

February 2026 MEE Questions

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MEE Question 1

In 2022, a mother conveyed by deed a house she owned to her three children, Alonzo, Barbara, and Carla, "as joint tenants with right of survivorship and not as tenants in common."

In 2023, without either Alonzo's or Barbara's knowledge or consent, Carla validly leased the house as a residence for a two-year term to a tenant for monthly rent of \$1,200. The lease began on January 1, 2023.

On December 10, 2023, the tenant emailed Carla: "I need to relocate to another city for work. I will move out of the house at the end of this month and won't ever return." Carla immediately replied, "Thank you for letting me know. To confirm our arrangement, however, you still owe me rent for the remaining 12 months of our two-year lease." The tenant did not reply to Carla's email and vacated the house three weeks later, on December 31, 2023.

The day after the tenant vacated the house, Carla advertised it for rent for \$1,200 monthly. Within a week she had received rental applications from three qualified potential tenants. After reviewing the applications, Carla decided that she no longer wanted the burden of being a landlord, and so she told the potential tenants that the house was off the market. The house then sat vacant for the one year remaining of the tenant's lease term. During that one-year period, Carla entered the house only to inspect and clean it.

Immediately after the tenant's term ended on December 31, 2024, Carla moved into the house. During the time of Carla's possession, the fair rental value of the house was \$1,500 per month.

Last month, Carla died. In her will she devised her interest in the house to her son.

Ignore any statute of limitations issues.

1. With respect to the two-year lease between Carla and the tenant:
 - (a) Was Carla entitled to receive 12 months of unpaid rent from the tenant at the end of the lease term? Explain.
 - (b) Were Alonzo and Barbara entitled to a share of the rental income payable to Carla under the lease? Explain.
2. Were Alonzo and Barbara entitled to any of the house's fair rental value from Carla during the time of her possession of the house after the tenant's two-year lease expired? Explain.
3. What effect, if any, did Carla's leasing the house to the tenant have on the ownership interests in the house following her death? Explain.

MEE Question 2

Angie developed an application ("app") for cell phones for herself and her friends to organize their large wardrobes better than any currently available commercial app.

In March, while discussing her app with her best friend, Basra, Angie wondered aloud whether she could earn money with her app by hiring a software developer to refine it so that she could make it available to the general public. Although Angie said nothing about starting a business at that time, Basra told her that he thought her idea was great, that he believed it would make a lot of money, and that he would be willing to invest \$5,000 if Angie started a business. Basra also offered to introduce Angie to Clyde, a software developer Basra had known for some time.

On April 1, Angie started a new business, which she called XYZ, to license and market her app, thinking that in a couple of months she would incorporate the business. On April 10, Basra put Angie in contact with Clyde. Angie, in the name of XYZ, and Clyde entered into a written agreement under which Clyde would make the app usable by the general public and XYZ would pay Clyde \$10,000 upon the signing of the agreement and \$15,000 when he completed and delivered the app. As soon as they signed the agreement, Angie paid Clyde \$10,000.

In June, Angie completed the paperwork to form a corporation to market the app and filed the paperwork with the appropriate state agency. The articles of incorporation named Angie as the sole initial director of the corporation. Acting as the director, Angie approved the corporation's issuance of 10,000 shares of stock to herself in exchange for her contribution to the corporation of all her intellectual property rights in the app. She also approached Basra, reminding him of their earlier conversation and offering him 2,500 shares for an investment of \$5,000 in the corporation. Basra agreed, and the corporation properly issued Basra 2,500 shares of stock in exchange for \$5,000.

In July, Angie realized that she would not be able to raise the additional capital necessary to refine the app for public use. She immediately told Clyde to stop work. Clyde responded that he had completed the work. He then sent her a bill for \$15,000 and delivered the fully usable app to her.

The corporation never took any formal action with respect to the agreement with Clyde.

Assume that the contract with Clyde was valid and that Clyde fully performed all his obligations.

1. May Clyde recover the unpaid contract price from Angie? Explain.
2. May Clyde recover the unpaid contract price from Basra,
 - (a) on the theory that Basra is a partner of Angie? Explain.
 - (b) on the theory that Basra is a shareholder of the corporation? Explain.
3. May Clyde recover the unpaid contract price from the corporation, on the theory that it adopted the contract? Explain.

MEE Question 3

A state prosecutor has charged James, age 35, with theft of comic books, in violation of the following State A statute:

A person commits the offense of theft by unlawfully taking and carrying away, or appropriating, any property of another person with the intent to permanently deprive the other person of the property.

The charges are based on the following facts:

James and his two sons, ages 10 and 13, collect comic books. They frequently visit their favorite comic-book store. As a result of the frequent visits and the amount spent monthly in the store, James and his sons are all on a first-name basis with the store owner.

On January 2, James and his sons were browsing in the store. After half an hour, James went to the counter to pay for several comic books while the boys continued looking through the shelves. James completed his purchase and told the boys that he was ready to leave. They all politely said "Thank you" and "Good-bye" to the store owner, who cheerfully responded, "See you soon."

Two weeks later, police officers arrested James as he was leaving work. The officers told him that the prosecutor was charging him with theft from the comic-book store. More specifically, the store owner had watched a surveillance video recording of the store from January 2, and in the video, he had seen one of James's sons, who was holding James's briefcase, place five comic books in the briefcase while the trio was browsing in the store. Before they left the store, James paid for the three comic books that he was holding in his hand. He did not pay for the five comic books in the briefcase that he carried out of the store.

During their investigation, the police located an incident report indicating that 15 years earlier James had been arrested at a local grocery store and accused of theft. James had eaten a handful of grapes, claiming that he was tasting them before he ultimately decided not to purchase any grapes. Although arrested, he was never charged with a crime regarding the grapes.

State A has adopted rules of evidence that are identical to the Federal Rules of Evidence. At trial, during the state's case-in-chief, the state asks the court to admit evidence that James was once accused of theft of grapes. Defense counsel objects on three independent grounds: (1) the evidence is irrelevant, (2) the evidence is improper character evidence, and (3) the evidence is improper evidence of other acts.

How would the court likely rule on each ground? Explain. Do not address any notice requirements.

MEE Question 4

Husband properly executed a will that included the following bequests:

- A. Any automobile I own at the time of my death to my brother if he survives me;
- B. The house I own at 211 Pearson Drive, City, State Y, which I purchased as an investment, to my mother; and
- C. The residue of my estate to Wife if she survives me.

The will contained no other provisions relating to the disposition of Husband's estate. At the time Husband executed his will, he did not own an automobile.

Six months after Husband executed his will, he sold the house at 211 Pearson Drive and reinvested the proceeds in another house, located at 500 South Street, City, State Y. At no time did Husband or Wife live in the house at 211 Pearson Drive or the subsequently acquired house on South Street.

One year after Husband executed his will, he and Wife had a child named Sam.

Two years after executing his will, Husband had a nonmarital child with his neighbor. This child is named Doris.

Three years after Husband executed his will, his brother died.

Husband died in State Y five years after executing his will, having never revised it. He is survived by Wife; his two children, Sam and Doris; his mother; and his brother's adopted child, Fred. Husband's estate is valued at \$3,325,000. It consists of an automobile (valued at \$25,000) that he acquired two months before he died, the house at 500 South Street (valued at \$300,000), and \$3 million in cash. His estate has no debts and no expenses.

State Y has adopted the Uniform Probate Code.

1. Does the bequest of the automobile to Husband's brother lapse and pass as part of the residue, or does it pass to the brother's adopted child, Fred? Explain.
2. Is Husband's mother entitled to the house at 500 South Street as a substitute for the house specifically bequeathed to her, or did that bequest adeem resulting in the house at 500 South Street passing to the takers of the residue under Husband's will? Explain.
3. To whom should the residuary estate be distributed? Explain.
4. Is Doris entitled to take a share of Husband's estate as an omitted child? Explain.
5. Is Sam entitled to take a share of Husband's estate as an omitted child? Explain.

MEE Question 5

Harmony Corporation sells musical instruments to both professional and amateur musicians. Harmony finances its business pursuant to a signed agreement with Bank, under which Bank has loaned money to Harmony and will continue to do so from time to time, and pursuant to which Harmony has granted Bank a security interest in all of Harmony's present and future inventory to secure its obligation to repay the loans. Bank has filed a properly completed financing statement reflecting this transaction in the appropriate filing office. The financing statement lists Harmony Corporation as the debtor and Bank as the secured party and indicates that the collateral is "inventory."

Harmony sells musical instruments to some of its customers on credit. In a credit sale, Harmony requires the customer to sign an agreement indicating that Harmony retains title to the instrument until the customer finishes paying for it.

Six months ago, Walter, a professional flutist, went to Harmony's showroom, where Walter saw a flute that he liked and thought would be perfect for his professional performances. Walter could not, however, afford to pay the \$1,500 price of the flute. Harmony agreed to sell Walter the flute on credit. As memorialized in a "credit sales agreement" signed by Walter, he paid \$300 in cash and promised to make payments of \$100 on the first day of each of the next 12 months, and until the last payment was made, Harmony retained title to the flute. At the time of the transaction between Walter and Harmony, Walter was unaware of the financing arrangement between Harmony and Bank.

One month ago, Walter, who had not finished paying Harmony the purchase price of the flute (which he had used exclusively for professional purposes), sold it to Joan, another professional flutist, for \$900 in cash. Joan had no knowledge of any interest of Bank or Harmony in the flute. After selling the flute to Joan, Walter stopped making installment payments to Harmony.

One week ago, Harmony defaulted on its obligations to Bank.

Both Bank and Harmony have discovered that Joan now has the flute, and each has demanded that she surrender the flute on the grounds that it is collateral for obligations owed to them.

1. Does Bank have a security interest in the flute that is enforceable against Joan? Explain.
2. Does Harmony have a security interest in the flute that is enforceable against Joan? Explain.

Assume that the financing statement filed by Bank is the only relevant financing statement filed and that all parties acted in good faith at all times.

MEE Question 6

A corporation is incorporated in and has its headquarters in State A. The corporation provides wealth-management services to high-net-worth individuals through its offices in States A, B, and C. The corporation is registered to do business in State C, pursuant to a state statute providing that any corporation that registers to do business in the state agrees that the state's courts may exercise "general personal jurisdiction" over the corporation and that the registered corporation "shall be subject to the same liabilities and duties" as corporations incorporated in State C.

Two years ago, Penny, a woman who lived in State B, visited the corporation's branch office in State B and there entered into a contract with the corporation to manage her assets. The corporation assigned Dan, one of its wealth managers at that branch office, to manage Penny's assets. Without Penny's authorization, Dan made extremely risky investments, resulting in the loss of almost all of Penny's assets. When the corporation learned of Dan's behavior, it fired him. Dan then left State B and moved into his parents' home in State C.

After terminating her relationship with the corporation, Penny also moved to State C. She hired an attorney there to represent her regarding possible claims against Dan and the corporation. For several months, the attorney unsuccessfully attempted to negotiate a settlement of Penny's potential claims against the corporation.

