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In re Wendy Martel

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In re Wendy Martel

FILE

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FILE

Walden, Martin & Watterson LLP
Attorneys at Law
1550 Fleming Boulevard
Clayville, Franklin 33340

MEMORANDUM

To: Examinee
From: Kimberly Salter
Re: Wendy Martel matter
Date: February 26, 2013

We have been retained by Wendy Martel, a local attorney, in a matter involving fees arising from her representation of a client, David Panelli, M.D., in a sexual harassment action against his former supervisor, Heather Kern, M.D., at the Sandoval Medical Center.

I interviewed Martel yesterday and learned the basic facts. In 2009, Panelli retained Rebecca Blair, another local attorney, to bring his sexual harassment action against Kern under a contingent fee agreement. In 2011, solely as a result of a personality conflict, Panelli discharged Blair and then retained Martel under a similar contingent fee agreement. Martel recently settled the case and obtained a recovery of $600,000.

Martel contacted Panelli to let him know that she had received the settlement funds and that the money was ready to be disbursed. In response, Panelli instructed Martel not to disburse any of the recovery to Blair for the work she had done before he fired her, and not even to give Blair any information about the settlement. Martel seeks our advice on how to proceed.

Please draft an opinion letter in accordance with our guidelines, identifying the questions raised by these facts and advising Martel how she should proceed.

Walden, Martin & Watterson LLP
Attorneys at Law
1550 Fleming Boulevard
Clayville, Franklin 33340

MEMORANDUM

To: Associates
From: Executive Committee
Re: Opinion Letters
Date: December 22, 2009

The firm follows these guidelines in preparing opinion letters to clients. In such a letter to a client, *separately* discuss each question as follows:

- State the question.
- Provide a short answer to the question of no more than a few sentences.
- Analyze the issues raised by the question, including both the facts relevant to the question and how the applicable authorities combined with the relevant facts lead to your answer.

Write in a way that is suitable to the client's level of sophistication and that allows the client to follow your reasoning and the logic of your conclusions.

Transcript of Interview with Wendy Martel

February 25, 2013

Kimberly Salter: Wendy, good to see you. You told me a bit about the case on the phone. Why don't you fill me in on the details?

Wendy Martel: Sure. I've got a problem. My client is David Panelli, a psychiatrist here in Clayville. About three years ago, he sued Heather Kern, another psychiatrist, for sexual harassment. He had just completed his residency at the Sandoval Medical Center; Kern had been his supervisor.

Salter: I remember. It was quite a scandal.

Martel: Yes, it filled the papers. Anyway, Panelli hired a local attorney, Rebecca Blair, under a contingent fee agreement, setting her fee as one-third of anything she recovered during her representation.

Salter: So Blair was his original attorney, and she filed the sexual harassment action?

Martel: Right. She filed the complaint and initiated discovery. Soon after filing the action, she and Panelli started experiencing difficulties in communication. I can't say that either of them was at fault; it was just a personality conflict, but one that escalated over time. By July 2011, Panelli had had enough, and he fired Blair and hired me.

Salter: Did Panelli have problems with the quality of Blair's work?

Martel: No, not at all. It was personality, pure and simple.

Salter: Okay. On what basis did Panelli hire you?

Martel: A one-third contingent fee agreement, just like the one he had with Blair.

Salter: What happened next?

Martel: I reviewed the file after I got it from Blair and found she had done a very good job in litigating the case. I also found a copy of a notice of statutory lien she had filed early on to obtain a security interest in any recovery she obtained for Panelli during her representation. It's standard practice in Franklin in contingent fee cases to file such a lien; here's a copy. I went on to complete discovery and filed a summary judgment motion. The court denied it. Pretty soon, however, Kern's lawyer came to appreciate the strength of our case, and we started to discuss

settlement. Last month, we settled the case for $600,000 and filed a dismissal of the action with prejudice.

In the settlement agreement, I obligated myself to pay any claim Blair might have out of the $600,000 and to indemnify Kern and her lawyer in case Blair made any claim against them. That's standard practice in Franklin. Usually, the attorneys can work these matters out.

Salter: Have the settlement funds come through?

Martel: Yes. I just received the check. I have not even cashed it yet.

Salter: Then what?

Martel: I figured I needed to give Panelli what was his and pay Blair something—precisely how much, I didn't know. My practice in situations like this is simply to get on the phone with the other lawyer and work things out informally.

Salter: You didn't do that here?

Martel: No. I sent Panelli an email—here's a copy—telling him I had received the settlement funds. Panelli immediately replied, instructing me not to give Blair anything and not even to tell her anything. I brought his email also. That is when I realized I was in over my head and needed help. So I called you.

Salter: The help you want is an opinion letter, right?

Martel: Right. I need to know how to proceed now that I have the settlement funds. Whatever I do, I want to be sure I am in compliance with Franklin's ethical rules.

Salter: We'll research the issues. What's your time frame?

Martel: Can you get me something soon?

Salter: How about by Thursday?

Martel: That's fine. Thanks, I really appreciate it.

Salter: Thanks. That's all I need. I'll be in touch by Thursday.

STATE OF FRANKLIN

DISTRICT COURT OF SHELBY COUNTY

DAVID PANELLI, M.D.,	)	No. Civ. 640100
Plaintiff,	)	
v.	)	**NOTICE OF LIEN**
HEATHER KERN, M.D.,	)	(Franklin Rev. Stat. § 6070)
Defendant.	)	
	)	

TO ALL PARTIES AND THEIR ATTORNEYS AND TO ALL OTHERS INTERESTED HEREIN:

PLEASE TAKE NOTICE THAT Rebecca Blair, of the Law Offices of Rebecca Blair, attorney of record for Plaintiff David Panelli, M.D., has and claims a lien, under Franklin Revised Statutes § 6070, ahead of all others on Plaintiff's interest in any recovery Blair may obtain herein on Plaintiff's behalf during her representation to secure payment for fees earned.

Date: November 20, 2009

Rebecca Blair

Rebecca Blair

LAW OFFICES OF REBECCA BLAIR
Attorney for Plaintiff David Panelli, M.D.

