

Applicant Number



In re Ace Chemical

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In re Ace Chemical

FILE

Memorandum to Examinee 1

Memorandum to file 2

Article from the *Franklin Daily News* 4

LIBRARY

Excerpts from the Franklin Rules of Professional Conduct..... 5

Franklin Ethics Opinion 2015-212..... 8

Hooper Manufacturing, Inc. v. Carlisle Flooring, Inc., Franklin Supreme Court (2002) 11

FILE

Montagne & Parks LLC
Attorneys at Law
760 Main Street, Suite 100
Essex, Franklin 33702

MEMORANDUM

To: Examinee
From: Lauren Scott, Managing Partner
Date: February 21, 2017
Re: Ace Chemical: potential conflicts of interest

Our law firm has been approached by Ace Chemical Inc., which wants to sue Roadsprinters Inc. for breach of a shipping contract. Ace claims that Roadsprinters failed to timely deliver Ace's goods to a customer. It is likely that Ace has a good case—the contract has a “time is of the essence” clause and delivery of the goods was significantly delayed. The work on this case would be done here at our Franklin office; I would be the lead attorney, and our partner Samuel Dawes would be the lead litigator. The law firm of Adams Bailey serves as Roadsprinters' outside counsel.

As you know, our firm has 400 lawyers in 14 different offices. Recently, we've become aware of certain circumstances that might affect our ability to represent Ace: 1) our office in the state of Columbia represents the Columbia Chamber of Commerce, and Jim Pickens, the president of Roadsprinters, was at one time chair of the Chamber's board; 2) Samuel Dawes once represented Roadsprinters in a trademark registration; and 3) our office in the state of Olympia has interviewed and would like to hire Ashley Kaplan, an attorney who currently works in Adams Bailey's Franklin office.

We will not undertake this representation if barred by the Franklin Rules of Professional Conduct, but we would very much like to take on this client in this matter if it is ethically permissible. We know that Roadsprinters will not waive any conflicts of interest.

Please prepare a memorandum to me analyzing whether any potential conflicts of interest are raised by these three circumstances. If you determine that one or more conflicts of interest exist, for each conflict you should identify the action we need to take to comply with the Rules. Do not draft a separate statement of facts, but be sure to integrate the relevant facts into your analysis. Note that Franklin's Rules of Professional Conduct are identical to the ABA's Model Rules of Professional Conduct and that Franklin Ethics Opinions are persuasive but not binding authority before courts.

Montagne & Parks LLC

MEMORANDUM TO FILE

From: Lauren Scott, Managing Partner
Date: February 17, 2017
Re: Ace Chemical: potential conflicts of interest

Montagne & Parks, through its Franklin office, would like to represent Ace Chemical Inc. in its suit against Roadsprinters Inc. Ace alleges that Roadsprinters breached its contract with Ace when Roadsprinters failed to deliver goods to Ace's customer on time. Roadsprinters is represented by the law firm of Adams Bailey.

Potential conflict: Columbia Chamber of Commerce

Through our office in the state of Columbia, our firm represents the Columbia Chamber of Commerce (Chamber); we have represented the Chamber for the last 10 years. (The Chamber is a membership organization of local businesses that promotes the general interest of the business community.) In the course of our representation of the Chamber, we have lobbied before the Columbia legislature for tax reform. For purposes of this lobbying effort, we received no confidential business information from Chamber members.

In our communications with Chamber members, we clarified that we represented the Chamber, and not the members, in lobbying, and that the content of our communications with members was not confidential. The Chamber and its members acknowledged in writing that our representation was limited to lobbying for the Chamber itself. While we received confidential information from the Chamber about legislative strategies and tactics related solely to tax issues, we received no confidential information from or about any of the Chamber's members.

Roadsprinters has been a member of the Chamber since the Chamber's inception 15 years ago. Jim Pickens has been the president of Roadsprinters for the last 20 years and was chair of the board of the Chamber in one of the years of our representation; however, throughout the lobbying effort, the firm worked primarily with the Chamber's executive director and not with the officers of the board.

Potential conflict: Samuel Dawes

Samuel Dawes, a partner in this firm, has successfully represented Ace against other adversaries in several other matters, and Ace wants him to handle this litigation.

Seven years ago, while he was in solo private practice, Mr. Dawes represented Roadsprinters in an uncontested trademark registration. Mr. Dawes has been interviewed consistent with Franklin Rule of Professional Conduct 1.6(b)(7). We have concluded that no information that he learned, or could have learned, could possibly be relevant to the litigation against Roadsprinters. Mr. Dawes reports that he has not had any contact with Mr. Pickens, the president of Roadsprinters, for the last five years.

Potential conflict: Ashley Kaplan

Our Olympia office has informed us that it recently interviewed Ashley Kaplan for a position as a senior associate in that office. The Olympia office was very impressed with Ms. Kaplan and wants to make her an offer—the office badly needs someone with her expertise. Ms. Kaplan currently works for the Franklin office of Adams Bailey. Ms. Kaplan has provided a list of the clients for which she has done work at Adams Bailey, and Roadsprinters is on that list.

FRANKLIN DAILY NEWS
Spotlight on a “Rising Star” in the Community

ESSEX—(December 20, 2010) As part of our series profiling rising stars in our business community, the *Franklin Daily News* this month shines a spotlight on young attorney Samuel Dawes.

Mr. Dawes is a graduate of the University of Franklin (B.A. in English and J.D.) and is currently in solo private practice in Essex, Franklin. He specializes in litigation and intellectual property work. Although he might one day want to work at a big firm, Mr. Dawes currently enjoys both the flexibility and the challenge of working alone. Mr. Dawes has been in solo practice for about five years, and he says he truly loves the independence and the opportunity to form close and lasting relationships. When asked for a specific example, Mr. Dawes mentioned his relationship with Jim Pickens, the president of his client Roadsprinters Inc. He stated that “Mr. Pickens taught me so much. He was so generous with his time and advice. It is people like him who make me love my job.”

According to Mr. Pickens, he came to Mr. Dawes for help in registering a trademark for “Roadsprinters” and saw real promise in the young lawyer. “Sam is a great guy and a great lawyer,” he said. “Although it was not at all necessary for the work on the trademark registration, I told him how to develop client relationships and I introduced him to community business leaders. I knew he was someone who was going places—and I wanted to help him get there.”

According to other lawyers with whom we spoke, Mr. Dawes is a rising star in the legal profession. He combines a strong intellect, a curious mind, and a desire to help others. He listens to his clients and truly seeks to help them. We expect great things of Mr. Dawes.

LIBRARY

Excerpts from the Franklin Rules of Professional Conduct

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:

...

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

...

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.9 Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rule 1.6 . . . that is material to the matter; unless the former client gives informed consent, confirmed in writing.