Penny's attorney learned that Dan was living with his parents in State C. The attorney tried to contact Dan at his parents' home to discuss settlement, but Dan never responded. The attorney learned that Dan was frequently away from home for weeks traveling throughout the United States.

One week before expiration of the statute of limitations on Penny's claims, her attorney, at Penny's direction, brought two separate actions in the US District Court for the District of State C: one action against Dan and one action against the corporation, both raising claims under a federal law designed to protect investors.

In the action against Dan, Penny's attorney mailed a request for waiver of service of process to the home of Dan's parents. Dan never replied to the request for waiver of service of process.

After receiving no reply to the request for waiver of service of process, Penny's attorney attempted to serve process on Dan. The law of State C allows service of process in its courts of general jurisdiction by sending the summons and complaint by first-class mail to a defendant's place of residence. Consistent with this law, Penny's attorney sent an envelope containing the summons and complaint by first-class mail to the home of Dan's parents.

The envelope had no markings indicating the nature of its contents, and Dan's parents placed the envelope with the rest of his mail, which they were collecting and saving for him until he returned from his travels.

When Dan failed to respond to the summons and complaint, Penny's attorney moved for a default judgment, which the court granted.

Two months later, Dan returned and opened his mail, discovering the summons and complaint. He contacted an attorney, who learned of the default judgment and promptly filed a motion in the federal court to set it aside based on insufficient service of process.

In Penny's separate action against the corporation, her attorney requested, and the corporation executed, a waiver of service of process. The corporation then filed a timely motion to dismiss for lack of personal jurisdiction over it.

Penny has done no business with the corporation's office in State C, and none of its employees in State C had anything to do with managing her assets.

Assume that the federal district court has federal-question jurisdiction over Penny's claims against Dan and the corporation.

1. Was service of process on Dan sufficient? Explain.
2. Does the district court have personal jurisdiction over the corporation? Explain.

February 2026 MEE Analyses

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RLP (I.B.; I.C.; I.D.2)

ANALYSIS

Legal Problems:

- (1) With respect to the two-year lease between Carla and the tenant:
 - (a) Was Carla entitled to seek 12 months of unpaid rent from the tenant at the end of the lease term?
 - (b) Were Alonzo and Barbara entitled to a share of the rental income payable to Carla under the lease?
- (2) Were Alonzo and Barbara entitled to any of the house's fair rental value from Carla during the time of her possession of the house after the tenant's two-year lease expired?
- (3) What effect, if any, did Carla's leasing the house to the tenant have on the ownership interests in the house following her death?

DISCUSSION

Summary

Under the traditional common law, if a tenant abandoned the leased premises, a landlord could elect not to accept the abandonment and sue for unpaid rent, either as it came due or at the end of the lease term. In states following that rule, Carla was entitled to receive from the tenant the 12 months of unpaid rent at the end of the lease term. In many states today, however, the landlord is required to mitigate damages by making reasonable efforts to re-let the premises. In some of the mitigation states, Carla could not recover anything from the tenant because she would be deemed to have accepted the surrender as she did not mitigate her damages. In other states, because she did not mitigate, she could not recover unpaid rent, but she could recover damages equal to the difference, if any, between the amount of rent due over the 12-month period and the house's fair rental value over the same period.

With respect to the lease between Carla and the tenant, Alonzo and Barbara were entitled to an equal share of the rental income.

Alonzo and Barbara were not entitled to any of the house's fair rental value during the time Carla occupied the house because any co-tenant is entitled to possession of the whole of the co-tenancy property without paying rent to the co-tenants not in possession.

The interests, if any, that Alonzo, Barbara, and Carla's son had in the house at Carla's death depend on whether the joint tenancy was severed when Carla leased the house to the tenant. There are two possible approaches. Under the traditional common law, a lease was a conveyance of property and thus a title transaction. As such, the lease by Carla to the tenant severed the joint tenancy, and Carla's one-third share was as a tenant in common with her two siblings Alonzo and Barbara (who between themselves remained joint tenants with right of survivorship). At Carla's death, her one-third share in the house passed to her son as a tenant in common.

Today, however, some states take the view that a unilateral lease does not sever a joint tenancy. Some states adopt the rule that a lease severs the joint tenancy only if it terminates after the lessor/joint tenant dies. If the lessor/joint tenant survives the lease termination, the joint

tenancy is not severed. Here, Carla survived the termination of the lease, so under this rule, the joint tenancy did not terminate when the lease terminated. Thus, at Carla's death, her joint-tenancy interest in the house terminated, leaving her nothing to pass to her son. As a result, at Carla's death, Alonzo and Barbara owned the house as joint tenants with right of survivorship.

Point One(a) (35%)

Under the traditional common law, if a tenant abandoned the leased premises, the landlord could elect not to accept the abandonment and, at the end of the lease term, sue for all unpaid rent. In states following the traditional common law, Carla was entitled to collect 12 months' rent from the tenant at the end of the lease term. Many states today, however, require the landlord to mitigate damages by making reasonable efforts to re-let the premises. In those states, because Carla did not mitigate, she either (a) could be deemed to have accepted the tenant's surrender of the house and thus not be entitled to either rents or damages or (b) could be limited to damages rather than rent.

The tenant abandoned the house with one year remaining on the lease. Abandonment occurs when a tenant vacates the leased premises and communicates the intent to no longer perform under the lease. Here, the tenant did so by sending an email message to Carla that stated the tenant's intent to cease living in the house at the end of the first year of the lease, and then physically moving out of the house.

At common law, when a tenant wrongfully abandoned the leased premises, the landlord had several options. First, the landlord could treat the abandonment as an offer of surrender of the premises, and accept the tenant's surrender, which would terminate the tenancy. *See* JOSEPH W. SINGER, PROPERTY § 10.4.4.4, at 464 (5th ed. 2017) ("If the landlord 'accepts the tenant's surrender,' the leasehold will terminate, as will all obligations under it owed by either party to the other."). Second, the landlord could re-let the premises on the account of the tenant. *Id.* Third, the landlord could sue the tenant for damages. *Id.* And fourth, the landlord could leave the leased premises vacant and sue for unpaid rent as it came due. *Id.*

Here, Carla did not either accept surrender of the leased premises or re-let on the tenant's account. Acceptance of surrender requires actions by the landlord that indicate the intent to do so, and Carla's actions of acknowledging the tenant's communication and then cleaning and checking on the house do not evidence such an intent. *See* SHELDON F. KURTZ, MOYNIHAN'S INTRODUCTION TO THE LAW OF REAL PROPERTY 127 (8th ed. 2022) ("Because a surrender requires mutual agreement, the unilateral action of the tenant in abandoning possession of the premises and repudiating the tenancy does not effectuate a valid surrender."). Also, there are no facts indicating that Carla communicated to the tenant that she would re-let the house on the tenant's account. So, under the common law, at the end of the lease term, Carla would be entitled to seek payment of the remaining unpaid rent from the tenant. *Id.* at 128 ("The traditional view is that because a lease is more of a conveyance than a contract, the general rule of contract law requiring the injured party to mitigate damages is not applicable.").

Many states have rejected the fourth common law option and require that a landlord take reasonable steps to mitigate damages when a tenant abandons leased property before the end of the lease term. *Id.* ("This trend is particularly strong in the case of residential tenancies."); JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 303 (5th ed. 2020) ("In an increasing number of jurisdictions, the landlord may only (1) terminate the lease or (2) mitigate his damages and then sue for the balance of rent due."). A landlord does so by making "reasonable efforts to re-let

[the premises]" to a new tenant. *Sommer v. Kridel*, 378 A.2d 767, 773 (N.J. 1977). If a landlord fails to do so, the courts will allow the landlord only damages equal to the difference, if any, between the amount of rent due over the term of the lease remaining after the tenant wrongfully vacated the property and the property's fair rental value over the same period. However, in some states, if the landlord fails to mitigate, the landlord is deemed to have accepted the surrender of the premises and is entitled to no damages. *See* UNIF. RESIDENTIAL LANDLORD AND TENANT ACT (1972) § 4.203(c).

Here, the facts show that Carla could have re-let the property because she received three qualified applications to rent within a week of advertising the house for rent. The facts also show that Carla chose not to rent the property because of her own desires to no longer have the burden of being a landlord, and not because the potential tenants were unacceptable. Thus, in states that require a landlord to mitigate damages, Carla would not be entitled to seek the unpaid rent from the tenant at the end of the lease term.

[NOTE: Because the facts do not indicate whether the jurisdiction requires a landlord to mitigate damages if a tenant wrongfully vacates the leased premises, examinees are free to answer this question under either of the conflicting principles—there is a duty to mitigate, there is no duty to mitigate—and receive full credit.]

Point One(b) (15%)

When a co-tenant unilaterally leases co-owned property to a third party, the other co-tenants are entitled to their share of the rental proceeds. Thus, Alonzo and Barbara were entitled to their share of the rent that Carla received under the lease to the tenant.

"If the property is rented out, co-owners have the right to share the rental income in proportion to their respective fractional ownership interests." SINGER, PROPERTY § 8.4.4, at 367 (5th ed. 2017). And so, when one co-tenant leases the property without the knowledge or agreement of the other co-owners, the leasing co-tenant must account to the other co-owners for their share of the rent received.

Carla leased the house to the tenant without the knowledge or agreement of Alonzo and Barbara. Thus, there was no agreement among the siblings that would change the common law rule concerning the sharing in rental proceeds. Therefore, Alonzo and Barbara were entitled to their share of the rental income that Carla received from the tenant.

Point Two (15%)

Alonzo and Barbara were not entitled to any of the house's fair rental value during the time of Carla's exclusive possession of the house because any co-tenant is entitled to possession of the property if the possessing co-tenant does not exclude the others from possession as well.

Each co-tenant is entitled to possession of the entire co-tenancy property if he or she does not exclude the others from exercising the same right. DALE A. WHITMAN, ANN M. BURKHART, R. WILSON FREYERMUTH & TROY A. RULE, THE LAW OF PROPERTY 160 (4th ed. 2019). There are no facts suggesting that either Alonzo or Barbara was excluded from also possessing the house. "[I]f one cotenant was in sole possession of property but had not excluded the others, she was not accountable for . . . the rental value of her use and possession." *Id.* at 161. Here Carla's possession was an entitlement of co-ownership, and she did not exclude Alonzo or Barbara from

also possessing the house. Therefore, she was not required to pay them the fair rental value of her possession.

Point Three (35%)

Under the traditional common law, Carla's unilateral execution of the lease severed her interest as a joint tenant, and she became a tenant in common with Alonzo and Barbara who, between themselves, remained joint tenants with right of survivorship. In that case, at her death Carla's share passed to her son, who was then a tenant in common with Alonzo and Barbara, who remained joint tenants with right of survivorship. Today, however, in some states, the lease here would not sever the joint tenancy and, at Carla's death, the house would be owned by Alonzo and Barbara as joint tenants with right of survivorship.