Email Correspondence

From: Wendy Martel
Sent: Friday, February 22, 2013; 4:24 PM
To: David Panelli
Subject: Settlement Funds

Dear David:

I just received the $600,000 settlement. Before I can proceed further, I've got to notify Rebecca Blair so that she and I can work out some arrangement about sharing the fees. I'll let you know what results.

Best wishes,

Wendy

Wendy Martel
Law Offices of Wendy Martel
100 Drumm Street
Clayville, Franklin 33340
Telephone: 255.555.0859
Email: wmartel@martellaw.com

From: David Panelli
Sent: Friday, February 22, 2013; 4:28 PM
To: Wendy Martel
Subject: RE: Settlement Funds

Wendy:

You must remember, I fired Blair eighteen months ago; I want her to remain fired. I forbid you to tell her anything about the settlement or to give her anything. You got me the recovery; she didn't. You've earned your fee; take it and send me what's mine.

David

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EXCERPTS FROM FRANKLIN RULES OF PROFESSIONAL CONDUCT

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

. . .

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Rule 1.4 Communications

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

. . . or

(6) to comply with other law or a court order.

Comment

* * *

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. This contributes to the trust that is the hallmark of the client-lawyer relationship. . . . Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the

client but also to all information relating to the representation. A lawyer may not disclose such information except as required or permitted by the Rules of Professional Conduct or other law.

* * *

[16] . . . In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish one of the purposes specified in Rule 1.6(b).

Rule 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

. . .

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

STATE BAR OF FRANKLIN

ETHICS OPINION NO. 2003-101

Issue:

Client retains Attorney for representation in a personal injury action under a contingent fee agreement entitling Attorney to one-third of any recovery he obtains during his representation. Client obtains medical care from Physician, agreeing that Physician will be paid $10,000 out of the proceeds of any recovery. Attorney and Client both have knowledge of Physician's interest in the recovery. After Attorney obtains a recovery for Client in the amount of $300,000 and places the resulting funds in a trust account, Client instructs Attorney to disburse $100,000 to himself for his fees, to disburse the remaining $200,000 to Client, and not to disburse the $10,000 to Physician. What should Attorney do in this situation?

Digest:

Attorney should contact Client and Physician, describing the existence and details of the dispute and stating (1) that Attorney cannot represent either Client or Physician in the dispute; (2) that if Client and Physician agree, Attorney will retain the disputed $10,000 in trust until they resolve the dispute; but (3) that in the absence of such an agreement, Attorney will seek guidance from the court. Attorney should also disburse to Client that portion of the funds that is undisputed.

Discussion:

In *Greenbaum v. State Bar* (Fr. Sup. Ct. 1996), the Franklin Supreme Court held that an attorney must promptly disburse to the client any funds that the attorney holds in trust for the client that the client is entitled to receive. *Greenbaum* qualified its holding by stating that the attorney may nevertheless continue to hold in trust, even contrary to the client's instructions, any portion of such funds on which the attorney has a claim in conflict with the client. *Greenbaum*, however, did not address the situation in which a third party has such a conflicting claim. The Franklin Rules of Professional Conduct address this issue briefly in the comment to Rule 1.15:

> Third parties may have lawful claims against funds held in trust by an attorney, such as a client's creditor who has a lien on funds recovered in a personal injury action. An attorney may have a duty to protect such a third-party claim against

> wrongful interference by the client, as when the attorney has entered into a fiduciary relationship with the third party. In such cases, the attorney must refuse to surrender the funds to the client until the claim has been resolved, and must so advise the client. An attorney should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

Under the facts stated, Attorney must act as follows to remain within the parameters established by our Rules of Professional Conduct:

1. An attorney must disburse to a client such funds as the attorney holds in trust for the client *to which the client is entitled.* Under the facts stated, in representing Client, Attorney had knowledge of the existence of Physician's interest in the funds in question. As a result, Attorney entered into a fiduciary relationship with Physician by operation of law and subjected himself to the fiduciary duties to deal with Physician with utmost good faith and fairness and to disclose to Physician material facts relating to Physician's interest in the funds. *Cf. Johnson v. State Bar* (Fr. Sup. Ct. 2000) (by representing client with knowledge of chiropractor's lien, attorney entered into fiduciary relationship and subjected herself to fiduciary duties to deal with chiropractor with utmost good faith and fairness and to disclose material facts, that is, those facts that are "significant or essential to the issue or matter at hand"). Under such circumstances, Attorney's disbursement of the disputed $10,000 to Client would violate Attorney's fiduciary duties to Physician and would make Attorney liable for compensatory and perhaps even punitive damages. Attorney's disbursement would also make Client liable for breach of contract. Franklin Rule of Professional Conduct 1.4(a)(5) requires a lawyer to "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by [these rules] or other law." For this reason, Attorney's disbursement of the disputed funds to Client would be fraught with difficulties.

2. Attorney's disbursement of the disputed $10,000 to Physician contrary to Client's instructions would violate Attorney's duties under *Greenbaum. Greenbaum* requires Attorney to disburse to

Client all such funds as Client is entitled to receive. It is risky for Attorney unilaterally to determine Client's "entitlement." The reasons for Client's demand that Attorney not disburse the $10,000 to Physician are unstated and may or may not be legitimate. For example, Client may have an evil motive, or Client may be misinformed about something and that misinformation has led to his instruction to Attorney. Whatever his reasons, they are not clear from the facts before us and may not be clear to Attorney. There are, in addition, fiduciary duties burdening Attorney in favor of Physician. For those reasons, Attorney would be ill-advised to prejudge the merits of such a dispute and act in favor of either Client or Physician.

3. If Client and Physician are unable to resolve their dispute, Attorney should seek guidance from the court and so inform Client and Physician.

This opinion is issued by the State Bar of Franklin pursuant to authority delegated to it by the Franklin Supreme Court. It is intended to guide attorneys who practice in the State of Franklin but does not purport to bind any court or other tribunal.

Clements v. Summerfield

Franklin Supreme Court (1992)

Plaintiff Ralph Clements, an attorney, was retained by defendant Marian Summerfield to bring an action for personal injury. Clements and Summerfield entered into a contingent fee agreement, under which Summerfield agreed to pay Clements one-third of any recovery he obtained during his representation. Some time thereafter, but before any recovery had been obtained, Summerfield discharged Clements and retained another attorney.

