ESSAY 1 – SAMPLE ANSWER 1

1.

Issue: Did Pete make the required showing as to receiving a temporary restraining order?

Rule: To receive a temporary restraining order (TRO), a party must show 1) that they stand to suffer immediate and irreparable harm without the issuance of a TRO, 2) for which damages are an inadequate remedy, and where 3) the balance of equities weigh in favor of granting the TRO.

Analysis: Pete likely did not meet the burden of showing that there should be a TRO put in place. On the facts, it seems that Pete would be restricted from competing, and his harm would be a loss of possible large cash prizes should he be unable to compete. While I am sure that Pete would like to compete in the competitions, the facts do not suggest that Pete stands to suffer any immediate injury beyond being unable to compete. And even if Pete is unable to compete, the only possible damages Pete may suffer are a lack of prize money. As this would be a financial damage, money damages would in fact be an adequate remedy for Pete. Unless Pete places some undue importance on the trophies awarded in these competitions, it is unlikely that Pete should have received a TRO.

Conclusion: Pete likely did not meet his burden necessary to receive a TRO.

2.

Issue: Was issuing the temporary restraining order ex parte proper?

Rule: A temporary restraining order can only be issued ex parte in two situations: where the defendant cannot be reached, or where there is a likelihood of harm to the plaintiff if the defendant is notified of the pursuit of a TRO. If either of these is true, the attorney submitting the request for a TRO must submit an affidavit either attesting to the fact that the defendant could not be reached, or that there is likely to be immediate and reparable harm to the plaintiff if the defendant is notified.

Analysis: Here, it was likely improper for the court to grant the TRO ex parte. Of the above requirements for issuing an ex parte TRO, none appear to be met. There are no facts to suggest that the League is unavailable or difficult to reach. There are no facts to suggest that the League will retaliate against Pete for his pursuit of the TRO. There are no facts to suggest that Pete will suffer an immediate and irreparable harm if the court does not issue the TRO ex parte. Finally, Pete's attorney offered no explanation as to why he failed to provide notice to the League of the pursuit of the TRO. Accordingly, the court likely erred in granting the TRO ex parte.

Conclusion: The court likely erred in granting the TRO ex parte.

3.

Issue: On what grounds can the League challenge the TRO?

Rule: A temporary restraining order can only be issued ex parte in a limited set of circumstances (see above). Additionally, in Georgia, a TRO may only be issue for 30 days from the time of the granting of the order. Further, in Georgia, a court has the discretion to require the party requesting a TRO to post a security bond to cover the losses that the nonmoving party suffers if it turns out the TRO should not have been granted. This is within the courts discretion, and a TRO may be granted without the requirement that a party post such a bond.

Analysis: Here, the TRO can likely be contested on two grounds. First, the TRO should not have been granted ex parte. The League can likely assert that the granting of the TRO ex parte was improper, and can at least get a hearing regarding the reissuance of a TRO. Second, the TRO is longer that the allowed limits. TROs can only be issued for 30 days from the date of issuance, and this TRO is set to last for 60 days. The League can likely assert that the TRO is too long and thus should at least be shortened to the allowed time.

However, the League likely will not be successful if it challenges on grounds that there was no bond offered. The bond requirement is at the discretion of the trial judge, and the League would have to show that the trial judge abused his or her discretion by not

requiring the bond. Accordingly, it is unlikely that the bond failure is grounds to overturn the TRO.

Conclusion: While there are grounds on which to challenge the TRO, the bond requirement likely is not one.

4.

Issue: What additional injunctive relief might Pete seek?

Rule: Injunctions are a type of equitable relief that either require a party to perform an action or prevent a party from doing so. There are two types of injunctions: preliminary, and permanent. Preliminary injunctions are issued during trial until the close of trial to prevent harm from befalling one of the parties during trial. Preliminary injunctions are issued only after a hearing at which both parties are given an opportunity to speak. There are four requirements for a preliminary injunction:

1. Likelihood of success on the merits.
2. A threat of immediate and irreparable harm for which damages are insufficient.
3. That the benefit of granting the injunction to the movant outweighs the burden of doing so to the nonmovant.
4. That the injunction does not diserve public policy.

A permanent injunction is similar to a preliminary injunction in that it prevents or forces a party to perform an act, but it is entered at the close of trial after the parties have had the full chance to litigate the matter. The requirements are the same, except that there is no requirement to show a likelihood of success on the merits because the party must have won on the merits already to receive a permanent injunction.

Analysis: Here, Pete could pursue a preliminary injunction at the end of the TRO. A preliminary injunction would ensure that Pete stays in the league until there is a chance to fully and completely litigate the matter. To succeed, Pete will have to show that he is likely

to win in his suit to be reinstated, that he will suffer immediate and irreparable harm if he is not kept in the group, that damages are insufficient to compensate him for that alleged harm, that the benefit to Pete outweighs the detriment to the League, and that the granting of an injunction does not disserve public policy.

It is likely that Pete will be successful in this endeavor. Pete already had to show a likelihood of success on the merits to garner the TRO, and he had to show that he would suffer immediate and irreparable harm for being removed from the League. All Pete would need to now show is that the injunction does not disserve public policy and that the benefit is greater than the burden. Accordingly, I believe that Pete would be able to garner the preliminary injunction.

Conclusion: Pete likely will be able to get the preliminary injunction.

ESSAY 1 – SAMPLE ANSWER 2

1. When a party is trying to get a Temporary Restraining Order (TRO) granted the party must show that there is an immediate harm if the court does not grant the TRO in favor of the moving party. A TRO is granted in situations to protect the status quo of the parties. TRO can be less formal than a Temporary Injunction or Permanent Injunction hearing and with the notices of a haering because of the threat of immediate harm a party might suffer.

Here, Pete can show both that there was a harm and that it was immediate. The League members are eligible to compete in barbecue cook-off every Friday night. By competing in those cook-offs you can be eligible to win large cash prizes. From the facts Pete was talking to the organizer on a Thursday. When other members of the League saw this they became suspicious and kicked him out of the League of Thursday afternoon. The cook out was the next day and he sought a TRO. There threat of not competing was immediate because there was less the 24 hours between the time he was voted out to when the cook-off began.

There was also immediate threat of harm to Pete. Pete was a star in the barbecue league, inferring from those facts that he was good at barbecuing, there is a good chance that he could win during those competitions. These competitions offered large cash prizes which means that it is a strong possibility that when Pete competes he has a shot at the cash prize. By removing from the League not only did they take away his opportunity to earn money the next day but it takes away that opportunity to earn money every Friday night.

Pete would most likely be successful in getting a TRO granted in his favor because the threat of harm was immediate because of the 24 hour time frame and missed opportunities to make money.

2. A court may find that it was not proper for the Judge to issue the TRO without giving notice to the League. Ordinarily when a party is seeking a TRO the moving party must give notice to the opposing party so that they can defend themselves and stance in court. However, there are certain situation where notice of a TRO cannot be done because of the immediacy of the possible harm. When such situation occurs then the moving party must give adequate reasoning as to why they could not provide notice to the other side in the form of an affidavit.

Here, the fact pattern tells us that the court did not give notice of the hearing to the League or its members. It may be deemed that because of the short time frame that this occurred a court might fight that no notice may be permissible because the event was happening the next day and may have been impossible to provide notice to the opposing side of a hearing, conduct the hearing and make a ruling before the competition started. However, a court may also deem that notice was necessary in this case because this was a group that competed every Friday night, so looking at how important notice is for parties to defend their case versus how many times Pete might miss a competition it may find that notice was more important but because large cash prizes were involved the court could find that notice wasn't necessary due to time constraints. If Pete had filed an affidavit describing why he could not give notice and how he tried to give notice then the court would probably would have found that no notice was justified because of the time period and money but because he did not file such affidavit the Judge most likely erred issuing the TRO without notice.

3. The League can challenge the TRO on the grounds that Pete posted no bond and the length of time the TRO was granted. In Georgia the maximum amount of time that a TRO can be effected for is 30 days. Typically a TRO is granted for 14 days and upon request the court can extend that to 30 days but anything longer than 30 days is deemed to be a preliminary injunctive where a party must be given notice and have had the opportunity to be heard.

Here, the court granted the TRO for 60 days, that is 30 days longer than the maximum amount of time Georgia permits a TRO.

The League can further argue that Pete is required to post bond. In Georgia, when an injunctions of any type, including TRO, has been granted the party seeking the injunction must pay the reasonable expenses associated with the injunction until the matter can be fully heard in court.

Here, the court did not require Pete to post bond when it should have because Pete is the party requesting of the TRO and it was granted in his favor. Pete should have to pay the expenses that occur because he is asking the court to impose his membership with the League.

4. After the TRO I would advise Pete that he should seek a Temporary/Preliminary Injunction and then move for a Permanent Injunction. As stated above, after 30 days a TRO can become a Temporary Injunction. This is a type of remedy that the court determines before there is a full hearing in order to preserve the status quo of the parties. At a Temporary Injunction hearing both parties have the opportunity to appear in court and argue for their case. In order to win on a Temporary Injunction, the moving party must show that can win on the merits, there is irreparable injury, balance of the equities against the parties and if it is contract to any public policy. Once a Temporary Injunction has been granted it is much easier to have a Permanent injunction granted because the moving party has already proven it can win on the merits on the case because it won the Temporary Injunction.

Here, Pete would have the burden of showing that he could win on the merits, irreparable harm, balance of the equities and that there is no public policy to the contrary. Pete could show that he could win on the merits based on the facts presented. He was the star of the Hometown Barbecue League, the day before one of the cook-offs suspicious members voted to kick him out of the league because he was just talking to the cook-off organizer. Pete can show irreparable harm because these cook-outs happen every Friday night and the is a possibility of winning large cash prizes not only was the a possibility it was very likely in Pete's case because he was the Star of the barbecue League and most likely had a higher chance of winning such prizes. By being excluded from the league he is missing an opportunity to participate in the cook-off every Friday night and from having the opportunity to win cash prizes. Pete can show by balancing the equities that he would be more entitled to participate in the league. The only thing the League can and has show in the facts is that they were suspicious because he was talking to the cook-off organizer and nothing else. Balancing the suspicion against Pete's interest in participating and cash prizes the court would find that the scale falls more in Pete's favor. Absent any public policies in the facts, allowing Pete to participate would not violate any public policies. Based on those facts Pete can show he should win the Temporary Injunction of the merits and the court grant the Temporary Injunction. Pete then should move for a permanent Injunction prohibiting the League from excluding him without reasonable reasons and he would most likely be successful because he was able to prove most of his case during the Temporary Injunction hearing.

ESSAY 1 – SAMPLE ANSWER 3

1.

The purpose of a temporary restraining order (TRO) is to maintain the status quo between the time that the request for relief is sought and the time that a court may enter an interlocutory (preliminary) injunction. In this case, the status quo was likely that Pete be given the opportunity to compete. Pete had competed in the previous cook-offs so to prevent him from doing so now would upset the status quo. A party may obtain a TRO if it shows that it will suffer imminent irreparable harm in the time between the hearing for the

TRO and when a hearing on a preliminary injunction can be heard. Irreparable harm is present when the injury cannot be cured by damages (money). Here, the harm is likely imminent, because he was banned the afternoon before a cookout so his need for relief is imminent. Here Pete might have trouble showing that he actually suffered irreparable harm. If all that he is interested in is getting the prize winnings then that can be cured after the fact by giving him money in the amount that he might have expected to win had he not been banned. However, Pete will likely be able to successfully argue that he also wants to compete for the fame and to preserve his reputation as a great chef. This is not something that money can give him back. So Pete will likely get a TRO.

2.

No, it was not proper. A TRO may be issued ex-parte (without the presence of opposing party) if the movant shows that they will suffer irreparable harm in the time that it would take to provide notice to the other party so that they could make a timely appearance. Additionally, the moving party must certify to the court the efforts that they did make to provide notice to the opposing party and show why further efforts of notice would not be beneficial. Here, Pete could successfully argue that irreparable harm would occur before notice could be provided to the opposing party as the cookout is the next day and the ban just happened that afternoon. However, Pete's attorney has failed to provide any explanation at the hearing why notice to the league should not be required and thus failed in the basic requirements necessary to get an ex-parte TRO.

3.

A TRO is generally not appealable. However, a party may challenge the validity of a TRO on the basis that a court did not have the jurisdiction to issue the order. Here, the order was issued by the Superior Court of the county in which the harm occurred thus because it is a question of equity the superior court was the only proper court and it had personal jurisdiction over all the GA residents. The League could challenge its validity on the basis of it being issued ex-parte, which they would likely be successful in doing. Additionally, the League could challenge the length of the TRO. A Georgia court may only issue a TRO for a period of 30 days at the end of which the movant will need to set a hearing for a

preliminary injunction if they wish to sustain relief. Because the TRO extends past 30 days the League could challenge it as invalid. However, more likely is that the courts would treat it under the Sampson/Granny Goose analysis of federal courts and the order would still stand, but be subject to appeal after the first valid 30 days had expired. Georgia does not require that litigants put forward bond to receive a TRO or preliminary injunction. Instead, it is placed within the discretion of the trial court to determine whether to require bond. Thus, this would not be a ground on which to challenge the validity of the TRO. When a court does require a bond in these instances it should be equal to the estimated harm done to the non-moving party as a result of the TRO or preliminary injunction if it is later determined to have been wrongly granted.

