Maryland State Board of Law Examiners

JULY 2019 UNIFORM BAR EXAMINATION (UBE) IN MARYLAND – REPRESENTATIVE GOOD ANSWERS

MPT 1

Representative Good Answer No. 1

MEMORANDUM

This memorandum addresses two key issues: (1) based on contradicting facts, whether or not Wuhan Precision Parts Ltd. ("WPP") will succeed in vacating the default judgment due to improper service under the Federal Rules of Civil Procedure ("FRCP") and the Hague Convention. and (2) if there are any grounds to challenge the attorney's fee ward.

1) It Is Unclear If WPP Will Successfully Vacate the Default Judgment Due To Improper Service Of Process Because The Standards For Vacating For That Purpose Differ And This Case Presents Facts That Favor Both Arguments

It is difficult to gauge whether or not the default judgment entered against WPP in its case versus American Electric Distribution Inc. ("AE") because district courts in Franklin have used different legal standards to review these types of decisions. Based on the present facts, the type of standard that the court decides to use will likely determine the outcome decision.

Applicable Standard: First and foremost, FRCP 4(f)(1) states that an individual in a foreign country may be served "by an internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention." FRCP 4(h)(2) allows for this type of service to apply to foreign corporations as well (such as WPP). For servicing a party in China, the Hague Convention requires that the serving party translate the documents in Mandarin Chinese and deliver the documents to the Chinese Central Authority, which then effectuate the service. (EduQuest Digital Corp. v. Galaxy Productions Inc.).

However, FRCP 4(f) also contains language that this formal process is not required when the person (or corporation) waives formal service. Districts courts in Franklin have shown that one such way that this formal process requirement is formerly waived is by agreeing to an arbitration proceeding within the United States. By agreeing to arbitrate in the United States, while also agreeing to a provision allowing court judgments to be entered, a foreign entity is deemed to have waived formal process outlined in the Hague Convention and could be served in another form.

In determining if formal service via FRCP 4(f) is waived and another form of service is proper, courts in the 15th Circuit have used different standards in measuring fair notice.

In Pennsylvania Coal Co. v. Bulgaria Trading and Transport Co., Ltd., the court stated that when a foreign corporation agrees to participate in arbitration proceedings in the United States, it cannot expect to participate in the arbitration decision and then avoid any consequences stemming from the decision. However, this court also recognized the importance of weighing the expectation of the parties to an arbitration against the right of fair notice. The court states where "parties have consented to arbitration, actual notice of the proceedings can be sufficient as long as it is fair and no injustice results." Those who try serving parties in good faith have a fair shot of prevailing if the notice given is fair.

However, in Eduquest Digital Corp. v. Galaxy Productions Inc., the court stated that the Penn. Coal standard was too loose. The court stated that if the parties to the underlying contract agreed to the provision in the arbitration clause that allowed court judgments to be entered, then the foreign corporation waived formal service of process. The court interpreted this provision to mean that the parties of the contract consented to be served by

actual notice that satisfies the general principles of due process. It is important to note, however, that this case explicitly says that its findings are limited to the specific facts of the case.

Facts Supporting A Decision To Vacate: In the present matter, there are certain facts that seem to indicate that vacating the default judgement due to improper service is the correct decision. First of all, WPP is a foreign corporation, so FRCP 4(f, h) states that it needs to be served in a way that in compliance with the Hague Convention, unless that service is deemed waived. It is possible that the service is deemed waive and if that is the case, it would be beneficial for the sake of WPP if the Penn. Coal standard was used.

The facts indicate that WPP received the summons via email to a company employee, who left the company shortly after. The summons was not translated in Mandarin Chinese and there are no facts that indicate AE even attempted to formally serve process by Hague Convention principles in good faith. WPP had to take an extensive amount of time to translate the summons. Also, since the employee who received the summons left, it is arguable that WPP was really on "actual notice." The summons was also sent by email even though WPP states that most of the communications between the parties was by fax and telephone (although, it is worth mentioning that the arbitration process was communicated via email.)

