

MPT-1 — Sample Answer 1

Memorandum

To: Partner

From: Associate

Date: 2-22-22

Re: Denise Painter Divorce

This memo will analyze whether the court will be more likely to award joint legal custody of Emma to Robert and Denise or sole legal custody to just Denise. Additionally, this memo will address the assets and debts of Denise and Robert and how those assets and debts will be categorized (marital or separate), distributed and how any appreciation and enhancement of assets will be treated.

I. Custody of Emma

The court will award joint legal custody of Emma to Robert and Denise. Section 420 of the Franklin Family Code (FFC) defines legal custody as "the right to make decisions about a child's medical care, education, religion, and other important issues regarding the child. In determining whether a party should be granted legal custody, the court will consider the following factors in FCC §421: (1) the agreement or lack of agreement of the parents on joint legal custody, (2) the past and present abilities of the parents to cooperate and to make decisions jointly, (3) the ability of the parents to encourage the sharing of love, affection, and contact between the child and other parent, and (4) the mental and physical health of all individuals involved. Under FCC § 422, there is a rebuttable presumption of joint legal custody. Joint legal custody is defined under FCC §420(c) as "means an order of the court awarding legal custody of a child to two parents. Joint custody does not imply an equal division of the child's time between the parents.

(1) the agreement or lack of agreement of the parents on joint legal custody

The courts will consider whether or not the parents agree on custody. Here, the Denise wants sole custody and Robert wants joint legal custody. There is a rebuttable presumption in favor of joint custody, so in order to get sole custody, Denise will have to show evidence to rebut this presumption.

(2) the past and present abilities of the parents to cooperate and to make decisions jointly

In *Sanchez v. Sanchez*, the court established that joint legal custody requires that the parents be willing and able to communicate and cooperate with each other and reach agreement on issues regarding the child's needs. The court will consider past and present abilities of the parents to cooperate and make decisions jointly. This does not require the parents have a completely

amicable relationship. In *Sanchez*, the mother remained hostile towards the father, refuses to communicate directly with the father, and the experts concluded that the mother was unable to communicate on a rational level because of the mother's anger towards the father. The court also determined that where there is no substantial evidence to find that both parents are able to communicate and cooperate in promoting the child's best interests to work together, an order for joint legal custody is not appropriate.

Here, past abilities of parents cooperating are present. Denise stated that they had a positive and loving relationship and both very involved with Emma on a day-to-day basis. They were able to jointly make decisions about her child care, schooling and extra curricular activities. Presently, their communication is not the most effective as they cannot agree on a means of communication. Denise prefers phone calls and Robert prefers texting. Because this Denise and Robert's communication issues are due to a difference in communication methods and lack of showing of hostility, total refusal to communicate and anger preventing effective communication as in *Sanchez*, the court will not find the parents are unable to communicate and cooperate to be able to have joint legal custody of Emma.

(3) the ability of the parents to encourage the sharing of love, affection, and contact between the child and other parent, and

Here, Denise has only let the child see her father twice in ten months, however she has remained open to communicating about custody, permits Emma and Robert to text. Robert admitted some lack of contact with Emma is because he needed to work on himself, and was not solely due to Denise.

(4) the mental and physical health of all individuals involved.

In *Williams v. Williams*, an untreated drug addiction was a legitimate factor in rebutting the presumption of joint legal custody. Here, Robert has a drinking problem, however it is not untreated as in *Williams*. Robert is in treatment for his alcoholism and is 4 months sober. The courts will likely consider this a positive step in the right direction and not against joint legal custody.

Considering all these factors, the courts will likely award joint legal custody.

II. Asset and Debt Distribution

Franklin is a community property state which the Franklin Community Property Act (FCPA) under §430(b) defines as "property acquired by either spouse or both spouses during the marriage that is not separate property. Under FCPA §430(a) Separate property is (1) Property acquired by either spouse before marriage or after entry of a decree of divorce, (2) property acquired by either spouse by gift, bequest, devise or descent, and (3) property designated as separate property by a written agreement between the spouses. The court must determine what constitutes community property and community debt and what constitutes their separate

property and separate debt. (*Barkley v. Barkley*). The FCPA defines separate debt and community debt under §431(a) and (b) respectively. Separate debt is a debt incurred by a spouse before marriage or after entry of a divorce decree. Community debt means debt incurred by either or both spouses during the marriage. Under FCPA §432 property acquired and debt incurred during the marriage by either spouse or both spouses is presumed to be community property or debt.

Before the marriage, Denise acquired the house at 212 Lake Street from her Uncle Sam Golden. The house was paid off. Under §430(a)(2), the house is separate property because it was acquired by a gift. The value of the house when gifted to Denise was \$215,000 and the current value is \$245,000, a difference of \$30,000 in increased value during the marriage. However, Robert claims that he wants to ensure he gets his fair share of the house in relationship to the work he put in on the garage and deck. In *Barkley v. Barkley*, the court determined when the husband made improvements to the wife's house, the additional value of the house was community property subject to equal distribution. Alternatively, the court in *Chicago v. Chicago*, determined that community property includes all income and appreciation on separate property due to the labor, monetary or in kind contribution of either spouse during the marriage. In *Chicago*, passive income was described as income acquired other than as a result of the labor, monetary or in-kind contribution. As in *Barkley*, where the husband made improvements that increased the value of a home that was the wife's separate property but could claim the increased value due to the improvements as community property, here the Robert can claim the same. As in *Barkley*, Robert spent money made during the marriage to make improvements on the house that arguably increased in the value. This value was not increased by merely passive incomes, such as market conditions. Instead, the value was increased due to money and labor. Therefore, the \$30,000 increase in value is community property subject to equal division.

