

Applicant Number

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MULTISTATE PERFORMANCE TEST

American Electric
v.
Wuhan Precision Parts

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American Electric v. Wuhan Precision Parts

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FILE

ATKINSON & CARLTON LLP
Attorneys at Law
3 Civic Center Plaza
Franklin City, Franklin 33812

To: Examinee
From: Alexandra Carlton
Date: July 30, 2019
Re: American Electric v. Wuhan Precision Parts Ltd.

Our client Wuhan Precision Parts Ltd. (WPP), a Chinese manufacturing company, seeks help in vacating a federal default judgment entered by the U.S. District Court for the District of Franklin. These court proceedings arise from an earlier arbitration between American Electric Distribution Inc. (AE) and WPP, which took place in Franklin.

WPP lost the arbitration and has paid the bulk of the monetary relief awarded to AE by the arbitrators. But because WPP did not fully comply with the arbitrators' award, AE filed a complaint in federal court to "confirm" or convert the award into a court judgment. Before WPP appreciated what was happening in federal court, AE obtained a default judgment (which converted the arbitration award into a federal court judgment) and was awarded an additional \$90,000 in attorney's fees tied to the court proceedings.

WPP accepts the arbitration award but contests the court's default judgment. WPP contends that it was not properly served in the federal court action in accordance with the international service of process provisions of the Hague Convention. WPP has asked us whether the default judgment can be vacated.

The Hague Convention is a treaty to which both the United States and China are signatories. It calls for service through governmental channels. However, we expect AE to argue that WPP waived its Hague Convention service protections by agreeing to arbitrate these claims in Franklin, and that WPP should not be able to complain because it received sufficient notice of the Franklin district court proceedings.

The issues presented are ones of first impression in our federal district court of Franklin; however, federal courts in our neighboring districts of Olympia and Columbia have addressed the question, albeit in different ways. Those decisions are attached.

Draft a memorandum to me analyzing the following issues:

1. Will WPP succeed in vacating the default judgment due to improper service under the Federal Rules of Civil Procedure and the Hague Convention? Discuss both the facts that support WPP's motion to vacate and those that undermine it.
2. Are there any grounds to challenge the attorney's fee award?

Your memorandum should focus on the service of process and fee issues. Do not include a separate statement of facts but be sure to integrate the facts into your analysis. Do not address personal jurisdiction. Another lawyer at our firm is assessing WPP's contacts with Franklin and whether the district court has personal jurisdiction over WPP.

Email from Shao Wen “William” Li to Alexandra Carlton

From: William Li (w.li@wuhanprecisionparts.com)
Sent: Tuesday, July 23, 2019, 10:24 p.m.
To: Alexandra Carlton (acarlton@aclaw.com)
Subject: American Electric judgment

Dear Alexandra,

We at WPP very much appreciated the chance to speak with you by Skype yesterday afternoon about our legal problem. As we discussed, the law firm we hired to handle the arbitration ended its work at our request after the arbitration award was issued. We're glad you represent us now.

WPP operates in Wuhan, an industrial city and a principal transportation hub in central China. We do not have offices, registered agents, or employees in the United States. WPP manufactures gear motors for dishwashers designed and assembled by American Electric (AE) for subsequent sale by U.S. Clean Corporation (USCC). AE is based in Franklin.

Here's the chronology of events:

2014 Supplier Agreement: In 2014, USCC asked AE for assurance that replacement gear motors would be available for use in repairing the dishwashers when necessary. Based on that request, on September 21, 2014, WPP and AE entered into a supplier agreement whereby AE authorized WPP to sell replacement gear motors directly to USCC on condition that WPP pay AE a royalty of \$50 for each gear motor sold. As part of the supplier agreement, we agreed to arbitrate any dispute in Franklin.

2017 Arbitration: In 2017, AE took us to arbitration, claiming that we had deliberately shipped different motors from the ones that we had agreed to provide in the supplier agreement. AE also claimed that we had sold 900 more replacement motors to USCC than we had reported to AE and therefore owed AE additional royalties. Even though the arbitrators ruled against us, AE did not get all it wanted. The arbitrators decided that we owed \$500,000 for shipping nonconforming motors and only \$25,000 for unpaid royalties on 500 of the replacement motors we sold directly to USCC. The arbitrators also ordered us to pay AE's attorney's fees in the amount of \$110,000.

WPP Partial Payments on the Arbitration Award: After the arbitrators issued their award on December 15, 2017, WPP promptly paid half of the \$500,000 damages award for the breach of contract claim on the motors. We have not yet paid the \$25,000 award for unpaid royalties or the \$110,000 attorney's fee award. We have had to delay payment due to an economic downturn resulting in foreign exchange and cash flow problems.

June 14, 2019 District Court Default Judgment: Our biggest problem is that because we had not fully complied with the arbitration award, a U.S. court has entered a judgment against us that now includes an additional \$90,000 in attorney's fees for the court process over and above the \$110,000 in fees awarded by the arbitrators. We do not see how additional attorney's fees could be awarded. Here's what we know:

- November 2, 2018 – AE Email of Summons and Complaint: From what you have told us, on November 2, 2018, an email attaching the summons and complaint to enforce the arbitration award was sent to our Vice President of Manufacturing, who had been our designated point of contact during the arbitration. We also understand from you that AE attempted to serve the summons and complaint through Chinese government channels. We did not receive anything from the Chinese government.
- VP Quits on November 9, 2018: We checked, and the VP quit on November 9, 2018. He did not forward the email or notify anyone about it. Just so you know, although the arbitration communications were by email, we normally do business with AE by fax and phone.
- March 8, 2019 – AE Mailing of Default Motion: We now know that AE put its motion for default judgment in the mail to us in March (return receipt requested), thinking mail service was okay because the summons and complaint had been "served" back on November 2, 2018.
- April 15, 2019 – WPP Actually Receives Motion: We did not receive AE's motion for default judgment until April 15, 2019, because the Wuhan government post office delayed delivery. In addition, the motion papers were in English, and following our company policy, they were sent to our in-house translation department. Once we

translated them into Mandarin Chinese, we realized that we needed to contact you. Then we learned from you that the court had already entered a judgment against us.

