February 2022 Georgia Bar Examination Essay and MPT Questions

ESSAY I

Don is accused of killing Jack by gunshot. Jack's family has filed a wrongful death civil action against Don, and the State is pursuing a criminal action against him. Each of these cases is properly in a Georgia court before a jury. Separately answer the following while applying Georgia law and the U.S. Constitution, as applicable.

1. During the trial of the civil case, the attorney representing Jack's family asked the following question of Don: "Did you tell anyone you had killed Jack?" Don's attorney objects. Briefly state and explain the best basis for the objection.

2. The Judge sustains the objection, and the attorney continues her examination with the following question: "Don, did you tell your lawyer that you killed Jack?" Don's attorney leaps from his chair to object. Briefly state and explain the best basis for the objection.

3. Assume that Don's attorney is successful in objecting to this question and that it also is not allowed. Is the civil jury authorized to consider in any way Don's refusal to answer either of these questions? Explain the basis for your answer.

4. In the civil trial, the attorney for Jack's family offers testimony from a witness about Don owing money to Jack. Don's attorney objects on the basis of the "Best Evidence" rule, as he contends there is a written promissory note of the alleged debt. Is that objection sufficient to exclude the testimony of the witness? Explain your answer.

5. In the criminal trial, Don's attorney called a witness to testify on direct examination about certain matters thought to be favorable to Don. However, he was having difficulty questioning the witness on direct examination, and the District Attorney kept objecting that Don's attorney was leading the witness. The witness's responses indicated he had a strong dislike for Don, was a close friend of Jack, and was not fully answering questions propounded to him. Briefly state the evidentiary rule that Don's attorney could use to overcome the objection to leading questions during the direct examination of this witness in order to allow him to ask leading questions.

6. In the criminal trial, the District Attorney offered evidence that Don had other criminal actions of a similar nature pending. Don's attorney decides to put Don on the witness stand to refute the evidence. After Don's examination by his attorney on the other criminal matters, the District Attorney begins to cross-examine Don. The District Attorney asks the following question: "Don, did you tell anyone you killed Jack?" Don's attorney immediately stands to object to that question. Has Don waived any right by testifying? Explain your answer.

7. In the criminal trial, Don's attorney wanted to introduce evidence of Don's good moral character, as Don always paid his debts on time. Would that evidence be admissible or excluded if an objection were raised by the District Attorney as to that type of evidence?

8. During the criminal trial, the District Attorney offered a witness to testify that he had been told by a cellmate (when he was being held for a criminal charge unrelated to Don's) that the cellmate said he heard Don confess to the shooting. Would such testimony be admissible in either the criminal or the civil case? Explain your response.

9. During the criminal trial, the District Attorney offered evidence that .45-caliber ammunition was found in Don's home during the execution of a valid search warrant. There was no evidence as to what caliber weapon was used to kill Jack. Don's attorney objected to the ammunition evidence. Briefly state and explain the best basis for the objection.

10. Upon cross-examination of one of the witnesses offering evidence damaging to Don, the witness denied being a convicted felon. What evidence could be used to impeach this witness? Briefly explain your answer.

ESSAY II

A year ago, Joe told Tom and six classmates at a reunion in Athens, Georgia (Clarke County) about a company he and his daughters Dawn and Dana had formed called DAWGS for Dogs, LLC. ("DD"), a duly-registered Georgia LLC with its registered principal place of business in Gainesville, GA (Hall County), where Joe and Dawn live. Dana is listed as DD's registered agent for service of process, although last month she moved from Gainesville to Oregon to be closer to DD's principal supplier.

Joe invited Tom (a resident of Fulton County) and his classmates (all residents of Cobb County) to his Athens hotel, for a presentation about DD. Joe told them that DD sells luxury, customizable wooden doghouses online. Joe (the managing member of the LLC), Dawn (the CEO), and Dana (the CFO) projected $15 million in sales and net profits of $3 million by the end of the following year. They also passed out interim, unaudited financial statements and shared projections based on those financial statements. They explained they needed more capital to fund growth and were offering an investment opportunity to become members of the LLC in which Joe as the managing member then owned a 60% interest and each of his daughters owned a 20% interest. Tom and his six classmates each were offered a 3% membership interest in the LLC for $25,000. (To do this, Joe and his daughters were contributing, and thus selling, portions of their own interests, so that if all seven invested, Joe's membership interest would be reduced to 50% and the two daughters' interests to 14.5% each). Joe and his daughters said that this additional $175,000 from the group would enable DD to secure commitments from the Oregon lumber company that shipped doghouse components to DD's fulfillment location in Gainesville. The three also noted that it was possible that in another 6-12 months, DD might need additional capital to continue its growth and therefore make a capital call on the new members.

Dawn and Dana then passed out an "Offering Memorandum" that described this general proposal and made clear that Joe would continue as the Managing Member, with exclusive authority over the operations of DD. The Memorandum also explained that should the Managing Member of the LLC determine in his sole discretion that DD required additional capital from the newly-admitted members at any time during the next 6 to 12 months, the new member would contribute another $25,000 as additional capital. If the new member declined to do so, then his membership interest would automatically be reduced to 1%.

Tom and his classmates were excited about this opportunity. All accepted the offer and signed an agreement consistent with the Memorandum's outline of terms.

Seven months later, the new investors received a capital call for the maximum $25,000 additional contribution. Tom contacted Joe and asked to see current audited financial statements. Joe sent him unaudited statements, saying that although he had spoken to a Georgia CPA, the CPA's fees were too high. Joe explained that Dana has a B.B.A. and was able to prepare financial statements that fairly and accurately present DD's results

of operations, just like a CPA would. Tom shared these financial statements with the six classmates, and all decided to respond to the capital call.

A few months later, Tom and his classmates were shocked when they read stories about irate customers of DD. They also learned that the Oregon lumber supplier had cut DD off due to nonpayment of its invoices.

Tom decided to call the CPA Joe had mentioned. The CPA confirmed that he had been engaged by Joe, but he had resigned from the engagement. He said he was not at liberty to say anything further about his communications with Joe or the reason for his resignation.

Tom and his six classmates are convinced that Joe and his daughters were not truthful about DD's financial condition and want your advice about how they could recover the money they invested.

1. What claim(s) will you advise Tom and his classmates that they may have against Joe and his daughters under Georgia law? (Do not assess what, if any, federal causes of action might be available.) Explain your reasoning.

2. With respect to any such claim(s), what would be the basis for personal jurisdiction in a Georgia court over each defendant and in which venue in Georgia, if any, could all three be named as defendants?

3. Will Tom be able to obtain discovery from the CPA in a Georgia court to see whether the CPA has information that would support a cause of action under Georgia law?

