MPT 1 - Sample Answer # 1

To: Wendy Martel
From: Examinee
Re: Panelli settlement funds distribution
Date: February 26, 2013

This opinion letter addresses the questions you raised about your legal and ethical duties and obligations regarding the $600,000 settlement obtained while representing David Panelli, M.D. We have researched the applicable law and Franklin's Rules of Professional Conduct to reach our opinion on how you should proceed with your client. Please contact us if you have any remaining questions.

1. Disclosure of the settlement to Rebecca Blair

In his email to you on February 22, 2013, Dr. Panelli forbade you from informing Rebecca Blair that the parties had reached a settlement, and forbade you to disburse any funds from the settlement to her. The first question is whether you have a duty to disclose the settlement to Blair, or to abide by your client's commands. It is our opinion that you must disclose the fact of settlement to Blair under the Franklin Rules of Professional Conduct, and that disclosure of the fact of the settlement is reasonably necessary to carry out your duties as an attorney in this state.

Franklin's Rules of Professional Conduct require attorneys to abide by the client's decisions in most matters relative to reaching the objectives of representation (Rule 1.2), but the requirement is tempered by the duties an attorney owes not only to the client, but to the court and others to whom the attorney owes fiduciary duties.

In addition to Rule 1.2, a lawyer is required to keep confidential information relating to representation unless the client gives informed consent to disclose, or if it falls under several specific categories in Rule 1.6. Here, Dr. Panelli would prefer that you honor your duty not to disclose any confidential information and refrain from informing Blair of the settlement, but that information does not appear to be the type of information contemplated by the Rule.

The typical situation in which disclosure of information to a third party would be permissable under Rule 1.6 would involve instances in which the client were attempting to commit a criminal or fraudulent act that could substantially harm the body of a person or the financial interests of a person. That doesn't appear to be the case in this instance, because there are no crimes of which Dr. Pannelli is seeking your assistance, and a command not to inform Blair of the settlement doesn't rise to the level of fraud in the code. A failure to disclose information is not the stuff fraud is made of.

However, Blair has filed her lien on the settlement property and that filing may compel you to reveal information about the settlement regardless of Dr. Pannelli's instructions. Rule

1.6(b)(6) allows you to reveal the fact of the settlement if you reasonably believe such disclosure is necessary to comply with "other law or a court order." While the lien isn't law or court order, it could become a court order down the road. It may be better to be safe than sorry in this instance.

Admittedly, the exceptions for the confidentiality of information in Rule 1.6 aren't strong enough standing alone to compel disclosure to Blair, but when coupled with Rule 1.15 on the safeguarding of property, as well as the State Bar Ethics Opinion No. 2003-101, disclosure to Blair is absolutely warranted.

Rule 1.15(d) states that a lawyer, "upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person." The term "shall" creates an affirmative obligation on your part to inform Blair. She is a third party with an interest in the settlement property evidenced most concretely in the filing of her lien. There is clearly a duty to inform under this section.

State Bar Ethics Opinion No. 2003-101 makes clear that you owe a fiduciary duty to Blair as well, and that failure to inform her of the settlement could be found a breach of this duty and open you up to liability to her. An attorney has a duty to protect a third party's interests when he knows of the interest, and must prevent wrongful interference by the client with that interest. This is the fiduciary duty you owe to Blair. You know of Blair's interest in the settlement for her work on the case for two years. With this knowledge, you entered into a fiduciary duty with Blair by the nature of your relationship, and this duty is by operation of law. The duty requires you to deal with Blair with "utmost good faith and fairness and to disclose to (her) material facts relating to (Blair's) interest in the funds." (Ethics Opinion citing Cf. Johnson v State Bar). We will discuss your duties related to the actual funds below, but at a minimum your fiduciary duty to Blair requires disclosure of the settlement.

Further, Rule 1.4(a)(5) requires that you respond to your client and inform him that you will be notifying Blair of the settlement, and failure to do so could warrant discipline under the rule for failing to consult with Dr. Pannelli when his demand was contrary to your ethical and fiduciary responsibilities to Blair.

2. Distribution of the funds in possession

$600,000 has been deposited into the trust account for distribution to your client and you for the professional services rendered. The question is, to whom should these funds be distributed, and when. It is our opinion that you should distribute $400,000 immediately to your client, Dr. Pannelli, and that the remaining $200,000 must be kept in the trust until the dispute regarding payment to Blair has been settled.

State Bar Ethics Opinion No 2003-101, in conjunction with Rule 1.15, requires disbursement of the funds entitled to the client, but that the remaining funds in dispute be kept in the account until the dispute is settled. $400,000 represents 2/3 of the settlement, and the client, under the contingent fee structure used by yourself and Blair, is entitled to

such. In his email to you Panelli sought immediate disbursement to him of the funds. It is appropriate that amount be distributed to him. The remaining $200,000 is 1/3 of the funds set aside as compensation for the legal work completed to reach the settlement. Both you and Blair had a contingent fee structure for your work, claiming 1/3 of any eventual settlement. It is from this remaining $200,000 that any disbursement to Blair should come.