Rule 1.10 Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

Franklin Ethics Opinion 2015-212

Ten lawyers are forming a new law firm in the state of Franklin. Each of the lawyers has, until recently, been a partner at a major law firm. All of them were at different firms, and many of those firms had several offices. In establishing the new firm, the lawyers want to properly assess potential conflicts of interest and thus determine their obligations regarding clients of their former firms. Specifically, they ask the following three questions:

- 1) Under Rule 1.9(a) of the Franklin Rules of Professional Conduct, how does a lawyer determine whether a matter is “substantially related” to another matter?
- 2) How do the Rules of Professional Conduct deal with lawyers who move from one firm to another firm?
- 3) How do the Rules of Professional Conduct treat a law firm with offices in multiple states?

Question One. Under Rule 1.9(a) of the Franklin Rules of Professional Conduct, how does a lawyer determine whether a matter is “substantially related” to another matter?

A lawyer has always been prohibited from using confidential information that he or she has obtained from a client against that client. But because this prohibition has not seemed enough by itself to make clients feel secure about reposing confidences in lawyers, the Rules have added a further prohibition: a lawyer may not represent an adversary of his or her former client if the subject matter of the two representations is “substantially related.” A substantial relationship exists when the lawyer *could* have obtained confidential information in the first representation that would be relevant in the second representation. It is immaterial whether the lawyer actually obtained such information and used it against the former client, or whether—if the lawyer is a firm rather than an individual practitioner—different people in the firm handled the two matters and scrupulously avoided discussing them. The reason that the disqualification occurs regardless of whether the lawyer actually obtained confidential information is practical: conducting a detailed factual inquiry into whether confidences had actually been revealed would likely compromise the confidences themselves.

In addition, the “substantial relationship” test is in keeping with the profession’s aspiration to avoid the appearance of impropriety. For a law firm to represent one client today, and the client’s adversary tomorrow in a closely related matter, creates an unsavory appearance of conflict of interest that is difficult to dispel in the eyes of the lay public—or for that matter the bench and bar. Clients will not share confidences with lawyers whom they distrust and will not trust firms that switch sides.

Question Two. How do the Rules of Professional Conduct deal with lawyers who move from one firm to another firm?

Rule 1.9 itself removes some of the harshness of the “substantial relationship” test when a lawyer moves from one firm to another. “A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client: (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rule 1.6 . . . that is material to the matter.” Thus the new firm may represent a client with materially adverse interests to the client of the moving lawyer’s old firm so long as the lawyer did not *actually* acquire confidential information. Even if the lawyer acquired confidential information, Rule 1.10 allows the law firm to continue representation of the client so long as the moving lawyer is screened from all contact with the matter. In order to properly screen, the lawyer must be denied access to all digital and physical files relating to the client and/or the matter. All digital files must be password protected and the screened lawyer must not have the password. All physical files must be under lock and the screened lawyer must not have the key. In addition, all lawyers in the firm must be admonished that they cannot speak with or communicate in any way with the screened lawyer about the matter. Finally the lawyer cannot receive any compensation resulting from representation in the matter from which she or he is being screened. Screening must take place as soon as possible, but in no case may it occur after the screened lawyer has had any contact with information about the matter from which he or she is being screened.

In addition, Rule 1.10 requires that the law firm promptly give written notice to any affected former client in order to enable the former client to ascertain compliance with the provisions of the Rule. This notice shall include a description of the screening procedures employed; a statement of the firm’s and of the screened lawyer’s compliance with these Rules; a

statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures.

Question Three. How do the Rules of Professional Conduct treat a law firm with offices in multiple states?

A confidence is defined by Rule 1.6 as “information relating to the representation.” This is intended to be applied broadly. It includes anything that the lawyer learns that has any bearing on the matter in which the lawyer is representing the client. Even information that is publicly available is confidential if it meets the definition in Rule 1.6. The Franklin Rules of Professional Conduct presume that confidences are shared by members of a law firm. This is why Rule 1.10 presumptively imputes a conflict of one member of a firm to the entire firm. Especially in these days of telecommuting, electronic files, and multi-state transactions, the imputation of Rule 1.10 applies to all members of the law firm, regardless of the office in which they work. Thus the conflict of one member of the firm is imputed to the entire firm—every office of that firm, regardless of the number of offices the firm maintains.

Hooper Manufacturing, Inc. v. Carlisle Flooring, Inc.
Franklin Supreme Court (2002)

In this action, Carlisle Flooring, Inc., has filed a complaint alleging that Hooper Manufacturing, Inc., has interfered with Carlisle's ability to contract with other manufacturers that produce the wax necessary for the creation of Carlisle's hardwood floors. Carlisle has a contract with Hooper, and for the last 10 years, Carlisle has bought all of its wax from Hooper. In its complaint, Carlisle alleges that Hooper has recently raised its prices for wax to the point that Carlisle can no longer produce hardwoods at a competitive price. In addition, Carlisle alleges that it sought out other wax producers but was told by each of them that Hooper would not allow them to sell to Carlisle.

The case is in the early stages of discovery, and Carlisle has filed a motion to disqualify Hooper's counsel, the venerable law firm of Klein and Wallace (K&W). The trial court denied the motion to disqualify, and Carlisle filed an interlocutory appeal to the Franklin Court of Appeal. The Court of Appeal reversed the trial court, and Hooper appeals.

According to affidavits filed by Carlisle, attorneys from K&W work as lobbyists for the professional trade association to which Carlisle belongs. Hooper counters that the lobbying organization is distinct from its members. Thus, according to Hooper, K&W should not be disqualified as its counsel.

Lobbying is an activity in which attorneys often engage. For purposes of determining whether a lawyer previously represented or is currently representing a client, we will take for granted that lobbying constitutes representation by an attorney. The harder question here is whether K&W's representation of the trade association is tantamount to representation of a member of that trade association.

The first issue we must address is what law to apply to this case. Both parties have cited the Franklin Rules of Professional Conduct. We acknowledge that the Rules of Professional Conduct are only intended to govern the regulation of lawyers. They are thus not binding on courts when faced with questions other than attorney discipline. Nonetheless, it would be foolish for courts to ignore those Rules when they are applicable to a lawyer's conduct. In the absence of any overriding policy considerations, courts in this state will be guided by the Rules of Professional Conduct, in addition to any other applicable law, in determining motions for disqualification based on conflicts of interest.

Since this case involves a concurrent conflict of interest, we look to Rule 1.7 of the Franklin Rules of Professional Conduct.

K&W is representing Hooper in direct opposition to Carlisle. The question thus posed is whether the representation of the trade association to which Carlisle belongs is equivalent to the representation of Carlisle itself.

In making this determination, the Court must be guided by the facts of the particular situation. The critical question one must ask is whether the trade association member provided confidential information to the lawyer that was necessary for the lawyer's representation of the trade association. If the answer is "yes," then the representation of the trade association is equivalent to representation of the member. However, even if the answer to that question is "no," the representation might still be deemed equivalent if the lawyer advised the member of the trade association that any and all information provided to the lawyer would be treated as confidential.