4. Tom has asked you to represent not only himself but also the six classmates who also invested in DD. You have no conflicts with existing or former clients in taking any of these seven on as clients or in being adverse to DD, Joe, Dawn, or Dana. The seven prospective clients seem able to pay 1/7 each of your likely fees for giving the advice and handling any lawsuit naming all of them as plaintiffs. What, if any, issues about consequences of a joint representation should you address in your engagement letter with them? Explain your answer.

ESSAY III

Your law firm has been asked to represent and advise North Soda Inc. ("North") as to whether it has a cause of action for breach of contract against South Soda Corp. ("South") for making a claim that it has an ownership interest in exclusive territories that North recently sold to Bigger Beverage, Inc. ("Bigger Beverage"). Please assume that Georgia law applies.

North was a wholesale distributor of beverages for National Soda, Inc. ("National"). North operated pursuant to a distributorship agreement (referred to as an "equity agreement") with National under which North acted as National's exclusive distributor within a defined territory in Georgia. South was also a wholesale distributor of beverages for National. South operated pursuant to an equity agreement with National under which South acted as National's exclusive distributor within a defined territory in Georgia that was different from, but contiguous to, North's exclusive territory. Thus, North and South shared a common territorial boundary.

In September 2010, National sent notices to its Georgia distributors, including North and South, that it would be revising its equity agreements to correct ambiguities and minor inconsistencies in the designated territories of several wholesalers. These notices included the corrected language National proposed for North's and South's exclusive territories.

On receipt of National's proposed narrative descriptions, North and South recognized that the narratives were *inaccurate* in that they did not correctly describe the territory depicted in the maps attached to their existing equity agreements and did not accurately describe the exclusive territories that North and South had been assigned and were actually serving at that time. National's proposed description mistakenly assigned a portion of North's territory to South and assigned a portion of South's territory to North. The owners of North and South conferred and agreed that they would: (1) jointly survey the boundary of North's and South's territories; (2) compose corrected descriptions of their respective territories that corresponded with their maps; and (3) submit their corrected narrative descriptions to National with their joint consent and request that National make the appropriate corrections to the proposed new boundary descriptions.

Once North and South had completed the survey and agreed on the correct written descriptions, South memorialized the agreement in a letter to National dated October 1, 2010 (the "October 1, 2010 Letter"), stating:

> We find the boundary between South's territory and North's territory to be ***inaccurate***. The boundary line should be Highway 83, with the city of Franklin and the town of Paris being assigned to North. A detailed description of the ***corrected*** boundary is enclosed herewith. North ***agrees*** with the boundary as described in the attachment.

The October 1, 2010 Letter attached a detailed narrative description of the boundary

between North's and South's territories that North and South agreed was the correct boundary. The Letter was signed by South's Chief Executive Officer.

For almost ten years, from October 1, 2010, through April 30, 2020, when North completed the sale of its assets to Bigger Beverage, North and South distributed National products within territories that were consistent and in compliance with the territorial descriptions in the October 1, 2010 Letter.

In March 2020, North entered into an Asset Purchase Agreement with Bigger Beverage whereby North agreed to sell to Bigger Beverage all of its assets, specifically including North's interest in the exclusive distributorship territory for National as described in the October 1, 2010 Letter.

Shortly thereafter, South learned of the pending sales transaction between North and Bigger Beverage. On April 14, 2020, South's CEO telephoned the president of Bigger Beverage, and told him that South was claiming it owned part of the territory that North was selling to Bigger Beverage. Some of the territory that South claimed it owned was within the territory that the October 1, 2010 Letter identified as being North's exclusive territory, but South was now claiming that it had an oral agreement with North whereby South merely loaned that portion of its territory to North.

As a result of South's claims, Bigger Beverage refused to go forward with the purchase transaction until North agreed to certain modifications in the Asset Purchase Agreement. Specifically, Bigger Beverage required that $2,000,000 of the $10,000,000 purchase price be placed in an escrow account pending the resolution of South's claim.

1. Is the October 1, 2010 Letter a valid and enforceable contract between North and South? Explain the basis for your answer.

2. Assuming the October 1, 2010 Letter is a valid and enforceable contract, does South's claim of ownership, alone, constitute a breach of that contract? What other claim(s) might North be able to pursue against South? Explain your answers.

3. Does the alleged oral agreement—about the loan of some of South's territory—affect your analysis of whether the October 1, 2010 letter is enforceable as written? Does it matter if the alleged oral loan agreement was made contemporaneously with the October 1, 2010 letter agreement or sometime thereafter? Explain your answers.

ESSAY IV

Fruit Magic, Inc. ("Magic"), a Georgia corporation, manufactures and sells on a wholesale basis a variety of food products, including peach jam. Delicious Jams & Jellies, Inc. ("DJJ"), also a Georgia corporation, operates retail specialty food stores that sell peach jam.

Eight months ago, Magic and DJJ entered into a three-year contract. Under that contract, Magic agreed to sell to DJJ, for $2 per jar, as many jars of peach jam as DJJ shall request, up to 500,000 jars per month.

Ben is a director of Magic, but he does not own any of its stock. He is also a 40% shareholder of DJJ, but he is not a member of its board and is not involved in the operations of DJJ. The contract between Magic and DJJ was approved by the Magic board of directors by a vote of six to two, with all eight of the Magic directors present and voting. Ben voted in favor of the contract. Prior to the meeting, Ben disclosed to the Chairperson of the Board that he was a shareholder of DJJ, but there was no mention of this fact at the meeting, and the other directors and officers of Magic did not know this fact.

Three months ago, extreme flooding in Brazil, one of the world's leading exporters of sugar, resulted in a severely limited sugarcane crop. Magic's cost to produce a jar of peach jam skyrocketed as a result. Consequently, Magic informed DJJ that Magic would only continue providing peach jam if DJJ began paying $3 per jar. DJJ subsequently placed an order for 300,000 jars and said that it expected Magic to honor the contract price of $2 per jar. Magic responded that it would not fill any more orders unless DJJ agreed to the higher price.

DJJ then filed a breach of contract suit against Magic in which DJJ prevailed and was awarded damages. Several shareholders of Magic then brought an action against Magic alleging that the Board breached its fiduciary duties in approving the contract. Defense counsel for Magic has learned the following facts about the meeting at which the Magic board approved the contract:

- The only persons present at the meeting were the eight directors, Magic's CEO, and Magic's Vice President of Sales. The meeting was properly called and held in accordance with applicable Georgia corporate law.

- No director had read the draft of the contract, but the Vice President of Sales (not a lawyer) gave an oral summary of what she considered to be salient points. One of the directors asked if the VP of Operations (who oversees manufacturing) was going to join the meeting and was told that he had a prior engagement.

- The meeting was conducted via Zoom video conference, with all parties able to hear each other, except for the time period during which some directors asked the Sales VP some questions. Due to technical issues, not all directors could hear that portion. Ben was among the directors who could hear, and he asked the VP several questions about the transaction.

