MPT 1 – SAMPLE ANSWER 1

To: Alexandra Carlton

FROM: Examinee

DATE: July 30, 2019

RE: American Electric v. Wuham Precision Parts Ltd.

MEMORANDUM

It is unlikely that the Court will vacate the default judgment due to improper service, but the court is likely to vacate the award of attorney's fees. Under Federal Rule of Civil Procedure 4(f)(1), service on an international party must occur in compliance with the terms of the Hague Convention. “The Hague Convention requires service upon a governmental authority, which in turn will effectuate service upon its own citizens and entities.” *Pennsylvania Coal*. More specifically, the Hague Convention as it applies to Chinese companies, like Wuham Precision Parts (WPP), 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." *Edu Quest*. It is likely, however, that the Court will relax this requirement and only require American Electric (AE) to have given WPP actual notice of the service, or it will likely find that WPP waived the Hague Convention service requirements when WPP agreed to arbitrate the claims in Franklin Court. However, the award for Attorney's Fees will likely be vacated for two reasons. First, this is a new claim that requires service in compliance with the Hague Convention and the Courts award went too far when it made a substantive ruling.

I. Vacating the Default Judgment Due to Improper Service

It is likely that the Court will affirm the default judgment, even though AE did not serve WPP in compliance with the terms of the Hague Convention. Under the Hague Convention, a party is required to serve its Pleading on a governmental authority, and in China specifically, the document must be in Mandarin Chinese and delivery must be made on the Chinese Central Authority, See *Pennsylvania Coal* and *Edu Quest*. This is an issue of first impression for this court, meaning that this Court has never decided whether parties to an arbitration agreement must effectuate service in accordance with the Hague Convention to enforce an arbitration award. Two Courts in the Fifteenth Circuit have tackled this issue and both courts found that strict compliance with the Hague Convention is not necessary. Therefore, it is likely that the U.S. District Court for Franklin will likely find the same. If the Court follows the Columbia approach, it is likely that WPP waived the formal service requirements; however, if the Court follows the Olympia approach, the court will look at factors concerning fairness to determine if WPP was properly served. Under both approaches, it is likely that the service was sufficient and the confirmation of the arbitration agreement will stand.

A. Waiver of Service

Under the Columbia approach, it is likely that WPP waived service. The United States District Court of Columbia held that "by agreeing to arbitrate, [a party] is deemed to have waived the right it possesses to formal service." Under this approach, the arbitration agreement alone serves as evidence that the parties did not have to follow the Hague Convention in order to serve WPP. That court found that there is "deemed waiver" when a party "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." Here, WPP entered into a supplier agreement with AE on September 21, 2014, this agreement allowed for arbitration of claims in Franklin City, Franklin, US. WPP

participated in the arbitration proceedings and on December 15, 2017, the arbitrator issued an award in favor of AE. Under the analysis provided by the U.S. District Court of Columbia, there is deemed waiver over the proceedings in the U.S. District Court of Franklin. The Columbia court held that it is unnecessary to look into the behavior or actions of the parties after the arbitration agreement when determining when non-conforming notice was proper.

It is likely that AE's notice was sufficient to enforce the default judgment. In Edu Quest, that court found that the prevailing party's service was proper. The prevailing party served the Chinese Government, in accordance with the Hague Convention, and subsequently effectuated personal delivery through international mail, return receipt requested, and service on the defaulting party's registered agent. These methods of service were sufficient to find that the defaulting party received notice; thus, that court confirmed the award. Here, AE served the Chinese government and sent the Complaint to WPP's VP on November 2, 2018. On March 8, 2019, AE mailed a Default Motion to WPP, return receipt required. On April 15, 2019, WP received the default motion. Finally, on June 14, 2019, the Court entered the Default Judgment. AE attempted to give notice of the Complaint as well as its motion for default through various means. These means were calculated to reach WPP and give WPP notice of the pending proceedings. These are similar to the means that were employed by the prevailing party in *Edu Quest*, because there was actual service of both the Complaint and the motion for default judgment on WPP, it is likely that the default judgment will be affirmed.

B. Fairness

If the Court applies the fairness standard it is likely that the default judgment will be affirmed. Under the fairness standard the U.S. District Court for Olympia held that "[w]hen parties have consent to arbitration, actual notice of the proceedings can be sufficient as long as it is fair and no injustice results." *Pennsylvania Coal*. The Court when determining

if fairness was met looked at the means in which the plaintiff attempted to serve the defaulting party, the defaulting party's actions with respect to honoring the arbitration award, and if the defaulting party actually received notice.

First, AE made numerous attempts to serve WPP. First, AE effectuated service in the means required by the Hague Convention. On or about November 2, 2018, AE attempted to effectuate service on the Chinese Government. Although, WPP never received this communication from the Chinese Government, AE followed the protocol outlined by the Hague Convention. Further, AE on November 2, 2018 sent WPP's VP a copy of the Complaint via email. Therefore, AE attempted to personally serve WPP. The Court will likely find that this method of attempting service is likely sufficient. However, WPP has an argument that this type of service was not reasonably calculated to give WPP notice. AE sent the email to WPP's VP. One week after the email was sent, WPP's VP quit and did not forward the email to anyone else at WPP. Further, under the course of AE's dealings with WPP, they did not correspond through email to WPP's VP. Rather, the two parties communicated through fax and telephone conversation. In *Pennsylvania Coal*, that court held that service through email, the same mode of communication used during the arbitration proceedings was proper. There, the court emphasized that the email correspondence was the regular means for communication between the parties and it was a means that was reasonably calculated to give the defendant notice of the pending action. Here, communication in a means that was not used prior to service of the complaint, may go to show that the complaint was not reasonably likely to put WPP on notice. However, WPP's former VP is presumably a competent individual and the service was sufficient to give WPP notice of the pending action.