Also, there is not any evidence that WPP has itself acted in bad faith and attempted to avoid all liability. They have already paid some of the arbitration judgment, despite having cash flow issues. Likewise, the harsher standard imposed by Eduquest is limited to its facts, where the corporation was actually acting in bad faith.

Facts Undermining A Decision To Vacate: The most important fact undermining this decision is WPP agreeing to arbitrate the decision in the United States and also its willingness to have a judgment entered by any court with jurisdiction thereof. WPP also took nearly nine months to respond to the summons, implying that perhaps they ignored the summons. The employee who received it was properly designated by WPP beforehand as well.

Furthermore, while they were in China and the Hague Convention requires a Mandarin Chinese translation, WPP agreed to arbitrate in English, perhaps showing its willingness to and acceptance to receive documents in Chinese.

2) There Are At Least Two Grounds to Challenge The Award Of Additional Attorney Fees

There are two grounds that WPP could use to challenge the additional attorney fees imposed by the court.

Additional Attorney Fees Are A "New Claim For Relief:" Under FRCP 5(a)(2) a new claim requires service that complies with the FRCP and the Hague Convention. Under the Hague Convention, the party raising a new claim must deliver a copy of that claim to the foreign governing authority (Penn. Coal).

The additional amount of attorney fees in the present matter where not mentioned in the complaint or the summons. Because of this, a new claim of relief was issued and that cannot be properly done without formal service of process.

There Is No Reference To A Judicial Remedy Regarding Attorney Fees In the Arbitration Clause: The court in Penn Coal states that courts are careful to defer all substantive decisions to the arbitrators. The court applies fairness principles in trying to ensure that both parties are fully aware of their rights. The court further explains that these fairness principles cannot be used to open up the door to claims, like requests for attorney's fees, that were not previously raised with the arbitrators.

Here, the arbitration clause does to provide for a judicial remedy for attorney fees if the arbitration decision is entered by a court having jurisdiction. Furthermore, there is nothing in the complaint asking for additional attorney fees.

Under these two theories, the award of additional attorney fees may be vacated.

Representative Good Answer No. 2

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

To: Alexandra Carlton From: Examinee Date: July 30, 2019

Re: American Electric v. Wuhan Precision Parts Ltd.

Alexandra,

You wrote me to request that I draft a memorandum concentering options to dispute confirmation of an arbitration award and associated attorney's fees for our client Wuhan Precision Parts Ltd. (WPP). The following memorandum addresses the two questions you requested I answer in your initial email.

MEMORANDUM

Introduction

This memorandum assesses the strengths and weaknesses of WPP's claims against enforcement of the June 14, 2019 Order Entering Default Judgment in the United States District Court for the District of Franklin. Though WPP will likely remain responsible for payment of the original arbitration award, WPP has substantial grounds on which to dispute the default judgment against it. Claims concerning vacating the judgment and challenging attorney's fees are addressed in turn.

1. Will WPP succeed in vacating the default judgment due to improper service under the Federal

Rules of Civil Procedure and the Hague Convention?

WPP seeks to vacate the default judgment due to improper service of process under the Federal Rules of Civil Procedure and the Hague Convention. This claim is a matter of first impression for the Federal District Court for the District of Franklin and the Order Entering Default Judgment has already ruled against WPP. Decisions in the federal courts of Olympia and Columbia provide substantial grounds on which to pursue this claim and WPP's chances of relief will improve substantially if it has the opportunity to present facts which were not in the record during the default judgment proceedings.

An order confirming an arbitration award is not valid if service of process was improper under the Federal Rules of Civil Procedure and the Hague Convention. The Federal Rules of Civil Procedure incorporate the Hague Convention by reference in Rule 4(f)(1): "an individual . . . may be served at a place not within any judicial district of the United States . . . by any internationally agreed means of service that is reasonably calculated to give

notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents." Federal Rules of Civil Procedure Rule 4(f)(1). Though the language is framed permissively, the Supreme Court has admonished "that compliance with the Hague Convention is 'mandatory in all cases to which it applies.'" Pennsylvania Coal Co. v. Bulgaria Trading & Transport Co., Ltd. (D. Olympia 2001) (citing Volkswagonwerk AG v. Schlunk, 486 U.S. 694, 705 (1988). As here, where both the United States and China are signatories to the Hague Convention, service in accordance with the Hague Convention is presumptively mandatory.