Confidential information is any information related to the representation of the client and learned during the course of the representation. Franklin Rule of Professional Conduct 1.6. The definition is very broad and includes all information, even publicly available information, that the lawyer discovers or gleans while representing the client. The information must, however, be related to the representation. A client cannot protect extraneous information simply by telling his or her lawyer. A client may have many conversations with the lawyer about any number of matters which have no relevance to the representation for which the lawyer was retained. These conversations cannot later be used by the client to prevent the lawyer from representing a party who is adverse to the client.

In this case, Carlisle, as a member of the trade association, provided only publicly available information to K&W lawyers for their work of lobbying on behalf of the trade association. While information related to the representation is normally treated as confidential if it meets the other requirements of Rule 1.6, we hold that a member's provision of publicly available information to counsel for the trade association does not, in and of itself, disqualify counsel for the trade association from representing a client who is adverse to the member.

We must then ask whether the lawyers for the trade association (here K&W) advised the member (here Carlisle) that information provided to the lawyers for the trade association would be treated as confidential. Affidavits submitted by attorneys from K&W state that they informed

the members of the trade association, including Carlisle, that the information provided to K&W and in support of the representation of the trade association would not be kept confidential.

Based on the fact that Carlisle provided only publicly available information to K&W in its representation of the trade association and that K&W told Carlisle that any information provided to K&W would not be kept confidential, we hold that representation of the trade association is not equivalent to representation of Carlisle. Thus, K&W's representation of Hooper is not directly adverse to a former client (i.e., the trade association).

But our analysis does not end there. Under Rule 1.7(a)(2), we must next ask whether representation of both Hooper and the trade association will materially limit the firm's ability to represent either client.

The critical factual inquiry is whether an employee of Carlisle had an important position in the trade association and, in that position, worked closely with the lawyers for the trade association. The affidavits filed by Carlisle state that Carlisle's chief executive officer, Nina Carlisle, serves as one of three members of the trade association's legislative and policy committee. In this capacity, Nina Carlisle works closely with K&W attorneys, developing legislative strategy and directing K&W lawyers on legislative tactics. The affidavit notes that Nina Carlisle meets with these attorneys in person and communicates with them via email every day during the legislative session, and an average of every two weeks during the rest of the year.

Under Rule 1.7(a)(2), this contact between K&W attorneys and Carlisle's chief executive officer materially limits K&W's ability to represent both Hooper and the trade association. The language of Rule 1.7(a)(2) refers to the "personal interest of the lawyer." This standard requires us to focus on the nature and extent of the relationship between the attorneys and Carlisle's representatives. The closer and more frequent the contact and the more active the role of the member representative in directing the lawyer, the greater the risk that the lawyer's ability to engage in concurrent representation is "materially limited." In this case, Carlisle's CEO plays an active role in directing K&W's attorneys and has frequent contact with them. This creates a substantial risk that the K&W attorneys' personal interests would materially limit the concurrent representation.

Carlisle's motion to disqualify Hooper's counsel should have been granted. The order of the Court of Appeal is **AFFIRMED** and the matter remanded to the trial court.

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The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

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

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When finished with this question, click ⌂ to advance to the next question.

(Essay)

===== Start of Answer #1 (1480 words) =====

MEMORANDUM

To: Lauren Scott
From: Examinee
Date: Feb. 21, 2017
Re: Ace Chemical: Potential Conflicts of Interest

Potential Conflict 1 - Columbia Chamber of Commerce

The issue is whether representation of the Chamber is tantamount to a representation of a member of that association. The rules of professional conduct govern the regulation of lawyers, and courts will look to these rules in determining any attorney non-compliance when faced with questions other than attorney discipline. Hooper

(2002). Montagne & Parks LLC wishes to represent Ace Chemical in direct opposition to Roadsprinters. Jim Pickens, President of Roadsprinters, was the chairman of Chamber for one year. The question is whether the representation of Chamber to which Pickens once belonged is equivalent to representation of Pickens himself. Courts will look at several factors in determining this issue: (1) whether the member provided information to that attorney that was necessary for the representation of the association; (2) whether attorney advised members of the association that information gathered would or would not be confidential; and (3) whether representation of both new client and association would materially limit the firm's ability to represent either client. Hooper (2002).

Whether Pickens provided information that was necessary

Confidential information is any information related to the representation of the client and learned during the course of representation. Franklin Rule of Prof. Conduct 1.6. This information covers even publically available information, but must be related to the representation. Extraneous information or conversations are not protected as confidential and cannot be objected to at a later event. In the present case, Pickens was director of Chamber for one year during which this firm represented Chamber. Pickens provided only publicly available information for work on lobbying on behalf of Chamber. The court in Hooper held that "a member's provision of publicly available information to counsel of the trade association does not, in and of itself, disqualify counsel for the trade association from representing a client who is adverse to the member." Hooper (2002). The situation in the present case is significantly similar.

Pickens and other members of the board provided only legislative tactics and strategies to the attorneys. No confidential information was provided to the firm. Any information gathered from Pickens would have been publicly available, and a court will likely not disqualify firm from representation of Ace.

Whether Attorney advised members about confidentiality:

The same rules on confidentiality stated above apply here. Courts will ask whether members were advised that information provided would be confidential or not confidential. In Hooper, the Attorneys informed the members that any information provided in support of the representation of the association would not be confidential. The court held that because only publicly available information was provided, and the attorneys did not hold information as confidential, that the representation of the association was not equivalent to the representation of the members. Hooper (2002). In this case, Pickens and other board members were informed that any information provided would not be held as confidential. The members acknowledged this in writing. A court will likely hold that the representation of Chamber is not equivalent to a representation of Pickens.

Whether representation of Ace and Representation of Chamber would limit representation:

The final inquiry courts will make is whether the firm's representation of both parties will limit the representation of either party in any way. Rule 1.7(a)(2) provides that contact between the attorneys and associations chief executive officer materially limits the firms

ability to represent the new client and the association. This rule looks to the "personal interest of the lawyer" and whether frequent contracts were made between the attorney and member. In Hooper, the firm was still representing the member CEO and the new client. The court held that disqualification by the Appeals court was proper. In our case, Pickens was a director, not CEO. In addition, his involvement was very limited in the entire process. Pickens was the chair of the board for only one year, and is not currently sitting. This firm's representation of Chamber is ongoing, but Pickens is not in the picture. The fact that firm still confers with CEO of Chamber regularly will not likely be found to have an impact on the firm's representation of Ace or Chamber. There is nothing "materially adverse" involved in this situation between Ace or Chamber.

In conclusion, the representation of Chamber should not prevent the representation of Ace simply because Pickens was once chairman of the board. The court will likely find that no confidential information was gathered, Pickens was informed of the fact that information provided would not be confidential (acknowledged in writing), and that representation of both Ace and Chamber will not limit representation of either parties in any way.

