MPT 1 – SAMPLE ANSWER 1

To: Hiram Betts

From: Examinee

Date: 2/25/2020

RE: *Downey v. Achilles Medical Device Company*

Examinee was presented with 2 questions for consideration and will answer them in two parts.

Part One: Whether the plaintiffs' lawyers or their representatives may communicate, without our consent, with the current and former AMDC employees regarding their knowledge about the manufacture and/or sale of the walkers?

Generally, according to Franklin Rules of Professional Conduct 4.2 and 5.3, an attorney may not speak with a person known to be represented by counsel regarding the subject of representation, nor may he direct another person over whom he has supervisory authority to speak to a person known to be represented by counsel without first obtaining counsel's consent. This is true even if the represented person voluntarily chooses to speak with the attorney. The first general issue to be addressed is whether Ashley Parks is a nonlawyer agent of opposing counsel for the purposes of FRPC 5.3. Since Ms. Parks was hired by opposing counsel, is investigating on behalf of opposing counsel, and is all but certain to report her findings to opposing counsel, it can be said that she is a nonlawyer whom opposing counsel has direct supervisory authority over. As such, references to opposing counsel in this memorandum will include references to Ms. Parks when analyzing whether either may speak with current or former employees.

Ron Adams: Mr. Adams is a former employee of AMDC. He has been retired since 2017. While employed with AMDC, Mr. Adams was in charge of the quality control department.

Ordinarily, opposing counsel would not be able to speak with Mr. A *if he were still employed with AMDC* since his act or omission may be imputed to AMDC. The Franklin Board of Professional Conduct (FBPC) rendered an opinion interpreting the above mentioned rules (4.2 and 5.3). Since Mr. A is no longer employed by AMDC, FBPC Ethics Opinion 2016-12 states that 4.2 limits contact with *current* agents and that "counsel may communicate freely with former agents." Therefore, opposing counsel may speak with him regarding the subject matter of the representation unless he has hired separate counsel. To our knowledge, he has not. Even if he does, the decision of whether to communicate with opposing counsel is between him and his attorney.

Gus Bartholomew: Mr. B is a current employee of AMDC. He is the executive assistant for the president of the company. As such, he has sat in on board meetings, as well as attorney client meetings. Typically, opposing counsel is not automatically prohibited from speaking with a mere employee with does not consult with the lawyer for the organization, does not have the authority to obligate the organization (such as accepting a settlement), or whose actions may not be imputed to the organization. On first look, Mr. B appears to meet this criteria. His position is not one in which he consults with or makes legal decisions with the lawyer, nor is it likely that his actions can be imputed to the organization since he is an executive assistant and this matter deals with products liability, and finally, he has no authority to obligate the organization. However, since Mr. B sat in on meetings with the counsel, took notes during those meetings, and has access to most of the president's communications, Mr. B was privy to communications that are protected by attorney client privilege. Opposing counsel would have reason to believe that the employee is privy to these communications since this employee is the executive assistant to the president of the company. As such, opposing counsel may speak with Mr. B for the reasons stated above, but, according to FBPC Ethics Opinion 2016-12, "[opposing] counsel must make every reasonable effort not to breach [attorney-client] privilege. Indeed, [opposing] counsel is prohibited from asking directly or indirectly about any of those communications."

Agnes Corlew: Ms. C is a current employee of AMDC. She is head of public relations. Communication with Ms. C will likely not be limited by rules 4.2 or 5.3. Ms. C is a current

employee, but her position within the company is not one in which she consults with or makes legal decisions with the lawyer, nor is it likely that her actions can be imputed to the organization since she is head of public relations and this matter deals with products liability, and finally, she has no authority to obligate the organization. Since she does not meet any of the three criteria for obligating opposing counsel to seek permission from AMDC counsel, opposing counsel or its agent may speak with her regarding the subject matter of the litigation without first seeking our approval.

Elise Dunham: Ms. D. is a current employee. She is the plant manager at the plant in which the walkers in question were manufactured. Mr. A would have reported to her during his time at AMDC. Ms. D is currently represented by separate counsel in relation to this matter. While Ms. D cannot obligate the organization nor does she consult with counsel, her "acts or omissions with the matter may be imputed to the organization." (FRPC 4.2) Ms. D was a plant manager where the alleged defective walkers were produced. In that capacity, Mr. Adams or subsequent quality control managers would have reported to her. Because of her managerial and supervisory position, if she were to carelessly allow for defective products to leave the plant, that liability would be imputed to AMDC. She has also hired separate counsel. Therefore, if opposing counsel wishes to speak with her regarding the subject matter of the pending litigation, then they must seek our permission because of our vicarious liability as well as permission from her present counsel.