However, in two cases with similar procedural dispositions, federal courts in Olympia and Columbia have denied motions to vacate default judgment to confirm arbitration awards even where service of process did not conform with the Hague Convention. As such, WPP will either need to argue that its case is distinguishable from those cases if the Federal District Court for the District of Franklin adopts either approach or offer an alternative under which its motion to vacate the default judgment is likely to be granted.

a) Under the standard in Pennsylvania Coal Co. v. Bulgaria Trading & Transport Co., Ltd., WPP may succeed in its motion to vacate because service of process by AE did not constitute fair notice.

Though the Supreme Court's admonition that application of the Hague Convention is mandatory seems to establish the formal requirements for proper service of process under these circumstances, the court in Penn Coal held that "strict adherence to the Hague Convention is not required" when the serving party complies with the Hague Convention in good faith by delivering the pleadings to the appropriate governmental authorities and when the party to be served has consented to and participated in arbitration "pursuant to an agreement contemplating the award's confirmation in court." Penn Coal. After establishing those preconditions were present in the record before it, the court proceeded to consider whether notice was fair. Id.. In essence, the court adopted the following test:

If the serving party has tried in good faith to comply with the Hague Convention by filing its pleadings with the appropriate government authorities and the party to be served consented to arbitration by an agreement contemplating judicial enforcement of any resulting arbitration award then only actual notice and fairness must be satisfied.

On the facts available, the first two conditions are satisfied. The Order Entering Default Judgment found that AE had filed its pleadings with the appropriate Chinese government authorities and no basis for assuming bad faith on this point exists in the record. Order Entering Default Judgment. WPP does not dispute that it consented to arbitration and that the arbitration agreement contemplated judicial enforcement of an arbitration award.

Under the third factor, WPP did receive actual notice, but the date by which the receipt of notice should be measured is not the same as those offered by the court in the Order Entering Default Judgment. The Order Entering Default Judgment characterized WPP as acting in bad faith. The court noted that WPP refused to appear despite being served by email, which "was used during the arbitration pursuant to the procedural rules governing arbitration." Order Entering Default Judgment. It further noted that the motion for default judgment was served by mail, that the complaint was served in November 2018, that the default motion was served in March 2019, and that at the time of the issuing the Order, eight months had elapsed since the complaint was served and 90 days had elapsed since the default motion was served. Id. The court even cast doubt on whether the failure to serve the default motion in Mandarin Chinese should justify delay because "those pleadings were short and straightforward." Id.

However, if Shao Wen "William" Li's account of events is accurate, WPP is on strong factual footing to contest this characterization. WPP contends that it "did not receive anything from the Chinese government" and that it never received actual notice by email because the email was sent to WPP's Vice President of Manufacturing who quit within one week of receipt of the email and "did not forward the email or notify anyone about it." Letter. Furthermore, though the service of the default motion by mail was sent on March 8, 2019, WPP contends that it did not receive it until April 15, 2019 "because the Wuhan government post office delayed delivery." Id. WPP contends further that by the time it translated the default motion, it had already learned of the default judgment. Id.

Under the standards in Penn Coal, a more complete factual record is likely to tip the balance of these factors in favor of WPP. In Penn Coal, BTT (the party to be served) allowed nine months to elapse between service of process and entry of the judgment. Penn Coal. The court noted that, unlike WPP, BTT raised no issues regarding translation, offered no explanation for failure to respond to email service despite using that form of communication during arbitration, and BTT was served by mail and personally. Id.. In contrast, WPP can dispute that it ever received actual notice by email because of the misconduct and resignation of its VP of Manufacturing and that the time between actual notice by mail was significantly less than 90 days because of delay by the Wuhan government post office.

