



THE SUPREME COURT *of* OHIO



# February 2022

## OHIO BAR EXAMINATION

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Multistate Essay Examination  
Questions & Selected Answers

Multistate Performance Test  
Summaries & Selected Answers



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FEBRUARY 2022 OHIO BAR EXAMINATION

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# OHIO BAR EXAMINATION

The February 2022 Ohio Bar Examination contained six Multistate Essay Examination (MEE) questions, which applicants were given three hours to answer. These essays were prepared by the National Conference of Bar Examiners (NCBE).

The exam also contained two Multistate Performance Test (MPT) items. These items were prepared by the NCBE. Applicants were given three hours to answer both MPT items.

The following pages contain the NCBE's summary of the MEE questions given during the February 2022 bar exam, along with the NCBE's summary of the MPT items given on the exam. This booklet also contains applicant answers to the essay and MPT questions.

The essay and MPT answers published in this booklet illustrate above average performance by their authors and, therefore, are not necessarily complete or correct in every respect. They were written by applicants who passed the exam and have consented to the publication of their answers. See Gov.Bar R. I, Sec. 5(C). The answers selected for publication have been transcribed as written by the applicants. To facilitate review of the answers, the bar examiners may have made minor changes in spelling, punctuation, and grammar to some of the answers.

Copies of the complete February 2022 MPT and its corresponding point sheet are available from the NCBE. Visit the NCBE's website at [www.ncbex.org](http://www.ncbex.org) for information about ordering.



# *QUESTION 1*

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## QUESTION

A man decided to start a business repairing diesel-engine trucks. His mother's farm had a large metal barn that had been used in the past to repair farm machinery. As his mother no longer used the barn for that purpose, she agreed to let the man perform truck repairs in it. The barn contained a large portable welding machine (worth approximately \$25,000) that would be useful for making repairs on large trucks. The mother made it clear to her son that he could use the barn but not her welding machine. Nonetheless, without his mother's knowledge, the man frequently used the welding machine for truck repairs.

On June 1, the man obtained a \$50,000 business loan from a local bank. The man and the bank signed a loan agreement. It contained a provision pursuant to which the man granted the bank a security interest "in all my equipment, including equipment hereafter acquired" to secure his repayment obligation. On the same day, the bank properly filed a financing statement listing the man as the debtor and indicating that the collateral was "all equipment, including equipment hereafter acquired."

On June 10, the man bought some specialized tools used for diesel-engine repair. The man agreed to pay the tool seller \$15,000 for the tools, paying \$1,500 down and agreeing to pay the remaining \$13,500 to the tool seller in monthly installments over a two-year period. The man signed a written agreement granting the seller a security interest in these tools to secure the man's obligation to pay the remaining \$13,500. The next day, the tool seller properly filed a financing statement listing the man as the debtor and indicating that the collateral was "diesel-engine repair tools."

The man has defaulted on his obligations to the bank and the tool seller.

1. Does the bank have an enforceable security interest in the portable welding machine? Explain.
2. Both the bank and the tool seller are asserting interests in the diesel-engine repair tools that the tool seller sold to the man.
  - a. Does the bank have an enforceable security interest in these tools? Explain.
  - b. Does the tool seller have an enforceable security interest in the tools? Explain.
  - c. Assuming that both the bank and the tool seller have such security interests in these tools, whose interest has priority? Explain.



# ANSWER

## **Bank Interest**

Bank likely does not have an enforceable security interest in the portable welding machine. At issue is whether Bank's security interest attaches to equipment not owned by the debtor.

In order to have a valid security interest, (i) the creditor must extend value; (ii) the debtor must have rights in the collateral; and (iii) the creditor and debtor must sign a proper security agreement naming the debtor, creditor and describing the collateral sufficiently, without the use of supergeneric terms or the creditor must take possession of the collateral. Once all of these requirements are met, the security interest attaches. In order to have a security interest that is valid against other creditors, the security interest must be "perfected." Generally, perfection occurs when a financing statement is filed, with the exception of money (only perfected by possession) or non-consumer deposit accounts (perfected by control).

Here, all of the elements for a valid security interest are met – Bank gave the man \$50,000, secured by all of his equipment now owned or hereafter acquired; the man has rights in the equipment; and the man and Bank signed a security agreement (the "loan agreement"). The security agreement lists the collateral as "all equipment" – this is a valid description of the collateral pursuant to the Article 9. Supergeneric terms (i.e. "all my property") are not sufficient descriptions of the collateral. However, "generic" descriptions, referring to the class of collateral, are valid. Additionally, the loan agreement includes a valid after-acquired property clause. Such clauses are valid and mean that Bank's interest not only attaches to the man's present equipment but will immediately attach to any equipment the man acquires. Additionally, Bank validly perfected its security interest by filing a financing statement.

The main issue is that the man did not own the portable welding machine – his Mother did. The security interest of Bank only attaches to the equipment that the man owns – it does not include equipment that he does not own. Here, the man not only did not own the machine, but he was using it without the true owner's permission. As such, unless the man acquires title to the machine, Bank's security interest does not attach to it.

Interest in the diesel-engine repair tools:

(a) Bank does have a valid security interest in the tools. At issue is whether the tools are covered by the Bank's after-acquired property clause. As discussed above, an after-acquired property clause covering all of the debtor's now owned or after-acquired equipment attaches when the debtor receives the equipment. Here, the tools are equipment. Equipment includes that property which the debtor uses in their business but does not sell (that would be inventory). Equipment is also any property that is not farm products, inventory, or consumer goods. Here, the tools are clearly equipment – they are used by the man in his diesel-engine repair business.

(b) Seller also has an enforceable security interest in the tools. The requirements for attaching a valid security interest are discussed above. Here, Seller extended value to the man, the man and the creditor signed a written agreement granting Seller a security interest, and the man has rights in the tools. Additionally, Seller's security interest is a purchase money security

interest (PMSI) in equipment, which is relevant for priority as discussed below.

However, Seller's interest only attached to the tools that the man purchased on credit – it would not cover after-acquired property. First, Seller's security agreement lists "these tools." While the financing statement listed the collateral as "diesel-engine repair tools," this description in the financing statement does not relate to the threshold matter of attachment – Seller's security interest only attached to the tools relating to his PMSI. Thus, Seller has a valid PMSI in the tools.

(c) Seller has priority in the tools. At issue is who has priority in equipment between a PMSI holder in equipment and a secured creditor who holds an after-acquired property clause.

Generally, priority is determined by the first to file or perfect as between two secured creditors. Thus, Bank would normally have priority over Seller regarding the tools because it filed and perfected on June 1, whereas Seller perfected on June 11. However, a PMSI in equipment has super-priority over other security interests that were perfected earlier if the security interest is perfected within 20 days of the debtor taking possession of the collateral. Here, that is precisely what happened – Seller filed the financing statement the next day after the security agreement was signed. As such, Seller takes the tools pursuant to the PMSI super-priority rule relating to equipment.

# *QUESTION 2*

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## QUESTION

A woman runs a gardening and landscaping business in State A. She uses a manual push mower to cut the grass and pruning shears to cut unwanted small branches from trees and large bushes.

Five months ago, the woman was hired to provide common-area mowing and landscaping services to a townhome community in which homeowners own some land commonly and some land individually. She also agreed to accept online service requests from homeowners in the community for individual landscaping jobs.