Under the traditional common law, a lease was treated as a conveyance of real property. Because of this, the grant of a lease by one joint tenant severed the unity of both title and interest, thereby destroying the right of survivorship. *See SINGER, supra*, § 8.2.2 at 352. Some states continue to follow this approach. *Id.* at 356. Other states, however, hold that a lease does not sever a joint tenancy or, alternatively, severs the joint tenancy only if the lessor/joint tenant dies before the end of the lease. *Id.*

Under the common law approach, the lease from Carla to the tenant severed Carla's interest in the joint tenancy, leaving her as a tenant in common with Alonzo and Barbara, who continued to be joint tenants with each other. Carla's share as tenant in common was devisable to her son. Thus, upon Carla's death, her son would own the house as a tenant in common with Alonzo and Barbara, who would remain joint tenants with right of survivorship.

Under the other two approaches, the lease from Carla to the tenant did not sever the joint tenancy because the state either follows the "no severance" rule or adopts the position that a "lease by one joint tenant severs the joint tenancy only if the lessor/joint tenant dies before the end of the lease." *Id.* Under the latter rule, "if the lease terminates before the lessor/joint tenant dies, then the right of survivorship remains intact," *id.*, and the joint tenancy is not severed. Here, the lease terminated before Carla died, and so the joint tenancy was not severed. Thus, at Carla's death, Alonzo and Barbara would own the house as joint tenants with right of survivorship and Carla's son would have no interest in the house.

[NOTE: The facts do not indicate which approach the jurisdiction follows, and so examinees should receive full credit for applying any one of the above positions.]

CORPORATIONS AND LLCs (II.A.)

ANALYSIS

Legal Problems:

- (1) Is Angie personally liable to Clyde for the \$15,000?
- (2) Is Basra personally liable to Clyde for the \$15,000, either as a partner with Angie or as a shareholder in the corporation she formed?
- (3) Is the corporation liable to Clyde for the \$15,000?

DISCUSSION

Summary

Angie is personally liable to Clyde for the remaining \$15,000 payment because she entered into the contract on behalf of herself, acting as a sole proprietor of a business, and not on behalf of any corporation.

Basra is not personally liable to Clyde. Basra never became a partner in a partnership with Angie. He is only a shareholder in the corporation that was eventually formed. Shareholders are not ordinarily liable for the debts of the corporation.

Because the corporation did not adopt the contract with Clyde, either explicitly or through its conduct, it is not liable on that contract.

Point One (35%)

Angie is personally liable to Clyde for \$15,000, having signed the contract with Clyde as the sole proprietor of her business.

A person who conducts a for-profit business without having formed a legal entity for purposes of that business operates as a sole proprietorship. In a sole proprietorship, the owner and the business are one and the same. When Angie entered into the agreement with Clyde, she became personally liable on the contract with Clyde.

Furthermore, if a sole proprietor subsequently forms a corporation, as Angie did, the sole proprietor is not automatically released from personal liability on contracts entered into while a sole proprietorship. RESTATEMENT (THIRD) OF AGENCY § 4.04. Rather, the other party to the contract would have to agree to release the sole proprietor from personal liability. Usually that happens in connection with the newly formed entity's adoption of the act purportedly done on its behalf. *Id.* § 4.04 cmt. c. However, this did not occur here.

[NOTE: Some examinees might discuss contract law concepts such as whether the UCC or common law applies to this contract, whether the parties properly formed the contract, or whether a party has defenses. Because the facts state that this contract was valid and that Clyde fully performed, there is no question but that the contract was properly formed and that there is no defense. Moreover, governing law is irrelevant. If examinees write that Angie or the corporation breached the contract, that is a correct statement but does not get at the heart of the question—whether Angie is personally bound by the contract. That question can be answered only by recognizing Angie is operating as a sole proprietorship and is personally liable for the debts of that sole proprietorship.]

Point Two(a) (15%)

Basra is not liable to Clyde for the \$15,000 as a partner because he never became a partner in a general partnership with Angie.

A partnership is an association of two or more people to carry on as co-owners a business for profit. [REVISED] UNIFORM PARTNERSHIP ACT (RUPA) (1997, as amended 2013) § 202. Partnerships may be formed without any formalities, and parties do not need to label themselves "partners" to have formed a partnership. RUPA § 202(a). Sharing profits can lead to a presumption that a partnership was formed. RUPA § 202(c)(3). If a partnership has been formed, each partner is jointly and severally liable for the debts of the business incurred while that person is a partner. RUPA § 306(a) & (b).

Here, Basra contemplated in March that he would be willing to invest in Angie's business. Moreover, he offered to put Angie in contact with Clyde, a software developer, to complete development of the app so that it could be used by the public. At that time, however, Angie did not yet have an intent to form a business. Moreover, Basra did not invest in the business at that time. And while Basra told Angie that he thought her idea was great and would make a lot of money, he recognized that no business had yet been formed when he told her that he would be willing to invest \$5,000 *if she started a business*. Basra's mere offer to put Angie in contact with Clyde is very unlikely to have been intended as a contribution to a partnership and was not made in contemplation of receiving an ownership interest in any business.

On April 1, Angie decided to form a business. Ten days later, she also (as a sole proprietor) hired Clyde to complete development of the app. It was not until June that Basra invested in the business and became a "co-owner," when the business was being conducted through the corporation. Accordingly, Basra was not a partner when Angie incurred the debt to Clyde. Basra is therefore not personally liable as a partner on the obligation to Clyde.

Point Two(b) (20%)

Basra is a shareholder in the newly formed corporation. Shareholders are not personally liable for the debts of the business.

Shareholders are not personally liable for the debts of a corporation, absent special circumstances not raised in this problem. MODEL BUS. CORP. ACT § 6.22(b); DEL. GEN. CORP. LAW § 102(b)(6). Basra therefore did not become personally liable on the debt owed to Clyde as a shareholder of the corporation. Indeed, as discussed below, it is likely that the corporation is not liable on this contract either.

Point Three (30%)

Because the corporation never took any formal action with respect to the contract with Clyde, it is not liable on that contract. The corporation did not affirm that contract either explicitly or through conduct.

When a purported agent enters into a contract on behalf of a not-yet-existent principal and knows that the principal does not yet exist, by default the agent is bound by that contract. *See* RESTATEMENT (THIRD) OF AGENCY § 6.04.

Moreover, when the principal comes into existence, it does not automatically become bound by the acts of the purported agent. Instead, to become bound, the newly formed principal

must, following its formation, adopt any obligation purportedly incurred on its behalf. *Id.* § 6.04 cmt (c); § 4.04 cmt. c.

Like ratification, an adoption or affirmance is either an overt act indicating assent that the act binds the newly formed principal or conduct that justifies a reasonable assumption that the principal so consented. *See id.* § 4.01. As to the latter, accepting the benefits of a transaction with knowledge of its material terms amounts to an affirmance. *Id.* § 4.01 cmt. d. "A corporation may adopt a contract made by a promoter by accepting its benefits with knowledge of its terms," *id.* § 4.04 cmt. c, and the knowledge of an agent of a corporation is imputed to the corporation if it is material to the performance by the agent of its duties. *Id.* § 5.03.

A newly formed entity's affirmance of a contract does not itself release the agent from liability on the obligation. *Id.* § 6.04 cmt (c).

Because Angie entered into the contract with Clyde before the corporation existed, the corporation was not bound at that time or when it came into existence. Instead, to become bound, the newly formed corporation would have needed to adopt the contract once it came into existence. Here, the newly formed corporation had information about the act purportedly done on its behalf—that is, Angie's entry into a contract. Because Angie was an agent of the corporation acting in furtherance of its business, Angie's knowledge can in theory be imputed to the corporation, including the knowledge that she signed a contract with Clyde. But the corporation did not ratify or choose to accept any benefit from the contract and took no other action with respect to the contract, such as explicitly stating that it was assenting to the contract. Furthermore, it took no action, such as paying Clyde, to justify a reasonable assumption by Clyde that the corporation intended to be bound. As a result, the corporation is not bound by the contract with Clyde.

EVIDENCE (II.A., C.1)

ANALYSIS

OBJECTIVE

This question is designed to test an examinee's knowledge and application of the rules for character evidence including (1) the relevance of propensity evidence, (2) the general prohibition against character evidence, and (3) the distinction between character evidence and (non-character) "other acts" evidence. The question also assesses an examinee's knowledge of the elements of criminal theft and the relationship between substantive law and evidence law.

Legal Problems:

- (1) How would the trial court likely rule on a relevance objection?
- (2) Assuming relevance, how would the trial court likely rule on an objection based on improper character evidence?
- (3) Assuming relevance, how would the trial court likely rule on an objection based on improper prior-acts-evidence?

DISCUSSION

Summary

The trial court would likely overrule the relevance objection. The relevance standard under Federal Rule of Evidence 401 is quite low. The evidence of James's alleged theft of grapes 15 years ago has some tendency, albeit minimal, to prove that James would intentionally take an item from a store without paying for it, rather than mistakenly doing so. Even if only minimally relevant, the evidence is likely to meet the low relevance threshold.

However, the trial court would likely sustain an objection based on improper character evidence. Generally, character evidence is inadmissible to demonstrate that an individual acted in accordance with that character on a particular occasion (so-called character-propensity evidence). *See* FED. R. EVID. 404(a)(1). Though Rules 404(a)(2) and (a)(3) set forth several exceptions to this general prohibition, none of those exceptions are applicable here. Moreover, even if evidence of James's character were admissible under an exception to Rule 404(a)(1), that character could not be proved by specific instances of conduct unless James's character trait was itself an essential element of the crime charged, which is not the case here. *See* FED. R. EVID. 405(b).

Rule 404(b)(2) of the Federal Rules of Evidence does allow admission of evidence of other crimes, wrongs, or acts if the relevance of that evidence is not based on character-propensity reasoning. Thus, for example, evidence of other acts might be admissible to show a person's motive for a crime. But that rule also would not be applicable here because the relevance of the evidence of James's alleged theft of grapes depends on character-propensity reasoning—i.e., the conclusion that he is a person who is willing to take items without paying for them and thus likely did so on the present occasion.

Point One (30%)

The trial court would likely overrule the relevance objection to evidence that James previously had been arrested for stealing grapes because that fact has some tendency, albeit minimal, to establish that James acted with intent to steal the comic books, a material issue in the case.

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." FED. R. EVID. 402. "Evidence is relevant if: (a) it has *any tendency* to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." FED. R. EVID. 401 (emphasis added). Whether a "fact is of consequence," meaning material, is determined based on the substantive elements of the offense charged. FED. R. EVID. 401, Adv. Cmte. Notes ("Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved?"). "Evidence having any probative value whatsoever can satisfy the definition." CHRISTOPHER MUELLER, LAIRD KIRKPATRICK & LIESA RICHTER, EVIDENCE, § 4.2 Defining Relevance (6th ed. 2018). The evidence need only have some tendency to circumstantially or directly prove a material fact; it need not be dispositive. FED. R. EVID. 401, Adv. Cmte. Notes ("The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action.").