As such, a court applying the Penn Coal factors is likely to find that WPP received actual notice much later than the court did in the Order Entering Default Judgment and that notice was not fair because events out of WPP's control denied it reasonable notice.

(b) Under the standard in EduQuest Digital Corp. v. Galaxy Productions Inc., WPP is less likely to succeed in vacating the default judgment because it would be deemed to have waived any right to formal service and its post-award conduct will not excuse its failure to appear.

The United States District Court for the District of Columbia in EduQuest simplified the test set out in Penn Coal by holding that agreement to arbitrate constitutes a "'deemed waiver' of formal Hague Convention service in connection with confirmation of an arbitration award." EduQuest Digital Corp. v. Galaxy Productions Inc. (D. Columbia 2005). As such, because WPP entered into such an agreement with AE, a court using the EduQuest standard would ignore WPP's post- award conduct entirely and simply consider whether the notice it received was reasonable and sufficient.

Instead of considering whether the actual notice received by WPP was fair, a court using this standard would likely conclude that AE's efforts were reasonable and sufficient because AE attempted Hague Convention-compliant service in good faith, used an established medium for communication arising from the arbitration proceedings (email), and served the default motion by mail. To avoid applying this standard, WPP should attempt to renew the argument made by Galaxy Productions in EduQuest that such a standard virtually eliminates any protection the Hague Convention would provide to parties to such arbitration agreements.

(c) WPP would succeed under a more formalistic standard requiring that only Hague Convention- compliant service of process can be proper to confer jurisdiction.

Though the courts in Olympia and Columbia adopted looser requirements, the original admonition of the Supreme Court about Hague Convention service of process was airtight. Because this is a matter of first impression, WPP can argue that the United States District Court for the District of Franklin should stick as closely

as possible to the intent of the Supreme Court in adopting that rule and accept no substitute for Hague Convention-compliant service of process. On the facts presented, because the Chinese government never served WPP, it would prevail under such a standard.

2. Are there any grounds to challenge the attorney's fee award?

Though the courts in Penn Coal and EduQuest disagreed on the first question, they both agreed that awarding attorney's fees in cases such as the one between WPP and AE is improper. Rule 5(a)(2) of the Federal Rules of Civil Procedure requires Rule 4-compliant service of process for "a new claim for relief." Federal Rules of Civil Procedure Rule 5(a)(2). In Penn Coal, the court characterized the attorney's fees as a new claim for relief which must be submitted in accordance with the Hague Convention. Penn Coal. Further, the court in Penn Coal required a return to arbitration to obtain any such attorney's fees. The EduQuest court adopted the Penn Coal court's reasoning on this claim in whole.

If the court adopts the standards set forth in those cases, which are a relatively straightforward application of the relevant Federal Rules of Civil Procedure and statutory law governing arbitration, WPP will prevail in challenging the attorney's fee award in the Order Entering Default Judgment. AE did not include the claim until it filed its motion for default judgment and only filed

its pleadings, not the motion, with the Chinese government. Order Entering Default Judgment. As such, WPP can succeed by arguing that the appropriate forum for litigating any such fees is by returning to arbitration and that the award should be vacated because AE did not serve this new claim in accordance with the Hague Convention.

Conclusion

Ultimately, WPP has a range of options on which to seek vacatur of the default judgment entered against it. These alternative bases for relief should provide the court substantial guidance in approaching these issues of first impression. Given WPP's particular aversion to paying the additional $90,000 in attorney's fees, the persuasive legal authority of neighboring federal district courts should provide strong grounds to challenge that award.

Best, Examinee

MPT 2

Representative Good Answer No. 1

To: Dana Carraway

Re: Carl Rucker

In order to achieve Mr. Rucker's stated goals of 1) assuring that Mrs. Rucker may live in the house on Cherry Tree Road for the rest of her life and 2) to assure that his two sons receive the house after she dies, and 3) to minimize the risk of litigation between them, the best course of action is for him to create a life estate in Mrs. Rucker and a remainder in Mr. Rucker's two sons, by deed and during his lifetime. The following are the reasons that support this recommendation. As stated, the client is not interested in creating a Trust.