4.

Pete can also seek a preliminary injunction (interlocutory injunction) and permanent injunction in order to secure his membership remains valid. A preliminary injunction's purpose is to maintain the status quo between the time of the hearing on issuance of preliminary injunction and the trial. Here the status quo, as above is the preservation of a membership which Pete has held for a long time. Georgia follows a factor based analysis (in contrast to the federal element requirement under Winters) in applying preliminary injunctions. To get a preliminary injunction a party must show 1. irreparable harm 2. That the balance of the hardships/equities favors them 3. that there is a likelihood of success on the merits of the underlying claim and 4. that an injunction would not disserve the public interest.

Irreparable harm exists when monetary remedies are not sufficient. Here, Pete will lose out on possible winnings from the cookouts which can be cured with money (damages), but he will also lose out on the prestige of being a great cook in the eyes of the community. This is not something that the court can give back to him with money as he cannot use money to buy prestige at the store. Thus, Pete may be able to show irreparable harm.

Balance of the hardships: If the injunction is not granted then the harm to Pete is that he will be deprived of his membership for a short time pending the trial. This will prevent him

from winning anything during that time and there may be some social stigma to his temporary loss of membership. If the injunction is granted then the harm to the League would be that they would potentially have to deal with a cheater for all of the competitions between the preliminary injunction hearing and the trial. This seems like a greater harm to the League than Pete, but it is a close call.

Likelihood of Success on the Merits: This factor considers which party is most likely to ultimately prevail at trial. This is probably the most important factor, but is not determinative. Here, the record is very sparse as to what rights Pete had to his membership. It could be that Pete's membership could be only withdrawn for cause or the League may have retained the power to dismiss anyone without notice. Additionally, even if Pete could only have his membership revoked for cause the facts don't tell us enough to determine if Pete actually was cheating when he was talking to an organizer of the cookout. Thus, this factor is a mystery and discovery will be necessary to determine which way it swings.

Not dis-serve the public interest: If an injunction was entered then it would interfere with a private organization's discipline of its membership, but it would preserve Pete's right to cook at the competition and because he is a "star" cook it would insure the public got to eat his tasty food. If an injunction were not issued then Pete would be barred from the cookout which would stop people from getting his cooking, but it would not prevent people from eating in general and would allow private organizations to enforce their rules against cheaters which is important to the public interest. This factor too seems to be close, but ultimately would come out in favor of the League.

While the factor test is not simply a matter of tallying up which side has more factors in their favor here it is a close call. Irreparable harm favors Pete, but the balance of the equities and public interest very narrowly favor the League, while the success on the merits is unclear without more facts. Thus, the court would likely strive to enforce the status quo and simply grant the injunction to allow Pete to continue to cook in the meantime.

While the court did not require Bond on the TRO it might require bond for the preliminary/interlocutory injunction. When a court does require a bond in these instances it should be equal to the estimated harm done to the non-moving party as a result of the TRO or preliminary injunction if it is later determined to have been wrongly granted.

If Pete wins at trial then he could seek the remedy of a permanent injunction. This would preserve his right to cook (absent malconduct) in perpetuity (or until the order says it ends). A permanent injunction is available when the movant shows 1. irreparable harm 2. balance of hardships 3. not dis-serve the public interest and 4. inadequate remedy at law. The likelihood of success factor is gone because the point of the trial was to determine that and the inadequate remedy at law factors is basically a repeat of the irreparable harm factor, but the US supreme court added it in Ebay, and everyone has pretty much followed suit.

ESSAY 2 – SAMPLE ANSWER 1

1. ***Buck's Conduct Requiring Prayer or Invocation before home football games:*** At issue is the Establishment Clause of the First Amendment. The First Amendment, applicable to the states because of incorporation through the 14th amendment, prohibits the government from engaging in activity that favors one religion over another, and it requires that the government legislate with a secular purpose. The Supreme Court of the United States in Lemon has held that the government must (i) act with a secular purpose, (ii) may not act in a way that has the primary effect of advancing or inhibiting religion, nor (iii) may there be excessive government entanglement with religion. This is not the only establishment clause test however. There is a test that prohibits a government from acting in a way that is unduly coercive in forcing individuals to participate in religion, this is most notably applied to younger people that may feel pressured more than adults. Another test requires that the government may not "endorse" religion through its actions such that a member of the political community in a town would feel ostracized, and finally some on the court have adopted a test that looks at the history and traditions of the country in analyzing whether a particular government action violates the Establishment Clause. An

additional constitutional violation may exists in the free speech clause of the first amendment as well. Under the first amendment, the government may not compel any individual to speak.

Here, as a threshold matter we have government action, which is critical because the First Amendment prohibits government action in this way. Coach Jones is presumably a government employee coach of a public school in Middle County. Thus, his actions are imputable to the public school board. His conduct in requiring a prayer or invocation to be read before each home football game violates the First Amendment because it clearly does not have a secular purpose, the primary effect of the action is to advance religion, as he has even stated that he believes God is the 12th player on his team and attributes the team's success to His intervention. And finally there is sufficient government entanglement because the message is happening on school property, over school's loud speaker, and on the school's budget. On the other first amendment grounds, Jerry Junior could potentially bring an additional first amendment claim arguing that Coach Jones is compelling him to speak because he "requires that his team participate in a religious devotional and prayer in the locker room." By requiring the speech, it is certainly compelled speech coming from a government actor.

2. ***Team & Student Body Elect to have prayer before home football game***: My answer would not be different in the event that the team elected to have prayer before each football game and after a majority of the school's student body voted in favor of having prayer at home football games. At issue is again the first amendments prohibition against the establishment of religion and prohibition of compelled speech. As discussed above, the actions of Buck violate the Establishment Clause under the *Lemon* test. The action would still be in violation of *Lemon* in light of a vote of the team and student body, but it would also run afoul of the other mentioned tests, specifically coercion and endorsement. The government action under the First Amendment may not have a coercive effect on an individual that essentially requires that person to feel pressured to conform to beliefs of the majority. The Supreme Court has used this analysis in context similar to these, where a minister gave a religious invocation at a public school graduation. The court reasoned that a young person may feel pressured to adopt the beliefs of the

government or, in situations like the one presented here, the majority of the community. Additionally, the government may not act in a way that amounts to an endorsement of a religion. Here, by having a vote of the team and school's student body, the government is endorsing religion. While the facts mention that the prayer would be from a rabbi or minister, a member of another religion may feel that the government is endorsing those religions over his, and thus they may feel like an outsider of the community.

3. ***Buck invited to offer opening prayer at the Georgia House Representatives:*** Buck, consistent with the First Amendment, may offer an opening prayer to the Georgia House of Representatives. At issue is the Establishment Clause. As mentioned in my first answer, the Supreme Court has employed several different tests in analyzing the Establishment Clause. Here, the court would most likely use a test that requires the court to look at the history and traditions of the country in determining whether an action is appropriate. A Supreme Court case has directly held that prayer before legislative bodies does not violate the Establishment Clause. The Court reasoned that there is a long history of opening prayers and invocations given before legislative bodies, and unlike the situation described above where a young student or person may feel coerced, those pressures do not exist in the context of a legislative body comprised of adults. The reason being that adults are able to either ignore the message being spoken, feel less pressured to accept the message to conform with their peers, and the nation's history has a long record of allowing religious prayers before legislative functions.

Thus, Buck, consistent with the First Amendment may give a prayer before the Georgia House of Representatives, even if he was not a lay minister. He would be acting in a very different context when offering a prayer at the statehouse and in a different capacity, notably not as a government employee requiring religious speech from young people.

ESSAY 2 – SAMPLE ANSWER 2

1. The issue is whether Buck's required prayer or invocation before each football game violates the First Amendment.

The First Amendment, as applied to the states through the Fourteenth Amendment, guarantees that the government shall make no law establishing religion. Thus, there must be state action for the Establishment Clause to be implicated. The Supreme Court has established a three part test to determine whether a state action violates the Establishment Clause (the Lemon test). The Lemon test asks: (1) whether the state action has a secular purpose; (2) whether the state action is neutral among and between religion and non-religion and; (3) whether the state action will result in excessive entanglement between government and religion. In addition, the Supreme Court has consistently struck down state actions that may appear to be an endorsement of a particular religion or of religion or nonreligions over the other. For instance, the Supreme Court has held that mandatory prayer at the start of a public school day and reading the Bible at school is unconstitutional.

In this case, Buck's actions violate the Establishment Clause and are unconstitutional. First, Buck, as the football coach of a public school, is a state actor whose actions are subject to the First Amendment and the Establishment Clause. Buck's actions fail to satisfy the *Lemon* test. First, there is no secular purpose in holding a prayer or invocation before every football game. Prayer is explicitly religious in nature and invoking divine intervention before a game is plainly sectarian. Secondly, Buck's actions is not neutral among and between religion and non-religion. Buck's actions plainly favor religion over non-religion and appear to favor Christianity as opposed to other religions. Finally, Buck's actions will result in excessive entanglement between government and religion. The government, as the school, will be seen as condoning and supporting religious actions, which is impermissible under the Establishment Clause. Buck's actions would also be subject to heightened scrutiny because it would constitute the government's endorsement of a particular religion as opposed to other religions or non-religions. Thus, Buck's actions are unconstitutional.

2. The issue is whether my advice would be different if, with Buck's encouragement, the team elected to have prayer before each football game and a majority of the student body voted in favor of prayer at home football games.

Under the First Amendment, there may be a limited exception for student-led prayer at extracurricular events that occur outside of school hours. However, this limited exception does not apply if the students conduct is sanctioned or approved by the government.

The school could argue that the conduct here falls into this limited exception because the players elected to pray before games and the student body has ratified this conduct by a majority vote. Thus, the school could argue that there is no state action because the students are acting as private citizens in deciding to bring their personal beliefs into a government setting. However, this would be unlikely to succeed.

In this case, Buck is encouraging his students and players to hold a prayer before the games and would appear to be leading the devotional and prayer before the games. Buck's encouragement and leadership of the actions likely means that the government is approving the sectarian activity that would violate the Establishment Clause. In fact, this could again be construed as government direction to perform a religious act. The majority vote by the student body cannot serve to rectify the activity. Even if the majority of a community agrees to the religious conduct, it remains a violation of the Establishment Clause for the government to act in any way that endorses a religion. Thus, Buck's encouragement and leadership of the prayer movement is likely fatal. Any student-led initiative must be truly student-led to satisfy the Establishment Clause and Buck's encouragement and orchestration of the prayer means the action still violates the Establishment Clause.

3. The issue is whether Buck, as a lay minister, may give an opening prayer to the Georgia House of Representatives without violating the First Amendment.

Generally, an opening prayer at a government meeting is presumed to violate the *Lemon* test and the First Amendment. However, recent Supreme Court jurisprudence may provide a limited exception to legislative bodies given the historical tradition of opening legislative sessions with prayer.

In this case, Buck has been invited to give the opening prayer at the Georgia House of Representatives. Ordinarily, Buck would not be allowed to give this opening prayer

because it would constitute government endorsement of religion, has no secular purpose, favors religion over non-religion, and would result in excessive entanglement between the government and religion. However, the Georgia House of Representatives as the venue for the prayer likely provides a limited exception to this rule. The House of Representatives is one house of the legislative body in Georgia. The House, as other legislative bodies do, has a long historical tradition of opening its legislative sessions with prayer or invocation given by a spiritual leader. Buck, even though he is a lay minister rather than ordained, may thus give the opening prayer to the legislature due to the historical tradition and ingrained societal norm of giving an opening prayer before a legislative session.

ESSAY 2 – SAMPLE ANSWER 3

1. Buck's conduct requiring a prayer or invocation to be read before each home football game violates the Establishment Clause of the First Amendment of the United States. The freedom of religion is a fundamental right protected by the First Amendment of the U.S. Constitution. It has been incorporated to apply to the States via the doctrine of selective incorporation through the 14th Amendment. Generally, public schools, as state actors, are prohibited from engaging in practices or policies, instituting curriculum, and funding programs that violate the Establishment Clause of the First Amendment. The United States Supreme Court has been especially wary of prayer in public schools. The Court has held that mandatory moments of silence before the school day at public schools violates the Establishment Clause. Likewise, the Supreme Court has also held that prayers given before a public high school graduation violated the Establishment Clause per the Lemon Test. This is in part due to the impressionable nature of teenagers who were required to attend graduation and would feel compelled to either participate in the prayer or ostracized for their lack of participation. Specifically, the Lemon Test requires that any actions taken by a state actor that concern religion must have a secular purpose and effect, the secular purpose neither advances nor inhibits religion (i.e. the law is neutral on its face and in its application), and that the action does not result in the excessive

entanglement between religion and government. In other words, the government should not be supervising religious activities.