Penny Ellis: Ms. E is a current employee of AMDC. She was formerly the Director of Marketing. She would have over seen the sale of the walkers in question. She is presently the CFO and on the Board of Directors (BOD) serving as the treasurer. Opposing counsel may not speak with Ms. E without obtaining our consent for two reasons. The first, and weaker reason, is that her actions while she was director of marketing may impute liability to us since her responsibilities included the sale of the walkers in question. The second reason is that she is currently on the board of directors. She may not participate in directing counsel, but she does have the apparent authority to obligate the company. By her own admission, she would be working out the financials if there was a settlement. She can also vote on issues relating to the pending litigation. Ms. E may not be active in the litigation, but

since she is on the BOD, she is represented by counsel to the extent that AMDC is represented by counsel (not personally), so speaking with her without obtaining consent would be inappropriate.

Part Two: Whether we, as AMDC's attorneys, may communicate with any of the named plaintiffs or potential class members without the consent of opposing counsel?

Generally, an attorney must have actual knowledge that a person is represented by counsel. In Downey's filing, they would have named the initial plaintiffs. Those plaintiffs are clearly represented by counsel and the "high standard" of knowledge is met. *Mahoney*. We cannot speak with any of the named plaintiffs without consent of their counsel, even if they initiate or consent to the communication.

The issue is whether we can speak to potential class members without counsel's consent. In Mahoney, The Franklin Court of Appeals decided a similar issue. In that case, certification for class status had been granted and counsel was in the 6 month opt out period. Even when class status had been met, counsel was still permitted to speak with potential plaintiffs since counsel could not know for sure they were represented by other counsel until the end of the 6 month period when both parties would know who had opted out. So we may communicate with potential plaintiffs **up until** the time period for opting out has ended. Once that time period has ended, we will know who exactly are the members of the class and will not be able to speak with them without obtaining opposing counsel's consent.

MPT 1 – SAMPLE ANSWER 2

BETTS & FLORES
Attorney at Law
300 Stanton St.
Franklin City, Franklin 33705

MEMORANDUM

TO: Hiram Betts

From: Bar Applicant

Date: February 25, 2020

Re: Downey v. Archilles Medical Device Company (AMDC)

Introduction

Downey v. Achilles Medical Device is a case in which the plaintiff's have alleged that AMDC whom we represent manufactured and sold defective walkers during the years 2010 - 2015. The plaintiff's are attempting to bring a class action, through five named plaintiffs led by a Ms Marie Downey regarding AMDC walkers model number 2852 which was manufactured in 2010 and marked as sold between 2010 and 2015.

Discussion

This memorandum will address and identify 3 major key areas:

1. If plaintiff’s lawyers or their representatives may communicate, with or without the consent, with former AMDC employees regarding knowledge about the sale and manufacture of walkers?

2. Weather AMDC attorneys, or our representatives may communicate with any named plaintiff's or potential members of the class with or without the consent of opposing counsel.

3. Other important issues to be considered. Whether a class may be properly certified.

First issue to be addresses is item #3. The plaintiff's are contemplating bring forth a class action suit. The first action will be the determination is if Ms. Marie Downey is an adequate representative of the class which will be bring action against AMDC. Did she in fact purchase a model 2852 walker in question and are the damages she is requesting typical of the other potential class members. If customer records or proof of purchase cannot be demonstrated that a purchase was made by Ms. Downey then she would have no standing in the case and therefore could not be a class representative. Therefore certification of the class will fail. I would argue that Ms. Downey does not represent the proposed class as a whole therefore the class cannot be certified. Opposing counsel will attempt to show that she does represent the class and did purchase the product. Again evidence to prove or disprove her standing as a class member would need to be gather from plaintiff's side. However, a motion could be made from our side that could disapprove that a purchase of the product was made during the required time period by her or the other five representative plaintiffs thus destroying the class action suit.

As to item 1.

a. AMDC is our client - we are the attorney's for AMDC therefore we are allowed as part of work product in preparation for litigation to interview any and all current employees of AMDC. Rule 4.2 "In representing a client, a lawyer shall not communicate about the subject or the representation the lawyer knows to be represented by other lawyer in the matter, unless the lawyer has the consent of the lawyer or to authorized to do so by law or court order. In this case the company is our client. The employees of the client or company may be interviewed by us. Unless during the course of our interview it has been determined that they are represented by their own individual attorney. If this is the case then an interview may still be conducted with that individual's counsel present.

b. During litigation a discovery plan would be agreed upon by the court and by both parties. During the discovery process our attorney will be allowed to request and to secure depositions with anyone we deemed useful from plaintiff's side. Therefore during these formal dispositions plaintiff's attorney will be present during all questioning. Thus Rule 4.2 must be strictly complied with during this process.