Clements then filed the present action against Summerfield, alleging that Summerfield breached the contingent fee agreement by discharging him without cause and by refusing to pay him his fees. Clements sought a declaration that the agreement was valid and that he had a one-third interest in any recovery ultimately obtained. Summerfield moved to dismiss the action on the ground that Clements did not and could not state a claim for relief. The district court granted the motion and dismissed the action. The Court of Appeal affirmed. We granted review.

Under a contingent fee agreement, an attorney does not have any right to fees unless and until the contingency specified has occurred. Without a right to fees, the attorney does not have a cause of action against the client for breach arising from failure to pay. The contingency specified may occur after the attorney's representation has terminated and another attorney has taken his or her place. In that case, the discharged attorney's right to, and cause of action for, fees is limited to *quantum meruit*, that is, the reasonable value of the services rendered during his or her representation, paid as a share of the total fees payable to the successor attorney—not as something in addition to those fees. Otherwise, the client's right to discharge the discharged attorney, which is absolute, might be unduly burdened by the prospect of paying the original attorney's full fees plus fees to the successor attorney as well.

We find no injustice in limiting the fees of the discharged attorney to an amount consisting of the reasonable value of the services rendered during the representation. In doing so, we preserve, as noted, the client's absolute right to discharge the discharged attorney. We also preserve the discharged attorney's right to fees that are fair. Of course, what fees are fair for the discharged attorney depends on the facts of the individual case as seen through the lens of equity, and may range from nothing out of the total fees payable to the successor attorney to the total fees in their entirety. We

expect that in all but the rarest case, a fair fee for the discharged attorney will fall somewhere between those extremes. We trust that trial courts will be able to strike an appropriate balance.[1]

In light of the foregoing, Clements' action is premature. Since Summerfield has yet to obtain any recovery in her personal injury action, the contingency specified in the contingent fee agreement has yet to occur. As a result, Clements does not yet have any right to fees from Summerfield, and hence does not yet have a cause of action against her for fees.

Affirmed.

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[1]By way of illustration, if a discharged attorney obtained no recovery during his representation, he would be entitled to nothing under his contingent fee agreement. If a successor attorney subsequently obtained a recovery during her representation, she would be entitled to receive whatever her contingent fee agreement specified—for example, if she had a one-third contingent fee agreement and obtained a $300,000 recovery, she would be entitled to receive $100,000. The discharged attorney would then be entitled to receive whatever share, if any, of the $100,000 fee received by the successor attorney that the court determined to be the reasonable value of his services under the circumstances.

1) MPT1 - Please type your answer to MPT 1 below

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When finished with this question, click Â to advance to the next question.
(Essay)

======== Start of Answer #1 (1509 words) ========

Wendy Martel

Martel, Adams & Thomas, LLP

5390 Markham

Clayville, Franklin 33340

Re: David Panelli settlement issues

Wendy,

In response to our conversations regarding David Panelli and his settlement funds, I have reached the following conclusions:

(1) What is the scope of ethical disclosure regarding your informing Ms. Blair of the settlement?

First, counsel Mr. Panelli that he is attempting to use your relationship and confidentiality to defraud his former attorney. Explain to him the consequences and ramifications of his purported path of conduct, and try to reason with him to consent to slpitting the funds. If he does not consent, advise him that you are not ethically able to fail to disclose the existence of the settlement to Ms. Blair because she is an interested third party with a knowledgable lien on

recovery. However, you must narrowly and reasonably disclose to Ms. Blair only the information necessary. By following these steps, you will not be violating the Franklin Rules of Professional Conduct.

Pursuant to Frankling Rules of Professional Conduct (FRPC) Rule 1.2, a lawyer shall abide by the client's decisions concerning the objectives of representation, and shall consult with the client as to the means by which they are to be pursued. A lawyer cannot counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but may discuss with said client the legal consequences of the proposed course of action and may assist the client to make a good faith effort to determine that validity, scope, meaning or application of the law. This is applicable to informing Mr. Panelli of the legal ramifications of his stated course of action, and to assisting him in making a better decision, and eventually consenting to your disclosing the settlement and releasing funds to Ms. Blair. Ideally, this would terminate the need for any further research, and the rest of this letter will be unneeded. However, in the chance that Mr. Panelli refuses to give consent, the following paragraphs will tell you how to proceed in terms of confidentiality and disclosure.

Rule 1.6 states that a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is inpliedly authorized in order to carry out representation, or the disclosure is permitted for 1) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyers services, or 2) to comply with other law or a court order. Further, Rule 4.1 provides that a lawyer hall not knowingly fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless it is

prohibited by Rule 1.6 (above). In your case, it seems that your client is attempting to use the attorney-client privilege to defraud a third-party creditor, his former attorney. Because Ms. Blair has filed a statutory lien with regards to the recovery, you may also disclose the existence of the settlement in order to comply with that document in the court.

Ethically, you may not fail to disclose the existence of the settlement to Ms. Blair. However, a disclosure adverse to the client's interests should be no greater than the lawyer reasonably believes necessary to accomplish this purpose, so be sure to only give the necessary information to Ms. Blair.

(2) In light of the ethical considerations, how should you proceed with regard to the settlement money?

Place the funds in a trust account separate from your own property. It must be either in the state of Frankin, or elsewhere with Mr. Panelli's consent. You may release any undisputed money that Mr. Panelli is entitled to (I believe 2/3 of his $600,000 settlement would be $400,000), but the settlement money in dispute must be kept in trust. Because the fees owed to Ms. Blair will be a portion of your own fees that Mr. Panelli is not claiming ownership to, the only part of the settlement that should not be distributed is $200,000. Inform Mr. Panelli and Ms. Blair of the money held in trust, and that an action may be filed in the court to resolve the dispute.

In Clements v. Summerfield, the court held that under a contingent fee agreement, an attorney does not have any right to fees unless and until the contongency specified has occurred.

Where the contongency specified occurs after the attorney's representation has been terminatied and another attorney has taken his place, the discharged attorney's right to, and cause of action for, fees is limited to quantum meruit: the reasonable value of the services rendered during his or her representation, paid as a share of the total fees payable to the successor attorney. Thus, the amount of fees owed to Ms. Blair will be a portion of your own fees, not an additional fee to be taken from Mr. Panelli's recovery. The fairness of the fee paid to Ms. Blair depends on the facts of the individual case viewed equitably. Given that she filed the motion and started discovery (that you say was "very good"), and you completed discovery and settled the case, you may be looking at a half-and-half split.