Second, the actions of WPP go against the notion that this type of service was fair. When the arbitration award was granted, WPP immediately paid the $500,000 to AE. WPP has failed to deliver the royalty payments or the attorney's fee award because there was an

economic downturn and they ran into cashflow issues. Unlike the defendants in both *Pennsylvania Coal* and *Edu Quest*, WPP was not attempting to avoid paying the award. WPP was not moving assets in a way that would limit its ability to pay its obligation to AE, like the defendant in *Pennsylvania Coal*. WPP was not deliberately fail to comply with the terms of the arbitration award, like the defendant in *Edu Quest*. Rather, WPP paid the initial sum of money and is planning on paying the rest of the award when they are more financially stable. Therefore, WPP's actions after the arbitration agreement do not weigh in favor of affirming the default award.

Finally, WPP was given actual notice of both the Complaint and the Motion for Default Judgment. The Complaint was sent to WPP's VP via email, an email that the VP received. The notice of the motion for default judgment was sent via mail and reached WPP on April 15, 2019. Although, the means in which the documents were submitted to WPP were not ideal and the remaining WPP were not aware of the service, an agent on behalf of WPP, the former VP, received actual notice of the proceedings. Therefore, this factor weighs in favor of affirming the default award.

Given that WPP arbitrated the matter in Franklin and AE made reasonable efforts to place WPP on notice of the Complaint and the default judgment, it is likely that service was sufficient and the default judgment confirming the arbitration award will be affirmed.

II. Attorney's Fees

It is unlikely that the award of attorney's fees will remain in effect. The two other District Courts in the Fifteenth Circuit refused to honor the attorney fees awards imposed by the District Court. Both Courts found that the fee request constituted "new relief" and required formal government service under the Hague Convention. Further, the Olympia Court noted that the attorney's fee award is a substantive change and goes against the role of the arbitrator and the court. First, this attorney's fee award is a "new claim" and requires

service in compliance with the Hague Convention. *See Pennsylvania Coal, Edu Quest*, and Fed. R. Civ. P. 5(a)(2). The Court in *Edu Quest*, which found that the plaintiff attempted to follow the Hague Convention for its original service of process, could not receive additional award of attorney's fees. In that case, like in the case at bar, the defendant never actually received service from their government. Therefore, the Hague Convention service was defective. Second, an award of this kind goes against the role of the court in these cases. The Olympia court noted "[w]hile 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." Pennsylvania Coal. The parties agreed to an arbitration, the prevailing party cannot then get an additional award from the courts that was not affirmed by the arbitral body. Therefore, the subsequent attorney's fees award was improper. Even though the arbitration award states that the ruling did not deny or limit AE's right to recover attorney's fees, if any, that might be incurred in enforcing its rights", the amount of the award is a substantive decision that must be decided through arbitration. Therefore, the award of attorney's fees should be vacated.

It is likely that the award of attorney's fees will be vacated, however, the award confirming the arbitration agreement will likely be affirmed.

MPT 1 – SAMPLE ANSWER 2

To: Alexandra Carlton

FROM: Examinee

DATE: July 30, 2019

RE: American Electric v. Wuham Precision Parts Ltd.

In this memo I will address whether our client, Wuhan Precision Parts Ltd. (WPP) (1) will succeed in vacating default judgment due to improper service under the Federal Rules of Civil Procedure and the Hague Convention and (2) has any grounds to challenge the attorney's fee award against it. Because this is an issue of first impression in the federal district court of Franklin, persuasive authority from our neighboring districts of Olympia and Columbia addresses both issues. Based on this persuasive authority, it is unlikely that WPP will succeed in vacating the judgment, though some arguments can be made that it should be dismissed for improper service of process, but WPP has two grounds for challenging the attorney's fees award that will likely be successful.

I. Improper Service

a. Federal Rules of Civil Procedure and Hague Convention

When a court confirms an arbitration award, requiring the plaintiff to file a complaint and service on the defendant of the summons and complaint, it become a court judgment. Pennsylvania v. BTT. This results in the plaintiff benefitting from all the collection tools flowing from a court judgment. Id. Thus, the defendant is entitled to proper service of process in order

to put him or her on notice of the charges against him or her.