Last week, the woman was at the community cutting thick brush and small branches using her pruning shears. She finished the work at noon and decided to try to collect an overdue payment from a homeowner who had ordered and received \$100 worth of landscaping services from the woman's business but had never paid for the services. The woman, carrying her pruning shears, walked directly to the homeowner's townhome. When she reached the front door, she was still holding the pruning shears (but down at her side, pointed toward the ground). The woman rang the doorbell, and the homeowner, who was just leaving on an errand, opened the door.

The woman asked bluntly, "Where's the money?" The homeowner did not recognize the woman because the two had communicated only online. Neither the woman's clothing nor her truck bore the name of her landscaping business. Frightened by the woman's cold tone and the pruning shears in the woman's hand, the homeowner immediately pulled five \$20 bills from her purse, held the cash out toward the woman, and said, "Take it. This is all I have!" The woman said, "Fine. That's what I was expecting." The woman put the \$100 in her pocket and walked toward her truck. The homeowner slammed the door and called the police.

On the way to her truck, the woman was still annoyed that it had taken so long for payment. She muttered to herself, "More than three months overdue and not even a tip!" She decided that she was entitled to something extra. She glanced over her shoulder to make sure the homeowner wasn't looking and grabbed a bronze garden figurine from the homeowner's front lawn, put it in her truck, and drove away.

When the woman got back to her workshop, she offered the figurine to her assistant, saying, "I'll sell you this cheap. How about \$10? Just don't ask where I got it." The figurine looked new, and the assistant noticed a \$200 price tag attached to the bottom of the figurine. The assistant quickly handed the woman \$10, saying, "Wow. That's a great deal. These things are in high demand, and I bet I can sell it for a hefty profit."

State A has the following criminal statutes:

**Theft:** Theft is the unlawful taking and carrying away of property from the person or custody of another, with intent to permanently deprive the owner of the property.

**Armed Robbery:** Armed robbery is theft of property, when in the course of the theft the offender is carrying a dangerous weapon and either (1) uses force, violence, or assault; or (2) puts the victim in fear of serious injury.

**Criminal Possession of Stolen Property:** A person commits criminal possession of stolen property when the person possesses property that the person knows or reasonably should know is stolen property with intent either (1) to benefit that person or a person other than an owner thereof; or (2) to impede the recovery by an owner.

**Dangerous Weapon:** A dangerous weapon is any (1) firearm; (2) device that was designed for use as a weapon and capable of producing death or great bodily harm; or (3) device that is being used in a manner likely to produce death or great bodily harm.

State A courts have determined that all State A criminal statutes should be interpreted to incorporate common law *mens rea* requirements.

1. Analyzing all elements of each crime, did the woman commit:
  - a. Armed robbery of the \$100 cash? Explain.
  - b. Theft of the figurine? Explain.
  - c. Criminal possession of the figurine as stolen property? Explain.
2. Did the woman's assistant commit criminal possession of stolen property? Explain.

# ANSWER

## Woman's Criminal Liability

### *Armed robbery of the \$100 cash*

The woman did not commit armed robbery. The elements of armed robbery are (i) theft of property; (ii) during the course of theft of property; (iii) the offender is carrying a dangerous weapon, and either (a) uses force, violence, or assault; or (b) puts the victim in fear of serious injury.

First, the armed robbery statute element of theft of property suggests it incorporates the crime of theft as an essential element. Since theft requires an "unlawful taking" from another, and the woman was owed \$100 by the homeowner, the woman could not have committed theft since it was not an unlawful taking. The woman was entitled to the money.

Second, if the preceding argument fails, the woman's shears and the way she was holding them mean that they were not a "dangerous weapon" under the criminal statute. The third element requires that an offender being carrying a dangerous weapon. Even if placing a victim in fear of serious injury is met, the shears are not a dangerous weapon. The criminal statute further defines a dangerous weapon as any (1) firearm; (2) device that was designed for use as a weapon and capable of producing death or great bodily harm; or (3) device that is being used in a manner likely to produce death or great bodily harm. Here, the woman's shears are used for cutting thick brush and small branches. When the woman went to homeowner's door, the shears were pointed down and at her side. Shears are not a firearm, nor are they designed for use as a weapon – as mentioned before, they are pruning shears used for landscaping. Further, the third definition of dangerous weapon cannot be met here because the woman was not using the shears in a manner that was likely to produce death or great bodily harm. The shears were not pointed at the homeowner nor were they oriented in a way that would likely lead to injury. Because the woman did not meet the "dangerous weapon" definition in the criminal statute, she cannot be held criminally liable for armed robbery of \$100.

### *Theft of the figurine*

The woman committed theft when she took the homeowner's figurine. Theft is the (i) unlawful taking and carrying away of property from the person, (ii) with intent to permanently deprive the owner of the property. While the homeowner owed the woman \$100 for the landscaping, the woman's desire to take the figurine was because she "was entitled to something extra," or a tip. Further, she took the figurine when the homeowner was not looking. The woman unlawfully took and carried away property of another which she had no right to. Further, her desire at the time of taking was for her to get "something extra." The intent to permanently deprive at the time of taking is met because of this desire, and with her subsequent action of attempting to sell the figurine, thus completely depriving the homeowner of her property. The woman committed theft when she stole the figurine.

### *Criminal possession of the figurine as stolen property*

The woman is also liable for criminal possession of stolen property. The elements are: (i) possessing property that the person knows or reasonably should know is stolen property with intent either to (a) benefit that person or a person other than the owner thereof, or (b) impede the recovery by an owner. The woman stole the figurine so she knew it was stolen property when

she possessed it by taking it from homeowner. When she sold the figurine to her assistant, she both benefited another person besides the owner (by selling it so cheap) and herself (by making a \$10 profit). Further, she also had the intent to impede recovery by the owner (most likely) by selling it to the assistant, making it harder for the owner to track down.

### **Woman's Assistant's Criminal Liability**

#### *Criminal possession of stolen property*

The woman's assistant committed criminal possession of stolen property. As the elements are outlined above, the woman's assistant "reasonably should have known" that the figurine was stolen. First, the woman said "don't ask where I got it." Second, the woman offered \$10 for the new looking figurine that had a price tag of \$200. Such a large discrepancy in value and suspicious comments by the woman put the assistant on notice that there was a reasonable probability it was stolen. When she agreed to the deal and took possession, she benefited herself by purchasing it so undervalued as to make a large profit through resale, which was her express intent.





# *QUESTION 3*

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## QUESTION

Six years ago, Amy and Bill incorporated a craft beer business as Beer Corporation (BC) in State A, whose corporate statute is modeled on the Model Business Corporation Act. Amy and Bill were the corporation's sole shareholders and sole directors at the time it was incorporated, and both of them were employed by BC.

Every fall after incorporation, Amy and Bill traveled to an internationally famous craft breweries trade show held in Germany to learn about the latest in craft brewing. Employees of other craft beer businesses that competed with BC did so as well. BC treated all expenses associated with attending the trade show as "ordinary and necessary" business expenses for accounting and tax purposes, and every year Amy and Bill used the corporate credit card to pay these expenses.