The debt acquired during the marriage is \$10,000 that will be split equally pursuant to FCPA §432, and 433, which states: Separate debt is a debt incurred by a spouse before marriage or after entry of a divorce decree. Community debt means debt incurred by either or both spouses during the marriage. Under FCPA §432 property acquired and debt incurred during the marriage by either spouse or both spouses is presumed to be community property or debt. 433 determines that the debt is split equally between the husband and wife. Denise will take \$5,000 and Robert will take \$5,000 of the debt.

Robert will be able to keep the motorcycle as separate property since it was a gift from his father.

The remaining assets will be split as requested and will likely be approved by the court because it is equal. Robert requested half of the improvements to the house (\$15,000) to both. Denise can keep the bedroom set, dining set, 2014 Ford Explorer, deck, detached garage leaving her with around \$18,000. Robert will keep the 65 inch TV, couch and loveseat, 2017 pickup truck that amounts to the same \$18,000.

MPT-1 — Sample Answer 2

MEMORANDUM

To: Harold Huss

From: Examinee

Date: February 22, 2022

Re: Denise Painter divorce

1. Joint Legal Custody is likely to be granted to both Denise and Robert.

Legal Custody as defined by 420 of the Franklin Family Code (FCC) is "the right to make decisions about a child's medical care, education, religion, and other important issues regarding the child." Legal custody can be sole or joint custody, but there is a rebuttable presumption that joint legal custody is in the best interest of the child. In determining custody rights, the court will consider the the factors outlined in 421 of the FCC. The rebuttable presumption of joint custody can be rebutted by findings of fact supported by "substantial evidence" as stated in *Sanchez v. Sanchez* (2010). Further, joint legal custody does not require an equal division of time.

There are four factors outlined in 421 of the FCC that can weigh in favor of, or against joint custody. First, the court shall consider the agreement or lack of agreement between the parties; second, the past and present abilities of the parties to cooperate in making decisions jointly; third, the ability of the parents to encourage the sharing of love, affection, and contact with the child; and fourth, the mental and physical health of all parties involved. In this situation, Mr. and Ms. Painter do not agree on sharing joint custody of Emma, so this factor will not be helpful in awarding custody. Second, the cooperation of the parents. The court in *Sanchez* stated the the parents do not have to have an amicable relationship, but it cannot be hostile, and there must be a "record of mature conduct... evidencing an ability to communicate with each other concerning the best interest of the child." The court in *Sanchez* determined the parents could not effectively communicate because of hostility, anger and a refusal to communicate. Here, Denise and Robert had a somewhat hostile ending to the marriage because of Robert alcoholism. The parents have not had extensive communications since the separation regarding Emma, but the communications they have had have been amicable. Denise allowed Robert to see Emma twice in the past few months, and is accepting of Robert attending her soccer matches. One factor weighing against their ability to communicate is they have a record of not responding to the other because they disagree on the medium, text versus phone calls. This makes it difficult to show a record of communication as required by *Sanchez*. Although they disagree on the method of communication, it is likely the court will not consider this enough to overcome the rebuttable presumption of joint custody because the parents have still been able to arrange visits, and it does not appear there is any hostility, anger or absolute refusal to communicate as was the case in *Sanchez*. Further, the court will look at Robert's expression that he wanted to get clean before

he became involved in Emma's life, and that he wants to be involved and make things work in the future. His alcoholism and subsequently getting clean is a justifiable reason for not being as involved in Emma's life as he wanted to be. The court will likely consider his ability and desire to be involved in the future, not just his past, infrequent visits.

The third factor is the ability to encourage the sharing of love, affection, and contact. Denise has allowed Robert to see Emma on a few occasions and allows him to text her, but she has not responded to his texts about seeing her, although she has returned his calls. This factor may be against sole custody for Denise because she has not encouraged a relationship between Emma and Robert, she has merely allowed it. The court may want to grant joint custody to ensure Denise allows and equal opportunity for Robert to develop and maintain a relationship with Emma. The last factor is the mental and physical health of the individuals involved. In *Williams v. Williams* (2005), the court held that an untreated drug addiction was a sufficient reason to rebut the presumption of joint custody. In order to rebut the resumption, there must be "a nexus between the parent's condition and the parent's ability to make decisions for the child." (*Ruben v. Ruben* (2004)). This factor will weigh against Robert because of his alcoholism. His alcoholism has inhibited his ability to keep a job, take care of Emma (as evidenced by failing to pick her up from school), and maintain a relationship with Denise. As distinguished from *Williams* where the drug addiction was untreated, Robert has undergone extensive rehabilitation including six months in a treatment plan and he is now four months sober. This factor will certainly weigh against Robert, but the record of sobriety coupled with his expression to be involved in Emma's life (including sports, spirituality, and music lessons) will be unlikely to overcome the rebuttable presumption of joint custody being in the best interest of the child.