The Federal Rules of Civil Procedure state that service on international parties must occur in by means of service reasonably calculated to give notice, such as those authorized by the Hague Convention. See Fed R. Civ P. 4. As a Chinese corporation. WPP is subject to the Hague Convention, which is between the U.S. and China. Under the Hague Convention, when Chinese entities are involved in litigation, the serving party must translate the documents into Mandarin Chinese and deliver the documents to the Chinese Central authority, which will effectuate service through its provincial courts. Hague Convention. The Supreme Court has held that compliance with the Hague Convention is mandatory in "all cases to which it applies." Pennsylvania Coal v. BTT citing Volkswagon v. Schlunk. Parties in other jurisdictions have attempted to set aside judgments founded on improper service of process under the Hague Convention. See In re Int'l Media Services.

b. Fairness

Despite the rules of the Hague Convention, persuasive authority indicates that courts will look not just to strict compliance with the Hague Convention, but to the balancing of the expectation of the parties to an arbitration against the right of fair notice when considering entry of default judgment from an arbitration award. Pennsylvania Coal v. BTT. the Federal Arbitration Act (FAA does not resolve the issue, and thus courts have the authority to excuse defects in service of process where considerations of fairness so require. Pennsylvania v. BTT. The reasoning behind this is that a party should not be able to seek refuge in the protections of the Hague Convention after consenting to, participating in, and then losing arbitration in an American jurisdiction. Id. At the same time, judicial proceedings are fundamentally different from arbitration proceedings, and expectations need to be balanced with fair notice as well as examining the good faith of the underlying business transaction.

i. Notice

In Pennsylvania Coal Co. v. BTT, persuasive authority in a neighboring state, the court examined a confirmed arbitration award resulting from default judgment where the parties were an American corporation and a Bulgarian company subject to the Hague Convention. Here, there was a good faith attempt on the part of the American corporation to comply with the Hague Convention. Moreover, BTT clearly received notice. Under the Federal Rules of Civl Procedure, service through personal service and U.S. Mail are recognized and were done here. Moreover, even though email is not typically authorized, BTT was served via email here and that was a reliable means of delivering the complaint to BTT and reasonably calculated to give notice. BTT officials had no difficulty understanding English and were thus not unable to understand the service of process.

Given the fact that it was abundantly clear that BTT received fair notice but was apparently acting in bad faith to avoid the court's reach, the court reasoned that strict adherence not required, actual notice and fairness are standards. Ultimately, Hague Convention shouldn't roadblock those in good faith.

The facts here indicate that a court would likely find that WPP had fair notice. Similar to in Pennsylvania, the plaintiff did attempt to comply with the Hague Convention, according to the Order Entering Default Judgment. It is not the fault of the plaintiff nor contemplated by the Hague Convention that the fault of the foreign official who received the proper filing under the Hague Convention should fall on the plaintiff who, in good faith, complied with the treaty. Moreover, email was used with the summons and complaint and sent to a vice president. Similar to in Pennsylvania, this is a reliable means of communication, previously used by the parties. It is not the fault of the plaintiff that the person who receive the email did not forward it. The papers were in English, and had to be sent to translation, but similar to in Pennsylvania, the parties clearly understood English - they arbitrated the dispute in English, clearly indicating their understanding of it. AE even mailed the motion to WPP; the fact that its

delivery was delayed over six months is again not the fault of AE and should not be held against it.

There is potential for a court to find otherwise, however. The parties here did mainly use fax and telephone, not email, and it is unclear whether emailing just the VP of Manufacturing would be sufficient to be "reasonably calculated" to notify the party of the charge against the company as a whole.

ii. Good Faith

What distinguishes these, however, is the fact that WPP does not appear to be acting in bad faith, unlike BTT, who was clearly trying to escape jurisdiction of the court. Thus, a court in our jurisdiction may not find this case sufficiently related to the facts in order to apply it here as persuasive authority. In Pennsylvania, the court focused extensively on the underlying business conduct that was not in good faith. Based on our information, it seems that WPP did act in good faith, just a series of unfortunate events (the VP retiring, the Chinese government not sending the information on to them, etc.) created roadblocks to getting the information. Moreover, their inability to fully pay the award was due to economic downturn, not a bad faith attempt at avoiding the sum due. Thus, it is possible they can argue that under the fairness doctrine they are entitled to relief because it is fundamentally unfair that they did not receive actual notice due to no fault of their own, unlike BTT who clearly was trying to avoid jurisdiction. However, because the court here focused more on the attempts at service rather than the conduct of the defendant, I still think it is likely that the fairness test will be met.

c. Agreement to Arbitrate Waives Formal Hague Convention Service

Even if applying a different test from a neighboring jurisdiction, the court would still likely find that by subjecting themselves to arbitration in the jurisdiction, WPP waived formal service and thus cannot set aside the default judgment. In Eduquest v. Galaxy, a persuasive case from a neighboring jurisdiction, the court examined a similar situation where a foreign company was

in default judgment over an arbitration award entered in the District of Columbia. Because the FAA does not provide methods of service for foreign parties who are not residents of the US, the court here held that the parties' consent to arbitration in the jurisdiction agree to provisions allowing court judgments to be made. In a stricter test than the fairness standard, consent to arbitrate in a U.S. jurisdiction deemed a waiver of formal service in connection with a confirmation of an arbitration award, consenting to service by actual notice that satisfies general principles of due process and the Federal Rules of Civil Procedure rather than strict Hague Convention formalities. Eduquest v. Galaxy.

Though a Franklin court may find that this approach eviscerates Hague Convention protections, as the court in Eduquest pointed out, however, as the court noted, the plaintiff did try to comply in good faith with the requirements of the Hague Convention.

On our facts, as previously noted, the plaintiff did attempt to comply with the requirements, according to the motion entering default judgment. So long as the court finds this a good faith attempt to comply, it seems even under the Eduquest standard that the default judgment here will not be set aside. WPP agreed to arbitrate in Franklin, which under this test would waive the right it possesses to formal service under the treaty.