In this case, Buck is requiring a prayer or invocation before each home football game at the High School over the stadium loudspeaker system. This mandatory requirement violates all three of the Lemon Test prongs. The primary purpose of this prayer or invocation is religious. It directly advances religion by promoting a religious message over the stadium's loudspeaker before each game. Everyone in the stadium can hear the message, whether or not they support its religious content. Although Buck asks a local minister or rabbi to deliver the prayer, the fact that various religious denominations are provided an equal opportunity to give the prayer does not neutralize its religious nature. The freedom of religion includes the freedom not to practice religion, so the presence of various faiths will not negate this advancement of church and state. Finally, under the

Lemon test, the law must not result in excessive entanglement. For many communities, especially a quiet community like Jamestown where the primary activity is the home football game, such a public display of religious endorsement is likewise an excessive entanglement of church and state. Coach Baker is in a position of authority at the school who insists on the deliverance of the prayer over the loudspeaker. He is using school resources and a secular school event to promote a religious message. Moreover, the requirement that his team participate in the religious devotional and pre-game prayer also violates the Lemon Test under the Establishment Clause for the reasons already mentioned.

2. Had the team elected to have prayer before each football game and the majority of the student body likewise voted in favor of prayers before the home football games, these activities would still violate the Establishment Clause under the Lemon Test. A public school student body cannot vote to have a school wide prayer prior to each football game. The Supreme Court agreed in a case with similar facts regarding a public high school in Texas. The primary purpose and effect of a school-wide prayer advances religion and excessively entangles the school in religious activities. It is no different from a prayer or invocation given before a high school graduation. Those in the audience will be compelled to listen even if they do not practice religion or share the same faith. Furthermore, another

purpose of the First Amendment is to protect minority interests. Those students who did not vote in favor of having prayer still have a fundamental First Amendment right to the separation of church and state. A majority vote by the student body cannot override that fundamental right.

A closer case is the team's decision electing to have prayer in their locker room before each football game. However, given the Coach's encouragement of this practice, the decision is likely to be construed as state action that arises to the level of excessive entanglement. Locker room prayers at a public school before a public football game cannot be enforced by a majority vote, nor encouraged by a Coach who is paid by the State. If, however, individual team members decided to pray before each game without the Coach's participation or encouragement, this is less likely to violate the Establishment Clause. Instead, the Free Exercise Clause protects one's exercise of religion in this realm, where individuals or groups come together voluntarily to pray or hold a moment of silence.

3. The Supreme Court of the United States has reached a different result regarding Establishment Clause violations in terms of legislative prayer. In Town of Greece, the Court reaffirmed the historic value and precedent of prayer before legislative sessions and before town council meetings. Legislative prayer occurs in a context altogether different from a high school football game or high school graduation. First, the Court has held that members of legislative bodies and those in the audience observing legislative debates are adults who are less susceptible to peer pressure and coercion. Adults, unlike high school students, are less impressionable and already have established convictions. They are less likely than high schoolers to feel "compelled" to participate in a prayer. With these constitutional precedents in mind, Buck can likely deliver an opening prayer before the Georgia House of Representatives. Legislative prayer does not violate the Lemon Test because its primary purpose is secular in nature. Prayers remind Members of the House of the solemn nature of their governmental duties elected by the public. Prayers provide an opportunity for these Members to contemplate the seriousness of their duties and importances of running government. Their purpose is neither to advance nor inhibit religion and there is no excessive entanglement between church and state, provided that the House allows any person regardless of their religion to offer an opening prayer.

Therefore, Buck as a lay minister can give this prayer without fear of violating the First Amendment.

ESSAY 3 – SAMPLE ANSWER 1

1.

In Under Georgia law, for evidence to be admissible, it must be relevant. Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than would be without the evidence. Evidence must also be authenticated. For writings and pictures, under Georgia law, the evidence must reliably show that the evidence is what it purports to be. For writings and photos, a testifying witness is not needed in Georgia if the court is satisfied that this standard is met. There is automatic authentication for certified public records. However, otherwise relevant, admissible evidence may nonetheless be declared inadmissible if the court finds that the probative value of the evidence is substantially outweighed by the risk of unfair prejudice to either party. This provision is often used to keep out evidence that would make the jury find on the basis other than the evidence presented at the current trial. Additionally, hearsay is an out of court statement by a human offered for the truth of the matter asserted. Hearsay is inadmissible in court, unless an exception can be found. An exception is made for public records recording findings of fact or opinion by an investigation authorized by law, or for matters observed pursuant to a duty at law, or for actives of the public agency.

Here, the conviction is assuredly relevant, because it tends to show the defendant was negligent and another jury found he was criminally culpable. Because this is a certified copy of defendant's criminal conviction, it is authenticated automatically because it is certified public record. While the copy of the conviction is hearsay, since it is a past statement offering to prove the defendant's guilt, the hearsay exception for public records would allow its admittance. However, a court would likely find this criminal conviction is inadmissible because the probative value will be substantially outweighed by the risk of unfair prejudice by the jury. Since the jury will see this and most likely decide the

defendant is guilty, a court will probably keep this record out of the case and rule it inadmissible.

Note that because the defendant did not plead guilty, and did not testify, his statements cannot be used for opposing party statement non-hearsay admissions.

2.

The issue is whether this opinion from a witness is sufficiently reliable. Under Georgia law, for evidence to be admissible, it must be relevant. Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than would be without the evidence. Additionally, the testimony of a witness must be based on their personal knowledge, and opinions given thereunder must be based on their personal knowledge or perception, and must be helpful to the jury.

Here, the Plaintiff would argue that since he personally witnessed the accident, he has personal knowledge of the incident. Also, he would argue that his estimation of speed is helpful to the jury in determining just how fast the defendant was actually going. He would point out that this miles per hour testimony is commonly allowed in courts. However, the defendant would argue that this evidence is not sufficiently reliable, since the plaintiff based this miles per hour approximation on his prior police work. Defendant would argue that simply being a police officer does not enable one to view the speed of a car and automatically be able to associate a miles per hour to its speed. However, a court would likely find this testimony admissible because it is helpful to the jury and based on personal observations.

Note that the fact that this evidence was in a deposition might allow the defendant to keep the use of the deposition out of evidence. See the explanation of hearsay above. Opposing party statements are technically non-hearsay if they are offered against the party who is the declarant. Also note that a prior consistent statement of a person is only admissible if they testify and are subject to cross, and if their credibility has been attacked (i.e. to rehabilitate the witness).

Therefore, here, the plaintiff might successfully argue that the deposition cannot be used since it is hearsay and is not an opposing party statement, since the plaintiff would offer this evidence for the benefit of himself (its not an 'opposing' party statement). It is also not admissible as a prior consistent statement, because the plaintiff has not taken the stand. Therefore, a court would likely allow this evidence to be admissible, but only if the plaintiff takes the stand.

3.

The issue is hearsay and opposing party statement. See the explanation of hearsay above and of opposing party statements being considered non-hearsay above.

Here, while this statement technically fits the definition of hearsay, because it is a past statement offered to show defendant likes beer and drank so much he does not remember the game, the Rules of Evidence declare it as non-hearsay since the defendant is an opposing party and it is being offered against him.

Alternatively, the defendant would argue that this is inadmissible character evidence. Character evidence is generally inadmissible against a party. Character evidence, explained further below, is evidence that a party has a propensity to act a certain way. This evidence is generally inadmissible under the aforementioned probative value substantially outweighed by the risk of unfair prejudice test.

Here, the defendant would argue that this is inadmissible because it tends to prove defendant has a general propensity to get drunk and not remember things. However, a court would not find this way, because the statement merely refers to a single incident.

4.

The Under Georgia law, there is no physician-patient privilege. See the explanation of hearsay above. Another hearsay exception is statements offered for medical diagnosis or treatment. To fit such exception, a statement can be made to anyone about (1) past or present (2) medical conditions or symptoms (3) for the purpose of receiving medical treatment or diagnosis.

Here, as to the statements by the treating physician, the statements about the plaintiff's injuries and about the plaintiff's pain and suffering will be admissible. While they are hearsay, they were offered for the purpose of present medical conditions and made to the doctor so that the doctor could make medical treatment.

However, the statements made to the doctor saying that the defendant is a drunk with a horrible reputation will not be admissible. First, under Georgia law, fault attributing statements are generally admissible (unlike most jurisdictions) if (1) the declarant's motive in making the statement was of the kind to receive medical care, and (2) the statement is of the kind used by a physician in making medical diagnosis or treatments. Additionally, under Georgia law, character evidence, or evidence that defendant has a propensity to act a certain way, is generally inadmissible. In a civil case, it is admissible (by specific acts, reputation, or opinion testimony), if the defendant (or plaintiff's) character is in issue by the elements of the charge or by the party testifying, or to prove absence of a mistake, identification, motive, intent, or common plan.

Here, the defendant would first argue that this statement is fault attributing, and should not be admissible under the hearsay exception. However, Georgia allows this statement because the statements were made to report to plaintiff's pain and suffering, and is of the type doctors ordinarily use in making such medical diagnosis. However, this last statement is likely inadmissible because it is character evidence against the defendant. The statement that defendant is a drunk and is known as such is clearly stating defendant has a general propensity. Additionally, the character civil exceptions will not get this evidence in. Since this case will be a negligence claim, the defendant's character will not be at issue. Also, it is not being used to prove one of the aforementioned MIMIC exceptions. Therefore, this final statement is inadmissible character evidence.

5.

Under Georgia law, a court may take judicial notice of a fact if it is generally known in the jurisdiction of the court, or if the authenticity of the fact cannot be reasonably questioned and can be easily verified. In a civil case, a judge may instruct that the finding of judicial

notice is conclusive. Note that Georgia allows courts to take judicial notice of government entity findings.

Here, the court may validly take judicial notice of the sunset time of the NOAA, and the defendant will not have much of an argument. This fact is clearly not reasonably questioned, since the NOAA seems to deal directly in this issue. The time the sun sets is also a fact, not an opinion or something of inherent ambiguity. Note that courts are allowed to take judicial notice of such finding of the NOAA in Georgia.

ESSAY 3 – SAMPLE ANSWER 2

1. To be admissible, evidence must be relevant. Evidence is relevant if it has any tendency to make a fact of consequence more or less probable. The defendant's conviction is relevant. Defendant was convicted of driving under the influence of alcohol and serious injury by vehicle. There is a dispute that defendant swerved to miss a vehicle that was driving in front of him without lights. Evidence of the defendant's conviction would make it more probable that he swerved due to his intoxication. Thus, the conviction is relevant. A conviction can be authenticated by obtaining form the public office that maintains the records.

A certified copy of Defendant's criminal convictions for driving under the influence of alcohol and serious injury by vehicle may be admissible as impeachment evidence under certain circumstances. A criminal conviction for a crime involving dishonesty (e.g. embezzlement) is admissible without reference to the risk of unfair prejudice, confusion of the issues, etc. A felony conviction, not of a crime of dishonesty, is admissible unless the danger of unfair prejudice, confusion of the issues, etc. substantially outweighs its probative value. (Because this is a civil case, the Rule 403 balancing test that favors exclusion when opposing party is the criminal defendant is inapplicable). Additionally, convictions that are more than 10 years old from the defendant's conviction or date of release (whichever is later) are generally inadmissible for being too remote.

Here, a criminal conviction for driving under the influence of alcohol and serious injury by vehicle is not the type of crime that involves dishonesty. Thus, the conviction must pass a Rule 403 balancing test, i.e. the probative value must be substantially outweighed by the risk of unfair prejudice to the defendant. It is not clear from the facts whether defendant's conviction was a felony, but even if it was, it must pass the standard Rule 403 balancing test because this is a civil trial, not criminal. Finally, the conviction is not likely 10 years old (even though not stated in the facts) because the plaintiff filed the civil suit when criminal charges were filed. If the plaintiff waited more than 10 years, the conviction is likely not admissible. Otherwise, the conviction is admissible because its probative value that defendant swerved due to drunkenness and not to miss a vehicle is not substantially outweighed by any unfair prejudice to the defendant. Thus, the conviction is likely admissible.

2. Plaintiff's deposition testimony regarding Defendant's speed is likely admissible. The evidence is relevant because it tends to prove the defendant was speeding when accident occurred.

Plaintiff's deposition testimony is hearsay. Hearsay is an out-of-court statement offered for the truth of the matter asserted. Hearsay is inadmissible unless a hearsay exception applies.

Assuming a hearsay exception applies, Plaintiff's testimony may be admissible because Plaintiff is a lay witness. Lay witnesses may testify if their testimony is based on personal knowledge, is helpful to the trier of fact, and not based on scientific, technical, or other specialized knowledge. Here, Plaintiff's testimony is based on personal knowledge--Plaintiff was driving the car when the accident occurred. Plaintiff's testimony would be helpful the trier of fact because it would help the trier of fact determine the true cause of the accident. Finally, Plaintiff's testimony is not based on scientific, technical, or specialized knowledge. Although the plaintiff worked as a police officer prior to becoming a teacher, this is not necessary opinion testimony related to how fast a car was driving when the witness witnessed the accident. Here, Plaintiff witnessed the accident, thus Plaintiff can offered his opinion on how fast Defendant was driving. Therefore, this testimony is likely admissible.

3. Plaintiff's testimony is not admissible. The evidence is not relevant because Defendant's statement about liking beer and not remembering the night of the Braves games does not have any tendency to make a fact of consequence to the current action more or less probable.

Plaintiff's testimony regarding the Defendant's statements are considered nonhearsay admissions of a party offered by opposing party, and thus will not be excluded on hearsay grounds.