This is supported by Clements v Summerfield (Franklin Supreme Court, 1992), in which the court found that where an attorney had been dismissed from representing a client after work had been done in support of the client's claim, that dismissed attorney could bring a claim of fees under quantum meruit for the reasonable value of services provided. The court's opinion noted the necessity for the contingency in a contingent fee contract to have occurred, and that a court in equity could determine such a value on a case-by-case basis. In a footnote supporting its opinion, the court illustrated the means by which a dismissed attorney and successor attorney might be compensated, and clearly foresaw a structure in which any funds in dispute would be allocated from the 1/3 contingent fee awarded in the overall recovery.

With regard to the $200,000 remaining, you should consult with Dr. Pannelli and encourage him to reach an agreement with Blair about how she should be compensated for her work. It is not your job or position to unilaterally arbitrate this dispute, for you are clearly a party in interest. Dr. Pannelli obviously values the work you accomplished and wants you to have the entire sum. Your interest would cloud your ability to objectively arbitrate the dispute between Pannelli and Blair. Blair certainly put in significant effort in the two years she represented Pannelli. You may be able to enlighten Pannelli on the role Blair played in his eventual settlement, and the value contributed. It would be wise to keep it very simple, perhaps letting Pannelli know that the complaint and discovery constituted roughly ½ of the work done on the case, and even if Pannelli feels your work was what reached the settlement, it is clear Blair's work at least aided in the recovery. It will be up to Pannelli and Blair to reach a conclusion on this matter of how to distribute the $200,000 amongst the two of you. If these parties cannot reach an agreement, you should seek guidance from the court on how to settle this dispute, and inform both Pannelli and Blair of your need to involve the court.

3. Conclusion

It is our opinion that you must disclose to Blair that a settlement has been reached, and consult with Pannelli about how he proposes to settle the dispute regarding payment of fees to Blair. You should distribute only the $400,000 to Pannelli now, and retain the remainder in the trust account until the dispute can be settled by the Pannelli and Blair, or by the court if necessary. To take any of the $200,000 for yourself, even if you believe you are entitled to it, could open you up to a breach of your fiduciary duties owed to Blair, and could open Blair up to liability for breach of contract.

MPT 1 - Sample Answer # 2

To: Wendy Martel
From: Applicant
Re: David Panelli Matter
Date: February 26, 2013

Dear Mrs. Martel,

STATEMENT OF THE QUESTION

How should you (Mrs. Martel) proceed after having received settlement funds for a client, having notified the client of receipt of funds, and been instructed by the client not to pay any fees to the previous attorney?

SHORT ANSWER TO THE QUESTION

In the instant case, you have several options. The first of which is mandated by the rules of professional conduct. You should first inform your client of the issues so that the client may make an informed decision on how to proceed. In addition to this, you should keep the funds in a separate account from your own so as to be compliant with the Professional Rules of Conduct. You must also disburse all funds to the rightful owners of the property that are not in dispute pursuant to the Professional Rules of Conduct. Once you have done the preceeding things, you must also hold the disputed amount between your client and the discharged attorney, Mrs. Blair. You must explain to both parties that you are holding the funds and cannot represent either party in a dispute between them. If your client and Mrs. Blair are able to resolve the dispute on their own, Mrs. Martel may disburse The funds pursuant to the agreement. If they are not able to reach as resolution, Mrs. Martel will need to seek guidance from the court in resolving the matter.

ANALYSIS

INFORMING THE CLIENT:

Mrs. Martel, you have an obligation under the Professional Rules of Conduct (Rule 1.4 and B) to keep the client informed of the status of the ongoing representation, and explain things reasonably well enough so as to allow the client to make and informed decision. Here, I understand that you have already made your client aware that you have received the settlement payment. This is a good first step. That said, you must go further and explain to him that Blair also has rights that stem from her representation and the work she did for the client.

WHAT ARE THE RIGHTS OF BLAIR?
Pursuant to the decision in *Clements v. Summerfeld*, a discharged attorney has a right to receive his/her contingency fee once that contingency has occurred. Additionally from that

decision, "the contingency specified may occur after the attorney's representation has terminated and another attorney has taken his or her place." This is what has occurred here because you have replaced Blair after she had already been granted a contingency fee by the client, and was subsequently fired. Thus, the court in *Clements* goes on to say that "the discharged attorney's right to, and cause of action for, fees is limited to quantum meruit." As you are aware, this will mean that Blair is entitled to receive the reasonable value of her services rendered during her representation. Additionally, you did the right thing by obligating that you will pay any claim to Blair because the court further discusses that the portion owed to the discharged attorney will come out of any fees owed to the attorney on record as it would be unjust to have the client be burdened by the prospect of paying the original attorney's full fees plus the fees to you, the successor attorney.