- June 14, 2019 – Court Orders Entry of Default Judgment: The court's order entering the default judgment mentions that AE attempted formal service under the Hague Convention by delivering the summons and complaint to the Chinese government. All we know is that we did not receive the summons and complaint, or any other legal documents, through government channels.

We need your help. The court entered a judgment without our knowledge. We are especially concerned with the additional \$90,000 in attorney's fees. If AE or its lawyers had called us, or used a fax machine, all of this could have been avoided.

Please know that we can pay your bill. Even though we have had some cash flow problems, we have had substantial profits in recent years and have paid a number of much larger judgments entered against WPP.

We appreciate your help.

Thank you,

Shao Wen "William" Li

Director of International Sales

UNITED STATES DISTRICT COURT
DISTRICT OF FRANKLIN

American Electric Distribution Inc.,
Plaintiff/Petitioner,

v.

Wuhan Precision Parts Ltd.,
Defendant/Respondent.

ORDER ENTERING DEFAULT
JUDGMENT

Civil No. 13-199-SJK

Plaintiff American Electric Distribution Inc. (AE) petitions for confirmation of an arbitration award and subsequently moves for an award of \$90,000 to cover the attorney's fees it incurred in pursuing relief before this court. AE is represented by Alan Richetti of Richetti & Hamill. Wuhan Precision Parts Ltd. (WPP) has made no appearance before this court in this matter.

The September 21, 2014 Supplier Agreement

This court proceeding arises from a Supplier Agreement ("Agreement") effective as of September 21, 2014, between AE and WPP. It reads in relevant part:

7. Attorney's Fees. In the event of breach, the prevailing party shall be entitled to recover its costs and expenses (including reasonable attorney's fees) incurred to enforce the terms of this Agreement.

8. Arbitration. Any controversy or claim arising out of or relating to this Agreement or the breach, termination, or validity thereof shall be settled by arbitration carried on in the English language, using three arbitrators selected as detailed in Paragraph 9 below, and shall be held in Franklin City, Franklin, U.S.A. Judgment upon the award rendered by the arbitration panel may be entered by any court having jurisdiction thereof.

December 15, 2017 Arbitration Award

A dispute arose, with AE eventually taking WPP to arbitration before an arbitration panel of the Franklin Center for International Dispute Resolution. The panel awarded AE the following:

First, due to WPP's sale of nonconforming motors, an award of damages of \$500,000.

Second, due to WPP's failure to properly account for its replacement motor sales to U.S. Clean Corporation, the panel concluded that WPP owed back royalties on the sale of 500 replacement motors, resulting in an additional award of \$25,000.

Third, the panel granted AE's request for attorney's fees tied to the arbitration proceeding, but only in the sum of \$110,000—one-third of the amount requested. The panel concluded that AE had overstated its case in several material respects that caused both sides to incur unnecessary fees and costs. The panel noted, however, that its ruling did not deny or limit AE's right to recover attorney's fees, if any, that might be incurred in enforcing its rights to future accountings and/or royalties.

The Court Proceedings to Confirm the Award and Motion for Default Judgment

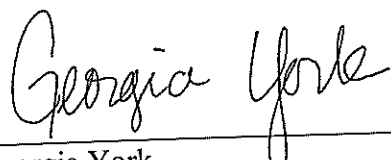
AE served its original complaint seeking to confirm the arbitration award by email to the Vice President of Manufacturing for WPP. Email service was used during the arbitration pursuant to the procedural rules governing the arbitration. AE's subsequent motion for a default judgment, which added a request for \$90,000 in attorney's fees, was served upon WPP by mail. The complaint was served on November 2, 2018, and the default motion was served on March 8, 2019. WPP failed to respond. Almost eight months have elapsed since service of the complaint, and over 90 days have elapsed since the date of the service by mail of the motion for default judgment. The court notes that unlike the summons and complaint, the default motion was not translated into Mandarin Chinese, although those pleadings were short and straightforward. Moreover, the record establishes that WPP regularly conducted its international business in English, including the arbitration proceedings at issue.

AE also attempted formal Hague Convention service of its pleadings via the Chinese Central Authority but received no communication in return.

Accordingly, it is hereby ordered that the plaintiff's motion for default judgment is GRANTED, and judgment is entered as follows:

1. Confirming the arbitration award of December 15, 2017, with the arbitration relief now converted to a judgment of this court; and
2. An additional award of \$90,000 in attorney's fees.

Dated: June 14, 2019



Georgia York
United States District Judge

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EXCERPTS FROM THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 4 [Summons and Complaint]

...

(f) Serving an Individual in a Foreign Country. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served at a place not within any judicial district of the United States

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

...

(h) Serving a Corporation, Partnership, or Association. Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation . . . must be served . . .

(2) at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery

Rule 5 [Post-Complaint Pleadings]

(a) Service: When Required

(2) *If a Party Fails to Appear.* No service is required on a party who is in default for failing to appear. But a [subsequent] pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4.

