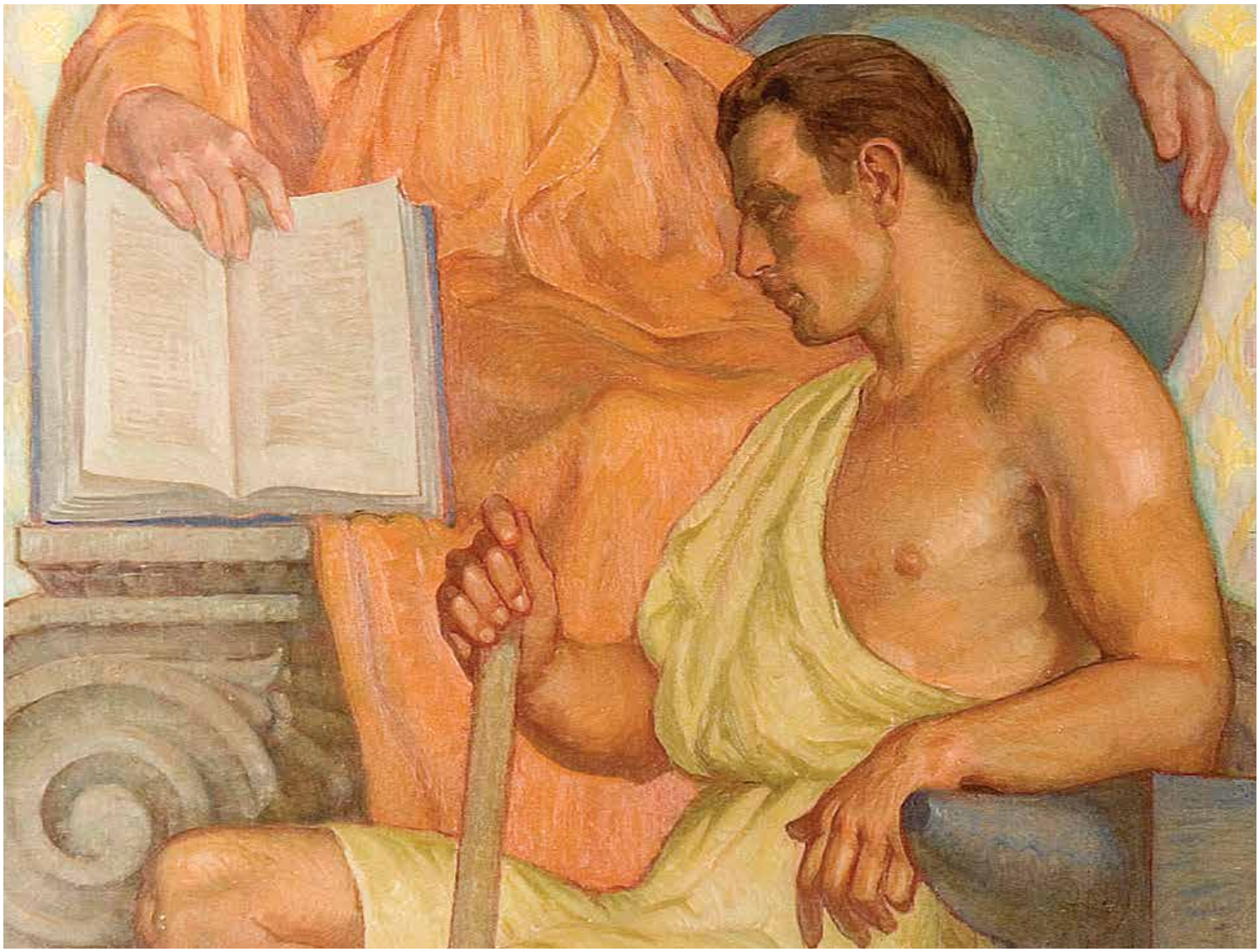
THE SUPREME COURT *of* OHIO



October 2020
OHIO BAR EXAMINATION

Multistate Essay Examination
Questions & Selected Answers

Multistate Performance Test
Summaries & Selected Answers

The Supreme Court *of* Ohio

OCTOBER 2020 OHIO BAR EXAMINATION

Multistate Essay Examination Questions & Selected Answers
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OHIO BAR EXAMINATION

The October 2020 remote Ohio Bar Examination contained three Multistate Essay Examination (MEE) questions. Applicants were given one and one-half hours to answer a set of three essay questions. These essays were prepared by the National Conference of Bar Examiners (NCBE).

The exam also contained one Multistate Performance Test (MPT) item. This item was prepared by the NCBE. Applicants were given 90 minutes to answer the MPT item.

The following pages contain the NCBE's summary of the MEE questions given during the October 2020 remote exam, along with the NCBE's summary of the MPT item given on the exam. This booklet also contains actual 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 October 2020 MPT and its corresponding point sheet are available from the NCBE. Please check the NCBE's web site at www.ncbex.org for information about ordering.