Assuming the evidence is relevant, the evidence is inadmissible character evidence. Character evidence is evidence used to show a person's propensity to commit a bad act, with the implication that because the person committed the bad act in the past, he is more likely to have committed the bad act. Character evidence is permitted in criminal cases under limited exceptions. However, character evidence is generally not admissible in civil trials unless the defendant's character is at issue (e.g. defamation, parental rights). Here, the Defendant's character is not at issue because this is a negligence case (Plaintiff is seeking compensation for damages related to Plaintiff's injuries in the accident). If the proponent offers the prior bad act evidence for some other purpose, such as to establish motive, identity, absence of mistake, then the evidence would be admissible. Since it is not likely, based on the testimony, that the prior bad act evidence is being offered for any of those purposes, Plaintiff's testimony will be inadmissible.

4. Plaintiff's statements to her doctor will be partially admissible, partially inadmissible. Plaintiff's statements are relevant because her statements are probative of the injuries and damages in dispute.

Plaintiff's statement are hearsay--out of court statement offered for the truth of the matter asserted--and thus inadmissible unless an exception applies. Plaintiff's statement to her doctor where he described his injuries for the treating physician and gave graphic information about his pain and suffering will be admissible under the hearsay exception for statements for medical diagnosis or treatment. Plaintiff made these statements to her doctor for medical diagnosis and treatment after Plaintiff was taken to a nearby hospital. Thus, these statements will be admissible.

Plaintiff's statements identifying the Defendant and Plaintiff's statements regarding Defendant being a known "drunk" are also hearsay, but not admissible under the medical diagnosis hearsay exception or any other exception. Plaintiff's statements were not made for the purpose of medical diagnosis or treatment. Plaintiff's physician did not need to know Defendant's identity in order to treat Plaintiff. Therefore, these statements will be inadmissible.

5. This information will be admissible. It is relevant because there is dispute between the parties on when the sunset on the day of the accident. Defendant claims the accident occurred in the dark; Plaintiff claims it was daylight. The evidence must also be authenticated. It can be authenticated simply be its proponent testifying that it is what the proponent claims it is. Although hearsay, it will be admissible under the public records or business records exception if documented in the regular course of business. Finally, the Court can take judicial notice of the time of sunset. A Court, on its own, or upon request of one of the parties, make take judicial notice of facts commonly known in the community and facts not open to dispute and easily proven by reliable methods. Here, the evidence comes from the National Oceanic and Atmospheric Administration, an agency within the Dept. of Commerce, establishing the time of sunset on July 10, 2017 (the day of the accident). Thus, the Court may take judicial notice of the time of sunset the day of the accident. Additionally, because this is a civil trial, the fact judicially noticed is conclusive among the jury.

ESSAY 3 – SAMPLE ANSWER 3

1. <u>The copy of Defendant's criminal convictions for driving under the influence of alcohol and serious injury by vehicle</u>

(a) Arguments for admission.

Hearsay is an out of court statement offered to prove the truth of the matter asserted. Hearsay may include evidence of prior criminal convictions, however such evidence is also subject to a hearsay exception. Assuming proper certification, evidence of a prior criminal conviction may be admissible (i) if it was a result of a guilty verdict or guilty plea,

and not a nolo contendere plea, (ii) the conviction was for an offense punishable by up to one year in prison, and (iii) it is offered to prove a fact essential to sustain the judgment.

Here, Defendant's conviction for driving under the influence and serious injury by vehicle was a result of a guilty verdict. Assuming both charges are felonies, each offense is punishable by one year in prison, satisfying the second element of the hearsay exception. Moreover, the evidence would be offered as proof of defendant's drunken driving and cause of serious injury by vehicle. As such, it is being offered to prove a fact essential to sustain the judgment. As such, the defendant's criminal convictions would likely be let in under the hearsay exception for criminal convictions.

(b) Arguments against admission.

Character evidence is generally inadmissible in a civil case to prove propensity. In other words, evidence that a person has acted a specific way on one occasion is inadmissible to prove that this person has acted a specific way on the occasion in question. There are narrow exceptions to this rule, such as when character evidence is an essential element of the claim against the defendant (i.e. evidence of parental unfitness in a child custody hearing), or prior instances of sexual misconduct or child molestation.

Here, the copy of Defendant's criminal convictions would be used to prove that he acted a certain way

2. <u>Plaintiff's statement that Defendant was operating his vehicle in excess of 80 miles per hour (mph).</u>

(a). Arguments for admission.

Hearsay is an out of court statement offered to prove the truth of the matter asserted. One hearsay exception is that for present sense impressions, which are applicable to statements made by a declarant while the declarant is contemporaneously perceiving an event or made immediately afterwards. Such present sense impressions may be admissible as substantive evidence.

Lay witness opinions may be admitted so long as they are not based on any technical or scientific knowledge and so long as the opinions will assist the trier of fact. In other words, lay witnesses are permitted to testify as to "common-sense" impressions that they may have had of an event.

Here, Plaintiff may be able to argue that his statements were a result of his present sense impressions of Defendant's speed. Moreover, Plaintiff may be able to argue that his statement constituted a lay opinion as to the speed at which Defendant's car was moving, as he may argue that such an estimation was a common-sense impression irrespective of his former status as a police officer.

(b). Arguments against admission.

The present sense impression exception to hearsay only applies to statements made by the declarant as the declarant is perceiving the event or immediately afterwards. Statements made after this specific window of time will not be permitted to come in as exceptions to the hearsay rule.

Lay witness opinions may be admitted so long as they are not based on technical or scientific knowledge or expertise. If a lay opinion does encroach on any of these grounds, then it will be inadmissible because the witness will have to be qualified as an expert. While Georgia does not adhere to the *Daubert* rule on expert witnesses, the court must still determine that the expert has based his or her testimony on reliable principles and methods. The expert's credibility is an issue for the jury to decide.

Here, Plaintiff did not make the statement that the Defendant was moving in excess of 80 mph while he was perceiving the event or immediately afterwards. Moreover, Plaintiff's assertion that Defendant was moving in excess of 80 mph, which he based on his prior occupation as a police officer, likely encroached on technical knowledge. As such, Plaintiff would have to be certified as an expert through demonstrating to the court that he is basing his opinion on reliable principles and methods.

3. Defendant's statement to his friends about liking beer.

(a). Arguments for.

Hearsay is an out of court statement offered to prove the truth of the matter asserted.

While hearsay is generally barred, there are certain statements that are excluded as "nonhearsay." Such exclusions apply if the declarant is present at the trial and available to testify. Statements covered under these non-hearsay exclusions include opposing party statements. Simply put, if the opposing party has either stated it himself or adopted it, it may come in against him or her.

Here, Defendant is present at trial and available to testify. As such, the non-hearsay exclusions apply to these facts. Defendant's statement that he likes beer and did not remember the night of the Braves baseball game were expressly made by the Defendant. As such, Plaintiff could easily argue that these statements should come in under a nonhearsay exclusion as an opposing party's statement.

(b). Arguments against.

Evidence must be relevant in order to be admitted. Relevance is the product of both probativeness (tendency to prove or disprove some fact) and materiality (pertinence to the case at hand). Moreover, even when evidence is relevant and has otherwise passed through the rigors of a hearsay and/or character analysis, it still may be excluded if the probative value is substantially outweighed by the risk of unfair prejudice. Unfair prejudice includes, among other factors, confusing the jury and confusing the issues.

Here, Defendant could argue that the statements are irrelevant. The statements that he "liked beer" and "didn't remember much about the night" of the Atlanta Braves baseball game are likely not probative of whether he was driving drunk at the time of the accident nor are they material to the case at hand. Even if they were held to be relevant, Defendant could argue that the risk of unfair prejudice (i.e. the danger that the evidence will muddle the issues or confuse the jury) would substantially outweigh whatever probative value the statements may carry.

4. Testimony from Plaintiff's treating physician.

(a). Arguments for.

While hearsay statements are generally barred, there is an exception for statements made for purposes of medical treatment. If the statement was made describing symptoms for the purpose of seeking medical treatment, or even of the cause of such symptoms, they may come in even if not necessarily made to a treating physician. There is another hearsay exception for then-existing mental, physical, or emotional state to prove the existence of a condition at the time it was made.

Here, Plaintiff could argue that the statements he made to the treating physician were made for the purpose of seeking medical treatment. They fit the requirements for such an exception, as they were made describing the plaintiff's symptoms and causes of symptoms for the purposes of medical treatment. Moreover, the statements made regarding his pain and suffering were a then-existing physical state and may come in to prove the existence of the condition.

(b). Arguments against.

The hearsay exception for statements made for purposes of medical treatment do not apply to statements that were not reasonably made for the purposes of seeking medical treatment. The statements regarding Defendant's reputation, aside from being character evidence, were not made for purposes of seeking medical treatment nor were they statements of a then-existing physical condition.

Information from the National Oceanic and Atmospheric Administration (NOAA) establishing the time of sunset.

When an issue is not subject to reasonable dispute, the court may, upon its own initiative or upon motion by a party, take "judicial notice" of the fact. A fact is not subject to reasonable dispute if it is either generally known within the court's jurisdiction, or originating from a source whose authority cannot reasonably be questioned. In a civil case, the court must instruct the finder of fact that it is required to accept the judicially noticed fact.

Here, the data comes from the National Oceanic and Atmospheric Administration (NOAA). As an agency within the Department of Commerce, it is likely a source whose authority and truth cannot reasonably be questioned. Plaintiff will likely be able to ask the court to take judicial notice of the time of the sunset, and the court will likely do so given the source of the information and mandate the jury to accept the fact since this is a civil case.

ESSAY 4 – SAMPLE ANSWER 1

1. Is Brown's deed legally enforceable under Georgia law?

Yes, Smith's transfer of property to Brown is legally enforceable under Georgia law.

The issue here is if the deed transferring one acre to Brown is enforceable as a valid land conveyance.

For a transfer of property to be valid, the transfer must meet certain requirements. First the transferor must have legal title to the land they are giving. The land must be sufficiently described in the deed. The means of identification can be by coordinates meets or bounds or another sufficient description that would set the property out from its self. The deed must be signed by the party conveying and witnessed. The deed must be delivered to and accepted by the transferee. The transferee should then properly record the deed in the appreciate county, although this is not mandatory (discussion of recording continued in question 2).

Here, Smith has legal title to his whole 100 acre parcel, and the facts do not state that it is encumbered in anyway. It is not clear if Smith filed to have the property parceled off from the original 100 acres, which is needed because he is only granting Brown one acre. The deed was prepared so presumptively the one acre parcel has been identified. The deed was signed by Smith and witnessed by his wife (an uninterested party). Finally, the deed was given to and accepted by Brown. If the deed sufficiently described the one acre parcel it is valid.

2. What effect does Brown's failure to record have?

A) Between Smith

The issue here is if Brown's failure to record effects his claims with Smith. When a deed is given in a convenance the conveyance should be recorded. This is to ensure that future interested parties are aware of the ownership and restrictions on the land. Georgia is a race notice jurisdiction, meaning for a deed to be valid against a subsequent purchaser in good faith, (bonafide purchaser BFP) the first to record the deed will win unless the person recording has notice of the other's interest. A subsequent purchaser in good faith is someone who gives value for the land and takes without notice of other's claims.

Here, Brown and Smith's interest are not effected by the failure to record because Brown received the property from Smith, therefore Smith has knowledge of Brown's ownership.

B) Between Land Magnates

Brown will lose his property interest against Land Magnates (LM) unless he records before they do. As stated above Georgia is a race-notice statute. Here, LM is a bonafide purchaser, meaning that if they record their deed to the entire 100 acres they will have legal title to it. There is no evidence that LM knows Brown has one acre of land, if Brown does not record his deed before the close of the contract, he will lose his rights in the land.

3. Brown's rights in the dirt road.

Brown has an easement by necessity. The issue here is what rights does Brown have in the dirt road he uses. A necessity easement is granted when a parcel is landlocked, meaning it does not have access to a road, and it was once owned by the same person. This easement is given because the land cannot be without access to a public road. This easement runs with the land and does not have to be recorded. It will be extinguishes if the properties come into the same ownership or if there is another way to a public road later provided. The land that benefits is the dominate estate, and it cannot overburden the easement with use. The land with the easement on it is the servant estate and cannot stop the other from using the easement.

Here, Brown is allowed to use the road now. The properties were once owned by the same person, and there is no other way to access the public road. Brown cannot overburden the road, like having several people drive over it, he is providing upkeep which is good, Smith or LM could not stop him from using the road because he must have access to it to get to the public road. The easement will last until there is another way for him to get to the road.

4. Is the restrictive covenant enforceable against Land Magnates

The restrictive covenant will not be enforceable against LM. The issue is if the covenant included in Brown's deed is a valid restriction on LM's use.

A restrictive covenant is a restriction on the use of land that runs with the land. For this reason the restriction must be recorded in order for it to be enforceable. It cannot be overly broad, enforce payments for an unlimited time or violate the rules against perpetuities. The restrictions also cannot violate the constitution. It can be binding on all successors in the land. In Georgia most covenants will be valid for at least 20 years without being renewed.

Here, while the covenant is not overly broad, and does not violate the constitution or rules against perpetuities, Brown has not recorded the deed that included the restriction. This means that LM has no notice of the restriction. There is also no other evidence that would give LM constructive notice because this is only for one acre of 100. If Brown had recorded, it would be enforceable for his one acre.