Pennsylvania Coal Co. v. Bulgaria Trading & Transport Co., Ltd.
United States District Court for the District of Olympia (2001)

Before the court is the motion of defendant Bulgaria Trading & Transport Co., Ltd. (BTT) to vacate a default judgment. BTT makes a limited appearance, arguing that it had not been properly served under the Hague Convention and therefore the default judgment is void for lack of proper service.

Background

Plaintiff Pennsylvania Coal Co. (Penn Coal) contracted for the sale of used coal processing equipment to BTT, a trading company headquartered in Sofia, Bulgaria. The parties agreed to arbitration of all disputes in San Andrea, Olympia.

After a contentious and prolonged arbitration proceeding, the arbitrators awarded Penn Coal \$4.5 million due to BTT's refusal to take delivery of approximately half of the equipment it had purchased. The panel also awarded \$300,000 in attorney's fees to Penn Coal pursuant to a term of the contract providing for the award of attorney's fees to the prevailing party.

BTT refused all requests by Penn Coal for payment of the \$4.8 million award. Penn Coal has presented evidence that BTT has since moved assets and has persisted in its contention that the Penn Coal equipment proved defective, notwithstanding the arbitration ruling to the contrary.

Penn Coal petitioned this court to confirm the award. When a court confirms an arbitration award, the arbitration award becomes a court judgment. In this way, a plaintiff can benefit from all the collection tools flowing from a court judgment. To confirm an arbitration award, the plaintiff files a complaint (or petition) in federal court and serves the defendant with a summons and complaint.

Penn Coal attempted formal Hague Convention service by delivering its pleadings to the appropriate Bulgarian governmental authority, but all subsequent governmental efforts to serve BTT were unsuccessful. Undaunted, Penn Coal took it upon itself to personally serve the summons and complaint at BTT's headquarters in Sofia, Bulgaria. Penn Coal also arranged for delivery through government postal channels (return receipt received), and it emailed a copy of the complaint to the BTT executive who had entered into the Penn Coal contract, using the same email address the parties had agreed to use for the arbitration proceeding.

Because BTT did not respond to Penn Coal's complaint or otherwise object over the nine months that followed, Penn Coal moved for, and this court granted, a default judgment for \$4.8

million as awarded by the arbitrators, plus an additional \$75,000 in attorney's fees tied to this proceeding.

Three weeks after this court issued its judgment, BTT appeared before this court to vacate that judgment. BTT acknowledges Penn Coal's evidence that BTT received actual notice but insists that the judgment is void because Penn Coal did not serve BTT in compliance with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (Hague Convention). The Hague Convention requires service upon a governmental authority, which in turn will effectuate service upon its own citizens and entities such as BTT. BTT challenges the fees awarded on the same basis.

Service Abroad Under the Hague Convention and Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure state that service on international parties must occur in compliance with the Hague Convention. *See* FED. R. CIV. P. 4(f)(1). Both Bulgaria and the United States are parties to the Hague Convention. Formal Hague Convention service calls for service by the Bulgarian authorities upon BTT. Penn Coal did not properly serve BTT under the Hague Convention. BTT relies on case law holding that if a party was never properly served, subsequent judgments founded upon that improper service are void and must be vacated. *See, e.g., In re Int'l Media Services Inc.* (15th Cir. 1998) (civil litigation, not arbitration).

The Enforcement of Arbitration Awards

Our circuit court has held that entry into an agreement to arbitrate in a particular jurisdiction constitutes consent to personal jurisdiction and to venue. *Auto Dealers Ass'n v. Pearson* (15th Cir. 1996). However, it is an issue of first impression as to whether a consent to arbitrate in Olympia also relaxes the service of process requirements of the Hague Convention. When a foreign corporation, such as BTT, agrees to participate in an arbitration proceeding in the United States, it cannot expect that it can consent to an Olympia arbitration, participate in it, and then, in the event that it loses, seek refuge in the protections of the Hague Convention to avoid facing any consequences in Olympia. At the same time, this court recognizes that judicial proceedings are different from arbitration proceedings and that the expectation of parties to an arbitration must be balanced against the right of fair notice.

The service-related provisions of the Federal Arbitration Act (FAA) do not resolve the issue. Given this silence, this court will follow the line of authority holding that in cases arising

from arbitration proceedings, defects in service of process may be excused where considerations of fairness so require. Where parties have consented to arbitration, actual notice of the proceedings can be sufficient as long as it is fair and no injustice results.

This court acknowledges the Supreme Court's admonition that compliance with the Hague Convention is "mandatory in all cases to which it applies." *Volkswagenwerk AG v. Schlunk*, 486 U.S. 694, 705 (1988). Here, however, Penn Coal tried in good faith to comply by delivering its pleadings to the Bulgarian authorities. More fundamentally, BTT consented to, and then participated in, an Olympia arbitration pursuant to an agreement contemplating the award's confirmation in court. In that circumstance, strict adherence to the Hague Convention is not required; actual notice and fairness are the standards. The Hague Convention is not designed to be a roadblock to those who act in good faith.

We now assess the fairness of the notice in this case. BTT clearly received notice, albeit without involvement of the Bulgarian government as the Hague Convention provides. Personal service and U.S. mail service are recognized forms of service under the Federal Rules of Civil Procedure. While email service is not typically authorized, it is the means by which the parties communicated during the arbitration. In this case, service via email was a reliable means of delivering the complaint to BTT and was reasonably calculated to give BTT actual notice. Finally, the lengths to which BTT went to evade its contract obligations and avoid accountability for the arbitrators' award cannot be rewarded. The manner in which BTT conducted its business (e.g., moving assets that could have been used to satisfy the arbitration award and claiming that Penn Coal's equipment was defective) is highly relevant and must be considered. Also, given that BTT has expressed no difficulty in comprehending the English-language documents arising from an American arbitration conducted in English, and given that BTT failed to appear in the nine months preceding this court's judgment, justice requires that this court affirm its earlier judgment confirming the arbitration award. On these facts, the actual notice given was fair.