QUESTION 1

QUESTION

Aldo, Belinda, and Carlos are equal partners in a general partnership that owns and operates a trash collection company in State A. They have no written partnership agreement. The three partners meet periodically to discuss the partnership's business, but they do not hold formal partner meetings.

Aldo manages the partnership's day-to-day operations. Belinda, who is an accountant, keeps the partnership's books and records. Carlos owns a landfill where the company dumps its trash collections.

Aldo contracted to purchase an all-electric garbage truck for the partnership for $100,000 from a truck dealership that had previously sold garbage trucks to Aldo for the partnership. All-electric garbage trucks, which are more fuel efficient than gas-powered trucks, have become common in the trash collection business. A gas-powered truck similar to what the partnership had been using would have cost only $60,000. Aldo purchased the truck in the partnership's name, using $30,000 of his personal funds as a down payment. Carlos believes that Aldo wasted money buying an all-electric truck because fuel costs had never been a problem for the partnership. Carlos is particularly concerned because the balance of the purchase price ($70,000) is due in six months, and the partnership does not have sufficient funds to pay the bill. Belinda and Carlos never authorized Aldo to purchase the all-electric truck and did not ask him to advance his own money for the down payment.

Aldo spends about twice as much time conducting the partnership's business as Belinda and Carlos do. Aldo has demanded that the partnership pay him for the value of his services, although there is no express agreement that any of the partners should be compensated for their services.

Five years ago, the partnership purchased a 500-acre tract of land in State B zoned for residential use only, as a long-term speculative investment. Last month, Aldo, purporting to act on behalf of the partnership, contracted to sell the land to a developer. The developer knew that the partnership operated its trash collection business only in State A and did not operate any business in State B. When Carlos heard what Aldo had done, he immediately told Aldo that the sales contract was not binding on the partnership because Carlos had not agreed to the making of the contract. Aldo, however, believes that he had the power to sign the contract for the partnership because Belinda had also agreed to the sale even though Carlos had not.

1. With respect to Aldo's purchase of the all-electric garbage truck:
    a. Is the partnership bound on the purchase contract? Explain.
    b. Assuming that the partnership is bound, is Carlos liable for any part of the unpaid balance of the purchase price? Explain.
    c. Assuming that the partnership is bound, is Aldo entitled to reimbursement from the partnership for the down payment he made on the truck? Explain.
2. Is Aldo entitled to be paid for the value of all or part of his services to the partnership? Explain.
3. Is the partnership bound on the sales contract for the land? Explain.

ANSWER

1. Aldo's Purchase of the All-Electric Garbage Truck

a. With respect to Aldo's purchase of the all-electric garbage truck, the partnership is bound on the purchase contract. The issue is whether Aldo had authority to purchase the all-electric truck on behalf of the partnership. Partners of a partnership will bind the partnership to contracts the partner enters into on behalf of the partnership when the partner had actual or apparent authority to enter into the contract. Actual authority occurs when the partner either had explicit authority via a partnership agreement to take such actions or when the partnership had authorized a partner to take such action. A partnership can authorize action in the ordinary course of business if a majority of partners agrees to the action. Actual authority may also occur if the partner is taking actions pursuant to his job. Apparent authority occurs when the third party reasonably believed that the partner had authority to enter into the contract. This can occur when the partner is acting within the ordinary course of business or is doing an act that is likely a part of his job description related to the partnership. Apparent authority may exist even if the partner lacked actual authority to enter into the contract. Here, Aldo did not have actual authority to enter into the contract to buy the all-electric truck. There was no partnership agreement granting Aldo such authority. There was also no vote among the three partners granting Aldo authority to enter into the contract because Belinda and Carlos, the other partners, never authorized Aldo's action. Additionally, although Aldo was involved with the day-to-day operations, it is unlikely that his job duties entailed buying a $100,000 truck that was vastly different than the gas-powered trucks the partnership usually used which were only $60,000 and experienced no issues with fuel. Therefore, Aldo did not have actual authority.

The partnership will only be bound if Aldo had apparent authority. Aldo had apparent authority to enter into the contract for the all-electric truck. It is reasonable for the truck dealership to believe that Aldo had authority to enter into this contract. The partnership owns and operates a trash collection company and thus, buying a garbage truck is within the ordinary course of business of the partnership. Additionally, the truck dealership had previously sold garbage trucks to Aldo for the partnership without any problem. Therefore, the truck dealership had a reasonable belief that Aldo had authority to enter into the contract, therefore Aldo had apparent authority. Because Aldo had apparent authority, the partnership is bound to the contract to buy the truck.

b. Assuming that the partnership is bound, Carlos is liable for any part of the unpaid balance of the purchase price. The issue is whether a partner is liable for the general partnership's obligations. In a general partnership, all partners are jointly and severally liable for the partnership's obligations. A third party must first sue the partnership on its debts and exhaust the partnership's resources before bringing suit against the partners individually. A partner who is held liable to a third party will be able to seek indemnification and/or contribution from other partners in the partnership. Indemnification will be available if another nonpaying partner wrongfully created the partnership obligation. Here, Carlos is a partner in the general partnership, therefore he is jointly and severally liable for the partnership's obligations. The truck dealership must first exhaust the partnership's resources before suing Carlos.

