddock* (Fr. Sup. Ct. 1999). In construing a restrictive covenant, a court must ascertain the drafter's intent from the instrument's language, giving a restrictive covenant's words and phrases their commonly accepted meaning. *Id.*

At common law, covenants restricting the free use of land were not favored. However, in 1990, the Franklin legislature amended the Property Code to provide that all restrictive covenants contained in instruments governing certain residential developments must be reasonably construed to give effect to their purposes and intent. *See* FR. PROP. CODE § 403. The Franklin Supreme Court has held that § 403's reasonable-construction rule concerning restrictive covenants supersedes the common law rule of strict construction. *See Humphreys v. Oliver* (Fr. Sup. Ct. 2007).

The Fosters contend that the trial court erroneously interpreted the restrictive covenant regarding the minimum distances at which fences must be placed from Eagle Drive (i.e., the 25-foot Eagle Setback). Article III, Section 9 of Royal Oaks subdivision's deed restrictions prohibits any fence from being erected "*nearer to the street* than 25 feet" [emphasis added]. Section 14 provides that "to the extent not otherwise limited by these deed restrictions, no building or other structure shall be located *nearer to a side lot line* than five feet" [emphasis added].

The Fosters argue that although Section 9 requires fences to be located at least 25 feet from the street, Section 14 should govern here because the front of their house faces Tremont Road and

thus the side of their house (and side lot line) faces Eagle Drive. Because the lot extends to the edge of Eagle Drive, and the fence is 10 feet from the edge of Eagle Drive, they assert that the fence does not violate the deed restrictions because it is more than 5 feet from their side lot line (as required by Section 14).

This interpretation lacks merit. The five-foot setback in Section 14 specifically applies to a setback from the "side lot line" only "to the extent not otherwise limited by these deed restrictions." Section 9 deals exclusively with a fence's distance "from the street." Thus, the "side lot line" setback established by Section 14 does not apply because Section 9 requires a greater setback (25 feet) between fences and bordering streets. Accordingly, the trial court did not misinterpret the Royal Oaks deed restrictions.

Application of the Restrictive Covenant

The trial court found that the ACC acted properly in denying the Fosters' request for a variance for the Eagle Drive fence. On appeal, the Fosters assert that the ACC's refusal to grant the variance was arbitrary, capricious, and/or discriminatory.

An association's application of a properly interpreted restrictive covenant in a particular situation is presumed to be proper "unless the court determines that the association acted in an arbitrary, capricious, or discriminatory manner." *Cannon v. Bivens* (Fr. Sup. Ct. 1998). The Fosters thus had the burden at trial to prove by a preponderance of the evidence that the Association's denial of the requested variance was arbitrary, capricious, or discriminatory.

In *Mims v. Highland Ranch Homeowners Ass'n Inc.* (Fr. Ct. App. 2011), the court upheld a summary judgment finding that the defendant association had acted in an arbitrary, capricious, or discriminatory manner in denying a request to build a carport. In *Mims*, although the deed restrictions did not specifically prohibit carports, an ACC member told the homeowner that the carport plans would be denied "no matter what," and the ACC did not review the carport plans or even contact the homeowner to discuss the dimensions of the proposed carport.

Here, in contrast, the Fosters deviated from the approved plans for their home and the ACC attempted to work out other fencing options with them. Although the deed restrictions allow the ACC to modify deed restrictions under "compelling" circumstances, the Fosters failed to provide any justification, let alone a compelling one, for relaxing the 25-foot Eagle Setback. The evidence at trial supports the trial court's finding that the ACC acted properly in denying the requested variance.

Damages under Franklin Property Code Section 404

Finally, the Fosters assert that the trial court erred in assessing $20,000 in damages under Franklin Property Code § 404(b) because the damages were "unsupported by the evidence, manifestly unjust, and erroneous as a matter of law." They contend that a trial court may not assess damages unless there is record evidence that a violation of a restrictive covenant resulted in actual harm or injury.

The amount of damages that may be assessed under § 404 is not related to the showing of any type of injury or harm or the extent of such injury or harm; rather, it is related to the number of days that the violation takes place, without any reference to the existence, nature, or extent of any type of injury or harm. Nothing in § 404 indicates that the "damages" that the trial court may "assess" under subsection (b) are intended to be compensation for any actual harm or injury from the violation of a restrictive covenant. The trial court did not abuse its discretion in assessing damages of $20,000 under § 404(b).

Affirmed.

