FEBRUARY 2017 BAR EXAMINATION

ESSAY I

On the morning of the day on which this collision occurred, Driver 1, accompanied by his friend, Passenger, drove a small Toyota pickup truck from his home in Hawkinsville to a farm implement auction in Moultrie, where Driver 1 purchased a heavy piece of farm equipment. Employees of the auction company loaded the piece of farm equipment onto a small flatbed trailer which Driver 1 was towing behind his pickup truck. Driver 1 assisted in the loading operation and helped the auction company employees lash the equipment to the trailer. The weight of this equipment was greater than the manufacturer recommended for this trailer, and the combined weight of the equipment and trailer was greater than the towing capacity of the pickup truck, according to its manufacturer.

As they watched the balance of the farm auction and visited with friends, Driver 1 and Passenger began to drink beer they brought with them. After the close of the auction, and the consumption of a great quantity of beer, Driver 1 and Passenger began the return trip to Hawkinsville in the pickup truck with the attached trailer and farm equipment. At a point between Cordele and Abbeville, the pickup truck topped a small hill and Driver 1 saw a car, which was driven by Driver 2, backing out of a driveway into his lane of the two-lane highway. At the same time, and approaching the pickup truck from the opposite direction, was a car being operated by Driver 3, a nurse, who was driving to the hospital in Cordele where she was to begin working the evening shift.

When he saw Driver 2 back into his lane, Driver 1 slammed on the brakes of the pickup truck, causing the farm equipment to shift forward over the tongue of the trailer. As a result, the front of the trailer, with the added weight, went down toward the pavement, forcing the rear of the pickup truck toward the pavement as well, and raising the front tires of the pickup off the pavement. As a consequence, Driver 1 was unable to steer the pickup truck at all. As the pickup truck went out of control, the trailer and farm implement swung across the center line of the roadway and collided with Driver 3's vehicle as she approached, despite the fact that Driver 3 was exercising ordinary care at all times.

As a result of the collision between the trailer and farm equipment hitting Driver 3's vehicle, Driver 3 received catastrophic injuries which were permanently disabling. Driver 1 managed to avoid any significant injury. However, Passenger was thrown from the pickup truck and died as a result of his injuries. Driver 2 did not receive any injury; and in fact, Driver 2 pulled back into his driveway immediately upon seeing the pickup truck top the hill approaching his driveway.

After the collision, it was determined by the investigating law enforcement officers that Driver 1 was under the influence of alcohol to an extent greater than the legal limit.

Considering the facts stated above, please respond to the following questions:

Questions:

1. Driver 3 was married, had two young children, and was employed at the hospital in Cordele. Passenger was a single, unemployed adult with no children who lived with his parents. If lawsuits were filed to seek damages due to the injuries suffered by Driver 3, and due to the death of Passenger, what types of damages might be sought as to each, by whom, and against whom?

2. Please discuss the affirmative defenses that might be available to rebut the various claims for damages sought on behalf of Driver 3 and due to Passenger's death.

3. During the course of the litigation which was initiated by Driver 3, Driver 3 signed an agreement presented to her by a physician pursuant to which Driver 3 pledged to pay her doctor's fees from her future recovery of damages. The case ultimately settled before trial and, despite her lawyer's efforts to address the issue of the outstanding medical expenses, Driver 3 refused to let her lawyer negotiate or tender any payment on her behalf to the doctor, saying that she "would look after the doctor". The doctor insisted upon payment and Driver 3 refused to authorize her lawyer to make the payment. What should Driver 3's lawyer do and why?

ESSAY II

Mr. Cash has developed opportunities, both domestically and abroad, to build warehouse facilities that utilize solar energy for power. Because of the popularity of and cost-savings associated with the use of solar energy, Mr. Cash already has many investors who would like to invest in his ventures. In connection with his warehouse business, Mr. Cash would like to set up an entity that will allow for investment by these and other investors. Additionally, this entity must be one in which profits can be retained so that the entity can acquire other businesses in the future to augment the current business model.

Mr. Cash also would like to create an entity that will be owned by Mr. Cash and two of his friends, each of whom will contribute the initial capital to the business. This business entity will manufacture and sell solar panels both for his warehouse facilities and for other commercial and residential users. Instead of retaining the profits from the sales in this entity, Mr. Cash wants to distribute all the profits it makes to the investors in the business. At the same time, he would like to protect the three investors in this company from potential liability that could arise out of their involvement in the business.