HOW YOU SHOULD MOVE FORWARD?

As previously mentioned, you should explain Blair's rights to the client and what the steps will be moving forward. Once you have done that, you must keep the settlement funds in a separate account from your own as prescribed by rule 1.15(d) of the Rules of Professional Conduct. This will prevent you from commingling funds and accidentally spending the money which does not belong to you. Additionally, while informing the client of the proceeding steps, you must inform him that you are under an obligation to let Blair know that you have received the funds as she has a right to some of the money. Rule 1. 6 of the Rules of Professional Conduct specify that "a lawyer may reveal information relating to the representation of a client the extent the lawyer reasonably believes...to prevent, mitigate, or rectify substantial injury to the financial interests or property of another...."

In conjunction with this rule, the case Greenbaum vs. State Bar exemplifies that you are acting not only as a fiduciary to your client but also to Blair because you knew of the contingency fee she was owed at the time your representation was initiated. In the Greenbaum case, an attorney engaged in the representation of a client where the client agreed that $10000 of the recovery would be given to a Physician. The court rules that under 1.15 of the Rules of Professional Conduct.

Third parties may have lawful claims against funds held in trust by and attorney, such as a client's creditor who has a lien on funds recovered in a personal injury action. An attorney may have a duty to protect such a third party claim against wrongful interference by the client, as when the attorney has entered into a fiduciary relationship with the third party.

Thus, the *Greenbaum* court referenced another case, *CF. Johnson v. State Bar* and said "As a result, the Attorney entered into a fiduciary relationship with the Physician by operation of aw and subjected himself to the fiduciary duties to deal with Physician with utmost good faith and fairness and to disclose to Physician material facts relating to the Physician's interest in the funds." This is the standard you should use as it relates to your duty to Blair with respect to the funds. You must keep her informed as to what is going on with the funds because you owe her a fiduciary duty to her as a result of her lien and the

fact that you had knowledge that she is a creditor with respect the recovery your client gets during your representation.

Once you have informed Blair and your client that you have received the funds, and you have kept them in a separate account, you must disburse the funds to people that are entitled to receive them. As previously mentioned, you will bear the burden of sharing the contingency fee received with Blair, and thus you should give all $400,000 that Mr. Panelli is owed to him and retain the other 200,000 to be split between you and Blair. At this point, it will be up to Mr. Panelli and Blair to work out what her fee will be. The difficulty here is that as previously mentioned, Blair is entitled to what the reasonable value of her services was, and according to the Clemens court, what fees are reasonable depends on the facts and the scope of the representation agreed to. Thus, if Mr. Panelli and Blair are able to reach an agreement, you should disburse the funds to Blair pursuant to the agreement, and keep the remainder of the funds as your fee. Should Mr. Panelli and Blair not be able to reach an agreement, you will have to take further action and "seek guidance of the court" as set forth in Ethics Opinion No. 2003-101. At that point, the court will determine what fees are reasonable and the amount that Blair will be entitled to. Once the court has made that determination, you should disburse The funds in an amount prescribed by the court order to Blair and keep the rest as your fee. If you have any further question, please do not hesitate to give us as call at our office at 1-800-4WM-WLAW.

Very truly yours,

MPT 1 - Sample Answer # 3

TO: Wendy Martel
FROM: Examinee
RE: Opinion Letter regarding Panelli settlement
DATE: February 28, 2013

Dear Ms. Martel;

I am writing this letter in response to your request from our office after reviewing the facts and relevant authorities.

This letter is an answer to your question of how to proceed now that you have the settlement funds, to be in compliance with Franklin's ethical rules, considering your duty to your client (Panelli) and Blair (his former attorney).

Considering the applicable authority and facts in your situation I would recommend that disburse to Panelli that he is entitled to after you deposit the check into your trust account (do this promptly) since any funds that may be due to Blair will likely come from your contingent fee (I will further explain this later), hold that money in the trust account because it is in dispute. If Panelli and Blair cannot resolve their dispute, you should then seek guidance from THE Court and so inform both Panelli and Blair (Ethics Opinion No. 2003-01).

Your duty to Panelli as his attorney under Rules of Profession Conduct

One issue you face is the fact that Panelli has clearly stated to you that he doesn't want you to pay any money from the settlement to Blair, let alone tell her of the settlement. Of course, under the Rules of Professional conduct, an attorney "shall abide by a client's decisions concerning the objectives of representation and, ... shall consult with the client as to the means by which they are to be pursued (Rule 1.2) As an attorney, as you know, you must consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law". (Rule 1.4(a)(5)).