Greenbaum v. State Bar (Fr. Sup. Ct. 1996) provided that an attorney must promptly disburse any funds that the attorney holds in trust for the client that the client is entitled to receive. This holding was further qualified by stating that the attorney may, nevertheless continue to hold in trust, even contrary to the client's instructions, any portion of such funds on which the attorney has a clain in conflict with the client. While this holding does not specifically address a situation in which a third party has a conflicting claim, when read in conjunction with FRPC's comment to Rule 1.15 (on safekeeping property), it has been extended to protect the lawful claims of lienholders. In these cases, the attorney must refuse to surrender the funds to the client until the claim has been resolved. However, a distinguishing factor in your own case is that, when read with Clements, the money owed to Ms. Blair is not being claimed by your client for his use- it is being held up by the client's insistence that you not share any of your fees with Ms. Blair. State Bar of Franklin Ethics Opinion No. 2003-101 suggests that because you have knowlege of the existence of Ms. Blair's interests in the funds that you have entered into a fiduciary duty with Ms. Blair by operation of law and have subjected yourself to a duty to deal with Ms. Blair with utmost good faith and fairness and to disclose to Ms. Blair any material facts relating to her

interest in the funds. Johnson v. State Bar also addresses the issue of a fidiciary duty between a lawyer and a third-party when the lawyer has knowledge of the third party's lien. Therefore, because you knew of Ms. Blair's lien interest, you owe her a fiduciary duty of good faith: to not release that money owed to her to either the client or for your own personal use.

In light of the foregoing facts and applicable law, it is my belief that the best way to proceed is to inform Mr. Panelli that you cannot lawfully fail to disclose the recovery to his former attorney, Ms. Blair. Inform Mr. Panelli of the legal consequences of his proposed conduct: that he would be attempting to defraud his former attorney and the court's statutory lien pertaining to recovery. Advise your client that under the FRPC, you are not ethically able to conceal the presence of the settlement or deny her the portion of recovery reasonably attributed to her work. Perhaps this will give him the information necessary to make a better decision: you know as well as I do that at the end of the day, 95% of clients will eventually agree with their attorneys.

However, in the slight chance that Mr. Nanelli does not give consent to pay Ms. Blair, you may release the settlement funds that he is entitled to, pursuant to Greenbaum (I believe $400,000), but you must keep separate the funds allocated to contingent attorneys' fees ($200,000). You cannot disperse the fee owed to Ms. Blair at the time because it is contrary to Mr. Panelli's wishes. Then inform both Mr. Panelli and Ms. Blair that an action may be filed to have the court resolve the dispute as to what will be paid to whom in terms of the attorneys' fees. Hopefully, however, it will not come to this, and Mr. Panelli will consent to the disclosure and release of funds to Ms. Blair.

If you have any further questions, please do not hesitate to contact me at (479) 848-5331.

Sincerely,

Lawyer McLawyerson

Walden, Martin & Watterson LLP

Attorneys at Law

1550 Fleming Boulevard

Calyville, Franklin 33340

======== End of Answer #1 ========
END OF EXAM

Applicant Number

02015

MPT-2
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In re Guardianship of Will Fox

Read the directions on the back cover.
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In re Guardianship of Will Fox

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PINE, BRYCE & DIAL, LLP
1348 W. Main Street
Melville, Franklin 33521

M E M O R A N D U M

To: Examinee
From: Karen Pine
Date: February 26, 2013
Re: Fox Guardianship and Motion to Transfer

Our client, Betty Fox, is a member of the Blackhawk Tribe, lives on the Blackhawk Reservation, and is the paternal grandmother of Will Fox, age 10. Will's mother is dead, and his father (Betty's son) is incapacitated as a result of a recent automobile accident. When the accident happened, Betty moved into her son's house to care for Will. She has been planning to move Will to her home on the Reservation and was surprised to learn that Will's maternal grandparents, Don and Frances Loden, had filed a Petition for Guardianship and Temporary Custody in Oak County District Court.

After consultation with Betty, I filed a petition on her behalf in Blackhawk Tribal Court requesting that she be appointed Will's guardian. I also filed a motion to transfer the Lodens' state court proceeding to the tribal court. The state court has ordered simultaneous briefs on our motion to transfer.

Please prepare our brief in support of the Motion to Transfer Case to Blackhawk Tribal Court. Be sure to follow the firm's guidelines on persuasive briefs, but do not include a separate statement of facts. Make all the arguments needed to establish that the state court should transfer the case. Anticipate and respond to any arguments against the transfer to tribal court that the Lodens' attorney is likely to raise.

PINE, BRYCE & DIAL, LLP

M E M O R A N D U M

To: All Lawyers
From: Litigation Supervisor
Date: August 14, 2009
Re: Persuasive Briefs

All persuasive briefs shall conform to the following guidelines:

Statement of the Case

In one paragraph, provide a succinct statement of the parties, the nature of the case (e.g., complaint for declaratory relief), and the matter or issue in dispute (e.g., lack of jurisdiction). When needed, note the posture of the case (e.g., discovery is completed). Finally, briefly explain the client's requested relief (e.g., grant the motion to dismiss). **For example: The patient has sued her physician for negligence in failing to diagnose colon cancer following the patient's colonoscopy. The patient's expert has testified that the cancer was readily detectable from the colonoscopy. The physician has filed a motion to dismiss, raising an issue involving the expert's qualifications. The patient objects and asks the court to deny the motion.**

Statement of Facts [omitted]

Body of the Argument

The body of each argument should analyze applicable legal authority and persuasively argue how both the facts and the law support our client's position. Supporting authority should be emphasized, but contrary authority should generally be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefing. Be mindful that courts are not persuaded by exaggerated, unsupported arguments.

Break the argument into its major components and write carefully crafted subject headings that illustrate the arguments they cover. The argument headings should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. **For example, <u>improper</u>: It is not in the child's best interests to be placed in the mother's custody. <u>Proper</u>: Evidence that the mother has been convicted of child abuse is sufficient to establish that it is not in the child's best interests to be placed in the mother's custody.**

Do not prepare a table of contents, a table of cases, or an index.