- At the beginning of the meeting, the CEO made an oral presentation about general business conditions, during which she mentioned increasing flooding conditions in Brazil. There was no further discussion of this issue during the meeting.

Both Magic and DJJ have agreed that there is no force majeure provision to excuse Magic from honoring the contract. Please answer the following:

1. Under Georgia law, a director has a duty of loyalty to the corporation and its shareholders. Did Ben breach his duty of loyalty by his actions at the Magic Board meeting at which the contract was approved? Explain your answer.

2. Did Ben's actions at the Magic Board meeting cause any potential harm to the corporation or its shareholders? Explain your answer.

3. Explain the business judgment rule ("BJR") under Georgia law. Include the public policy reasons for the BJR and a description of the statutory presumption afforded directors and how it maybe rebutted.

4. Will the BJR protect Magic's board of directors (ignoring for this question any possible breach by Ben of his duty of loyalty)? Explain your answer.

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Painter v. Painter

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Law Offices of Harold Huss
610 Main Street
Monroe, Franklin 33002

MEMORANDUM

To: Examinee
From: Harold Huss
Date: February 22, 2022
Re: Denise Painter divorce

We were recently retained by Denise Painter to represent her in filing and pursuing a divorce action against her husband, Robert Painter. The parties have one child, Emma, who is eight years old. I would like you to prepare an objective memorandum to me analyzing the following issues:

1. Is the court more likely to award joint legal custody of Emma to Robert and Denise or sole legal custody to just Denise?

2. For each of Robert's and Denise's assets and debts, determine whether it is (a) separate property or debt or (b) community property or debt. Be sure to discuss the appreciation or enhancement of any asset's value.

For each of the issues above, be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect your analysis. Do not include a separate statement of facts. I have attached a marital assets and debts worksheet that our paralegal completed during a meeting with Denise. As you know, Franklin is a community-property state, so the parties' community property and debts are divided equally. Do not discuss any child support issues.

Law Offices of Harold Huss

MEMORANDUM TO FILE

From: Harold Huss
Date: February 1, 2022
Re: Denise Painter divorce consultation notes

I met with Denise Painter today. She would like to obtain a divorce from her husband, Robert Painter. Denise and Robert started dating while they were juniors at Monroe High. They got married right after graduating from high school in 2013. They have an eight-year-old daughter named Emma, who is their only child. For the first seven years of Emma's life, Denise and Robert had a positive and loving relationship and were both very involved with Emma on a day-to-day basis. They jointly made decisions about her child care, schooling, extracurricular activities, and medical care.

The family dynamics changed significantly about a year ago, when Robert began drinking alcohol heavily. Robert would come home at 3:00 or 4:00 a.m. and stay up until dawn. He began sleeping through his shifts at his job as a mechanic at Lloyd's Automotive. About 10 months ago, in May, Robert forgot to pick up Emma from school because he was drunk; a week later he was arrested for DUI. Fearful that Robert would drive drunk with Emma in the car, Denise immediately demanded that Robert move out. The next day he moved into an extended-stay motel on the edge of town. He still lives in the motel and has been voluntarily participating in an outpatient rehabilitation program for alcohol addiction for the last six months.

Emma is in third grade at Lincoln Elementary School, which she has attended since kindergarten. She is a cheerful, healthy girl. Denise and Emma have a close relationship. They like to do crafts and watch movies together, and Denise helps Emma with her homework every night. Denise's mother, Harriett Golden, is also very involved in Emma's life. She picks up Emma from school and stays with Emma at Denise's house until Denise gets home from work.

According to Denise, Emma has spent time one-on-one with Robert only twice since he moved out 10 months ago—for an afternoon the week after he moved out and then again on Emma's birthday last August. For both visits, Robert called Denise to request time with Emma, and Denise agreed. These are the only two interactions that

Robert and Denise had from the time that Robert moved out until last October. Since October of last year, Robert has been texting Denise requesting to see Emma. Denise prefers to discuss the issue of visitation with Robert on the phone. So rather than return his texts, she calls him and leaves messages on his voicemail. She has called him 12 times in the past four months, but Robert hasn't answered the phone or returned her calls. Robert and Emma haven't spoken since Emma's birthday in August apart from casual conversation near the bleachers at Emma's soccer games. Robert and Emma do send text messages to each other from time to time, and Denise thinks that this communication is fine.

Denise has worked as the office manager at the Franklin Aluminum Can Company in town since high school. She continues to work there full-time and earns $40,000 per year. About nine months ago, Robert was fired from his job at Lloyd's Automotive for missing too much work. He is now working for his brother's construction business putting up drywall. Denise doesn't know how much he makes but guesses it's probably $25 an hour.

During the marriage, Denise and Robert lived in a house at 212 Lake Street, where Denise and Emma continue to reside. Denise's uncle, Sam Golden, gave the house to Denise two days before Denise and Robert's wedding. Sam had already paid off the mortgage. Denise and Robert paid $5,000 to install a deck in 2016. And in 2019, they built a detached garage on the property, at a cost of $5,000. Both improvements were made with the couple's savings.

Denise would like to file for divorce as soon as possible. She would like the ground for divorce to be incompatibility. She wants sole legal and physical custody of Emma, although she believes that Robert will want joint legal custody. Denise plans to stay in the house on Lake Street. She would like to receive child support from Robert but does not want to request alimony. She would like to return to using her maiden name, Denise Golden. Denise will meet with our paralegal to complete the marital assets and debts worksheet.

Law Offices of Harold Huss

MEMORANDUM TO FILE

From: Harold Huss
Date: February 3, 2022
Re: Conversation with Robert Painter

I called Robert Painter, the husband of our client Denise Painter. I informed him that I worked for our firm, that we represented his wife, that she wanted a divorce, and that I had several questions for him. I asked him whether he had hired an attorney. He said that he had not. I asked if he would be willing to talk with me, and he said yes.

Robert told me that he doesn't object to Emma's living with Denise, as long as he has regular visits with his daughter. He did not have a proposal for that contact but was insistent that he be regularly involved in Emma's life. In particular, he said that he would like to have joint legal custody but isn't requesting sole legal custody. He told me that he was interested in attending Emma's extracurricular activities, including her soccer practices and games and her music lessons. He also indicated that, since he had started rehab, he had become more aware of his own spiritual needs, and that he wanted to participate in that part of Emma's life too.

He stated that he has been working on his alcohol dependence for more than six months and thinks that he has made progress to becoming a more reliable parent. He said that he has not consumed any alcohol in the past four months and that he gets tested regularly by his rehab program. He hadn't had much one-on-one contact with Emma since he moved out of the Lake Street house because he wanted to wait until he got his act together. However, he has attended every one of Emma's soccer games since moving out. He said that he and Emma text each other sporadically. He also said that he is frustrated because Denise won't respond to his text messages but instead calls him and leaves rambling voicemail messages. He prefers to communicate by text message.