Lastly, to be in compliance with Franklin's ethics rules, "a lawyer should reveal information relating to the representation of a client unless the client gives informed consent; unless you must do so to prevent a crime or fraud that is reasonably certain to result in substantial injury to the financial interests of property of another (Rule 1.6).

You clearly have a duty to Panelli that create issues for you in regards to your cooperation with Blair. Panelli has made it very clear from his email that he wants Blair to "remain fired" and he forbids you to "tell her anything about the settlement or to give her anything". Looking at Rule 1.2 especially, it may be reasonable to think you must follow his decisions. However, the Rules also allow you, and require you to prevent your client from committing a crime or fraud, under Rule 1.6. Although it is a more distant concern, it is key that you

ensure Panelli doesn't face further legal issues with Blair, considering the lien she has against interested parties which would include Panelli. You also don't want to encounter any issues in allowing Panelli's use of your services to result in any potential crime or fraud against Blair. Considering this, it is important in your duty to Panelli to communicate the potential limitation of your representation (under Rule 1.6) considering the expectation he has set for you (Rule 1.4).

Your duty to Blair at issue of your compliance with Franklin's Rules

While you have a clear duty to Panelli as his attorney, you also have a duty to Blair. Discussed in the "Ethics Opinion No. 2003-101" an attorney will have a fiduciary relationship with a third party by operation of law, subjecting herself to deal with the third party with utmost good faith and fairness (Ethics Opinion). In this opinion, the State Bar of Franklin considered the situation where a third party has a conflicting claim with property held in a trust. Referring to Rule 1.15, the Court mentions that [a]n attorney may have a duty to protect such a third party claim against wrongful interference by the client, as when the attorney has entered into a fiduciary relationship with the third party "(Ethics Opinion)".

If the attorney has knowledge of the existence of Physician's intent in the funds in question, the attorney has entered into a fiduciary relationship by operation of law.

Because you were clearly aware of Blair's interest, so much that you even obligated yourself to pay any claim she might have out of the $600,000, you have created a fiduciary relationship with her. If you don't deal with this issue in a good faith and fairness, you may be subject to compensatory and perhaps punitive damages, and Panelli may be liable for breach of contract. Since it is not clear cut that Panelli is right in preventing payment to Blair, and considering your fiduciary duty to Blair, you should not act in favor of either Panelli or Blair, and should seek guidance from the Court and inform both parties.

Likely outcome if dispute goes to Court

In Clements v. Summerfield, the Court dealt with a very similar situation, in that a lawyer challenged his former clients refusal to pay him after retaining a new attorney. Here, the Court upheld the previous decision that the attorney lead no cause of action. In particular, the Court noted that when a contingency occurs after the attorney's representation has terminated, his right to fees is limited to quantum meruit (Clements). Otherwise, the client's right to disclose may be unduly burdened. The Court also notes that these fees may be paid as a share of the total fees payable to the successor attorney. (Clements)

Considering the facts in your situation, you will likely, if at all, need to prepare for paying Blair out of your contingency fee. These fees will be limited to the value of Blair's services rendered during her representation. She will not get the full amount of her contingency arrangement. As such, I recommend you leave the $200,00 portion you are taking in trust, until a court can decide if she is owed anything, and if so, how much.

MPT 2 - Sample Answer # 1

State of Franklin
District Court of Oak County

In the Matter of the Petition of
Don and Frances Loden
For Guardianship and Temporary Custody of
Will Fox, a minor (DOB 1/3/03)

Brief in Support of the Motion to Transfer Case to Blackhawk Tribal Court

Statement of the Case

Betty Fox, as a member of the Blackhawk Tribe, seeks removal of a child custody petition for THE guardianship and custody of her grandson, Will Fox, to the Blackhawk Tribal Court. Following the incapacitation of Will's father in a car accident, Will's maternal grandparents, Don and Frances Loden, filed a petition for guardianship and temporary custody of Will in the District Court of Oak County. As a recognized member of the Blackhawk Tribe, Betty seeks removal of the petition to the Blackhawk Tribal Court because Will is an Indian Child of the Blackhawk Tribe and jurisdiction for custody matters concerning an Indian Child properly rests with the appropriate Tribal Court pursuant to the Indian Child Welfare Act of 1978 (ICWA).

Statement of Facts: Omitted per your instructions.

Argument

I. Removal to Tribal Court is appropriate because Will Fox is an Indian Child as defined by ICWA.

Will Fox meets the definition of an Indian child pursuant to ICWA § 1903 which defines an Indian Child as an unmarried person under eighteen who is either a member of an Indian Tribe, eligible to become a member, or is the biological child of a member. As Will is ten years old, the biological child of a member of the Blackhawk tribe, and a member of the Tribe himself, he is and Indian Child for purposes of § 1903 and removal of a child custody hearing pursuant to the ICWA. Although Will's mother was not a member of the tribe and he lived off of the reservation prior to his father's accident, Will has successfully assimilated into tribal culture. Furthermore, Will has attended tribal functions since he was six years old, which further evidences his connection to the Tribe.