STATE OF FRANKLIN
DISTRICT COURT OF OAK COUNTY

IN THE MATTER OF THE PETITION OF Don and Frances Loden, Husband and Wife, **FOR GUARDIANSHIP AND TEMPORARY CUSTODY OF** Will Fox, a minor (DOB 1/3/03)	Case No. 2013- FA-238

PETITION FOR GUARDIANSHIP AND TEMPORARY CUSTODY

Petitioners Don and Frances Loden allege as follows:

1. Petitioners are husband and wife, of lawful age and under no legal disability, and reside in the city of Melville, Oak County, Franklin. They are the maternal grandparents of Will Fox.

2. Will Fox is 10 years of age and was born in Melville, Franklin, on January 3, 2003, and has lived here his entire life.

3. Sally Loden Fox, Petitioners' daughter, was Will's biological mother. She died in childbirth. Will's biological father, Joseph Fox, suffered an incapacitating brain injury in a car accident on November 21, 2012. Joseph is in a coma and unable to care for Will. Will has no court-appointed guardian and, since his father's accident, has been cared for by Petitioners and by his paternal grandmother.

4. Petitioners are part of Will's extended family. Will has resided with Petitioners periodically since the death of his mother. Will has attended school and has received medical care in Melville, near Petitioners' home. Will has cousins and playmates in Melville.

5. Petitioners are reputable persons of good moral character with sufficient ability and financial means to rear, nurture, and educate Will in a suitable and proper manner.

YOUR PETITIONERS PRAY THE COURT to appoint Petitioners as guardians and temporary custodians of the minor, Will Fox.

Frank Byers

Filed: February 1, 2013

Frank Byers
LAW OFFICES OF FRANK BYERS
Attorney for Petitioners Don and Frances Loden

STATE OF FRANKLIN
DISTRICT COURT OF OAK COUNTY

IN THE MATTER OF THE PETITION OF Don and Frances Loden, Husband and Wife, **FOR GUARDIANSHIP AND TEMPORARY CUSTODY OF** Will Fox, a minor (DOB 1/3/03)	Case No. 2013-FA-238

MOTION TO TRANSFER CASE TO TRIBAL COURT

Betty Fox moves the Court to transfer this action to the Tribal Court of the Blackhawk Tribe, pursuant to the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901 *et seq.*, and states:

1. Will Fox is an "Indian child" as defined by ICWA, is under 18 years of age, and is a member of the Tribe.

2. Will is the biological son of Joseph Fox, a member of the Blackhawk Tribe, and Sally Loden Fox. Sally died on January 3, 2003. Joseph is incapacitated as the result of a car accident that occurred on November 21, 2012. Betty Fox is the mother of Joseph and the paternal grandmother of Will.

3. The Blackhawk Tribe is an "Indian tribe" as defined by ICWA, 25 U.S.C. § 1903.

4. The Blackhawk Tribe is "the Indian child's tribe" as defined by ICWA, in that the child is a member of the Tribe.

5. This is a "child custody proceeding" subject to transfer to the Blackhawk Tribal Court under ICWA.

6. ICWA requires that the state court transfer a child custody proceeding involving an Indian child to the jurisdiction of the tribe when the Indian custodian petitions the state court to do so, unless there is good cause not to do so. 25 U.S.C. § 1911(b).

7. In accordance with Blackhawk tribal custom, Betty Fox is the Indian custodian of the child in that she is the only living Indian grandparent and that she has physical care, custody, and control of the child. Betty Fox has been the principal caregiver of Will since the incapacitation of his only living parent, Joseph.

8. Good cause does not exist to deny transfer of this proceeding.

9. Betty Fox filed a Petition for Guardianship of Will in the Blackhawk Tribal Court on February 11, 2013.

WHEREFORE Betty Fox asks the Court to transfer the above-captioned proceeding to the Tribal Court of the Blackhawk Tribe and to grant such other relief as the Court deems just and proper.

Karen Pine

Filed: February 11, 2013

Karen Pine
LAW OFFICES OF PINE, BRYCE & DIAL, LLP
Attorney for Petitioner Betty Fox

IN THE TRIBAL COURT OF THE BLACKHAWK TRIBE

IN RE THE GUARDIANSHIP OF	)	
Will Fox, a minor	)	
Betty Fox,	)	Case No. FAM 13-3
Petitioner	)	

PETITION FOR GUARDIANSHIP

Betty Fox petitions this Tribal Court to permit her to become guardian of the minor child Will Fox (DOB 1/3/03) and states as follows:

1. Betty Fox is of lawful age and under no legal disability. She is a member of the Blackhawk Tribe and resides on the Reservation of the Blackhawk Tribe within the borders of the State of Franklin. She has resided on the Reservation from birth to the present.

2. Betty Fox desires to be appointed the guardian and custodian of Will Fox, a male minor child who is 10 years of age. Betty Fox is the paternal grandmother of Will.

3. The biological mother of the child was Sally Loden Fox, a non-Indian, who died in childbirth on January 3, 2003. The biological father of the child is Joseph Fox, who was severely injured in an automobile accident on November 21, 2012, and remains in a coma. He is unable to care for Will.

4. Both Joseph Fox and Will Fox are members of the Blackhawk Tribe, as demonstrated by the letter from the Tribal Court of the Blackhawk Tribe, attached.

5. Will resided with his father in Melville, Franklin, approximately 250 miles (a three- to four-hour drive) from the Reservation, from his birth to the date of his father's accident. He has continued to reside there in the care of Betty Fox since his father's accident, visiting occasionally with his maternal grandparents, Don and Frances Loden. Since the age of six, Will has attended the annual powwows on the Reservation with Betty Fox.

6. On February 1, 2013, Don and Frances Loden filed a petition in the District Court of Oak County, State of Franklin, Case No. 2013-FA-238, seeking guardianship and temporary custody of Will. No orders have been entered in any court affecting the custody or guardianship of Will or the parental rights of Joseph.