As to Item 2:

a. Rule 4.2 is quite clear that we may not communicate with any member of opposing party once they are named as part of the class unless we have the consent of the opposing party. However, until the class is certified and until the members are made a part of the class they communication between our lawyers and associates will be permitted. If our client AMDC has kept records as to whom their product was sold to during the years 2005 - 2007. This information may be gathered as work product through customer warranty submissions. It also may be gathered from the plaintiff's requirement to notify all buyers that they are members of the class and have an opportunity to opt out. Until they are official member so the class then investigators and our team is allowed to conduct interviews and gather information as part of attorney work product.

b. Training will be done with members of our legal team to ensure that once members become a part of the class or individuals state they do not wish to address anything further without consulting with counsel they all efforts must stop at that time from our side unless as part of a proper discovery plan approved by the court.

Conclusion

Following actions must be taken:

1. Class action certification should be challenged in the form that Ms. Marie Douney does not fully represent the class of consumers who purchased the product during the years concerned.

2. Past and current employees of AMDC may be interviewed by our team unless they are represented by attorney. Until this is known interviews may be conducted as allowed by Rule 4.2.

3. Pre-class customers may be interviewed up until they become members of the class. Once class status has been determined then Rule 4.2 will require compliance with court ordered discovery plan and or permission if person is represented by counsel to conduct questioning.

MPT 1 – SAMPLE ANSWER 3

Memorandum

To: Hiram Betts

From: Examinee

Date: February 25, 2020

Re: *Downy v. Achilles Medical Device Company*

Our client, Achilles Medical Device Company (AMDC) is the defendant in this case regarding the manufacture of and sale of defective walkers during the years 2010-2015. AMDC has had one former and four current employees contacted by an investigator from

the Plaintiff's law firm, Ashley Parks, wishing to speak with them. None of the former or current employees has yet talked with the investigator.

I have been tasked to analyze:

1. Whether the plaintiffs' lawyers or their representatives may communicate, without our consent, with the former and current employees regarding their knowledge about the manufacture and/or sale of the walkers. I will address each employee in turn;

FRPC Rule 4.2 and Rule 5.3. Franklin Board of Professional Conduct Ethics Opinion 2016-12 establishes a 3 prong test to determine if an employee is protected by Comment 7 of FRBS Rule 4.2. Prohibiting communications with a constituent of the organization.

Prong 1 prohibits unauthorized communication with a person in the organization who supervises, directs or regularly consults with the organizations lawyer regarding the matter.

Prong 2 prohibits unauthorized communication with a person in the organization who has "authority to bind the organization in this matter", and includes only those agents or employees who have authority to enter into binding contractual settlements on behalf of the organization. This authority can be actual or apparent.

Prong 3 prohibits unauthorized communication with an agent or employee of the organization whose "act or omission in connection with the matter at hand may be imputed to the organization for purposes of civil or criminal liability.

(a) Ron Adams, retired director of quality control from 2003-2017.

Mr. Adams, as a former and not current employee, can be communicated with freely by opposing counsel or nonlawyer employed or retained by or associated with a lawyer and is

not protected by FRCP 4.2, Comment 7. Franklin Board of Professional Conduct Ethics Opinion 2016-12 reinforces this Rule.

(b) Gus Bartholomew, current employee, employed since 2003 as executive assistant to the President of AMDC.

Mr. Bartholomew as executive assistant would neither supervise, have authority to bind or whose act or omission could be imputed to the company.

He is likely not protected by rule 4.2, and may be contacted by opposing counsel, or their representative.

(c) Agnes Corlew, current employee, employed since January 2017 as head of the public relations department.

Ms. Corlew would not be covered by Rule 4.2, Comment 7 as she doesn't supervise or supervise the attorney, but in the course of her job as head of public relations she might consult the attorney so that she might be able to answer questions from the press regarding pending litigation so that she might communicate the official position of the company to the public. In doing so, she is probably privy to the strategy and tactics of the AMDC attorney so that she can present the best image possible of the company. Ms. Corlew doesn't appear to have any authority to bind the company, at least in a contractual sense. Ms. Corlew has made no act or omission in connection with pending class action so Prong 3 of the FBPC Ethics opinion likely does not apply.