By creating a life estate in Mrs. Rucker, she will have the absolute and exclusive right to possess and use the property during her lifetime. Walker's Treatise on Life Estates. As a life tenant (LT), Mrs. Rucker (W) will be entitled to possession of the property during her life and her rights will automatically expire upon her death. As the life tenant, she will be responsible for real estate, taxes, insurance, and maintenance costs related to the property. Id. (More on these expenses below) As a life tenant, W may sell or otherwise transfer her interest, however, any transferee from a life tenant can only have the estate for only as long as the LT lives. In other words, her life is the measuring life of the interest. Similarly, if she mortgages her interest, that mortgage will expire upon her death automatically. Id. Therefore, she will not be able to sell the home or otherwise transfer her interest in the home to a third party, e.g., donating to charity, without the interest expiring upon her death.

For Mr. Rucker's sons, Mr. Rucker can create a remainder interest, which can be created in more than one person. As remainder owners, his sons will become the owners of the home immediately upon the death of W. As remainder owners, they will also have no right to use the property or income the property during the W's lifetime. Id. The remainder owner cannot affect the LT's interest in the property while she is alive. Neither of his sons, or their creditors, will be able affect the W's possession as long as she's alive. However, if W neglects or harms the property in some way, the remainder owners can sue the LT for the damage in an action for waste. Therefore, if the W, out of spite, decides to neglect or harm the property later in life, they will have recourse to seek remedy.

Mr. Rucker should create the life estate while he is alive. This can be accomplished by executing a new deed to the life tenant (his wife) and the remainder owners (sons), He should be informed that once a decision is made to transfer a property to a life estate, it is almost always irreversible. Id. Therefore, if he should change his mind for some reason, he cannot reverse this grant without the consent of all the life tenants and remainder owners. In other words, his wife and two sons must all consent should he decide to reverse his decision after a new deed has been executed. In addition, if he decided to sell the house, for example, or sign a mortgage to borrow money against the home for major repairs, etc., the life estate and remainder holders must all agree and sign. This can also severely restrict marketability of the property and make it nearly impossible to borrow money using the home as collateral. Id.

If the life estate and remainder interest is created during Mr. Rucker's life (vs. in a will upon his death), the home will automatically belong to W and then, upon her death, will automatically belong to his sons, with no need for probate of the property, which will avoid any risk of litigation and costs and delays related to probate. Id. The risk of litigation is higher if a life estate is created instead by will. In addition to the time and costs associated with possible litigation, there is a risk that the court may award the monetary value of the life estate to the LT instead of possession of the property (which goes against his goals). Id. Transferring the property by deed minimizes these risks.

There are some issues related to creating a life estate for a spouse:

Elective Share

Franklin law permits a surviving spouse to claim a percentage of the deceased spouse's "augmented estate", which is the deceased spouse's probate estate increased by, among other things, lifetime gifts to the surviving spouse. Recent case law has clarified that the value of such a life estate should be included in calculating the elective share of the surviving spouse. In re

Estate of Lindsay 2008 Franklin is not a community property state and in Franklin a spouse who has sole title to a residence may transfer a life estate to anyone without the other spouse's consent. Walker Treatise.

In addition to the home, client also owns certificates of deposit totaling $200,000, which he plans to bequeath to W upon his death. Otherwise, he has stated that he has no other property, e.g. retirement accounts, as he will be relying on social security. He has also stated that W has no other assets or property and will also be relying on social security. Franklin law states that spouse is entitled to claim an elective share equal to 50% of the "augmented estate" or in alternative

what was bequeathed in a will. Franklin Probate Code 2-202. The value of a life estate should also be included in the augmented estate, in addition to the assets passing by will, when determining the elective share. In re Estate Lindsay. The percentage of the surviving spouse's share depends on the length of time the surviving spouse had been married to decedent. Id.

Since they have been married 18 years already, W will be entitled to 50%. Id.