II. The Blackhawk Tribe is an Indian Tribe and has jurisdiction in custody matters concerning Will Fox as an Indian Child of The Tribe.

Pursuant to ICWA § 1911, a Tribal Court has jurisdiction in child custody proceedings concerning an Indian Child of the Tribe. As Will Fox is an Indian Child of the Blackhawk Tribe, the Blackhawk Tribal Court is the appropriate court to hear proceedings concerning his guardianship and custody. Evidence of the Blackhawk Tribal Court's authority and recognition under the ICWA is evidenced in the letter from Sam Waters, ICWA Director. Waters' letter also confirmed Will's membership in the Tribe in addition to that of his grandmother and father.

III. The Loden's Petition for Guardianship and Temporary Custody satisfies the requirement of a Child Custody Proceeding in which Jurisdiction rests in the Blackhawk Tribal Court.

Pursuant to ICWA § 1902, a child custody proceeding includes any action removing an Indian child from his parent or Indian custodian to the home of a guardian or conservator where the parent or Indian guardian cannot have the child returned upon demand, but where parental rights have not been terminated. In re Custody of R.M., the Franklin Supreme Court held that a petition for physical and legal custody of a child fell within the auspices of the ICWA as a proceeding for foster care placement. In reaching its determination, the court recognized the ICWA definition of foster care as encompassing situations in which (1) a child is removed from his parent or Indian guardian, (2) temporarily placed in a foster home or the home of a guardian or conservator, (3) the parent or Indian Guardian cannot have the child returned upon demand, and (3) parental rights have not been terminated.

In filing their action, the Loden's seek to remove Will from the custody of his father and his grandmother - his Indian custodian. As such, their petition satisfies the requirement of foster care placement under the ICWA and is grounds for removal of the case to the Blackhawk Tribal Court. See In re Custody of R.M. (rejecting the petitioner's argument that an action for legal and physical custody did not constitute an action for foster care). Although the Loden's may argue that they seek only temporary custody, they nevertheless seek to obtain custody and interfere with the rights of his Indian custodians.

V. Removal to to Blackhawk Tribal Court is proper as there is no good cause for denying removal in this case.

There is no good cause to prohibit removal of the Loden's petition to the Blackhawk Tribal Court. Pursuant to ICWA § 1911, unless good cause is shown for denying transfer, any state court proceeding for the foster care or placement of an Indian child shall be transferred to the jurisdiction of the appropriate Indian Tribe. See also, In re Custody of R.M.(finding no good cause for removal despite the fact that the petitioners lived more than an hour away from the tribal court, and noting the powers of the tribal court to obtain and

review evidence sufficient to render a reasonable judgment). Pursuant to federal guidelines, good cause not to transfer a hearing to a tribal court may be shown if:

(I) The proceeding was at an advanced stage and the petitioner failed to promptly file for removal;

(ii) The Indian child is over twelve years old and objects to the transfer;

(iii) Evidence cannot be adequately presented in the tribal court;

(iv) The parents of a child over five years old object to removal and the child has had little or no contact with the tribe, Department of the Interior, Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings.

Furthermore, these guidelines suggest that the burden of showing good cause is on the party opposing removal.

In this case, Betty Fox promptly filed for removal. Consequently, the Loden's cannot argue that the proceeding is at an advanced stage of litigation. Consequently, the first factor of good cause analysis weighs in favor of removal. Will Fox is under ten years old and appears to enjoy tribal life and customs. Consequently, there is no good cause to prohibit removal to tribal court on the grounds that he is over twelve and opposes removal. Although the Lodens do not live at the Blackhawk reservation, there is no evidence to suggest that removal from the District Court of Oak County, only 250 miles from the reservation, will be unduly burdensome. See In Re Custody of R.M. Furthermore, there is no evidence to suggest that the Tribal Court will be unable to adequately conduct the proceedings and render judgment. Id. Finally, all evidence indicates that Will Fox has embraced his tribal heritage since he was six years old and enjoys living with his grandmother. Consequently, there is no reasonable ground for the Loden's to argue that removal to the Blackhawk Tribal Court is Improper.

Conclusion

For the reasons stated above, the District Court of Oak County should order removal of the Petition For Guardianship and Temporary Custody of Will Fox to the Blackhawk Tribal Court as proper pursuant to ICWA requirements.