ESSAY 4 – SAMPLE ANSWER 2

1.

The issue is whether Brown's deed to his one-acre parcel is legally enforceable.

A deed is enforceable if it is in writing, signed by the grantor, it describes the property, and it is lawfully executed and delivered. Additionally, in Georgia, a deed must be signed by 2 witnesses; however failure to have 2 witnesses only affects the recordability of a deed,

and not the validity of the deed itself. Here, the deed to Brown is in writing, it is signed by Smith (the grantor), it describes the property sufficiently enough (one acre upon which Brown lives). The deed was lawfully executed and it was presumably delivered and accepted by Brown (although the facts do not stated anything about delivery or acceptance). The deed was only signed by his wife; it was not signed by 2 witnesses, therefore, it cannot be validly recorded. This does not affect the validity of the deed itself though.

Brown's deed however may be possibly be subordinate to a subsequent bona fide purchaser for value without notice, who records first.

2.

The issue is how Brown's failure to record affects his claim as between Brown and Smith

Smith transferred his 1-acre land to Brown via a deed. The failure of recording Brown's deed has no effect on the claims between Brown and Smith. The 1-acre land belongs to Brown, and Brown can enforce it against Smith by merely showing the signed deed, which satisfies the statute of frauds (a writing for transfer of land, signed by the party to be charged, i.e. Smith).

The issue is how Brown's failure to record affects his claim as between Brown and Land Magnates

Brown's failure to record does not affect his claim against Land Magnates. Georgia is a race-notice state, meaning the first BFP for value without notice to record first has superior claim. Thus, Land Magnates' claim is only superior to Brown's title if it was a BFP without notice who recorded first.

Here, Land Magnates is a purchaser for value, however, Land Magnates had notice of Brown's claim, therefore, Land Magnates cannot be a BFP. Notice can be actual, inquiry (an inspection of the property would show someone else living there), or record notice (the the deed was recorded before the time of the purchase). Here, Land Magnates had inquiry notice of Brown's claim to the one-acre land. A buyer of land is required to inspect the

property to make sure no one is living on it whose claim would be hostile to yours. If Land Magnates had inspected the land, it would've found that Brown was living on the one acre land. And therefore, Land Magnates had inquiry notice, and cannot achieve BFP status.

Land Magnates may argue however that it is impracticable to inspect all 100 acres of land, to find someone occupying just 1 acre of it. However, this argument will likely fail because Brown had maintained the dirt road that connected the one-acre parcel to the State highway, and there was a house build on it, thus it would not have been impracticably difficult to discover it upon inspection. Additionally, the rest of the 99 acres was dedicated to farming. Finding a residential home would have provided inquiry notice. Thus, even if Land Magnates had recorded its deed (which the facts do not specify whether or not it did), it would not have a superior claim against Brown according to Georgia' recording statute (race-notice, first BFP to record wins). This because Land Magnates is not a BFP because it had inquiry notice.

3.

The issue is whether Brown has an easement across Land Magnates’ land.

If there was an easement, the easement would be an easement appurtenant to Brown’s dominant tenement: the servant tenement being Land Magnates' land, and the dominant tenement being Brown's one-acre parcel. An easement is created via necessity (i.e. landlocked), by grant (express grant of an easement by the dominant tenement holder), prescription (i.e. adverse possession, without exclusivity), prior use (the easement existed when the property was purchased, and rejection of the use of the easement deprives the owner of the enjoyment of his land).

An easement appurtenant runs with the land, and is only terminated by a physical act of the dominant estate (non-use in Georgia, or a physical act), by condemnation of the servient estate, destruction of the servient estate other than by willful conduct of the servient estate owner, or by express agreement between the parties to release the easement. Here, there was no such release of the easement by the parties; Smith granted/allowed Brown to cross his land and develop the dirt road to access the State

Highway. It was not terminated via condemnation or destruction or physical act by the dominant estate. Therefore, the easement runs with the land, and Brown retains the easement.

Brown could claim a right to a continued use of the dirt road through an easement by necessity; Brown's one-acre parcel is landlocked and surrounded by 99-acres of Land Magnates. The only way to access the State highway is through Land Magnate's land. However, in Georgia, the claimant petitioning for an easement by necessity is required to give compensation for that land (i.e. the easement is condemned, and put up for sale to the petitioner).

4.

The issue is whether the restrictive covenant is enforceable against Land Magnates.

The burdens of a restrictive covenant run with the land if there is (1) a writing between the original parties regarding the covenant, (2) intent by the original parties for the covenant to run with the land, (3) the covenant touches and concerns the land, (4) there is horizontal privity (i.e. succession of estates), (5) there is vertical privity (non-hostile nexus), and there is (6) notice to the subsequent party of the covenant. Here, the restrictive covenant is in writing, contained in the deed to Brown. There was an intent by the original parties for the covenant to run with the land (i.e. the deed provided the covenant would bind on all successors in interest). The covenant touches and concerns the land b/c it deals with the parties as land owners (i.e. what they can and cannot do with the land), rather than as individuals. There is horizontal privity (succession of estate) because the relationship between the original parties, Smith and Brown, was grantor-grantee. Additionally, there is horizontal privity, a non-hostile nexus between Smith and Land Magnates (i.e. Land Magnates did not oust Smith, but purchased the land from him). However, the facts do not state that Land Magnates had notice of the restrictive covenant. Notice can be actual, inquiry, or record. The deed contained the restrictive covenant, but it was not recorded. And inquiry would not make it apparent that a restrictive covenant existed. Therefore, the burden of the restrictive covenant does not run with the land, and Land Magnates is not burdened by it.

ESSAY 4 – SAMPLE ANSWER 3

1. Whether the deed transferring title of the one-acre parcel to Brown legally enforceable?

In Georgia, a deed is valid if it (1) is in writing; (2) signed by the grantor; (3) is acknowledged by two witnesses one of which is a notary or clerk of court (4) is delivered; and (5) acceptance is assumed under a rebuttable presumption. If the deed fails for the signatures it is still a valid deed it is just not record-able. A deed should be recorded with the clerk of court in that county. Here, there was a valid writing, which we can infer since Smith signed as grantor and a valid deed was prepared. Also, it was signed by Smith the grantor. However, it was not valid as to the lone wife signature. There would need to be another party witnessing the deed who was either a notary or other court official in the presence of the court. While this won't make the deed invalid, it will make it invalid for recording. Also, we know that the deed was delivered since Brown accepted it. Therefore, there was a valid transfer of the deed but the deed would not be recordable.

2. How does Brown's failure to record the deed effect his claim between him and the parties.

Georgia follows the race-notice statute for recording deeds. In a race-notice statute the first bona fide purchaser for value that records wins. The general rule is first in time first in right, but this is modified by the statute. A bona fide purchaser (BFP) for value is someone who gives for value with no notice of a previous recording. The BFP must not have actual notice, inquire notice, or record notice. Actual notice is the notice that one has when they actually physically know or have heard that a person is on the property. Inquire notice is the type of notice one has by making a inquire into the property's condition. They merely inspect the property to see if anyone else is on it. Record notice is the notice one receives by checking the recording system in that state to see if there is a previously recorded deed.

a) As between Smith and Brown, Brown would have a valid claim that the he owned the land. Here, even though Brown did not record the deed he was delivered and accepted

a valid deed. Absent an effective deed transferring the land back to Smith, Brown would have superior title to the land. Smith could show the valid deed as proof of the transfer and he would take in a claim between him and Smith.

b) As between Brown and Land Magnets, Land Magnets would have a superior claim than Brown. Here, Brown did not record nor was he a BFP. Brown took the land as a gift and therefore did not give value for the land, and therefore cannot claim that he was a BFP. Even if he could claim he was a BFP in Georgia it is the person who records first as the BFP who takes. Land Magnets most dispositive claim would be that they were a BFP and recorded before Brown. However, the one place that could cause the court pause would be as to the inquire notice. While it states that Land Magnets does not have notice of the transfer if a court determined that an inspection of the property would reveal Brown farming. Also, the court may consider why they did not inspect what was at the end of the 20 ft wide dirt road running through their to be property. However, Brown has a 1 acre tract in the middle of 100 acres and it would be unlikely that the court would consider the inspection of 100 acres to be reasonable. Therefore, Land Magnets will be considered the first BFP to take and they will have a valid claim against Brown's right to the land.

3. Assuming Brown retains valid title, on what grounds could Brown claim right to continued use of the dirt road.

Under Georgia law, a landowner can maintain the continued use of an easement by express grant, by implication, or by prescription. An easement by express grant is where the easement is expressly granted in the deed. This did not happen here and would not apply.

An easement by implication can arise when the landowner transfers a valid deed and the grantee retains the use of the easement where the court can determine the use was implied because the grantee has 1) continuous use of the easement before the transfer; 2) the grantee use is strictly necessary for them to continue use of their land; and 3) the use of the land is within the reasonable expectation of the original use.

Here, Brown used the road before the grant to get to and from his property. He did not do anything to expand the use of the road nor did he seem to do anything to violate the type of use previously allowed. Also, the road would be necessary for him to continue to get to and from his property. This necessity is strict because there is no other way for him to access his land. Therefore, he would likely get an easement by implication.

Easement by prescription is where the grantee 1) continuously used the land for the statutory period of 7 years in Georgia; 2) used the land open and notorious manner; 3) the use was hostile; and 4) the use was actual. Here, it appears that Brown used the land with Smith's permission and would not be hostile. Therefore, a prescriptive easement would not work.

4. Would the restrictive covenant contained Brown's deed apply to Land Magnets.

The Under Ga law, restrictive covenants require that they be 1) in writing; 2) parties must show intent; 3) there must be horizontal privity between the parties; 4) there must be vertical privity; and 5) the party must have notice. A restrictive covenant is a covenant that burdens a piece of property. Here, there was no notice given to Land Magnets as to the restrictive covenant. Further, they did not have any type of privity or relationship with Brown that would make this covenant enforceable against them. The covenant that is contained in a deed to a third party that another party does not know about will not burden the party with no notice. If Smith wanted to burden the property with Land Magnets he would have had to put that covenant in their deed. It would be unfair for a court to later enforce a covenant on Land Magnets who likely bargained for the land in a good faith arms length transaction. Therefore, the restrictive covenant was neither imposed on them through Smith nor would run from Brown.

MPT 1 – SAMPLE ANSWER 1

To: Alexandra Carlton

FROM: Examinee

DATE: July 30, 2019

RE: American Electric v. Wuham Precision Parts Ltd.

MEMORANDUM

It is unlikely that the Court will vacate the default judgment due to improper service, but the court is likely to vacate the award of attorney's fees. Under Federal Rule of Civil Procedure 4(f)(1), service on an international party must occur in compliance with the terms of the Hague Convention. “The Hague Convention requires service upon a governmental authority, which in turn will effectuate service upon its own citizens and entities.” *Pennsylvania Coal*. More specifically, the Hague Convention as it applies to Chinese companies, like Wuham Precision Parts (WPP), requires "that the serving party translate the documents into Mandarin Chinese and deliver the documents to the Chinese Central Authority, which will effectuate service through its provincial courts." *Edu Quest*. It is likely, however, that the Court will relax this requirement and only require American Electric (AE) to have given WPP actual notice of the service, or it will likely find that WPP waived the Hague Convention service requirements when WPP agreed to arbitrate the claims in Franklin Court. However, the award for Attorney's Fees will likely be vacated for two reasons. First, this is a new claim that requires service in compliance with the Hague Convention and the Courts award went too far when it made a substantive ruling.

I. Vacating the Default Judgment Due to Improper Service

It is likely that the Court will affirm the default judgment, even though AE did not serve WPP in compliance with the terms of the Hague Convention. Under the Hague Convention, a party is required to serve its Pleading on a governmental authority, and in China specifically, the document must be in Mandarin Chinese and delivery must be made on the Chinese Central Authority, See *Pennsylvania Coal* and *Edu Quest*. This is an issue of first impression for this court, meaning that this Court has never decided whether parties to an arbitration agreement must effectuate service in accordance with the Hague Convention to enforce an arbitration award. Two Courts in the Fifteenth Circuit have tackled this issue and both courts found that strict compliance with the Hague Convention is not necessary. Therefore, it is likely that the U.S. District Court for Franklin will likely find the same. If the Court follows the Columbia approach, it is likely that WPP waived the formal service requirements; however, if the Court follows the Olympia approach, the court will look at factors concerning fairness to determine if WPP was properly served. Under both approaches, it is likely that the service was sufficient and the confirmation of the arbitration agreement will stand.

A. Waiver of Service

Under the Columbia approach, it is likely that WPP waived service. The United States District Court of Columbia held that "by agreeing to arbitrate, [a party] is deemed to have waived the right it possesses to formal service." Under this approach, the arbitration agreement alone serves as evidence that the parties did not have to follow the Hague Convention in order to serve WPP. That court found that there is "deemed waiver" when a party "by agreeing to arbitrate in Columbia and participating in those proceedings, the parties to the underlying contract agreed to the provision allowing court judgments to be entered." Here, WPP entered into a supplier agreement with AE on September 21, 2014, this agreement allowed for arbitration of claims in Franklin City, Franklin, US. WPP

participated in the arbitration proceedings and on December 15, 2017, the arbitrator issued an award in favor of AE. Under the analysis provided by the U.S. District Court of Columbia, there is deemed waiver over the proceedings in the U.S. District Court of Franklin. The Columbia court held that it is unnecessary to look into the behavior or actions of the parties after the arbitration agreement when determining when non-conforming notice was proper.

