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MPT 1
July 2019

American Electric v. Wuhan Precision Parts **(July 2019, MPT-1)** In this performance test, the client, Wuhan Precision Parts (WPP), is a Chinese corporation that manufactures gear motors for dishwashers. WPP wants to know its likelihood of success in vacating a default judgment entered against it by the Unites States District Court for the District of Franklin. The default judgment arises from an earlier arbitration between WPP and American Electric (AE). Although WPP agreed to arbitrate its contract dispute with AE in Franklin, it now seeks to vacate the default judgment that (1) confirms the arbitration panel's award of damages to AE and (2) awards additional attorney's fees to AE related to the federal court proceeding. WPP's hopes turn on the effect, if any, of improper service under the Hague Convention and the Federal Rules of Civil Procedure when the resulting default judgment arises from an arbitration proceeding and award. The File contains the instructional memorandum, an email from a WPP executive, and the court order entering the default judgment. The Library contains excerpts from Rules 4 and 5 of the Federal Rules of Civil Procedure and cases from two neighboring jurisdictions, Olympia and Columbia, which discuss alternative approaches to deciding when strict compliance with the Hague Convention Rules of Service will be excused by the courts.

To: Alexandra Carlton

From: Examinee

Date: July 31, 2019

Re: American Electric v. Wuhan Precision Parts Ltd.

Memorandum

Our client, Wuhan Precision Parts Ltd. (WPP) a Chinese manufacturing company, is seeking help in vacating a federal default judgment entered by the US District Court for the District of Franklin. WPP operates in Wuhan, an industrial city and a principal transportation hub in central China. WPP does not have offices, registered agents, or employees in the United States. WPP manufactures gear motors for dishwashers designed and assembled by American Electric (AE), a Franklin corporation, for subsequent sale by U.S. Clean Corporation (USCC).

In 2014, WPP and AE entered into a supplier agreement, whereby they agreed to arbitrate any dispute in Franklin. The parties entered into arbitration in 2017, where the arbitrators decided that WPP owed $500,000 for shipping non-confirming motors and $25,000 for unpaid royalties. The arbitrators also ordered WPP to pay AE's attorney's fees in the amount of $110,000. Due to WPP's failure to pay the award, a U.S. court has entered a default judgment on June 14, 2019. The award includes an additional $90,000 in attorney's fees. WPP would like to know 1) whether the default judgment may be vacated and 2) whether they can challenge the additional attorney's fees.

Vacating the Default Judgment

The Federal Arbitration Act governs the service of petitions to confirm arbitration awards. However, the statute does not provide a method of service for a foreign party who is not a resident of any district in the United States. The Courts look to guidance from the Federal Rules of Civil Procedure and the Hague Convention for methods of service of a foreign party. Here, WPP is a Chinese foreign party, subject to the FRCP and the Hague Convention service rules. Under FRCP 4(f)(1), "Unless federal law provides otherwise, an individual . . . may be served at a place not within any judicial district of the United States by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents." FRCP 4(h)(2) states "Unless federal law provides otherwise or

the defendant's waiver has been filed, a domestic or foreign corporation . . . must be served . . . at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal service." Both China and the United States are parties to the Hague Convention and therefore, this case will be governed by the methods set forth in the Hague Convention. When Chinese entities are involved, the Hague Convention 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. If a party was never properly served, subsequent judgments founded upon that improper service are void and must be vacated (In re Int'l Media Serivces Inc.).

Here, AE failed to follow the methods set forth in the Hague Convention for Chinese entities. As stated above, the Hague Convention requires that the serving party translate the documents into Mandarin Chinese and deliver the documents to the Chinese Central Authority. AE served its original complaint seeking to confirm the arbitration award by email to the Vice President of Manufacturing for WPP on November 2, 2018. AE served its motion for default judgment on WPP by mail on March 8, 2019. AE attempted to serve the summons and complaint through Chinese government channels, but WPP did not receive anything from the Chinese government. WPP did not receive AE's motion for default judgment until April 15, 2019 (though AE will argue that these delays were due to the Wuhan government post office delaying delivery rather than the fault of AE). These documents were in English, rather than Mandarin as specified in the Hague Convention. WPP was forced to send the documents to their in-house translation department who did not complete their translation until the default judgment had already been entered. WPP can argue that AE failed to follow the directions of the Hague Convention for Chinese entities and therefore service was improper.

However, Courts in the neighboring districts of Olympia and Columbia have given greater leeway to parties serving foreign corporations. For example, the Olympia court has held that entry into an agreement to arbitrate in a particular jurisdiction constitutes consent to personal jurisdiction and to venue. (Auto Dealers Ass'n v. Pearson). However, this is an issue entirely separate from whether consent to arbitrate also relaxes the service of process requirements of the Hague Convention. (Penn. Coal Co. v. Bulgaria Trading & Transport Co., Ltd.) The Olympia court has recognized that judicial proceedings are different form arbitration proceedings and that the expectation of parties to an arbitration must be balanced against the right of fair notice. And while compliance with the Hague Convention is "mandatory in all cases to which it applies" (Volswagonwerk AG v. Schlunk), the Hague

Convention is not designed to be a roadblock to those who act in good faith. Instead, the Olympia court turned to principles of fairness, holding that, where parties have consented to arbitration, actual notice of the proceedings can be sufficient as long as it is fair and no injustice results. (Penn. Coal Co. v. Bulgaria Trading & Transport Co., Ltd.) The focus of this approach is on the good faith of the underlying business conduct and the reasonableness of the notice.

The Olympia Court then applied the fairness approach in Penn. Coal Co. v. Bulgaria Trading & Transport Co., Ltd. In that case, Penn Coal contracted with a trading company, BTT, headquartered in Sofia, Bulgaria. The parties agreed to arbitration of all disputes in Olympia. Penn Coal attempted formal Hague Convention service by delivering its pleadings to the appropriate Bulgarian governmental authority, but all subsequent governmental efforts to serve BTT were unsuccessful. Penn Coal then personally served BTT and arranged for delivery through government postal channels, and emailed a copy of the complaint to the BTT executive who entered into the contract. The Olympia court found that service via email was a reliable means of delivering the complaint to BTT and was reasonably calculated to give BTT actual notice. Further, the Court noted that the manner in which BTT conducted its business, moving assets that could have satisfied the arbitration award and claiming that Penn Coal's equipment was defective, was highly relevant and must be considered. Finally, the Court commented that BTT had no difficulty comprehending the English-language documents arising from the arbitration. The Court concluded that the actual notice was fair and affirmed its earlier judgment confirming the arbitration award.

Here, WPP would likely not succeed if the Franklin Court applies the fairness approach set out in Olympia. AE attempted in good faith to serve WPP by emailing the Vice President of Manufacturing who had been WPP's designated point of contact during the arbitration. WPP may argue that the Vice President quit on November 9, 2018 and failed to forward the email or notify anyone about it. However, the court will not likely find that argument convincing. WPP could also argue that they usually communicate via fax and phone, but all of the arbitration discussions were conducted via email. Finally, the documents were served in English in good faith. All of the arbitrations were conducted in English and the contract was in English. The lower court found that WPP regularly conducted its international business in English, including the arbitration proceedings at issue. Overall, if the Court follows the Olympia fairness approach, the court will likely find that AE's attempts to serve were in good faith and will enforce the judgment.