It appears that the partnership's resources will not be sufficient because the facts indicate that the partnership does not have sufficient funds to pay the bill on the truck. Therefore, the truck dealership will be able to sue the three partners in the partnership to cover any part of the bill that is unpaid by the partnership. The truck company could choose to only sue Carlos if it wanted because of joint and several liability. Whatever Carlos is required to pay he will be able to seek an indemnification award from Aldo for wrongfully entering into the contract without having actual authority.

c. Assuming that the partnership is bound, Aldo is not entitled to reimbursement from the partnership for the down payment he made on the truck. The issue is whether a partner in a partnership who has entered into a contract without actual authority is entitled to a reimbursement. A partner owes a partnership a duty of loyalty, care, and obedience. The partner is not permitted to enter into contract on behalf of the partnership when the partner knows he does not have actual authority to enter into the contract. A partner who wrongfully enters into a contract without actual authority on the partnership's behalf is not entitled to reimbursement for any payments he made when entering into the contract. Therefore, because Aldo did not have actual authority to enter into the contract for the truck he will not be able to seek reimbursement for his payment of the down-payment for the truck.

2. Aldo's Services to the Partnership

Aldo is not entitled to be paid for the value of all or part of his services to the partnership. The issue is whether a partner in a general partnership is entitled to payment for his services rendered for the partnership. In a general partnership, a partner is not entitled to payment for services rendered by the partner on behalf of the partnership. This is the case even if one partner does more work than another partner. This general rule can be changed via a partner agreement saying otherwise. Here, Aldo is part of a general partnership and thus, under the default rules, he is not entitled to payment for the time he conducts for the partnership's business. Additionally, there is no express agreement stating that any of the partners should be compensated for their services. It is irrelevant that Aldo puts in twice as much time rendering services for the partnership than Belinda and Carlos. As such, Aldo is not entitled to be paid for the value of all or part of his services to the partnership.

3. Sales Contract for the Land

The partnership is not bound on the sales contract for the land. The issue is whether Aldo had authority to enter into the sales contract. A partnership is not bound by contracts entered into by a partner if the partner lacked actual or apparent authority. A partner has actual authority to enter into contracts that are outside the scope of the business of the partnership only when there is unanimous consent from all the partners. Additionally, apparent authority does not exist when a partner purports to enter into a contract on behalf of a partnership for something that is outside the scope of the partnership's business. This is so because a reasonable person would not believe the partner had such authority. Here, Aldo lacked actual authority to sell the land in State B because this was not a transaction within the partnership's ordinary business. A garbage business is not in the ordinary business of selling residential land. Therefore, for actual authority to exist, there needed to be unanimous consent. There was not unanimous consent, because only Aldo and Belinda agreed to the sale and Carlos did not. Thus, there was not actual authority for the sale. Additionally, there was no apparent authority. It was not

reasonable for the developer to believe that Aldo had the authority to sell the partnership's land. This was an act outside the partnership's ordinary business. Additionally, the developer had no prior history with the partnership selling him land. Therefore, there was no apparent authority for the sale. Because there was neither apparent nor actual authority for the sale, the partnership is not bound by the sale.

QUESTION 2

QUESTION

On July 1, a restaurant owner was arrested and charged with arson after a June 1 fire destroyed his failing restaurant.

The prosecutor plans to call a bartender to testify at trial. The bartender had worked at the owner's restaurant and is expected to testify as follows:

The owner fired me at the beginning of May, a few weeks before the fire. On April 23, before I was fired, I showed up at the restaurant a little early for my shift. The owner was talking on the phone when I arrived. As I walked in, I heard him say, "I know it's risky, but I'll do whatever it takes to get back some money from this lousy restaurant." When I came to the restaurant after I was fired to pick up my final paycheck, I overheard one of the waiters telling the owner, "Count me in on your plan to burn down the restaurant. I've recently done that sort of thing and haven't been caught."

The prosecutor also plans to introduce a written and certified report prepared by a police arson investigator on Aug. 1. The arson investigation report states:

This arson investigation report was prepared to assist in determining the cause of the June 1 restaurant fire and in developing evidence relevant to the pending prosecution of the owner for arson. Pursuant to investigation of the interior and exterior of the premises, I have concluded that the fire began inside the restaurant, where I detected the presence of fire accelerants. The possibilities of a naturally occurring or accidental fire, electrical fire, or gas fire have each been eliminated using a range of tests and reconstruction models. Based on my training as an arson investigator, I conclude that the fire did not occur accidentally and that the use of fire accelerants inside the structure caused the fire to spread quickly and increased the extent of the damage.