Ms. Corlew is likely protected by FRPC 4.2, comment 7

(d) Elise Dunham, current employee, employed since March of 2009 as plant manager, represented by independent counsel

Ms. Dunham as plant manager is protected on 2 levels. Since she has hired independent counsel, the opposing counsel must get personal counsel to approve any communication with her. Further, opposing counsel, or their representative, FRBC Rule 5.3, must immediately terminate communication upon learning that the individual is represented. Ms. Dunham is also protected from being contacted by opposing counsel by Prong 1, 2 and 3 of the FBPC analysis. She, as plant manager, regularly consults the organization's lawyer, she has actual authority to bind AMDC to contractual obligations and her alleged act or omission in supervising the director quality control and the director manufacturing might be imputed to the company.

(e) Penny Ellis, current employee, employed since 2008, 2008-2016 was director of marketing, 2016 to present chief financial officer of AMDC.

Ms. Ellis is likely protected by Rule 4.2, Comment 7. She was director of marketing during the relevant period and is currently the chief financial officer of the company. As director she could bind the company contractually for sales and her act or omission in sales could be imputed to the company and now, as CFO, she would again satisfy the requirements of Prong 2 of the opinion and she probably consults with the company lawyer on a regular basis as CFO.

All analysis as to who would or would not be protected, and the potential violations of FRPC 4.2 can be inputed to opposing counsel by the acts of their investigator under Rule 5.3.

2. Whether we, as AMDC's attorneys, or our representatives may communicate with any named plaintiffs or potential members of this class without the consent of opposing counsel. I will address each issue in turn:

Rule 4.2 prohibits AMDC's attorneys, or their representatives, from communicating with a person the lawyer or representative knows is represented by counsel.

Here, there is a potential class action, and we intend to oppose plaintiffs motion for class certification. The class has not yet been certified, but we are prohibited from communicating with any named members of the class without permission.

The prohibition only extends, however, to the named plaintiffs in the lawsuit. Communication with potential members of a class, without the permission of the class counsel, is not prohibited. *Mahoney et al v. Tomco Manufacturing.*

MPT 2 – SAMPLE ANSWER 1

In Re Eli Doran

PETITIONER'S CLOSING ARGUMENT

Your Honor, this Court should annul the January 2019 Marriage of Paula Daws and Eli Doran and set aside Eli Doran's October 2019 will for the following reasons:

I. This Court Should Annul the January 2019 Marriage of Paula Daws and Eli Doran Because He Lacked the Capacity to Consent to Marriage As He Equated Marriage With Being Cared For and Could not Think Abstractly About Anything or Make Any Rational Judgments

Although a marriage that complies with the requirements of the Franklin Uniform Marriage and Dissolution At (FUMDA) is presumptively valid, that presumption can be simply overcome by evidence that is clear and convincing such that it shows that it is substantially more likely than not that a party lacked capacity to consent to a marriage. In Re Mason. The capacity to consent to marriage is a high one that requires the individual to understand the nature, effect, and consequences of marriage and its duties and responsibilities. Each party must *understand* what the marriage is and that capacity is measured at the time of marriage.

In Mason, the individual had terminal cancer and was taking medications to control the pain from the cancer that had a high probability of creating mental changes in any patient. Mason. However, there was also testimony that patients can and do have periods of lucidity. Id. The court found that since the marriage was presumptively valid under FUMDA, the oncologist believed that she had the capacity to consent to stopping treatment, and that the individual had the capacity to grant a POA to her sister, the petitioner, the marriage was valid. Id. The court also crucially added that Mason and Green had been engaged to be married for two years and that they had planned for a marriage and life together. Id. In contrast, in In Re Simon, Simon had suffered the fourth in a series of strokes and the individual she married was a medical technician employed at the facility where Simon lived. Simon. They had no prior romantic relationship and they were arranged to get married two weeks before Nancy's death. Id. The court found that Simon did not have the capacity to enter marriage because she had no understanding of what marriage is and that she was incapable of receiving or evaluating information and should not make any decisions for herself or others. Id.

The case before us is just like the Simon case. Eli Doran had no prior relationship with Paula Daws before he moved into her facility and then not even one year later, they were married. We heard testimony from Dr. Anita Bush, a specialist in clinical psychology that works with patients who have cognitive or mental disorders, that Eli Doran did not possess the capacity to consent to marriage because he could not think abstractly about anything or make any rational judgments. She told us that during her very first visit, Eli did not even understand why he was there and stated that he was healthy and needed no medication, even though he took several medications to address chronic conditions. She also told us that he was not oriented to time and that he lived with his deceased wife, Janet, who died two years prior to that visit. Most importantly, she also told us that he said he was married to Vera Wilson, who was his housekeeper. They had never been married. Based on this, Dr. Bush determined that Eli Doran equated marriage with being cared for, which is inconsistent with what the capacity to marry requires. The law requires that each party must understand what marriage is at the time of marriage, including the effects and consequences of marriage. Equating marriage with being cared for is completely inconsistent with the requirements under the law. Moreover, the testimony at the hearing also indicated that Eli was being cared

for Paula, which explains why he may have stated that he wanted to marry Paula. He clearly did not understand the meaning of marriage.