7. Don and Frances Loden are not members of any tribe.

8. On February 11, 2013, Betty Fox filed a motion in the District Court of Oak County, State of Franklin, seeking to transfer the state court proceeding from state court to the Tribal Court of the Blackhawk Tribe, pursuant to the Indian Child Welfare Act, 25 U.S.C. §§ 1901 *et seq.*

9. Betty Fox is a reputable person of good moral character with sufficient ability and financial means to rear, nurture, and educate the child in a suitable and proper manner. She is part of Will's extended family and is Indian.

Wherefore, Petitioner Betty Fox asks the Tribal Court:

A. To accept transfer of jurisdiction of Case No. 2013-FA-238 from the District Court of Oak County, State of Franklin, to this Tribal Court and deny the Lodens' petition.

B. To appoint Betty Fox guardian of Will Fox.

C. For such further relief and for the entry of such additional order or orders as may be necessary or appropriate in this proceeding.

Karen Pine

Filed: February 11, 2013

Karen Pine
LAW OFFICES OF PINE, BRYCE & DIAL, LLP
Attorney for Petitioner Betty Fox

BLACKHAWK TRIBAL COURT

P.O. Box 752

BLACKHAWK AGENCY, FRANKLIN 33912-0752

Re: Will Fox

Date: February 10, 2013

TO WHOM IT MAY CONCERN:

This letter confirms that the following persons are members of the Blackhawk Tribe:

Betty Fox (DOB July 31, 1959)

Joseph Fox (DOB October 6, 1982)

Will Fox (DOB January 3, 2003)

This letter attests that the Blackhawk Tribe is a recognized tribe under the Indian Child Welfare Act (ICWA) and that the Blackhawk Tribal Court is a recognized instrumentality of the Tribe. The Tribal Court has a family court unit, with power and authority over any family matter. I am the ICWA Director.

Sam Waters

ICWA Director

Email from Joseph Fox to Betty Fox

From: Joseph Fox
Sent: August 23, 2011
To: Betty Fox
Subject: Will's Visit

Mom,

Will loved attending the powwow on the Reservation last week. This was his third powwow—he can't stop talking about it. And he loved spending the week with you. He is already talking about going to the powwow next year, and of course, we will both be with you for the holidays. I know that the long drive is tiring, but it's worth it to see how much Will loves being on the Reservation. I hope he always remembers that he is a Blackhawk. Will loves visiting Sally's parents as well. I hope nothing ever happens to me, but it is great to know that Will has grandparents who love him.

Love,

Joseph

Excerpt from *Journal of Native American Law*, Vol. 8 (2003)

Native American Customs Regarding Care of Children

The Indian Child Welfare Act (25 U.S.C. §§ 1901 *et seq.*) was enacted to address abuses in the removal of Native American ("Indian" as the Act calls them) children from their homes and therefore from their tribes and reservations. The Senate hearings revealed a lack of understanding of Native American customs among those officials entrusted with placement of children.

Almost all Native American tribes have a long-standing custom or practice of caring for their children within the extended family. Even where Native American parents have not appointed a custodian, tribes expect that an extended family member will become the custodian of the child. In most tribes, it is expected that the maternal grandparents, if available, will be the custodians if the natural parents are deceased or unable to parent the children. A few tribes, such as the Blackhawk, expect that the Native American grandparents, maternal or paternal, will become the custodians.

Although guardianship is established by native custom and practice, it is not unusual for those who have become guardians through native custom or practice to seek tribal court appointment as guardians. This step is taken for practical reasons because the tribal court's order appointing the guardian avoids disputes with various entities, such as schools, medical providers, and the like.

* * * *

LIBRARY

EXCERPTS FROM THE INDIAN CHILD WELFARE ACT OF 1978 (TITLE 25 U.S.C.)

§ 1902 Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

§ 1903 Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

. . .

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe . . . ;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

. . .

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

. . .

§ 1911 Indian tribe jurisdiction over Indian child custody proceedings

. . .

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided,* that such transfer shall be subject to declination by the tribal court of such tribe.

DEPARTMENT OF THE INTERIOR

BUREAU OF INDIAN AFFAIRS

GUIDELINES FOR STATE COURTS; INDIAN CHILD CUSTODY PROCEEDINGS

* * * *

Determination of Good Cause to the Contrary

(a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by [25 U.S.C. §§ 1901 *et seq.* (Indian Child Welfare Act)] to which the case can be transferred.

(b) Good cause not to transfer this proceeding may exist if any of the following circumstances exists:

(i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.

(ii) The Indian child is over 12 years of age and objects to the transfer.

(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.

(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

(c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

(d) The burden of establishing good cause to the contrary shall be on the party opposing the transfer.

In re Custody of R.M.

Franklin Supreme Court (2009)

Joan Albers filed in the Franklin district court a Petition for the Sole Physical and Legal Custody of R.M. (DOB 4/20/2005). The Petition did not seek to terminate the parental rights of R.M.'s parents. Albers, the maternal aunt of R.M., has shared responsibility for raising R.M. since the child was two months old. Albers, R.M., and R.M.'s parents are members of the Falling Rock Tribe. The district court granted the motion by R.M.'s parents to transfer this matter to the Falling Rock Tribal Court, relying on the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1911(b). The Court of Appeal affirmed. Albers appeals.

The Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et seq.*, was the product of rising concern over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes. U.S. Senate oversight hearings yielded numerous examples documenting "[t]he wholesale removal of Indian children from their homes, . . . the most tragic aspect of Indian life today." *Indian Child Welfare Program, Hearings before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess., 3 (1974) (statement of William Byler). The Association on American Indian Affairs reported that 25 to 35 percent of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions. It also identified serious adjustment problems encountered by these children during adolescence, as well as the impact of the adoptions on Indian parents and the tribes themselves.

Additional witnesses at the Senate hearings testified to the impact on the Indian tribes of this history. One witness testified:

> Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. . . . Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptuous of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.

In enacting the Act, Congress found that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children" and that "the States, exercising their recognized

jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901.

Albers argues in her appeal of the transfer of the matter to tribal court that ICWA does not apply. She contends that this is not a child custody matter because she does not seek to terminate the parental rights of R.M.'s parents. She simply wants to be able to make decisions for R.M. The parents, however, argue that what Albers seeks is a foster care placement that is governed by § 1911(b) of ICWA.