Attorney's Fees

Even though the court grants the default judgment, the court agrees with BTT that Penn Coal's request for attorney's fees for these court proceedings is on a different footing. The additional \$75,000 in attorney's fees is not referenced in the summons and complaint. Accordingly, the court will relieve BTT from the \$75,000 attorney's fee judgment.

There are two reasons for denying attorney's fees in this subsequent court action. First, unlike the confirmation of the arbitration award, the request for fees for litigating before this court is a "new claim for relief." A new claim requires service that complies with the Federal Rules of Civil Procedure and the Hague Convention. *See* FED. R. CIV. P. 5(a)(2). Under the Hague Convention, the party raising a new claim must deliver a copy of that claim to the foreign governing authority, which will then deliver it in accordance with local judicial process. Penn Coal did not follow that procedure.

A second and independent ground for denying attorney's fees centers on the role of the arbitration panel versus that of the court. While the FAA contemplates that arbitral parties can turn to courts to confirm the awards themselves, courts are careful to defer all substantive decisions to the arbitrators. Here, the contract between Penn Coal and BTT allows for the prevailing party to obtain attorney's fees but contains no reference to judicial remedies in that regard. Accordingly, Penn Coal's fee request is one that it must pursue by returning to arbitration. That conclusion is especially appropriate given that this court employed "fairness" principles when upholding the judgment confirming the arbitration award. Those principles cannot be used by Penn Coal to open the door to claims, like requests for attorney's fees, that were not previously raised with the arbitrators.

Accordingly, BTT's motion to vacate this court's earlier default judgment is DENIED as to the \$4.8 million arbitration award but GRANTED as to this court's judgment for \$75,000 in attorney's fees.

EduQuest Digital Corp. v. Galaxy Productions Inc.
United States District Court for the District of Columbia (2005)

Before the court is the petition of EduQuest Digital Corporation (EQ) to confirm a 2003 arbitration award and grant its subsequent motion for an award of attorney's fees tied to this judicial proceeding.

Procedural History

EQ designs educational games and licenses those products for resale by companies across the globe. Galaxy Productions Inc. (Galaxy) is based in Beijing, China. It entered into a licensing contract with EQ covering 422 of EQ's products and authorizing their resale over a five-year period from 2000 through 2004. In the event of breach, the licensing contract called for arbitration in Center City, Columbia. The contract provided that any prevailing party was entitled to attorney's fees. It also stated that "judgment upon the award rendered by the arbitration panel may be entered by any court having jurisdiction thereof."

The arbitrators, after taking 16 days of testimony, concluded that Galaxy had breached its licensing agreement with EQ by failing to remit all licensing fees for products it sold in China, and that Galaxy's sale of counterfeit copies of EQ's games warranted an additional award of lost profits of \$750,000. The arbitrators awarded \$225,000 in attorney's fees to EQ and directed that Galaxy submit semi-annual reports of all of its licensed sales.

Facing Galaxy's noncompliance with the arbitration award, EQ petitioned this court to convert its arbitration decision into a judgment that it can enforce. EQ initiated formal service following the Hague Convention and provisions of the Federal Rules of Civil Procedure. When Chinese entities are involved, the Hague Convention requires that the serving party translate the documents into Mandarin Chinese and deliver the documents to the Chinese Central Authority, which will effectuate service through its provincial courts. EQ fulfilled its responsibilities. However, after hearing nothing from the Chinese government, EQ opted for self-help via a combination of service by personal delivery upon a Beijing agent of Galaxy and service by international mail, return receipt requested. In light of that, EQ asks this court to deem service to have been proper.

Despite EQ's efforts at service, Galaxy failed to respond to EQ's initial petition to confirm the award. EQ seeks attorney's fees and costs of \$95,000 tied to these judicial proceedings. EQ's

motion for attorney's fees was served by personal delivery and international mail, return receipt confirmed.

Galaxy made a limited appearance that the court agreed would not waive Galaxy's jurisdictional objection. Galaxy appeared after receiving the fee-related motion. Galaxy challenges this court's jurisdiction, arguing that a federal court lacks jurisdiction if a defendant is improperly served, in this case pursuant to the formal governmental service provisions of the Hague Convention.

Confirmation of the Arbitration Award

The Federal Arbitration Act governs the service of petitions to confirm arbitration awards. However, that statute does not provide a method of service for a foreign party who is not a resident of any district in the United States. Some courts, facing circumstances different from those presented here, turn to principles of "fairness" to excuse defects in service of process in cases arising from arbitration proceedings. *See, e.g., Penn. Coal Co. v. Bulgaria Trading & Transport Co., Ltd.* (D. Olympia 2001) (evidence of evasion). The focus tends to be on the good faith of the underlying business conduct, as well as the reasonableness of the notice. There is sufficient evidence here of the counterfeiting of intellectual property and deliberate noncompliance with the arbitration award. From this court's perspective, however, the "fairness" standard of *Penn Coal*, which balances the equities, is too loose to serve as a guide as to when courts can excuse noncompliance with the Hague Convention and Federal Rule of Civil Procedure 4 when confirming arbitration awards.