BC was successful, and Amy and Bill wanted to expand the business if they could get a significant capital infusion. Last year, they met Sharon, who agreed to invest in BC. In exchange for her investment, BC issued her new shares in the corporation. Sharon then owned 40% of the outstanding shares of BC. Amy and Bill then each owned 30% of BC's outstanding shares, and they continued to run the day-to-day business. Sharon was elected as the third director of BC.

At the first board meeting after Sharon's election to the board, Sharon questioned the need for Amy and Bill to go to Germany every year at corporate expense. Amy explained, "The trips give us new ideas about ingredients and brewing techniques. And incidentally, while we are there, we can do some sightseeing." In fact, many of BC's competitors covered such travel to Europe for their key employees. Sharon was not convinced about the need for this travel and said, "As far as I'm concerned, the practice must stop!"

At last month's regularly scheduled board meeting, Amy and Bill announced to Sharon that they were planning to travel to Belgium and not to Germany. "We believe that Belgium, not Germany, is where innovations in craft brewing are now happening, and we want to bring back fresh ideas for our business. We expect that the trip will take a full week, and while visiting different breweries we can also take in nearby museums and historic sites. As in the past, we will have BC pay all the expenses for that week."

Sharon objected and said, "If you do this, I'm going to sue!" But Amy and Bill were undeterred, and as a majority of the board, they voted to approve their trip to Belgium at corporate expense. The following week, they traveled to Belgium using BC's credit card. Upon their return, they caused BC to pay the credit card bill.

1. Did Amy and Bill have the authority as members of the board to vote to approve their trip to Belgium at corporate expense? Explain.
2. Did Amy and Bill violate the duty of loyalty by having the corporation pay for their Belgium trip over Sharon's objection? Explain.
3. Assuming that Amy and Bill violated the duty of loyalty by having the corporation pay for their Belgium trip, can Sharon personally recover from Amy and Bill all the expenses for that trip paid by BC? Explain.

4. Assuming that Amy and Bill violated the duty of loyalty by having the corporation pay for their prior trips to Germany, can Sharon bring a derivative claim to recover from Amy and Bill the expenses paid by BC that related to their prior trips to Germany? Explain.

## ANSWER

1. Authority to approve the Belgium trip expenses: Amy and Bill had the authority to approve the transaction over Sharon's objections. At issue is the voting requirements to approve an action by the board.

The board of directors consists of members who are fiduciaries of the corporation. Directors can only act at a properly noticed meeting where a quorum is present. Quorum requirements may be set in the articles of incorporation, but in their absence, a quorum is satisfied when a majority of the directors attend a meeting and are given proper notice of it. Here, there was a quorum present – there are a total of 3 directors and all 3 were present at the “regularly scheduled board meeting” (indicating proper notice). Since a quorum was present, Amy and Bill’s votes in favor of the trip encompassed 2/3 of the directors’ votes. As such, Amy and Bill, as members of the board, authorized the trip and expenses by a majority of the board.

2. Duty of Loyalty: Amy and Bill likely did not violate the duty of loyalty to BC by having the corporation pay for their Belgium trip. At issue is whether the trip constitutes an interested director transaction.

Board members are required to exercise the duty of care and loyalty to the corporation. For the duty of loyalty, the burden is on the director to prove that the transaction was not a violation of their duty of loyalty. The duty of loyalty requires that board members not compete with the corporation or usurp a corporate opportunity. It is implicated in instances where interested directors engage in actions that benefit themselves. However, simply because a director is interested in a transaction will not give rise to a duty of loyalty violation if a majority of a disinterested board of directors approve the transaction, or a disinterested majority of the shareholders approve the transaction. Additionally, many jurisdictions also require a showing that the transaction is also fair and reasonable under the circumstances.

Here, it is arguable that the trip to Belgium was for the benefit of Amy and Bill at the expense of BC. As stated by Amy and Bill, one of the purposes of the trip was in part so “we can also take in nearby museums and historic sites.” However, this benefit to Amy and Bill was only incidental to the actual purpose of the trip – gaining knowledge of different beers from different countries. As such, paying for the flight and hotel would not be a violation of the duty of loyalty. As stated in the facts, the fact that other beer businesses pay for such trips using corporate assets also is evidence that this was not an interested director transaction.

However, if Amy and Bill attempt to have the corporation pay for unreasonable expenses, or other expenses not related to the corporate purpose of the trip, this would be a violation of the duty of loyalty. This would include paying for museum trips, or things such as excessive hotel or food expenses. In such an instance, this would be a violation of the duty of loyalty. Given that Sharon is the only disinterested director, her vote against would be the only one that counted, and as such, the transaction could not be ratified by a majority of disinterested shareholders or directors.

3. Sharon cannot personally recover for the trip paid by BC. At issue is whether a violation for the duty of loyalty is properly brought as a derivative action or direct shareholder action. Derivative suits are those that are brought to vindicate the corporation's rights. Generally, a demand must be made on the board before a derivative action may commence (or demand must be excused due to futility, such as when the directors are the very ones who engaged in the impropriety). A direct action, by contrast, does not seek to vindicate the corporation's rights, but rather the individual shareholder's rights.

Violations of the duty of loyalty require the action to be a derivative suit. This is because the duty of loyalty is owed by the board to the corporation, not the shareholders. Violations for the duty of loyalty cannot give rise to a direct suit by a shareholder because the harm was done to the corporation, not the shareholder. As such, Sharon could not personally recover from Amy and Bill. Instead, assuming this was brought as a derivative suit, Amy and Bill would be required to reimburse the corporation if they were found to have violated the duty of loyalty. This money would not go directly to Sharon. Thus, Sharon cannot personally recover the expenses for the trip paid by BC – BC would recover and the assets would be corporate assets.

4. The corporation would not be able to recover from Amy and Bill in a derivative suit brought by Sharon for prior trips to Germany. At issue is whether the board is liable for past actions that were ratified by the board. Here, the board approved the actions before Sharon was a shareholder or director of BC. Duty of loyalty violations are determined at the time the transaction occurs. Here, when Amy and Bill did the past trips to Germany, they were the only shareholders and directors of the corporation. Given that it is standard practice in the beer business to have the company pay for employee trips to Germany/Belgium to learn about beer, and that at the time the transaction was made it was not violating the duty of loyalty, a derivative suit cannot be maintained to recover the past expenses associated with the Germany trips.



# *QUESTION 4*

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## QUESTION

Peter planned to open a 50-seat pizza parlor that would also make pizzas for home-delivery service. He asked his sister Angela to make some purchases for his pizza parlor. “First, to fit with the parlor’s unique decor, I want you to buy 50 red chairs from the local furniture store, but don’t spend more than \$10,000 on the chairs. Second, I want you to buy a new electric bicycle for pizza deliveries, but don’t spend more than \$5,000. Finally, I’d like you to buy from the local restaurant supplier a pizza oven for the pizza parlor, but it shouldn’t cost more than \$12,000.” Angela responded, “I fully understand. Agreed.”

That day, Angela went to the local furniture store. She told the salesperson that she wanted to buy 50 red chairs and to spend no more than \$10,000. The salesperson responded that red chairs were in high demand and that 50 of them would cost \$20,000, but that for \$10,000, Angela could buy 50 yellow chairs. Believing that Peter would prefer to stay within the \$10,000 budget, even though the chairs were yellow, Angela signed a written contract in her name alone to buy the yellow chairs from the store at that price. Angela did not mention to the salesperson that she was buying the chairs for anyone other than herself or that she had authority to buy only red chairs.