Under § 1911(b), upon receipt of a petition to transfer by a parent, an Indian custodian, or the Indian child's tribe, the state court child custody proceedings are to be transferred to the tribal court, except in cases of "good cause," objection by a parent, or declination of jurisdiction by the tribal court.

The critical issue in determining whether ICWA applies is not how a party captions the petition, but rather what the petition seeks. ICWA defines foster care placement as encompassing four requirements: (1) the Indian child is removed from the child's parent or Indian custodian, (2) the child is temporarily placed in a "foster home or institution or the home of a guardian or conservator," (3) the parent or Indian custodian cannot have the child returned upon demand, and (4) parental rights have not been terminated. 25 U.S.C. § 1903(1).

ICWA does not define these terms. Franklin state law, however, defines the guardian of a minor as one with "the powers and responsibilities of a parent with sole legal and physical custody to the exclusion of all others." FR. REV. STAT. § 72.04. For example, a guardian is empowered to facilitate the minor's education and social and other activities and to authorize medical care. Under Franklin law, a "conservator for a minor" has the power to provide for the needs of the child and has the duty to pay the reasonable charges for the support, maintenance, and education of the child. *Id.* § 72.08.

Here, by seeking to have sole legal custody of R.M., Albers in effect seeks the ability to decide her care, including the ability to remove R.M. from her parents and place her temporarily in Albers's home. The parents would not be able to have the child returned upon demand.

The terms "conservator" and "guardian" describe the very powers Albers seeks. Albers cannot avoid the effect of ICWA by calling her petition one for "sole physical and legal custody." Thus, her petition falls within the definition of "foster care placement" to which ICWA applies.

Albers also claims that she can object to the transfer to tribal court because she is an Indian custodian. In doing so, Albers relies on the legislative history of ICWA. "[B]ecause of the extended family concept in the Indian community, parents often transfer physical custody of the Indian child to such extended family members on an informal basis, often for extended periods of time and at great distances from the parents. While such a custodian may not have rights under State law, they do have rights under Indian custom which this bill seeks to protect, including the right to protect the parental interest of the parents." H.R. REP. NO. 95-1386 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7543.

We assume that Albers would be an Indian custodian under ICWA. Nevertheless, while Indian custodians such as Albers are eligible to *petition* to transfer, they do not have the right to *object* to the transfer. 25 U.S.C. § 1911(b). Being an Indian custodian does not give Albers the right to object to the transfer in this case.

Finally, Albers argues that good cause exists not to transfer the matter under § 1911(b) but to keep it in state court because the evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses. The Bureau of Indian Affairs has issued Guidelines to help state courts in determining good cause not to transfer. BUREAU OF INDIAN AFFAIRS, *Guidelines for State Courts; Indian Child Custody Proceedings ("Guidelines").* Although the Guidelines have not been promulgated as administrative regulations, they clarify the congressional intent behind this legislation. We therefore follow them.

The Guidelines recognize that undue hardship is one of the circumstances that would warrant a finding of good cause not to transfer. However, Albers has failed to meet her burden. *See Guideline (d).* The tribal court is located just over an hour's travel time from Albers's home and less than two hours' travel time from the home of R.M.'s parents. It is within one to two hours' driving time of school and medical personnel and any other witnesses likely to be called to testify. In fact, Albers admits to often taking R.M. to the reservation to visit with family and friends, a trip that was not inconvenient to her. It has been our experience that tribal courts have the power to subpoena witnesses needed to prove parties' allegations. We have no reason to question that power here, and our state courts will issue subpoenas upon request of tribal courts. Accordingly, good cause not to transfer does not exist here.

The district court correctly applied the law in this case by ordering the transfer to the Tribal Court.

Affirmed.

2) MPT2 - Please type your answer to MPT 2 below *(Essay)*

======== Start of Answer #2 (1787 words) ========

BRIEF IN SUPPORT OF MOTION TO TRANSFER CASE

TO BLACKHAWK TRIBAL COURT

Statement of the Case

The maternal grandparents of minor Will Fox seek guardianship and temporary custody of their grandson, as against his paternal grandparent, Blackhawk Indian Tribe member, and current custodian Betty Fox, as a result of his father's incapacitation. In addition to seeking guardianship, Betty Fox has petitioned this court for transfer to Blackhawk Tribal Court, as governed by the Indian Child Welfare Act of 1978 ("ICWA"). At issue is the application of the ICWA to the custody of Will Fox and whether good cause exists to deny such transfer.

Statement of Facts

[omitted]

Argument

Pursuant to the ICWA, upon receipt of a petition by an Indian Custodian to remove child custody proceedings from state court to tribal court, the state proceedings must be transferred to the tribal court, unless good cause exists to deny the transfer. The application of the ICWA is

a prerequisite to the removal of a state child custody proceeding to tribal court and will thus be analyzed first, followed by a discussion of the absence of good cause to deny such transfer.

A. The ICWA applies to the guardianship and transfer actions of Will Fox because his maternal grandparents seek a "foster care placement" of Will, an Indian child, which is an action within the scope of the Act.

The ICWA, as codified in 25 U.S.C. §§ 1901 et seq., governs the child custody proceedings of Indian children. Child custody proceedings under this Act do not turn on how a party captions the case, but rather on the nature of the proceeding. In re Custody of R.M. (Franklin S.Ct. (2009)). One such proceeding involves foster care placement which requires: (1) the Indian child is removed from the child's parent or Indian custodian, (2) the child is temporarily placed in a "foster home or institution or the home of a guardian or conservator," (3) the parent or Indian custodian cannot have the child returned upon demand, and (4) parental rights have not been terminated. Id. In the case at bar, the maternal grandparents of Will Fox seek guardianship and custody of their grandson, as against his paternal grandmother and current Indian custodian, Betty Fox. Despite the captioning of "Guardianship and Temporary Custody," the maternal grandparents are actually seeking what the ICWA terms a foster-care placement. Therefore, the ICWA applies to this proceeding. A discussion of each element follows.

i. Indian Child Removed from the Child's Parent or Indian Custodian.