It is likely that AE's notice was sufficient to enforce the default judgment. In Edu Quest, that court found that the prevailing party's service was proper. The prevailing party served the Chinese Government, in accordance with the Hague Convention, and subsequently effectuated personal delivery through international mail, return receipt requested, and service on the defaulting party's registered agent. These methods of service were sufficient to find that the defaulting party received notice; thus, that court confirmed the award. Here, AE served the Chinese government and sent the Complaint to WPP's VP on November 2, 2018. On March 8, 2019, AE mailed a Default Motion to WPP, return receipt required. On April 15, 2019, WP received the default motion. Finally, on June 14, 2019, the Court entered the Default Judgment. AE attempted to give notice of the Complaint as well as its motion for default through various means. These means were calculated to reach WPP and give WPP notice of the pending proceedings. These are similar to the means that were employed by the prevailing party in *Edu Quest*, because there was actual service of both the Complaint and the motion for default judgment on WPP, it is likely that the default judgment will be affirmed.

B. Fairness

If the Court applies the fairness standard it is likely that the default judgment will be affirmed. Under the fairness standard the U.S. District Court for Olympia held that "[w]hen parties have consent to arbitration, actual notice of the proceedings can be sufficient as long as it is fair and no injustice results." *Pennsylvania Coal*. The Court when determining

if fairness was met looked at the means in which the plaintiff attempted to serve the defaulting party, the defaulting party's actions with respect to honoring the arbitration award, and if the defaulting party actually received notice.

First, AE made numerous attempts to serve WPP. First, AE effectuated service in the means required by the Hague Convention. On or about November 2, 2018, AE attempted to effectuate service on the Chinese Government. Although, WPP never received this communication from the Chinese Government, AE followed the protocol outlined by the Hague Convention. Further, AE on November 2, 2018 sent WPP's VP a copy of the Complaint via email. Therefore, AE attempted to personally serve WPP. The Court will likely find that this method of attempting service is likely sufficient. However, WPP has an argument that this type of service was not reasonably calculated to give WPP notice. AE sent the email to WPP's VP. One week after the email was sent, WPP's VP quit and did not forward the email to anyone else at WPP. Further, under the course of AE's dealings with WPP, they did not correspond through email to WPP's VP. Rather, the two parties communicated through fax and telephone conversation. In *Pennsylvania Coal*, that court held that service through email, the same mode of communication used during the arbitration proceedings was proper. There, the court emphasized that the email correspondence was the regular means for communication between the parties and it was a means that was reasonably calculated to give the defendant notice of the pending action. Here, communication in a means that was not used prior to service of the complaint, may go to show that the complaint was not reasonably likely to put WPP on notice. However, WPP's former VP is presumably a competent individual and the service was sufficient to give WPP notice of the pending action.

Second, the actions of WPP go against the notion that this type of service was fair. When the arbitration award was granted, WPP immediately paid the $500,000 to AE. WPP has failed to deliver the royalty payments or the attorney's fee award because there was an

economic downturn and they ran into cashflow issues. Unlike the defendants in both *Pennsylvania Coal* and *Edu Quest*, WPP was not attempting to avoid paying the award. WPP was not moving assets in a way that would limit its ability to pay its obligation to AE, like the defendant in *Pennsylvania Coal*. WPP was not deliberately fail to comply with the terms of the arbitration award, like the defendant in *Edu Quest*. Rather, WPP paid the initial sum of money and is planning on paying the rest of the award when they are more financially stable. Therefore, WPP's actions after the arbitration agreement do not weigh in favor of affirming the default award.

Finally, WPP was given actual notice of both the Complaint and the Motion for Default Judgment. The Complaint was sent to WPP's VP via email, an email that the VP received. The notice of the motion for default judgment was sent via mail and reached WPP on April 15, 2019. Although, the means in which the documents were submitted to WPP were not ideal and the remaining WPP were not aware of the service, an agent on behalf of WPP, the former VP, received actual notice of the proceedings. Therefore, this factor weighs in favor of affirming the default award.

Given that WPP arbitrated the matter in Franklin and AE made reasonable efforts to place WPP on notice of the Complaint and the default judgment, it is likely that service was sufficient and the default judgment confirming the arbitration award will be affirmed.

II. Attorney's Fees

It is unlikely that the award of attorney's fees will remain in effect. The two other District Courts in the Fifteenth Circuit refused to honor the attorney fees awards imposed by the District Court. Both Courts found that the fee request constituted "new relief" and required formal government service under the Hague Convention. Further, the Olympia Court noted that the attorney's fee award is a substantive change and goes against the role of the arbitrator and the court. First, this attorney's fee award is a "new claim" and requires

service in compliance with the Hague Convention. *See Pennsylvania Coal, Edu Quest*, and Fed. R. Civ. P. 5(a)(2). The Court in *Edu Quest*, which found that the plaintiff attempted to follow the Hague Convention for its original service of process, could not receive additional award of attorney's fees. In that case, like in the case at bar, the defendant never actually received service from their government. Therefore, the Hague Convention service was defective. Second, an award of this kind goes against the role of the court in these cases. The Olympia court noted "[w]hile the FAA contemplates that arbitral parties can turn to courts to confirm the awards themselves, courts are careful to defer all substantive decisions to the arbitrators." Pennsylvania Coal. The parties agreed to an arbitration, the prevailing party cannot then get an additional award from the courts that was not affirmed by the arbitral body. Therefore, the subsequent attorney's fees award was improper. Even though the arbitration award states that the ruling did not deny or limit AE's right to recover attorney's fees, if any, that might be incurred in enforcing its rights", the amount of the award is a substantive decision that must be decided through arbitration. Therefore, the award of attorney's fees should be vacated.

It is likely that the award of attorney's fees will be vacated, however, the award confirming the arbitration agreement will likely be affirmed.

MPT 1 – SAMPLE ANSWER 2

To: Alexandra Carlton

FROM: Examinee

DATE: July 30, 2019

RE: American Electric v. Wuham Precision Parts Ltd.

In this memo I will address whether our client, Wuhan Precision Parts Ltd. (WPP) (1) will succeed in vacating default judgment due to improper service under the Federal Rules of Civil Procedure and the Hague Convention and (2) has any grounds to challenge the attorney's fee award against it. Because this is an issue of first impression in the federal district court of Franklin, persuasive authority from our neighboring districts of Olympia and Columbia addresses both issues. Based on this persuasive authority, it is unlikely that WPP will succeed in vacating the judgment, though some arguments can be made that it should be dismissed for improper service of process, but WPP has two grounds for challenging the attorney's fees award that will likely be successful.

I. Improper Service

a. Federal Rules of Civil Procedure and Hague Convention

When a court confirms an arbitration award, requiring the plaintiff to file a complaint and service on the defendant of the summons and complaint, it become a court judgment. Pennsylvania v. BTT. This results in the plaintiff benefitting from all the collection tools flowing from a court judgment. Id. Thus, the defendant is entitled to proper service of process in order

to put him or her on notice of the charges against him or her.

The Federal Rules of Civil Procedure state that service on international parties must occur in by means of service reasonably calculated to give notice, such as those authorized by the Hague Convention. See Fed R. Civ P. 4. As a Chinese corporation. WPP is subject to the Hague Convention, which is between the U.S. and China. Under the Hague Convention, when Chinese entities are involved in litigation, the serving party must translate the documents into Mandarin Chinese and deliver the documents to the Chinese Central authority, which will effectuate service through its provincial courts. Hague Convention. The Supreme Court has held that compliance with the Hague Convention is mandatory in "all cases to which it applies." Pennsylvania Coal v. BTT citing Volkswagon v. Schlunk. Parties in other jurisdictions have attempted to set aside judgments founded on improper service of process under the Hague Convention. See In re Int'l Media Services.

b. Fairness

Despite the rules of the Hague Convention, persuasive authority indicates that courts will look not just to strict compliance with the Hague Convention, but to the balancing of the expectation of the parties to an arbitration against the right of fair notice when considering entry of default judgment from an arbitration award. Pennsylvania Coal v. BTT. the Federal Arbitration Act (FAA does not resolve the issue, and thus courts have the authority to excuse defects in service of process where considerations of fairness so require. Pennsylvania v. BTT. The reasoning behind this is that a party should not be able to seek refuge in the protections of the Hague Convention after consenting to, participating in, and then losing arbitration in an American jurisdiction. Id. At the same time, judicial proceedings are fundamentally different from arbitration proceedings, and expectations need to be balanced with fair notice as well as examining the good faith of the underlying business transaction.

i. Notice

In Pennsylvania Coal Co. v. BTT, persuasive authority in a neighboring state, the court examined a confirmed arbitration award resulting from default judgment where the parties were an American corporation and a Bulgarian company subject to the Hague Convention. Here, there was a good faith attempt on the part of the American corporation to comply with the Hague Convention. Moreover, BTT clearly received notice. Under the Federal Rules of Civl Procedure, service through personal service and U.S. Mail are recognized and were done here. Moreover, even though email is not typically authorized, BTT was served via email here and that was a reliable means of delivering the complaint to BTT and reasonably calculated to give notice. BTT officials had no difficulty understanding English and were thus not unable to understand the service of process.

Given the fact that it was abundantly clear that BTT received fair notice but was apparently acting in bad faith to avoid the court's reach, the court reasoned that strict adherence not required, actual notice and fairness are standards. Ultimately, Hague Convention shouldn't roadblock those in good faith.

The facts here indicate that a court would likely find that WPP had fair notice. Similar to in Pennsylvania, the plaintiff did attempt to comply with the Hague Convention, according to the Order Entering Default Judgment. It is not the fault of the plaintiff nor contemplated by the Hague Convention that the fault of the foreign official who received the proper filing under the Hague Convention should fall on the plaintiff who, in good faith, complied with the treaty. Moreover, email was used with the summons and complaint and sent to a vice president. Similar to in Pennsylvania, this is a reliable means of communication, previously used by the parties. It is not the fault of the plaintiff that the person who receive the email did not forward it. The papers were in English, and had to be sent to translation, but similar to in Pennsylvania, the parties clearly understood English - they arbitrated the dispute in English, clearly indicating their understanding of it. AE even mailed the motion to WPP; the fact that its

delivery was delayed over six months is again not the fault of AE and should not be held against it.

There is potential for a court to find otherwise, however. The parties here did mainly use fax and telephone, not email, and it is unclear whether emailing just the VP of Manufacturing would be sufficient to be "reasonably calculated" to notify the party of the charge against the company as a whole.

ii. Good Faith

What distinguishes these, however, is the fact that WPP does not appear to be acting in bad faith, unlike BTT, who was clearly trying to escape jurisdiction of the court. Thus, a court in our jurisdiction may not find this case sufficiently related to the facts in order to apply it here as persuasive authority. In Pennsylvania, the court focused extensively on the underlying business conduct that was not in good faith. Based on our information, it seems that WPP did act in good faith, just a series of unfortunate events (the VP retiring, the Chinese government not sending the information on to them, etc.) created roadblocks to getting the information. Moreover, their inability to fully pay the award was due to economic downturn, not a bad faith attempt at avoiding the sum due. Thus, it is possible they can argue that under the fairness doctrine they are entitled to relief because it is fundamentally unfair that they did not receive actual notice due to no fault of their own, unlike BTT who clearly was trying to avoid jurisdiction. However, because the court here focused more on the attempts at service rather than the conduct of the defendant, I still think it is likely that the fairness test will be met.

c. Agreement to Arbitrate Waives Formal Hague Convention Service

Even if applying a different test from a neighboring jurisdiction, the court would still likely find that by subjecting themselves to arbitration in the jurisdiction, WPP waived formal service and thus cannot set aside the default judgment. In Eduquest v. Galaxy, a persuasive case from a neighboring jurisdiction, the court examined a similar situation where a foreign company was

in default judgment over an arbitration award entered in the District of Columbia. Because the FAA does not provide methods of service for foreign parties who are not residents of the US, the court here held that the parties' consent to arbitration in the jurisdiction agree to provisions allowing court judgments to be made. In a stricter test than the fairness standard, consent to arbitrate in a U.S. jurisdiction deemed a waiver of formal service in connection with a confirmation of an arbitration award, consenting to service by actual notice that satisfies general principles of due process and the Federal Rules of Civil Procedure rather than strict Hague Convention formalities. Eduquest v. Galaxy.

Though a Franklin court may find that this approach eviscerates Hague Convention protections, as the court in Eduquest pointed out, however, as the court noted, the plaintiff did try to comply in good faith with the requirements of the Hague Convention.

On our facts, as previously noted, the plaintiff did attempt to comply with the requirements, according to the motion entering default judgment. So long as the court finds this a good faith attempt to comply, it seems even under the Eduquest standard that the default judgment here will not be set aside. WPP agreed to arbitrate in Franklin, which under this test would waive the right it possesses to formal service under the treaty.