Further, while the neighboring District of Columbia uses a different approach, WPP is still

unlikely to succeed under their approach. In EduQuest Digital Corp. v. Galaxy Productions Inc., the Court found that the Penn Coal test was too loose to serve as a guide as to when courts can excuse noncompliance with the Hague Convention and FRCP Rule 4 when confirming arbitration awards. Rather, the court found that the better rationale was that, 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. That participation served as a "deemed waiver" of formal Hague Convention service in connection with confirmation of an arbitration award. The Columbia Court read the parties' contract as consenting to service by actual notice that satisfied the general principles of due process and the FRCP, rather than the strict formality of the Hague Convention, where the arbitration takes place in the jurisdiction contemplated in the parties' agreement.

In that case, a Chinese company entered into a licensing contract that called for arbitration in the District of Columbia. The contract provided that any prevailing party was entitled to attorney's fees and stated that judgment upon the award rendered by the arbitration panel may be entered by any court having jurisdiction. EduQuest initiated formal service following the Hague Convention and the FRCP. However, after hearing nothing from the Chinese government, EduQuest opted to serve via personal delivery upon Galaxy and by international mail. The Court then found that, by agreeing to arbitrate, Galaxy was deemed to have waived the right it possessed to formal service and that the actual notice Galaxy received was reasonable and sufficient. Here, WPP is a similarly situated Chinese entity challenging a default judgment. Like in that case, the parties did not hear anything from the Chinese government and initiated service by alternative methods. The court will likely find that WPP consented to arbitration in Franklin and is thereby deemed to have waived formal Hague Convention service, and enforce the default judgment. AE's efforts to mail and email the Vice President of WPP would be both reasonable and sufficient to support a default judgment.

Overall, under either Olympia's fairness approach or Columbia's deemed waiver approach, AE's efforts to serve WPP will likely be found sufficient to support a default judgment. Therefore, WPP will not likely be successful in vacating the default judgment.

Challenging the Attorney's Fee Award

The District of Olympia addressed the issue of attorney’s fees in Penn. Coal Co. v. Bulgaria Trading & Transport Co., Ltd. There, the Court found that the attorney’s fees had not been included in the summons and complaint. Thus, the request for fees for litigating

before the court constituted a "new claim for relief" requiring service that complies with the Federal Rules of Civil Procedure and the Hague Convention. Federal Rules of Civil Procedure Rule 5(a)(2) states that, if a party fails to appear, "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 on that party under Rule 4." Under the Hague Convention, the party raising a new claim must deliver a copy of that claim to the foreign governing authority, which will then deliver it in accordance with local judicial process. Thus, the Olympia Court found that Penn Coal, in failing to follow those procedures, was not entitled to attorney's fees. The Columbia Court then agreed with the reasoning of the District of Olympia as to attorney's fees, finding that the fee request is a "new claim for relief" and Rule 5(a)(2) requires formal government service under the Hague Convention. The Columbia Court denied EduQuest's motion for an award of attorney's fees. (EduQuest Digital Corp. v. Galaxy Productions Inc.)

The Olympia Court also found a second and independent ground for denying attorney's fees, centered on the role of the arbitration panel versus that of the court. The Court stated that, while 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. The Olympia court found that the contract between the parties allowing the prevailing party to obtain attorney's fees but containing no mention of judicial remedies required that the parties return to arbitration. Penn Coal could not request attorney's fees that were not previously raised with the arbitrators and the court denied the request. Here, the Franklin Court issued attorney's fees, a substantive issue, without submitting it to further arbitration. Thus, WPP will likely win a challenge to the attorney's fees under this approach.

Here, WPP will likely win on the attorney's fees issue. The attorney's fees were not mentioned in the original petition and therefore constitute a new claim for relief requiring service that complies with the FRCP and the Hague Convention. In addition, under the Olympia Court standard, the Franklin Court may find that this issue is properly suited for further arbitration, rather than a decision by the courts.

Conclusion

WPP will likely not be able to vacate the default judgment. Franklin law has not yet addressed the issue of service of a foreign entity under the Hague Convention. If the Franklin Court strictly follows the provisions of the Hague Convention and the FRCP, WPP will be able to vacate the judgment for improper service. Yet it is more likely that the court will

employ one of the approaches set forth in the neighboring districts of Olympia or Columbia. Under either the fairness or the deemed waiver approach, the Franklin Court will likely find that AE's attempts to conform with the Hague Convention and good faith efforts to serve WPP will be sufficient. However, WPP will have a good chance in challenging the attorney's fees. Both Olympia and Columbia courts agree that attorney's fees constitute a new claim for relief, which must comply with proper service under the Hague Convention. Thus, WPP will likely win on the attorney's fees issue.

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MPT 2
July 2019

Estate of Carl Rucker **(July 2019, MPT-2)** This performance test requires examinees to evaluate two estate planning approaches that the client, Carl Rucker, could take regarding his main asset—his house. Rucker's dilemma is that while he is certain that he wants his wife, Sara, to be able to continue living in the house after his death, she does not get along with his two sons from his first marriage, and Rucker wants his sons to eventually inherit the house. In addition to identifying the advantages and disadvantages of the two possible approaches (a life estate or a contract to make a will (or not to revoke a will)), examinees are to make a recommendation about which approach will better serve Rucker's goals—to ensure that the house ultimately belongs to his sons and to minimize the risk of litigation over the estate. The File contains the instructional memorandum, a transcript of the client interview, and an appraisal for the house. The Library contains excerpts from *Walker's Treatise on Life Estates* and two cases from the Franklin Court of Appeal: *In re Estate of Lindsay,* addressing the impact of a life estate on the calculation of a spouse's elective share, and *Manford v. French,* discussing the requirements for creating a valid contract to make a will (or not to revoke a will).

TO: Dana Carraway

FROM: Examinee

DATE: 30 July 2019

RE: Carl Rucker

ISSUES

I. What are the advantages and disadvantages of a testator creating a life estate for a spouse leaving a remainder to the testator's children?

II. If a life estate is implemented, how will the life estate be treated in the testator's estate for purposes of calculating the elective share?

III. What are the advantages and disadvantages of a testator contracting with a spouse to write wills leaving the property to the testator's children?

IV. Between these two options, which option will best achieve the testator's stated goals of providing for his surviving spouse, passing the property to his children, and minimizing the risk of litigation between the parties?

SHORT ANSWERS

A. Creating a life estate for a spouse while leaving a remainder interest to children ensures certainty of achieving goals, but compromises flexibility and autonomy with regard to the testator's lifetime disposition of the property.

B. The life estate will be included when calculating the elective share of the surviving spouse.

C. Creating a contract to make a will and/or contract not to revoke a will granting life tenancy of a property to a surviving spouse and then providing for a remainder interest to others achieves simplicity of administration during the lifetime of the life tenant, but poses a significant risk of breach of contract and resulting litigation.

D. Under these facts, the testator should transfer a remainder interest in the property to his

sons while reserving a life estate for his spouse through a current execution and recording of a deed providing for this disposition.

FACTS

Carl Rucker ("Carl") has two children, Fred and Andrew, by his first wife. Subsequently, eighteen years ago, Carl remarried to Ms. Sara Rucker ("Sara"). Carl's stated estate planning goals are (1) to assure that Sara can live in the home for her lifetime, (2) to eventually pass ownership of the family home to his sons, Fred and Andrew, after Sara dies, and (3) to minimize the risk of litigation between Sara, Fred, and Andrew. Carl has concerns that Fred, Andrew, and Sara do not get along and would engage in disputes over the estate and home if he does not implement the proper estate planning solution, and Carl does not foresee that Sara, Fred, and Andrew will be able to resolve their differences.