As to property, Robert was very clear that he wants to keep the motorcycle and the pickup truck, which are still in his possession. He was also very clear that he had put a lot of work into the freestanding garage and the deck. He wants to ensure that he gets his fair share of the house, to reflect the money he invested in both the garage and the deck.

MARITAL ASSETS AND DEBTS WORKSHEET

	CLIENT WOULD LIKE TO KEEP	DATE ACQUIRED	VALUE
Assets			
Bedroom set	X	2014	$500
65-inch Samsung TV		2019	$500
Leather couch and loveseat		2014	$500
Dining set	X	2018	$500
2017 Toyota Tacoma pickup		2019	$17,000
2014 Ford Explorer	X	2017	$7,000
2009 Kawasaki motorcycle (gift to Robert from his father)		2019	$600
Deck	X	2016	$5,000
Detached garage	X	2019	$5,000
House at 212 Lake Street	X	2013	$215,000 (in 2013) $245,000 (current value)
Debts			
Best Buy credit card		2019	$1,000
CarMax loan for Tacoma pickup		2019	$5,000
Target credit card		2018	$4,000
Retirement Accounts or Pension Plans		None	
Is any property located outside the state?		No	

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EXCERPTS FROM FRANKLIN FAMILY CODE

§ 420 Custody definitions

As used in the Franklin Family Code,

(a) "legal custody" is the right to make decisions about a child's medical care, education, religion, and other important issues regarding the child.

(b) "sole legal custody" means an order of the court awarding legal custody of a child to one parent.

(c) "joint legal custody" means an order of the court awarding legal custody of a child to two parents. Joint custody does not imply an equal division of the child's time between the parents.

(d) "physical custody" is the right to have the child live with a parent all or part of the time.

§ 421 Standards for the determination of legal custody

In any case in which a judgment or decree will be entered awarding the legal custody of a minor, the district court shall determine custody in accordance with the best interests of the child. The court shall consider all relevant factors including, but not limited to,

(a) the agreement or lack of agreement of the parents on joint legal custody;

(b) the past and present abilities of the parents to cooperate and to make decisions jointly;

(c) the ability of the parents to encourage the sharing of love, affection, and contact between the child and the other parent; and

(d) the mental and physical health of all individuals involved.

§ 422 Standards for determination of joint legal custody

There shall be a rebuttable presumption that joint legal custody is in the best interests of a child. . . .

FRANKLIN COMMUNITY PROPERTY ACT
(Franklin Family Code § 430 *et seq.*)

§ 430 Classes of property

(a) "Separate property" means

(1) property acquired by either spouse before marriage or after entry of a decree of divorce;

(2) property acquired by either spouse by gift, bequest, devise, or descent;

(3) property designated as separate property by a written agreement between the spouses;

. . .

(b) "Community property" means property acquired by either spouse or both spouses during marriage that is not separate property . . . .

§ 431 Definition of separate and community debt

(a) "Separate debt" means a debt incurred by a spouse before marriage or after entry of a decree of divorce.

(b) "Community debt" means a debt incurred by either spouse or both spouses during marriage.

§ 432 Presumption of community property and debt

Property acquired and debt incurred during marriage by either spouse or both spouses is presumed to be community property or debt . . . .

§ 433 Distribution of community property and debt

In divorce proceedings, the court shall determine what constitutes community property and community debt and what constitutes separate property and separate debt. Except as otherwise noted in this section, the court shall distribute the community property and debt equally between the spouses. While the division of the value of community property and debt must be equal, the court may exercise discretion in awarding specific property and debt to each spouse to reach an equal distribution.

Sanchez v. Sanchez
Franklin Court of Appeal (2010)

This is an appeal arising out of a custody dispute between the parties, Carl Sanchez (father) and Stephanie Sanchez (mother). The father asserts that the district court abused its discretion in awarding joint legal custody of the parties' five-year-old son to both parents. We agree and reverse the district court.

The district court held a trial on the issue of child custody in June 2008 and subsequently issued a decree granting the parties' divorce and awarding joint legal custody to the parties and physical custody to the father with weekend visitation by the mother. The court determined that both parties were entitled to joint legal custody of the child and that joint legal custody was in the best interests of the child.

The determination of the trial judge will not be overturned in the absence of a clear abuse of discretion. However, a judgment based on findings of fact not supported by substantial evidence, which findings have been properly attacked, cannot be sustained on appeal and must be reversed. *Getz v. Hamburg* (Fr. Sup. Ct. 1977).

As defined in the Franklin Family Code (FFC), "legal custody" is "the right to make decisions about a child's medical care, education, religion, and other important issues regarding the child." FFC § 420(a). In determining whether a party should be granted legal custody, the trial court must consider the factors in FFC § 421. Under FFC § 422 there is a rebuttable presumption of joint legal custody. Our Supreme Court has determined that this presumption may be rebutted by certain evidence. In the *Ruben* case, the presumption was rebutted because the mother was diagnosed with a mental condition that affected her ability to participate in decision making for the child. *Ruben v. Ruben* (Fr. Sup. Ct. 2004). To rebut the presumption based on a mental condition, there must be a nexus between the parent's condition and the parent's ability to make decisions for the child. *Id.*; *see also Williams v. Williams* (Fr. Ct. App. 2005) (untreated drug addiction held to be a legitimate factor in rebutting the presumption of joint legal custody).

This case presents a different question, relating to the parents' ability to communicate. To be effective, joint legal custody requires that the parents be willing and able to communicate and cooperate with each other and reach agreement on issues regarding the child's needs. Under FFC § 421(b), the court shall consider "the past and

present abilities of the parents to cooperate and to make decisions jointly." The ability to cooperate concerning joint legal custody does not require the parents to have a totally amicable relationship. However, "parents must be able to cooperate in decisions concerning major aspects of child-rearing." *Ruben.* An award of joint legal custody contemplates an equal exercise of authority by parents who share the responsibility of making important decisions regarding their child. *Id.* Joint legal custody should not be awarded unless there is a record of mature conduct on the part of the parents evincing an ability to effectively communicate with each other concerning the best interests of the child, and then only when there is strong potential for such conduct in the future.

On appeal, the father challenges the district court's finding of fact that the parties "have shown the ability to communicate and cooperate with each other in promoting the child's best interests and needs on those occasions when they have set aside their present differences and have not been unduly influenced by their respective families and friends." At trial, the expert witnesses agreed that the mother remains hostile toward the father and refuses to directly communicate with the father, instead only communicating with the father by calling his parents and asking them to relay messages to him. Similarly, the experts agreed that the parties lack the ability to communicate with each other on a rational level, primarily due to the mother's feelings of anger toward the father. The exchanges of the child were so acrimonious that the trial judge ordered the parties to exchange the child at the public library.