2. Division of Marital and Separate Assets

Below is a list of assets that is categorized as community property or debt, or as separate property or debt. Denise and Robert were married in 2013. Community property as defined in 430 of Franklin Community Property Act (FCPA) is property acquired by either or both spouses during a marriage that is not separate property. Separate property is property acquired before marriage, by gift or bequest, or by written agreement. Community property and debt will be distributed equally, but the court has discretion on awarding specific property and debt.

1. Bedroom sets: This is community property because it was acquired after their marriage. Any increase in value or decrease will be shared by the spouses equally.
2. 65 - Inch TV: This is community property because it was acquired after their marriage.
3. Couch and Loveseat: This is community property because it was acquired after their marriage.
4. Dining Set: This is community property because it was acquired after their marriage.
5. 2017 Pickup: This is community property because it was acquired after their marriage.

6. Kawasaki Motorcycle: This is Robert's separate property. This was acquired during their marriage, but it was a gift to Robert from his Father, so it would be treated as separate property consistent with FCPA 430. Any appreciation, maintenance and expense will be attributed to Robert as well.

7. Deck: This is community property because it was acquired/built after their marriage. Although this was an addition to the house as separate property (see below), the addition was based on the contribution of both spouses' savings, and so it will be treated as community property. This is similar to the additions made in *Barkley v. Barkley* (2006), where the husband made various improvements to the wife's house, so the court considered these improvements community property. Here, the court can award credit to Robert in the amount of 50% of all the improvements to the house.

8. Detached Garage: This is community property because it was acquired/built after their marriage. Although this was an addition to the house as separate property (see below), the addition was based on the contribution of both spouses' savings, and so it will be treated as community property consistent with the above analysis.

9: House at 212 Lake St: This is Denise's separate property. First, it was acquired before her and Robert's marriage, and even if it was acquired during their marriage, it was a gift from her uncle so it would be treated as separate property. The house was valued at \$215k when Denise acquired it, and now has a value of \$245k. The appreciation in value will be separate property if it is considered "passive income" and is not due to the "labor, monetary, or in-kind contribution of either spouse during the marriage." (*Barkely*). In *Barkley*, a husband's SIP plan was acquired before marriage and appreciated during marriage due to contributions from the husband, and market factors. The court attributed the contributions from the husband to community property, and the market appreciation to separate property. Similarly, the court here will attribute the increase in the value of the house based on market factors alone to Denise. There is a \$30k total increase, and \$10k of this will be community property (see above) and the remaining \$20k will be separate for Denise. Denise may be able to introduce evidence that a calculation based on FMV of the property before the additions (deck and garage) vs. the FMV of the property after the addition could be used which may be more beneficial to Denise, but it is unclear if the court will allow this calculation to be used based on *Barkely*.

10. Best Buy CC debt: This is community debt because it was acquired after their marriage.

11.. Carmax Loan: This is community debt because it was acquired after their marriage, and it related to community property because the truck was acquired during their marriage.

12. Target CC: This is community debt because it was acquired after their marriage.

MPT-1 — Sample Answer 3

To: Harold Huss

From: Examinee

Date: February 22, 2022

Re: Denise Painter divorce Memo

1. The court will likely award joint legal custody of Emma to Robert and Denise rather than sole legal custody to Denise.

In Franklin, legal custody is defined as the right to make decisions about a child's medical care, education, religion and other important issues regarding the child. The court can either decide between sole custody to one parent or joint legal custody to two parents. To determine between is best, the court looks at a number of factors in accordance to the best interests of the child. These factors include: (i) agreeability between the parents on joint custody; (ii) past and present abilities of the parents to cooperate and make joint decisions; (iii) the ability of the parents to encourage the sharing of love, affection, and contact between the child and the other parent; and (iv) the mental and physical health of all individuals involved. *Franklin Family Code Section 420, 421*. There is also a rebuttable presumption that joint legal custody is in the best interests of a child.

A. Robert and Denise do not agree on joint custody, but the rebuttable presumption of joint legal custody will likely be enough to overcome this factor.

The rebuttable presumption of joint legal custody can be rebutted by certain evidence such as a mental condition affecting a parent's ability to participate in decision making. In order to rebut this, there must be a nexus between the parent's condition and the parent's ability to make decisions for the child. *Ruben*. Further, untreated drug addictions also held to be a legitimate factor in rebutting the presumption of joint legal custody. *Williams*.

Here, In Denise's consultation, she stated that she is seeking sole legal and physical custody of their daughter, Emma. In Robert's consultation, he wants to request joint legal custody. Since the presumption in Franklin is towards joint legal custody rather than sole, it will likely be controlling absent a rebuttal from the petitioner seeking sole legal custody and that it is in the best interest of a child. Though Denise can argue that Robert is heavily reliant on alcohol, Robert has been voluntarily participating in an outpatient rehabilitation program for the last six months, where he gets tested regularly. He states he has not consumed any alcohol in four months. This can be distinguished from *Williams* because currently, the alcohol (drug) is not a nexus between Robert's condition and his ability to make decisions for Emma. He states that he has even been keeping away to clean up his act to come back. He clearly has the right headspace to help make decisions for Emma and the presumption of joint legal custody would be in favor of it. However, Denise's

best argument would be to attack the credibility of the fact he has only been in rehab for a few months and may not complete it.