Carl's estate includes his home, with a current fair market value of $250,000, which he owns in his name alone. If Sara were to receive a life estate in Carl's home, the present value of such a life estate would be $80,000. (Both of these figures have been calculated by a certified residential appraiser.) Carl's other assets consist of several long-term certificates of deposit, worth $200,000. Carl intends to devise the long-term certificates of deposit to Sara at his death to provide for unexpected repairs or emergencies. Sara's only other source of income in the event of Carl's death, on these facts, would come from Social Security.

ANALYSIS

A. Creating a life estate for a spouse while leaving a remainder interest to children ensures certainty of achieving goals, but compromises flexibility and autonomy with regard to the testator's lifetime disposition of the property.

A life estate is created where the owner of real property creates a property interest in another person for that person's life; such person is referred to as a "life tenant." See Walker's Treatise on Life Estates. The creator of the life estate will often designate a person to receive the property after the life estate terminates; such property right is deemed a "remainder." Id. A life tenant has an absolute and exclusive right to use the property during his or her lifetime and is responsible for real estate taxes, insurance, and maintenance

costs related to the property. Id. While a life tenant has a right to sell or transfer the life estate interest, the transferee's rights would terminate upon the death of the life tenant, and the property would designate pursuant to the remainder created by the original owner. See id. Life estates can be created during the lifetime of the owner by deed, or can be created in the owner's will. See id. Litigation risks do exist when creating a life estate by will, because the possibility also exists that the court could transfer the monetary value of the life estate in the home rather than the right to posses the home itself, thus defeating the testator's intentions. Id. Creating a life estate by deed, rather than by will, somewhat alleviates these risks.

Carl's stated goal is to allow Sara to live in the house for her lifetime. Upon her death, the property should then pass to his two sons. Since a life estate creates a property interest in one party for that person's lifetime and provides that the property can then descend to a different party at the death of the life tenant, creating a remainder interest in Carl's sons while granting a life estate to Sara would achieve Carl's estate planning goals.

The means of creating the life estate is also relevant. Creating a life estate in a will poses a risk of litigation, and since the court could elect to give Sara the value of the life estate rather than the possession of the property itself, that would defeat Carl's stated intention of allowing Sara to live in the home during her lifetime, which he desires to do because she loves living there. As such, while creating a life estate through Carl's will could achieve Carl's goals, the risks posed by doing so likely outweigh the benefits of employing this option. In contrast, Carl could provide for the property during his lifetime by executing and recording a deed that created a life estate in the property for Sara that would vest upon his death, and then create a remainder interest in his two sons that would vest upon Sara's death. Employing this method would achieve his goals without posing the risks that are present when creating a life estate by will.

However, "the decision to transfer the property to a life estate is almost always irreversible" and "[i]f the owner changes his or her mind, a change cannot occur without the consent of all life tenants and remainder owners." See Walker's Treatise on Life Estates. Employing this method and making an inter vivos disposition of the property could constrict Carl's freedom to remove the life estate in the future. Furthermore, Sara would be responsible for real estate taxes, insurance, and maintenance costs during her lifetime. Finally, "all owners, including remainder owners, must agree to sign a deed to sell the property in fee or to sign a mortgage secured by the full value of the property," posing a risk of dispute in this instance. Id.

B. The life estate will be included when calculating the elective share of the surviving spouse.

Notwithstanding any estate planning documents to the contrary, a surviving spouse is entitled to claim 50% of the "augmented estate" of a deceased spouse under Franklin law. See In re Estate of Lindsay (Franklin Ct. App. 2008), see also Franklin Probate Code § 2-202. The augmented estate includes (1) net assets held in the probate estate, (2) the assets transferred by the decedent to the decedent's spouse prior to death, and (3) the surviving spouse's own assets and pre-death transfers. See Lindsay, supra; see also Franklin Probate Code § 2-204, 2-206, and 2-207. The present value of a life estate should be included in the calculation of the augmented estate for purposes of calculating the elective share. See Lindsay, supra.

As Lindsay shows, the value of the life estate (worth $80,000) given to Sara will be included in the calculations when determining her elective share. Under these calculations, Carl's estate would consist of his long-term certificates of deposit (worth $200,000, which are probate assets) and the value of the life estate ($80,000) for a total augmented estate of $280,000. Since no information is given on Sara's assets, the assumption is that she has no assets of her own. The value of Sara's life estate is $80,000, and Carl already proposes to devise the $200,000 of certificates of deposit to Sara. As such, Sara will be receiving $280,000 in value from Carl's estate. Under the elective share, Sara would be entitled to one-half the value of the augmented estate, or only $140,000. The elective share will likely not be an issue given Carl's current estate planning goals, since Sara is receiving more than she is entitled to if she chose the elective share.

C. Creating a contract to make a will and/or contract not to revoke a will granting life tenancy of a property to a surviving spouse and then providing for a remainder interest to others achieves simplicity of administration during the lifetime of the life tenant, but poses a significant risk of breach of contract and requisite litigation.

Generally, "an individual who receives an unrestricted bequest under a will has complete freedom to dispose of the property he or she receives" through sale, mortgage or devise. See Manford v. French (Franklin Ct. App. 2011). Spouses who seek to restrict the other spouse's ability to transfer property can do so through two different methods applicable here (since the client does not wish to employ a trust at this time). The first method is to create a contract to make a will that requires the surviving spouse not to change the terms of an

agreed-upon will. Id. This method does not prevent the surviving spouse from transferring, mortgaging, or selling the property during his or her lifetime. Id. However, a contract not to revoke a will achieves the goal of preventing the surviving spouse from selling or otherwise encumbering the property. The second method is to employ a joint or mutual will reflecting a contractual commitment between the two spouses; a joint will is one will signed by two or more testators while mutual wills make mirror-like descriptions of each other's property. Id. Any contract to make a will or contract not to revoke a will must be in writing or be evidenced by a writing, and the will must specifically refer to such a contract or restate material provisions of the contract. Id. The mere fact of drafting a joint will does not provide a presumption of contract not to revoke the will or wills. Id.

Utilizing this method, Carl could transfer ownership of the property to both Sara and himself during his lifetime and then could enter into a joint will with Sara devising the property at Sara's death to the two sons, combined with a contract not to revoke a will. Carl could also transfer ownership of the property to Sara and himself during his lifetime and then enter into a contract with Sara to make mutual wills, combined with a contract not to revoke such mutual wills. In order to prevent Sara from selling or encumbering the property during her lifetime, Carl must ensure that his estate planning utilizing this option also includes a valid contract not to revoke the will. Specifically, in order for this method to work most efficiently and without undue confusion, it is paramount that Carl and Sara also complete this contract (whether to make and not revoke mutual wills, or not to revoke the joint will) with all the proper formalities and then either expressly reference the contract the will or restate material portions of the contract in their will.

The advantage of utilizing this option is that it would likely preempt legal conflict between Sara, Fred, and Andrew during Sara's lifetime, since Sara would be the only owner of the property (bound, of course, by the contract). The chief disadvantage is that Carl will ultimately not be able to guarantee that his estate planning goals will be achieved without incurring a significant risk of legal action. Sara could breach the contract and devise the property (to her favorite charity, or otherwise) in breach of the contract, meaning that Carl's estate planning goals would not be achieved without litigation. While specific performance and/or money damages would be available to Fred and Andrew in this instance, enforcement of their rights under the contract would require litigation, which by necessity places the resolution of the issue in the hands of a judge or jury with all of the uncertainty that that can entail.

D. Under these facts, the testator should transfer a remainder interest in the property to his

sons while reserving a life estate for his spouse through a current execution and recording of a deed providing for this disposition.