A review of the record reveals that, contrary to the district court's finding, there is no substantial evidence on which to base a finding that both parents are able to communicate and cooperate in promoting the child's best interests or to work together sufficiently and in such manner as to justify an award of joint custody. The court's erroneous finding, in turn, forms part of the basis of its judgment awarding joint custody. Because there is no substantial evidence to support this key requirement under FFC § 421(b), the presumption of joint legal custody has been rebutted. There is no substantial evidence to support the district court's finding that joint legal custody is in the child's best interests.

Accordingly, the award of joint legal custody was error. Reversed and remanded.

Barkley v. Barkley
Franklin Court of Appeal (2006)

Phyllis Barkley appeals from a divorce judgment that granted the parties' divorce and divided their marital property.

Phyllis Barkley (the wife) and John Barkley (the husband) were married in 1999. The wife filed a petition for divorce in 2003. After a final hearing, the trial court granted the petition for divorce on the ground of incompatibility. The court determined what constituted the parties' separate and community property and distributed their community property pursuant to the Franklin Community Property Act, § 430 *et seq.* of the Franklin Family Code (FFC).

When a trial court grants a divorce, the court must determine what constitutes the parties' community property and community debt and what constitutes their separate property and separate debt. FFC § 433. Community property includes personal and real property owned by either or both of the spouses that was acquired by either or both of the spouses *during* the marriage. FFC § 430(b). Separate property includes personal and real property acquired by one spouse *prior* to the marriage. FFC § 430(a)(1).

Once the trial court has determined the status of the parties' property and debts, the court should award each spouse his or her separate property and then distribute the community assets and debts equally pursuant to FFC § 433. While the value of community property and debt must be divided equally, the court may exercise discretion in awarding specific property and debt to each spouse to reach an equal distribution of 50% to each party.

The first issue on appeal is whether the trial court committed prejudicial error when it excluded appreciation of that part of the husband's savings and investment plan (SIP) owned before marriage.

Before their marriage, the husband had accumulated $150,000 in an SIP maintained by his employer. This money is clearly the husband's separate property under FFC § 430(a)(1). When the wife filed for divorce three and a half years later, the SIP was valued at $200,000. Thus, the value of the SIP increased by $50,000 during the marriage. The increase in value to the plan was the result of both the husband's contributions and market appreciation.

During the marriage, the husband contributed $30,000 to the plan. The $30,000 sum that the husband contributed during the marriage generated $3,000 in interest. Thus, the portion of the SIP that accumulated during the marriage is $33,000. This money is clearly community property under FFC § 430(b) and should be divided 50/50.

The difference between the $50,000 total increase in the SIP and the $33,000 portion that constitutes community property is $17,000. The $17,000 difference represents the increase in value due to investment earnings on the husband's separate property. The wife contends that these earnings should be considered community property and therefore divided 50/50. The husband argues that this money is merely passive income earned on his separate property, which remains his separate property.

Community property includes all income and appreciation on separate property due to the labor, monetary, or in-kind contribution of either spouse during the marriage. Conversely, separate property includes passive income and appreciation acquired from separate property by one spouse during the marriage. "Passive income" is defined as "income acquired other than as a result of the labor, monetary, or in-kind contribution of either spouse." *Chicago v. Chicago* (Fr. Ct. App. 2001).

We believe that the trial court's characterization of the appreciation in the SIP as the husband's separate property is not against the manifest weight of the evidence. The wife presented no evidence that the SIP's increase in value was related to the reinvestment of dividends that could have been disbursed or that marital funds were used to pay income taxes on the appreciation. Nor was there any testimony that the increase was related to any labor or monetary or in-kind contribution on the wife's part. In the absence of such evidence, the trial court was correct in concluding that the increase was mere passive appreciation acquired from the husband's separate property.

The second issue on appeal is whether the trial court committed prejudicial error when it gave the husband credit in the amount of $20,000 for alterations to the wife's house.

Before the parties' marriage, both the husband and the wife owned separate houses. After they married, the husband moved into the wife's house. The husband testified about various improvements to the wife's house that he paid for during their marriage. According to his testimony, the out-of-pocket cost for these improvements was

$39,000. In addition, the husband testified that he spent $1,000 to install an invisible fence in the backyard. The wife stated that, although some of the improvements were necessary to eventually sell the house, many of the upgrades were performed over her objection and were solely for the husband's benefit.

In making its property award, the trial court determined that the $40,000 in improvements paid for by the husband was community property subject to equal distribution. Because these upgrades were incorporated into the wife's house, which she continues to own, the court treated the expenditures as community property and credited $20,000, or one-half of the $40,000 in improvements, to the husband as community-property distribution of these improvements. On appeal, the wife claims that the proper form of valuation is the difference between the fair market value of her house after the improvements and the fair market value of her house before the improvements.

The wife's attorney valued the house at $350,000. We note, however, that the record does not reflect whether this is a pre- or post-improvement valuation. In any event, the record reveals only this one value, so regardless of which of the two values it represents, there was no evidence about the value of the other. The only other evidence concerning value before the trial court revealed that the husband spent $40,000 on improvements to the wife's house. In the absence of any evidence to determine whether the improvements increased the fair market value of the house, the court can award credit to the party who paid for the improvements equal to 50% of the total cost of the improvements. The court's decision to award the husband half the cost of the improvements was not arbitrary, unreasonable, or unconscionable.

Affirmed.

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State of Franklin v. Ford

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State of Franklin v. Ford

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OFFICE OF THE PUBLIC DEFENDER FOR THE STATE OF FRANKLIN
COUNTY OF HAMILTON
805 Second Avenue
Centralia, Franklin 33705

MEMORANDUM

To: Examinee
From: Lucas Pines, Deputy Public Defender
Date: February 22, 2022
Re: Motion to sever in *State v. Ford*, 2021 CF 336

Our office represents Sylvia Ford, who is charged with two drug-related offenses and one weapons charge. One of the drug offenses allegedly occurred in April 2021. The other drug offense and the weapons charge arise from a single traffic stop six months later, in October 2021. Ford has pleaded not guilty to all three charges.

The prosecution has grouped all three offenses in one indictment. Under Franklin law, if charges are contained in one indictment, they are tried together unless the court decides to sever the counts of the indictment and order a separate trial for each count. I am concerned that a joint trial of all three charges will greatly prejudice Ford's case on each charge. Accordingly, we will be filing a motion to sever the three offenses so that each will be tried separately. I have attached a draft of the motion to sever. As you know, the State of Franklin has adopted rules of criminal procedure and rules of evidence that are identical to the Federal Rules of Criminal Procedure and the Federal Rules of Evidence.

I need you to prepare the argument section of the brief in support of the motion. In doing so, be sure to follow our office guidelines for drafting trial briefs.