Under this test, the defendant's post-award conduct is irrelevant, so WPP cannot make the good faith argument they can make under the fairness test. WPP still has an argument under this test however, which is that proper service of process was still not made because they were only served via email, which is not allowed under the Federal Rules of Civil Procedure. A court will still likely find this acceptable. WPP has no offices, registered agents, or employees in the United States; it would be very hard for AE to find a way to serve WPP properly under the Federal Rules of Civil Procedure short of flying to China and personally serving an agent there, which could be unreasonable. In Eduquest, The court finds "actual notice Galaxy received was reasonable and sufficient." Since WPP regularly communicated in English and via email, this test is likely met.

II. Attorney's Fees

WPP will likely succeed in getting the $90,000 attorney's fees dismissed.

In Eduquest, the request for attorneys fees was deemed a "new claim for relief" separate and apart from the underlying arbitration award that required formal government service under the Hague Convention. Eduquest v. Galaxy, Penn v. BTT. The courts here found that a new claim must deliver on foreign authority. Moreover, in Pennsylvania v. BTT, the court focused on the differences between the arbitration panel and the court as contemplated by the contract. Where a contract allows for prevailing party to obtain attorneys fees but no judicial remedies in that regard, the party must pursue it via arbitration. Pennsylvania v. BTT. Here, on our facts, it does not appear that the plaintiff made any attempt to comply with the Hague Convention over these fees, and thus under both jurisdictions' tests, WPP should argue that this is a new claim that must be properly served in accordance with the Hague Convention. Though the supplier agreement between the AE and WPP expressly stated that the prevailing party shall recover reasonable attorney's fees incurred to enforce the terms of the agreement, it also states that any controversy or claim arising out of the agreement shall be settled by arbitration. Order Entering Default Judgment.

Moreover, Under the Federal Rules of Civil Procedure, 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 under Rule 4. Fed. R. Civ Pro. 5. Thus, WPP must argue this is a new claim for relief and that proper service of process is required.

III. Conclusion

Ultimately it is unclear which test Franklin will adopt, as all authority discussed above is persuasive, coming from our circuit but within other district courts. However, under either the fairness or waiver tests, it is unlikely that WPP will have the judgment set aside. Under either approach however, it is likely that the additional attorney's fees award will be dismissed.

MPT 2 – SAMPLE ANSWER 1

To: Dana Carraway

FROM: Examinee

DATE: July 30, 2019

RE: Carl Rucker

MEMORANDUM

You have asked me to discuss the advantages and disadvantages of both 1) creating a life estate for Mrs. Rucker, with remainder to Mr. Rucker's sons, and 2) contracting with Mrs. Rucker to write wills that will ensure Mr. Rucker's sons receive the house after both spouses die. Additionally, you have asked me to provide a recommendation as to which approach will better accomplish Mr. Rucker's goals of 1) ensuring Mrs. Rucker can stay in the house for the rest of her life, 2) ensuring that his sons receive the house upon Mrs. Rucker's death, and 3) minimizing the risk of litigation between the two interests.

1. Creating a Life Estate, Remainder to Sons

A life estate would accomplish Mr. Rucker's goal of ensuring that Mrs. Rucker (Sara) has the opportunity to live in the house for the rest of her life while, upon her death, his sons will receive title to the house.

Advantages

The advantages to a life state are fairly simple: Sara will be able to live in the home for as long as she lives and, upon her death, the interest of the property (the remainder) will pass

to whomever owns the remainder interest in the life estate, here, that would be the sons. The treatise on Life Estates, *Walker's Treatise on Life States*, states that "Any transferee from a life tenant can have an estate only for so long as the life tenant lives." *Walker's Treatise on Life Estates*. Additionally, "remainders may also be created in one or more persons" Walker's. Finally, "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 the property, avoiding the costs and delays of probate."

Here, the advantages are apparent: Sara can live on the property and enjoy the property for the entirety of her life and then, upon her death, Mr. Rucker's sons will immediately receive title to the property without any probate involved. This prevents costly litigation and is rather simple to accomplish. Creating a life estate would be best served by Mr. Rucker simply executing a new deed, granting the life estate to Sara and the remainder to his sons, and then transferring the deed to the appropriate parties for recordation.

Disadvantages

There are some disadvantages to life estates, however, including that: "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." *Walker's*. However, barring the deed allowing such ability, all parties, life tenants and remainder owners, have to mutually consent to sell the property or secure a mortgage with the property; this "severely restricts the marketability of the property." *Walker's*. Next, the Life Tenant would also be legally responsible for real estate taxes, insurance, and maintenance costs related to the property. Finally, transferring a life estate while still alive is possible by executing a new deed to the new life tenant and remainder owners; however, doing so negates the previous owner's interest and is "almost always irreversible;" once the life estate has been created, "a change cannot occur without the consent of all life tenants and remainder owners." *Walker's*. In

terms of risk of litigation, there is still a high risk of litigation if the life estate is created by a Will rather than an inter vivos transaction; "transferring property by deed, as opposed to by will, minimizes the risk." *Walker's*.