The bartender is available to testify at trial, but the waiter is unavailable because he fled overseas after learning that he was under investigation for arson, and the court cannot compel him to attend the trial or otherwise testify. The arson investigator is unavailable to testify at trial because he has died, but the prosecutor plans to introduce the arson investigation report through the testimony of an expert witness, an out-of-state arson investigator who did not participate in the arson investigation.

The jurisdiction's rules of evidence are identical to the Federal Rules of Evidence, and the jurisdiction affords criminal defendants no greater rights than those mandated by the federal Constitution. The owner has objected to all the proffered evidence mentioned above on the grounds of hearsay. The owner has also raised a constitutional objection to the introduction of the arson investigation report.

1. Should the judge allow the bartender to testify about what he overheard the owner saying on the phone? Explain.
2. Should the judge allow the bartender to testify about what he overheard the waiter saying to the owner? Explain.
3. Should the judge admit the certified arson investigation report in light of:
    a. The owner's hearsay objection? Explain.
    b. The owner's constitutional objection (assuming that the hearsay objection is overruled)? Explain.

ANSWER

The first issue here is whether the judge should allow the bartender to testify about what he overheard the owner say on the phone, despite the owner objecting due to hearsay. A hearsay statement is a statement made out of court, that is being offered to prove the truth of the matter asserted. The statement made by the owner on the phone was made in the bar and thus out of court. Additionally, the prosecution is offering the statement to prove the truth of the matter asserted (i.e., that the bar owner truly would "do whatever it takes to get some money back" from the restaurant). So, the statement is indeed hearsay. However, the rules of evidence applicable here contain several hearsay exceptions and no hearsay examples can allow statements that otherwise would be hearsay to still be admitted. One of those exceptions is for statements made by party opponents (also known as "admissions.")The party opponent exception states that any statement made by an opposing party is admissible against that party, for any purpose. Here, the statement about "doing whatever it takes" to get money back despite knowing that "it's risky" was made by the owner, who is the party opponent in this situation (because the prosecution is offering it, the defendant owner is the party opponent). Thus, it meets the criteria for the statement of party opponent exception to the hearsay rule. Evidence still must be relevant to be admitted though, meaning that it must tend to make a fact of consequence more or less likely to be true. This is a low bar, however, and the statement made by the owner makes it more likely that he would do something like burn down his restaurant for insurance money, and thus is relevant. Since the evidence is relevant, was heard directly by the witness, and there is an exception to the hearsay rule that applies, the owner's statement can come in as evidence.

The second issue is whether the waiter's statement to the owner may be admitted into evidence. The party opponent exception will not apply here, because the declarant waiter is not a party. The statement is once again hearsay, because it was made out of court and is being offered to prove the truth of the matter asserted (that the waiter was in on the plan to burn the restaurant down and had done so before). However, there are other hearsay exceptions that apply to this statement. One such exception is called the statement against interest exception. This applies when a declarant makes a statement that is against his penal or proprietary interest at the time it was made. Additionally, the witness-declarant must be unavailable at trial for this to apply. In this case, the waiter is unavailable because he is out of the country and is beyond the reach of the court. His statement saying "count me in on burning down the restaurant, I've recently done that sort of thing and haven't been caught" was clearly against his penal interest at the time it was made, because it exposed him to criminal liability. It is also relevant, because it makes the fact that the owner was engaged in a plan to burn his restaurant down more likely to be true. Thus, since it is relevant and a hearsay exception applies, this evidence can be admitted. In the alternative, there is also an argument to be made that the statement by the waiter went to his then existing state of mind and should be admitted under that exception (because plans and intent can fall under that exception), however it is more likely that the statement against interest will be used.

The third issue concerns the investigation report, and first it must be determined whether the report is admissible despite a hearsay objection. The

report is hearsay because it was made and written out of court, and is being offered to prove the truth of the matter asserted in the contents of the report. However, the Federal Rules of Evidence state that public records will not be considered hearsay if: the report was made by someone concerned with the activities of a government agency, or contained the findings of an official investigation made by a public entity. Here, the investigation report was made to lay out the findings of an investigation, and was made by someone with a duty to report such findings (the police investigator). Thus, it seems that the report would meet the criteria for the public records exception. However, there is an exception to the public records exception that states that the findings of investigations cannot be used in evidence against the accused in a criminal case, but can only be admitted if it is being offered against the government. So, even if the exception exists, it seems that the judge should still sustain the objection.

The final issue is whether, assuming the hearsay objection is overruled, the owner's constitutional rights would be violated if the report is admitted into evidence. They would be. The U.S. Constitution contains a confrontation clause, which essentially gives the accused in a criminal case the right to confront the witnesses against them. The accused here is of course the owner. Thus, the owner has the right to confront the witnesses against him (meaning he can cross-examine them). When hearsay documents or statements are entered into evidence, defendants retain the same rights of confrontation as they do with live witnesses. So, if the report is entered into evidence, the owner will have a right to confront the person who wrote the report. Courts have interpreted the confrontation clause to require that when public records are introduced, the defendant has a right to confront and cross-examine the person who made or assisted with the report and its creation. In this case, the writer of the report is dead. The owner has never had a chance to cross-examine him. The prosecution wants to introduce the evidence via an expert witness (there is no need to do an analysis of whether the expert is qualified to be an expert, as it is irrelevant to this issue). However, that expert witness did not participate in the arson investigation, and thus will not satisfy the confrontation clause requirements. As such, if the report is entered into evidence by the expert witness, it will be a violation of the defendant owner's rights under the confrontation clause as found in the U.S. Constitution.