OFFICE OF THE PUBLIC DEFENDER FOR THE STATE OF FRANKLIN
COUNTY OF HAMILTON

OFFICE MEMORANDUM

To: Assistant Public Defenders
From: Lucas Pines, Deputy Public Defender
Date: September 5, 2017
Re: Guidelines for Persuasive Briefs in Support of Trial Motions

All persuasive briefs in support of motions filed in trial court shall conform to the following guidelines:

Statement of the Case: [omitted]

Statement of Facts: [omitted]

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. Do not reserve arguments for reply or supplemental briefing. While you want to make sure you raise every plausible issue, you should also be mindful that courts are not persuaded by exaggerated or unsupported arguments.

Organize the arguments into their major components and write carefully crafted subject headings that illustrate the arguments they cover. The argument headings should succinctly summarize the reasons the court should take the position we are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or statement of an abstract principle. For example, improper: "The motion to suppress should be denied." Proper: "Because the officer read the defendant his rights under *Miranda v. Arizona* and the defendant signed a statement waiving those rights, the motion to suppress should be denied."

Do not prepare a table of contents, a table of cases, or an index.

OFFICE OF THE PUBLIC DEFENDER FOR THE STATE OF FRANKLIN
COUNTY OF HAMILTON

FILE MEMORANDUM

From: Lucas Pines, Deputy Public Defender
Date: February 17, 2022
Re: State v. Ford, 2021 CF 336

Our client, Sylvia Ford, is charged with three felonies. All three charges are contained in one indictment, although the charges arise from events on two different occasions. I have attached a copy of the indictment as well as copies of the affidavits supporting the arrests in each incident. These affidavits better specify the events alleged by the prosecution. This memorandum includes information from my conversation with Ford about the allegations.

Events of April 17, 2021 (relating to the first charge)

The first charge arises from the alleged sale by Ford of 10 grams of cocaine on April 17, 2021. Ford told me that she was hanging out at her brother's apartment on Primrose Lane when a man she did not know knocked at the door. Ford answered the door, and her brother, who was standing next to her, gave the man a baggie containing some powder. The man then handed Ford some money. Ford said that as soon as the man left, she gave the money to her brother. She left the apartment soon afterward and heard nothing about the incident until she was arrested six months later.

Events of October 24, 2021 (relating to charges two and three)

Ford told me that on October 24, 2021, she was driving alone on Highway 30 when she was pulled over by a police officer. The officer stated that Ford had been swerving out of her lane and gave her a field sobriety test, which she failed. The officer arrested Ford for driving under the influence (DUI), handcuffed her, and locked her in the backseat of the police cruiser. Ford said that the officer then searched the car she had been driving. She later learned that the officer found marijuana, a small scale, and empty plastic baggies in the backseat of the car and a handgun in the trunk. The car is owned by James Litton, Ford's boyfriend. The handgun in the trunk is registered to Litton. Ford claims that none of the items (the scale, the baggies, the marijuana, or the handgun) belonged to her and that she did not know that they were in the car. She often borrowed Litton's car.

At the time of Ford's arrest for DUI on October 24, the officer discovered the outstanding warrant for the April 2021 drug transaction. The officer also learned of a 2015 conviction for assault with intent to commit murder, which is a felony. Because a convicted felon is not permitted to possess a handgun, Ford was charged with being a felon in possession of a firearm. She was also charged with possession of the marijuana in the car. Based on the quantity of the marijuana and the fact that the officer found the scale and baggies along with the drugs, Ford was charged with possession of marijuana with intent to distribute. Baggies and scales are typically used in the packaging and sale of drugs. Although Ford was arrested for the DUI, the prosecution has decided not to proceed on the DUI charge, and it was not included in the indictment.

Reasons for Motion to Sever

Ford is very worried that the jury will hold it against her that she has previously been convicted of assault with intent to commit murder. I agree. I informed her that the 2015 felony conviction would very likely be introduced in a trial on the weapons charge because it is that conviction that makes it illegal for her to possess a handgun. I told her that, assuming we can sever the cases, we would do whatever we could to prevent the prior felony conviction from being introduced in either of the drug cases.

I contacted the prosecutor's office and offered, for purposes of the trial, to stipulate to the fact that Ford has a prior felony conviction without naming the felony. The prosecutor was unwilling to enter into the stipulation and insisted that, as part of his trial presentation on the weapons charge, he intends to introduce Ford's prior conviction for assault with intent to commit murder. The prosecutor will also argue that the presence of the gun in the car proves intent to sell the marijuana found in the car. This reinforces our need to sever the weapons charge from the two drug charges.

Ford told me that she wants to testify in her own defense. Indeed, she wants to tell the jury about both incidents, and her testimony will therefore encompass the facts surrounding all three charges that are included in the indictment. Because she is charged with being a felon in possession of a firearm, the prior assault conviction will be introduced as evidence in the gun case whether she testifies or not.

In the drug cases, however, the prior assault conviction would not be potentially admissible unless Ford chooses to testify. If the drug charges are severed from the felon-

in-possession charge, the prior assault conviction would not be admissible as substantive evidence in the drug cases. If Ford chooses to testify in the trial of the drug charges, the prosecution could try to impeach her credibility with the prior assault conviction. The introduction of the assault conviction in the drug cases would severely prejudice her defense in those cases.

Whether Ford testifies or not, we need to sever each of these offenses from the others. It would be highly prejudicial for the jury to hear about all these charges in one trial. Hearing about two drug offenses in one trial might make the jury more willing to convict Ford on either charge or both charges. And it would be very prejudicial for the jury to hear about Ford's 2015 conviction for assault with intent to commit murder when the jurors consider whether she is guilty of the drug charges.

IN THE CRIMINAL COURT FOR HAMILTON COUNTY
STATE OF FRANKLIN

INDICTMENT

COUNT 1

The Grand Jurors of Hamilton County, Franklin, duly empaneled and sworn, upon their oath, present that on the 17th day of April 2021, in Hamilton County, Franklin, Sylvia Ruth Ford knowingly sold 10 grams of a substance containing cocaine, a controlled substance, a felony in violation of Franklin Crim. Code § 39 and against the peace and dignity of the State of Franklin.

COUNT 2

The Grand Jurors of Hamilton County, Franklin, duly empaneled and sworn, upon their oath, present that on the 24th day of October 2021, in Hamilton County, Franklin, Sylvia Ruth Ford knowingly possessed with the intent to sell four kilograms of marijuana, a controlled substance, a felony in violation of Franklin Crim. Code § 39 and against the peace and dignity of the State of Franklin.

COUNT 3

The Grand Jurors of Hamilton County, Franklin, duly empaneled and sworn, upon their oath, present that on the 24th day of October 2021, in Hamilton County, Franklin, Sylvia Ruth Ford, having previously been convicted of the felony of assault with intent to commit murder, knowingly possessed a handgun, a felony in violation of Franklin Crim. Code § 55 and against the peace and dignity of the State of Franklin.