The next day, Angela went to a local bike shop to buy a new electric bicycle, again without mentioning that she was buying the bicycle for anyone else. The bike salesperson truthfully told Angela that she could get a used cargo bike that was not electric, but that could carry more than an electric bike. Believing that Peter would prefer the greater carrying capacity of the cargo bike, Angela purchased it for \$8,000, paying with her personal check made out to the bike shop. She immediately rode the bike to Peter, who at first was very annoyed with Angela for purchasing a used cargo bike rather than a new electric bike. But two days later, after trying out the cargo bike, he called Angela and said that he would keep the \$8,000 cargo bike because he liked its carrying capacity.

The following day, Peter called the local restaurant supplier in the morning and told the owner, “I am going to open a pizza parlor next month. I have asked my sister Angela to come to your store to purchase a pizza oven on my behalf for the pizza parlor.” That afternoon Angela went to the supplier and signed a contract to buy a pizza oven as “Angela, on behalf of Peter.” The price for the oven was \$15,000, which was a fair price for the pizza oven. The contract specified that the price was payable in full upon delivery. When the restaurant supplier delivered the oven to Peter, he refused to accept delivery or pay the \$15,000 purchase price, telling the delivery driver, “Take it back; I don’t want it. It’s too expensive.”

Assume that there is an enforceable contract in each case.

1. As to the yellow chairs:
  - a. Is Peter bound by the contract signed by Angela with the furniture store? Explain.
  - b. Is Angela bound by the contract she signed with the furniture store? Explain.
2. As to the used cargo bike, can Angela recoup from Peter the \$8,000 that she paid to the bike shop for it? Explain.
3. As to the pizza oven, is Peter bound by the contract signed by Angela? Explain.



## ANSWER

1. As to the yellow chairs -

a. Is Peter bound?

Peter is not bound by the contract signed by Angela with the furniture store. The issue is whether Angela had authority to bind Peter. Where there is an agency relationship, an agent acts on behalf of a principal and owes the principal a duty to execute their duties with respect to the principal's instructions. Here, an agency relationship was created when Peter asked his sister to make some purchases for his pizza parlor and Angela responded that she fully understood and agreed to his specific instructions. In the present case, there was neither actual nor apparent authority to enter into the contract for the yellow chairs. Actual authority is the authority that an agent reasonably believes she possesses as a result of the principal's communications to her. Here, Peter specifically asked Angela to buy 50 red chairs for no more than \$10,000. She purchased 50 yellow chairs for \$10,000. The fact that she based her decision on the belief that Peter would prefer to stay in budget with the yellow chairs is irrelevant because she was specifically instructed to stay within the budget. Angela did not possess apparent authority either. Apparent authority is the authority that a third party reasonably believes an agent has as a result of principal's communications with third party or holding out as an agent possessing such authority. Here, Peter did not communicate with the furniture store at all and Angela signed the contract in her name alone. When an agent enters into a contract without actual or apparent authority and the principal is entirely undisclosed, as is the case here, the principal will not be liable on the contract absent some ratification or waiver on the part of the principal. Here, Peter is plainly not liable.

b. Is Angela bound?

Angela is bound by the contract she signed with the furniture store. Please refer to the agency rules discussed above. Angela signed the contract in her name alone and did not mention to the salesperson that she was buying for anyone other than herself or that she had authority to buy only red chairs. Thus, because she lacked actual and apparent authority and because she signed in her own name and did not disclose the principal, Angela will be bound to the contract.

2. As to the used cargo bike, can Angela recoup?

Angela can recoup the \$8,000 she paid to the bike shop for the used cargo bike. The issue is whether Peter ratified the contract despite Angela's initial lack of authority to enter into it. Please refer to the agency rules discussed above. Angela's actual authority with respect to the purchase of a bike was that which Peter expressly stated to her: "I want you to buy a new electric bicycle for pizza deliveries, but don't spend more than \$5,000." She did not have actual authority to purchase the cargo bike because it was neither a new electric bike nor was it within Peter's price range. She did not have apparent authority either. There are no facts to indicate that Peter had any contact with the bike shop. On top of that, Angela paid for the bike with a personal check, making no indication of her agency relationship with Peter. Thus, Peter ordinarily would not be bound by that sale. However, Peter ratified the contract with his conduct after the purchase. The facts state that he was initially annoyed when he saw that Angela defied his instructions, but two

days later, he called Angela and said that he would keep the bike because he liked its carrying capacity. Even where an agent enters into a contract without authority, the contract can be ratified by the principal, and the contract will be treated as though it was entered into with the proper authority. The fact that Peter decided to keep the bike and made this known to Angela is conduct amounting to ratification or acquiescence because he is accepting the benefit of the transaction and thus would be estopped to deny Angela the right to recoup the \$8,000 she paid.

3. As to the pizza oven, is Peter bound by contract signed by Angela?

Peter is bound by the contract for the pizza oven signed by Angela. The issue is whether Angela had apparent authority. Please refer to the agency rules above. Angela did not have actual authority because she purchased a pizza oven for more than she was instructed to pay (\$12,000 was authorized, but she spent \$15,000). The fact that this was fair market value for a pizza oven is irrelevant as to the authority analysis. Angela did have apparent authority; however, in this instance, Peter called the local restaurant supplier and told the owner she he has asked his sister to come to the store and purchase the oven on his behalf. He did not state what his budget was. Thus, the owner could reasonably believe based on Peter's phone call that Angela had the authority to purchase the oven for \$15,000, particularly because this was a fair price for an oven. Nothing in the facts indicate that the owner had any reason to believe that Angela was not authorized to pay that amount because Peter did not specify his budget. Further, Angela signed "Angela, on behalf of Peter." In a disclosed principal situation, the principal is bound to the contract entered into by the agent.

# QUESTION 5

## QUESTION

Ten years ago, Settlor, a widower, established an irrevocable trust. At that time, Settlor had only one child, Daughter, who had two adult children, Ann and Bob.

The trust instrument named Settlor's friend as the sole trustee and stated, in pertinent part:

1. The trustee shall pay all trust income to Daughter, Ann, and Bob, in equal shares.
2. No income beneficiary may alienate or assign their trust interest, nor shall such interest be subject to the claims of their creditors.
3. Trust principal will be distributed following Daughter's death "as she may appoint by her will, among her heirs at law and in such shares as she, in her sole discretion, may deem appropriate."

Each year after the trust was established, the trustee distributed equal shares of trust income to Daughter, Ann, and Bob.

Two years ago, Settlor remarried. His wife recently gave birth to their twins. Settlor wants to ensure that his twins receive a share of trust principal after Daughter's death. Daughter has agreed to help effectuate this goal.

Last month, the trustee received letters from two of Bob's creditors seeking to have the claims they had against Bob paid from Bob's interest in the trust. One of these creditors, a bank, has a \$20,000 judgment against Bob for a loan that Bob did not repay.

The other creditor is Bob's former wife, who seeks to enforce a \$30,000 judgment against Bob for unpaid child support owed for their five-year-old child.