QUESTION 3

QUESTION

A father and mother divorced last year after a 12-year marriage. At the time of their divorce, they lived in State A. They were both 41 years old, each had a college education, and they had two children, ages 11 and 9.

The divorce court in State A, among other things,

a. Awarded the mother sole custody of the two children;

b. Ordered the father to pay the mother a total of $4,000 per month in child support;

c. Ordered the father to pay the mother $3,000 per month in spousal support for five years; and

d. Ordered an equitable division of the couple's property, such that after the division each of them wound up with $80,000 and a car.

Following the divorce, the mother continued to live in State A with the children. Before the divorce, she had been working full-time for $28,000 per year at a day-care center. Five months after the divorce, however, she had a heart attack, forcing her to cut back her work. As a result, her annual pay was reduced to $7,000. Her doctor recommends that she not resume full-time work, because full-time work and caring for the children and the home would be too stressful.

For the first five months after the divorce, the father paid the mother the full amount he owed for child and spousal support. Shortly thereafter, he was terminated from his $150,000-per-year job because of company downsizing. He received a lump sum severance payment of $75,000. When he was terminated from his job, he stopped paying child and spousal support.

He then decided to move to State B, in part because he hoped he could avoid paying anything to the mother, and in part because the job prospects in State B were better. He transferred all his bank accounts to banks in State B. The father is currently unemployed. However, he has had several job interviews in State B, and market conditions make it likely that he will eventually find a job comparable to the one he had in State A.

The mother has brought an action in a State B court to collect child and spousal support from the father. She claims that the spousal support obligation should be increased to $4,500 per month because she is in poor health and cannot resume full-time employment. She also asks that the spousal support be extended for an additional five years.

The father claims that the State A child support order is no longer effective and cannot be enforced because he has moved to State B. In the alternative, he claims that his child support obligation should be reduced from $4,000 to $2,000 per month because of his current unemployment. In addition, he asks that this reduction be made retroactive to the date he lost his job. He also opposes any increase in his spousal support obligation.

Neither party's expenses have changed since the time of the divorce judgment. Both State A and State B are in compliance with federal law concerning the enforcement of child support orders.

1. Is State B required to enforce the State A child support order? Explain.
2. Does the State B court have jurisdiction to modify the father's child support obligation? Explain.
3. Without regard to jurisdictional issues, how should a court rule on the father's requests to reduce his child support obligation and to make the reduction retroactive? Explain.
4. Without regard to jurisdictional issues, how should a court rule on the mother's request for an increase in and extension of the spousal support obligation? Explain.

ANSWER

1. The issue is whether State A's order is entitled to full faith and credit and whether it can enforce the child support order that had not previously been filed. The Uniform Family Income Support Act (UFISA) requires that signatory states honor previous child support orders that are entitled to full faith and credit. This presumes that personal and subject matter jurisdiction was proper. Here, State A had jurisdiction to enter a proper judgment. Both mother, father, and family lived in State A, giving it personal jurisdiction over the parties, and the court entering the order was a divorce court, giving it subject matter jurisdiction over the case. When the court has personal jurisdiction over both parties, a court can grant a divorce, as well as decide other issues such as those pertaining to child custody, child support, and the distribution of assets. This differs from an ex-parte divorce, where only the parties are present before the court. In those cases, the court can only award a divorce. Because the court had proper jurisdiction, its child support order is entitled to full faith and credit. Thus, State B is required to enforce the State A child support order.

2. The issue is whether State A still has exclusive continuing jurisdiction over the child support order. Under the Uniform Family Income Support Act (UFISA), the court that enters a child support order has exclusive, continuing jurisdiction until no party remains in that state or the parties expressly agree to a different state's jurisdiction. Here, mother and the children still live in State A with the children and has not consented to new jurisdiction. Thus, father's move, though evidenced as serious with his transferred bank accounts, to State B does not give State B jurisdiction to modify the child support order.

3. a) The issue is whether a child support obligation can be modified retroactively. Child support obligations can never be modified retroactively. Accordingly, a court should deny the father's requests to make any reductions in his obligations retroactive.