Here, while Sara merely has a life estate, she will still be able to sell or mortgage the property if she wishes unless the deed or will conveying the interest in the property states otherwise; given that Mr. Rucker has an express interest in ensuring that his sons receive the property upon Sara's death, it would be highly advisable to include such restrictive language in the instrument used to convey the life estate. Next, while the restriction requiring all interested parties mutually agree to sell or borrow against the property creates a hindrance on marketability, this will likely not cause a concern for the Rucker's, given all involved parties appear to want to keep the house. Mr. Rucker did express concern about whether or not Sara could properly maintain the house without borrowing against the property, an act that would need to be approved by both of Mr. Rucker's sons. Finally, while it appears that the best way to create this life estate is by conveying a deed for the property, doing so will result in an almost irreversible course of events: changing the estate back to a fee simple would require the consent of all interested parties.

Additionally, in consideration of the surviving spouse's elective share," the Franklin Court of Appeal has held that "the value of the life estate should be included" in determining the value of the elective share. In re Estate of Lindsay (Fr. Ct. App. 2008). In Lindsay, the Appeals court determined that a surviving spouse, when married for 15 years or more, is entitled to a 50% elective share of the "augmented estate." Lindsay. The question was then whether or not the life estate should be included when determining the value of the "augmented estate." The court held that the "life estate should be included in the calculation of the augmented estate for determination of [surviving spouse's] elective share." In re Estate of Lindsay (Fr. Ct. App. 2008). As a result, a surviving spouse who receives a life estate, even while the decedent spouse is still living, must include the value of the life estate

in the total value of the augmented estate.

Here, because the value of the life estate is found to be $80,000, this would mean that, if Sara chooses to utilize an elective share, she will be entitled to 50% of Mr. Rucker's estate or, $140,000. $140,000 is 50% of Mr. Rucker's estate, the certificate of deposits valued at $200,000, and the life estate, which is valued at $80,000.

2. Contracted Wills with Mrs. Rucker

Mr. Rucker can also seek to create contracted wills with Mrs. Rucker to ensure that, upon his death, his interests will be carried out. Spouses may enter into "joint wills" and then seek to restrict the surviving spouse from ignoring the provisions of the joint will. There are two ways to prevent such conduct from happening and to create 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." Manford v. French (Fr. Ct. App. 2011). This method still allows a surviving spouse to sell or encumber the property without breaching the contract." Manford, see also Kurtz v. Neal (Franklin Sup. Ct. 2005). Second, Spouses can enter into either joint wills or mutual wills that "reflects a contractual agreement between them." Manford. A joint will is a single will signed by two or more testators which deals with the distribution of property of each testator; mutual wills are separate wills of two or more testators which create "mirror-image" dispositions of their property. *Manford.*

Advantages

If Mr. Rucker chooses to enter into a scenario where both him and Sara contract to make either a joint will or mutual wills, Mr. Rucker will need to ensure that the contract is in writing, as required by Franklin law. Franklin law states that a contract to make a will, or not to revoke a will, must be in writing and "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." *Manford (quoting* Franklin Probate Code Sec. 2-514). Therefore, with either a joint of mutual will, the parties can expressly contract to determine how to distribute property while also binding the surviving spouse to the surviving spouse's will to distribute their property.

Here, Mr. Rucker would appreciate that the law requires contracted wills to be in writing; this requirement not only prevents oral evidence or other testimony from altering his intent, but also ensures that, because such requirements are enumerated by statute, the risk of litigation will likely be minimized. This option still allows Mr. Rucker to contract with Sara to ensure that, upon her receipt of the life estate as bequeathed Mr. Rucker's will, Sara's will does not allow her to dispose of the property in any way or to back out of the previous agreement.

Disadvantages

The disadvantages to contracted wills can be found in the first method to restrict surviving spouses from ignoring the provisions of the will of the decedent spouse: the spouses can enter into an agreement that restricts the right of the surviving spouse from altering the "agreed-upon testamentary disposition" while also still allowing the surviving spouse to "sell or encumber the property without breaching the contract." Such conduct would severely inhibit Mr. Rucker's sons' interest in the property and surely go against Mr. Rucker's intent to ensure that his sons receive the property upon the death of Sara.

Recommendation

After reviewing the case law and the facts, I believe that the best way for Mr. Rucker to effectuate his interests would be to create a life estate in both his and Sara's names with the remainder in both of his sons' names. As we saw in Lindsay, it is possible for one to create a life estate in their own and their spouses names and then leave the remainder for their children. As stated above, the best way to create the life estate is by deed and, while

conveying the life estate by deed is essentially irreversible, leaving Mr. Rucker's name on the life estate will ensure that he still retains an interest in the property as a life tenant. Next, when Mr. Rucker dies, the estate will still remain a life estate and Sara will still be able to live on the property with the remainder staying with Mr. Rucker's sons. This meets the first two of Mr. Rucker's goals: ensuring Sara has a place to live until she dies and ensuring his sons receive the house after Sara's death.

As for the third goal, minimizing the risk of litigation, this strategy ensures that the property will not need to go through probate. Upon Mr. Rucker's death, Sara retains her life estate interest in the property and later, upon her death, his sons will automatically receive the interest in the property. Additionally, by creating the life estate whilst he is still living, Mr. Rucker will be able to create a strong presumption that he intended for the property to remain a life estate for Sara even after his death; this will remove most potential causes of action.