Opposing counsel may argue that this case is similar to Mason, where the individual had lucid moments from time to time and that Eli Doran had a lucid moment when he decided to marry Paula Daws. They will likely try to base this on the testimony we heard that Dr. Bush did not meet with Eli during the time of the marriage and that the preacher that married Paula and Eli did not notice any cognitive defects. This is very problematic and the court would err if they were to rely on this because the preacher did not have any medical experience and could not possibly determine that Eli had the requisite capacity for marriage. Moreover, based on Dr. Bush's testimony, even if Eli had lucid moments—which was unlikely, he would still not be able to make rational judgment calls. This case is entirely distinguishable from Mason because the oncologist in that case testified that lucid moments were possible and the relationship between the individuals was not a new one. Here, Eli had no relationship with Paula prior to the living situation and the potential for lucidity was very small.

Therefore, the court should annul this marriage because Eli Doran did not possess the requisite capacity for marriage given that he equated marriage with being cared for.

II. This Court Should Set Aside Eli Doran's October 2019 Will Because He Lacked Testamentary Capacity As He Did Not Know the Nature and Extent of His Property, and He Did Not Know Who His Niece Was and Believed His Deceased Wife Was still Alive and Living With Him

Generally, the law requires that the testator have testamentary capacity. Dade. This means that the testator at the time of executing the will is capable of knowing the nature of the act he is about to perform, the nature and extent of his property, the natural objects of his bounty, and his relation to them. Id. (finding testamentary capacity where the testator had a history of alcoholism with a noticeable decline in cognitive ability, a loss of short-term memory, instances of speaking to people that were no longer present, forgot to pay bills

and forgot to keep appointments for the doctor or the car because the testator was lucid during the time he made the changes to his codicil given that he was not drinking alcohol at the time). We bear the burden of proving that Eli lacked testamentary capacity by a preponderance of the evidence and we readily carry that burden.

This case is completely distinguishable from the Dade case. Here, Eli was diagnosed with Dementia and his cognitive functioning was on a consistent decline that Dr. Bush determined to be a permanent, progressive condition. We heard from his niece that she first began noticing this decline well before she moved him in with Paula Daws. At times he could not even remember who she was married to or who she even was in relation him. He did not know that his parents had passed away. He was forgetting to pay bills and could not remember answers to simple questions posited by his niece just like the testator in Dade. The difference is Eli did not have the same lucid moments that the testator in Dade had. Knowing the relationships of the individuals you are related to is a crucial consideration for determining testamentary capacity because those people are who your property would ordinarily go to. To make matters worse, Eli believed his deceased wife, Janet, was still alive and living with him even though she had died years earlier. According to Dr. Bush, Eli Doran was simply incapable of any ordinary judgment or reasoning. He lacked the ability to meet his most basic needs and provide for his safety and health. These are simply not characteristics of an individual that has testamentary capacity. Additionally, we heard from Dr. Bush that each time she conducted the proper state tests on Eli, his cognitive functioning was on a steady decline and that it was highly unlikely that he would have a lucid moment to make a will, and that even if he did, he would not be able to make rational judgments. He could not even pay a bill or verbalize reasonable understanding of a will. We heard that Eli's initial will, which was tendered into evidence, provided that he wanted to provide the local church with his entire estate. The petitioner would not stand to take anything here and has no other motive than to protect the interests of Eli Doran contrary to opposing counsel's assertion that petitioner is jealous of Paula Daws.

Opposing counsel will likely argue that the will was properly executed with two witnesses that stated that Eli was lucid and all he wanted to do was give his property to Paula.

However, credibility determinations of those witnesses are crucial in determining testamentary capacity. Paula Daws' daughter was one of the witnesses to the will and she absolutely has a motive to lie to say that Eli was lucid because she would stand to take under the will once her mother passes away. Moreover, the only other witness, Paula Daws, has a significant motive in that she has $15,000 in debt. These witnesses are unreliable and are simply insufficient to make the determination that Eli Doran was lucid and had testamentary capacity when he made this new will.

Therefore, we ask this Court to set aside Eli Doran's October 2019 will because he lacked testamentary capacity at the time he made the will—he did not know the objects of his bounty.

MPT 2 – SAMPLE ANSWER 2

To: Robert Cook

From: Examinee

Date: February 25, 2020

Re: Eli Doran matter

Neither the marriage between Eli Doran and Paula Daws nor the Will executed by Eli Doran are valid. Doran lacked the capacity to consent to the marriage as well as the testamentary capacity to create a will.