Under this test, the defendant's post-award conduct is irrelevant, so WPP cannot make the good faith argument they can make under the fairness test. WPP still has an argument under this test however, which is that proper service of process was still not made because they were only served via email, which is not allowed under the Federal Rules of Civil Procedure. A court will still likely find this acceptable. WPP has no offices, registered agents, or employees in the United States; it would be very hard for AE to find a way to serve WPP properly under the Federal Rules of Civil Procedure short of flying to China and personally serving an agent there, which could be unreasonable. In Eduquest, The court finds "actual notice Galaxy received was reasonable and sufficient." Since WPP regularly communicated in English and via email, this test is likely met.

II. Attorney's Fees

WPP will likely succeed in getting the $90,000 attorney's fees dismissed.

In Eduquest, the request for attorneys fees was deemed a "new claim for relief" separate and apart from the underlying arbitration award that required formal government service under the Hague Convention. Eduquest v. Galaxy, Penn v. BTT. The courts here found that a new claim must deliver on foreign authority. Moreover, in Pennsylvania v. BTT, the court focused on the differences between the arbitration panel and the court as contemplated by the contract. Where a contract allows for prevailing party to obtain attorneys fees but no judicial remedies in that regard, the party must pursue it via arbitration. Pennsylvania v. BTT. Here, on our facts, it does not appear that the plaintiff made any attempt to comply with the Hague Convention over these fees, and thus under both jurisdictions' tests, WPP should argue that this is a new claim that must be properly served in accordance with the Hague Convention. Though the supplier agreement between the AE and WPP expressly stated that the prevailing party shall recover reasonable attorney's fees incurred to enforce the terms of the agreement, it also states that any controversy or claim arising out of the agreement shall be settled by arbitration. Order Entering Default Judgment.

Moreover, Under the Federal Rules of Civil Procedure, no service is required on a party who is in default for failing to appear, but a subsequent pleading that asserts a new claim for relief against such a party must be served under Rule 4. Fed. R. Civ Pro. 5. Thus, WPP must argue this is a new claim for relief and that proper service of process is required.

III. Conclusion

Ultimately it is unclear which test Franklin will adopt, as all authority discussed above is persuasive, coming from our circuit but within other district courts. However, under either the fairness or waiver tests, it is unlikely that WPP will have the judgment set aside. Under either approach however, it is likely that the additional attorney's fees award will be dismissed.

MPT 2 – SAMPLE ANSWER 1

To: Dana Carraway

FROM: Examinee

DATE: July 30, 2019

RE: Carl Rucker

MEMORANDUM

You have asked me to discuss the advantages and disadvantages of both 1) creating a life estate for Mrs. Rucker, with remainder to Mr. Rucker's sons, and 2) contracting with Mrs. Rucker to write wills that will ensure Mr. Rucker's sons receive the house after both spouses die. Additionally, you have asked me to provide a recommendation as to which approach will better accomplish Mr. Rucker's goals of 1) ensuring Mrs. Rucker can stay in the house for the rest of her life, 2) ensuring that his sons receive the house upon Mrs. Rucker's death, and 3) minimizing the risk of litigation between the two interests.

1. Creating a Life Estate, Remainder to Sons

A life estate would accomplish Mr. Rucker's goal of ensuring that Mrs. Rucker (Sara) has the opportunity to live in the house for the rest of her life while, upon her death, his sons will receive title to the house.

Advantages

The advantages to a life state are fairly simple: Sara will be able to live in the home for as long as she lives and, upon her death, the interest of the property (the remainder) will pass

to whomever owns the remainder interest in the life estate, here, that would be the sons. The treatise on Life Estates, *Walker's Treatise on Life States*, states that "Any transferee from a life tenant can have an estate only for so long as the life tenant lives." *Walker's Treatise on Life Estates*. Additionally, "remainders may also be created in one or more persons" Walker's. Finally, "if a life estate in real property is created while the owner is alive, then upon the death of the last life tenant, the real property automatically belongs to the remainder owner, with no need for probate of the property, avoiding the costs and delays of probate."

Here, the advantages are apparent: Sara can live on the property and enjoy the property for the entirety of her life and then, upon her death, Mr. Rucker's sons will immediately receive title to the property without any probate involved. This prevents costly litigation and is rather simple to accomplish. Creating a life estate would be best served by Mr. Rucker simply executing a new deed, granting the life estate to Sara and the remainder to his sons, and then transferring the deed to the appropriate parties for recordation.

Disadvantages

There are some disadvantages to life estates, however, including that: "a deed or will can empower a life tenant to sell or mortgage the property from which the life estate is carved without the consent of the owners of the remainder interest." *Walker's*. However, barring the deed allowing such ability, all parties, life tenants and remainder owners, have to mutually consent to sell the property or secure a mortgage with the property; this "severely restricts the marketability of the property." *Walker's*. Next, the Life Tenant would also be legally responsible for real estate taxes, insurance, and maintenance costs related to the property. Finally, transferring a life estate while still alive is possible by executing a new deed to the new life tenant and remainder owners; however, doing so negates the previous owner's interest and is "almost always irreversible;" once the life estate has been created, "a change cannot occur without the consent of all life tenants and remainder owners." *Walker's*. In

terms of risk of litigation, there is still a high risk of litigation if the life estate is created by a Will rather than an inter vivos transaction; "transferring property by deed, as opposed to by will, minimizes the risk." *Walker's*.

Here, while Sara merely has a life estate, she will still be able to sell or mortgage the property if she wishes unless the deed or will conveying the interest in the property states otherwise; given that Mr. Rucker has an express interest in ensuring that his sons receive the property upon Sara's death, it would be highly advisable to include such restrictive language in the instrument used to convey the life estate. Next, while the restriction requiring all interested parties mutually agree to sell or borrow against the property creates a hindrance on marketability, this will likely not cause a concern for the Rucker's, given all involved parties appear to want to keep the house. Mr. Rucker did express concern about whether or not Sara could properly maintain the house without borrowing against the property, an act that would need to be approved by both of Mr. Rucker's sons. Finally, while it appears that the best way to create this life estate is by conveying a deed for the property, doing so will result in an almost irreversible course of events: changing the estate back to a fee simple would require the consent of all interested parties.

Additionally, in consideration of the surviving spouse's elective share," the Franklin Court of Appeal has held that "the value of the life estate should be included" in determining the value of the elective share. In re Estate of Lindsay (Fr. Ct. App. 2008). In Lindsay, the Appeals court determined that a surviving spouse, when married for 15 years or more, is entitled to a 50% elective share of the "augmented estate." Lindsay. The question was then whether or not the life estate should be included when determining the value of the "augmented estate." The court held that the "life estate should be included in the calculation of the augmented estate for determination of [surviving spouse's] elective share." In re Estate of Lindsay (Fr. Ct. App. 2008). As a result, a surviving spouse who receives a life estate, even while the decedent spouse is still living, must include the value of the life estate

in the total value of the augmented estate.

Here, because the value of the life estate is found to be $80,000, this would mean that, if Sara chooses to utilize an elective share, she will be entitled to 50% of Mr. Rucker's estate or, $140,000. $140,000 is 50% of Mr. Rucker's estate, the certificate of deposits valued at $200,000, and the life estate, which is valued at $80,000.

2. Contracted Wills with Mrs. Rucker

Mr. Rucker can also seek to create contracted wills with Mrs. Rucker to ensure that, upon his death, his interests will be carried out. Spouses may enter into "joint wills" and then seek to restrict the surviving spouse from ignoring the provisions of the joint will. There are two ways to prevent such conduct from happening and to create such a restriction: "First, the spouses may enter into a contract to make a will, one that restricts the right of the surviving spouse to alter an agreed-upon testamentary disposition." Manford v. French (Fr. Ct. App. 2011). This method still allows a surviving spouse to sell or encumber the property without breaching the contract." Manford, see also Kurtz v. Neal (Franklin Sup. Ct. 2005). Second, Spouses can enter into either joint wills or mutual wills that "reflects a contractual agreement between them." Manford. A joint will is a single will signed by two or more testators which deals with the distribution of property of each testator; mutual wills are separate wills of two or more testators which create "mirror-image" dispositions of their property. *Manford.*

Advantages

If Mr. Rucker chooses to enter into a scenario where both him and Sara contract to make either a joint will or mutual wills, Mr. Rucker will need to ensure that the contract is in writing, as required by Franklin law. Franklin law states that a contract to make a will, or not to revoke a will, must be in writing and "established only by (i) provisions of a will stating material provisions of the contract, (ii) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract, or (iii) a writing signed by the decedent

evidencing the contract." *Manford (quoting* Franklin Probate Code Sec. 2-514). Therefore, with either a joint of mutual will, the parties can expressly contract to determine how to distribute property while also binding the surviving spouse to the surviving spouse's will to distribute their property.

Here, Mr. Rucker would appreciate that the law requires contracted wills to be in writing; this requirement not only prevents oral evidence or other testimony from altering his intent, but also ensures that, because such requirements are enumerated by statute, the risk of litigation will likely be minimized. This option still allows Mr. Rucker to contract with Sara to ensure that, upon her receipt of the life estate as bequeathed Mr. Rucker's will, Sara's will does not allow her to dispose of the property in any way or to back out of the previous agreement.

Disadvantages

The disadvantages to contracted wills can be found in the first method to restrict surviving spouses from ignoring the provisions of the will of the decedent spouse: the spouses can enter into an agreement that restricts the right of the surviving spouse from altering the "agreed-upon testamentary disposition" while also still allowing the surviving spouse to "sell or encumber the property without breaching the contract." Such conduct would severely inhibit Mr. Rucker's sons' interest in the property and surely go against Mr. Rucker's intent to ensure that his sons receive the property upon the death of Sara.

Recommendation

After reviewing the case law and the facts, I believe that the best way for Mr. Rucker to effectuate his interests would be to create a life estate in both his and Sara's names with the remainder in both of his sons' names. As we saw in Lindsay, it is possible for one to create a life estate in their own and their spouses names and then leave the remainder for their children. As stated above, the best way to create the life estate is by deed and, while

conveying the life estate by deed is essentially irreversible, leaving Mr. Rucker's name on the life estate will ensure that he still retains an interest in the property as a life tenant. Next, when Mr. Rucker dies, the estate will still remain a life estate and Sara will still be able to live on the property with the remainder staying with Mr. Rucker's sons. This meets the first two of Mr. Rucker's goals: ensuring Sara has a place to live until she dies and ensuring his sons receive the house after Sara's death.

As for the third goal, minimizing the risk of litigation, this strategy ensures that the property will not need to go through probate. Upon Mr. Rucker's death, Sara retains her life estate interest in the property and later, upon her death, his sons will automatically receive the interest in the property. Additionally, by creating the life estate whilst he is still living, Mr. Rucker will be able to create a strong presumption that he intended for the property to remain a life estate for Sara even after his death; this will remove most potential causes of action.

Finally, Mr. Rucker is concerned about Sara's being able to maintain the house. Using the elective share analysis found in Lindsay and discussed above, Mr. Rucker's "augmented estate" will total to $280,000; the sum of Mr. Rucker's certificates of deposit ($200,000) and Sara's life estate ($80,000). Therefore, the creation of the life estate will result in Sara's elective share being $140,000, not the $200,000 plus Mr. Rucker intended. Sara of course will be able to avoid the elective share and simply receive what was bequeathed in the will: the certificates of deposit. This will result in Sara receiving the life estate and the $200,000 certificates of deposit.

In conclusion, this discussion details both the advantages and disadvantages of the two options with a view of achieving Mr. Rucker's goals to 1) assure that his wife can live in the house for the rest of her life, 2) assure that his sons receive the house after his wife dies, and 3) to minimize the risk of litigation. Creating a life estate for both himself and Sara, with remainder to his sons, will best achieve those goals.

MPT 2 – SAMPLE ANSWER 2

MEMORANDUM

To: Dana Carraway

From: Examinee

Date: 7/30/19

RE: Carl Rucker Estate

Introduction

This memorandum discusses the potential disposition of the property of Carl Rucker ("Carl") at his death. In particular, it considers possible methods to dispose of his house at 1513 Cherry Tree Road (the "House"). Carl plans to bequeath his other assets (CDs, totaling $200,000) to Sara. The house is worth approximately $250,000.

With regard to the House, Carl has 3 goals: 1) to assure that his wife Sara Rucker ("Sara") can live in the House for the rest of her life; 2) to assure that his sons Fred and Andrew Rucker (together, "sons") receive the House after Sara dies; and 3) to minimize the risk of litigation between them. Carl does not want to use a trust.

Discussion

A disposition that accomplishes Carl's goals can be attained either by creating a life estate in Sara, with a remainder in his sons, or by transferring the property to Sara in fee simple but contracting with her to make a transfer by will to his sons. Under each of these methods, the property transfer could occur during Carl's life (by deed) or after his death (by will).

Section A discusses this threshold determination. Section B then discusses creating a life estate for Sara with a remainder in the Sons. Section C addresses contracting with Sara to write wills that leave the house to the sons.

Based on the discussion below, I recommend that Carl transfer the house in a life estate by deed to himself and Sara jointly, with a remainder in his sons.

A. Transfer by Deed vs. by Will

i. Transfer by Deed

Whether the interest is in fee simple or a life estate, the initial transfer can be accomplished during Carl's life or at his death. A life time transfer of the real estate can be accomplished by Carl transferring the property to himself and Sara jointly. See Lindsay at 9 (discussing transfer of life estate of one spouse to both spouses). The primary advantage of a transfer by deed is that it ensures that property itself is in fact transferred. Walker's at 8. While still living, Carl could guarantee that Sara would have her interest in the property, and it her right to possess it would not be subject to probate or to a potential disposition.