Potential Conflict 2 - Sam Dawes

The issue is whether Sam Dawes may represent Ace Chemicals in its suit against Roadsprinters. Under Rule 1.9(a) of the Franklin Rules of Prof. Conduct, a lawyer is prohibited from using confidential information obtained from a client against that same

client. A lawyer may not represent an adversary of his or her former client if the subject matter of the two representations is "substantially related." Furthermore, a substantial relationship exists when the lawyer *could* have obtained confidential information in the first representation that would be relevant in the second representation, immaterial of whether information was *actually* obtained. Rule of Prof. Conduct 1.9(a); See also, Franklin Ethics Opinion 2015-212. Finally, the substantial relationship test is in keeping with the profession's aspiration to avoid the appearance of impropriety. For firms to represent one client today and an adversary tomorrow in a "closely related matter," creates an unsavory appearance with the public. Franklin Ethics Opinion 2015-212.

In this case, Dawes represented Roadsprinters in an uncontested trademark registration. This was a one time representation by Dawes. The instant matter pursued by Ace is a contract dispute between itself and Roadsprinters. In no way would this breach of contract claim be considered "substantially related" to a trademark registration. While the rule indicates only the possibility of confidential information being obtained, any information gained by Dawes in the prior representation would not be relevant whatsoever to this contractual dispute. Additionally, because this is not a "closely related matter," there should be no issue with the new representation of an adversary. The only item that might be an issue would be the article published by the Franklin Daily News on Dec. 20, 2010. The article paints the relationship between Dawes and Pickens in a favorable light. A suit against Roadsprinters might likely cause an appearance of impropriety.

In conclusion, Dawes representation of Roadsprinters and the proposed new representation of Ace are not "substantially related," nor are they a "closely related matter." Any information gained in the previous representation would not affect the second. The appearance of impropriety might be an issue, but a Court will likely decide that the suit against Roadsprinters would not involve any confidential information gained by Pickens, and that the appearance of impropriety would not be a concern.

Potential Conflict 3 - Ashley Kaplan

The issue is whether the firm will be able to represent Ace if it hires Ashley Kaplan, an attorney at the firm currently representing Roadsprinters. Rule 1.9 states that an attorney cannot knowingly represent a person in the same or substantially same related matter in which the attorney formerly represented a client: (1) whose interests are materially adverse to that client; and (2) about whom the lawyer had acquired information protected by Rule 1.6 (confidentiality). Rule 1.6 imputes the knowledge of one attorney between all attorneys of the same firm, regardless of how many offices and locations there might be. Rule 1.9 minimizes the harshness of this rule by requiring the incoming attorney (with the conflict) to be screened from all contact. The incoming attorney must be denied access to electronic and physical files, and must not be in any discussion concerning the case. Additionally, no compensation can be paid to the conflicted attorney from the matter. Rule 1.10 adds the requirement of certification wherein the firm certifies in writing the procedures taken in the screening process, notifies the previous client (with the conflict), and allows for review by tribunal if client

Applicant Number

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MULTISTATE PERFORMANCE TEST

In re Guardianship of Henry King

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In re Guardianship of Henry King

FILE

Memorandum to Examinee1
Office memorandum re: Findings of Fact and Conclusions of Law.....2
Transcript of testimony of Ruth King Maxwell.....4
Transcript of testimony of Noah King7

LIBRARY

Excerpts from Franklin Guardianship Code9
Matter of Selena J., Franklin Court of Appeal (2011).....10
In re Guardianship of Martinez, Franklin Court of Appeal (2009)13

FILE

Sibley and Wallace Law Office, P.C.
232 Cable Car Road
Dry Creek, Franklin 33808

MEMORANDUM

To: Examinee
From: Eleanor Wallace
Date: February 21, 2017
Re: Guardianship of Henry King

We represent Ruth King Maxwell in an adult guardianship case in which she seeks to be named as the guardian for her father, Henry King. Ruth's brother, Noah King, opposes Ruth's petition to become guardian. Noah is asking the court to appoint him as guardian instead.

In 2013, Henry King learned that he had a condition that might leave him incompetent to manage his affairs. At that time, Henry executed an advance health-care directive naming Noah as his health-care agent and a durable power of attorney giving Noah the power to make financial decisions for him. Those documents also nominated Noah to become Henry's guardian if that later proved necessary.

Since then, Ruth has become increasingly concerned about Noah's handling of his authority over their father's finances and medical care. Her concerns came to a head after a series of events which led to conflict with her brother and caused her to seek our representation.

We filed a petition to have Ruth named as guardian for Henry. There was an evidentiary hearing on Ruth's petition last week; relevant portions of the transcript are attached. The court ruled that Henry's nomination of Noah as prospective guardian in 2013 was valid at the time it was made. It also ruled that Henry is now incompetent, cannot manage his affairs, and needs a guardian. All counsel (Henry's court-appointed attorney, Noah's attorney, and our office on behalf of Ruth) have been instructed to submit proposed Findings of Fact and Conclusions of Law. Our proposed Findings and Conclusions should persuade the court that (1) it has authority to override the nomination, and (2) Ruth should be appointed guardian.

Please draft our proposed Findings of Fact and Conclusions of Law to submit to the court. Be sure to review and follow our office guidelines on drafting proposed Findings of Fact and Conclusions of Law so that the court will be more likely to adopt them and rule in our favor.

Sibley and Wallace Law Office, P.C.

OFFICE MEMORANDUM

To: All attorneys
From: Managing partner
Date: March 4, 2016
Re: Preparation of proposed Findings of Fact and Conclusions of Law

In bench trials, trial courts usually require the parties to file proposed Findings of Fact and Conclusions of Law. Findings of Fact are the court's final factual determinations based on the evidence presented. Conclusions of Law are the court's legal determinations when it applies the law to its factual findings. A judge will often adopt one party's proposed Findings of Fact and Conclusions of Law. It is thus critical that we draft our proposed Findings and Conclusions so that the court will adopt them. This memo states our firm's conventions for this kind of filing.

All proposed Findings of Fact on all issues are grouped together in one section under the heading "Findings of Fact." They are then followed by all Conclusions of Law on all issues grouped together under the heading "Conclusions of Law."

Each section should consist of separate, sequentially numbered paragraphs. In general, each "Finding" or "Conclusion" should consist of one sentence stating a single fact or legal conclusion. Use the following conventions:

- (1) *Proposed Findings of Fact:* Set forth those facts that the testimony and other evidence support and that are necessary to our claim or defense. Think about how to sequence and structure your Findings to lead to the legal conclusions that you would like the court to reach. This will help you to identify the facts that support your legal conclusions and to put them in the most persuasive order. Be sure that the Findings accurately reflect the record. (Our paralegal will add citations to the record as appropriate.)

The Findings should cover all the relevant facts, including those *not* favorable to our position. For those Findings that are unfavorable to our client's position, frame them in a way that minimizes their effect.