Here, to find James guilty, the state must prove, and the trier of fact must find, beyond a reasonable doubt that James (1) took and carried away, or appropriated, (2) the personal property of another, (3) with the intent to permanently deprive the other of the property. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW, Larceny: General Principles § 32.02[A] Definition (7th ed. 2015). The intent-to-steal element of the crime requires the State A prosecutor to prove that James, the defendant, had a specific intent to permanently deprive the comic-book store of the comic books that were in his briefcase and, furthermore, that James had that intent at the time he took the comic books out of the store. *See generally, id.*, Larceny: Intent to Steal § 32.07[A] (Nature of the Felonious Intent) and § 32.07[B][1] (Concurrence of Mens Rea and Actus Reus).

The fact that James was previously accused of stealing grapes may lead a trier of fact to conclude that James is guilty of theft, in particular that he intended to steal the comic books his son placed in his briefcase. The facts of the grape theft incident suggest, even if only minimally, that James is willing to take items from a store without paying for them. Although taste-testing grapes seems like relatively minor conduct, many grocery shoppers engage in the behavior, and stores generally do not stop customers from doing so, doing so tends to support the mens rea element of intent to permanently deprive another of his property by showing that a person is, indeed, willing to deprive a store owner of property without properly paying for it. Additionally, the similarity of the two incidents supports finding the evidence relevant. In both instances, James was shopping in a store and failed to pay for an item before appropriating or taking it.

On the other hand, several facts reduce the probative value of the evidence. First, the factual circumstances of the two situations are very different. Openly taste-testing a few grapes in a store before ultimately deciding not to purchase any is quite different from stealing comic books by allegedly hiding them in one's briefcase and not paying for them. Second, James was arrested but not charged or convicted in connection with the grapes. Thus, the accuracy and reliability of the factual allegations and evidence have not been tested in any legal proceeding and remain uncertain. Third, the arrest was 15 years ago, when James was a 20-year-old young

adult. An event that happened 15 years ago when a person was a young adult may bear little reflection on one's mindset as a mature, 35-year-old, employed parent.

In conclusion, however, despite the arguably strong arguments that the evidence has very little probative value, relevance is a very low threshold and even minimally relevant evidence is admissible; thus, the trial court would likely overrule a relevance objection. The evidence that James shoplifted grapes is relevant to prove his character trait (of being willing to take property from stores without paying for it) and thus to support an inference that he acted with intent to steal when he took the comic books from the comic-book store.

[NOTE: Rule 403 allows a court to exclude relevant evidence for prejudice, confusion, waste of time, and other reasons if the "probative value [of the evidence] is substantially outweighed" by one or more of those other considerations. Here, given the low probative value of the evidence, a court might exclude it under Rule 403 because of the risk of prejudice to James through admission of the evidence, of a delay in the proceedings if James decides to litigate the facts of the grape-eating episode, and of confusion of the jury about exactly what James is on trial for and what it must decide. However, the facts state that the defense objection was based on relevance, and the question asks only about that relevance objection, so a discussion of Rule 403(b) is beyond the scope of the question asked, although one might expect a lawyer to make a Rule 403(b) objection.]

Point Two (20%)

The trial court would likely sustain an objection that the evidence is inadmissible character evidence because its relevance depends on prohibited propensity-based inferences and because it seeks to prove character by proving other acts, which is also not permissible under the Federal Rules.

Even though the evidence of the grape-eating incident is relevant to prove James's character and, hence, to support the prosecution's claim that he intended to steal the comic books, there are two reasons it is inadmissible for this purpose.

First, "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." FED. R. EVID. 404(a)(1). The crux of the rule is that a person's disposition, or character-based propensity, is inadmissible, even if relevant. FED. R. EVID. 404(a) Adv. Cmte. Notes; *see also* MUELLER, ET AL., *supra*, § 4.11 Character evidence-generally. In the context presented here, if the evidence of alleged theft of grapes is offered to show that James is a thief or that he has a propensity to steal, it will not be admissible as proof that he stole the comic books as charged in the present case. If that is the rationale for admitting evidence of the alleged theft of the grapes, then the evidence is inadmissible under Rule 404(a)(1).

Rules 404(a)(2) and (a)(3) set forth exceptions that allow the admission of character evidence when it is offered by a defendant or when it is used to impeach a witness. However, none of the exceptions apply here. James, the defendant, is not seeking to admit evidence of anyone's character. FED. R. EVID. 404(a)(2). Additionally, the state is seeking to introduce this evidence as part of its case-in-chief and not to impeach any witness, so the exception for witnesses does not apply. FED. R. EVID. 404(a)(3).

Second, even if a court concluded that evidence of James's character or character traits was admissible, his character could be proven only by opinion testimony or testimony about his reputation. Proof of "specific instances of [a person's] conduct" cannot be used to prove "a

person's character or character trait" unless the person's character or character trait is itself an "essential element of a charge, claim, or defense," which is not the case here, *see* Rule 405(b), .

Thus, the trial court would likely find that the evidence is inadmissible to the extent that it is offered to prove James's character. This is true even though evidence of James's character is relevant.

Point Three (50%)

The trial court would likely sustain an objection based on improper "other acts" evidence because the relevance of the evidence of James's alleged theft of grapes depends on character-propensity reasoning.

Rule 404(b)(1) prohibits the admission of an other crime, wrong, or act "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." This rule would also prohibit introduction of James's alleged theft of the grapes to prove that he has a propensity to steal.

However, Rule 404(b)(2) allows evidence of "other crimes, wrongs, or acts" for noncharacter purposes such as, but not limited to, proof of motive, knowledge, opportunity, or intent.

The state likely would assert that the evidence of James's prior theft is admissible because it is offering the grape-theft testimony for an enumerated, relevant, non-character purpose, i.e., to prove that James intended to steal the comic books. The trial court would likely reject such an argument because the relevance of the other act (taste-testing grapes) to the instant prosecution relies upon character-based reasoning, i.e., that if James would eat grapes without paying for them at the grocery store, then he would take comic books from a store without paying for them. The evidence proves James's intent only on the basis of a prohibited inference that James has a propensity to steal and therefore likely stole on this occasion.

Hence, evidence of theft, even if it were called "other act" evidence, would violate the prohibition against character evidence and character-propensity reasoning. *Id.*; *see also* MUELLER, ET AL., *supra*, § 4.16 Discretion to Exclude Prior Wrongs ("The proponent of evidence under FRE 404(b) has the burden of identifying a relevant purpose that does not involve the prohibited inference from character to conduct.").

Finally, even if the trial court were to conclude that evidence was admissible for a non-propensity reason, it would likely exclude the evidence because the only form of evidence offered by the government (a police report or police testimony of the report) is insufficient to establish that the other act (stealing the grapes) occurred. "Evidence of arrests or charges is generally not admissible to prove crimes or misconduct under FRE 404(b) because such evidence by itself is insufficient to establish that the underlying conduct occurred." MUELLER, ET AL., *supra*, § 4.15 Wrongs to Prove Specific Points.

[NOTE: Evidence of prior bad acts and criminal convictions can be used under certain circumstances to impeach a witness's character for truthfulness. *See* FEDERAL RULES OF EVIDENCE 608 and 609. Those rules are not applicable here because the state is not seeking to impeach a witness; it is seeking to use James's alleged prior bad acts as part of its case-in-chief. There is no suggestion in the facts that James plans to testify in the case.]

DECEDENTS' ESTATES (II I.1, I.2, I.10 & I.12; III.A. & B.)
ANALYSIS

OBJECTIVES

This question tests the principles of lapse, ademption, and omitted children.

Legal Problems:

- (1) Does the bequest of the automobile to Husband's brother lapse and pass as part of the residue or does it pass to the brother's adopted son, Fred?
- (2) Is Husband's mother entitled to the house at 500 South Street, City, State Y, as a substitute for the house specifically bequeathed to her under Husband's will, or did that bequest adeem resulting in the house at 500 South Street passing to Wife as the residuary legatee under Husband's will?
- (3) To whom should the residuary estate be distributed?
- (4) Is Doris, Husband's nonmarital child who was born after the will was executed, entitled to take a share of Husband's estate as an omitted child?
- (5) Is Sam, Husband's marital child who was born after the will was executed, entitled to take a share of Husband's estate as an omitted child?

DISCUSSION

Summary

The automobile should be distributed to Fred as the substitute beneficiary of the bequest to his father, who was Husband's brother. Under the Uniform Probate Code, the survivorship contingency in the will does not avoid the operation of the anti-lapse statute.

The house at 500 South Street, City, State Y, should be distributed to Husband's mother as a substitute gift for the devise of the house on Pearson Drive that was sold and the proceeds used to purchase the house on South Street.

The residue of the estate passes to Wife, who is named as the sole beneficiary of Husband's residuary estate.

Doris is entitled to an omitted child's share because she was born after the execution of the will and the will devised nothing to her mother (Husband's neighbor).

Sam is not entitled to a share of the estate even though he was born after the will was executed because the will devised a substantial portion of the estate to his mother (Wife), who survived Husband and is entitled to take under the will.

Point One (25%)

The bequest of the automobile does not lapse; it passes to Fred, the adopted child of Husband's predeceased brother. Under the Uniform Probate Code, the survivorship contingency attached to the bequest to the brother is insufficient evidence that Husband intended the gift to lapse.

Husband bequeathed "any automobile" owned at death to his brother. Since Husband's brother did not survive Husband, the question arises as to whether the bequest lapses. If it does, the subject matter of the bequest passes as part of the residuary estate. If it doesn't, the subject matter of the bequest passes to whomever the substitute taker of the bequest is as determined by state law.

Here the governing law is the Uniform Probate Code. Under § 2-603(b)(1) of the Code, "[i]f a devisee fails to survive the testator and is . . . a descendant of a grandparent . . . of . . . the testator," a substitute gift is created in the deceased devisee's surviving descendants. Under the Code, it is irrelevant that the bequest to the brother was expressly subject to a survivorship contingency. Section 2-603(b)(3) expressly provides that "words of survivorship, such as in a devise to an individual 'if he . . . survives me' . . . are not, in the absence of additional evidence, a sufficient indication of an intent" that the provisions of § 2-603(b)(1) not apply.

Here, Fred is the substitute taker under § 2-603. It is irrelevant that Fred is the brother's adopted child and not a biological child because adopted and biological children are treated the same under the Code for both intestate-succession purposes and for construing wills. *See* UNIF. PROB. CODE §§ 1-201(5), 1-201(9), 2-118. Thus, Fred is entitled to the automobile.

Point Two (25%)

The house located at 500 South Street passes to Husband's mother as a substitute gift under the bequest of the house located at 211 Pearson Drive.