MPT 2 - Sample Answer # 2

State of Franklin
District Court of Oak County

IN THE MATTER OF THE PETITION OF
Don and Frances Loden, Husband and Wife,
FOR GUARDIANSHIP AND TEMPORARY CUSTODY OF
Will Fox, a minor (DOB 1/3/03)

BRIEF REGARDING MOTION TO TRANSFER TO BLACKHAWK TRIBAL COURT

I. Statement of the Case

Petitioners Don and Frances Loden, the grandparents of ten-year-old Will Fox ("Will"), have filed a petition for guardianship and temporary custody in this court. Will's mother is deceased, and his father, Joseph Fox ("Joseph") is in a coma due to a car accident. Betty Fox ("Betty"), Joseph's mother and Will's current primary care giver, objects and has filed a motion for guardianship in Blackhawk Tribal Court. In addition, Betty has moved this court to transfer the proceeding to Blackhawk Tribal Court. This brief addresses solely Betty's motion for transfer of this proceeding.

II. Argument

A. The Lodens' petition for guardianship and temporary custody is a "foster care placement" under the Indian Child Welfare Act ("ICWA")

Pursuant to ICWA, state courts must transfer any proceeding regarding the foster care placement of an Indian child to the tribal court with jurisdiction over such child. ICWA sec. 1911(b). A foster care placement is defined as "any action" removing an Indian child from his parent or Indian custodian and placing such child temporarily in the home of a guardian, provided that the parent or Indian custodian cannot have the child returned upon demand and parental rights have not been terminated. *Id.*

In determining if a proceeding is within the scope of ICWA, the Franklin courts look beyond the caption of the case to what the proceeding seeks to accomplish. *See In re Custody of R.M.*, Franklin Sup. Ct. 2009. Regardless of how a petition is styled, therefore, if the effect of that petition is to place the child in the care of another, such that the Indian custodian or parent cannot demand return of the child, the proceeding is subject to ICWA.

Specifically with regard to petitions for guardianship, the courts have noted that Franklin law provides a guardian with the "powers and responsibilities of a parent with sole legal and physical custody to the exclusion of all others." Fr. Rev. State. sec 72.04, *cited in Custody of R.M.* Among those rights, the court noted, is the ability to remove the child from the home of the parents, albeit temporarily, rendering a guardianship proceeding within the scope of ICWA. *Custody of R.M.* In such case, the parents would not be able to demand the return

of the child, which is definitive of a foster care placement under ICWA.

Here, the Lodens seek both guardianship and temporary custody. Although Will has spent time with the Lodens since his father's accident, his grandmother is his primary care giver and his father is living. As noted by the *R.M.* court, guardianship gives the guardian the right the remove the child from the case of the Indian custodian and to refuse to return him to it. Therefore, a guardianship proceeding is, by definition, a foster care proceeding within the scope of ICWA.

The Lodens will likely argue that this petition is outside the scope of ICWA because the relief sought is merely temporary. However, as the *Custody of R.M.* court noted, even the temporary right to remove the child from the care of his parents or Indian custodian is sufficient to bring the proceeding within ICWA's scope, provided that right would permit the guardian to refuse to return the child to his home. Therefore, the Lodens' petition, regardless of how styled, is a foster care placement under ICWA, and must be transferred to Blackhawk Tribal Court.

B. Betty is an "Indian custodian" within the meaning of ICWA and has the right to seek transfer

ICWA, in granting rights to a child's Indian custodian, reflects cultural norms of extended family member care in the Indian community. As the legislative history of the law reflects, the intent of Congress was to preserve the Indian identity of children by keeping them in Indian homes. ICWA Sec. 1902. Congress recognized that Indian families often vested the care of children in the extended family, and created the concept of an "Indian custodian" to reflect that such care givers have rights under Indian custom. H.R. Rep. No. 95-1386, *cited in Custody of R.M.* ICWA defines an "Indian custodian" as an "Indian person who has legal custody of an Indian child under tribal law or custom...or to whom temporary physical care, custody, and control has been transferred by the parent of such child." ICWA sec. 1903(6). An Indian custodian is empowered to seek transfer of a custody proceeding to tribal court. ICWA sec. 1911.

Betty does not have legal custody of Will under the law of Franklin, but she does have custody of him under the custom of the Blackhawk Tribe. In the Blackhawk Tribe, there is a cultural expectation that the grandparents (paternal or maternal) of a child will become custodians if the parents die or cannot care for the child. *Journal of Native American Law*, Vol. 8 (2003). In addition, although Joseph, due to his accident, did not explicitly transfer temporary care of Will to Betty, given the underlying cultural expectation, it may be deemed that he transferred such care to her.

The Lodens will likely argue that under the governing expectation of the Blackhawk Tribe, they have as much of a right to become Will's custodians as does Betty. While that may be true, that is a matter best suited for resolution by the Blackhawk Tribal Court. Betty, as Will's Indian custodian, has the right to petition for transfer.