Since receiving the letters from the two creditors, the trustee has continued to pay trust income to Daughter, Ann, and Bob, but he has refused to pay anything to either of Bob's creditors.

Under the Uniform Trust Code:

1. May the bank reach Bob's interest in present and future distributions of trust income to satisfy its judgment against Bob? Explain.
2. May Bob's former wife reach Bob's interest in present and future distributions of trust income to satisfy her judgment against Bob? Explain.
3. With respect to the power of appointment:
  - a. What is the proper classification of Daughter's power of appointment? Explain.
  - b. Is it likely that an appointment of trust principal by Daughter to Settlor's twins would be effective? Explain.
  - c. If Daughter fails to exercise her power of appointment, to whom would the trust principal pass upon her death? Explain.

# ANSWER

## **1. May the bank reach Bob's interest in present and future distributions of trust income?**

The bank may not reach Bob's interest at all. The issue is whether the trust's spendthrift provision precludes creditors from reaching Bob's interest. The trust instrument includes a spendthrift provision – “no income beneficiary may alienate or assign their trust interest, nor shall such interest be subject to the claims of their creditors.” A spendthrift provision operates to preclude beneficiaries of the trust identified by the provision from alienating or assigning their interest in the trust whether voluntarily or involuntarily. Spendthrifts are useful in situations where a settlor perhaps does not trust a beneficiary to handle their interest responsibly or when they would like to block creditors from reaching such interests. Creditors like Bank are unable to reach the interest unless an exception applies, which it does not. Here, Bank has a \$20,000 judgment against Bob for a loan that Bob did not repay, but the spendthrift provision will preclude bank from recovering from Bob's interest. In some jurisdictions, it is the interest and not the distribution itself that is unavailable to creditors, meaning that the creditor cannot get the trustee to pay the creditor directly, but the creditor may directly go after what is in the beneficiary's bank account upon a distribution being made. This is not an effective method of recovery for creditors because a beneficiary can simply remove that money from an account and spend it so that creditors cannot get to it.

## **2. May Bob's former wife reach Bob's interest in present and future distributions of trust income?**

Bob's wife may reach his interest to satisfy her judgment against Bob. The issue is whether the spendthrift provision will preclude wife's recovery. Ordinarily, a spendthrift provision will preclude creditors from reaching a beneficiary's interest, but there is an exception to this rule when the creditor is a former spouse seeking unpaid child support, alimony, or necessities. In the interest of public policy, courts allow former spouses to reach a beneficiary's interest for this purpose, even where a spendthrift provision is in place, to promote the payment of child support and the welfare of children and families in general. Here, former spouse is seeking to enforce a \$30,000 judgment for unpaid child support owed for their 5-year-old. Accordingly, a court will order trustee to pay Bob's former wife directly to satisfy the child support judgment.

## **3. With respect to the power of appointment:**

### **a. Classification**

Daughter's power of appointment can be classified as a testamentary specific power of appointment. The issue is what kind of power of appointment is created by the language of the trust. A power of appointment is a provision in a trust that grants a person named in the trust the ability to distribute trust principal in her discretion. A power of appointment that is effective upon a person's death at the probate of their will is called a testamentary power of appointment. Powers of appointment can be general or specific. A specific power of appointment limits the ability of the holder of the power. The holder may not use the power to their own benefit or to give their own creditors access to distributions. The power of appointment must be exercised in favor of those people listed specifically in the trust. On the other hand, a general

power of appointment is broader. It allows the holder to make distributions as she pleases and to their own benefit if she wishes. The power of appointment in this instance is listed as – “Trust principal will be distributed following Daughter’s death ‘as she may appoint by her will, among her heirs at law and in such shares as she, in her sole discretion, may deem appropriate.’” Because Settlor specified that the power is effective “by her will,” it is testamentary and because he also specified that the power of appointment is to be used “among her heirs at law,” it is specific so it cannot be exercised in favor of Daughter or anyone who is not her heir at law.

b. Would an appointment to Settlor's twins be effective?

An appointment to Settlor’s twins by Daughter would not be effective. The issue is what happens when the power of appointment conflicts with Settlor’s intent. Daughter does not have the power to appoint a trust principal to Settlor’s twins because they are not “Daughters’ heirs at law” as is required by the trust provision creating the power of appointment. The twins would be Daughter’s siblings, while Daughter’s heirs would normally be construed as Daughter’s issue, Ann and Bob. On the other hand, Settlor’s wife recently gave birth to twins and Settlor apparently wanted to ensure that his twins received a share of trust principal after Daughter’s death such that Daughter has agreed to effectuate that goal. Settlor could achieve this goal by modifying the trust instead.

c. If Daughter fails to exercise her power of appointment, to whom would trust principal pass upon her death?

If Daughter failed to exercise her power, the trust principal would pass by the laws of intestacy. The issue is what happens when the holder of a power of appointment fails to exercise his power. Here, Daughter holds the testamentary power of appointment. The general rule is that if she does not exercise it, the principal will pass by the laws of intestacy. By the laws of intestacy, the people entitled to any money here first be Daughter’s issue, Ann and Bob, split equally. In some jurisdictions, the principal will go into a resulting trust if the power is not exercised.

# *QUESTION 6*

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## QUESTION

Buyer manufactures scarves from various fabrics, including silk. It buys silk from various fabric importers including Seller, from whom Buyer has made over 250 purchases of silk during the last six years. In each of these earlier transactions, Seller delivered the silk to Buyer at no extra charge, and Buyer paid Seller the purchase price at the time of delivery.

On January 9, Buyer and Seller agreed in a telephone call that Buyer would buy 10,000 yards of silk from Seller on February 1 at a price of \$10 per yard. The next morning, Buyer sent a signed note to Seller, stating, "I'm glad that we were able to reach agreement so quickly yesterday on the deal for the 10,000 yards of silk I'm buying from you." Seller received the note two days later, read it, placed it in its files, and did not respond to it in any way. On February 1, Seller did not deliver silk to Buyer's place of business.

The next day, Buyer contacted Seller to complain. Seller replied, "This isn't a delivery order. You didn't say anything about delivery when you placed this order last month. Come pick it up – and hurry! Your order is taking up space in our warehouse." Buyer, who did not have a truck large enough to pick up the silk, responded by saying, "Deliver it by tomorrow or I'll see you in court."

Two days later, on February 4, when Seller had not delivered the silk to Buyer, Buyer made a good-faith and commercially reasonable purchase of 10,000 yards of silk of identical quality from Dealer at a price of \$12 per yard, including delivery to Buyer.

Buyer then sued Seller for \$20,000, alleging that Seller had breached its obligations under the January 9 agreement.

1. Is there a contract enforceable by Buyer against Seller arising from the January 9 agreement? Explain.
2. Assuming that there is a contract enforceable by Buyer against Seller arising from the January 9 agreement, does the contract require Seller to deliver the silk to Buyer's place of business? Explain.
3. Assume that there is a contract enforceable by Buyer against Seller arising from the January 9 agreement, that the contract requires Seller to deliver the silk to Buyer, and that Buyer suffered no incidental or consequential damages. Is Buyer entitled to damages of \$20,000 based on Buyer's purchase of substitute silk? Explain.