Under the common law, the specific bequest to Husband's mother of his house at 211 Pearson Drive would have adeemed, and thus would have been invalid, because he did not own that specific piece of property at the time of his death. However, § 2-606(a)(5) of the Uniform Probate Code expressly provides that a specific devisee (here Husband's mother) is entitled to "any real property . . . owned by the testator at death which the testator acquired as a replacement for specifically devised real property"

Here the facts support the conclusion that the house Husband owned at 500 South Street was acquired as a replacement for the house he owned at 211 Pearson Drive. Husband's will expressly notes that the house on Pearson Drive was an investment property, and other facts establish that he bought the South Street house as an investment. Indeed, Husband purchased the South Street house with the funds received from the sale of the house on Pearson Drive. Last, neither Husband nor Wife lived in either house at any time, further evidencing the investment nature of both houses.

Accordingly, Husband's mother is entitled to the house at 500 South Street.

Point Three (10%)

Wife is entitled to the residuary estate.

Wife is the named residuary beneficiary under Husband's will and as such is entitled to the residuary estate (probate estate less the value of the specific devises of the automobile and the house). However, as discussed in Point Four, Doris is entitled to an omitted child's share that, under UPC § 3-902, is payable from Wife's share of the residue.

Point Four (25%)

Doris, Husband's nonmarital child, is entitled to a share of Husband's estate because she was born after Husband's will was executed, the will made no provision for her, and her mother (the neighbor) received nothing under Husband's will.

Under § 2-302 of the Uniform Probate Code, if a child is born to a testator after the testator has executed his will and in the will the testator makes no provision for the child (as here), the child may be entitled to a share of the testator's estate. However, the omitted child is not entitled to a share of the estate if the will devised "substantially all of the estate to another parent of the omitted child and that other parent survived the testator and is entitled to take under the will." UNIF. PROB. CODE § 2-302(a)(1).

Doris is Husband's child and was born after Husband executed his will. (See § 2-117 of the Code, providing that "[a] parent-child relationship extends equally to every child and parent, regardless of the marital status of the parent.") Because no provision was made for her or her mother in Husband's will, Doris is entitled to a share of Husband's estate. See UNIF. PROB. CODE § 2-302(a)(1).

Doris's omitted-child's share is equal to the share of Husband's estate that she would have received if Husband had died intestate. This share is based upon what would have been left for Husband's children had he died intestate after first setting aside the intestate share of Wife. Because Husband has two children, Doris would take half that amount.

Under § 3-902 of the Code, the omitted child's share will be paid out of the residuary estate otherwise passing to Wife.

[NOTE: As noted above, Husband's estate is valued at \$3,325,000. To calculate Doris's omitted-child's share of that estate: first, calculate Wife's intestate share of Husband's \$3,325,000 estate; second, subtract Wife's intestate share from \$3,325,000; and third, allocate 50% of the balance to Doris. Under § 2-102(4) of the Code, Wife's intestate share would be \$150,000 plus one-half of \$3,175,000. This totals \$1,737,500 and leaves \$1,587,500 for the two children. Of this amount, Doris is entitled to one-half or \$793,750. So, Doris's omitted-child's share is \$793,750, and the residue of Husband's estate would then be \$2,206,250 after taking account of the car and the house. This results in Wife taking 66% of the estate. Examinees are not expected to do this math.]

Point Five (15%)

Sam, even though he was born after Husband executed his will and was not provided for in the will, is not entitled to any share of the estate under the Uniform Probate Code because his mother (Wife) was devised substantially all of Husband's estate.

Sam is also a child of Husband who was born after Husband executed his will. Unlike Doris's mother (the neighbor), however, Sam's mother (Wife) is provided for in Husband's will. The question, then is whether Wife takes substantially all of Husband's estate. Here, Husband devised \$3 million of this \$3,325,000 estate (90% of his estate) to Wife. She survived Husband and is entitled to take this under his will. Therefore Sam, the child of Husband and Wife, is not entitled to an omitted child's share assuming that 90% is deemed substantially all of Husband's estate.

As discussed in Point Four, Doris is entitled to an omitted child's share that will be paid out of Husband's residuary estate, which would reduce Wife's share (as beneficiary of the

residuary estate) from 90% to 66%. This raises the issue of whether the substantiality test has been met. Arguably, the substantiality test is still satisfied as the *will* devised Wife substantially all of Husband's estate. If Wife takes only 66% of the estate that is because other law, not Husband's will, caused that result. Nonetheless, an answer that argues the other way and concludes that Wife was not devised substantially all of Husband's estate because of Doris's claim, thus entitling Sam to an omitted child's share, should receive full credit.

[NOTE: Examinees who recognize that Sam is not entitled to an omitted child's share because his mother is the residuary beneficiary under his father's will should receive some credit. To receive full credit, the examinee should recognize the existence of the "substantially all" test in § 2-302(a)(1) of the UPC.]

SECURED TRANSACTIONS (I.B.; II.D., & E.; III.B.; IV.B. & C.)
ANALYSIS

Legal Problems:

(1)(a) Did Bank have a security interest in the flute before it was sold by Harmony? Was the security interest perfected?

(1)(b) Did Bank's security interest in the flute continue after the successive sales of the flute to Walter and Joan?

(2)(a) Did Harmony have a security interest in the flute before Walter sold it to Joan? Was the security interest perfected?

(2)(b) Did Harmony's security interest in the flute continue to be enforceable after Walter sold the flute to Joan?

DISCUSSION

Summary

Bank had a perfected security interest in Harmony's inventory. When one item of that inventory—the flute—was sold to Walter, he took the flute free of Bank's security interest in it because Walter was a "buyer in ordinary course of business."

Because Walter owned the flute free of Bank's security interest, he transferred it to Joan free of that security interest. Thus, Bank does not have a security interest in the flute that is enforceable against Joan.

Harmony's retention of title to the flute when it was sold to Walter is limited to a security interest. That security interest was not perfected because Harmony did not keep possession of the flute and did not file a financing statement listing Walter as debtor and indicating the flute as collateral.

When Joan later bought the flute from Walter, Joan took free of Harmony's security interest because the security interest was not perfected and Joan bought the flute in good faith and received delivery of it without knowledge of the security interest. Thus, Harmony does not have a security interest in the flute that is enforceable against Joan.

Point One(a) (20%)

Bank had a perfected security interest in the flute before it was sold by Harmony.

Because Harmony held the flute for sale, it was part of Harmony's inventory. *See* UCC § 9-102(a)(48). Thus, it was covered by the security interest granted by Harmony to Bank. The security interest was enforceable and attached because the three criteria in UCC § 9-203(b) were fulfilled: value had been given (Bank loaned money to Harmony), Harmony had rights in the flute, and Harmony had signed a security agreement containing a description of the collateral. Bank's security interest in the flute was also perfected. Filing the financing statement satisfied the requirement in UCC § 9-310 that a financing statement must be filed to perfect a nonpossessory security interest in goods.

Point One(b) (30%)

Bank's security interest in the flute did not continue after the successive sales of the flute to Walter and Joan.

As a general rule, a security interest continues after sale of the collateral. UCC § 9-315(a)(1). However, that general rule is subject to many exceptions, one of which applies here: a buyer in ordinary course of business (BIOCOB) takes free of a security interest created by that buyer's seller. *See* UCC § 9-320(a). A BIOCOB is a buyer who buys goods in good faith, without knowledge that the sale violates the rights of another, from a person in the business of selling goods of the kind, in the ordinary course of the seller's business. UCC § 1-201(b)(9). Walter qualifies as a BIOCOB. Walter bought the flute from a person (Harmony) in the business of selling goods of the kind in the ordinary course of Harmony's business, and the facts indicate that Walter acted in good faith and was unaware that the sale violated the rights of another. Because Walter was a BIOCOB, he took the flute free of Bank's security interest, which was created by his seller, Harmony.

Since Walter owned the flute free of that security interest, under general property principles all of his property rights in the flute were transferred to Joan when Walter sold the flute to her. *See also* UCC § 2-403(1). Thus, Joan acquired the flute free of Bank's security interest. This is often referred to in secured transactions law as the "shelter principle."

Point Two(a) (30%)

Before Walter sold the flute, Harmony had an unperfected security interest in it.

The agreement between Walter and Harmony provided that Harmony retained title to the flute until Walter satisfied his obligation to pay the remainder of the purchase price. Under UCC §§ 1-201(b)(35) and 2-401(1), however, Harmony's retained interest is limited to a security interest. The security interest was enforceable and attached because the three criteria in UCC § 9-203(b) were fulfilled: value had been given (the flute), Walter had rights in the flute, and Walter had signed a security agreement containing a description of the collateral.

Harmony's security interest in the flute was not perfected. To be perfected, a security interest must have attached and, unless an exception (such as the secured party taking possession of the collateral) applies, there must be a filed financing statement covering the collateral. UCC §§ 9-308, 9-310. Here, the security interest attached because it was enforceable and there was no agreement to delay attachment. UCC § 9-203(a). But because Harmony did not file a financing statement and no exception applies, the security interest was not perfected.

[NOTE: An examinee might state that the security interest was perfected even though no financing statement was filed because Harmony's security interest was a purchase-money security interest (PMSI). This is not correct. While the security interest was a PMSI because it was retained by the seller of the flute to secure the buyer's obligation to pay the remainder of the purchase price (see UCC § 9-103), the exception to the requirement that a financing statement be filed applies only to purchase-money security interests in consumer goods. *See* UCC § 9-309(1). The flute was not consumer goods because Walter did not buy it for personal, family, or household purposes but, rather, used it in his profession. *See* UCC § 9-102(a)(23).]

Point Two(b) (20%)

Harmony's security interest in the flute is not enforceable against Joan.

Prior to the sale from Walter to Joan, Harmony had an unperfected security interest in the flute. (See Point Two(a).) Because Joan bought the flute in good faith and received delivery of it without knowledge of that unperfected security interest, she took free of that security interest. UCC § 9-317(b). Thus, Harmony's security interest in the flute is not enforceable against Joan.

[NOTE: Some examinees may note that Harmony's rights against Walter constitute chattel paper in which Bank has a security interest as proceeds of its original collateral. This is correct but does not affect the answer to the questions posed.]

CIVIL PROCEDURE (I.B., C. & D.)

**ANALYSIS
OBJECTIVE**

The objective of this question is to test an examinee's knowledge of and ability to apply the service-of-process requirements under Federal Rule of Civil Procedure 4 and the constitutional requirement that notice be reasonably calculated under the circumstances to provide actual notice. The question also tests the examinee's knowledge of and ability to apply the rules for personal jurisdiction over corporations.

Legal Problems:

(1)(a) Does service of process pursuant to the law of the state where the district court sits comply with Federal Rule of Civil Procedure 4?

(1)(b) Does the mode of service that was performed, which failed to provide actual notice, satisfy the constitutional requirement that notice be reasonably calculated under the circumstances to provide actual notice?