C. THE Lodens are not Will's parents, and therefore cannot object to the transfer to Blackhawk Tribal Court

ICWA provides that a qualifying custody proceeding shall be transferred to tribal court on the petition of either parent or the child's Indian custodian, unless the child's parents - and only the child's parents - object. ICWA sec. 1911(b); *see also Custody of R.M.* (finding that an Indian custodian has no right to object to the transfer of proceedings to tribal court). Will's mother is deceased and his father is incapacitated. Therefore, there is no party with a right to object to the transfer of this proceeding to Blackhawk Tribal Court.

D. Good cause to decline the transfer motion does not exist

ICWA provides that the state court may decline to transfer the proceeding on a showing of good cause. ICWA sec. 1911(b). the Bureau of Indian Affairs has issued guidelines which state that good cause may exist if, inter alia, (I) necessary evidence could not be adequately presented without undue hardship to the parties or the witnesses or (ii) the parents are unavailable and the child has had little or no contact with the child's tribe or members of the child's tribe. *BIA Guidelines*. While the BIA Guidelines are not official administrative regulations, the courts of Franklin have found them to be binding in ICWA cases. *Custody of R.M.*

The Lodens will likely argue that presenting evidence in Blackhawk Tribal Court will pose an undue burden on them. The reservation is approximately 250 miles from Melville, the child's current residence, which is a three- to four-hour drive. In *Custody of R.M.*, The court found that a one- to two-hour drive was not sufficiently long enough to constitute undue hardship. In that case, however, none of the parties were residents on the reservation. While the distance here is greater, Betty is a resident of the reservation. While the Lodens do bear a greater travel burden, and the reservation is further from witnesses who might testify, the strong public policy interest in providing for tribal jurisdiction must outweigh this burden.

In addition, the Lodens will likely argue that the case should not be transferred because Will's contact with the tribe is minimal. Although Will's visits to the reservation were limited, he lived with his father, a member of the Blackhawk Tribe and one whose communications with his family evidence a strong sense of tribal identity. In addition, Will made annual visits to the Blackhawk pow-wow, and spent time with Betty on the reservation at other holidays during the year. Therefore, it cannot be argued that Will's contact with the Blackhawk Tribe has been minimal. Good cause for declining the transfer does not exist.

III. Conclusion

As the Franklin courts have recognized, Congress has clearly stated that tribal jurisdiction over child custody proceedings is necessary to ensure the survival of Indian communities and the welfare of their children. *Custody of R.M.* Will Fox is an Indian child currently living

with an Indian custodian, who seeks, as is her legal right, the transfer of this proceeding to Blackhawk Tribal Court. There is no party that has the right to object to the transfer that has the capacity to do so, and no good cause exists for this court to decline to transfer the proceeding. While Will's paternal grandparents may, in the end, be found to be the best legal custodians for him, that decision must be made by the tribal court.

MPT 2 - Sample Answer # 3

STATEMENT OF THE CASE

The Movant, Betty Fox, is the paternal grandmother of the "Minor," Will Fox. Respondents, Don Loden and Frances Loden, are the maternal grandparents of the Minor. This case seeks to appoint a guardian and custodian of the Minor following the incapacitation of the Minor's father, Joseph Fox ("Father"). The Minor's mother, Sally Loden Fox ("Mother"), died in childbirth. Movant seeks to transfer this case from this Court, the Oak County District Court in the state of Franklin, to the Blackhawk Tribal Court, pursuant to the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. § 1911(b).

STATEMENT OF FACTS

[Omitted]

BODY OF THE ARGUMENT

Movant is entitled to transfer of this case to the Blackhawk Tribal Court pursuant to ICWA § 1911(b). There are six elements presented in the statute regarding transfer from a state court to an Indian tribal court: (1) the proceeding in the state court is "for the foster care placement of," (2) an Indian child, (3) not domiciled or residing within the reservation, (4) in the absence of good cause to the contrary, (5) absent the objection by either parent, and (6) upon the petition of the Indian custodian. ICWA, 25 U.S.C. § 1911(b).

I. Respondents seek the foster care placement of the Minor.

The Franklin Supreme Court has determined that foster care placement has four elements: "(1) the Indian child is removed from the child's parent of Indian custodian, (2) the child is temporarily placed in a 'foster home or institution or the home of a guardian or conservator,' (3) the parent or Indian custodian cannot have the child returned upon demand, and (4) parental rights have not been terminated. *In re Custody of R.M.* (2009) (quoting ICWA, 25 U.S.C. § 1903(1)).

Respondents seek to be named "guardians and temporary custodians" of the Minor. Petition for Guardianship and Temporary Custody. Respondents are seeking sole legal custody of the Minor. *See In re Custody of R.M.*; Fr. Re. Stat. § 72.04 (defining a guardian as one with "the power and responsibilities of a parent with sole legal and physical custody to the exclusion of all others"). Respondents seek to remove THE Minor from Movant, THE Minor's Indian custodian. *See* Petition for Guardianship and Temporary Custody; *Native American Customs Regarding Care of Children*, 8 Journal of Native American Law (2003) (stating that the Blackhawk tribe expects that the Native American grandparents will become custodians).