3. b) The issue is whether the father's new circumstances support a prospective change in his child support obligation. Children have a right to support from both parents, and both parents have equal obligations to provide for their children. A child support obligation is made with best interests of the child in mind, and the goal in most states is to recreate the support a child would have if the martial home were still intact. Courts consider a variety of factors, including the child's needs, the lifestyle of the child during the marriage, whether the parent has sole or partial custody, as well as the ability of each parent to contribute. This requires a court to look to each parents' education, earning potential, etc. A child support order can be modified prospectively if the parent seeking the modification can show a substantial change in circumstances. A voluntary reduction in salary generally will not suffice. A court is unlikely to grant a modification here. Both parents have had significant changes to their ability to financial contribute to their children's care, but the husband's is only temporary. Both parents are educated, but father had a job that paid $150,000 and the mother had a job that paid only $28,000. The husband made almost five times as much. Thus, he presumably would have contributed more monetarily to the children's financial needs in the martial home. Additionally, mother has sole custody of the children, meaning that she must maintain the home for the children and their day-to-day care. Although father lost his job, he received a sizable lump-sum

severance payment of $75,000, mitigating any loss he may see from his unemployment. Additionally, the job prospects in State B are better and he has seen progress in his job hunt. He is likely to find a comparable job. He received $75,000, which is half of his salary. If he finds a job within six months, which it seems like he will, given his interviews, he will see no reduction in annual salary. Given these circumstances, it is unlikely that a court would find that the father's support should be halved. It is worth pointing out that the mother in her own right would likely be successful in increasing the father's child support obligations given her substantial change in circumstances. The mother has had a heart attack, causing her annual pay to be reduced by 75 percent. Moreover, she has the medical opinion of her medical provider that she cannot resume work while still caring for the children – of whom she has full custody. This further shows how unlikely a court is to grant the father's requests to reduce his child support obligation.

4. The issue is whether the mother can demonstrate a significant or substantial change in circumstances justifying a change in spousal support. Spousal support is an obligation of one former spouse to provide financial support to another spouse. In some cases, the support is temporary so that a spouse can become financially sufficient (short-term) or so a spouse may go to school to become financially self-sufficient (rehabilitative). In other cases, particularly with long marriages, spousal support can be permanent and received on a periodic basis. A court considers the education of the spouses, their health, their earning potential, the value of their current assets and property, as well as whether any non-monetary work contributed to the marriage, such as child-rearing and housekeeping. A spousal support order may be modified if the spouse can show a significant or substantial change in circumstances. A voluntary reduction of income generally is not sufficient to justify a modification. Here, the mother's request for increased spousal support is likely to be granted, particularly once the father finds a new job. The mother has had a heart attack and has seen her income reduced by 75 percent. Moreover, she is now unable to work full-time. This is a significant change justifying not only an increase in the amount of support, but also the length that she is entitled to receive it. Although the parents split the marital assets, each ending up with $80,000 and a car, and both have a college education, the father clearly has greater earning potential, even with his job loss. He received $75,000, which is half of his salary. If he finds a job within six months, which it seems like he will given his interviews, he will see no reduction in annual salary. And given the length of their marriage – 12 years, the mother's request for an extension of five years is reasonable. If the marriage had been 15 years, it could have been a permanent obligation. Thus, both parts of the mother's request will be granted.

MPT 1

KLEIN V. STATE OF FRANKLIN (OCTOBER 2020, MPT-1)

The examinee's task is to draft an objective memorandum regarding sovereign immunity and notice requirements under the Franklin Tort Claims Act. The client, Janet Klein, wants to make a claim against the State of Franklin for the actions of a State employee with regard to injuries Klein sustained in a three-car collision in the parking lot of the Franklin State Fairgrounds. Klein suffered both physical injuries (a serious back injury and a broken wrist) and property damage to her car. The State of Franklin and governmental employees are protected from liability because of sovereign immunity unless one of the waiver provisions of the Franklin Tort Claims Act applies. The examinee is to analyze whether the State is protected from liability in this case by sovereign immunity and whether the State received sufficient notice as required by the Act. The File contains the instructional memorandum, a letter from Janet Klein to the State's Risk Management Division, the accident report, a memorandum from the law firm's investigator, and email correspondence between the investigator and Randall Small, a State parking supervisor. The Library contains excerpts from the Franklin Tort Claims Act and three Franklin cases interpreting the Act.

ANSWER

Law Offices of Bunke & Huss
600 Center Street, Suite 210
Franklin City, Franklin 33113

Memorandum

To: George Bunke
From: Examinee
Re: Janet Klein matter

This memo evaluates and analyzes the matter of Janet Klein, who came to our office last week regarding a potential claim she had against the State of Franklin. You asked me to evaluate her claims under the facts and circumstances and determine two things:

a. Whether the State of Franklin is protected from liability in this case by sovereign immunity or whether this claim falls under the Franklin Tort Claims Act; and

b. Whether the State of Franklin received sufficient notice as required by the Franklin Tort Claims Act to allow Ms. Klein's matter to proceed.