Because Doran lacked the capacity to consent to his marriage to Daws in January 2019, the marriage should be annulled.

Doran lacked the capacity to consent to his marriage with Daws. Under Franklin Uniform Marriage and Dissolution Act (FUMDA) a marriage is presumptively valid if it complies with

licensing and officiating requirements. In re the Estate of Carla Mason Green. This presumption comports with the public policy of favoring the validity of marriage, but even this policy may be overcome with clear and convincing evidence. Evidence that is clear and convincing establishes that it is substantially more likely than not that a party lacked capacity to consent to a marriage.

Capacity to consent is defined as "the ability to understand the nature, effect, and consequences of marriage and its duties and responsibilities." Id. Each party must understand what marriage is and freely intend to enter into it. Id. Capacity is measured at the time of marriage. Courts have held that where an individual has had a series of strokes such that the individual was incapable of receiving or evaluating information and should not make any decisions for herself, that person lacked capacity to marry. In re Marriage of Simon. The time that two married individuals knew each other and the nature of their relationship prior to the marriage are also relevant factors. Id.

Here, Doran lacked the ability to to receive or evaluate information and should not make decisions for himself. Carol Richards, Eli's niece, testified that he was incapable of doing basic chores like cleaning his home. He was unable to keep a check book and constantly forgot his family. He also referred to Vera Wilson as his wife when in fact she cleaned his house. Although the defendant may argue that Carol's testimony is not credible, such an assertion is incorrect. In many cases a niece's testimony would not be credible due to the inheritance she would likely receive from the original will. However, that rule is not applicable here. Carol was not set to inherit anything from Eli. All of his estate under the original will was set to go to his favorite church. Therefore it cannot be asserted that Carol is testifying out of self interest. She is actually acting out of a desire that he be "safe and cared for" and that the defendant not take advantage of Doran.

Furthermore, Dr. Bush, a clinical psychologist, testified that it was her opinion that Doran did not "possess the mental capacity to consent to marriage." According to Dr. Bush, Doran equates marriage to being cared for. Dr. Bush testified that it is unlikely that he had periods of lucidity such that he could exercise judgment. The ability to exercise judgment is

paramount in a determination of capacity to marry. Dr. Bush's testimony is extremely credible as she has spent more than one occasion with Doran and is an expert. While she is not a medical doctor, she is specially trained in cognitive decline. The fact that she failed to alert authorities under the Franklin Elder Protective Services act is not dispositive of her credibility. Under the facts known to her, Doran was receiving proper care.

Doran and the defendant did not have the kind of relationship that would naturally lead to marriage, like the parties in Green did. In Green, the parties knew each other for two years and for two years they had talked of and planned for marriage. That is not the case here. Although Doran and the defendant did know each other for a while, their relationship was more in the nature of patient-caregiver. The defendant's testimony otherwise is not credible because she is set to inherit a substantial sum from Doran.

It is clear that Doran equated marriage with being cared for, and that is the only reason he married Daws. Daws, according to her own testimony, cleaned his home, provided his meals and laundry service and supervised his medications. He stated that he loved the defendant merely because she was caring for him multiple times to multiple witnesses, including the Defendant herself. He told her that they should get married immediately after he told her he liked how she cared for him. He also accidentally referred to Vera Wilson as his wife merely because she cared for him. Doran cannot be held to have capacity to understand marriage when he believes that marriage involves simply being cared for by someone.

Because of this Doran could not have had the requisite capacity to form a valid marriage.

Because Doran lacked testamentary capacity, his will executed in October 2019 ought to be set aside in favor of his valid 2016 will.

At the time of execution, Doran lacked testamentary capacity. Testamentary capacity means the testator must be capable of knowing the nature of the act he is about to perform,

the nature and extent of his property, the natural objects of his bounty, and his relation to them. Proving a lack of testamentary capacity must be done by a preponderance of the evidence. Such a determination cannot be proven by legal incompetence alone. Therefore a determination of incompetence alone is not sufficient to prove lack of testamentary capacity. The court in In re Estate of Dade held that severe alcoholism was not enough to invalidate testamentary capacity because the testator in that case had periods of lucidity.

Doran had no clue who his family was and therefore did not know the natural objects of his bounty. Several months prior to the execution of the will, in June 21, 2019, he referred to Carol as his driver. He denied that they were related according to Dr. Bush's testimony. This is the key element of this case. Carol was arguably the most important and central figure in Doran's life at the time. He saw her regularly according her testimony, yet prior to and leading up to the execution of his October 2019 will, he did not realize her true identity. He certainly did not realize she was family. The same time he denied that Carol was related to him, he said that he lived with his now deceased wife, Janet. In reality he lived with the defendant. He believed his parents, long deceased in June 2019, were still alive. He likely did not have periods of lucidity at the time of execution of the will that would bring him out of his confusion, as the defendant will likely argue. Although he was coherent and understood things at times, such as when he was married, according to Rev. Simm's testimony, this was well before the execution of the will. And all testimony to the contrary by the defendant and her daughter are not credible because they stand to inherit significantly if the will is validated.