(2) Can a federal district court exercise jurisdiction over a corporation when the corporation is registered to do business in the state in which the court is located but the cause of action is unrelated to the corporation's activities in that state?

DISCUSSION

Summary

Serving process on Dan by first-class mail satisfied the requirements of Federal Rule of Civil Procedure 4 because service was made according to the law of the state where the district court sits. However, this method of service was likely not reasonably calculated under the circumstances to provide Dan with actual notice because Penny's attorney knew that Dan was frequently not at his residence and the attorney put nothing on the envelope containing the summons that would have alerted Dan's parents to the fact that this was an important document. Therefore, this did not satisfy the requirements of constitutional due process.

Although Penny's action against the corporation is unrelated to the corporation's contacts with State C, the corporation is subject to suit in State C on any cause of action anyone has against it because it consented to such suits by registering to do business in State C.

Point One(a) (25%)

Service of process that complies with the law of the state where the district court sits satisfies Federal Rule of Civil Procedure 4.

Rule 4(e) lists the ways in which an individual may be served within a US judicial district. One way is by "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made." FED. R. CIV. P. 4(e)(1). Penny's attorney sent the summons and complaint to Dan's residence by first-class mail. This complies with the law of State C, where the district court is located, and therefore satisfies the requirements of Rule 4.

Point One(b) (25%)

While service by first-class mail was in accord with state law, it likely was not reasonably calculated under the circumstances to provide actual notice and therefore did not satisfy the requirements of constitutional due process.

Service of process must also satisfy the requirements of constitutional due process. The Supreme Court has held that due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* at 315.

A strong argument can be made that the service effected on Dan did not meet the constitutional standards. The attorney knew that Dan was traveling extensively and was frequently away from his parents' home for long periods of time. Moreover, the attorney had previously mailed a request for waiver of service to the home of Dan's parents without reply. While Dan was free not to execute the waiver, under Federal Rule of Civil Procedure 4(d)(1), he had "a duty to avoid unnecessary expenses of serving the summons." By executing the waiver, Dan would avoid having to pay the cost of service and would obtain additional time to answer Penny's complaint. *See* Fed. R. Civ. P. 4(d)(2)–(3). The fact that Dan failed to execute the waiver of service, notwithstanding the incentives to do so, is a circumstance that might suggest that mail sent to his parents' home was not reaching him in a timely way.

Moreover, Penny's attorney had another option for serving process that would not have added significantly to the burden. Rule 4(e)(2)(B) permits service of process on an individual within a US judicial district by "leaving a copy of [the summons and complaint] at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there." The attorney knew that Dan's usual place of abode, while not traveling, was his parents' home. The attorney could have arranged to have a "person who is at least 18 years old and not a party" leave the summons and complaint at Dan's parents' home with one of his parents. *See* FED. R. CIV. P. 4(c)(2). Upon personal receipt of the summons and complaint, and not a mere envelope in the mail, Dan's parents would have been more likely to notify Dan of the process received. Instead of taking this step, the attorney mailed service of process without even indicating on the envelope the importance of the document. As a result, the district court may rule that the service of process effected on Dan did not satisfy constitutional due process.

Point Two (50%)

The federal district court in State C can exercise personal jurisdiction over the corporation.

In general, a federal district court located in State C is entitled to exercise personal jurisdiction over a defendant if that defendant would be subject to the personal jurisdiction of the state courts of State C. *See* FED. R. CIV. P. 4(k)(1). Thus, the federal district court has jurisdiction over the corporation if a State C state court would have such jurisdiction under the circumstances of the case.

A State C court can exercise personal jurisdiction over a corporate defendant under three circumstances. First, a court can exercise "specific personal jurisdiction" over a corporation if the claim against the corporation arises out of the corporation's activities in the state. *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty.*, 582 U.S. 255, 262 (2017). Second, a

court in State C can exercise general jurisdiction over a corporate defendant (i.e., jurisdiction over any cause of action against the defendant) if the corporation is "at home" there. *See Daimler AG v. Bauman*, 571 U.S. 117 (2014) (discussing "at home" jurisdiction). Finally, a corporation is subject to the jurisdiction of a court in State C if it consents to that jurisdiction in State C. *Mallory v. Norfolk Southern Ry. Co.*, 600 U.S. 122 (2023) (reaffirming consent jurisdiction). Here, the corporation would be subject to the jurisdiction of a court in State C only on the basis of consent.

A State C court could not exercise specific jurisdiction over the corporation. Penny's claim arises out of the corporation's activities in State B, and its office and employees in State C had nothing to do with managing Penny's assets.

A State C court could also not exercise jurisdiction over the corporation on the theory that it is "at home" in State C. A corporation is considered to be "at home" in both the state where it is incorporated and the state where it has its principal place of business. *Daimler*, 571 U.S. at 137. A corporation's principal place of business is typically where its headquarters are located. Here, the facts tell us that the corporation's headquarters are in State A, which is also its place of incorporation. Thus, the corporation is not "at home" in State C for the purposes of being subject to a State C court's general personal jurisdiction.

However, the corporation did register to do business in State C pursuant to a statute that says that corporations that register to do business in the state agree to be subject to the general personal jurisdiction of State C courts and to be treated the same as domestic corporations. In *Mallory v. Norfolk Southern Ry.*, *supra*, the Supreme Court concluded that a corporation's registration to do business in Pennsylvania under such a statute subjected the corporation to the general personal jurisdiction of Pennsylvania courts. Consent, even when extracted as a condition for doing business in a state, is sufficient to subject the corporation to suit on causes of action unrelated to the corporation's activities in the state.

Thus, although Penny's claim against the corporation is unrelated to its activities in State C, it is nonetheless subject to the jurisdiction of courts in State C because it consented to such jurisdiction by registering to do business in State C.

February 2026 MPT-1 Item

Otto v. Nolan

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Otto v. Nolan

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Law Offices of Stapleton & Garcia LLP

400 Central Avenue, Suite 505
Frankfurt City, Franklin 33122

MEMORANDUM

To: Examinee
From: Beverly Garcia
Date: February 24, 2026
Re: Kari Otto matter

Our client Kari Otto wants to obtain a divorce from her husband, Eric Nolan. The parties' separation has been amicable, and they want to work together to reach a fair outcome in their divorce. I met with Kari last week. Eric, who intends to proceed pro se, consented to meet with me a few days after that. Kari and Eric are hoping to reach an agreement regarding their property before they initiate divorce proceedings. The parties do not have children.

The pivotal issue in this divorce is the question of when the parties were married. Kari believes that they were married in 2006. Eric believes that they were not married until 2019.

I would like you to prepare a memorandum to me analyzing the following:

1. Was the parties' marriage created in 2006 or 2019?
2. If the parties' marriage was created in 2006, which property is marital property and which is Eric's or Kari's separate property?
3. If the parties' marriage was created in 2019, what effect, if any, would that have on the characterization of property?

For each issue, be sure to explain your analysis, cite the relevant legal authority, and state your conclusion. Do not include a separate statement of facts, but be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect your analysis.

Do not address what percentage of the marital property should be awarded to Eric and what percentage of the marital property should be awarded to Kari. Also do not discuss any business interests of the parties.

Law Offices of Stapleton & Garcia LLP

FILE MEMORANDUM

From: Beverly Garcia
Date: February 16, 2026
Re: Kari Otto file—client interview notes

Today I met with client Kari Otto, who wants to divorce her husband, Eric Nolan.

Kari and Eric met in 2004 at a farmers' market. Kari was selling flowers at one booth, and Eric was selling his photographs at a neighboring booth. At that time, Eric was a burgeoning photographer who sold his photographs at farmers' markets, art fairs, and local galleries. Since before they met, Kari has been growing flowers on an acre of land that she owns located 20 miles outside Frankfurt City in Frankfurt Acres. On weekends, she sells her flowers at farmers' markets and to local grocery stores. During the week, she is an employee at a plant nursery.

Kari and Eric dated for about a year and then, in January 2005, began living together in the bungalow that Eric was renting at 1505 Clark Street in a vibrant part of Frankfurt City. Kari and Eric were content with their relationship. They regularly socialized with a small group of friends who got together for potluck dinners, parties, and hiking outings. Kari continued working at the plant nursery and selling flowers while Eric's photography career took off. Well-known magazines started commissioning Eric's work. His earnings greatly increased, and he bought \$50,000 worth of photography equipment in December 2005.

In August 2006, Eric gave Kari a diamond ring and asked her to marry him. Kari was very excited and said yes. On September 19, 2006, Eric and Kari obtained a marriage license. That night, they went out to a formal dinner with a few close friends to celebrate obtaining the marriage license. Shortly thereafter, Eric started referring to Kari as his "wife." While both Eric and Kari were excited about the marriage license, they did not have a wedding ceremony before the marriage license expired, nor did they file a marriage certificate with the county clerk's office. Nevertheless, Eric and Kari told their friends that they had gotten married, and their friends started referring to them as a married couple.

On September 19, 2007, Eric gave Kari an anniversary card, a copy of which is attached to this memorandum.

In January 2008, the landlord told Eric that he was going to put the bungalow on the market. Eric asked the landlord to sell the bungalow to him, and after negotiating a price of \$400,000, purchased it in February 2008. Using money that he had earned as a photographer, Eric made a 20% down payment on the house. He took out a 15-year mortgage in his name alone for the remaining purchase price.

In late May 2019, Kari told Eric that she was disappointed that they had not had a wedding ceremony back in 2006. As a result, they went to the county clerk's office and obtained a new marriage license. They then had a small wedding ceremony with a few close friends on June 8, 2019, on Kari's land in Frankfurt Acres. Kari wore a wedding gown, and Eric wore a tuxedo. A wedding photographer took pictures at the ceremony. The day after the wedding, Kari and Eric filed a marriage certificate with the county clerk.

In 2022, Kari made significant improvements to the land in Frankfurt Acres. With funds she had received as a gift from her mother, Kari hired a local contractor to build a large gardening shed so that she could store equipment.

Kari and Eric have grown apart and have decided to divorce. She says that she believes that they became married in 2006. Kari is upset that Eric is alleging that they were not married until 2019. She describes the ring that Eric gave her as an "engagement ring."

Kari reports that friends and family also believe that they were married in 2006. She showed me a cross-stitch wall hanging that Eric's grandmother had hand-stitched and given to her. The cross-stitch depicts a man and a woman, bears the names "Eric" and "Kari," and includes the words "United in Love" and the date "September 19, 2006." The woman depicted is wearing a wedding gown and veil and is holding a bouquet of flowers. The man is formally dressed. Kari said that Eric's mother and grandmother were upset because they felt that Kari and Eric had deprived them of being there for the wedding in 2006.

Kari and Eric still have a joint bank account that they opened in December 2006, to which they both have contributed funds and from which they have paid their bills,

including the mortgage on the bungalow, since 2006. They filed joint tax returns every year starting in 2007. They also sent annual Christmas cards with their photos that were signed "Love, Mr. and Mrs. Nolan."