For this court, at least on these facts, the better rationale is that by agreeing to arbitrate in Columbia and participating in those proceedings, the parties to the underlying contract agreed to the provision allowing court judgments to be entered. This serves as a "deemed waiver" of formal Hague Convention service in connection with confirmation of an arbitration award. Put another way, this court reads the parties' contract as consenting to service by actual notice that satisfies the general principles of due process and the Federal Rules, rather than the strict formality of the Hague Convention—at least in cases where the arbitration takes place in the jurisdiction contemplated in the parties' agreement. Under this analysis, Galaxy's post-award conduct is irrelevant. This court finds that by agreeing to arbitrate, Galaxy is deemed to have waived the right it possesses to formal service. The actual notice Galaxy received here was reasonable and sufficient.

Galaxy objects strongly to the court's "deemed waiver" analysis. It contends that such an approach eviscerates the Hague Convention protections for all arbitrated matters and opens the door to uninvited judicial proceedings. This court does not intend its holding to be so broad. Here, EQ attempted formal Hague Convention service in good faith. In at least those circumstances, the "deemed waiver" approach should be available to protect good-faith litigants like EQ.

Attorney's Fees

While this court does not adopt the "fairness" approach used in the District of Olympia pursuant to *Penn Coal* to assess proper service requirements to confirm arbitration awards against foreign parties, this court does agree with the reasoning of the *Penn Coal* court as to attorney's fees. The fee request is a "new claim for relief," and Rule 5(a)(2) requires formal government service under the Hague Convention. Accordingly, this court will deny EQ's motion for an award of attorney's fees.

EduQuest's petition to confirm the arbitration award is hereby GRANTED, and its motion for attorney's fees is DENIED.

NOTES

NOTES

MULTISTATE PERFORMANCE TEST DIRECTIONS

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The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

Do not include your actual name anywhere in the work product required by the task memorandum.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

Applicant Number



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MULTISTATE PERFORMANCE TEST

Estate of Carl Rucker

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Estate of Carl Rucker

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FILE

Buckman & Carraway
Attorneys at Law
240 West End Highway
Middleburg, Franklin 33905

MEMORANDUM

To: Examinee
From: Dana Carraway
Date: July 30, 2019
Re: Carl Rucker

Carl Rucker has asked for our advice about the disposition of his property after his death. Mr. Rucker owns a house in Middleburg, which he has owned for nearly 45 years. He has two children by his first wife: Fred and Andrew. His first wife died 24 years ago. He remarried 18 years ago to his current wife, Sara Rucker.

Mr. Rucker would like to arrange his affairs so that, if he dies first, Mrs. Rucker can live in the house for the rest of her life. He wants to make sure that the house passes to his two sons after her death. However, his current wife and his two sons do not get along. He expects that, if given the chance, his sons would try to remove Mrs. Rucker from the house if she were living in the house after his death. He also believes that, if she owned the house, Mrs. Rucker would leave the house to a charity rather than to his sons. Mr. Rucker would like our advice about how to assure the result that he wants while minimizing the possibility of extended legal battles.

I'd like you to focus on two of the possible approaches that Mr. Rucker might consider: (1) creating a life estate in the house for Mrs. Rucker while she is alive, with the remainder to his sons; and (2) contracting with his wife to write wills that leave the house to his sons after both he and Mrs. Rucker have died.

Please prepare a memorandum for me that discusses the advantages and disadvantages of these two approaches. Make sure to discuss the impact, if any, on a surviving spouse's elective share. Your memorandum should also include a recommendation as to which approach will better accomplish Mr. Rucker's stated goals: (1) to assure that Mrs. Rucker can live in the house for the rest of her life, (2) to assure that his sons receive the house after she dies, and (3) to minimize the risk of litigation between them.

As you will see, the client does not want a trust; do not address that topic.

Transcript of client interview: Carl Rucker
July 17, 2019

Attorney Carraway: Hello, Mr. Rucker. Thank you for coming today.

Carl Rucker: Thank you for making the time.

Attorney: I understand that you want to talk about a will.

Rucker: Well, yes, although I'm not sure it's a will I want.

Attorney: Tell me how I can help.

Rucker: To help you understand the situation, I have to tell you a little about my background. I'm 67 years old now, but I got married when I was 19. My first wife, Frances, was the same age, and we started a family right away. We had two boys within about three years.

Attorney: What are their names?

Rucker: Fred is 47. And Andrew, or Andy, is 45. They're both married. Fred has two kids of his own.

Attorney: When your sons were born, did you live in Middleburg?

Rucker: Yes. I've lived in Middleburg my whole life. After Andy arrived, we bought the house that I live in now, on Cherry Tree Road.

Attorney: I know that neighborhood. You say that only you live there. . . . Is Frances . . . ?

Rucker: Yes, she passed away the year Andy turned 21. Cancer.

Attorney: I'm sorry.

Rucker: I was on my own for years after that. Then I met Sara. She was a receptionist at my doctor's office, and we just hit it off. We got married about 18 years ago. And that's the problem.

Attorney: How so?

Rucker: My sons do not like her. I mean, they really don't like her. She is very different from their mother, it's true. But I'd have thought they'd get over it. Sara made an effort, but she couldn't do a thing about it. Things have been hard for years. It's at the point where I only see the boys on my own. I visit them, and Sara doesn't come with me. The boys and Sara don't talk at all. And if I'm honest, I think Sara has come to dislike them too.

Attorney: I am very sorry to hear this. I know how hard that can be. Can you explain what you're looking for from me?

Rucker: It has to do with the house. It's a beautiful place. The boys love it because it's where they grew up. They resent Sara because they think she wants to take it away from them. Sara loves the house because it's where she and I have made a life together. We're very happy there. She worries that they will kick her out as soon as I die.

Attorney: Who owns the house?

Rucker: I do. Frances and I owned it jointly, but I took over when she died. We had a 30-year mortgage on the place, but I paid that off years ago. Sara has never asked to become an owner, and I never saw the need to put her on the deed. Now . . . I don't know.