Based on the foregoing law and discussion, it is likely that Carl's best option would be to transfer a remainder interest in the property to his sons during his lifetime by deed, creating a life estate in Sara. Carl's goals are to assure that Sara can live in the house during her lifetime and to assure that his sons receive the house after she dies. The best way for a testator or testatrix to ensure that his goals are achieved, generally, is to provide for those goals, to the extent possible, during his or her life. Based on these facts, Carl does not appear to be concerned with restricting his own ability to transfer or encumber the property, but pursuant to his love for the property, his sons' love for the property, and Sara's love for the property, wants to be sure that all parties will receive the benefit of the home. As a result, Carl should transfer a remainder interest in the property to his sons during his lifetime by deed, granting a life estate to Sara.

CONCLUSION

In conclusion, Carl could create a life estate by will, create a life estate by deed, enter into a contract with Sara to make mutual wills disposing of the property according to his goals and a covenant not to revoke those wills, or to create a joint will with Sara and enter into a covenant not to revoke the joint will. Given that Carl does not appear to be concerned with his ability to be sole decision maker with regard to the property, and appears to be primarily concerned with his family's ability to enjoy the home, providing for the home through a deed executed during his lifetime appears to be the best option under these facts.

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MEE 1 – Decedents' Estates / Conflict of Laws

Testator's handwritten and signed will provided, in its entirety,

> *I am extremely afraid of flying, but I have to fly to City for an urgent engagement. Given that I might die on the trip to City, I write to convey my wish that my entire estate be distributed, in equal shares, to my son John and his delightful wife of many years if anything should happen to me.*
> *January 4, 2010*
> *Testator*

When Testator wrote the will, he was domiciled in State A, and his son John was married to Martha, whom he had married in 2003. Testator had known Martha and her parents for many years, and Testator had introduced Martha to John. At the time John and Martha married, Martha was a widow with two children, ages five and six. Following their wedding, John and Martha raised Martha's children together, although John never adopted them.

Two years ago, Martha was killed in an automobile accident.

Six months ago, John married Nancy.

Four months ago, Testator died while domiciled in State B. All of his assets were in State B. The handwritten will of January 4, 2010, was found in Testator's bedside table. Testator was survived by his sons, John and Robert, and John's wife Nancy. Testator was also survived by Martha's two children, who have continued to live in John's home since Martha's death.

State A does not recognize holographic wills. State B, on the other hand, recognizes "wills in a testator's handwriting so long as the will is dated and subscribed by the testator."

Statutes in both State A and State B provide that "if a beneficiary under a will predeceases the testator, the deceased beneficiary's surviving issue take the share the deceased beneficiary would have taken unless the will expressly provides otherwise."

How should Testator's estate be distributed? Explain.

Testator's estate should be distributed as follows: 1/2 of the estate should be distributed to John under the terms of the will, and the other half should be distributed to Martha's two children.

The first issue is whether the will is valid because it was executed in State A, which does not recognize holographic wills. To be valid, a will normally must be made by someone over the age of 18, signed by the testator, evince testamentary intent, and be attested to by two witnesses. However, some states recognize holographic wills, which permit wills to be admitted to probate when the material portions of the will are in the testator's handwriting with the testator's signature on the document. Here, the State B statute also requires that the will be dated. Additionally, a testator's will is valid if it is valid in the state where it was executed, in the state where the testator is domiciled at death, or where the property to be disposed of under the will is located.

Here, Testator's will was entirely handwritten, and the material portions disposing of his property are contained in the handwritten instrument. The instrument is signed by Testator, and, in accordance with the State B statute, the will provides the date that it was executed. The will did not comply with State A's law, which is the law of the place where the will was executed and the state where Testator was domiciled at the time. However, Testator later became domiciled in State B, and this was his domicile at death. All of Testator's assets were also located in State B. Therefore, because the will was valid where the testator was domiciled at death and because all of his assets were there, the will is a valid holographic will because it complies with State B's law.

The next issue, also pertaining to validity, is whether the limiting language, "Given that I might die on the trip to City," means that the will lapsed after Testator safely returned home after the trip, or if the testamentary intent continued after the testator's return. Generally, one's motive for making a will is not a factor that courts take into account. Limiting language in a will can restrict the duration of a will's validity, but only if there is a clear intent to do so. Courts often construe such limiting language as lasting beyond the shorter duration stated in the will, particularly where the testator did not make any later testamentary instruments because the limited duration will is likely what the testator would have intended for the distribution of his or her estate even if he or she did survive the duration listed in the will.

Here, a court would likely find that the will remained valid beyond the Testator's trip to City. While Testator expressed his reservations about flying and his fear of dying on the trip, there was no clear intent limiting the effect of the will to only the period of time that Testator was on his trip. Rather, Testator expressed a fear of dying on the trip, but then expressed a general intent that, in the event he died, he wanted his son John and John's wife, Martha, to take his estate. The language goes to his motive for making the will, but it does not express a clear desire to limit the will's effectiveness to only a limited period of time. Thus, because Testator's will was validly executed and it was not limited by the language about Testator's trip to City, the will is valid. Because the will is valid, 1/2 of the estate will go to John under the terms of the will.

The will devised the other half of Testator's estate to John's "delightful wife of many years." One issue that this language raises is whether the gift should pass to John's new wife, Nancy, because of the general language in the will. A Testator can include in a will bequests that are conditioned on acts of independent significance, meaning that the acts are separate and apart from simply devising the testator's property. But where the language in the will identifies a specific person, that will not be construed as devising property conditioned on an act of independent significance. Additionally, extrinsic evidence is permissible to resolve an ambiguity if that ambiguity is latent, meaning that it is not readily identifiable from reading the language of the will, even though the will is clear about who should take the property.

Here, John was married to Martha at the time Testator executed his will. Martha died before Testator, and John then married Nancy six months ago. The language in the will that 1/2 of the estate go to John's "delightful wife of many years" likely was not a condition on an act of independent significance, but rather a specific identification of Martha. But this is ambiguous from the circumstances because Nancy is now John's wife. Extrinsic evidence would show that Testator had known Martha and her family for years, and that Testator was the one that introduced John and Martha, and this shows that Testator, when the will was devised, did not have a general intent to leave his property to whomever John was married to at Testator's death, but rather to Martha. Furthermore, the language "of many years," also does not fit with Nancy and John's relationship because they were married only six months ago. Therefore, a court would likely find that the other half of Testator's estate should pass to Martha.

Even so, Martha predeceased Testator, so the final issue is the effect of her death. Under the common law, when a beneficiary of a will predeceases the testator, the beneficiary's gift lapses. Statutes in States A and B, called anti-lapse statutes, prevent this result by providing that a predeceasing beneficiary's surviving issue take the predeceasing beneficiary's share under the will. Normally, anti-lapse statutes require some degree of blood relation for the anti-lapse statute to apply, but that does not appear to be the case here. Martha has two issue, her children, and so because she predeceased the testator, her share will pass to her two children under the anti-lapse statute. Note that it makes no difference if a court construes the will as simply providing a residuary clause – residuary interests do not pass to the other residuary beneficiary unless the gift lapses altogether.

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MEE 2 – Criminal Law & Procedure

On February 1, a woman began serving a 60-day sentence in the county jail for operating a motor vehicle under the influence of alcohol. On February 4, a detective from the county sheriff's department took the woman from her cell to an interrogation room in the jail building. He informed her that she was a suspect in a homicide investigation and that he wanted to ask her some questions. The detective then read the woman the state's standard Miranda warnings:

> You have the right to remain silent. Anything you say can be used against you in court. You have the right to an attorney. If you cannot afford an attorney, one will be appointed for you. If you decide that you wish to speak with us, you may change your mind and stop the questioning at any time. You may also ask for a lawyer at any time.