Furthermore, Dr. Bush's testimony regarding the decline of Doran's mental capacity through the use of the MMSE test is extremely persuasive. according to this test by the time he executed his will, he had severe progressive dementia.

As stated above, the defendant's testimony lacks all credibility, because she is set to inherit significantly through this new, surprise will. Her son's testimony is not credible for the exact same reason. Furthermore, she clearly attempted to cover up her machination by not telling

any of his family members. Her purposes may be merely to pay off her significant credit card debt of $15,000.

He forgot who was in his family and what the nature and extent of his estate was. Because of this Doran lacked testamentary capacity and his will is invalid.

Conclusion

It is clear that Doran had neither capacity to marry nor testamentary capacity. In the interest of fairness, the defendant should not be allowed to profit from her close confidential relationship with Doran. This court should annul the marriage and set aside the will in question.

MPT 2 – SAMPLE ANSWER 3

Carol Richards, as legal guardian of Eli Doran, seeks to have the marriage to Paula Daws annulled and the October 2019 will set aside because during both events, Doran lacked capacity to consent to marriage and lacked testamentary capacity to execute a will.

Because Eli Doran Lacked Capacity to Consent to Marriage, the January 2019 Marriage to Paula Daws Should be Annulled

In *In re Green*, the Franklin Court of Appeal defined the capacity required to consent to marriage is the ability to understand the nature, effect, and consequences of marriage and its duties and responsibilities. The parties must freely, without duress or coercion, intend to marry and understand what it is. The capacity to marry is considered at the time of marriage. A legal guardian, or other petitioner, may overcome the presumption of a valid marriage by clear and convincing evidence one of the parties lacked capacity at the time of marriage.

Thus, the petitioner must show it is substantially more likely than not that a party lacked capacity on the date of marriage.

On January 15, 2019, Eli Doran did not have the capacity to understand what he was doing when he married Paula Daws, nor did he understand what marriage meant, what the consequences were, or the duties or responsibilities required. For over three years, Doran has been evaluated by a clinical psychologist and his primary care doctor. Over the last three years, after testing and evaluations, these doctors concluded that Doran has experienced significant decline in his cognitive abilities. Since May 2018, he has been diagnosed with multiple cognitive dysfunctions and more recently in June 2019, Dr. Bush, the clinical psychologist diagnosed Doran with a permanent cognitive condition that will only continue to worsen. Over the three year period prior to the marriage, Doran's score on the Mini-Mental State Exam, MMSA, dropped from 21 to 17, which Dr. Bush calls a significant decline.

Paula Daws married Doran after he asked her twice when he said she took good care of him. What Doran fails to understand is that he was paying Daws to take care of him. It was and still is her job to feed and house Doran and ensure he receives his medication. It is impossible that at the time of the marriage, Doran understood what it meant to be married. Dr. Bush testified that Doran only understood marriage as being cared for, and Doran did not understand the duties and responsibilities associated with marriage. Moreover, Dr. Bush testified that in July 2019, after Doran has lived in Daws' house for over a year, he did not know where he lived and believed his wife, who has died several years earlier, was alive. At the time of his last visit with Dr Bush, she testified that Doran believed his parents were alive despite the fact that they had passed away decades prior.

The Franklin Court of Appeals did not annul a marriage in *In re Green* because at the time of the marriage, the woman was able to participate in decisions concerning her medical treatment, she participated in the discussion, and her doctors testified that on the say of the marriage, she was lucid despite the pain medication she was taking. While Dr Bush was no present on the day of the marriage and cannot testify to Doran's lucidity on that day, the

present case is distinguishable. In Green, the woman was on medication that impaired her thinking, she was not facing actual cognitive dysfunction or deterioration. Her doctors knew that she could be lucid and participate in discussions about her treatment and made rational decisions. Unlike the woman in Green, Doran cannot experience rational decision making, and was not able to participate in discussions about his treatment. His niece chose to put him in an assisted living facility at the advice of his doctor. While Doran agreed to go, he in no way participated in a discussion to determine his course of treatment. Additionally, Dr. Bush testified that Doran could not experience rational decision making or understand abstract thought and concepts. Moreover, Dr. Bush testified that is it unlikely Doran has any moments or lucidity and states that she seriously doubts his ability to exercise any judgment.