B. Though communication could improve, the past and present abilities of the parents to cooperate and make joint decisions likely favor joint custody over sole custody.

In *Sanchez*, the court stated that this factor requires the parents be "willing and able to communicate and cooperate with each other and reach agreement on issues regarding the child's needs." Further, this does not require the parents to be completely amicable, they simply must be cooperative enough to make important decisions regarding their child. However, joint legal custody should not be rewarded unless there is a record of "mature conduct" on part of communications concerning the best interests of the future.

Here, Denise stated that both her and Robert had a loving relationship in the seven years prior where they jointly made decisions about Emma's childcare, schooling, extracurriculars, and medical care. However, due to Robert's drinking and his DUI it significantly affected Robert's ability to make joint decisions for Emma. Though Robert has been in rehabilitation for the past six months, there has been very little communication on his behalf. Denise stated she feels more comfortable talking on the phone and called 12 times to no avail in the past four months. Robert stated he was frustrated because he prefers communication over text and Denise will not reply to them. They also do not talk much at Emma's soccer games.

While this element seems to be lacking, it can be distinguished from the *Sanchez* case where the court found that the mother was hostile towards the father and would only communicate with him by calling his parents to relay messages. Also, the court found the mother's anger towards father skewed their communications and that they were so "acrimonious" that the judge made the parties exchange their child at a public library. Here, the parties are not completely amicable, but there is direct communication with each other. There is also no evidence that shows either of the parents have so much animosity towards each other that they would act irrationally when making decisions for Emma, or that they would need to meet in a public space for drop off. Mere frustration by either parties is likely not enough to rebut this factor, so sole custody would be favored here as well.

C. The court will likely the ability of the parents to encourage the sharing of love, affection, and contact between the child and the other parent is met

Denise stated that she is highly involved in Emma's life and they have a close relationship. They do homework together and watch movies. Robert, admittedly, has not had very much contact with Emma, but claims its because he wants to get clean before spending more time with her. However, he has attended every one of Emma's soccer games and texts Emma from time to time, which Denise is okay with. He does not object to Emma living with Denise and just wants to have regular visits with Emma. It is clear from these facts that each parent, although not completely amicable, care about Emma and impliedly encourage Emma to have a relationship with both parents. Robert and Denise both agree when Robert wants to visit and they even have casual

conversations at the soccer games. Further, this element is likely met to establish joint legal custody.

D. The mental and physical health of the parties involved may be a detrimental factor in favoring Joint Custody on behalf of Robert

Both Denise and Emma have demonstrated healthy physical and mental well-beings, but Robert has a recent history of alcoholism and has only been in rehab for six months and is has only been clean for four months. However, as stated above, this is distinguished from the Williams case because the Williams case presented an untreated drug addiction and that there was nexus between this condition and the parent's ability to make decisions for the child. In our case, Robert voluntarily admitted himself and is working towards treatment. Depending on how much "treatment" is deemed necessary by the court, this may be an inhibiting factor for Robert.

In sum, the court with its rebuttable presumption towards joint legal custody over sole custody, it is likely the court would favor joint legal custody of Emma between Robert and Denise rather than sole custody by Denise based on the best interests of Emma.

2. In Franklin Separate Property is property acquired by either spouse before marriage or after divorce, by gift, or designated to be separate. Community property is property acquired by either spouse or both spouses during marriage that is not separate property. The notions for debt are specified the same way.

Under code section 432, property acquired and debt acquired during marriage by either spouse or both spouses is presumed to be community property or debt. The distribution shall distribute community property equally between the spouses and the court may exercise discretion in awarding specific property and debt to each spouse to reach an equal distribution.

Assets:

A. Bedroom set, Samsung TV, Leather couch and loveseat, dining set

Each of these would likely be considered community property because they were likely acquired during the marriage. They are each valued at \$500, which would add up to \$2000 and these proceeds should be split equally between Denise and Robert.

B. Toyota pickup, Kawaski motorcycle, Ford Explorer

While both were acquired during the marriage, only the motorcycle would be considered separately since it is a "gift" to Robert. Therefore, absent any more information about the pickup it is likely community property, but the motorcycle is not. For the same reason, the Ford Explorer is likely community property and should be distributed equally along with the pickup.

C. Deck and Garage

Denise and Robert both paid \$5000 for the deck in 2016 and the detached garage. These were made with the couples savings, making them both community property. While Robert can make the argument that he "put in a lot of work" into both of these, the court is not likely to make a special reward because it would qualify as community property-- they both paid the same amount and were married when adding to the home. He could use the Barkley case to argue these improvements are ones that she keeps and adds value to the house and ask for the difference between the fair market value and market value, but there is no evidence as to the value he added. However, since it's equal to 50 percent or more, the court may reward him with half.

D. House at 212 Lake Street

The court would likely state this is Denise's separate property because it was gifted to her mortgage free before her and Robert were married. However, Robert could argue that the value in 2013 at \$215,000 and its current value of \$245,000 would yield him some of the profit. Similar to above, though he does not state how much value he actually added, the court could make a special finding and crediting him with some of the value he provided. However, absence of any evidence to determine whether the improvements increased the fair market value of the house, the court may reward credit to Robert for paying for improvements equal to 50% of the total cost. He could argue his 50% profit towards the Deck and Garage go towards adding value of the house and be credited with half.