The detective asked the woman if she understood these rights. When she replied, "Yes, and I want a lawyer," questioning ceased immediately, and she was returned to her cell.

On March 15, the detective removed the woman from her cell and took her back to the same interrogation room. The detective told her that he wanted to ask her questions about the homicide because he had new information about her involvement. The detective read her the same Miranda warnings he had read on February 4 and asked her whether she understood her rights. She said, "Yes."

The woman then asked the detective, "If I ask you to get me a lawyer, how long until one gets here?" The detective replied as follows:

> We have no way of getting you a lawyer immediately, but one will be appointed for you, if you wish, if and when you go to court. We don't know when that will happen. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering questions until a lawyer is present.

The detective's statement accurately characterized the procedure for appointment of counsel. The woman then said, "I might need a lawyer." The detective responded, "That's your call, ma'am."

After a few minutes of silence, the woman took a Miranda waiver form from the detective and checked the boxes indicating that the rights had been read to her, that she understood them, and that she wished to waive her rights and answer questions. She then signed the form. After the detective began to question her, she confessed to the homicide.

The woman was charged with murder in state court. Her lawyer filed a motion to suppress the woman's March 15 statements to the detective, alleging three violations of her Miranda rights by the detective:

> (1) Interrogating the woman on March 15 after she had invoked her Miranda right to counsel on February 4.

(2) Incorrectly conveying to the woman her Miranda right to counsel by the statements he made on March 15.

(3) Interrogating the woman on March 15 after she had invoked her Miranda right to counsel on March 15.

This state affords a criminal defendant no greater rights than those mandated by the U.S. Constitution.

After an evidentiary hearing, the trial court denied the motion to suppress on all three grounds raised by defense counsel.

Did the court err? Explain.

March 15 Interrogation After Right to Counsel Invoked on February 4

The court did not err by denying the defendant's motion to suppress the woman's March 15 statements to the detective as a result of interrogating the woman on March 15 after she invoked her Miranda right to counsel on February 4. The issue is whether the detective violated the defendant's Miranda rights by not waiting longer before questioning her again. Miranda rights protect against police misconduct during custodial interrogations. The United States Constitution's 5th Amendment Miranda rights are applied to the states through the 14th Amendment's due process clause. Generally, the police must cease all questioning after the interrogation suspect has invoked his or her right to counsel. The police must scrupulously honor defendant's request. In scrupulously honoring the request, courts will apply the 14 day rule. This rule states that the police cannot question a suspect about the same crime until 14 days after the time of the custody. The time of custody references the time that the interrogation subject was under custody for questioning about that particular crime.

Here, the woman was serving a 60-day sentence in the county jail for operating a motor vehicle under the influence of alcohol. The detective was not questioning the woman about that crime. The detective was questioning the woman about a separate homicide. Once the defendant was brought from the jail into an interrogation room, she was in custody for purposes of the homicide investigation because a reasonable person would not feel free to leave at this point. The detective duly read the woman her Miranda rights and once she unambiguously invoked her right to an attorney, the detective ceased questioning immediately and she was returned to her cell, at which point (Feb. 4) she was no longer in custody for purposes of the homicide investigation. More than 14 days later, on March 15, detective properly removed the woman from her cell again and re-Mirandized her before questioning her again. Thus, the detective properly interrogated the woman again and the court did not err in denying the defendant's motion to suppress.

Incorrect Miranda Rights

The court did not err by denying the defendant's motion to suppress the woman's March 15 statements to the detective as a result of incorrectly conveying to the woman her Miranda right to counsel by the statements he made on March 15. The issue is whether the statements the detective made on March 15 were sufficient Miranda warnings such that the woman completely understood her rights. Generally, the police need not convey the Miranda rights (1) to remain silent (2) to an attorney using exact language (as seen in police television shows) as long as the substance of the Miranda rights are properly conveyed.

Here, the detective read the woman the same rights on March 15 as he read her on February 4. The statements included the right to remain silent and the right to an attorney in proper substance. The detective properly included that the woman may ask for an attorney at any time and properly included the effect of her statements to the police (that they will be used against her). Thus, the detective properly Mirandized the woman on March 15 and the court did not err in denying the defendant's motion to suppress.

March 15 Interrogation After Right to Counsel Invoked on March 15

Finally, the court did not err in denying the defendant's motion to suppress the woman's March 15 statements to the detective after she improperly invoked her right to counsel on March 15. The issue is whether the woman's statements on March 15 properly invoked her right to counsel. An invocation of the right to counsel must be clear and unambiguous. The police have no duty to encourage the interrogation suspect to be clear and unambiguous. Further, an interrogation suspect may waive her Miranda rights if it is done knowingly and voluntarily. Here, the detective properly provided all the information about the right to counsel that the woman asked for. Further, the woman said "I might need a lawyer" to which the detective replied "that's your call". This statement by the woman was not a clear and unambiguous statement because it was qualified by the word "might". The woman then knowingly and voluntarily waived her Miranda rights by checking the boxes and signing the waiver form. Thus, the woman did not properly invoke her right to counsel and knowingly and voluntarily waived her Miranda rights. The woman's confession is therefore valid. As a result, the court did not err in denying the defendant's motion to suppress on all three counts.

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MEE 3 – Corporations & LLCs

Parent Inc., a company in the renewable energy business, has several subsidiaries. In all cases, Parent maintains control of its subsidiaries by selecting the members of each subsidiary's board of directors, most of whom also serve as officers and employees of Parent.

One of the subsidiaries, HomeSolar Inc. (incorporated in a jurisdiction that has adopted a version of the Model Business Corporation Act), was acquired three years ago by Parent. Parent owns 80% of HomeSolar's voting shares, with the remaining shares publicly traded on a national stock exchange. HomeSolar manufactures and sells products exclusively for the residential solar power market.

Another subsidiary, IndustrialSolar Inc., is wholly owned by Parent and manufactures products exclusively for the industrial solar power market.

A shareholder of HomeSolar, after making a proper demand on the board to which the board failed to timely respond, brought a derivative suit against Parent, as the controlling shareholder of HomeSolar, making the following allegations:

> (1) HomeSolar has not paid dividends since being acquired by Parent three years ago. In SEC filings, HomeSolar has explained that its no-dividend policy provides funds for its research and development budget as it seeks to develop new products for the residential solar power market in which it operates. Nonetheless, HomeSolar has more than adequate earnings and was obligated to pay dividends to its shareholders.
>
> (2) Since acquiring HomeSolar, Parent has caused HomeSolar to purchase the "rare earth" minerals necessary for the manufacture of its residential solar panels from SolarMaterials Corp., a wholly owned subsidiary of Parent. SolarMaterials was created for the purpose of acquiring such minerals and reselling them to the various renewable energy subsidiaries of the Parent group. The long-term contract under which HomeSolar purchases rare earth minerals from SolarMaterials, however, sets prices significantly higher than the current market prices under similar long-term contracts for such minerals.
>
> (3) After Parent learned about a large government grant to develop industrial-scale solar projects, Parent caused IndustrialSolar to apply for and secure this grant, denying HomeSolar the opportunity to obtain this grant.

1. Did Parent breach any duties to HomeSolar with respect to HomeSolar's no-dividend policy? Explain.

2. Did Parent breach any duties to HomeSolar with respect to HomeSolar's contract with SolarMaterials for the purchase of rare earth minerals? Explain.