Attorney: Do you know how much the house is worth?

Rucker: I don't. I have never put it on the market, and never plan to do so. I think the fair market value is \$250,000, maybe higher. The property taxes are around \$1,700 a year.

Attorney: By the way, Carl, how old is Sara?

Rucker: Sara is 65.

Attorney: And are you retired?

Rucker: I will retire next year. I don't have a pension or a retirement account, since I never worked anywhere that offered one. So I will be relying on Social Security. Sara is working now but will retire a few years from now. She doesn't have a pension or retirement account either. So all she'll have is her Social Security.

Attorney: Do you have any other assets?

Rucker: Yes, I own several long-term certificates of deposit that total around \$200,000. These are all in my name alone. I plan to give them to Sara when I die.

Attorney: Luckily, your assets will not raise any estate tax concerns. Let me ask something different: are you both healthy?

Rucker: Yes, and with luck, we'll stay that way.

Attorney: Of course. It's my job to help you plan for the worst.

Rucker: I know. And I have already lost Frances. It could happen again, to either of us.

Attorney: Tell me exactly what you want to happen.

Rucker: If I die first, I want Sara to be able to have the house as long as she is alive. Then I want it to go to my sons. If Sara dies before I do, then I want my two sons to have the house after I die. They get along and will figure out what to do with it.

Attorney: If you die first, and Sara gets the house outright, will she make sure that your sons get the house eventually?

Rucker: She says she will, but I am not so sure. There's just too much bad blood between them. Also, she has been very involved in a charity and may want to leave the house to that charity when she dies.

Attorney: If your sons get the house outright, will they let Sara live there as long as she wants?

Rucker: Again, I hate to say it, but no, they won't. I'm sure they would try to kick her out.

Attorney: Let's say that we find a way for Sara to keep the house while she is alive. Would she be able to afford it?

Rucker: Well, between her Social Security and whatever Social Security she gets as my widow, she might be able to pay the taxes and keep the place up, but I worry that she might not be able to afford unexpected repairs or emergencies. It's possible she would have to borrow against the house. That's why I plan to leave her the \$200,000 certificates of deposit when I die.

Attorney: Your sons, are they well off?

Rucker: Yes, they're doing okay. They won't need the Cherry Tree house. But I know that they would like to keep it in the family.

Attorney: One last thing. Do you think that there is any chance that Sara and your sons will figure out a way to get along with one another?

Rucker: The way things have been, no, not a chance. I really worry about it. The last thing I want is for the three of them to end up fighting in court, spending money on lawyers, and selling the house to end up with nothing.

Attorney: Okay. Thank you, Carl. I know that this is hard to discuss. We will look into the choices that you might have. I'll start by focusing on what happens if Sara survives you. I will schedule an appointment when we have some ideas. I would normally recommend a trust for this kind of situation.

Rucker: I don't want a trust. I had a close friend who left his property in a trust and it caused him and his wife and children nothing but trouble. And I don't want anyone else to have control of the property.

Attorney: You and I will have to go over what a trust can and cannot do. But I hear you. When we meet next, we will be sure to go over other options as well.

Jill Baker
Certified Residential Appraiser
1 Vicker Place
Centralia, Franklin 33705

MEMORANDUM

To: Dana Carraway
From: Jill Baker
Date: July 23, 2019
Re: Valuation of Carl Rucker Residence and Life Estate

You asked me to determine the current fair market value for the residence of Carl Rucker and to assess the value of a life estate held by Mrs. Rucker, currently age 65, in that residence, assuming Mr. Rucker were deceased.

Fair Market Value

The Rucker residence is located at 1513 Cherry Tree Road in Middleburg, Franklin. It is a 2,700-square-foot two-story house, with garage, attic, and basement. The house sits on three acres of land in a neighborhood zoned R10 for residential use. The house is set back about 60 feet from the road and has a large backyard.

I spoke with agents at different real estate agencies about the neighborhood and about comparable properties. These agents indicated that houses in that neighborhood have retained their value, even in down times for real estate; and, as you know, the housing market is coming back in our region. Based on sales of comparable houses, these agents agreed that current fair market value for the house would be roughly \$250,000. This value is likely to change over time.

Value of Life Estate

As you know, the value of a life estate is less than the value of the fee ownership of the whole property. For purposes of advising your client at this time, I have calculated that the present value of a life estate for Mrs. Rucker in the residence is \$80,000, assuming Mr. Rucker is deceased.

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LIBRARY

Excerpt from Walker's Treatise on Life Estates

The owner of real property, by deed effective immediately or by will, can create successive ownership interests in the realty. An interest created in a person currently entitled to possession for that person's life is called a life estate, and that person is called a life tenant; an interest created in a person whose right to possession arises only after the death of the life tenant is called a remainder. Life estates and remainders can be created in one or more persons.

Life Tenant: A life tenant has absolute and exclusive right to use of the property during his or her lifetime. Life estates can be held by one or more persons, such as spouses or siblings. The life tenant is entitled to possession of the property during his or her life or to rents from the property should the life tenant rent it to another. The rights of a life tenant expire automatically upon the death of the life tenant. The life tenant is responsible for real estate taxes, insurance, and maintenance costs related to the property.

Generally, the life tenant can sell or otherwise transfer that interest. However, any transferee from a life tenant can have an estate only for so long as the life tenant lives. Similarly, if the life tenant mortgages the life tenant's interest, that mortgage expires when the life tenant dies. However, a deed or will can empower a life tenant to sell or mortgage the property from which the life estate is carved without the consent of the owners of the remainder interest.