Finally, Mr. Rucker is concerned about Sara's being able to maintain the house. Using the elective share analysis found in Lindsay and discussed above, Mr. Rucker's "augmented estate" will total to $280,000; the sum of Mr. Rucker's certificates of deposit ($200,000) and Sara's life estate ($80,000). Therefore, the creation of the life estate will result in Sara's elective share being $140,000, not the $200,000 plus Mr. Rucker intended. Sara of course will be able to avoid the elective share and simply receive what was bequeathed in the will: the certificates of deposit. This will result in Sara receiving the life estate and the $200,000 certificates of deposit.

In conclusion, this discussion details both the advantages and disadvantages of the two options with a view of achieving Mr. Rucker's goals to 1) assure that his wife can live in the house for the rest of her life, 2) assure that his sons receive the house after his wife dies, and 3) to minimize the risk of litigation. Creating a life estate for both himself and Sara, with remainder to his sons, will best achieve those goals.

MPT 2 – SAMPLE ANSWER 2

MEMORANDUM

To: Dana Carraway

From: Examinee

Date: 7/30/19

RE: Carl Rucker Estate

Introduction

This memorandum discusses the potential disposition of the property of Carl Rucker ("Carl") at his death. In particular, it considers possible methods to dispose of his house at 1513 Cherry Tree Road (the "House"). Carl plans to bequeath his other assets (CDs, totaling $200,000) to Sara. The house is worth approximately $250,000.

With regard to the House, Carl has 3 goals: 1) to assure that his wife Sara Rucker ("Sara") can live in the House for the rest of her life; 2) to assure that his sons Fred and Andrew Rucker (together, "sons") receive the House after Sara dies; and 3) to minimize the risk of litigation between them. Carl does not want to use a trust.

Discussion

A disposition that accomplishes Carl's goals can be attained either by creating a life estate in Sara, with a remainder in his sons, or by transferring the property to Sara in fee simple but contracting with her to make a transfer by will to his sons. Under each of these methods, the property transfer could occur during Carl's life (by deed) or after his death (by will).

Section A discusses this threshold determination. Section B then discusses creating a life estate for Sara with a remainder in the Sons. Section C addresses contracting with Sara to write wills that leave the house to the sons.

Based on the discussion below, I recommend that Carl transfer the house in a life estate by deed to himself and Sara jointly, with a remainder in his sons.

A. Transfer by Deed vs. by Will

i. Transfer by Deed

Whether the interest is in fee simple or a life estate, the initial transfer can be accomplished during Carl's life or at his death. A life time transfer of the real estate can be accomplished by Carl transferring the property to himself and Sara jointly. See Lindsay at 9 (discussing transfer of life estate of one spouse to both spouses). The primary advantage of a transfer by deed is that it ensures that property itself is in fact transferred. Walker's at 8. While still living, Carl could guarantee that Sara would have her interest in the property, and it her right to possess it would not be subject to probate or to a potential disposition.

Furthermore, the main potential disadvantage of a deed transfer--the potential for litigation over the estate's value--doesn't really apply in this case, for two reasons.

First, the amount of the estate is clear. Under Franklin's Probate Code, a spouse has the opportunity to take an elective share instead of the amount created by will. § 2202. Historically, lifetime gifts that created a life estate led to ambiguity about how to determine the amount of an augmented estate. But recent cases have clarified that a life estate gift to a spouse counts as part of the "augmented estate." See *In re Estate of Lindsay* (2008) (citing FPC § 2206). Thus, here, even if given during his lifetime, the amount of the life estate would be included in the augmented estate.

Second, Sara's share from the will would be greater than her elective share. Under the

accounting discussed above, the value of the augmented estate after a deed transfer would be $280,000 (the $200,000 in assets + the $80,000 in life estate). Under this proposed disposition, she stands to receive the *entire* share under the deed and will, whereas her elective share would only be half of it. Thus, in contrast to the spouse in Lindsay, who was to receive less than half of her spouse's assets, Sara would be unlikely to challenge the will. Under a fee simple transfer, the analysis is the same (she would receive all vs. half).

ii. Transfer by Will

Creation by will has two primary disadvantages, alluded to earlier. First, Sara would not receive her interest until after the will was probated. That means that the Sons could raise any number of defenses, such as challenging Carl's capacity, etc. It would also mean any of Carl's debts would have to be resolved first (note that Carl has not referred to any currently-existing debts), which means she could potentially lose the house, if he were to fall into debt. Even if not, the probate process would have to be completed before she received her interest.

Second, even if she was entitled to receive the interest, there is a risk that "the court could award the monetary value of the life estate . . . instead of possession of the property." *Walker's* at 8. Even if this risk is remote, as it would cut against Carl's expressly stated intent, the possibility remains and should be considered.

B. Life Estate in Sara with a Remainder in Sons

A life estate is an "interest created in a person currently entitled to possession for that person's life." *Walker's Treatise on Life Estates at 7*. Creating a life estate would give Sara a full right of use and possession of the property, including a sale or transfer of it, for the period of her life. Immediately on her death, the property would transfer to the sons. A life estate can be created during Carl's life by transfer of deed, or it could be created at his death, according to his will. Both approaches are considered below. Based on Sara's age,

the estimated value of her life estate is $80,000.

One disadvantage of a life estate, whether by deed or by will, is that, by giving the Sons a remainder interest in the property, they would have standing to bring a challenge to Sara's possession of the property on the basis of waste. If Sara failed to maintain the premises, or failed to pay the taxes, or even tried to alter the house, she might be subject to litigation from the sons.