As discussed below, I conclude that: (1) The State of Franklin is not protected by sovereign immunity because the negligence of its employee created a dangerous or unsafe condition, which qualifies as negligence in the operation or maintenance of state property under Franklin law, and that Ms. Klein likely can seek relief under the Franklin Tort Claims Act; and (2) Although Ms. Klein failed to give actual notice within 90 days as required by the FTCA, the State probably had actual notice of the likelihood of litigation due to the detail given in the police report and Mr. Smalls' own knowledge of the incident.

1. The State of Franklin is Not Protected from Liability by Sovereign Immunity Because the Negligence of Its Employee Created a Dangerous or Unsafe Condition Which Caused Ms. Klein's Injury on State-Owned and Operated Property.

The first issue is whether the State of Franklin is protected from liability by sovereign immunity in this matter. This analysis rests upon the assumption that Mr. Smalls was acting within the scope of his duty and was negligent. This analysis will proceed through three parts, in accordance with Franklin Tort Claims Act (FTCA) § 416, which provides that immunity is waived when "bodily injury, wrongful death, or property damage is caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building or public park."

A. Ms. Klein suffered bodily injury and property damage, which puts her injury within the scope contemplated by the FTCA.

The first step in determining if Ms. Klein can obtain relief under the FTCA is to determine whether she suffered injury contemplated by the FTCA. The FTCA provides that plaintiffs may recover for "bodily injury, wrongful death, or property damage." According to Ms. Klein, she suffered various damages, including damage to her car, physical injury to her back and her wrist, and economic damages in the forms of lost income, paying her car insurance deductible, and loss of enjoyment of activities. The physical and personal property injuries were confirmed in Officer Silversmith's report, when he acknowledged that "Ms. Klein complains of wrist pain" and that there was property damage to several parts of her car. Thus, Ms. Klein's injuries fall within the scope of the FTCA.

B. Mr. Smalls' negligence in the operation and maintenance of the parking lots resulted in the creation of a dangerous condition on government property.

For Ms. Klein's claim to succeed, she must show that the incident happened not just because of Mr. Small's negligence or negligent supervision, but rather that his negligence created a dangerous condition on the property which caused her harm. Numerous Franklin court holdings have reiterated that standard in determining what negligence as applied to "operation and maintenance of any building or public park." Negligent supervision or lack of staffing, are insufficient, as seen in *Rodriguez v. Town of Cottonwood* (Fr. Ct. App. 2018). In Rodriguez, the court held that sovereign immunity was not waived when a child was injured on a slide at a day camp whose staffers were inattentive. Because the property itself was not dangerous – the slide was not defective and the playground was built to be safe for children – the negligence of the staffers did not result in the waiver of governmental immunity. Rather, the court held,"negligent performance of an employee's duties" must "result[] in a dangerous or defective condition." *Rodriguez*. See also *Farrington v. Valley County* ("§ 416 does contemplate waiver of immunity where, due to the alleged negligence of public employees, an injury arises from an unsafe, dangerous, or defective condition on property owned and operated by the government"). The question, therefore, is whether Mr. Small's negligence resulted in a dangerous or defective condition on the property. Ms. Klein noted, in her letter to the State, that the Hopps Rodeo, the event she was attending, was "the most well-attended event at the annual State Fair," and that she attends every year, and every year "the traffic after the rodeo is always total chaos." The traffic at the event, therefore, was not unforeseeable and not unexpected. Mr. Thomas, our investigator, visited the fairgrounds and noted that Lot B, where the accident occurred, accommodates 5,000 vehicles (which tracks well with Ms. Klein's affirmation that the rodeo, which was held in an arena which seats 6,000, was sold out this year). Mr. Thomas also noted that the Central Avenue exit was barricaded by "heavy and substantial" barriers, which a reasonable guest would not consider removing to open up a second exit. When Mr. Thomas visited, the second exit was still barricaded and only the Lomas Boulevard exit was available for guests to use. These facts indicate that Mr. Small knew or should have known that the parking lot would be crowded, and that the rush of guests to depart the rodeo may have resulted in an unsafe condition. Furthermore, as Mr. Small has been the director of the lot for nine years, he knew or should have known about the traffic at the rodeo and the danger of only having one available exit. Mr. Thomas also spoke to other employees who expressed concerns about the state of the

parking lot. Ms. Moore, who frequently works big events at the Arena, told Mr. Thomas that numerous staff members have expressed safety concerns. Both Ms. Moore and Mr. Cranston, another employee, told Mr. Thomas that they had personally told Mr. Small to move the second barrier. Because it seems likely that Mr. Small knew or should have known about the danger caused by the galvanized steel barrier due to his many years managing the parking lot at the fairgrounds, because his employees recognized that danger and informed him of it, it is likely that a court could find that Mr. Small's failure to move the barrier was negligent and resulted in the creation of an unsafe and dangerous condition.