Like the case in *Simon*, Doran met his suitor because she was his caretaker and only knew her as such. Doran and Daws did not have any previous relationship and she presents no evidence of any courtship prior to Doran asking her to marry him. Like *Simon*, Doran's doctor has testified that he cannot make decisions for himself. Doran cannot be said to understand what marriage is. As Dr Bush testified, he equated marriage to care-taking. This is evidenced by his mental decline and the fact that he asked his previous caretaker to marry him, again because she took good care of him and again without any evidence of a courtship.

Doran lacks the ability to think abstractly, so he could not plan a life or a future with Daws. Doran is only able to understand that she takes care of him. Daws did not provide any evidence of a courtship nor did she express her feelings for Doran. She said he only had to ask twice and she got married the next day. No rational person would take Doran's ask as a true marriage proposal. Especially one without any evidence of a relationship between them. The testimony of the Rev. Simms cannot be controlling because he does not know Mr. Doran and it is unclear what his relationship with Daws is. Daws and her daughter have something to gain from the marriage. As Daws' reverend, Rev. Simms may have something to gain as well. In addition to the lack of evidence, Daws has not produced any credible witnesses to testify to the legitimate marriage and relationship between her and Doran.

Your honor, please annul this marriage because of the clear and convincing evidence that Doran is unaware of what is means to have married Daws and cannot understand the nature of the commitment.

Because Eli Doran Lacked Testementary Capacity, the October 2019 Will Should be Set Aside in Favor of Eli Doran's Earlier Will

The Franklin Court of Appeal defined testamentary capacity in *In re Dade*. At the time the will is signed, a testator must be able to know the nature of the act of executing the will, the nature and extent of his property and those natural object of his bounty, and his relation to them. If a petitioner proves by a preponderance of the evidence that the testator lacked testamentary capacity at the time of execution of the instrument, it will be void. In order to void such an instrument, there must be a finding of more than just legal incompetence, there must be a lack of understanding.

Doran lacked capacity when he signed the will in October 2019 because he did not understand the extent of his property, he did not fully understand who his relatives are nor did he know which of them were alive. In order to have capacity to execute a will, Doran must have been able to understand what property, including money, he owned and how much he owned. At the time of the will, Doran lived in a home operated by Daws because he was unable to care for himself. He was also unable to manage his checkbook, or pay any bills, so his payment to the facility owned by Daws had to be automatic because he was unable to manage his finances. Doran is clearly incapable of understanding the nature and extent of his property.

Daws and her daughter testified that Doran said he wanted Daws to have all of his "stuff." Stuff can in no way be interpreted as a term encompassing knowledge of the extend of one's property. The first time Daws claimed Doran wanted her to have his stuff is when she commented on his belongings in his room. It is unclear what Doran means by stuff but it is unlikely that any rational person would understand "stuff" to mean all of my belongings and money. Daws claims she wrote the will at the direction of Doran, it is impossible to believe

Doran knew what he was doing and what he meant when he signed a will to give Daws all of his stuff.

The court, in *In re Dade*, denied the appeal of a son and daughter seeking to invalidate a codicil to their father's will. The court held the father knew what he was doing because although he added gifts to three people, he left a significant sum to his son and daughter. Additionally, the court questioned the motives of the children seeking invalidation of the codicil. If the court invalidated the codicil, the children would increase the size of their gifts from the estate. Here, however, is a very different situation. Carol Richards, Doran's niece and legal guardian seeks to gain nothing from invalidating the new will. She is not in the previous will, in fact Doran left all of his property to his church. Her testimony in the case is not "colored by her interest."

The testimony of Daws and her daughter is "colored by their interests." Daws would receive Doran's entire estate if the will remains valid, which includes the proceeds from the sale of his home. Daws' daughter would gain under the will because she would inherit anything that remained from her mother. The new will greatly disturbs the previous will, which had been in effect since 2016, before any diagnoses of mental impairment. As discussed previously, Doran was facing significant cognitive impairment around the time of the execution of the will. He has been diagnosed with cognitive dysfunction since May 2018. The credibility of the will must be questioned because the one beneficiary who stood to gain the entire estate was the drafter of the will. This beneficiary is also the sole caretaker of Doran. It is the responsibility of the trial court to make determinations of credibility which are crucial to detemining testamentary capacity. This court must find the testimony of Daws and her daughter incredible and cannot bear on the validity of the will.

The court must find Doran lacked testamentary capacity to execute the will. Doran is more than legally incompetent. He is unable to understand the property he owns and is unable to understand who his relatives are. There is a preponderance of evidence proving Doran did not have capacity or understanding to execute this will.