E. Debts

Each of these debts were acquired during the marriage, and should be equally distributed. Passive income should be taken into consideration.

MPT-2 — Sample Answer 1

ARGUMENT AND CITATIONS OF AUTHORITY

I. Joinder of all three counts in one indictment was improper because each count is dissimilar to the other, nor does either of the three share any commonality either in the type of charge or the nature of the charge.

Pursuant to Rule 8(a) of the FRCP, an indictment or information may charge a defendant in separate counts with two or more offenses if the offenses charged - whether felonies or misdemeanors or both - are *the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.*

FRCP Rule 8(a) is very clear in its language in defining when it is acceptable to charge a defendant in separate counts with two or more offenses. First and foremost, Defendant was indicted three times for offenses that occurred on two separate occasions. Rule 8(a) allows for such joinder of counts, but only in certain instances. The first count stems from an interaction Defendant inadvertently experienced while at a friend's home. An informant for the police presented to the door of Defendant's brother's home to purchase cocaine and the informant provided the money to Defendant after retaining powder cocaine from her brother. This portion of the indictment charges Defendant with "knowingly [selling] 10 grams of a substance containing cocaine, a controlled substance." Now, the second count arose six months later when she was pulled over for swerving out of her lane. Defendant was subsequently arrested for DUI, and the officer searched, and found, marijuana, a small scale, and empty plastic baggies in the backseat of the car and a handgun in the trunk. These two counts of the indictment not only occurred on two separate occasions, but also involved different types of drugs, as well as very different circumstances. The Prosecution likely joined these claims together under the "same or similar character" portion of Rule 8(a). However, the court in *State v. Saylers* accurately stated "[s]imply because the two charges have "robbery" in their titles is not a sufficient basis on which to join the charges in a single indictment." *State v. Saylers*. Similarly, just because both charges pertain to drugs does not mean that they are "the same or similar character." The court in *Saylers* continues on to differentiate between the two robbery charges and how they involved different circumstances dissimilar to one another. Likewise, Defendant's drug charges are dissimilar. One charge pertains to cocaine, whereas the other charge involves marijuana. The remainder of Rule 8(a) is irrelevant on the grounds that these incidents did not occur in the same act or transaction, nor were they connected with or constitute parts of a common scheme or plan. The incidents involved different substances, different circumstances (one being in a home and the other being in a vehicle), and in no way could these charges be seen as a parts of a common scheme or plan given the differences between the two situations. As to the firearms charge, this charge is in no way similar or part of the same act or transaction, nor is it connected with or constitutes parts of a common scheme or plan. In every possible way, the firearms charge is of a different kind and nature to that of the drug charges, and therefore should have never been included in the same indictment.

Therefore, this Court should find that the joinder of all three counts in one indictment was improper because the different counts involve different circumstances and facts dissimilar to one another.

II. Based on the decision in *State v. Ritter*, joinder of all counts in the indictment would provide sufficient prejudicial effect on Defendant because conviction on the gun possession charge would automatically deem Defendant guilty on intent to sell marijuana.

Under FRCP Rule 14, if joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever defendants' trials, or provide any other relief that justice requires.

Consolidation of all three charges into one indictment and, subsequently, one trial, is improper because doing so would prejudice the Defendant. In the present matter, it is undoubtedly clear that joinder of all three counts, or charges, into one trial would prejudice the Defendant. In *State v. Ritter*, the court lays out three scenarios and their sufficiency to justify severance. In doing so, the court states "prejudice may occur when evidence that the defendant is guilty of one offense is used to convict him of another offense even though the evidence would have been inadmissible at a separate trial." *State v. Ritter*. The prosecution intends to introduce Defendant's prior conviction for assault with intent to commit murder. In doing so, the prosecution will argue that the presence of the firearm in the car, correlated to count two of the indictment, provides the intent to sell the marijuana found in the car. Therefore, if Defendant was to be found guilty of being a felon in possession of a firearm, she would by virtue be found guilty of intent to sell marijuana as well because the gun would have been considered in her possession. This is the exact type of situation the court in *Ritter* discusses. It would be unduly prejudicial to allow the conviction of one crime to automatically result in the conviction on a separate crime. Rather, Defendant should be able to present evidence in her defense on both charges, separate from one another, without the possibility of prejudice.

Therefore, the prejudicial effect the joinder of all claims would have on Defendant would result in simultaneous conviction of two crimes based on a finding of guilty on one crime. Such a circumstance entails extreme prejudicial upon Defendant.

III. Based on the decision in *State v. Ritter*, the court should separate the counts into three separate trials because unfair prejudice would occur in preventing the Defendant from being able to defend herself through testifying.

Under FRCP Rule 14, if joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever defendants' trials, or provide any other relief that justice requires.