3. Did Parent breach any duties to HomeSolar by denying HomeSolar the opportunity to apply for the government grant? Explain.

Question 1

Parent likely did not breach any duties to HomeSolar with respect to HomeSolar's no-dividend policy. At issue is whether the business judgment rule will apply so as to presume that Parent acted within their duty of care.

The board of directors of a corporation owe the corporation various fiduciary duties. One such duty is the duty of care. This requires the directors to discharge their duties in good faith, with the care of a reasonably prudent person acting in similar circumstances, and with the reasonable belief that they are acting in the best interests of the corporation. Along with this duty of care, courts have stated that a business judgment rule applies such that the directors are afforded a rebuttable presumption that they met their duty of care. Thus, a court will uphold the board's decisions in accordance with the duty of care so long as the presumption is not rebutted.

Here, Parent is a company in the renewable energy business and maintains control of its subsidiaries by selecting the members of each subsidiary's board of directors. Effectively, this means that Parent (and the board members selected) owe fiduciary duties of care (and loyalty, as will be described below) to the subsidiary corporations. Parent acquired HomeSolar Inc. three years ago and owns 80% of HomeSolar's voting shares. Thus, Parent owes HomeSolar a duty of care.

The shareholder of HomeSolar bringing suit alleges that in its SEC filings, HomeSolar has explained that its no-dividend policy provides funds for research and development as it seeks to develop new products for the residential solar power market. Although HomeSolar has adequate earnings to pay dividends to its shareholders, it has not done so since being acquired by Parent three years ago. However, the decision to distribute dividends is solely within the board's discretion. Because Parent controls the boards of its subsidiaries, including HomeSolar, it is within Parent's discretion when to distribute dividends. Here, there is a valid reason given in the SEC filing for not offering distributions - namely, the company seeks to use its funds to develop new products. This decision by the board not to make distributions is a rational business reason and will be protected by the business judgment rule. There is no evidence that Parent is acting in bad faith or against the interests of HomeSolar. Consequently, the presumption that the board acted in accordance with its duty of care has not been rebutted based on these facts.

For these reasons, Parent has not breached any duties to HomeSolar with respect to

HomeSolar's no-dividend policy.

Question 2

Parent breached its duty of loyalty to HomeSolar with respect to HomeSolar's contract with SolarMaterials. At issue is whether Parent self-dealed such that it breached its duty of loyalty to HomeSolar.

As noted above, the board of directors owe fiduciary duties to a corporation. In addition to the duty of care, the directors owe a duty of loyalty to the corporation such that they act fairly towards the corporation and do not "self-deal" and enter into any transactions in which there is a conflict of interest. If the board self-deals, the duty of loyalty will be breached unless the action is approved by a majority vote of disinterested directors after full disclosure of material facts, is approved by a majority vote of disinterested shareholders after full disclosure of material facts, or the transaction is fair to the corporation.

Here, Parent caused HomeSolar to purchase "rare earth" minerals for manufacturing its solar panels from SolarMaterials, a corporation that is wholly owned by Parent. SolarMaterials was created solely to acquire such minerals and resell them to subsidiaries of the Parent group. Thus, Parent is self-dealing in this case. Specifically, it is forcing HomeSolar to buy materials from a company owned by Parent such that Parent profits (through its other subsidiary SolarMaterials) off of HomeSolar. Thus, these transactions would be a breach of loyalty absent approval by disinterested directors or shareholders, or absent fairness to the corporation. There is no evidence that disinterested directors or shareholders have approved these transactions, and the transactions clearly are not fair to HomeSolar, because the contract prices are significantly higher than the current market prices under similar long-term contracts for such minerals.

For these reasons, Parent has breached its duty of loyalty to HomeSolar.

Question 3

Parent likely has not breached any duties to HomeSolar by denying HomeSolar the opportunity to apply for the government grant. At issue is whether Parent has usurped a corporate opportunity from HomeSolar such that it has breached its duty of loyalty.

The rules relating to the duty of loyalty are listed above. In addition to self-dealing, directors may breach the duty of loyalty by usurping a corporate opportunity that was in the

corporation's line of business. The corporation must have had an expectancy in the opportunity in order for the duty to be breached. If the directors do obtain a corporate opportunity, in order to avoid breaching their duty of loyalty, they must first present it to the corporation and wait for the corporation to reject it before acting upon it.

Here, Parent learned of a large government grant to develop industrial-scale solar projects. Parent caused its other subsidiary IndustrialSolar to apply for and secure this grant, thereby denying HomeSolar the opportunity to obtain the grant. While a grant relating to solar projects would generally be in HomeSolar's line of business, HomeSolar likely did not have an expectancy in this opportunity because HomeSolar manufactures and sells products exclusively for the residential (rather than industrial) solar power market. IndustrialSolar, in contrast, manufactures products exclusively for the industrial solar power market. Because the grant was to develop industrial (rather than residential) solar projects, HomeSolar likely did not have an actual expectancy in this opportunity. Consequently, Parent likely did not usurp any corporate opportunity.

For these reasons, Parent likely has not breached any duties to HomeSolar by denying HomeSolar the opportunity to apply for the government grant.

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MEE 4 – Contracts

On March 1, a contractor and an owner of movie theaters signed an agreement providing that, no later than August 15, the contractor would install seats in the owner's new movie theater. The agreed-upon price was $100,000, which was less than the $150,000 that other similar contractors would charge for the same work. The agreement required that the owner pay the contractor half the price at the time the work commenced and the other half at completion. The contractor was willing to do the work for less money than its competitors because the contractor was new to the area and hoped to build up a positive reputation.

The agreement further provided that the contractor would start work no later than July 1. On July 1, before beginning the agreed-upon work, the contractor informed the owner that it would not perform its obligations under the agreement because it had obtained a more lucrative installation contract elsewhere. At that point, no payments had been made to the contractor.

The installation of the seats was the last step necessary for the theater to open to the public. The owner, which had anticipated that the contractor would install the seats by the August 15 deadline, had planned and widely promoted a film festival for September 1–10 to celebrate the opening of the new movie theater.

Immediately after learning that the contractor would not install the seats, the owner began to look for a substitute contractor. Despite diligent efforts, the owner could not find a contractor that would agree to install the seats by August 15. Eventually, after an extensive search, the owner found a substitute contractor that agreed to install the seats for $150,000 by September 15. No other contractor could be found who would agree to install the seats at a lower price or before September 15.

Installation of the seats was completed on September 15, the substitute contractor was paid $150,000, and the theater opened a few days later. Because the theater had no seats at the time of the film festival scheduled for September 1–10, the owner canceled the festival.

The owner sued the original contractor for breach of contract, and the parties agreed to a non-jury trial. The judge has concluded that the contractor's actions with respect to the seat-installation agreement constituted a breach of contract by the contractor. In addition, the judge has made the following findings of fact:

- The contractor was unaware that the owner was planning to hold a film festival when it entered into the contract.

- The owner would have made a profit of $35,000 if the seats had been installed in the new movie theater and the film festival had been presented there as scheduled on September 1–10.

- The owner could have relocated the film festival to a nearby college auditorium that was available September 1–10 and, if this had occurred, the owner would have made a profit of $25,000.

1. Do the damages recoverable by the owner include $50,000 for the amount paid to the substitute contractor above the $100,000 price to be paid to the original contractor under the contract? Explain.