Powell v. Westside Homeowners Association Inc.
Franklin Court of Appeal (2019)

Richard Powell appeals the trial court's grant of a permanent injunction in favor of Westside Homeowners Association Inc. (HOA) requiring Powell to remove a vehicle parked on his front lawn in violation of certain restrictive covenants contained in the neighborhood association's deed restrictions. We affirm.

BACKGROUND

The HOA is a neighborhood association in the Westside neighborhood of Bradford, Franklin, and is governed by a board of directors. Property in the neighborhood is subject to certain deed restrictions recorded in January 1974 and enforced by the HOA Architectural Control Committee (ACC).

Powell owns a home on Claremont Drive in the neighborhood. In August 2016, Powell began parking a Chrysler Pacifica minivan on his front lawn, next to the driveway and under an oak tree. In September 2016, the ACC notified Powell that parking a vehicle in his front yard violated the HOA restrictive covenants and that the vehicle needed to be removed within 10 days. The letter also stated that if Powell disagreed, he could contact the ACC and explain his position. Powell did not respond or move the minivan. The ACC sent a second letter in October 2016 notifying Powell that the HOA was prepared to file suit against him for the ongoing violation and advising that he could request a hearing before the board within 30 days. Powell never responded. On February 6, 2017, the HOA sued Powell, seeking a permanent injunction requiring removal of the minivan. After a bench trial, the trial court granted the permanent injunction and assessed attorney's fees and costs against Powell.

DISCUSSION

Powell challenges the trial court's findings that Powell violated the restrictive covenants by parking his minivan on his front lawn. In the alternative, Powell argues that even if his actions did violate the restrictive covenants, the HOA waived its right to enforce the restrictions because the HOA allowed other homeowners to park their cars in their front yards.

We review de novo a trial court's conclusions of law. *Mistover LLC v. Schmidt* (Fr. Sup. Ct. 1987). Restrictive covenants are subject to the general rules of contract construction and are to be reasonably construed to give effect to their purposes and intent. FR. PROP. CODE § 403(a). The restrictive covenant at issue provides, in relevant part, that "No vehicles . . . shall be parked or

stored between the curb and building line of any lot, other than on a paved driveway." Although restrictive covenants cannot restrict or prevent the use of property as a family home, *id*. § 403(b), the restrictive covenant here does not affect Powell's ability to use his property as his home. Rather, it simply requires him not to park his minivan in his front yard. Although this restriction was recorded in 1974, before Franklin Property Code § 403 was enacted, § 403 applies retroactively to create a presumption that the restriction is reasonable. *See id.* § 403(c).

Powell admits to parking his minivan on his front lawn, which is between the curb and the building line of his lot. In doing so, Powell violated the deed restriction.

We reject Powell's contention that the HOA waived its right to enforce the deed restriction. To demonstrate a waiver of restrictive covenants, a party must prove that "the violations then existing were so extensive and material as to reasonably lead to the conclusion that the restrictions had been waived." *Larimer Falls Comm. Assoc. v. Salazar* (Fr. Ct. App. 2005). The number, nature, and severity of the existing violations are factors to consider in determining waiver. *Id*.

Franklin courts have repeatedly found that the evidence was insufficient to support a finding of waiver when 1% to 10% of properties violated the restrictive covenants at issue. For example, no waiver has been found where 4 of 62 lots had nonconforming fences, 2 of 33 lots contained unapproved access roads, 10 of 180 houses violated setback requirements, and 15 of 150 homeowners stored prohibited recreational vehicles on their property. *See id.* and cases cited therein.

At trial, the chair of the ACC testified that in the five years preceding the lawsuit, she had not seen any other vehicles parked on the front lawns of other properties in the neighborhood. Powell did not produce any evidence to support his allegation that other homeowners parked their cars in violation of the restrictive covenant.

The trial court properly issued the permanent injunction. Affirmed.

CONNECTICUT BAR EXAMINATION

27 July 2021

ESSAY QUESTION #1

From the Multistate Essay Examination

A mother was shopping with her six-year-old son at Big Box store. The son was visually impaired, so his mother, concerned about crowding and jostling by other patrons, restrained him by placing her hand on his shoulder and instructed him to remain in her grasp. Despite his mother's efforts, the son broke free of her grasp and ran toward a nearby candy display. Because he was running and visually impaired, the son did not notice some cheesecake on the floor in the store's self-serve dining area; the cheesecake was flattened and dirty. The son slipped on the cheesecake and fell to the floor, suffering physical injury. Another customer unsuccessfully attempted to help the son to stand, worsening the son's injury by negligently twisting his arm.