A child is considered an Indian child if he or she is under the age of 18 years old and is a member of a recognized Tribe. ICWA §1903 (4). An Indian Custodian is a person who has

temporary physical care, custody, and control of the child. ICWA § 1903(5). Here, Will Fox is an Indian child because he is ten years old and is a member of the Blackhawk Tribe, as recognized by the ICWA. In addition, Betty Fox is an Indian Custodian because she has been caring for and in primary custody of Will Fox since the incapacity of his father, Joseph Fox, in 2012. The maternal grandparents of Will Fox, who have been involved in Will's life, seek to remove Will from the custody of Betty. Therefore, this element is met.

ii. The Child is Temporarily Placed in the Home of a Guardian or Conservator.

While the ICWA has not defined "guardian" or "conservator," the state law of Franklin defines "guardian" as one with the "powers and responsibilities of a parent with sole and physical custody to the exclusion of all others." In re Custody of R.M. (Franklin S.Ct. (2009). Here, the maternal grandparents of Will Fox seek to establish custody of Will to the exclusion of Betty Fox. Therefore, they qualify as "guardians," thus satisfying this element.

iii. The Parent or Indian Custodian cannot have the Child Returned upon Demand.

Here, if the court were to grant the maternal grandparents' petition for guardianship and custody, Betty Fox could not have Will Fox returned upon demand to her custody. Therefore, this element is met.

iv. Parental Rights have not been Terminated.

In the case at bar, Will's only living parent, Joseph Fox, has been rendered incapacitated by a recent car accident. His parental rights have not been terminated. Therefore, this element is

met.

Because all four elements of foster care placement are met, this is a child custody proceeding subject to the ICWA and is therefore entitled to transfer to tribal court, absent a showing of good cause for the denial of such transfer. The maternal grandparents have the burden of establishing good cause to deny the transfer. Dept. of the Interior Bureau of Indian Affairs Guidelines for State Courts - Determination of Good Cause to the Contrary.

B. The maternal grandparents have failed to establish good cause to deny transfer under the ICWA due to the early stage of the proceedings, Will's failure to object, the availability of necessary evidence in Blackhawk Tribal Court, and Will's connection to the Blackhawk Tribe.

Good cause to deny the transfer of state child custody proceedings exists if the Tribe does not have a tribal court (which is not at issue in this case, given Blackhawk's recognition under the ICWA), or any of the following: "(1) the proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing, (2) the Indian child is over 12 years of age and objects to the transfer, (3) the evidence is necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses, or (4) the parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe." Dept. of the Interior Bureau of Indian Affairs Guidelines for State Courts - Determination of Good Cause to the Contrary. These factors should be balanced with the widespread acknowledgement of the Indian culture's long-standing custom and practice to care for their children with extended family. See Excerpt from Journal of Native American Law, Vol. 8 (2003).

i. Stage of the Proceeding

This factor weighs in favor of Betty Fox. In the case at bar, the maternal grandparents filed their Petition for Guardianship and Temporary Custody in this court on February 1, 2013. Within 10 days, Betty Fox filed her Motion to Transfer Case to Tribal Court (February 11, 2013). Given the timely nature of Betty's filing, the maternal grandparents cannot show good cause as to denial on this factor.

ii. Age and Objection of the Indian Child

Here, Will, the Indian child, is only ten years old and has not objected to the transfer. Therefore, the maternal grandparents cannot establish good cause on this factor.

iii. Adequacy of Evidence Presented to Tribal Court without Undue Hardship to Parties or Witnesses

In In re Custody of R.M., the Franklin Supreme Court held that the petitioner had failed to meet her burden of showing undue hardship as a ground to deny transfer. In that case, the Court noted that the tribal court was located just over an hour from the petitioner's home and less than two hours' from the child's home. In addition, it was within one-two hours of the school and medical personnel and other witnesses that may be called to testify. The Court also noted a tribal courts' power to subpoena witnesses if necessary.

Here, the adqueacy of evidence presented to the Blackhawk Tribal Court is without

undue hardship, though the maternal grandparents will argue otherwise. Will currently resides with his father, where Betty Fox has cared for him since 2012, in Melville, Franklin. Melville is 250 miles from the Blackhawk Reservation, which is estimated to be three-to-four hours' driving time. He has occassionally visited his maternal grandparents during this time, though he has consistently attended the annual powwows on the Reservation with Betty. Because the Reservation is in the same state and within a three to four hour drive, the parties or witnesses necessary to the case will not be unduly burdened by traveling such distances.

The maternal grandparents may rely on the In re Custody of R.M. case to allege that the three-to-four hour commute is too long for witnesses and parties to travel. Specifically, they may argue that since Will has lived in the Melville area all of his life, all of his connections by way of relationships, school, and medical care are in that area. In addition, Joseph's express acknowledgment of how tiring the drive is to the Reservation in his letter to Betty dated August 23, 2011, supports the maternal grandparents' position. While this all may be true, other facts overcome any possible undue hardship. For example, Will has traveled to the Reservation at least once every year for the last few years to attend the powwows. In addition, in the same letter mentioned above, Joseph announced his intention for he and Will to spend the holidays on the Reservation with Betty. This establishes that the travel was not such a hardship as to deny it. Finally, the tribal court has the power to subpoena witnesses, if travel proves to be burdensome. Therefore, the necessary evidence is adequate such that a transfer to Blackhawk Tribal Court is appropriate.

iv. Parents of Child over Age Five are Not Available and Child lacks Contact with the Tribe or Members thereof.

As mentioned above, Will is over the age of five. In addition, his only living parent, Joseph, was rendered incapacitiated by a car accident, which has unfortunately left him in a coma.Therefore, he is unavailable. While the maternal grandparents may seize upon this factor as evidencing good cause for the denial of the transfer based on those facts, their position is without merit. As noted, Will has attended the powwows for the last few years. In fact, his father Joseph documented his excitement and eagerness to return to the following years' powwow in 2011, before his accident. Joseph even mentioned his desire for his young son to "always remember[s] that he is a Blackhawk." In addition, Betty, a member of the Blackhawk Tribe, has been Will's primary caregiver since his father's accident. These facts are sufficient for the requisite contact necessary to defeat a showing of good cause for removal.

As the above factors show, the maternal grandparents have not satisfied their burden of establishing good cause to the contrary. Most importantly, the overarching concern for the preservation of Indian culture lends itself to the granting of Betty Fox's Motion to Transfer Case to Blackhawk Tribal Court.

======== End of Answer #2 ========
END OF EXAM