An augmented estate includes the following: 1) the net assets held in probate estate, 2) assets transferred by decedent to the spouse before death, 3) surviving spouse's own assets and pre- death transfers (Franklin Probate Code). Using these provisions, the calculated value of the augmented estate as of today is $280,000 ($80,000 value of life estate present day + $200,000 in deposits). W will be entitled to 50% of that amount should she opt to take elective share. However, since client plans to bequeath the total $200,000 to W in his will, this is moot.

If the client decides to try and enter into a contract with his wife to achieve his wishes, there are many risks with going this route. They may execute a joint will that leaves W all of his property if she survives him then all of the property including property transferred to surviving spouse from first spouse to transfer to a third party, in this case the client's two sons. However, W will be free to revoke any will after his death. The issue is whether W will have any contractual obligation to H arising from the joint will. An individual who receives an unrestricted bequest under a will has complete freedom to dispose of property she receives. Manford v. French. There are two methods to accomplish a restriction of these rights. Id.

First, spouses may enter into a contract to make a will, one that restricts the right of surviving spouse to alter an agreed upon testamentary disposition. Id. A contract to make a will requires survivor not to change terms of an already agreed upon will, but it does not prevent survivor from transferring the property during her lifetime. Id. In this case, the W could sell or otherwise encumber the property with debt without breaching the contract. Kurtz v. Neal.

Second, souses can restrict the rights of the survivor through a joint will that reflects a contractual obligation between them. Id. A joint will is one will, signed by two or more testators that deal with distribution of the property of each testator. Any contract to make a will or not to revoke a will must be in writing and may be established only by 1) provisions of a will stating material provisions of the contract, 2) an express reference in a will to a contract and extrinsic evidence proving terms of the contract, 3) a writing signed by the decedent evidencing the contract. Id. and Franklin probate code 2-514

There must be some written evidence of the existence and terms of such a contract. This assures that the parties' intentions can be determined and minimizes risks of future litigation. Breach of contract offers two possible remedies: 1) specific performance or money damages. More importantly, "the execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills." Id.

In other words, the fact that such a contract or will is executed does not create an obligation that W may not revoke it and make a new and different will.

Given the risks associated with creating a joint will or mutual will with W, and the inherent risks of litigation that comes with that option, it is recommended that client be advised to create a life estate in W and remainder in his two sons by deed during his lifetime. Then to bequeath the $200,000 to his wife in a validly executed will.

Representative Good Answer No. 2

To:Dana Carraway

From: Examinee Date: July 30, 2019

Re: Carl Rucker property disposition

You have asked me to consider which manner of property disposition is best for Mr. Rucker in his situation. Mr. Rucker is a 67-year-old Franklin resident and lives with his current (and second) wife, Sara, who is 65 years old. Mr. Rucker has two adult sons from his prior, now deceased, wife - Fred, who is 47, and Andy, who is 45. According to Mr. Rucker, Sara and the two sons do not get along well, and their differences appear irreconcilable. (See Rucker interview transcript).

Mr. Rucker has asked us for advice as to the best way to dispose of his residential property located at 1513 Cherry Tree Road in Middleburg, Franklin. Its current value is approximately $250,000. (Appraiser Memo). Mr. Rucker wants to find a way to ensure that his wife lives in the residence if he predeceases her, and then want the property to go to his sons. You have asked me to consider whether it is more preferable for Mr. Rucker to either deed his wife a life estate in the property, or to make a contract with his wife to write wills that leave the house to his sons. Each is considered in turn.

I. What are the benefits and drawbacks should Mr. Rucker grant his wife a life estate in the property, with a remainder to his sons?

Mr. Rucker could execute a deed transferring his fee simple interest to both himself and his wife as life-tenants. As an initial matter, Mr. Rucker's property is unencumbered, and his previous spouse as died; accordingly, under Franklin law, he is entitled to transfer a life estate to anyone. See Walker's Treatise on Life Estates (hereinafter Walker's Treatise).

A life estate creates an absolute right in the life tenant to absolute and exclusive possession of property for the duration of their life. See Walker's Treatise. In addition, the life tenant may rent or lease the property. Id. The life tenant may also sell her interest, but the transferee's interest will last only for the life of the transferor life tenant. Id. While in possession, the life tenant is responsible for all real estate taxes, insurance, and maintenance costs. Id.