Kari describes the wedding ceremony on June 8, 2019, as a renewal of vows and an opportunity for her to finally wear a wedding dress. However, apart from the Christmas cards, she has never used Eric's last name and only began using "Otto-Nolan" as her last name after the 2019 wedding ceremony.

Transcript of Meeting with Eric Nolan
February 19, 2026

Att'y Garcia: Thanks for agreeing to meet with me today. Just to confirm, I am representing Kari Otto-Nolan in this matter. I am not your attorney, and it is my understanding that you are currently unrepresented and are agreeing to meet with me without an attorney present.

Eric Nolan: That's right. Kari and I want to resolve this as peacefully and easily as we can.

Garcia: Great. We are trying to figure out when you and Kari got married, so I'm going to ask you some questions about that. Did you ask Kari to marry you in September 2006?

Nolan: I did. We were in love, and it seemed like the right thing to do.

Garcia: And what did she say when you asked her to marry you?

Nolan: She said yes. I was thrilled.

Garcia: And did you give her a ring in September 2006?

Nolan: Yeah, but it was just a promise ring. It wasn't an engagement ring or anything.

Garcia: So why didn't you and Kari have a marriage ceremony after you asked her to marry you?

Nolan: I guess I was nervous about making a lifelong commitment.

Garcia: Were you intending to officially marry Kari in September 2006 when you asked her to marry you?

Nolan: Yeah, I intended to marry her, but we just didn't get around to it until 2019. We were already living together, so there wasn't a lot of pressure for us to get married.

Garcia: But did you begin calling Kari your wife after September 2006?

Nolan: Yes, I did that. But only once in a while.

Garcia: So why did you end up having the marriage ceremony in June 2019?

Nolan: We had been going through some problems. Kari always wanted a wedding ceremony—a white dress and all that. I thought that having a ceremony would make the relationship stronger.

...

Garcia: What property are you hoping to keep in the divorce?

Nolan: Well, of course I want to keep the house. I also want to keep all my photography equipment. Kari can keep her acreage, but she should pay me for my share of the shed on that property.

Garcia: What kind of camera equipment do you have?

Nolan: I have a lot of it. I bought about 10 cameras the year we moved in together—probably worth about \$50,000. I've probably acquired another \$150,000 in photography equipment since then. Some of it has depreciated in value.

* * *

Happy Anniversary to My Love

Dear Kari,

Happy First Anniversary! This has been such a wonderful year together. Thanks for all your patience with me as I have learned to be a good husband to you. To many more happy times.

Love,

Eric

Assets and Debts Worksheet

Asset	Date Acquired	Value
House at 1505 Clark Street	2/2008	\$400,000 (in 2008) \$800,000 (in 2026)
Tract of land in Frankfurt Acres	9/2001	\$ 70,000 (in 2001) \$150,000 (in 2026)
Photography equipment	12/2005	\$ 50,000 (in 2005)
Additional photography equipment (reflecting depreciation from initial purchase price of \$150,000)	10/2006–2025	\$120,000 (in 2026)
2024 Toyota Tundra pickup truck (Kari's vehicle; paid off)	5/2024	\$ 40,000 (in 2024) \$ 32,000 (in 2026)
2024 Nissan Altima sedan (Eric's vehicle; paid off)	1/2024	\$ 30,000 (in 2024) \$ 22,000 (in 2026)
<u>Bank Accounts</u>		
First Bank joint checking account in the name of Kari Otto-Nolan and Eric Nolan	12/2006	\$120,000 (in 2026)
<u>Debts & Liabilities</u>		
Credit card debt: none		
Balance on mortgage for 1505 Clark Street: \$50,000		
<u>Retirement Accounts or Pension Plans</u>		
None		

Excerpts from Franklin Family Code

§ 200 Definitions

...

(c) The term "marital property" shall mean all property acquired by either or both spouses during the marriage except as specified in subsection (d)

(d) The term "separate property" shall mean

- (1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse;
- (2) compensation for personal injuries;
- (3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse;
- (4) property described as separate property by written agreement.

§ 211 Common-law marriage

(a) A common-law marriage shall be recognized as a valid marriage in this state. . . .

...

§ 215 Disposition of property in divorce actions

(a) Except when the parties have a valid prenuptial or postnuptial agreement resolving all issues related to the parties, the court shall determine the respective rights of the parties in their separate or marital property.

- (1) Separate property shall remain such.
- (2) Marital property shall be distributed equitably between the parties, considering the circumstances of the case and of the respective parties.
- (3) In determining an equitable disposition of property under paragraph (2), the court shall consider [factors omitted].

Schwartz v. Darrow

Franklin Court of Appeal (2022)

When Robert Cohn died intestate, his ex-wife, Susan Schwartz, was appointed personal representative of his estate. Teresa Darrow sought Schwartz's removal, asserting that she (Darrow) should have had priority for that appointment as Cohn's common-law wife. A probate court magistrate found that although Cohn and Darrow cohabited for eight years and held themselves out to their community as married, other factors weighed against a finding of common-law marriage, including the facts that the couple did not file joint tax returns, own joint property or accounts, or share a last name. Darrow appealed.

At a hearing to determine whether a common-law marriage existed between Cohn and Darrow, Darrow testified that six years before his death, Cohn presented her with a wedding ring and told her they could be husband and wife if she agreed; that she did agree; and that after that day she wore the ring and the couple held themselves out as married. The magistrate also considered testimony from Schwartz and from many of Darrow's and Cohn's family members, friends, acquaintances, neighbors, and coworkers. Except for Cohn's father and Schwartz, all witnesses stated that they thought Cohn and Darrow were spouses, and some said that they were surprised by this litigation. Some witnesses testified that the couple wore what the witnesses assumed were wedding rings.

The magistrate found that "Cohn and Darrow agreed to and did hold themselves out to be married to the community of their coworkers, friends, and neighbors. However, their family members knew they were not ceremonially married." The magistrate concluded that the evidence weighed against a finding that a common-law marriage existed. For example, although the couple paid bills jointly, they maintained separate bank accounts. There was no evidence that the couple had joint ownership of any vehicles, real estate, or credit accounts. Notably, the magistrate "gave tremendous weight" to the fact that Cohn and Darrow had filed their taxes separately in every year of their purported common-law marriage, despite the fact that the Internal Revenue Service permits common-law spouses to file jointly. Ultimately, the magistrate concluded that Darrow had not proven that a common-law marriage existed.

We review the magistrate's factual findings for clear error and his common-law marriage finding for an abuse of discretion.

A common-law marriage may be established by clear and convincing evidence showing the mutual agreement of the couple to enter the legal and social institution of marriage, followed by conduct manifesting that mutual agreement, often referred to as "holding out." *Howard v. Howard* (Fr. Sup. Ct. 2015). The burden of proving common-law marriage lies with the person claiming its existence. *Id.*

The key question is whether the parties mutually intended to enter a *marital* relationship—that is, to share a life together as spouses in a committed, intimate relationship of mutual support and mutual obligation. *Id.* Ultimately, a common-law marriage finding depends on the totality of the circumstances. Relevant conduct includes, but is not limited to, cohabitation; reputation in the community as spouses; maintenance of joint banking and credit accounts; purchase and joint ownership of property; filing of joint tax returns; evidence of shared financial responsibility, such as leases in both parties' names, joint bills, or other payment records; evidence of joint estate planning, including wills, powers of attorney, and beneficiary designations; symbols of commitment, such as ceremonies, anniversaries, cards, and gifts; and the couple's references to or labels for one another.

Thus, in *Ridley v. Brooks* (Fr. Ct. App. 2008) there was no common-law marriage even though the parties lived together, shared living expenses, and indicated that they were husband and wife on a health insurance form and their apartment lease. The evidence established that the health insurance designation was done as a convenience to save money on premiums, and Brooks, who had been through an acrimonious divorce years before, often stated to friends that she had no intention to remarry.

Here, based on the hearing testimony, the magistrate found that Cohn and Darrow "*agreed to and did hold themselves out to be married* to the community of their coworkers, friends, and neighbors. However, their family members knew they were not ceremonially married." (Emphasis added.) It is unclear from this phrasing whether the magistrate separately concluded that Cohn and Darrow agreed to *be* married. On remand, the district court must determine whether Cohn and Darrow in fact agreed to be married.

Darrow's testimony that Cohn asked her to be his wife, that she accepted, and that he provided her with a ring could be evidence of the couple's express agreement to marry even without a formal ceremony or the presence of some of the other supporting

factors. Although a couple's decision to maintain separate finances remains relevant, it is not necessarily indicative of the lack of the parties' intent to be married.

We vacate the order appointing Schwartz as the personal representative and remand to the probate court with instructions to reconsider whether a common-law marriage existed.

Jones v. Cardiff
Franklin Supreme Court (2023)

Samuel Cardiff and Megan Jones were married in May 2018 and have one child. When they married, both spouses were working attorneys. Megan stopped working outside the home when their son was three years old. Samuel was an associate at a law firm from 2012 until 2018 and has been a partner at that law firm since 2018.

Prior to the marriage, Samuel acquired a house situated on 20 acres of land in Cottonwood, Franklin. During the marriage, the parties spent approximately \$500,000 to renovate and improve the property. While Samuel played a larger role in these improvements, Megan also participated in some of the project's details.

In March 2021, Megan filed for divorce. A trial ensued on the issues of equitable distribution, maintenance, and child support. The district court recognized that the Cottonwood property was Samuel's separate property but held that funds spent on renovations were marital property subject to equitable distribution. The court awarded 50% of the appreciation of the Cottonwood estate to Megan. The Franklin Court of Appeal modified the judgment on both the law and the facts by, among other things, reducing Megan's share of the enhanced value of the Cottonwood property to 25%.

Separate property is defined to include an increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse. See FR. FAM. CODE § 200(d)(3). Thus, any appreciation in the value of separate property due to the contributions or efforts of the nontitled spouse will be considered marital property. *Price v. Price* (Fr. Sup. Ct. 2001). This includes any direct contributions to the appreciation, such as when the nontitled spouse makes financial contributions to the property, as well as when the nontitled spouse makes direct nonfinancial contributions, such as by personally maintaining, making improvements to, or renovating a marital residence. *Id.*

Here, the district court properly held that the improvements were marital property because the increase in the property's value was a result of both parties' efforts. We find that the court of appeal did not abuse its discretion in reducing the award to Megan from 50% to 25% of the property appreciation. Samuel's income was the sole source of the funds expended on the property, and his involvement in the renovations was far more extensive than Megan's.

Affirmed.

Bower v. Bower
Franklin Court of Appeal (2014)

The parties were married on May 16, 1998. Soon after the marriage, they purchased and moved to Happy Dairy Farm. The husband brought 32 head of cattle and farming equipment to Happy Dairy Farm from Fairdale Dairy, a dairy farm that he had been operating but sold right before the marriage. For the first two years of the marriage, the wife actively assisted on the Happy Dairy Farm but thereafter was devoted almost exclusively to raising the parties' children and household responsibilities. In 2013, the wife filed for divorce.