Respondents seek to place the Minor in their home as guardians and temporary custodians. *See* Petition for Guardianship and Temporary Custody. If Respondents are named guardians and temporary custodians, Movant, as the Indian custodian, would be

unable to demand the return of the minor. *See In re Custody of R.M.* Respondents do not seek to terminate the parental rights. *See* Petition for Guardianship and Temporary Custody.

Therefore, the remedy sought by Respondents is a "foster care placement," as defined under ICWA.

II. THE Minor is an Indian Child under ICWA as THE Minor is a member of THE Blackhawk Tribe.

An Indian child is defined as "any unmarried person who is under age eighteen and is . . . a member of an Indian tribe . . . ." ICWA, 25 U.S.C. § 1903(4).

The Minor is ten years old and is unmarried. *See* Petition for Guardianship and Temporary Custody. The Minor is a member of the Blackhawk Tribe. Letter from Sam Waters (Feb. 10, 2013).

Therefore, the Minor is an Indian child.

III. The Minor is not domiciled or residing within the Blackhawk Reservation.

The Minor is currently residing at the Father's home in Melville, Oak County, Franklin. This is approximately 250 miles from the Blackhawk Reservation, approximately a three- to four-hour drive.

IV. There is no good cause to the contrary.

The Department of the Interior, Bureau for Indian Affairs has defined "good cause to the contrary" for the purpose of barring a transfer to a tribal court. One sufficient element for good cause would be the lack of a tribal court. Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings* ("Guidelines"). The Franklin Supreme Court has followed these guidelines. *In re Custody of R.M.* Additionally, the Department of the Interior has identified four other sufficient elements for barring transfer: "(I) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing. (ii) The Indian child is over 12 years of age and objects to the transfer. (iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses. (iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe." *Guidelines.* The burden of proving good cause against a transfer is on the party opposing the transfer. *Id.*

This proceeding was not at an advanced stage when Movant filed the Motion to Transfer Case to Tribal Court. Respondents had filed their Petition for Guardianship and Temporary Custody on February 1, 2013. Movant filed the Motion to Transfer Case to Tribal Court on February 11, 2013. This Court had not yet ruled on the Petition for Guardianship and

Temporary Custody.

The Minor is only 10 years of age. Therefore the second factor is irrelevant in this case. Transfer to the Blackhawk Tribal Court would not present an undue hardship on the parties or the witnesses. Previously the Franklin Supreme Court has found that an approximately two hour driving time for parties and witnesses was not an undue hardship. *In re Custody of R.M.* Although the travel time here is between three and four hours, this should not constitute an undue burden. The Father and the Minor had previously made the trip on numerous occasions. Movant has been the primary care giver since the Father became incapacitated. See Petition for Guardianship, filed with the Tribal Court of the Blackhawk Tribe.

The Minor has had significant contact with the Blackhawk Tribe and its members. The Minor has attended at least four powwows on THE Blackhawk Reservation. Email from Joseph Fox to Betty Fox (Aug. 23, 2011); Petition for Guardianship, filed with the Tribal Court of the Blackhawk Tribe. He has spent entire weeks on the reservation and enjoys the time spent there. *Id.* The Father intended to continue bringing the Minor to events on the Blackhawk Reservation and hoped that the Minor would continue to remember the family's Blackhawk roots.

Therefore, there is no good cause against transferring this case to the Blackhawk Tribal Court.

V. The parents have not objected to the transfer of jurisdiction.

The Mother is deceased and the Father is currently in a coma. Currently, neither parent has objected or is capable of objecting to the transfer of jurisdiction to the Blackhawk Tribal Court.

VI. Movant is the Indian Custodian of the Minor.

As shown above, the Blackhawk tradition is that the Native American grandparents, either paternal or maternal, become the Indian custodian of an Indian child. *Native American Customs Regarding Care of Children*, 8 Journal of Native American Law (2003). Here, Movant is a member of the Blackhawk Tribe. Letter from Sam Waters (Feb. 10, 2013). Movant is the paternal grandmother of the Minor. Petition for Guardianship, filed with the Tribal Court of the Blackhawk Tribe. Neither of the respondents is a member of any Indian tribe. *Id.* Therefore, the Blackhawk Tribe considers Movant to be the Indian custodian of the Minor.

Therefore, Movant has met each of the elements required for transfer of a child custody case from a state court to an Indian tribal court. Additionally, Respondents cannot show that there is good cause to deny the transfer. Pursuant to ICWA, 25 U.S.C. § 1911(b), this Court must transfer this action to the Blackhawk Tribal Court.