Omit any facts not relevant to the Conclusions of Law.

(2) *Proposed Conclusions of Law*: Concisely state the legal conclusions necessary to support our claim or defense. Organize this section by first stating general rules and then applying these rules to specific facts from the Findings of Fact. Include citations to the legal authorities that support the relevant conclusions.

Your proposed Findings of Fact and Conclusions of Law, while drafted to favor your client, should not be explicitly argumentative. *In re Guardianship of Martinez* (Fr. Ct. App. 2009) contains a trial court's Findings of Fact and Conclusions of Law that the appellate court approved as an example of how to effectively write proposed Findings and Conclusions.

Contrast the example in *Martinez* with the example below, which states too many facts in one paragraph and does not present them in a coherent or persuasive sequence:

1. Testator died on July 3, 2015, and Petitioner submitted Testator's will for probate on July 10, 2015. Testator executed a will on May 6, 2003. The will submitted on July 10, 2015, is identical to the one executed on May 6, 2003. This will contained signature lines for Testator and for two witnesses; Testator signed on the line designated for his signature. One of the witness lines was empty.

The following represents a more appropriate draft of these Findings of Fact:

1. Testator executed a will on May 6, 2003.
2. The will contained a signature line for Testator, signed by him.
3. The will contained two signature lines for witnesses, only one of which contained a signature.
4. Testator died on July 3, 2015.
5. Petitioner submitted this will for probate on July 10, 2015.

**Transcript of Testimony of Ruth King Maxwell
February 13, 2017**

Att’y Wallace: Could you state your name?

Ruth Maxwell: Ruth King Maxwell.

Wallace: Your address?

Maxwell: 4465 East Canyon Avenue, Dry Creek, Franklin.

Wallace: What is your relationship to Henry King?

Maxwell: I am his daughter.

Wallace: Could you tell the court why you brought this case?

Maxwell: I want to be named guardian for my father and to keep my brother from becoming guardian. I’m worried about how my brother has treated my father.

Wallace: Your brother already has authority to act for your father, is that right?

Maxwell: Yes. He has my father’s power of attorney for financial matters and is his health-care agent.

Wallace: Tell the court how that came about.

Maxwell: My father is 74 years old now. Our mother died in 2012; a year after that, he started to have trouble with his memory and began to lose his attention span. He consulted his doctor, who referred him to a neurologist and a psychiatrist. He was told that he had early signs of dementia.

When that happened, Dad set up arrangements for his health care and finances if he did become incompetent. At that time, I lived in a different state. My brother, Noah, lived here in Dry Creek. We all talked it over and agreed that it made sense for my father to give Noah the authority to make health-care and financial decisions for him and to nominate Noah as his prospective guardian. Noah was closer and could respond more quickly.

So Dad signed an advance directive and a power of attorney and in both documents nominated Noah as his prospective guardian. Dad was doing well then.

Wallace: Your honor, we have stipulated to the validity of those documents that were signed May 20, 2013. Ms. Maxwell, what happened then?

Maxwell: For a while, my father was fine. Then, about two years ago, he began to get worse. Eventually, he wouldn’t go out of the house; he would sit in his

favorite chair and stare out the window or at a book or at the TV. Sometimes he would talk with one of us, but he made less and less sense. He wasn't upset, but he was very different from the way he had been before. Not as sharp or funny. It has been like that for nearly two years. His doctor tells us that his condition is permanent. I know that he can't take care of himself, and I'm worried about my brother's ability to take care of Dad.

Wallace: Why are you worried about your brother?

Maxwell: About a year and a half ago, I came back to Dry Creek to visit my father. When I talked with him, I saw that he was favoring his right arm, leaning away from that side in his chair. I asked him what had happened, and he said, "Nothing." I insisted, and he eventually said that he had fallen in the shower, but that everything was okay. I asked him to show me his arm, and he finally did. It was bruised up and down the back of his arm.

I talked with Noah, and he said that he knew about the fall, but that Dad hadn't really complained that much about it, so he didn't think it was much of a problem. He agreed to take Dad to the doctor, and I went with him. The arm was just bruised, badly, but there were no broken bones, thank God.

Wallace: What did you do next?

Maxwell: I had it out with my brother a few days later. He said that I shouldn't worry, that he knew how to take care of Dad, and that I should just stay out of it. He got pretty angry. I couldn't figure out why, so I let it go.

Wallace: What happened after that?

Maxwell: In August 2016, I was able to transfer to a nearby office for my company. I started to spend two or three evenings a week with my father. This is when I found out that my father had broken his wrist in June when he tripped over a rug in his bedroom. Noah did not tell me about this until I confronted him about it after I had moved back to Dry Creek.

Wallace: What else did you notice about your father's condition?

Maxwell: I began to notice that Noah wasn't buying any food for him. The refrigerator was always nearly empty, just skim milk and a little bread, and there was only canned soup in the cupboards. I started buying food and cooking for him, whenever I could. Eventually, I hired someone to shop and cook for him.

Wallace: What did you learn about the state of your father's finances?

Maxwell: One day I arrived at Dad's house and found an overdue notice from the electric company. I called the company, and they said that they would only deal with Noah. So I called Noah, and he said that he had missed a few months' payments but not to worry about it.

Wallace: What did you do then?

Maxwell: I decided to look through Dad's bank statements and his bills. Noah kept all of that at Dad's house. It turns out that Noah had not been paying a lot of different bills. Nothing was too far behind, but the electric bill wasn't the only one where he had received threatening letters. Some were from Dad's doctor, who was about to send his account to collection.

I also saw that Dad had been spending a lot of money. His checking account statement showed a lot of charges from Amazon and other online retailers, but I didn't see anything new around the house. When I asked Dad, he said that he wanted to give his friends gifts, to make sure that they came to visit him. All told, for the two months that I reviewed that day, he had spent roughly \$2,200 online. Dad only gets about \$2,500 a month between his pension and his Social Security.

Wallace: Did you talk with your brother?

Maxwell: I confronted Noah the same day. He got very angry and told me to let it go . . . not so nicely, I'm afraid. He said that he had known about the online purchases and that it was hard to keep Dad from doing what he wanted. He said that it was those purchases that made it hard to keep up with the bills. Noah said that he had all of these other bills under control and that nothing would get shut off. I said that wasn't good enough. We had a bad argument.

Wallace: No further questions.

**Transcript of Testimony of Noah King
February 13, 2017**

Att’y Wallace: Could you state your name?

King: Noah King.

Wallace: What is your relationship to the proposed ward Henry King?

King: I am his son. I am also his health-care agent and have his durable power of attorney.

...

Wallace: I have here several bank statements. These are your father’s, aren’t they?

King: Yes, these are my father’s bank statements for the last 12 months.

Wallace: How do you know about them?

King: I manage my father’s finances, so I see these every month.

Wallace: Don’t these statements show a series of purchases from Amazon and eBay?