Furthermore, the main potential disadvantage of a deed transfer--the potential for litigation over the estate's value--doesn't really apply in this case, for two reasons.

First, the amount of the estate is clear. Under Franklin's Probate Code, a spouse has the opportunity to take an elective share instead of the amount created by will. § 2202. Historically, lifetime gifts that created a life estate led to ambiguity about how to determine the amount of an augmented estate. But recent cases have clarified that a life estate gift to a spouse counts as part of the "augmented estate." See *In re Estate of Lindsay* (2008) (citing FPC § 2206). Thus, here, even if given during his lifetime, the amount of the life estate would be included in the augmented estate.

Second, Sara's share from the will would be greater than her elective share. Under the

accounting discussed above, the value of the augmented estate after a deed transfer would be $280,000 (the $200,000 in assets + the $80,000 in life estate). Under this proposed disposition, she stands to receive the *entire* share under the deed and will, whereas her elective share would only be half of it. Thus, in contrast to the spouse in Lindsay, who was to receive less than half of her spouse's assets, Sara would be unlikely to challenge the will. Under a fee simple transfer, the analysis is the same (she would receive all vs. half).

ii. Transfer by Will

Creation by will has two primary disadvantages, alluded to earlier. First, Sara would not receive her interest until after the will was probated. That means that the Sons could raise any number of defenses, such as challenging Carl's capacity, etc. It would also mean any of Carl's debts would have to be resolved first (note that Carl has not referred to any currently-existing debts), which means she could potentially lose the house, if he were to fall into debt. Even if not, the probate process would have to be completed before she received her interest.

Second, even if she was entitled to receive the interest, there is a risk that "the court could award the monetary value of the life estate . . . instead of possession of the property." *Walker's* at 8. Even if this risk is remote, as it would cut against Carl's expressly stated intent, the possibility remains and should be considered.

B. Life Estate in Sara with a Remainder in Sons

A life estate is an "interest created in a person currently entitled to possession for that person's life." *Walker's Treatise on Life Estates at 7*. Creating a life estate would give Sara a full right of use and possession of the property, including a sale or transfer of it, for the period of her life. Immediately on her death, the property would transfer to the sons. A life estate can be created during Carl's life by transfer of deed, or it could be created at his death, according to his will. Both approaches are considered below. Based on Sara's age,

the estimated value of her life estate is $80,000.

One disadvantage of a life estate, whether by deed or by will, is that, by giving the Sons a remainder interest in the property, they would have standing to bring a challenge to Sara's possession of the property on the basis of waste. If Sara failed to maintain the premises, or failed to pay the taxes, or even tried to alter the house, she might be subject to litigation from the sons.

C. Fee Simple Estate for Sara and Contract for a Will

The other alternative is to give Sara a complete interest in the property (again, whether by will or by deed), and then make a binding contract with her. Again, the transfer could be accomplished by a deed or by a will. The enforceability of the contract is discussed below, followed by a consideration of each method of transfer.

In general, a contract to make a will, or a contract not to revoke a will must be in writing. *Manford v. French (2011)* at 12 (citing FPC § 2514). In particular, according to § 2514, such a contract can be established by one of the following: "i) provision of a will stating material provisions of the contract; ii) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract, or a writing signed by the decedent evidencing the contract." Simply creating a "joint will" is not enough if the will does not reference the contract. *Manford* at 12-13. Thus, Carl would need to establish a signed, written contract. He would also do well to reference that contract in his own will to ensure that the Sons could enforce the contract as against Sara's estate.

The benefit of a total transfer to Sara is that the sons would not have a property interest in the house, and so could not sue her for waste.

The flipside, and major disadvantage of this approach, is that, even if the contract were enforceable, the sons could still lose the house, if Sara made a lifetime transfer. The

contract is not enforceable against third parties, and Sara's will wouldn't speak until she died. Thus, while Sara lives, the sons have no property interest in the house, and are not parties to the contract. If they were deemed intended beneficiaries of the contract, they may be able to sue to enforce it. However, if they failed to do so, and Sara successfully transferred the house, e.g. to the charity, they would have no recourse against the third party. Their specific devise would be adeemed in her will, and they would receive nothing. This is a major disadvantage.

Conclusion

Carl's best option is probably to transfer the house in a life estate by deed to himself and Sara jointly, with a remainder in his sons. While this gives rise to the potential for litigation over waste, it minimizes risk of litigation during the probate process and provides the strongest guarantee that each party will possess the House in accordance with Carl's wishes.

MPT 2 – SAMPLE ANSWER 3

TO: DANA CARRAWAY

FROM: EXAMINEE

RE: CARL RUCKER – DISPOSITION OF PROPERTY

DATE: JULY 30, 2019

You asked me to analyze two possible approaches for the disposition of property of our client, Carl Rucker, such that his affairs are arranged to comply with his wishes that after his death, his current wife can remain in the house until her death, after which it would pass to his sons from a previous marriage. Mr. Rucker further seeks to minimize the risk of litigation between his current wife and his sons. This memo thus considers whether (1) Mr. Rucker should create a life estate in the house for his wife, Mrs. Rucker, with remainder to his sons, or (2) contract with his wife to write wills that leave the house to his sons after both he and Mrs. Rucker have passed. As you have requested, this memo does not address the possibility of a trust.

SHORT ANSWER

(1) Making a lifetime transfer of a life estate to Mrs. Rucker, with his two sons as remaindermen, is an attractive option for Mr. Rucker. Such a transfer would allow his wife to live in the home as a typical fee simple property owner would, and any property-related payments could likely be made with the bequeathed Certificates of Deposit. Further, because the transfer is immediate, there is a lower risk of litigation and lower cost as

compared to distribution via will. However, such a transfer would reduce Mrs. Rucker's elective share by the value of her life estate. To avoid reduction issues, Mr. Rucker could potentially make the inter vivos transfer and then bequeath his Certificates of Deposit to Mrs. Rucker outright, reducing her likelihood of choosing to take the elective share.

(2) Making a contract with Mrs. Rucker to make wills is another option for Mr. Rucker that has some benefits which are perhaps outweighed by its drawbacks. Although a separate, written contract is enforceable, Mrs. Rucker may be unenthusiastic about affirmatively making her own will leaving the family home to Mr. Rucker's sons. Additionally, moving the property through probate twice—once upon the death of Mr. Rucker, once upon the death of Mrs. Rucker—increases the cost and risk of litigation for all parties involved. Such litigation undermines Mr. Rucker's stated intentions.

ANALYSIS

(1) First, Mr. Rucker may elect to create a life estate in the house for Mrs. Rucker with his two sons as remaindermen. Because Mr. Rucker is currently the only named person on the deed, he can make such a transfer without Mrs. Rucker's consent, in the event that the two perhaps disagree on the precise approach to take with the property. Walker's Treatise on Life Estates. Granting his wife a life estate has many advantages that suit Mr. Rucker's stated wishes. First, a life tenant has the absolute and exclusive right to use the property during their lifetime. Id. Perhaps because they have full possession of the property during their lifetime, life tenants are solely responsible for real estate taxes, insurance, and maintenance costs while they are alive. *Id*. The life tenant can further mortgage or sell her interest in the property without the consent of the remaindermen. *Id*. Indeed, the remaindermen have no right to use the property nor generate income from the property during the life tenant's tenure*. Id*. These features of the life estate help accomplish Mr. Rucker's goals of ensuring his wife can remain in the home during her lifetime and reducing the risk of litigation between her and his sons, as his sons would have no legal say in

whether Mrs. Rucker chooses to dispense with the property. The fact that Mrs. Rucker would have to pay certain home-related costs does not undercut Mr. Rucker's intentions, as payment of such taxes and fees comes with any ownership of property. Further, although Mrs. Rucker does not have income on her own, Mr. Rucker indicated that he would leave valuable Certificates of Deposit to her after his death which would allow her to comfortably pay for such costs.

Choosing to transfer the property via a lifetime deed also avoids the primary drawbacks of transferring the property via will. If the property is transferred through Mr. Rucker's will, the parties may litigate. In such an event, the court could award the monetary value of the life estate rather than actual possession of the property. *Id.* Such a decision would eviscerate Mr. Rucker's purposes of the transfer—that his wife can remain in the home and to minimize litigation between her and her sons. Further, choosing to transfer through a deed avoids the costs and delays of probate. *Id.*

However, transferring the property through deed is not without its drawbacks. First, Mr. Rucker's sons would have a cause of action against Mrs. Rucker in the event they believed she was committing any waste on the property that would decrease the value of their future interest. Because of the unsavory relationship between his sons and wife, his sons may choose to bring such actions as frequently as possible, interfering with her enjoyment and undermining Mr. Rucker's goal to minimize litigation. Further, any sale or mortgage of the home requires the mutual consent of the life tenant and remaindermen. *Id.* Note that Mrs. Rucker, because of her lack of independent income, might seek to mortgage the property to borrow money secured by its full value. If Mrs. Rucker sought to dispose of or encumber the entire property (as opposed to Mrs. Rucker selling her interest alone), an agreement between all parties would be exceedingly difficult to achieve.

Crucially important to consider is the impact a life estate would have on Mrs. Rucker's elective share upon Mr. Rucker's death. Franklin law requires that a surviving spouse can

claim a percentage elective share of the "augmented estate" or alternatively what was bequeathed in the decedent's will. Franklin Probate Code § 2202; *In re Lindsay* (Franklin Ct. App. 2008). For spouses who have been married for at least 15 years—like Mr. and Mrs. Rucker—that elective share is 50% of the augmented estate. In Franklin, courts have recently held that the value of the granted life estate, if transferred during the decedent's life, should be included in calculating the elective share of the surviving spouse. Walker's Treatise; see also *Lindsay* (affirming an *inter vivos* life estate transfer should count towards the calculation of the surviving spouse's elective share). Thus, an *inter vivos* transfer of a life estate to Mrs. Rucker would reduce her elective share recovery by the value of her life estate, i.e., $80,000.

As it stands, Mr. Rucker's augmented estate would likely be worth about $450,000, per the categories of estate assets as listed in Franklin Probate Code §§ 2204 through 2207: his home is worth $250,000, and his Certificates of Deposit are worth $200,000.[1]1 The unaltered, 50% elective share would thus be worth $225,000. However, if Mrs. Rucker had been given a life estate during Mr. Rucker's lifetime, her elective share would be reduced by its value, and thus would be worth only $145,000.

However, this reduction would be irrelevant if Mrs. Rucker chose to take what was bequeathed to her under Mr. Rucker's will instead of the elective share. To avoid any reduction issues, Mr. Rucker could make the *inter vivos* life estate transfer and subsequently bequeath the entirety of his Certificates of Deposit to Mrs. Rucker, as he has indicated he intends to do. That way, Mrs. Rucker would not be inclined to choose the (now-reduced) elective share.

(2) Another option for Mr. Rucker is to enter into a contract with Mrs. Rucker to make a will that restricts the surviving spouse's right to alter an agreed-upon testamentary disposition.

---

[1] We currently do not have substantial information on any bank accounts or other assets which may alter this amount.

The agreed-upon will would, under the contract terms, have to remain the same, although the surviving spouse would be able to sell or encumber the property without breaching that contract. *Manford v. French* (Franklin Ct. App. 2011) (citing *Kurtz v. Neal* (Franklin Sup. Ct. 2005)). Thus, Mr. Rucker could contract with Mrs. Rucker: Mr. Rucker would make a will giving Mrs. Rucker the home after Mr. Rucker's death; in return, Mrs. Rucker would make a will giving Mr. Rucker's sons the home after her death. Provided that the contract was in writing, per Franklin Probate Code § 2514, it would be enforceable. *Manford.* Note that simply drafting joint wills alone is not enough to prove that a restrictive contract to make wills was entered into. Id.; see also Franklin Probate Code § 2515 ("The execution of a joint will or of mutual wills does not create a presumption of a contract not to revoke the will or wills."), § 2514(ii) (requiring "extrinsic evidence proving the terms of the contract").

However, as mentioned *supra*, there are drawbacks to transferring property via a will. The parties to a will could seek to litigate, and a court may choose to award the value of the life estate—in this case, $80,000—instead of full possession of the home. Walker's Treatise. Further, probate of wills—which in this case, would have to occur twice—is both time consuming and expensive. Franklin courts have also held that the breach of a contract to make or not revoke a will can result in either specific performance *or* money damages, indicating that specific performance, which would protect the ownership rights of both Mrs. Rucker and Mr. Rucker's sons, is not always available. Further, Mrs. Rucker may balk at the prospect of writing Mr. Rucker's sons into her will, especially after Mr. Rucker's death. To further reduce the risk of litigation or animosity between his family, then, this option is probably not best for Mr. Rucker.

CONCLUSION

Mr. Rucker can achieve his stated objectives through either an *inter vivos* life estate transfer or a contract to make wills. In order to reduce litigation and most likely meet his goals, Mr. Rucker should probably transfer a life estate to his wife during his lifetime with a remainder

to his sons. Further, Mr. Rucker's will should unequivocally bequeath his Certificates of Deposit to his wife to avoid issues with the reduction of her elective share.