Big Box had in place a policy instructing employees to take steps to promptly clean known hazards on the floor, but it did not assign an employee to monitor floor conditions. Big Box employees do not know when any employee had most recently inspected the floor or when the floor had last been cleaned. The self-serve dining area includes displays that contain takeout food, including cheesecake. These displays had last been stocked several days before the son slipped on the cheesecake. On the day the son slipped and fell, a store employee had walked by the self-serve dining area before the son slipped but had not noticed the cheesecake on the floor.

The mother has filed a negligence claim on her son's behalf against Big Box and the customer who attempted to help the son. Both Big Box and the customer claim that the son was negligent.

1. Under the applicable standard of care, are the facts sufficient for a jury to find that the son acted negligently? Explain.

2. Under the applicable standard of care, are the facts sufficient for a jury to find that Big Box acted negligently? Explain.

3. Can the customer be held liable for enhancing the son's injury? Explain.

4. Assuming that only Big Box and the customer were negligent and can be held liable, can the son recover the full amount of damages from Big Box only? Explain.

Do not address the effect of any "Good Samaritan" statute.

CONNECTICUT BAR EXAMINATION

27 July 2021

ESSAY QUESTION #2

From the Multistate Essay Examination

Carlos, Diana, and Ethan own all the shares of Winery Inc., which is incorporated in State A. They are equal shareholders of the corporation and the only members of its board of directors. They share responsibilities in the corporation's vineyard and winery. They have no shareholders' agreement.

Recently, Carlos and Diana decided that it would be a good idea to change the corporation's business model. In addition to producing wines from the corporation's own small vineyard using sustainable, organic farming methods, they believe that the business should expand to buy grapes from local vineyards that produce grapes using such methods. They believe this new focus will allow them to attract new customers interested in organic wines. They also see this change and expansion to their business as a way to promote environmentally sustainable organic grape cultivation in their region.

To make this shift in the corporation's business, Carlos and Diana have decided that the corporation should become a "benefit corporation." A benefit corporation, authorized by many states, is a type of for-profit corporation that defines in its articles of incorporation a social or environmental purpose. Benefit-corporation law insulates directors from liability for making business decisions that serve this defined social or environmental purpose, even when their decisions may negatively impact shareholder profits.

State A has adopted the Model Business Corporation Act, which does not explicitly provide for benefit corporations. State A courts have held that domestic corporations must seek to maximize shareholder profits.

State B, which is adjacent to State A, also has adopted the Model Business Corporation Act but has modified its corporate statute to provide for the formation of benefit corporations. To form a benefit corporation, the articles of incorporation must indicate that the corporation has opted to be a benefit corporation and must state a social or environmental purpose for the corporation. The State B statute insulates directors from liability for claims that they did not seek to maximize shareholder profits if their decisions are consistent with the corporation's stated social or environmental purpose.

Carlos and Diana have decided that they can best carry out the new business plan by creating a benefit corporation in State B to operate in State A with the stated social and environmental

purpose of "promoting sustainable and organic vineyard, winery, and production practices." They will incorporate the new benefit corporation as Organic Wines Corp. and be its only initial shareholders. Once this corporation is created, they will cause Winery Inc. to merge into it with all the Winery Inc. shares converted into shares of Organic Wines Corp.

Ethan is opposed to the plan, but Carlos and Diana support it.

1. Can Ethan block the merger of Winery Inc. into Organic Wines Corp. by voting against it? Explain.

2. If Winery Inc. merges into Organic Wines Corp., does Ethan have a right to demand that he receive payment in cash (instead of receiving shares in Organic Wines Corp.) equal to the fair value of his shares in Winery Inc.? Explain.

3. Assume that Ethan becomes a shareholder of Organic Wines Corp. Could Ethan successfully sue the Organic Wines Corp. directors in State A for promoting sustainable and organic practices at the expense of maximizing shareholder profits? Explain. Do not discuss whether that suit would have to be direct or derivative.

CONNECTICUT BAR EXAMINATION

27 July 2021

ESSAY QUESTION #3

From the Multistate Essay Examination

Fifteen years ago, a woman moved to State A for a temporary job. Shortly after moving to State A, the woman met and briefly dated a man who lived in State A.

Eight months after her relationship with the man ended, the woman, still living in State A, gave birth to a daughter. She then moved to State B with her daughter. The woman was certain that the man was the daughter's father because he was the only person she had had sexual intercourse with while she was living in State A, but she did not contact him to tell him of her pregnancy or the daughter's birth. The woman had no other children. She and the daughter lived together as a two-person household exclusively in State B. The woman told her family and her daughter that the daughter's father had been killed in a car accident.