King: Yes, they do. About a year ago, I saw that my father had started to buy things online. I checked his accounts and saw that he had asked to ship these items to various friends. When I asked my father about it, he said that he wanted to make those gifts because he felt that he owed his friends favors and because he wanted them to come visit him. I didn’t feel comfortable calling his friends to ask for these things back. I also didn’t have the heart to tell him to stop. So I just let it go on.

Wallace: Your father is on a fixed income, isn’t he?

King: Yes, he is. He gets \$2,515 per month, between his Social Security and his pension.

Wallace: These charges total about \$9,000 over the past 12 months, isn’t that correct?

King: Yes, it is.

Wallace: In some months, he charged as much as \$1,200, isn’t that so?

King: Yes, that’s right. After that month, I did ask him to stop it and tried to explain how it was hurting him. But he didn’t seem to understand.

Wallace: You didn’t take any other steps to stop the spending, did you?

King: No, I didn’t. Like I said, I didn’t think it was my place to keep him from spending his money the way he wanted. And he has enough money.

...

Wallace: I'm showing you medical records concerning your father's treatment over the last year. You're not familiar with these, are you?

King: Not with these records, no.

Wallace: Are you familiar with your father's medical condition over the past year?

King: Of course I am.

Wallace: I want to ask you about his condition on June 22, 2016. Your father broke a bone in his wrist, isn't that so?

King: Yes, but it was an accident. I went by one evening to check on Dad, and he complained of being a little stiff, but he didn't seem in all that much pain. The next day at lunch, a neighbor called me and said that I should come look at him, that his wrist was swollen. I came over, and she was right. I took him to the emergency room right away. I watched them put on a cast. They discharged him that night.

Wallace: You don't know how this happened, do you?

King: I wasn't there and he wouldn't tell me at the time. I think he was embarrassed. I later learned that he had tripped on a rug. His wrist is completely healed now.

Wallace: You didn't tell your sister about it at the time, did you?

King: No, I didn't. I just didn't think she needed to know. I knew she would get upset with me and blame me for it.

...

LIBRARY

Excerpts from Franklin Guardianship Code

§ 400 Definition of Guardian

“Guardian” means an individual appointed by a court to manage the income and assets and provide for the essential requirements for health and safety and personal needs of someone found incompetent.

§ 401 Order of Preferences for Appointment of Guardian for an Adult

(a) The court shall appoint as guardian that individual who will best serve the interest of the adult, considering the order of preferences set forth in this Code section. The court may disregard an individual who has preference and appoint an individual who has a lower preference or no preference, provided, however, that the court may disregard the preference listed in paragraph (1) of subsection (b) of this Code section only upon good cause shown.

(b) Individuals who are eligible have preference in the following order:

- (1) The individual last nominated by the adult in accordance with the provisions of subsection (c) of this Code section;
- (2) The spouse of the adult;
- (3) An adult child of the adult;

...

(c) At any time prior to the appointment of a guardian, an adult may nominate in writing an individual to serve as that adult’s guardian should the adult be judicially determined to be in need of a guardian, and that nomination shall be given preference as described in this Code, provided:

- (1) it expressly identifies the individual who shall serve as guardian; and
- (2) it is signed and acknowledged by the adult in the presence of two witnesses who sign in the adult’s presence.

§ 402 Revocation or Suspension of Guardian

Upon petition of an interested party or upon its own motion, whenever it appears to the court that good cause may exist to revoke or suspend the guardian or to impose sanctions, the court shall investigate the allegations and may require such accounting as the court deems appropriate. After investigation, the court may, in the court’s discretion, revoke or suspend the guardian, impose any other sanction or sanctions as the court deems appropriate, or issue any other order as in the court’s judgment is appropriate under the circumstances of the case.

Matter of Selena J.
Franklin Court of Appeal (2011)

This appeal presents an all-too-familiar scenario in guardianship cases, in which one sibling claims a breach of fiduciary duty by another sibling who has been nominated as the proposed guardian of a parent.

The proposed ward, Selena J., is 81 years old and lives with her daughter Naomi (a registered nurse). In 2008, Selena executed an advance directive naming Naomi as her health-care agent, and a durable financial power of attorney naming Naomi as her agent to manage her finances. Both documents nominated Naomi as Selena's guardian in the event of a later guardianship.

The petitioner, Michael, is Selena's son. In 2010, he petitioned to become his mother's guardian. He claimed that Naomi had failed to use the power of attorney to manage their mother's assets after Selena's mental decline became apparent. He also claimed that Naomi had failed to provide care for their mother, ignoring signs of mental decline and failing to seek medical care for various illnesses that their mother had suffered.

Naomi responded and asked the trial court to name her as guardian. She requested that the court give priority to Selena's expressed wishes, as required by Franklin Guardianship Code § 401(b)(1).

After discovery, Naomi moved for summary judgment, which the trial court granted. The court noted that neither party contested Selena's competency at the time that she nominated Naomi, and found that the nominations had complied with the formalities laid out in Franklin Guardianship Code § 401(c). Both parties conceded that Selena presently needed a guardian. The trial court ruled as a matter of law that it had to honor Selena's wishes. It appointed Naomi as guardian. Michael appealed.

We begin with the proposition that the law recognizes and protects an individual's right to make decisions about her medical and financial affairs. An advance directive permits the individual to specify the medical care she would prefer to receive and to name a "health-care agent" to make those decisions when she lacks the competency to do so. A durable financial power of attorney gives the individual the right to name an agent to handle financial matters when she lacks the competency to do so. Both documents create a fiduciary relationship. Both a

health-care agent and the holder of a durable financial power have a legal obligation to act in the principal's best interest and to avoid self-dealing.

These documents can raise difficult questions when someone later petitions for the appointment of a guardian. Franklin law has long held that a later guardianship overrides an earlier grant of authority through either an advance directive or a power of attorney. The authority granted to the guardian supersedes any conflicting authority granted to the agent under either document. *Matter of Collins* (Fr. Sup. Ct. 2002).

At the same time, the law also permits an individual to nominate a person (including the individual's agent) as a possible future guardian, provided that the nomination is in writing and complies with certain formal requirements. FRANKLIN GUARDIANSHIP CODE § 401(c). Should this happen, the statute accords the person so nominated the highest preference for appointment as guardian. *Id.* § 401(b)(1).

The trial court correctly relied on these statutes in concluding that Selena had named Naomi as her preferred guardian. However, the trial court erred in appointing Naomi as a matter of law.

The statute does not make the nomination of a preferred guardian binding in a later guardianship proceeding. The statute states that a court in a guardianship proceeding "may disregard an individual who has preference and appoint an individual who has a lower preference or no preference." *Id.* § 401(a). The statute makes clear that a court may disregard an advance nomination of a guardian, but "only upon good cause shown." *Id.* This language creates a preference in favor of the nominated person. But this preference may be overcome with a sufficient factual showing of good cause.