2. May the owner recover for lost profits resulting from the cancellation of the film festival? Explain.

3. Assuming that the owner is entitled to recover for lost profits resulting from the cancellation of the film festival, how much should the owner recover? Explain.

1. The owner of the movie theater is entitled to $50,000 damages above the amount paid to the substitute contractor.

The issue is the appropriate measure of damages. Contracts are governed either by common law or the UCC. Contracts for services are governed by common law, whereas contracts for the sale of goods are governed by the UCC. Because this is a service contract which calls for the installation of theater chairs, this is a contract governed by common law.

Under common law, parties to a contract must substantially perform their duties. Before a party has performed, there is the possibility that will not perform under the contract. If a party to a contract unequivocally informs the other party that he will not perform under the contract, this amounts to an anticipatory repudiation and is treated as a breach. The nonbreaching party has the option to sue for damages immediately, or wait until the time for performance to be due to sue under the contract.

Here, the movie theater contracted with a contractor to install seats in the movie theater, beginning on July 1 and to be completed by August 15th. However, on July 1, before any money had been paid under the contract, the contractor informed the movie theater owner that he would not perform his obligations under the agreement because he had obtained a more lucrative installation contract elsewhere. This amounts to an anticipatory repudiation because it was an unequivocal statement that the contractor would not perform. This amounts to a breach and the movie theater owner can sue under the contract either immediately or at the time performance is due.

When a party breaches, the goal of contract law is to place the nonbreaching party in the position that they would be had the contract been performed, as expectation damages. However, the nonbreaching party also has a duty to mitigate damages in order to reduce the total liability.

Here, the contract called for the contractor installing movie seats at a price of $100,000, to be completed by August 15th. However, the contractor breached this contract before any work had been done or any payment had been made. Immediately after the breach, the movie theater owner mitigated damages by looking for a substitute contractor to install the seats. However, despite the owner's best efforts after extensive search, the owner couldn't find anyone right away at the same price. He eventually found a substitute contractor that agreed to install the seats for $150,000, completed by September 15th. No other contractor could be found who would agree to install the seats at a lower price.

If the contractor had performed as required, the owner would have paid $100,000 for movie seats. However, because the contractor breached, the owner had to pay $150,000 for movie seats. Thus, under the expectation damages theory, the owner is entitled to $50,000 from the contractor, because this is the amount that would put him in the position he expected to be in if the contractor had performed.

2. May the owner recover for lost profits resulting from the cancellation of the film festival?

The owner likely will not be able to recover for lost profits resulting from the cancellation of the film festival. The issue is whether the damages suffered as a result of this cancellation were foreseeable.

Consequential damages are an additional form of damages that are available for breach of contract. Under consequential damages, the non-breaching party is entitled to additional damages that were suffered as a result of the breach, as long as the reason for the damages was known to the breaching party and such damages were foreseeable.

Here, the contract called for a completion date of August 15th. The owner wanted the seats installed by that date because he was planning to host a film festival from September 1-10 to celebrate the opening of the movie theater. However, because the contractor breached, the owner could not find another substitute contractor to complete the project in time, and canceled the film festival. The breaching contractor, though he had contracted to complete the contract by August 15th, was unaware that the owner was planning to hold a film festival when it entered into the contract.

Thus, the owner likely will not be able to recover for lost profits resulting from the cancellation of the film festival, because the contractor did not know about the film festival. The damages in lost profits suffered by the owner were not foreseeable, and consequential damages are not available.

3. Assuming that the owner is entitled to recover for lost profits resulting from the cancellation of the film festival, how much should the owner recover?

The issue is whether the owner had a duty to mitigate. Parties have a duty to mitigate damages, thereby reducing the amount for which the breaching party is liable.

Here, the judge made a finding of fact that the owner would have made a profit of $35,000 if the seats had been installed and the film festival had been presented there as scheduled. The owner is not likely to recover the full $35,000, however, because the owner failed to mitigate. The owner could have relocated the film festival to a nearby college auditorium that was available September 1-10, and if this had occurred, the owner would have made a profit of $25,000. However, the owner failed to do so, and thus failed to mitigate and reduce his damages by $25,000.

Therefore, assuming the owner can recover lost profits, the owner will likely recover $10,000 (the difference between the $35,000 and $25,000), but will not recover the full $35,000, because the owner did not mitigate damages by moving the film festival.

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MEE 5 – Family Law

Twelve years ago, Wendy and Frank were married in State A. One year later, their daughter, Danielle, was born in State A. The couple and their daughter have continued to live in State A.

One year ago, Frank lost his job as a steelworker after suffering a serious back injury. Frank's doctor has said that he will not be able to return to work.

One month ago, Frank filed an action against Wendy seeking spousal support. Frank filed the action after Wendy, a commercial airline pilot whose work frequently necessitates her absence from home, stopped depositing her wages into the couple's joint bank account and refused to pay household bills. Frank's unemployment insurance is inadequate to pay all the household bills.

Danielle's school recently sent her parents a note indicating that Danielle will not be allowed to enroll in school next year unless the parents provide proof of her vaccination. Frank, based on his personal, nonreligious beliefs, has consistently refused to allow Danielle to receive any vaccinations. Danielle does not satisfy the requirements for a medical exemption. State A has amended its mandatory vaccination law by eliminating all nonmedical exemptions based on "personal beliefs." As amended, the law requires, as a precondition to a child's enrollment in any public school, that "the child's parent or guardian must provide proof that the child has received all vaccinations mandated by the State Department of Health." Frank has brought an action challenging the State A vaccination law under the U.S. Constitution as a violation of his parental rights.

Two weeks ago, Danielle, age 11, with her parents' permission, went to visit her aunt in State B. One week into the visit, the aunt called Frank and Wendy and told them that Danielle did not want to return to her parents' home because "Mom is always traveling, Dad is really depressed since his back injury, and I just can't stand living there anymore." The aunt told Frank and Wendy that "I can't in good conscience send her home, so I'm immediately going to court to seek legal custody."

1. May Frank obtain spousal support from Wendy? Explain.

2. Will Frank's constitutional challenge prevail? Explain.

3. In what state must the aunt file a custody petition? Explain.

4. Is the court likely to grant legal custody of Danielle to her aunt? Explain.

1. Spousal Support

Frank cannot obtain spousal support from Wendy. At issue is whether a spouse can seek spousal support when they are still legally married.

Marriage comes with legal rights and obligations. One such obligation is the obligation to financially support the other spouse. However, courts generally consider matters of spousal support private affairs and will not interfere in a valid marriage until the couple separates or files for divorce. Claims for spousal support are usually denied when the couple is still in a legally valid marriage and have not separated or started the process of getting a divorce. Although Frank has a right to spousal support from his wife, he is unlikely to successfully obtain a court order for spousal support because he and Wendy have not separated or filed for divorce. Furthermore, there is no requirement that Wendy must place her paychecks in their joint bank account. Therefore, Frank will be unsuccessful in obtaining spousal support.

2. Frank's Constitutional Challenge

Frank's constitutional challenge to the vaccination requirement will not prevail. At issue is whether a school can require vaccination of students as a prerequisite to enrollment without any non-medical exemptions.