C. Fee Simple Estate for Sara and Contract for a Will

The other alternative is to give Sara a complete interest in the property (again, whether by will or by deed), and then make a binding contract with her. Again, the transfer could be accomplished by a deed or by a will. The enforceability of the contract is discussed below, followed by a consideration of each method of transfer.

In general, a contract to make a will, or a contract not to revoke a will must be in writing. *Manford v. French (2011)* at 12 (citing FPC § 2514). In particular, according to § 2514, such a contract can be established by one of the following: "i) provision 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 a writing signed by the decedent evidencing the contract." Simply creating a "joint will" is not enough if the will does not reference the contract. *Manford* at 12-13. Thus, Carl would need to establish a signed, written contract. He would also do well to reference that contract in his own will to ensure that the Sons could enforce the contract as against Sara's estate.

The benefit of a total transfer to Sara is that the sons would not have a property interest in the house, and so could not sue her for waste.

The flipside, and major disadvantage of this approach, is that, even if the contract were enforceable, the sons could still lose the house, if Sara made a lifetime transfer. The

contract is not enforceable against third parties, and Sara's will wouldn't speak until she died. Thus, while Sara lives, the sons have no property interest in the house, and are not parties to the contract. If they were deemed intended beneficiaries of the contract, they may be able to sue to enforce it. However, if they failed to do so, and Sara successfully transferred the house, e.g. to the charity, they would have no recourse against the third party. Their specific devise would be adeemed in her will, and they would receive nothing. This is a major disadvantage.

Conclusion

Carl's best option is probably to transfer the house in a life estate by deed to himself and Sara jointly, with a remainder in his sons. While this gives rise to the potential for litigation over waste, it minimizes risk of litigation during the probate process and provides the strongest guarantee that each party will possess the House in accordance with Carl's wishes.

MPT 2 – SAMPLE ANSWER 3

TO: DANA CARRAWAY

FROM: EXAMINEE

RE: CARL RUCKER – DISPOSITION OF PROPERTY

DATE: JULY 30, 2019

You asked me to analyze two possible approaches for the disposition of property of our client, Carl Rucker, such that his affairs are arranged to comply with his wishes that after his death, his current wife can remain in the house until her death, after which it would pass to his sons from a previous marriage. Mr. Rucker further seeks to minimize the risk of litigation between his current wife and his sons. This memo thus considers whether (1) Mr. Rucker should create a life estate in the house for his wife, Mrs. Rucker, with remainder to his sons, or (2) contract with his wife to write wills that leave the house to his sons after both he and Mrs. Rucker have passed. As you have requested, this memo does not address the possibility of a trust.

SHORT ANSWER

(1) Making a lifetime transfer of a life estate to Mrs. Rucker, with his two sons as remaindermen, is an attractive option for Mr. Rucker. Such a transfer would allow his wife to live in the home as a typical fee simple property owner would, and any property-related payments could likely be made with the bequeathed Certificates of Deposit. Further, because the transfer is immediate, there is a lower risk of litigation and lower cost as

compared to distribution via will. However, such a transfer would reduce Mrs. Rucker's elective share by the value of her life estate. To avoid reduction issues, Mr. Rucker could potentially make the inter vivos transfer and then bequeath his Certificates of Deposit to Mrs. Rucker outright, reducing her likelihood of choosing to take the elective share.

(2) Making a contract with Mrs. Rucker to make wills is another option for Mr. Rucker that has some benefits which are perhaps outweighed by its drawbacks. Although a separate, written contract is enforceable, Mrs. Rucker may be unenthusiastic about affirmatively making her own will leaving the family home to Mr. Rucker's sons. Additionally, moving the property through probate twice—once upon the death of Mr. Rucker, once upon the death of Mrs. Rucker—increases the cost and risk of litigation for all parties involved. Such litigation undermines Mr. Rucker's stated intentions.

ANALYSIS

(1) First, Mr. Rucker may elect to create a life estate in the house for Mrs. Rucker with his two sons as remaindermen. Because Mr. Rucker is currently the only named person on the deed, he can make such a transfer without Mrs. Rucker's consent, in the event that the two perhaps disagree on the precise approach to take with the property. Walker's Treatise on Life Estates. Granting his wife a life estate has many advantages that suit Mr. Rucker's stated wishes. First, a life tenant has the absolute and exclusive right to use the property during their lifetime. Id. Perhaps because they have full possession of the property during their lifetime, life tenants are solely responsible for real estate taxes, insurance, and maintenance costs while they are alive. *Id*. The life tenant can further mortgage or sell her interest in the property without the consent of the remaindermen. *Id*. Indeed, the remaindermen have no right to use the property nor generate income from the property during the life tenant's tenure*. Id*. These features of the life estate help accomplish Mr. Rucker's goals of ensuring his wife can remain in the home during her lifetime and reducing the risk of litigation between her and his sons, as his sons would have no legal say in

whether Mrs. Rucker chooses to dispense with the property. The fact that Mrs. Rucker would have to pay certain home-related costs does not undercut Mr. Rucker's intentions, as payment of such taxes and fees comes with any ownership of property. Further, although Mrs. Rucker does not have income on her own, Mr. Rucker indicated that he would leave valuable Certificates of Deposit to her after his death which would allow her to comfortably pay for such costs.