In this case, the trial court erred in failing to consider Michael's evidence that good cause existed not to appoint his sister as guardian. Michael's affidavits indicate evidence that Naomi had neglected her mother's financial affairs and that she had also neglected to arrange for needed medical care for her mother. Without assessing the persuasive effect of this evidence, at the very least it creates an issue of fact on whether "good cause" exists to override Selena's nomination of Naomi.

No Franklin case has yet ruled on the "good cause" standard as it relates to overturning a *proposed* ward's previously stated preference for a guardian. As noted, the trial court failed to discuss the available evidence as it related to good cause.

The trial court on remand should apply a good cause standard to determine whether Selena's nomination of Naomi should be honored. This court has previously analyzed good cause in the context of the *removal* of a court-appointed guardian. FRANKLIN GUARDIANSHIP CODE § 402; *In re Guardianship of Martinez* (Fr. Ct. App. 2009). The same good cause standard applies in this context: a court may refuse to appoint a proposed guardian when that person's previous actions would have constituted a breach of a fiduciary duty had the person been serving as a guardian. Such conduct is of special concern when that person has actually served as a fiduciary for the proposed ward under an advance directive or power of attorney.

For these reasons, we reverse the trial court's judgment and remand the case for proceedings consistent with this opinion.

In re Guardianship of Martinez
Franklin Court of Appeal (2009)

Evelyn Waters appeals from a judgment against her in connection with expenditures that she made while guardian of her niece, Marlana Martinez, who is an incapacitated adult. Evelyn also appeals from an order removing her as Marlana's guardian.

A trial court has authority to remove a guardian for good cause pursuant to Franklin Guardianship Code § 402. That statute gives the trial court discretion to determine whether the available information establishes good cause. *Id.* That statute also permits the trial court to "issue any other order as in the court's judgment is appropriate under the circumstances of the case."

We will affirm the trial court's exercise of discretion unless its decision is clearly erroneous. In this case, the trial court issued written Findings of Fact and Conclusions of Law that specified the basis for its decision. These Findings and Conclusions, which we adopt, state as follows:

FINDINGS OF FACT:

1. Evelyn Waters has served as guardian of her niece, Marlana Martinez, since November 2005.
2. Marlana was born in May 1984 and suffered significant injuries at birth that left her profoundly disabled.
3. In 1988, a medical malpractice action arising from complications during Marlana's birth led to a substantial settlement that resulted in an annuity to Marlana of over \$8,000 per month.
4. In 2005, Marlana's last surviving parent died, after which a trial court appointed Evelyn as Marlana's guardian.
5. Since Evelyn's appointment, Marlana has lived with Evelyn, who has served as Marlana's primary caregiver.
6. In July 2006, Evelyn purchased a house for herself in her own name, using \$25,000 in funds from Marlana's estate for the down payment.
7. In August 2006, Marlana moved into the house with Evelyn.

8. In November 2006, Evelyn submitted her first annual report as guardian, which described the home purchase and mentioned several other expenditures without providing a detailed accounting.

9. This first annual report included expenditures during the previous year for an automobile, for mortgage payments, and for \$2,500 per month to Evelyn as “caregiver’s salary.”

10. Despite repeated requests from this court, Evelyn did not submit more detailed reports or any statement justifying these expenses.

11. In May 2007, this court appointed counsel to represent Marlana.

12. In June 2007, Marlana’s counsel petitioned this court to remove Evelyn as guardian and to require her to reimburse Marlana’s estate for any expenses not specifically used to provide for Marlana’s care.

13. This court granted the motion and appointed Marlana’s uncle, Joseph Sears, as guardian to succeed Evelyn.

14. On July 30, 2007, Evelyn filed her final accounting about Marlana’s estate. Both Marlana’s counsel and the new guardian objected to that accounting.

15. This court has reviewed both of the reports filed by Evelyn, covering the period from December 2005 to June 2007. During this period, Evelyn spent over \$137,000 from Marlana’s monthly annuity payments.

16. Evelyn has sufficiently documented that \$55,000 in expenditures, including the salary paid to Evelyn, was necessary for Marlana’s individual needs, and that an additional \$35,000 reflected Marlana’s prorated share of household outlays (such as mortgage payments, real estate taxes, moving expenses, groceries, utilities, and car payments).

17. Evelyn has provided no documentation to justify the remaining \$47,000 expended from Marlana’s monthly annuity.

18. The \$25,000 down payment for the house purchased in Evelyn’s name (*see* ¶ 6) was cash from the sale of investments in Marlana’s estate.

CONCLUSIONS OF LAW:

1. A guardian has the responsibility to apply the income and principal of the ward's estate "so far as necessary for the comfort and suitable support of the ward." *Nonnio v. George* (Fr. Sup. Ct. 1932).
2. A guardian acts in a fiduciary capacity toward the ward, which requires the guardian not to expend the ward's funds so as to benefit the guardian. *See In Re Samuels* (Fr. Sup. Ct. 2002).
3. The law does not require approval of expenditures in advance, but a trial court may disapprove of expenditures after they have been made. *Id.*
4. Good cause exists to remove a guardian when a guardian breaches her fiduciary duty by using the ward's funds to benefit the guardian. *Nonnio v. George*.
5. As guardian for Marlana, Evelyn had a fiduciary duty to use Marlana's funds for Marlana's comfort and suitable support and not to benefit herself as guardian. *Nonnio v. George; In Re Samuels*.
6. Those expenditures totaling \$55,000 that directly benefitted Marlana and those totaling \$35,000 for Marlana's pro rata share of household expenses did not breach Evelyn's fiduciary obligations as guardian. *Nonnio v. George*.
7. All other expenditures benefitted Evelyn personally and breached her fiduciary obligations as guardian. *Id.*
8. The use of \$25,000 from the sale of investments from Marlana's estate to purchase a house in Evelyn's name also breached Evelyn's fiduciary obligations as guardian. *Id.*
9. These breaches constitute good cause for revoking Evelyn's authority as guardian for Marlana. *Id.*

DISCUSSION

On appeal from this order, Evelyn claims that the trial court abused its discretion in removing her as guardian of Marlana. She insists that in managing Marlana's estate, her "primary goal" was to make Marlana's life "as comfortable and pleasurable as possible." Evelyn

contends that the trial court's requirement that she repay Marlana's estate for all undocumented expenses punished her for insignificant errors in reporting.

A guardian owes a fiduciary duty to her ward. This duty obligates the guardian to act in the best interest of the ward and not to use her decision-making authority to benefit the guardian. A guardian can breach this duty by action or neglect, if the action or neglect harms the ward. A fiduciary can harm the ward through mismanagement of finances, neglect of the ward's physical well-being, or similar actions. A fiduciary can also be held accountable if she uses her decision-making authority to benefit the guardian at the ward's expense.