The remainder holders are those who take possession of the property immediately following the life tenant's death. The remainder owner does not have the right to use the property, nor do they have the right to a portion of the property's income during the life tenant's possession. Id.

These various rights give rise to both positive and negative implications with regards to Mr. Rucker's situation. I address the negatives first, and then turn to the positive.

A. Negative Aspects of Creating a Life Estate in Mrs. Rucker

First, Mr. Rucker should be aware that under Franklin law, his deed of a life estate to both himself and his wife Sara could not be revoked at any point during his life, unless all parties – including his sons as remaindermen - consent to the revocation. Given that the sons want Mrs. Rucker to have no interest in the property at all, this may prove troublesome and could lead to familial strife and potentially litigation.

Second, and relatedly, while a life tenant can obtain a mortgage against her life estate interest, Mrs. Rucker would not have the unilateral right to sign a mortgage to borrow money secured by the full value of the property. See Walker's Treatise. This could prove problematic for Mrs. Rucker. Mr. Rucker indicated to us that Mrs. Rucker will likely be living off of only her Social Security income, should Mr. Rucker predecease her. (See Rucker Interview). Mr. Rucker fears that Mrs. Rucker will not be able to afford emergency or expensive improvements on her own income and might need to borrow against the house. Id. If this were the case, Mrs. Rucker would be limited in the amount of money she could mortgage. As of now, her life estate would only be about $80,000, which would appear to be the cap on the amount of money she could borrow to pay for repairs. (Appraiser Memo). Were Mrs. Rucker to not be able to afford the payments, then Mr. Rucker's sons might be able to bring an action against her for damages. See Walker's Treatise. This again would create a potential for litigation between Mrs. Rucker and the sons.

Third, such a transfer of a life estate would impact Mrs. Rucker's elected share, should she decide to take that as opposed to what Mr. Rucker devises to her. Franklin law permits a spouse to take a forced, elective share of 50% of their deceased spouse's augmented estate in lieu of what the surviving spouse is devised. Fr. Probate Code § 2-202. However, when a surviving spouse receives a life estate from the decedent spouse inter vivos, the value of the life estate is added to the decedent spouse's augmented estate. In re Estate of Lindsey (Fr. Ct. App. 2008). Then, after this, the 50% cut is taken, and then the value of the life estate already received is deducted from that cut. Id. Here, Mrs. Rucker appears to be set to inherit Mr. Rucker's only assets, $200,000 in certificates of deposit. See Fr. Probate Code § 2-204. Were she to take an elective share, her life estate ($80,000), would be added to this augmented estate, and then the 50% cut would be taken out, making the estate worth $280,000. See Lindsey. From her 50% cut ($140,000), the value of the life estate would be added, leaving her with only $60,000 in assets inherited. See id. She should be advised under this option to not take a forced share.

Finally, were Mr. Rucker to give Mrs. Rucker a life estate via will as opposed to deed, he should be aware that his sons could petition a court to award Mrs. Rucker the monetary value of the life estate in probate proceedings as opposed to possession under the terms of the will. See Walker's Treatise. This concern is avoided, however, if he creates the life estate by deed. Id.

B. Positive Implications

The first positive aspect of creating a life estate by deed is that Mr. Rucker's property will automatically pass to his sons once Mrs. Rucker passes away. See Walker's Treatise. There will be no need for litigation, and no need to even probate the property. Id. This will significantly reduce the need to incur costs in disposing of the property once Mr. and Mrs. Rucker are deceased.

The second positive aspect is that even if Mrs. Rucker decides to transfer the home, then the transferee's possessory interest will only last as long as Mrs. Rucker is alive. See Walker's Treatise. Mr. Rucker is concerned that, given the chance, Mrs. Rucker will transfer the property to charity, both because of her distaste for the sons and because of her active participation in charity. (Rucker Interview). However, even if Mrs. Rucker does

so, as indicated, the charity would only have a possessory interest as long as she is alive. See Walker's Treatise. There would be little litigation concerns, as long as the transferee kept the property in reasonable condition for the sons to inherit, and the sons would still obtain possession rights immediately upon Mrs. Rucker's death.