Choosing to transfer the property via a lifetime deed also avoids the primary drawbacks of transferring the property via will. If the property is transferred through Mr. Rucker's will, the parties may litigate. In such an event, the court could award the monetary value of the life estate rather than actual possession of the property. *Id.* Such a decision would eviscerate Mr. Rucker's purposes of the transfer—that his wife can remain in the home and to minimize litigation between her and her sons. Further, choosing to transfer through a deed avoids the costs and delays of probate. *Id.*

However, transferring the property through deed is not without its drawbacks. First, Mr. Rucker's sons would have a cause of action against Mrs. Rucker in the event they believed she was committing any waste on the property that would decrease the value of their future interest. Because of the unsavory relationship between his sons and wife, his sons may choose to bring such actions as frequently as possible, interfering with her enjoyment and undermining Mr. Rucker's goal to minimize litigation. Further, any sale or mortgage of the home requires the mutual consent of the life tenant and remaindermen. *Id.* Note that Mrs. Rucker, because of her lack of independent income, might seek to mortgage the property to borrow money secured by its full value. If Mrs. Rucker sought to dispose of or encumber the entire property (as opposed to Mrs. Rucker selling her interest alone), an agreement between all parties would be exceedingly difficult to achieve.

Crucially important to consider is the impact a life estate would have on Mrs. Rucker's elective share upon Mr. Rucker's death. Franklin law requires that a surviving spouse can

claim a percentage elective share of the "augmented estate" or alternatively what was bequeathed in the decedent's will. Franklin Probate Code § 2202; *In re Lindsay* (Franklin Ct. App. 2008). For spouses who have been married for at least 15 years—like Mr. and Mrs. Rucker—that elective share is 50% of the augmented estate. In Franklin, courts have recently held that the value of the granted life estate, if transferred during the decedent's life, should be included in calculating the elective share of the surviving spouse. Walker's Treatise; see also *Lindsay* (affirming an *inter vivos* life estate transfer should count towards the calculation of the surviving spouse's elective share). Thus, an *inter vivos* transfer of a life estate to Mrs. Rucker would reduce her elective share recovery by the value of her life estate, i.e., $80,000.

As it stands, Mr. Rucker's augmented estate would likely be worth about $450,000, per the categories of estate assets as listed in Franklin Probate Code §§ 2204 through 2207: his home is worth $250,000, and his Certificates of Deposit are worth $200,000.[1]1 The unaltered, 50% elective share would thus be worth $225,000. However, if Mrs. Rucker had been given a life estate during Mr. Rucker's lifetime, her elective share would be reduced by its value, and thus would be worth only $145,000.

However, this reduction would be irrelevant if Mrs. Rucker chose to take what was bequeathed to her under Mr. Rucker's will instead of the elective share. To avoid any reduction issues, Mr. Rucker could make the *inter vivos* life estate transfer and subsequently bequeath the entirety of his Certificates of Deposit to Mrs. Rucker, as he has indicated he intends to do. That way, Mrs. Rucker would not be inclined to choose the (now-reduced) elective share.

(2) Another option for Mr. Rucker is to enter into a contract with Mrs. Rucker to make a will that restricts the surviving spouse's right to alter an agreed-upon testamentary disposition.

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[1] We currently do not have substantial information on any bank accounts or other assets which may alter this amount.

The agreed-upon will would, under the contract terms, have to remain the same, although the surviving spouse would be able to sell or encumber the property without breaching that contract. *Manford v. French* (Franklin Ct. App. 2011) (citing *Kurtz v. Neal* (Franklin Sup. Ct. 2005)). Thus, Mr. Rucker could contract with Mrs. Rucker: Mr. Rucker would make a will giving Mrs. Rucker the home after Mr. Rucker's death; in return, Mrs. Rucker would make a will giving Mr. Rucker's sons the home after her death. Provided that the contract was in writing, per Franklin Probate Code § 2514, it would be enforceable. *Manford.* Note that simply drafting joint wills alone is not enough to prove that a restrictive contract to make wills was entered into. Id.; see also Franklin Probate Code § 2515 ("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."), § 2514(ii) (requiring "extrinsic evidence proving the terms of the contract").

However, as mentioned *supra*, there are drawbacks to transferring property via a will. The parties to a will could seek to litigate, and a court may choose to award the value of the life estate—in this case, $80,000—instead of full possession of the home. Walker's Treatise. Further, probate of wills—which in this case, would have to occur twice—is both time consuming and expensive. Franklin courts have also held that the breach of a contract to make or not revoke a will can result in either specific performance *or* money damages, indicating that specific performance, which would protect the ownership rights of both Mrs. Rucker and Mr. Rucker's sons, is not always available. Further, Mrs. Rucker may balk at the prospect of writing Mr. Rucker's sons into her will, especially after Mr. Rucker's death. To further reduce the risk of litigation or animosity between his family, then, this option is probably not best for Mr. Rucker.

CONCLUSION

Mr. Rucker can achieve his stated objectives through either an *inter vivos* life estate transfer or a contract to make wills. In order to reduce litigation and most likely meet his goals, Mr. Rucker should probably transfer a life estate to his wife during his lifetime with a remainder

to his sons. Further, Mr. Rucker's will should unequivocally bequeath his Certificates of Deposit to his wife to avoid issues with the reduction of her elective share.