The court in *State v. Ritter* stated, "prejudice may result if the defendant wishes to testify in his own defense on one charge but not on another." the court further states "[s]everance of counts is warranted when a defendant has both important testimony to give concerning one count and

a strong need to refrain from testifying on [another count]." In the present case, Defendant desires to testify as it relates to the two drug charges listed in the indictment. However, she would be unable to do so if the counts remain joined together. Defendant's prior assault conviction is undoubtedly admissible as it relates to the gun charge because it provides the basis for convicting her as a felon in possession of a firearm. However, this also prevents Defendant from testifying because, with the joinder of all counts, the prosecution would be able to admit evidence of the prior conviction as substantive evidence relating to the felon in possession of a firearm charge. However, in the event the counts are separated, evidence of the prior conviction may be admissible to impeach Defendant's credibility, but it would not be admitted as substantive evidence. Given this, the need for separate trials is apparent. Failure to separate the counts in different trials disables Defendant from presenting her constitutionally protected right to assert her defense to the charges brought. Moreover, to separate the counts into different trials would follow the directive handed down by *State v. Ritter*.

Therefore, the counts should be separated into different trials because joinder of the claims in one trial would inhibit Defendant's ability to testify in her own defense because evidence of her prior conviction could be admitted as substantive evidence if the trials are combined.

In conclusion, joinder of all three counts would prejudice the Defendant in more ways than one. In conjunction with prejudice, the joinder of all counts is improper pursuant to FRCP Rule 8(a). Therefore, this court should separate the counts into different trials to permit the Defendant to present her defense without undue prejudice.

MPT-2 — Sample Answer 2

Motion to Sever

Statement of the Case:

Statement of Facts:

ARGUMENT

According to Franklin Rule of Criminal Procedure (FRCP), if the joinder of offenses or defendants in an indictment, an information, or consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants, trials, or provide any other relief that justice so requires. *FRCP 14a*. Here, the joinder of all three trials should be severed because, if allowed, the joinder will be unfairly prejudicial to Ms. Sylvia Ford.

When determining severance, there are three kinds of prejudice if separate offenses, particularly those that are merely of similar character and do not arise out of a single transaction, are joined. They are discussed below.

I. Sylvia will be prejudiced by the joinder of the offenses because the jury will consider her a bad person of all offenses because she is charged with more than one.

The defendant may be prejudiced because the jury could consider the defendant a bad person and find him guilty of all offenses simply because he is charged with more than one offense, but this is rarely a sufficient basis to justify severance. *State v. Ritter, Franklin Court of Appeal (2005)*. Here, Sylvia has been charged with multiple offenses, two drug offenses and one weapons charge. The jury will consider her a bad person based on her being charged with three offenses, and, therefore, she will be prejudiced by joinder of offenses.

II. Severance should occur because evidence that Sylvia is guilty of one offense may be used to convict her of another offense even though the evidence would have been inadmissible in separate trials.

If two or more offenses are of the same or similar character, are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan, they may be charged in the same indictment. *FRCP 8a; State v. Sayers, Franklin Court of Appeal (2013)*. The burden is on the defendant to establish severance of joinder and the court should generally limit itself to those facts contained in the indictment, but if the indictment does not provide sufficient facts to clarify the connection between the counts, the trial court may look to other documentary evidence in the case such as affidavits in support of arrests or affidavits in support of search warrants. *Id.* In *Sayers*, the court stated that just because two charges had "robbery" in their titles, the charges weren't entitled to joinder alone. *Id.* Because they were different types of robberies and they were two years apart, and there was no other evidence, including affidavits,

used to support a find that the acts were of the same character, transaction, or scheme, the charges didn't warrant joinder. *Id.* Here, both charges are for drugs, but they contain the same word like the robbery in *Saylers*, even though the charges concern drugs. Also, there are affidavits to support the charges, unlike in *Saylers*.

If proof of the defendant's commission of one of the illegal acts would not otherwise have been admissible in the trial for the other offense, the defendant will be prejudiced, and severance should be granted. *State v. Ritter*, Franklin Court of Appeal (2005). The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice or misleading the jury. FRCP Rule 403. In *Ritter*, the court found that the evidence of each heroin sale would have been permissible in a trial involving the other transaction because they go to show a common scheme or plan to sell heroin in the same neighborhood due to Ritter selling the heroin in the same area, from the same vehicle, in the same period of time. Also, the court found that carrying a weapon is highly correlated with the intent to sell drugs, similar to possession of baggies or scales, therefore, gun possession is relevant to intent and the probative value is not substantially outweighed by unfair prejudice, especially when there is a limiting instruction. Here, Sylvia has been charged with two drug charges. The first charge stems from the alleged sale of 10 grams of cocaine. While at her brother's apartment she answered the door, her brother gave a man cocaine and the man handed the money to Sylvia, which he immediately gave to her brother, and Sylvia then left. The second drug charge stems from a DUI arrest while Sylvia was driving her boyfriend's car, where after being arrested, the arresting officer found marijuana, a small scale, and empty baggies in the backseat. During that arrest, the officer found a handgun in the trunk. Because she was a felon, she was charged with being a felon in possession of firearm, but the DUI charge was let go. Sylvia's case is different from *Ritter* because the drug charges here are from two different substances, marijuana and cocaine, while in *Ritter* the drug charges both stemmed from marijuana. Also here, she was pulled over driving under the influence, while the other charge occurred. In *Ritter*, the evidence would have been admissible in each trial because they could use the evidence to show common plan, but here there is no common scheme or plan. The drugs are different types, she is being alleged to have one while on the road and one in a house, and there's evidence to show that the drugs belong to different people, her brother and her boyfriend. The evidence of the marijuana wouldn't be admissible at the trial for the cocaine and vice versa. Also, like in *Saylers*, the court can consider the time between offenses. Here, the assault conviction was from six years ago, even longer than the two years in *Saylers*. Therefore, if the trials are all together, Sylvia will be unfairly prejudiced.