Two months ago, the daughter, age 14, overheard a conversation between the woman and her oldest friend. The friend said, "Your daughter's father is now an important scientist. His most recent research is in today's newspaper. Don't you think your daughter should meet him?"

The daughter, shocked, found the newspaper and emailed the scientist whose research was described in the paper. In the email, she identified her mother, recounted the conversation she had overheard, and suggested DNA testing. The man agreed to cooperate, and the test confirmed that he was the daughter's biological father. The daughter told the man that she wanted to live with him at his home in State A. The man, wanting to get to know his daughter better, agreed and sent her a bus ticket, which she used without her mother's permission.

Three weeks after the daughter's arrival in State A, the man sued in a State A court to establish his paternity, to gain sole custody of the daughter, and to obtain child support from the woman. The man had the woman served personally in State B.

Under State A's long-arm statute, the State may exercise personal jurisdiction over a nonresident for purposes of determining paternity, child custody, and child support if "the individual engaged in sexual intercourse in this State and the child may have been conceived by that act of intercourse." State A's paternity statute permits the "mother or alleged father to establish paternity at any time during the mother's pregnancy or within 21 years after the child's birth."

The woman moved to dismiss the man's suit, arguing that State A's exercise of personal jurisdiction over her would violate her rights under the due process clause of the Fourteenth Amendment. The trial court denied her motion, and the woman made a special appearance,

preserving her right to appeal on the jurisdictional issue. At a hearing on the merits, the woman argued, based on a series of United States Supreme Court opinions, that a putative father may not establish his paternity years after his child's birth unless he registered with a putative father registry or actively participated in his child's care. She also argued that the court lacked authority to issue either a child custody or a child support order.

1. Did the State A court's exercise of personal jurisdiction over the woman violate her rights under the due process clause of the Fourteenth Amendment? Explain.

2. Assuming that the State A court properly exercised personal jurisdiction over the woman, and that the man's paternity is undisputed, does the court have subject-matter jurisdiction to

    (a) award the man sole custody of the daughter? Explain.

    (b) require the woman to pay the man child support? Explain.

CONNECTICUT BAR EXAMINATION

27 July 2021

ESSAY QUESTION #4

From the Multistate Essay Examination

A police officer patrolling in his squad car after dark saw a woman lying on the sidewalk near an intersection. A teenage girl standing near her yelled, "Help! That guy just knocked this woman down and took her purse!" The girl pointed toward a man carrying a white purse and sprinting away from the scene.

The officer jumped out of his squad car and shouted, "Stop! Police!" He ran after the man down an alley and between houses. The man leapt a series of backyard fences and ran onto a back porch. The officer, following behind, jumped over a low fence, heard the man fumbling with keys, and saw him unlock the back door of a house. The man rushed inside and slammed the door. The officer tried to open the door, but it was locked. From inside the house, the man yelled, "Get off my porch!" The officer kicked the door open. The man was standing just inside the door, out of breath, and a white purse was on the floor near his feet.

The officer handcuffed the man, grabbed the purse, and walked the man back to the intersection where the woman was sitting on a nearby bench. The teenage girl was gone.

The woman immediately said, "That's my purse." Then she asked the officer, "Is that the guy who took it? I never saw anything. Someone pushed me hard from behind, knocked me down, grabbed my purse, and took off. I was dazed and just lay there until some girl helped me up."

The officer told the man that he was under arrest and placed him in the backseat of the squad car.

Another officer arrived, and a few minutes later the teenage girl returned. The girl began speaking with the second officer, saying, "I was right there. It happened really fast. One second I was waiting for my bus and reading text messages. The next second I heard a woman scream and saw some big guy running past me with a purse."

The girl then noticed the man handcuffed in the backseat of the squad car. She shouted, "Oh my gosh! Hey, I think that's the guy! It was dark, and it happened fast, but, wow. He's right there in the car. I'm pretty sure that's the guy."

The state charged the man with one count of robbery under a state statute that defines the crime as it was defined under the common law.

Relying only on his rights under the United States Constitution, the man has moved the trial court to suppress evidence of the purse and the officer's testimony about where the officer recovered it. The man argues specifically that the officer's entry into his home without a warrant violated his constitutional rights. The man has also moved the court to prohibit any witness from discussing the girl's on-the-scene identification of him and to prohibit her from identifying him in court during trial. He argues specifically that allowing evidence of the teenage girl's identification would violate his constitutional rights.

1. Did the officer's warrantless seizure of the man and warrantless seizure of the purse in the man's home violate the man's Fourth Amendment rights? Explain.

2. Would the trial court violate the man's constitutional due process rights by admitting testimony that reveals the girl's on-the-scene identification of the man or by allowing her to identify him in court? Explain.