A TRUE BILL

Date: December 28, 2021

Silas Jones
SILAS JONES
DISTRICT ATTORNEY

Victoria Garcia
VICTORIA GARCIA
GRAND JURY FOREPERSON

AFFIDAVIT IN SUPPORT OF ARREST

STATE OF FRANKLIN)
COUNTY OF HAMILTON)

Officer Kevin Diaz, first being duly sworn, states:

I am an officer in the Franklin City Police Department. On April 17, 2021, a confidential informant advised me of ongoing drug activity at 224 Primrose Lane, Apt. 5, in Franklin City, Franklin. My partner and I arranged to meet with the confidential informant on the 100 block of Primrose Lane. When we met with the informant, we searched him for contraband (none was found) and took all personal money from his person.

The confidential informant was fitted with electronic video and audio recording devices so that I could monitor and record the events. He was issued previously photocopied money with a face value of $100 with which to "buy" drugs. He was then instructed to go to 224 Primrose Lane, Apt. 5, and to purchase $100 worth of cocaine. We observed the confidential informant go directly to the apartment, knock, and enter. He spoke with two persons while in the apartment: an unidentified man and a woman later identified as Sylvia Ford. Ms. Ford opened the door to the apartment, and in her presence, the unidentified man gave the confidential informant a plastic baggie containing a powdered substance. The confidential informant gave Ms. Ford the previously photocopied $100. When the confidential informant returned to where I was stationed, he gave me the baggie containing the powdered substance. That substance was later tested and identified as containing cocaine.

Dated: May 12, 2021

Kevin Diaz

Kevin Diaz

Signed before me on this 12th day of May, 2021

Jane Mirren

Jane Mirren
Notary Public

AFFIDAVIT IN SUPPORT OF ARREST

STATE OF FRANKLIN)
COUNTY OF HAMILTON)

Officer Amanda Carter, first being duly sworn, states:

I am an officer in the Franklin City Police Department. On October 24, 2021, while on a routine patrol, I observed a car, Franklin license plate 224NGZ, swerving in and out of traffic. I followed the car and turned on my lights and siren. The car pulled over and stopped. I parked my police cruiser behind the car and approached the car. The driver gave me her driver's license, which identified her as Sylvia Ford. I conducted a field sobriety test and Ms. Ford failed the test. I placed her under arrest for driving under the influence, placed her in handcuffs, and locked her in the backseat of my cruiser. After calling for backup, I searched Ms. Ford's car. In the backseat of the car, I found four kilograms of marijuana, empty plastic baggies, and a small scale. In the trunk of the car, I found a handgun. I later learned that the handgun was registered to James Litton and that the car was also registered to Mr. Litton.

After placing Ms. Ford under arrest, I learned that there was an outstanding warrant for her arrest for sale of cocaine arising from an incident on April 17, 2021. I also learned that she has a prior conviction for assault with intent to commit murder, a felony.

Dated: October 25, 2021

Amanda Carter

Amanda Carter

Signed before me on this 25th day of October, 2021

Jane Mirren

Jane Mirren
Notary Public

STATE OF FRANKLIN

DISTRICT COURT OF HAMILTON COUNTY

STATE OF FRANKLIN,	)	
Plaintiff,	)	
v.	)	**Case No. 2021 CF 336**
	)	
SYLVIA RUTH FORD,	)	
Defendant.		

MOTION TO SEVER OFFENSES

Pursuant to Rules 8 and 14 of the Franklin Rules of Criminal Procedure, defendant Sylvia Ruth Ford moves this court to sever the offenses charged in this case and to order a separate trial upon each offense for the following reasons.

Defendant is charged in Count I with the sale of 10 grams of cocaine, in Count II with possession with intent to sell marijuana, and in Count III with being a felon in possession of a firearm. Counts I and II are separate and distinct incidents alleged to have occurred approximately six months apart. Count III involves alleged conduct that is separate and distinct from the conduct alleged in Counts I and II.

Pursuant to Franklin Rule of Criminal Procedure 8, joinder of these three offenses in a single trial is improper.

Moreover, pursuant to Franklin Rule of Criminal Procedure 14, defendant will be prejudiced by the trial of any of these three offenses with any of the others. Accordingly, defendant has an absolute right to severance of the offenses.

Defendant moves the court to hold a separate trial for each of the offenses charged in the indictment. Defendant submits the following brief in support of this motion.

Lucas Pines

Lucas Pines
Attorney for defendant Sylvia Ruth Ford

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FRANKLIN RULES OF CRIMINAL PROCEDURE

Rule 8. Joinder of Offenses or Defendants

(a) Joinder of Offenses. The indictment or information may charge a defendant in separate counts with two or more offenses if the offenses charged—whether felonies or misdemeanors or both—are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.

* * *

Rule 14. Relief from Prejudicial Joinder

(a) Relief. If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

FRANKLIN RULES OF EVIDENCE

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

* * *

Rule 404(b). Other Crimes, Wrongs, or Acts

(1) ***Prohibited Uses.*** Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ***Permitted Uses.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

State v. Saylers
Franklin Court of Appeal (2013)

Defendant Jenna Saylers appeals her conviction by challenging the trial court's denial of her motion to sever two charges against her that were joined into a single indictment. Count 1 of the indictment charged her with robbing a convenience store in Lynbrook, Franklin, on July 4, 2012. Count 2 charged her with attempted robbery of an individual in Franklin State Park on May 12, 2010. She was convicted of both counts by a jury. We reverse.

Pursuant to Rule 8(a) of the Franklin Rules of Criminal Procedure, two or more offenses may be charged in the same indictment if they are of the same or similar character, are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan. The defendant bears the burden of establishing the impropriety of the joinder. In deciding whether charges have been improperly joined, the trial court should generally limit itself to those facts contained in the indictment. If, however, the indictment does not provide sufficient facts to clarify the connection between the counts, the trial court may look to other documentary evidence in the case such as affidavits in support of arrests or affidavits in support of search warrants.

In this case, the trial court looked only at the indictment and found that, because the two charges both involve robbery, they were properly joined. When determining whether charges were improperly joined, this court reviews the decision of the trial court de novo.

Simply because the two charges have "robbery" in their titles is not a sufficient basis on which to join the charges in a single indictment. One charge is the robbery of a convenience store, while the other is the attempted robbery of a hiker in a state park. Further, the alleged crimes occurred two years apart.

Had the trial court reviewed the affidavits in support of the arrests in this case or other similar documentary evidence, it might have found some basis to support its finding that the acts were of the same character or were part of a transaction or scheme. *See* Fr. R. Crim. Proc. 8(a). But based on the record before us, there is no support for the trial court's conclusion that the charges warranted joinder under Rule 8(a).

Reversed, and remanded for new trials.

State v. Ritter
Franklin Court of Appeal (2005)

Timothy Ritter appeals from his conviction on two felony counts of possession of heroin with intent to sell. The first count charged him with possession with intent to sell heroin on September 19, 2003. The second count charged him with possession with intent to sell heroin on January 3, 2004. He raises two issues on appeal: (1) the trial court erred in failing to sever the counts for trial, and (2) the trial court erred in admitting evidence that Ritter was in possession of a weapon at the time of the second charged crime. We affirm.