The Findings of Fact belie Evelyn's argument that the trial court punished her for reporting errors. The Findings demonstrate that, even if Marlana received excellent care, Evelyn almost completely disregarded her fiduciary obligation to preserve and manage the estate to provide for Marlana's needs. Instead, Evelyn drew upon estate funds for her own support and comfort. Far from an abuse of discretion, the trial court's order carefully distinguishes between those funds used for Marlana's needs, those funds used for her fair share of common expenses, and those funds for the use of which no justification existed. "No abuse of discretion exists where a trial court identifies clearly and specifically those facts which support its Conclusions of Law." *Nonnio*.

The trial court's decision fully accords with the applicable principles of guardianship law. It does not punish Evelyn for minor failures in accounting. Instead, it uses the court's statutory authority to "issue any other order as in the court's judgment is appropriate under the circumstances of the case." FRANKLIN GUARDIANSHIP CODE § 402.

This court acknowledges that caring for Marlana at home may have been an exceptionally expensive undertaking. But that expense did not relieve Evelyn of the obligation of establishing which expenses were necessary and related to Marlana's individual needs. The trial court's Findings of Fact established that Evelyn treated the estate not as Marlana's separate funds to be used for Marlana's needs, but as a personal asset available to pay for Evelyn's food, housing, and other personal expenses.

Judgment affirmed.

MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

Do not include your actual name anywhere in the work product required by the task memorandum.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

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

===== Start of Answer #2 (1091 words) =====

MPT - 2

In re Guardianship of Henry King

Proposed Findings of Fact & Conclusions of Law

(1) Proposed Findings of Fact:

- 1) Ruth King Maxwell is the daughter of Henry King.
- 2) Noah King is the son of Henry King.
- 3) In 2013, Henry began to have trouble with his memory and lose attention span.
- 4) A doctor informed Henry he had early signs of dementia.
- 5) It was agreed by all parties that Henry make Noah his guardian.
- 6) On May 20, 2013 Henry signed an advance directive and power of attorney, which made Noah his prospective guardian.
- 7) Henry was mentally and physically "doing well."
- 8) Over the past two years, Henry's condition began to worsen.
- 9) A year and a half ago, Henry fell in the shower and bruised his arm.
- 10) Noah knew about the fall, but didn't think it was an issue.
- 11) Both siblings took Henry to the doctor and discovered his arm was only

bruised badly.

12) A few days later, Noah got angry and told Ruth not to worry and he knew how to take care of Henry.

13) In June 2016, Henry broke his wrist when he tripped over a rug in his bedroom, which Ruth was not notified.

14) After the accident, Noah claims that Henry did not seem in much pain.

15) The next day, a neighbor discovered Henry's wrist was swollen and Noah took him to the ER.

16) A cast was placed and Henry was discharged that night.

17) In August 2016, Ruth transferred to a nearby office with her company.

18) Ruth is now able to spend two or three evenings a week with her father.

19) Around August 2016, Ruth discovered that Henry broke his wrist.

20) Ruth also discovered that Noah was not buying Henry food.

21) The refrigerator only had skim milk and a little bread, and there was only can soup in the cupboards.

22) Ruth hired someone to shop and cook for Henry.

23) Ruth discovered an overdue notice from electric company.

24) Ruth looked through Henry's bills and statements and discovered many of the bills were late.

25) Ruth discovered statements and charges from Amazon and other online retailers, but could not find new items around Henry's house.

26) Henry stated the online gifts were for his friends, because he wanted them to

come visit him.

27) Besides explaining that it was hurting Henry's fiances, Noah took no other steps from preventing his father from buying gifts online.

28) In a two month period, \$2,200 was spent online.

29) In the past 12 months, he spent about \$9,000.

30) Henry only receives \$2,515 a month from his pension and Social Security (this is \$30,180 a year).

31) Noah admitted he knew of the online purchases. He stated it was hard to kep Henry from purchasing items, and it made it hard to keep up with the bills, but he was able to keep the bills under control.

(2) Proposed Conclusions of Law:

1) A guardian is an "individual appointed by a court to manage the income and assets and provide the essential requirements for health and safety and personal needs of someone found incompetent." Franklin Guardianship Code § 400.

2) The court shall apoint a guardian whose interest will best serve the interest of the adult. Franklin Guardianship Code § 401(a).

4) An adult may nominate in writing an indivudal to serve as the adult's guardian should the adult be judicially determined to need a guardian. Franklin Guardianship Code § 401(c)

4) This must be expressed, signed, and acknowledged by the adult in the

presence of two witnesses who sign in the adult's presence. Id.

5) The individual last nominated by the adult has preference over an adult child of the adult. Franklin Guardianship Code § 401(b).

6) The law recognizes and protects an individual's right to make decisions about her medical and financial affairs, this includes advance directive permits to specify the medical care the ward would prefer to receive and handle financial matters, and to name an agent to make the decisions when she/he lacks capacity. Matter of Selena J. (Fr. Ct. of App. 2011)

7) The court may disregard an individual who has preference and appoint an individual who has a lower preference if good cause is shown. Franklin Guardianship Code § 401(a).

8) A court may refuse to appoint a proposed guardian when that person's previous actions would have constituted a breach of a fiduciary duty had the person been serving as a guardian; and such conduct is of special concern when that person has actually served as a fiduciary for the proposed ward under an advance directive or power of attorney. Matter of Selena J. (Fr. Ct. of App. 2011)

9) The guardian should act in the best interest of the ward. In re Guardianship of Martinez (Fr. Ct. of App. 2009).

10) Henry King signed a valid advance directive and power of attorney on May 20, 2013, which made Noah his prospective guardian. Henry was mentally and physically "doing well."

11) A guardian has the responsibility to apply the income and principal of the

ward's estate "so far as necessary for the comfort and suitable support of the ward." In re Guardianship of Martinez (Fr. Ct. of App. 2009) citing *Nommio v. George* (Fr. Sup. Ct. 1932).

12) Around August 2016, it was discovered that Noah was buying Henry very little food and what food present was not diverse, nor not suitable for the comfort of Henry.

13) Besides a discussion, Noah has done nothing to prevent his father from continuing to purchase online gifts for his friends and breached his fiduciary duty of financial affairs.

14) These online orders have cost Henry about \$9,000 during the year, this is compared to the \$30,180 he gets per year from social security and pension.

15) Due to the online orders, Henry's bills have not been paid on time and he has received an overdue notice from electric company.

16) A neighbor, not Noah, discovered that Henry's wrist was broken and he needed medical care and has shown that Noah has breached his fiduciary duty over Henry's medical affairs.

17) As an adult daughter, Ruth is eligible to have preference as a guardian of Henry.

18) Ruth has Henry's best interest and has hired a cook/shopper, reviewed finances, and concerned herself with his medical interest.

19) These breaches constitute good cause for disregarding Henry's preference to appoint Noah and instead appoint Ruth as Henry's legal guardian.

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===== End of Answer #2 =====

END OF EXAM