# ANSWER

## **1. Contract between Buyer and Seller:**

Buyer and Seller have an enforceable contract for the sale of the silk. The issue is whether the seller has any defenses to the formation of the contract. In a contract for the sale of goods, Article 2 of the Uniform Commercial Code (UCC) governs the transaction. Certain sales of goods need to be in writing for them to be enforceable. The statute of frauds requires contracts for the sale of goods for \$500 or more be in writing to be enforceable. A writing sufficient for the statute of frauds must identify the parties, state the material terms of the agreement, and be signed by the party to be charged. The UCC allows for written confirmatory memorandums between merchants to satisfy the statute of frauds. That memorandum need not comply with all the requirements of the statute of frauds and will be binding on the parties if there is no objection within a reasonable amount of time after receiving the memorandum, as long as it specifies the quantity of goods sold. Here, Buyer purchased silk for \$100,000, so the transaction needed to be reduced to writing. However, Buyer and Seller are merchants, so they only needed to have a confirmatory memorandum sent. Buyer sent such a memorandum the morning after making the agreement, to which Seller received and did not respond to. The memorandum confirmed the terms of the agreement as to quantity and Seller did not object within a reasonable amount of time. Therefore, Buyer and Seller have an enforceable contract for the sale of the silk.

## **2. Delivery Requirements:**

Seller is required to deliver the silk to Buyer's place of business on February 1. The issue is whether past or regular conduct can regulate terms of the agreement. When a contract is silent to certain terms of the agreement, the court may look to various factors to interpret the terms. One factor is the course of dealing, where the court may add terms consistent with prior dealings to the contract. Here, Buyer and Seller have entered into over 250 agreements for Buyer to purchase silk from Seller in the last six years. In each of those agreements, Seller delivered the goods to Buyer's place of business and Buyer paid for the silk on delivery. Because their agreement this time was silent as to the terms of delivery or lack thereof, the court can look to prior dealings to determine the terms of another similar agreement. Based on the prior dealings between Buyer and Seller, the court will most likely construe the terms of the agreement to have Seller deliver the silk to Buyer, as they have done each time for all of their agreements for the past six years.

## **3. Buyer's Damages:**

Buyer is entitled to \$20,000 in damages from Seller's breach. At issue is whether a buyer may recover damages for the seller's breach after buyer makes an effort to cover the damages through purchasing other conforming goods from another source. Article 2 of the UCC permits damages in various methods for seller's or buyer's breach. For buyers who have their goods not delivered or rejects the entire shipment of non-conforming goods, the UCC permits the buyer to sue for damages after they acquire their goods from another source if they do so in good faith. The damages are expectancy damages, where the buyer's damages are equal to the price to cover the seller's breach less the contract price. Here, Seller breached the agreement by not delivering the silk to Buyer at all. Buyer then purchased another 10,000 yards

of silk in good faith, which were identical in quality to Seller's silk. The total cost of Buyer's cover was \$120,000 (10,000 yards of silk at \$12 per yard), which is \$20,000 more than the contract with Seller (10,000 yards of silk at \$10 a yard is \$100,000). Thus, the costs of damages to Buyer was the cover cost of \$120,000 less the cost of the contract with Seller (\$100,000) which equals a net of \$20,000.

# *MPT 1*

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*PAINTER V. PAINTER  
(FEBRUARY 2022, MPT-1)*

This performance test requires the examinee to draft an objective memorandum addressing issues arising in a divorce action. The client, Denise Painter, is filing for a divorce from her husband, Robert Painter. The parties have been married for nine years and have an eight-year-old daughter, Emma. The examinee's memorandum should address whether a court is likely to grant joint legal custody of Emma to both Denise and Robert or sole legal custody to just Denise, taking into consideration the rebuttable presumption in the Franklin Family Code in favor of joint legal custody. In addition, the examinee should determine the proper classification under Franklin law of the couple's property and debt, including how a court would likely allocate the appreciation of the house in which the Painters lived during their marriage and where Denise and Emma continue to reside. The File contains the instructional memorandum, notes from the initial client consultation with Denise and from a conversation with Robert, and a list of the parties' assets and debts. The Library contains excerpted sections of the Franklin Family Code, including the Franklin Community Property Act, and two Franklin appellate cases.

# ANSWER

To: Harold Huss

From: Examinee

Re: Denise Painter Divorce

## Introduction

### *I. Likelihood of the Court to Award Joint or Sole Legal Custody of Emma*

Legal custody is defined as the “right to make decisions about a child’s medical care, education, religion, and other important issues regarding the child.”

§420(a). In determining the legal custody of a minor child, the district court will look to the best interests of the child. §421. In so doing, the court will consider all relevant factors, including but not limited to: (a) any agreement or lack thereof of the parents on joint custody; (b) the past and present abilities of the parents to cooperate and to make decisions jointly; (c) the ability of the parents to encourage the sharing of love, affection, and contact between the child and the other parent; and (d) the mental and physical health of all involved. *Id.* Further, there is a rebuttable presumption that joint custody is in the best interest of the child. §422. A determination by the trial judge will not be overturned, absent a clear abuse of discretion. *Sanchez v. Sanchez*. However, “a judgment based on findings of fact not supported by substantial evidence ... cannot be sustained on appeal and must be reversed.” *Id.*

The presumption for joint legal custody must be rebutted by specific evidence. *Sanchez*. The ability to cooperate does not require the parents to have a totally amicable relationship, rather “parents must be able to cooperate in decisions concerning major aspects of child-rearing.” *Id.* (quoting *Ruben v. Ruben* (Fr. Sup. Ct. 2004)). In order to be effective, “joint legal custody requires that the parents be willing and able to communicate and cooperate with each other and reach agreement on issues regarding the child’s needs.” Joint custody will not be awarded “unless there is a record of mature conduct on the part of the parents evincing an ability to effectively communicate with each other concerning the best interests of the child.” *Sanchez*.

In *Sanchez*, the Franklin Court of Appeals found that the mother was openly hostile and refused to communicate directly with the father. Rather, she would communicate with him by calling his parents and having them relay messages to him. *Sanchez*. Further, expert witness agreed that “the parties lack the ability to communicate with each other on a rational level.” *Id.* Also, the exchanges of the child were so acrimonious that the judge had to order exchanges at the public library. *Id.* Thus, since there was no substantial evidence to support a finding of the parents being able to communicate, the Court of Appeals reversed the decision of the trial court for abuse of discretion.

The ability of Denise and Robert to communicate does not rise to the level of hostility present in *Sanchez*. There is evidence to suggest that they can communicate and cooperate shown by the two visits to Robert that Emma had. In those visits, Robert called Denise to request time and Denise agreed. However, those are the only two instances of real communication between them. Since then, neither of the two can seem to get on the same page regarding what the means of communication should be with Robert texting while Denise would rather call. This is frustrating to Robert because Denise won’t respond to his text messages, instead leaving rambling voicemails.

However, this does not show a lack of willingness to communicate, such as there was in *Sanchez*. Unless there is some evidence to show that Denise and Robert cannot absolutely agree on how they should communicate, the ability to cooperate and communicate would lean in favor of joint legal custody.