Remainder Owner: The owner of the remainder following a life estate automatically becomes owner of the real estate immediately upon the death of the last life tenant. The remainder owner has no right to use of the property or the income from the property during the life tenant's lifetime. Remainders may also be created in one or more persons.

Considerations

Creating a life estate in real property while the owner is alive (as opposed to one created by the owner's will) can be accomplished by executing a new deed from the owner of the property to the life tenant(s) and remainder owner(s). It is generally advisable to record the deed. However, the decision to transfer the property to a life estate is almost always irreversible. If the owner changes his or her mind, a change cannot occur without the consent of all life tenants and remainder owners. Their mutual consent may be difficult to obtain.

All owners, including remainder owners, must agree to sign a deed to sell the property in fee or to sign a mortgage to borrow money secured by the full value of the property. Disagreement

among the owners severely restricts the marketability of the property and may make it nearly impossible to borrow money to make major repairs or improvements to the real property.

If a life estate in real property is created while the owner is alive, then upon the death of the last life tenant, the real property automatically belongs to the remainder owner, with no need for probate of that property, avoiding the costs and delays of probate. A life estate is worth less than full ownership in the same property.

The remainder owner cannot affect the life tenant's interest in the property. For example, if a parent who owns real property gives her children a remainder interest and retains a life estate in the property for herself, neither the children nor the children's creditors can affect the parent's possession. If the life tenant's actions or neglect harm the property, the remainder owners can sue the life tenant (or the life tenant's estate) for the damage in an action for waste.

The risk of litigation should be considered, especially for life estates created by a will. In addition to the time and costs of litigation, there is a risk that the court could award the monetary value of the life estate to the life tenant instead of possession of the property. Such a result would defeat the testator's wishes to permit the life tenant to live in the residence. Transferring property by deed, as opposed to by will, minimizes this risk.

Elective share

Creating a life estate by deed in the owner's spouse may have implications for the distribution of the owner's probate estate. Franklin law permits a surviving spouse to claim a percentage share of the deceased spouse's "augmented estate" (the deceased spouse's probate estate increased by, among other things, lifetime gifts to the surviving spouse). This share is called the "elective share." For many years, it was unclear what should happen when the surviving spouse held a life estate transferred by deed from the deceased spouse while alive. Recent cases have clarified that the value of such a life estate should be included in calculating the elective share of the surviving spouse.

No requirement of spousal consent

Some states limit the ability of one spouse who has sole title to a residence to transfer that residence to anyone without the other spouse's consent. Franklin law does not recognize this limitation with respect to a residence titled solely in one spouse's name prior to the marriage. Nor is Franklin a community property state. Thus, in Franklin, a spouse who has sole title to a residence may transfer a life estate to anyone without the other spouse's consent.

In re Estate of Lindsay
Franklin Court of Appeal (2008)

Joseph Lindsay, spouse of the decedent, Nancy Lindsay, filed a petition in the probate court seeking to take his elective share of the decedent's estate. The probate court determined that Mr. Lindsay's elective share had been satisfied by a life estate transferred to him by the decedent and an outright bequest in the decedent's will and that Mr. Lindsay was not entitled to anything further from the decedent's estate. Mr. Lindsay appeals from that determination.

The decedent and Joseph Lindsay were married on June 16, 1990. Mr. Lindsay was the decedent's second husband. The decedent had two children by a prior marriage, both of them adults at the time of her second marriage. The decedent owned a residence and 25 acres of surrounding land, acquired before her second marriage. On July 20, 2005, the decedent transferred this real property to herself and Mr. Lindsay as life tenants, granting a remainder interest to her two children. Joseph Lindsay's life estate was valued at \$200,000. The assets of Nancy Lindsay's estate that would pass by will (stocks, bonds, savings accounts, and other personal property) totaled \$900,000, of which Joseph Lindsay was bequeathed \$400,000. Mr. Lindsay elected not to receive this bequest and instead to claim the elective share.

Franklin law states that Joseph Lindsay is entitled to claim an elective share equal to 50% of the "augmented estate" or, in the alternative, what was bequeathed in the will. FRANKLIN PROBATE CODE § 2-202. The question before the court is whether the value of the life estate should be included in the augmented estate, in addition to the assets passing by will, when determining the elective share. We hold that the value of the life estate should be included.

The percentage size of the surviving spouse's share depends on the length of time the surviving spouse had been married to the decedent. *Id.* A spouse like Mr. Lindsay, who was married for 15 years or more, is entitled to claim a 50% elective share of the augmented estate. Permitting a surviving spouse to claim an elective share of a deceased spouse's augmented estate protects that spouse from the harsh effects of the decedent's decision to leave the spouse little or nothing through probate. The purpose of the elective share is to give the surviving spouse a fair share of the economic partnership maintained by the couple before the decedent's death.

An augmented estate, according to Franklin law, includes four categories of assets, only three of which are relevant here: (1) the net assets held in the probate estate, FRANKLIN PROBATE CODE § 2-204; (2) the assets transferred by the decedent to the decedent's spouse before death,

FRANKLIN PROBATE CODE § 2-206; and (3) the surviving spouse's own assets and pre-death transfers, FRANKLIN PROBATE CODE § 2-207. Using these three provisions, the probate court calculated the value of the "augmented estate," described earlier, at \$1.1 million.

Petitioner Lindsay's calculation: exclude value of life estate from augmented estate and claim 50% elective share

Mr. Lindsay claimed his elective share of the estate pursuant to Franklin Probate Code § 2-202. As Mr. Lindsay calculates his elective share in the augmented estate, he claims to be entitled to 50% of the \$900,000 probate estate (or \$450,000). He also claims that the value of the life estate (worth \$200,000) should be disregarded in computing the elective share. If he is correct, he would receive a total of \$650,000 of benefits: \$450,000 as his elective share plus the earlier transfer of the life estate worth \$200,000.