Severance issue

Importantly, Ritter does not claim that the two counts of the indictment were improperly joined under Rule 8(a) of the Franklin Rules of Criminal Procedure. Rather, he argues that, pursuant to Rule 14, the trial court should have severed the counts for trial because he was prejudiced by the lawful joinder. There are generally three kinds of prejudice that may occur if separate offenses, particularly those that are merely of similar character and do not arise out of a single transaction, are joined.

First, the defendant could be prejudiced because the jury could consider the defendant a bad person and find him guilty of all offenses simply because he is charged with more than one offense. While this is clearly prejudicial, it is rarely a sufficient basis on which to justify severance.

Second, prejudice may occur if proof of the defendant's commission of one of the illegal acts would not otherwise have been admissible in the trial for the other offense. In other words, prejudice may occur when evidence that the defendant is guilty of one offense is used to convict him of another offense even though the evidence would have been inadmissible at a separate trial.

Third, prejudice may result if the defendant wishes to testify in his own defense on one charge but not on another. Severance of counts is warranted when a defendant has made a convincing showing that he has both important testimony to give concerning one count and a strong need to refrain from testifying on the other.

In this case, Ritter claims that evidence of each of the charged offenses would not have been admissible in the trial of the other. Rule 404(b) of the Franklin Rules of

Evidence allows admission of other acts if introduced for a purpose other than to prove "propensity." Permissible purposes for admission of "other acts" evidence include proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

If Ritter had been tried separately on the two charges of selling heroin, evidence of the other heroin sale would have been admissible in each trial. Ritter sold heroin in the same area, from the same vehicle, in the same period of time. This demonstrates a common scheme or plan. *See* Rule 8(a). Each act of possession with intent to sell would be admissible in the trial of the other alleged offense, not because it shows Ritter's character to sell heroin, but because it shows that all his actions were part of a single plan to sell heroin in the same midtown neighborhood.

Next Ritter claims that, even if allowed by Rule 404(b), evidence of either drug sale would have been excluded under Rule 403. He is correct that, even if allowed by Rule 404(b), evidence of other acts may still be excluded if the prejudicial effects of admission substantially outweigh the probative value of the evidence under Rule 403.

But this argument is unavailing. In this case, the probative value of the two drug sales is relatively high, precisely because they permit an inference of a single plan to sell drugs. To be sure, telling the jury about another drug offense in a case involving a similar offense would prejudice the defense. But that prejudice is not the kind of "unfair prejudice" covered by Rule 403, nor would it substantially outweigh the probative value of evidence of a common plan.

Evidence of possession of a weapon

Ritter also claims that the trial court erred in admitting proof, over Ritter's objection, that he possessed a gun during the January 3rd incident. The issue is whether the gun was introduced for a permitted use under 404(b)(2) rather than simply to show Ritter's propensity to carry weapons, a use that is prohibited under 404(b)(1). Ritter is charged with possession of heroin with intent to sell. Carrying a weapon is highly correlated with the intent to sell drugs, similar to the possession of baggies or scales. Thus evidence of Ritter's possession of a gun is relevant to an issue other than propensity to carry a weapon; it also goes to his intent to sell drugs. The state is taxed with proving the

defendant's intent by proof beyond a reasonable doubt. The evidence is thus admissible under Rule 404(b).

Finally, we consider Rule 403. Is the probative value of the evidence of the gun, in this case to show that Ritter had the intent to sell heroin, substantially outweighed by the danger of the unfair prejudices listed in Rule 403? To be sure, Ritter was prejudiced by the introduction of the gun, but we cannot say that the evidence unfairly prejudiced him in the jury's deliberation. The judge gave a limiting instruction that the jury could consider the gun only for the purpose of determining Ritter’s intent to sell heroin. We therefore find that the probative value of that evidence was not substantially outweighed by the danger of unfair prejudice.

In conclusion, evidence of each heroin sale would have been admissible in a trial involving the other transaction. Joinder of the two counts did not create sufficient prejudice to warrant severance under Rule 14 of the Rules of Criminal Procedure. Furthermore, introduction of the gun was relevant to an issue in the case, and its probative value was not substantially outweighed by the danger of unfair prejudice.

Affirmed.

State v. Pierce
Franklin Court of Appeal (2011)

Noah Pierce appeals from his convictions for violation of an order of protection and for being in possession of a firearm while under a separate order of protection. The only issue we address on appeal is whether the trial court erred in denying his motion to sever the charges for trial pursuant to Rule 14 of the Franklin Rules of Criminal Procedure. We review the denial of a Rule 14 severance under an abuse of discretion standard.

In 2009, Pierce was under an order of protection enjoining him from having contact with his former girlfriend, Norah Lynn, after he had threatened her (the Lynn Order). Pierce was subsequently arrested for violating the Lynn Order. The allegation underlying the arrest was that he texted Lynn and threatened her on March 10, 2009. The Lynn Order expired on January 31, 2010.

On April 12, 2010, based on proof that Pierce had threatened his ex-wife, Julia Stein, an order of protection was issued enjoining Pierce from having any contact with Stein (the Stein Order). On December 6, 2010, while he was under the Stein Order, Pierce was searched while entering a bar and a handgun was found on his person. Possession of a firearm while under an order of protection is a felony under Franklin law.

Pierce was subsequently charged in a single indictment. Count 1 alleged that he violated the Lynn Order on March 10, 2009, by texting and threatening Lynn. Count 2 alleged that he was in possession of a firearm on December 6, 2010, while under the Stein Order. Pierce moved to sever the charges based on the prejudice caused by a joint trial. The trial court denied the motion, finding that while the charges were similar, the prejudice caused to Pierce was not sufficient to require severance.

Pierce based his motion to sever on the ground that, had the two cases been tried separately, evidence of the Stein Order would not have been admissible in the trial on the charge of violating the Lynn Order under Franklin Rule of Evidence 403. In essence, Pierce's argument is that he was on trial for one violation of an order of protection and one violation of the weapons laws. Evidence of the existence of the Stein Order was extremely prejudicial to his trial on the violation of the Lynn Order. We agree.

Were it not for the joinder of the offenses in one indictment, the jury charged with determining whether Pierce had violated the Lynn Order would have had no reason to

know about the 2010 Stein Order (forbidding him to have contact with his ex-wife). The Stein Order was not relevant to any issue in the trial of the violation of the Lynn Order. Pierce was prejudiced by the introduction of this evidence. When a jury learns of a separate offense committed by a defendant, the jury can be tempted to infer the worst about that defendant.

Reversed and remanded.

NOTES

MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

Do not include your actual name anywhere in the work product required by the task memorandum.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.