The court has ruled that another way to rebut the presumption of joint custody is a mental condition of one of the parents that impairs their ability to participate in decision making. *Sanchez*. Such that “there [is] a nexus between the parent’s condition and the parent’s ability to make decisions for the child.” *Id.* An untreated drug addiction was held to be a legitimate factor in rebutting the presumption of joint legal custody. *Williams v. Williams* (Fr. Ct. App. 2005). While Robert is an alcoholic, he has been getting treated for it. He has been in rehab for the last six months, has not taken a drink in the last four, and gets tested regularly. As such, the fact that Robert is an alcoholic alone will not rebut the presumption of joint custody.

With regard to the other factors, there must be specific evidence in order to rebut the presumption of joint legal custody. Firstly, “the agreement or lack of agreement of the parents on joint legal custody.” There is a lack of agreement between the parties on these factors. Denise wishes to have sole legal custody of Emma; and Robert would like to have joint legal custody, but he is not requesting sole legal custody. “The ability of the parents to encourage the sharing of love, affection, and contact between the child and the other parent.” Both Denise and Robert have the ability to do this. Denise is not opposed to Emma visiting or having contact with Robert. This is shown by the fact that Emma has visited Robert, texts him from time to time, and has conversations at Emma’s soccer games. Robert is not opposed to Emma living with Denise, so long as he has regular visits with her. Because of this, both parents are able to encourage the sharing of love, affection, and contact between the other parent.

Because most of the factors seem to lean in favor of joint legal custody, there is a presumption that joint legal custody is in the best interest of Emma, and there is no specific evidence to rebut that presumption, the court will likely award joint legal custody to both Denise and Robert.

## *II. Likelihood of assets and debts being (a) separate property or debt or (b) community property or debt.*

When a trial court grants a divorce, the court must determine what constitutes community property and debt and what constitutes their separate property and separate debt. §433.

Separate property is: (1) property acquire by either spouse before marriage or after entry of a decree of divorce; (2) property acquired by either spouse by gift, bequest, devise, or descent; and (3) property designated as separate property by a written agreement between the spouses. §430(a)(13). Community property, on the other hand, is any property acquired by either spouse or both spouses during marriage that is not separate property. §430(b).

Separate debt is a debt that is incurred by a spouse before marriage or after entry of a decree of divorce, while community debt is a debt incurred by either spouse or both spouses during marriage. §431. Further, there is a presumption that any property or debt acquired/incurred during marriage by either or both spouses is community property or debt. §432.

Under §430(b), any property acquired by either spouse during the marriage is not separate property. Further, there is a presumption that any property or debt acquired during the marriage is community property. §432. As such, any property that was acquired by either Robert or Denise after their 2013 marriage would be considered community property. As such, the bedroom set (acquired in 2014), the TV (2019), the leather couch and loveseat (2014), the dining set (2018), the pickup truck (2019), the debts of the Best Buy credit card (2019), the car loan for the pickup (2019), and the target credit card (2018) would all be considered community property and debt, unless either party can show that it was obtained through gift, bequest, devise, or descent, or there was a written agreement designating it as such. There is no evidence of that at this time, so those assets and debts will be considered community property by the court.

Any property acquired before the marriage or by gift is considered to be separate property. The house at 212 Lake Street was not only acquired before the marriage but was also a gift. Denise's uncle gave the house to Denise before the wedding. While it was two days before the wedding, it was still before the marriage took place. Also, it was a gift from her uncle. He gave it to Denise without any payment or request in return. As such, because it was given before the marriage took place it was separate property. The motorcycle given to Robert, by his Father, was received during the course of the marriage. It was acquired by Robert in 2019. Because of that, there is a presumption that it is community property. However, it was a gift to Robert from his father. Because gifts acquired by spouses are considered to be separate property, the motorcycle will also be considered separate property by the court.

This still leaves the question of the deck and detached garage. In *Barkley v. Barkley*, the Court of Appeals affirmed a trial court award of 50% of the total cost of improvements to a house that the husband paid for out of his own pocket. In making that determination, the court found that the improvements were community property subject to equal distribution. *Id.* On appeal, the wife argued that the proper valuation is the "difference between the fair market value of her house after the improvements and the fair market value of her house before the improvements." *Id.* However, there was no evidence submitted of the two valuations. As such "in the absence of any evidence to determine whether the improvements increased the fair market value of the house, the court can award credit to the party who paid for the improvements equal to 50% of the total cost of the improvements."

Denise and Robert paid \$5,000 to install the deck to the house in 2016 and another \$5,000 to build a detached garage on the property in 2019. The total \$10,000 paid for both improvements were made with the couple's savings. Because of that, the deck and garage (and the cost to build them) would be community property. As such, they would be subject to a 50% split in the absence of evidence to determine whether the improvements increased the fair market value of the house. However, the value of the house when it was gifted to Denise was \$215,000 and its current value is \$245,000. If the evidence were to show that the increase in value was because of the improvements made with community property, then the difference in two valuations would be the community property subject to distribution. As such, it is likely that the court will find that the difference in value of the house is community property subject to distribution.

**Conclusion**

Because there is no real lack of willingness to communicate that rises to the level of outright hostility, Robert is seeking and getting treatment for his alcohol addiction, and none of the other factors rebut the presumption that joint legal custody is in the best interest of Emma, the Court will likely award joint legal custody to both Denise and Robert.

All the property acquired during the duration of the marriage will be considered community property by the court, except the motorcycle that was gifted to Robert from his father will be considered separate property. Further, all the debt acquired during the duration of the marriage will also be considered community property. While the house at 212 Lake Street will be considered separate property, the improvements to the house made with community property (and the value it added to the house) will also be considered community property by the court.



# *MPT 2*

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*STATE OF FRANKLIN V. FORD*  
*(FEBRUARY 2022, MPT-2)*

In this performance test, the client, Sylvia Ford, has been charged in a three-count indictment with the sale of cocaine, possession of marijuana with intent to sell, and being a felon in possession of a firearm based on a 2015 felony conviction. The alleged drug sales occurred six months apart, under very different circumstances: the cocaine sale occurred at an apartment, and the marijuana and weapons charges arose from a traffic stop. The state public defender is representing Ms. Ford. The examinee is tasked with preparing a persuasive argument in support of a motion to sever the three charges for trial so that Ms. Ford is not tried in a single trial for all three alleged offenses. In doing so, the examinee should make two arguments under the Franklin Rules of Criminal Procedure in support of severance: that the three counts are improperly joined under Rule 8 (Joinder of Offenses or Defendants), and that even if some of the offenses are properly joined, pursuant to Rule 14 (Relief from Prejudicial Joinder) Ms. Ford will be prejudiced by the lawful joinder. The File contains the instructional memorandum, the office guidelines for drafting persuasive briefs, a summary of the client interview, the indictment, two affidavits in support of the arrests, and the motion to sever. The Library contains excerpts from the Franklin Rules of Criminal Procedure and the Franklin Rules of Evidence, which are identical to the federal rules, as well as three appellate cases.

# ANSWER

STATE OF FRANKLIN  
DISTRICT COURT OF HAMILTON COUNTY STATE OF FRANKLIN,  
Case No. 2021 CF 336  
Plaintiff,  
v.  
SYLVIA RUTH FORD,  
Defendant.