The personal representative's calculation: include value of life estate in augmented estate

The personal representative of the decedent's estate agrees that the elective share is 50% of the augmented estate. However, the representative takes a different view of how that share is calculated, claiming that the value of the augmented estate includes both the probate estate *and* the value of the life estate. By including Mr. Lindsay's life estate, the "augmented estate" totals \$1,100,000: the \$200,000 life estate plus the \$900,000 in probate assets. Therefore, the 50% elective share equals one-half of \$1,100,000 (that is, \$550,000). Because Mr. Lindsay has already received the \$200,000 life estate, he would be entitled to receive only \$350,000 of the probated assets via an elective share.

We agree with the personal representative that Mr. Lindsay's life estate should be included in the calculation of the augmented estate for determination of his elective share. In addition, the court correctly used the value of the life estate, or \$200,000, and not the full fair market value of the house, in calculating the elective share.

Accordingly, we affirm the probate court's decision.

Manford v. French
Franklin Court of Appeal (2011)

On January 27, 1997, Opal French and her husband, George, executed a single will that recited only that it was a “joint” will. This will would have transferred all the property of the first spouse to die to the survivor; then, upon the death of the survivor, all the survivor’s property, including the property acquired from the first spouse to die, was to go to Mary Elizabeth Manford, their only child. George predeceased Opal in 1998. Opal received all property held by him pursuant to the joint will.

In 2004, Opal French drafted a new will, expressly revoking the 1997 joint will. This new will transferred all of her property to her two children by a previous marriage. It also expressly disinherited Manford. The will stated that Opal had “given Mary Elizabeth Manford her part of the estate before my death, through significant loans that she has not repaid. I forgive these loans, but she has received enough.”

Opal died in February 2010. Her children from the previous marriage, acting as co-executors, offered the 2004 will for probate. Manford contested, claiming that (1) the 1997 joint will was intended to be contractually binding; (2) Opal could not revoke the 1997 will after she had benefited from its probate; and (3) because of this fact, her 2004 will was invalid. Manford sought specific performance of the 1997 will, or in the alternative, money damages.

Manford filed an affidavit maintaining that Opal and George had conducted a family meeting in 1996 and expressed a plan to execute a will that would devise the estate to Manford after their deaths. The parties filed cross-motions for summary judgment. The trial court ruled for the co-executors. Manford appealed.

We must decide whether Opal had any contractual obligation to George arising from the 1997 will that prevented her from revoking that will after George’s death and thereby preventing Manford from receiving all her mother’s estate. This question depends on whether the creation of a joint will on its own creates such a contractual obligation.

An individual who receives an unrestricted bequest under a will has complete freedom to dispose of the property he or she receives. She can sell the property, mortgage it, or dispose of it by will. Given this, some spouses seek to restrict the ability of the surviving spouse to dispose of property in a will, especially where one or both spouses have children by a previous marriage.

Two methods exist to accomplish such a restriction. First, the spouses may enter into a contract to make a will, one that restricts the right of the surviving spouse to alter an agreed-upon testamentary disposition. A contract to make a will requires the survivor not to change the terms of an already-agreed-upon will, but it does not prevent the survivor from transferring the property during the survivor's lifetime. The survivor could sell the property or encumber the property with debt without breaching the contract, provided the agreed-upon will remains the same. *Kurtz v. Neal* (Franklin Sup. Ct. 2005).

Second, spouses can restrict the rights of the survivor through a joint will or a mutual will that reflects a contractual agreement between them. A joint will is one will, signed by two or more testators, that deals with the distribution of the property of each testator. Mutual wills are separate wills of two or more testators that make "mirror-image" dispositions of each testator's property.

Franklin Probate Code § 2-514 provides in general terms that any contract to make a will or not to revoke a will must be in writing:

A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, may be established only by (i) provisions of a will stating material provisions of the contract, (ii) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract, or (iii) a writing signed by the decedent evidencing the contract.

This statutory provision resolved a long-standing line of cases that dealt with questions about "oral contracts to make a will." As specified in the current statute, there must be some written evidence of the existence and terms of such a contract. This requirement assures that the parties' intentions can be determined and minimizes the risk of future litigation over the contract. Breach of a contract to make a will or not to revoke a will gives rise to two possible remedies: specific performance of the contract or money damages.

Manford claims that the mere fact of drafting a joint will provides written evidence of both the existence and terms of a contract binding both testators to the terms of the joint will. Whatever the merits of this proposition in general, Franklin Probate Code § 2-515 undercuts it: "The execution of a joint will or of mutual wills does not create a presumption of a contract not to revoke the will or wills." The 1997 will executed by Opal and George French is a joint will. The fact of its execution, standing alone, does not create an obligation that Opal may not revoke it and make a new and different will.

In the alternative, Manford claims that the terms of the joint will imply the existence of a

contract not to revoke a will and that the family meeting in 1996 provides “extrinsic evidence proving the terms of the contract.” FRANKLIN PROBATE CODE § 2-514(ii). This argument fails for two reasons. First, the statute requires “an express reference . . . to a contract” in the joint will; no such reference exists. Second, the “family meeting” described in Manford’s affidavit entails little more than a statement by George and Opal that they planned to make a will at some point in the future, *not* that they had executed or intended to execute a contract to do so.

Thus, the 1997 will imposed no contractual obligation on Opal not to execute a new will revoking the 1997 will’s terms. George and Opal could have entered into a contract binding Opal not to do so, but nothing in the record indicates that they did so or that such a contract was reduced to writing.

Affirmed.

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MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

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Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

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