Do not discuss any confrontation clause issues.

CONNECTICUT BAR EXAMINATION

27 July 2021

ESSAY QUESTION #5

From the Multistate Essay Examination

Eight years ago, a testator validly executed a will. The will, in pertinent part, provided:

1. I give my house to my friend Doris.

2. I give my residuary estate, in equal shares, to my friend Alice, if she survives me, and to my friend Bill, if he survives me.

3. If any beneficiary under either of the foregoing two provisions of this will predeceases me and my will does not expressly provide otherwise, the heirs of the deceased beneficiary shall take the beneficiary's bequest.

Three years ago, Bill and Doris died.

Doris died testate, bequeathing her entire estate to a charity. If Doris had died intestate, all of her probate assets would have passed to her nephew, her sole heir.

Bill died intestate, and his entire probate estate passed to his daughter, his sole heir.

Last week, the testator died a domiciliary of State A, leaving a probate estate consisting of her house and a bank account with a balance of $250,000. The testator died with no debts.

State A's anti-lapse statute provides in its entirety:

> Unless the decedent's will provides otherwise, if a bequest is made to a beneficiary who predeceases the decedent leaving issue surviving the decedent, the deceased beneficiary's share passes to the issue of the deceased beneficiary.

The testator is survived by Doris's nephew, Bill's daughter, and Alice. The only relative of the testator who survived the testator is her sister. The charity to which Doris bequeathed her estate still exists.

1. Does the state anti-lapse statute or Clause 3 of the testator's will determine who takes the share of a beneficiary who predeceased the testator? Explain.

2. Assuming that Clause 3 of the testator's will applies, who is entitled to the testator's house? Explain.

3. Does the residuary bequest to Bill lapse because of the express survivorship requirement in Clause 2 of the testator's will? Explain.

4. Who is entitled to Bill's one-half share if the bequest to Bill lapses? Explain.

5. Who is entitled to Bill's one-half share if the bequest to Bill does not lapse? Explain.

CONNECTICUT BAR EXAMINATION

27 July 2021

ESSAY QUESTION #6

From the Multistate Essay Examination

A 55-year-old woman had been employed for 30 years as a paralegal at a law firm in State A. One year ago, a 28-year-old male attorney became the firm's paralegal manager.

The attorney began criticizing the woman's work and berating her on nearly a daily basis. He made derogatory comments about her and her work to the other paralegals and attorneys in the firm. He nicknamed her "grandma" and told people that "it's time for a new generation to take its place here."

Three months after he took over as paralegal manager, the attorney fired the woman. To replace her, he hired a 22-year-old paralegal. He explained the firing to his coworkers by stating that the woman had stolen valuable supplies from the firm and was neither honest nor trustworthy.

After exhausting all prerequisite administrative remedies, the woman filed an action in the US District Court for the District of State A. Her lawsuit was against the attorney who had fired her. The woman's complaint states two causes of action. First, the complaint asserts that the attorney fired her because of her age, in violation of the federal Age Discrimination in Employment Act of 1967 (ADEA) (under which the attorney is considered an "employer"). Second, the complaint alleges that the attorney made defamatory comments about the woman to other employees of the law firm, thereby committing a tort under State A law. In particular, the woman's complaint alleges that the attorney made comments to others "to the effect that [the woman] was dishonest and a thief," and that "such comments were false and defamatory." The woman's allegations include the approximate dates of the comments and the identity of persons to whom they were made, but the complaint does not recite the exact allegedly defamatory language used by the attorney.

The attorney and the woman are both citizens and domiciliaries of State A, where the law firm's offices are located and where all the events in this matter took place. State A pleading rules require a plaintiff's defamation claim to "allege the time and place where the allegedly false statement was made, the persons to whom it was made, and the particular words constituting defamation." State A courts apply these rules strictly and dismiss complaints seeking damages for defamation if the specific words that are alleged to be defamatory are not stated in the complaint.

The attorney concedes that the court has federal-question jurisdiction over the woman's ADEA claim but has moved to dismiss her defamation claim. The motion to dismiss argues (i) that the federal court lacks jurisdiction over the defamation claim because it is based entirely on state law,

and (ii) that the woman did not allege the "particular words constituting defamation" as required by State A.

1. Should the federal court grant the attorney's motion to dismiss the woman's defamation claim on the ground that the federal court lacks jurisdiction over that claim because it is based entirely on state law? Explain.

2. Should the federal court grant the attorney's motion to dismiss the woman's defamation claim on the ground that the woman did not allege the "particular words constituting defamation" as required by State A? Explain.