Finally, under this approach, Mrs. Rucker's possession of the home would be undisturbed, as long as she maintained the property in reasonable condition. See Walker's Treatise. The sons could only come after her in litigation if there was some waste. Id. Given that Mrs. Rucker can mortgage her life estate interest during her lifetime, it seems that she would have the funds to make such emergency repairs, despite Mr. Rucker's concerns about her finances. See Walker's Treatise; Rucker Interview. More importantly, if this mortgage is created, then it will die with Mrs. Rucker, as a life tenant's mortgage of her life estate does not pass to the remaindermen.

II. What are the benefits and drawbacks should Mr. Rucker contract with his wife to write wills devising the property to his sons?

A. How is the contract created?

Mr. Rucker could also contract with Mrs. Rucker to create a testamentary disposition of the property in two ways. First, Mr. and Mrs. Rucker could contract to make a joint will that restrict the right of the surviving spouse to alter the agreed-upon testamentary dispositions. Manford v. French (Fr. Ct. App. 2011). Second, Mr. and Mrs. Rucker could enact mutual wills that make "mirror-image" dispositions of each testator's property. Id. In either scenario, for the contract to be valid, there must be either some express provision in the will, or a separate writing, indicating the spouses' intent to create such a contract. Fr. Probate Code § 2-514. Just because an implied will is executed does not give rise to a presumption that a contract to make wills, or a contract not to revoke wills, has been created. Manford v. French. Mr. Rucker should be advised of the strict requirements to create this; the court will not accept extrinsic evidence alone in finding the contract to make a will. See id.

B. What are the negative implications of this approach?

First, and most significantly, Mr. Rucker should be aware that just because a joint will, or a contract to make/not revoke wills, has been executed does not mean that the surviving spouse cannot sell property devised in the will. See Kurtz v. Neal (Fr. Sup. Ct. 2005). Thus, even if the contract was validly executed and both Mr. and Mrs. Rucker devised the home to the sons, Mrs. Rucker could still sell the house to a charity and deprive the sons of future ownership. See Kurtz. In this situation, there would be nothing for the sons to do; the gift would merely be addeemed, and they would take nothing.

Second, as implicated in the discussion above, in order for a contract to make a joint will (or a contract to not revoke a will) to be valid, both spouses must execute a separate agreement indicating their intent for there to be a joint will or a contract to not revoke a will. See Lindsey; Fr. Probate Code § 2-514. Given that Mrs. Rucker seems to harbor ill feelings towards Mr. Rucker's sons at this point (see Rucker Interview), it is not at all clear that Mrs. Rucker would agree to such an arrangement.

C. What are the positive implications of this approach?

The main positive aspect to this approach is that Mrs. Rucker, as the presumed fee simple owner of the home, could freely mortgage the property without needing the sons' consent. Compare with Walker's Treatise. This approach would also ensure that Mrs. Rucker has free, uninterrupted possession of the home, without fear that the sons will try to remove her from the property.

III. Recommendation

Based on the foregoing considerations, I would recommend to Mr. Rucker that he create a lifetime deed that grants both Mrs. Rucker and himself a life estate in the property. First, like a contract to make wills, this will ensure that Mrs. Rucker can live in the home for her lifetime. Second, and more importantly, it does a much better job of ensuring that his sons will have the right to possess and own the home after she dies. Finally, this approach has the least amount of litigation potential. Though there is certainly a chance that the sons will litigate over waste issues, those issues will likely not arise, because Mrs. Rucker and still mortgage her life estate interest (valued at $80,000) and use those funds to pay off the mortgage. Importantly, that mortgage will die once she does, too. There is, however, a significant risk of litigation under the contracts approach, because Mrs. Rucker could freely sell the property during her lifetime, and there's nothing the sons could do about it. Thus, I believe that the life estate approach is best.