Finally, because he is socially conscious, Mr. Cash also would like to set up an entity in honor of his grandmother. He would like to use some of the profits from his business ventures to provide funds through this entity to organizations that promote humanitarian causes and provide education, healthcare and other social services to impoverished communities. He has friends who would like to donate funds to such an entity, but they are only willing to donate if their contributions are tax-exempt.

Mr. Cash knows there are various types of entities that can be used for differing purposes, and he seeks your advice on the types of entities that should be created in order to accomplish his goals.

Questions:

1. Applying Georgia law, what type of entity should Mr. Cash organize that will allow investors to invest in the entity and allow that entity to retain profits for investment in future business opportunities? Explain fully and include in your answer a discussion of the steps and procedures Mr. Cash will be required to follow to legally create and register in the State of Georgia the entity you recommend.

2. Applying Georgia law, what type of entity should Mr. Cash organize that will allow for the manufacture and sale of solar panels and the distribution of the profits from the sales to the investors in the business? Explain how this entity is created and the benefits of its use.

3. Finally, applying Georgia law, what type of entity should Mr. Cash organize that can accept donations to be used for the public good that will not create tax consequences for individual donors? Explain how this entity is created.

ESSAY III

The State of Georgia has enacted a law creating a tuition voucher program which allows any student in kindergarten through 8th grade who is currently enrolled in a failing public school system under state control to receive a tuition voucher to partially offset the cost of attending another participating public or private school. While less than 20 percent of eligible students have taken advantage of the tuition voucher program, of those who have, more than 90 percent use the vouchers to enroll in Catholic school.

Due to an increasing number of drunken driving incidents, the City of Savannah enacted an ordinance banning the consumption of alcohol within the city limits. The ordinance has no exceptions. Savannah Church has been located within the city limits for more than 50 years. Consumption of alcohol is an important part of the Savannah Church communion service. Because of the ordinance, Savannah Church is not allowed to hold services that include the consumption of alcohol within the city limits.

The City of Tybee Island has enacted an ordinance banning the consumption of alcohol in a designated area of the city that has been the site of several drunken driving incidents. The only building located in the area subject to the alcohol ban is Tybee Church, which is the only church in the City of Tybee. Tybee Church also considers consumption of alcohol an important part of the Tybee Church communion service. In addition to having church services in the building, Tybee Church also has wedding receptions and other events in the church building during which alcohol is consumed. Because of the ordinance, Tybee Church is effectively prohibited from holding communion services that include consumption of alcohol on church property.

The Georgia state law and the City of Savannah and City of Tybee ordinances have been challenged as violating the First Amendment of the United States Constitution by parties who have standing to challenge the law and the ordinances.

Questions:

1. How will the Court likely rule on the challenge to the State of Georgia law on the school voucher program? Explain your answer fully.

2. How will the Court likely rule on the challenge to the City of Savannah ordinance? Explain your answer fully.

3. How will the Court likely rule on the challenge to the City of Tybee ordinance? Explain your answer fully.

ESSAY IV

Grandpa Jones had only one son, Jeff, who died in a tragic automobile accident in 2003. Jeff was married to Martha, and had two young children, Rob, born in 1997, and Justine, born in 2000.

After Jeff's unexpected death, Grandpa decided he needed to create a trust fund for Rob and Justine to pay for their ongoing support, college education and health care expenses. Because Martha had very limited income, Grandpa felt the need to supplement the financial support which Martha would provide her children.

Grandpa selected two of Jeff's closest friends, Bill and Hank, to be trustees of the trust for his grandchildren. To fund the trust, Grandpa decided to transfer to Bill and Hank, as trustees, a 50-acre tract of raw land which Grandpa had owned for many years, located about one-half of a mile from I-85 north of Atlanta. While the land had limited value on the date the trust was created, Grandpa felt it would appreciate in value over time and provide his grandchildren with more than adequate financial support.

Grandpa created the trust in 2005, but in 2015, after Rob had turned 18 years of age and was about to enter college, Bill and Hank, as trustees, realized that the 50-acre tract held in the trust was producing no income and would not provide any financial support for Rob to pay tuition, room and board and travel expenses during his college years. Because there was a limited market for the 50-acre tract held in the trust, Bill suggested to Hank that he, meaning Bill, would be willing to purchase the tract from the trust at its current fair market value, thus exchanging the tract for cash which could be invested and which could provide Rob with the financial support he would need during his college years. The trust fund would also be available to help Justine when she reached college age.