Under 14th Amendment substantive due process, a parent has a fundamental right to raise their children and rear them as they see fit. This includes the right to decide how to raise and educate them. Because the rearing of children is a fundamental right, strict scrutiny applies and a state cannot deprive this right unless it is narrowly tailored to a compelling government interest. Here, Danielle's school, pursuant to State A law requiring proof of vaccinations, requires proof of vaccination before she is allowed to enroll in school. Frank, based on his personal, nonreligious beliefs has consistently refused to allow Danielle to receive any vaccinations and Danielle does not satisfy the requirements for medical exemption. While Frank has a fundamental parental right regarding his child, the State A law does not violate this right. The Supreme Court has upheld requiring vaccinations in the interest of health and safety. Here, the State has a compelling government interest in the health and safety of its citizens and the vaccination requirement is narrowly tailored to that interest because it allows for exemptions based on medical conditions. In addition, Frank is not asserting a religious objection, but rather argues the law infringes on his "personal beliefs." As a result, the law will be upheld as constitutional.

3. Jurisdiction of Custody Petition

The custody petition must be filed in State A. At issue is the proper jurisdiction to file a custody petition.

The general rule is that a custody petition must be filed in the child's home state, which is the state where the child has been living with a parent or someone acting as a parent for

the past 6 months. Danielle's home state is State A because that is where she has lived since she was born 11 years ago. While Danielle is currently in State B staying with her aunt, this is only a temporary visit and would not be considered to be her home state. As a result, the petition should be filed in State A.

4. Likely Ruling on Legal Custody

The court is not likely to grant legal custody of Danielle to her aunt. At issue is when it is appropriate to grant custody to a non-parent.

When making a custody determination, the overriding factor is the best interests of the child. A court will also consider the resources of the parties, their ability to provide for the child, the parties' and child's wishes, and the bonds of the parties. Custody is rarely awarded to a non-parent due to the fundamental right to rear one's child discussed above. Custody is typically granted to a non-parent only when the parent is unfit, has abandoned the child, or where the child is at risk of danger, such as from abuse. Here, the aunt seeks custody of the child because Wendy travels frequently, Frank is depressed, and Danielle expressed that she did not want to return home. While the wishes of the child are considered, Danielle's wishes here are not sufficient to overcome taking custody away from her parents. Her parents are able to properly care for her and have not abandoned her or caused her any harm. She has lived with them for the past 11 years and there are no facts that warrant removing her from her parent's legal custody. While the court has a lot of discretion in making a custody determination, the constitutional protections dictate that she should remain in the legal custody of her parents under these circumstances.

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MEE 6 – Civil Procedure / Constitutional Law

Trident Healthcare Inc., incorporated in State X, owns and operates hospitals and clinics in States X, Y, and Z. Medical information for all of Trident's current and former patients is stored on computer equipment housed at Trident's corporate headquarters in State X.

Last December, unknown persons hacked into Trident's computer system and obtained the personal medical information of at least 30,000 Trident patients, including 5,000 patients living in State X, 10,000 patients living in State Y, and 15,000 patients living in State Z. However, there is no evidence that the thieves have used any of this medical information.

The State X Privacy Protection Act imposes an absolute duty on health-care providers, including companies like Trident, to keep patient medical information private. The legislature concluded that the "invasion of privacy" resulting from data breaches causes significant harm to the individuals involved. Thus, the law allows any person whose private medical information is obtained by an unauthorized third party in any manner to recover actual damages from the health-care provider. Further, because such damages are sometimes difficult to quantify, the state law provides that an individual is entitled to a minimum statutory (nominal) damages award of $500 to compensate for this "invasion of privacy." This state law is not preempted by any federal law.

A man, who is a citizen of State X and whose medical records were stored in the Trident computers, has brought a class action in the federal district court of State X against Trident on behalf of himself and all the persons whose health-care information was taken during the hacking of Trident's computer system. The man is represented by counsel with extensive experience in class actions of this type. The complaint is limited to claims arising out of the hacking of medical information. It seeks no actual damages but does seek statutory damages on behalf of all members of the class pursuant to the State X statute. The complaint alleges the facts detailed above and alleges that the court has jurisdiction based on diversity, pursuant to 28 U.S.C. § 1332. The complaint also alleges that most if not all of Trident's patients are U.S. citizens who are domiciled in the states where they receive their health care.

State X's legislatively adopted Civil Practice Rules provide that "if any statute or law of this state allows for an award of statutory or nominal damages, recovery of such damages may be sought in an individual action but not in a class action."

Trident has moved to dismiss the man's class action brought in federal district court, arguing that (i) the court lacks subject-matter jurisdiction over the state-law claim raised by the class action, (ii) the action fails to allege a claim upon which relief can be granted because of the state law barring class actions to recover statutory damages, and (iii) the man does not have standing to bring a statutory damages claim in federal court.

With respect to each of these arguments, how should the court rule? Explain.

1. The Court has subject matter jurisdiction over the state law claim raised by the class action. To have subject matter jurisdiction over a claim, a federal court must have diversity of citizenship jurisdiction (where no plaintiff resides in the same state as any defendant and the amount in controversy is greater than $75,000), federal question jurisdiction (where the plaintiff's well-pleaded complaint asserts a violation of right granted under federal law), or supplemental jurisdiction (where there is already one valid claim invoking the court's jurisdiction, which is inapplicable here). This claim arises under state law so federal question jurisdiction is unavailable. Additionally, in calculating the amount in controversy for diversity of citizenship jurisdiction, the court does not aggregate claims by multiple plaintiffs against the defendant (i.e. one cannot add up all the $500 claims to get over the $75,000 threshold). Since there is no federal question or diversity jurisdiction, there can be no supplemental jurisdiction either.

Notwithstanding the above analysis, there is an exception for class actions based on a federal statute that is applicable here and grants the court jurisdiction. Where a class action has minimal diversity (at least some plaintiffs being domiciled in jurisdictions different than the defendant) and the amount of all the claims added together is over five million dollars, the federal court will have jurisdiction over the claims. Those requirements are met here.

2. A federal court sitting in diversity will apply the Federal Rules of Civil Procedure. Under the Erie doctrine, a federal court will apply state substantive law and federal procedural law. Since this is a procedural matter (i.e. it deals with how citizens can pursue these claims, NOT whether they have any claim or right), and not a substantive matter, the FRCP will govern and the court may join these claims. If this were a substantive matter, the state X law would govern.

3. The man has standing to bring this claim in federal court. To have Article III standing under the U.S. Constitution to bring a claim in federal court, a plaintiff must show that he has (1) suffered an injury in fact (that is concrete and actual or imminent); (2) that the defendant's conduct caused this injury, and (3) that a favorable decision by the court will redress his injury. Lujan.

Here, while the man cannot show that he has been damaged by the thieves' use of his information, he can show that the company has breached its absolute duty that it owed him under state law, and as a result he is entitled to statutory damages. Where a statute imposes liability on a company for breaching a duty, and a well-pleaded complaint indicates a breach of that duty entitling him to damages, there has been an injury in fact as far as Article III is concerned. The State X Privacy Protection Act was, according to the legislature, a reaction to the "significant harm" caused to individuals by an invasion of privacy resulting from data breaches. Here, the damage was done when the thieves retrieved his information. They could also use it at any time. Additionally, the legislature has found that because this injury is difficult to quantify, the man is entitled to damages from the company as a result of their breach of duty (by not protecting his info) and the invasion of his privacy, even if he cannot prove he was otherwise damaged by the thief's actions.

Causation and redressability are also met here. The two prongs are often analyzed together because if one is satisfied, the other usually is as well. Here, since Trident's actions caused the injury by not protecting his information, they have caused the harm. The injury, while difficult to quantify, carries a mandatory statutory penalty as State X imposed a penalty upon them to compensate the man for the invasion of his privacy. This will redress his injury by providing him with funds that he can use to better protect his privacy in the future, cover the administrative costs of finding a new hospital, and compensate him for the invasion of his privacy.