C. The FTCA applies to the parking lot of the fairgrounds.

Even if Mr. Small was negligent and Ms. Klein suffered an injury within the scope of the FTCA, sovereign immunity is not waived unless the injury happened on "any building or public park," pursuant to § 416. The trial court in *Farrington v. Valley County* held that the FTCA did not apply to the maintenance of the grounds surrounding a public area. Under that holding, the parking lot of the State fairgrounds, where the incident occurred, would not be subject to the FTCA. However, the Franklin Supreme Court overruled that interpretation, finding instead that the FTCA applies to "premises owned and operated by governmental entities," which includes "property surrounding a public building" and "the grounds surrounding the buildings." *Farrington v. Valley County* (Fr. Sup. Ct. 2015). Thus, the fact that Ms. Klein's accident occurred in the Franklin State Fairgrounds parking lot, rather than the fairgrounds itself or within the NashTel Arena, does not preclude her from filing her claim under the FTCA. Because the fairgrounds and the parking lots are owned by the State, as confirmed by Mr. Thomas, the FTCA applies to injuries incurred through negligent operation or maintenance of the parking lot of the fairgrounds as well.

2. The State Had Actual Notice of the Likelihood of Ms. Klein's Litigation.

The second issue, presuming that this claim falls under the Franklin Tort Claims Act (the FTCA), is whether the State had sufficient notice under the FTCA for the case to proceed.

A. Ms. Klein did not give proper notice under the statute.

Under FTCA § 4116, notice must be given to the proper governmental authority within 90 calendar days after the incident giving rise to the claim. Such notice must be in writing and state the time, place, and circumstances of the loss or injury. According to the police report from Officer Silversmith, the incident happened at 10:58 p.m. on May 23, 2020. Ms. Klein sent her written letter of "notice" to the Risk Management Division on Aug. 30, 2020, well over 90 days after the incident happened. Thus, she is unable to claim under FTCA § 4116 that she gave written notice to the State within 90 days. The question, therefore, is whether the State had actual notice of the incident before Ms. Klein sent her letter.

B. The State most likely had actual notice of the occurrence which alerted it to the likelihood of litigation.

There are ways, in addition to and aside from written notice, that the State can have actual notice of an FTCA claim, which would save Ms. Klein from automatic dismissal based on the timing of her letter. There are two main requirements for this: that the notice be given to the correct authority and

that the State has notice that litigation is or may be pending. First, the notice has to be given to the correct authority. *Ferguson v. State of Franklin* (Fr. Sup. Ct. 2010) held that "the particular agency that caused the alleged harm must have actual notice before written notice is not required" (emphasis added). In this case, that means that the State's parking bureau must have had actual notice of the incident which would alert it that litigation may ensue. Here, Mr. Small stated, in his email to our investigator, Mr. Thomas, that he remembers the incident and was there on-site when it happened. He also stated that he received the traffic collision report created by Officer Silversmith a week after the incident. As the Director of Parking Facilities, Mr. Small's awareness of the incident, and his memory that Ms. Klein was "yelling at the police officer and threatening to sue the State," will most likely be found to give actual notice to the State. As an employee of the State, and as Director of Parking Facilities, Mr. Small serves as an agent of the State and his actions and knowledge can be imputed to the State. Thus, Mr. Small's presence at the incident may be sufficient to give the State, and the State parking bureau, actual notice of the incident. Additionally, a police report can serve as actual notice in some cases. *Beck v. City of Poplar* (Fr. Sup. Ct. 2013) established that a police report can serve as actual notice of an occurrence "only where the report contains information that puts the governmental entity allegedly at fault that there is a claim against it." This is an exacting standard, as the Beck court did not find actual notice where a police report contained the date, time, and location of the accident, as well as the parties involved and the fact that the plaintiff suffered minor physical injury. Notice that an incident occurred is insufficient; rather, the test is whether the governmental entity involved was "given notice of a likelihood that litigation may ensue." Not only must the government have notice of an incident, but it must also have notice that the incident will give rise to litigation. To demonstrate, there was actual notice in *Solomon v. State of Franklin* (Fr. Sup. Ct. 2012), where the plaintiff called the relevant government department within 90 days of the incident and informed the State that he had hired a lawyer to start legal proceedings. Here, Officer Silversmith's report of the incident, which was created the night of the incident, included in his notes a quote from Ms. Klein: "Whoever runs this parking lot is an idiot. The State will pay for this!" Whether this is sufficient to ensure that the state was given "notice of a likelihood that litigation may ensue" may be debatable. However, a reasonable party could conclude, based on Ms. Klein's words, that she intended to pursue litigation, or even that there was a "likelihood" that it "may be subject to a lawsuit." *Beck v. City of Poplar*.

In conclusion, despite Ms. Klein's failure to provide written notice within the time frame specified by the FTCA, it is likely that a court could find that the State had actual notice of the incident which would satisfy the "actual notice" requirement of § 4116 through both the detailed police report and Mr. Small's personal knowledge of the event.

3. Conclusion

As described above, I conclude that the State of Franklin is not protected through sovereign immunity from Ms. Klein's claim, and that the State did receive sufficient actual notice of Ms. Klein's claim despite her failure to send a written letter within 90 days.

On the cover:

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