III. Sylvia wouldn't testify in the trials for the separate drug charges because her prior assault conviction could be used to impeach so severance should be granted because forcing Sylvia to testify in one single trial unfairly prejudices her by allowing the prosecution to impeach her when she otherwise wouldn't be susceptible to this impeachment in separate trials.

Prejudice may result if the defendant wishes to testify in his own defense on one charge but not the other. *Ritter*. Additionally, severance of counts is warranted when a defendant has made a convincing showing that he has both important testimony to give concerning one count and a strong need to refrain from testifying on the other. In *State v. Pierce*, Franklin Court of Appeal

(2011), court found severance was appropriate because if it weren't for joinder of the offenses in one indictment, the jury would have no reason to know about separate protective orders. The court stated that because the second order wasn't relevant to any issue in the trial for violation of the first order, the introduction of the second order prejudiced the defendant, reasoning that when a jury learns of a separate offense committed by a defendant, jury can be tempted to infer the worst. In *Pierce*, the jury would have no reason to know about the second order if it weren't for the joined trials. *Id.* Here, Sylvia has been convicted for assault with intent to commit murder previously. If she testifies in the trials for the drug charges, the prosecution could use her prior assault conviction to impeach her because it is a felony and admissible. So would be advantageous for her not testify for those charges to keep her prior convictions from damaging her credibility for the jury.

We believe Severance should be granted because joinder is unfairly prejudicial to Sylvia.

STATE OF FRANKLIN
DISTRICT COURT OF HAMILTON COUNTY

STATE OF FRANKLIN

Plaintiff,

v.

Case No. 2021 CF 336

SYLVIA RUTH FORD

Defendant.

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO SEVER OFFENSES

Statement of the Case: (Omitted)

Statement of Facts: (Omitted)

Argument:

Defendant Sylvia Ford ("Defendant") moves this court to sever these three offenses and hold three separate trials because joinder of these convictions would unfairly prejudice her if joined in a single trial. Under the Franklin Rules of Criminal Procedure (FRCP), Rule 8 states that joinder of offenses is permissible if the offenses are (1) of the same or similar character; (2) are based on the same act or transaction; or (3) are connected with or constitute parts of a common scheme or plan. Relief from joinder may be granted under FRCP Rule 14 if joinder appears to prejudice a defendant or the government. For the following reasons, Defendant's claims should be tried in three separate and distinct trials.

If Defendant is charged with all three acts in one trial, she will be unfairly prejudiced because admission of these acts will constitute impermissible character evidence that would not otherwise be admissible in separate trials under the Federal Rules of Evidence.

Under Franklin Rules of Evidence Rule 403, the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of...unfair prejudice. Additionally, Franklin Rule of Evidence 404(b) prevents evidence of other crimes, wrongs, or acts from being admitted as impermissible character evidence to prove that on a particular occasion the person acted in accordance with the character.

Defendant's charges are wholly unrelated to each other, and if they were tried in separate trials, each distinct act would not be admissible because its probative value would substantially outweigh the risk of unfair prejudice. Although some of these instances may be admissible for other purposes, it would not have the same prejudicial effect as holding one trial for all three charges.

In *State v. Ritter*, the Franklin Court of Appeal noted that "carrying a weapon is highly correlated with the intent to sell drugs." Thus the State believes here that evidence of the handgun will be admissible regardless of whether or not the two incidents are tried separately. However, what would *not* be admissible is Defendant's prior felony charge for assault with a deadly weapon. If tried together, the jury will be alerted to the fact that Defendant has a prior felony for assault, which may unfairly prejudice Defendant as a jury may believe she has the propensity to commit violent crimes. Further, because Defendant intends to testify, it is possible that this evidence is admitted to impeach her, should it be relevant. Those admissions are acceptable under the Federal Rules of Evidence, but a single trial for all three would create a situation in which "the jury can be tempted to infer the worst about the defendant." *State v. Pierce*. Evidence of possession of the gun is not contested, but admitting evidence of Defendant's prior conviction for assault would likely fail as it does not speak to Defendant's "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident" when looked at in relation to her charge of possession and intent to distribute marijuana. See FRE 404(b)(2).

Further, Defendant has not been convicted of any drug charges yet. "Prejudice may occur if proof of the defendant's commission of one of the illegal acts would not otherwise have been admissible at a separate trial." *State v. Ritter*. Admission of the charge of intent to sell cocaine would be inadmissible to prove propensity in the trial for intent to sell heroin, as would its converse. In *Pierce*, the court found that evidence of two similar protective orders would not have been admissible if tried separately because they would have created significant jury bias. Additionally, the court held that the subsequent protective order was not relevant to any issue in the trial for the first order, such that *Pierce* was prejudiced by the introduction of this evidence. That is relevant to Defendant's current situation, in which two distinct incidents that led to similar charges would unfairly prejudice a jury into believe that Defendant had a propensity for selling drugs. Taken apart, with each incident's distinct circumstances (as discussed below), a jury might simply find that Defendant was in the wrong place at the wrong time in one instance or another.