Bill proceeded to have the tract appraised by a qualified MAI appraiser who determined the tract to be valued at $2,000 per acre. Hank wondered if Bill's purchase of the tract was a good idea, but did not object to the transaction. Bill also told Martha of his plan; Martha too agreed that this would be in her children's best interest. Bill proceeded to purchase the tract from the trust for $100,000 cash in 2015.

In September 2016, Moxie Industries, an international plastics conglomerate, decided to move its headquarters to Georgia and wanted to find a suitable location for its production facility and corporate offices. Grandpa's 50-acre tract, which Bill now owned, turned out to be the perfect location for Moxie, and it offered Bill $10,000 per acre for the land, which Bill quickly accepted. The transaction closed in February 2017, and Bill was paid $500,000 for the tract.

Rob is now 19 years of age, while Justine is 16. Please address the following questions as you analyze these facts:

Questions:

1. Has Bill or Hank breached any fiduciary duty which either of them may have had to Rob and Justine under applicable Georgia law? If so, describe how either or both of them may have breached a duty to Rob and Justine. Please discuss or explain your answer fully.

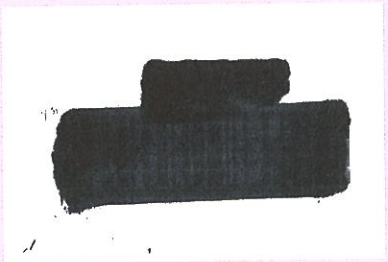
2. If you conclude that Bill or Hank or both are liable to Rob and Justine in connection with the described transactions, are they equally liable according to applicable Georgia law, or does one co-trustee have greater liability than the other? Please discuss or explain your answer fully.

3. If Rob and Justine wish to file a lawsuit against Bill, Hank or both under applicable Georgia law, how long will each of them have to file such a suit?

4. What legal remedy should Rob and Justine seek? Please discuss or explain your answer fully.

5. Finally, under applicable Georgia law, was there a judicial remedy available to Bill and Hank, as trustees, which would have allowed them to sell the tract to Bill without creating the potential for a claim or claims to be made against them by the grandchildren? Please discuss or explain your answer fully.

Applicant Number



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In re Ace Chemical

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In re Ace Chemical

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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.

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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.

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.

NOTES

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.

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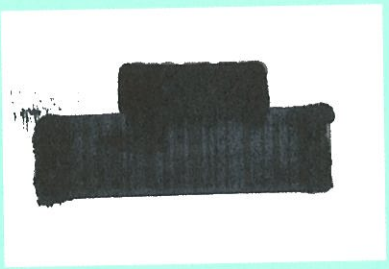

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In re Guardianship of Henry King

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In re Guardianship of Henry King

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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.

Sibley and Wallace Law Office, P.C.

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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, Marlena Martinez, who is an incapacitated adult. Evelyn also appeals from an order removing her as Marlena'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, Marlena Martinez, since November 2005.

2. Marlena 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 Marlena's birth led to a substantial settlement that resulted in an annuity to Marlena of over $8,000 per month.

4. In 2005, Marlena's last surviving parent died, after which a trial court appointed Evelyn as Marlena's guardian.

5. Since Evelyn's appointment, Marlena has lived with Evelyn, who has served as Marlena's primary caregiver.

6. In July 2006, Evelyn purchased a house for herself in her own name, using $25,000 in funds from Marlena's estate for the down payment.

7. In August 2006, Marlena 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 Marlena.

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

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

14. On July 30, 2007, Evelyn filed her final accounting about Marlena's estate. Both Marlena'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 Marlena's monthly annuity payments.

16. Evelyn has sufficiently documented that $55,000 in expenditures, including the salary paid to Evelyn, was necessary for Marlena's individual needs, and that an additional $35,000 reflected Marlena'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 Marlena'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 Marlena'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 Marlena, Evelyn had a fiduciary duty to use Marlena's funds for Marlena'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 Marlena and those totaling $35,000 for Marlena'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 Marlena'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 Marlena. *Id.*

DISCUSSION

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

contends that the trial court's requirement that she repay Marlena'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 Marlena received excellent care, Evelyn almost completely disregarded her fiduciary obligation to preserve and manage the estate to provide for Marlena'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 Marlena'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 Marlena 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 Marlena's individual needs. The trial court's Findings of Fact established that Evelyn treated the estate not as Marlena's separate funds to be used for Marlena's needs, but as a personal asset available to pay for Evelyn's food, housing, and other personal expenses.

Judgment affirmed.

NOTES

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.