## MOTION TO SEVER OFFENSES

Statement of the Case: [omitted]

Statement of Facts: [omitted]

Argument in Support of Brief to Sever Offenses:

*Because severe and undue prejudice would result by allowing evidence of the 2015 prior conviction that is admissible in the weapons charge to also be heard in the drug charge cases, where it otherwise would NOT be admissible, the motion to sever the weapons charge from the drug charges should be granted in order to avoid substantial injustice.*

Franklin Rules of Criminal Procedure Rule 14 holds that if the joinder of offenses or a consolidation for trial appears to prejudice a defendant, the court may order separate trials of counts. Here, the joinder of the weapons charge with each, or either, of the drug charges would cause severe prejudice to Ms. Ford, and therefore the court has the authority to sever these counts and order separate trials on each in order to avoid this substantial and undue prejudice.

*State v. Ritter* held that prejudice occurs when “proof of the defendant’s commission of one of the illegal acts would not otherwise have been admissible in the trial for the other offense. Here, prejudice will occur to Ms. Ford without severing the charges because proof of her prior 2015 conviction for assault with intent to commit murder will be admissible in the count III weapons charge due to the elements of a felon in possession of a handgun. However, this conviction would NOT be admissible in either the count II or count III drug charges, and allowing the jury to hear this evidence in the drug charges simply because they are being tried jointly with the weapons charge will prejudice the jury to be more likely to convict on those drug charges when they otherwise would not, and should not, be aware of the conviction when considering the drug charges on their own in a separate trial.

Similarly, *State v. Pierce* held that when evidence of one charge that would not be admissible in a separate trial of another charge allows the jury to hear evidence that it otherwise would have no reason to know about, extreme prejudice occurs. Like the circumstances in that case, the jury would have no reason to know about Ms. Ford’s prior conviction in the trial of the drug charges because they would not be admissible under Franklin Rule of Evidence 403. Therefore, if not for the joinder of the offenses with the weapons charge, the jury would not hear this evidence; allowing for such joinder would be extremely prejudicial. *Pierce* held that “when a jury learns of

a separate offense committed by a defendant, the jury can be tempted to infer the worst about that defendant.” That is exactly what will happen to Ms. Ford if these charges are not severed.

Moreover, the joinder of these charges would result in unjust character evidence, leading the jury to use Ms. Ford’s character for propensity to commit crimes to influence their decisions, which is banned under Rule 404(b) Franklin Rules of Evidence. When the jury learns of the prior conviction and weapons charge that they would have no reason to know about in the drug cases if not for joinder, they will be tempted to infer the worst about Ms. Ford. This will taint their decision when deciding which charges to convict or acquit on. Therefore, it is clear that the prejudicial effect of joinder of all Ms. Ford’s charges would substantially outweigh the probative value.

Furthermore, *State v. Ritter* held that “[s]everance of counts is warranted when a defendant has made a convincing showing that he has both important testimony to give concerning one count and a strong need to refrain from testifying on the other.” This is because prejudice will result when the “defendant wishes to testify in his own defense on one charge but not on another.” Here, Ms. Ford wishes to testify in the weapons charge and has strong reason to do so in order to explain the events surrounding the charge to clearly and helpfully allow the jury to determine why she is innocent. The weapon she is being charged with was actually registered in her boyfriend’s name and found in the trunk of her boyfriend’s car. Ms. Ford wishes to testify as to these events, to show that she did not knowingly possess the weapon she is being accused of possessing. Knowingly possessing the firearm is an element of the charge that the prosecutor must prove beyond a reasonable doubt. This testimony is crucial to Ms. Ford’s defense and is clearly important testimony that is needed to convince the jury of her innocence. However, Ms. Ford has a strong need to refrain from testifying in either of the drug cases, in order to ensure any prior conviction of hers could not become admissible for impeachment purposes. Therefore, Ms. Ford has a very strong need to testify in the weapons charge, and a strong interest not to testify in the drug charges. As a result, under the *State v. Ritter* rationale, undue prejudice will result from all of these charges being tried together. The motion to sever these charges should be granted to avoid this prejudice.

For these reasons, the motion to sever the weapons charge from the drug charges should be granted.

*Because the two drug charges are not part of the same character, transaction, or scheme, and since hearing about both in one trial would prejudice the jury to convict on either, or both charges, the motion to sever the two drug charges from one another should be granted.*

Under Rule 8 of Franklin Rules of Criminal Procedure, joinder of offenses is proper if they are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan. While both are drug related charges, Count I on the charge of the sale of 10 grams of cocaine is a completely different and distinct event than Count II on the charge of possession with intent to sell marijuana. The events relating to these separate charges occurred six months apart and under entirely different circumstances that are severable and unrelated from one another.

*State v. Slayers* held that simply because two charges contain the same name of offense, “robbery” it is not a sufficient basis on which to join the charges in a single indictment. Here, Ms. Ford’s two drug charges were insufficiently joined into a single indictment merely because they were both drug related charges. This alone is an insufficient basis, and the charges should be severed. In *State v. Slayers*, the robberies occurred at two different locations, with different degrees of seriousness, and at two different dates. As a result, there was no basis to support a finding that they were of the same character or part of the same transaction or scheme. Similarly, here, Ms. Ford’s two drug related charges occurred at two different locations, one being at her brother’s apartment and the other being in her boyfriend’s vehicle. The two charges are of varying degrees of circumstance, one being a sale of cocaine and the other being a possession with attempt to sell. In *State v. Slayers*, even the difference from robbery and attempted robbery were enough of a difference to weigh against a finding of similar character of a charge. Therefore, Ms. Ford’s two different charges are certainly enough to show distinct character in each charge. Furthermore, the two charges, as in *State v. Slayers*, were at different times, one being April 17, 2021, and the other being Oct. 24, 2021. With more than six months apart from one another, these two charges simply cannot be considered the same transaction or scheme.

Moreover, the incidents involved different people and events that lead to the arrests. With the first charge occurring as a result of Ms. Ford’s brother’s conduct and a police informant, and the other charge resulting from a DUI stop that led to discovery in Ms. Ford’s boyfriend’s car. The events and conduct alleged in each of these chargers are clearly distinct and unrelated. Thus, there is no connection between the events of the two that indicate, in any manner, there was a common scheme or plan. As a result, the totality of the circumstances show with certainty that the two drug offenses Ms. Ford is charged with are not a part of the same transaction or scheme. Therefore, there is insufficient basis to support a finding that they should be joined.

Additionally, the jury hearing about both of these alleged drug offenses that Ms. Ford is charged with will cause undue risk or substantial prejudice because it will cause the jury to believe she is more likely to have committed each offense since she is charged with two drug offenses that occurred at different times. While *State v. Ritter* held that this type of risk is rarely a sufficient basis to justify severance, it also held that this is a factor to consider and in the court’s own words is “clearly prejudicial.” Therefore, when this clear type of prejudice, while not sufficient alone to sever, is added to the above explanation that the charges themselves are not sufficiently based on the same character, transaction, or common scheme or plan as required under Franklin Rules of Criminal Procedure to join offenses, it is clear that the risk here substantially outweighs any probative value.

For these reasons, the motion to sever these two charges from one another should be granted.



*On the cover:*

Detail from the Thomas J. Moyer Ohio Judicial Center  
Law Library Reading Room Mural 7, depicting the  
availability of knowledge in printed books.

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THE SUPREME COURT *of* OHIO