Further, evidence of these drug trials would not have been admissible under any of the exceptions in 404(b)(2), except perhaps impeachment if Defendant testifies. In *Ritter*, in which the court found evidence of a common scheme or plan which *would* have been admissible at trial. In Defendant's case, the two acts resemble those in *Pierce*, as there is no evidence of common scheme or plan (see *infra*).

For those reasons, one trial of all three charges would unfairly prejudice Defendant's case in violation of FRCP Rule 14, and the three charges should be severed.

Simply because the two charges related to an intent to sell drugs does not mean they were "of the same or similar character" such that charges should be joined in a single indictment.

Defendant is charged with three counts - two relating to intent to sell drugs and one relating to possession of an illegal firearm. The distinction between the intent to sell drugs and the possession of a firearm as a convicted felon are clear. The question remains as to whether Defendant's two unrelated charges of intent to sell drugs are of the "same or similar character" such that they can be permissively joined under FRCP Rule 8.

"In deciding whether charges have been improperly joined, the trial court should generally limit itself to those facts contained in the indictment." *State v. Sayers*. However, if the indictment does not provide sufficient facts, "the trial court may look to other documentary evidence in the case." *Id.* In *Sayers*, the appellate court overturned a determination by the trial court that two incidents were related simply because "they both had robbery in their titles." The two incidents were distinct in that one was a robbery of a convenience store and one was attempted robbery of an individual in a state park. The Court of Appeal also found that the trial court erred in *not* looking at the available documentary evidence available.

In the present case, both the indictment and the documentary evidence show that the incidents described bear almost no common facts. The first incident, which occurred in April 2021, occurred when Defendant was seen receiving money for a drug transaction that was instigated by her brother. Officer Diaz states in his sworn affidavit that they had been tipped off about potential illegal activity at Defendant's brother's apartment, where Defendant happened to be at the time of the alleged activity. Defendant did not even hand the substance over to the informant, it was furnished by her brother, but she received the money from the informant, for which she was charged. The second incident, which occurred in October 2021, presented an entirely different set of facts. Officer Amanda Carter states that she pulled Defendant over for what appeared to be a DUI. After lawful arrest, she searched the back seat of the car and found baggies and scales, which are typically associated with intent to sell drugs. She also found four kilograms of marijuana. This car belonged to - and is registered to - Defendant's boyfriend. The circumstances here do not present evidence of same or similar character. One occurred when Defendant was visiting a relative, and one occurred when Defendant was driving someone else's vehicle. Additionally, these were different substances.

Timing is also relevant to whether two incidents were "same or similar." In *Sayers*, the court noted that 2 years had passed between the two incidents. This was a significant amount of time. Although Defendant's case presented a shorter time span, the two incidents still occurred six months apart, which should be considered in whether the two incidents were same or similar.

The three acts were not based on any of the same acts or transactions, as the two drug charges occurred six months apart, and the possession of the gun was not related to the possession of the drugs.

If the joined acts occurred as part of the same act or transaction, the acts may be joined. In the present case, it is clear that Count I and Counts II and III occurred at different times. But Counts II and III should not be considered part of the same act or transaction just because they were part of a single incident.

Count II is possession and intent to sell marijuana and Count III is felon in possession of a handgun. Defendant was charged with assault with intent to commit murder in 2015, making her possession of the handgun illegal. This felony is not related to the charge of intent to distribute marijuana. The discovery of the gun is incidental to an arrest, and may be introduced as evidence showing intent to distribute drugs (per *State v. Ritter*, as discussed, possession of weapons is correlated with selling drugs), but she is not a felon in possession of a handgun *because* she was convicted of a felony for selling drugs. Because the underlying felony related to the possession of the gun is not related, the two counts are not of the same act or transaction even though they were discovered during a single arrest.

The three acts were not part of a common scheme or plan, as all three are wholly unrelated to each other.

The three acts as outlined in the indictment are clearly not part of a common scheme or plan, as all three are wholly unrelated to each other. Count III is clearly distinct from Counts I and II because it is a felon in possession charge, and the underlying felony is not related to drugs. Count I and II are more closely related, but are also clearly distinct.

In *Ritter*, the court did not sever the defendant's indictments, because there was enough evidence that the two incidents *were* part of a common scheme or plan. The court noted that Ritter sold heroin in the same area, from the same vehicle, in the same period of time, which demonstrated a common scheme or plan and presented admissible evidence. Defendant's situation is entirely distinct from the case in *Ritter*. Defendant was not in the same place, the same vehicle, or the same time period when the two events occurred. Nor did the two events even constitute the same substance. If tried in two separate trials, it is likely that a court would find that admitting evidence of the other drug charge would be highly prejudicial to Defendant's case, and would prevent it from being entered. Therefore, these acts should not be permissively joined because they are not part of a common scheme or plan.

Conclusion

In conclusion, Defendant's indictment should be severed because evidence of each incident would be highly prejudicial to Defendant's case in all three instances. Further, the three instances should not be joined because they fail as to all three acceptable reasons for joinder under FRCP Rule 8 - they are not of the same or similar character, they do not arise out of the same acts or transactions, and they are not part of a common scheme or plan.