Following a bench trial, the district court found that the farm was marital property subject to equitable distribution. The parties stipulated that the total value of the marital property, including marital property not at issue on appeal, was \$2 million. Of this amount, the court awarded \$800,000 to the wife, representing 40% of the parties' marital property. The court found that the husband's separate property included 107 head of cattle valued at \$80,000 and related equipment worth \$500,000. The wife appealed.

We conclude that several errors were committed in the district court's disposition of the parties' property. First, the record was insufficient to support the finding that the value of the present 107 head of cattle and farm equipment constituted the husband's separate property. Undeniably, the cattle and equipment in question were either produced or purchased *during* the marriage, and thus fell squarely within the statutory definition of marital property. See FR. FAMILY CODE § 200(c). Moreover, since the cattle and equipment did not predate the marriage and were not acquired by gift or inheritance, they could not be excluded from equitable distribution under the statutory definition of separate property in § 200(d). Rather, the court determined that the cattle and equipment were the husband's separate property because they were "an outgrowth of the cattle and equipment owned by the husband before the marriage" and therefore were covered by the statutory definition of separate property as "property acquired in exchange for or the increase in value of separate property" under § 200(d)(3).

However, we note that the husband testified that the productive life and marketable value of the 32 cattle he brought to the marriage in 1998 had been totally dissipated within a relatively short period of time, coinciding with the period of the wife's active participation in the farming operations. Likewise, the equipment owned by the husband before marriage

had worn out and had been replaced by other equipment, paid for with postmarital profits or loans that the wife cosigned. The size of the present herd demonstrates that the farm experienced a manifold expansion beyond the initial cattle and equipment. These facts render inappropriate any equating of the entire current herd and equipment with "property acquired in exchange for or the increase in value of" the comparatively modest assets the husband brought to the marriage.

Defining separate property to include acquisitions during the marriage in *exchange* for the premarital or gift property of one of the spouses or an *appreciation* in the value of such property would generally presume some rough equivalency in value at the time between the premarital property and that which was acquired in exchange. That is not the situation presented here, where depreciated premarital property (i.e., the original 32 head of cattle and related equipment) was *replaced* by property greater in quantity and value (i.e., the current, larger herd of cattle and equipment) that was largely produced or paid for through the activities of the marital economic partnership. Nor could the district court properly exclude the wife from sharing in the current herd and equipment by deeming these items merely an increase in value of the husband's original separate property. The significant expansion in the farming operation here was not due to unrelated market factors or inflation. Instead, prosperity and growth occurred through the parties' mutual marital efforts, during which the wife initially directly benefited the business, pledged her personal credit for its debts, and contributed indirectly to its success through her services as a homemaker and mother. Certainly, if the parties' dairy farm had been started *after* the parties married and the wife only indirectly contributed to it, she still would have been entitled to some share of the appreciation of the dairy farm's value. See *Litman v. Litman* (Fr. Ct. App. 2010) (spouse entitled to appreciation of other spouse's separate property asset even if spouse's contributions were indirect).

While it was improper for the district court to have excluded the total value of the present herd and equipment from equitable distribution, we think the husband is entitled to be credited with the value of his initial contribution of his premarital cattle and equipment. A further determination must be made of the value of the original 32 head of cattle and equipment when the parties married in 1998.

Reversed and remanded.

February 2026
MPT-1
Drafters' Point Sheet

Otto v. Nolan

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Otto v. Nolan
DRAFTERS' POINT SHEET

In this performance test, the examinees' law firm represents Kari Otto in a divorce proceeding against Eric Nolan. The examinees' task is to draft a memorandum advising the supervising partner on when the parties were married and which of the parties' property is marital property and which is separate property given each possible marriage year. Examinees are specifically asked to analyze the following:

1. Was the parties' marriage created in 2006 or 2019?
2. If the parties' marriage was created in 2006, which property is marital property and which is Eric's or Kari's separate property?
3. If the parties' marriage was created in 2019, what effect, if any, would that have on the characterization of property?

The File contains the task memorandum, the client interview notes, a transcript of an interview with Eric Nolan, an assets and debts worksheet completed by the law firm's paralegal, and a copy of an anniversary card given to Kari Otto by Eric Nolan. The Library contains selected excerpts from the Franklin Family Code and three appellate cases.

This point sheet contains all the issues the drafters intended to raise in the item.

I. FORMAT AND OVERVIEW

The supervising attorney has directed the examinee to draft an objective memorandum regarding when the parties became married and how the parties' assets would be characterized under two possible scenarios—a common-law marriage or a ceremonial marriage. No specific formatting is required, but examinees are directed not to draft a statement of facts. Examinees' responses should address the issues in the order set forth in the partner's memorandum.

II. FACTS

This section summarizes the facts as they emerge from the various materials in the File.

Kari Otto and Eric Nolan met in 2004 at a farmers' market where Kari was selling flowers and Eric was selling his photographs. Kari grew flowers on land she owned located 20 miles outside Frankfurt City. She worked as an employee at a plant nursery during the week and sold her flowers on the weekend. Eric worked as a photographer. In January 2005, they began living

together in a bungalow that Eric was renting. They were content in their relationship and had a positive social life. Eric bought \$50,000 worth of photography equipment in December 2005 as his career took off.

In August 2006, Eric gave Kari a diamond ring and asked her to marry him. She said yes. On September 19, 2006, they obtained a marriage license and went out for a formal dinner with friends to celebrate obtaining the marriage license. They did not have a ceremony or file a marriage certificate with the county clerk. The marriage license expired.

Nevertheless, Eric started referring to Kari as his wife, and the parties told their friends that they were married. Their friends referred to them as a married couple. Eric's grandmother gave Kari a cross-stitch wall hanging that suggests that she believed that Eric and Kari had married on September 19, 2006. Kari describes the ring that Eric gave her as an engagement ring. She believes that she and Eric became married in 2006. Eric characterizes the ring as a promise ring and believes that they did not become married in 2006. He reports that while he intended to marry Kari in 2006, he did not actually become married to her until 2019, when they had a wedding ceremony.

The parties filed joint tax returns annually starting in 2007 and have had a joint bank account since December 2006. They have sent Christmas cards signed "Love, Mr. and Mrs. Nolan." However, apart from the Christmas cards, Kari did not start using Eric's last name until after the 2019 wedding ceremony.

On September 19, 2007, Eric gave Kari an anniversary card in which he referred to himself as her husband. In February 2008, using funds from his earnings for a 20% down payment on the \$400,000 house, Eric bought the bungalow in which he and Kari had been living. He took out a mortgage for the remaining cost of the house, putting the mortgage in his name alone.

In 2019, the parties obtained a new marriage license and had a wedding ceremony on June 8. At the ceremony, Kari wore a wedding gown and Eric wore a tuxedo. A wedding photographer took pictures at the ceremony. Kari and Eric filed the marriage certificate from this ceremony with the county clerk.

In 2022, Kari made significant improvements to her land using funds received as a gift from her mother to build a large gardening shed to store equipment.

The value of the bungalow has appreciated to \$800,000, but there is a remaining mortgage loan balance of \$50,000. The flower farm has appreciated from \$70,000 to \$150,000, which includes the value added by the shed that Kari had built on the property in 2022 with money from

her mother. Eric and Kari currently have \$120,000 in their joint bank account, which they opened in 2006. In addition to the \$50,000 Eric spent on photography equipment in 2005, since October 2006 Eric has spent another \$150,000 on equipment. As a result of depreciation, the photography equipment is now worth \$120,000. Both parties drive paid-off vehicles that were purchased in 2024. There are no debts or retirement or pension plans, and the only liability is the balance on the mortgage.

III. LEGAL AUTHORITIES

The Library contains relevant excerpts of the Franklin Family Code and three cases: *Schwartz v. Darrow*, *Jones v. Cardiff*, and *Bower v. Bower*.

Franklin Family Code

The State of Franklin recognizes common-law marriage. FR. FAM. CODE § 211(a).

The Code defines “marital property” as “all property acquired by either or both spouses during the marriage.” FR. FAM. CODE § 200(c). Pursuant to § 200(d), the term “separate property” refers to

- (1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse;
- (2) compensation for personal injuries;
- (3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse;
- (4) property described as separate property by written agreement.

Under § 215, unless parties in a divorce have a valid pre- or postnuptial agreement, the court will determine the rights of the parties with respect to disposition of property. While “[s]eparate property shall remain such,” the parties’ marital property will be “distributed equitably . . . considering the circumstances of the case and of the respective parties.”

Schwartz v. Darrow – Franklin Court of Appeal, 2022

This case provides guidance on the circumstances under which a Franklin court will conclude that a couple entered into a common-law marriage. In Franklin, a common-law marriage

may be established by the mutual agreement of the couple to enter the legal and social institution of marriage, followed by conduct manifesting that mutual agreement. As explained in *Schwartz*, ultimately, a common-law marriage finding depends on the totality of the circumstances. Relevant conduct includes, but is not limited to, cohabitation; reputation in the community as spouses; maintenance of joint banking and credit accounts; purchase and joint ownership of property; filing of joint tax returns; evidence of shared financial responsibility, such as leases in both parties' names, joint bills, or other payment records; evidence of joint estate planning, including wills, powers of attorney, and beneficiary and emergency contact designations; symbols of commitment, such as ceremonies, anniversaries, cards, and gifts; and the couple's references to or labels for one another.

In *Schwartz*, the appellate court held that the determinative question was whether the parties *intended* to be married, that is, whether the parties mutually intended to enter a *marital* relationship, which the court described as sharing a life together as spouses in a committed, intimate relationship of mutual support and mutual obligation. The probate court magistrate had given "tremendous weight" to the fact that Teresa Darrow and Robert Cohn (the decedent) had always filed separate tax returns even though IRS rules permit common-law spouses to file jointly. On appeal, the court explained that evidence that the couple had maintained separate finances was relevant to whether a common-law marriage existed, but it did not necessarily establish that the parties lacked the intent to be married. For that reason, the court remanded the case to the probate court for further proceedings.

Jones v. Cardiff – Franklin Supreme Court, 2023

Jones v. Cardiff involves the characterization of separate property that has increased in value during marriage. The parties in *Jones* spent approximately \$500,000 to renovate and improve land that the husband had acquired before the marriage.

Under Franklin law, "separate property" includes "the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse." FR. FAM. CODE § 200(d)(3). When the property appreciates in value due to the contributions or efforts of the nontitled spouse, that increase will be considered marital property. This includes any direct contributions to the appreciation, such as when the nontitled spouse makes financial contributions to the property, as well as when the nontitled spouse makes direct

nonfinancial contributions, such as by personally maintaining, making improvements to, or renovating a marital residence.

In *Jones*, the court agreed that the appreciation in the land's value was marital property because the increase in value was the result of both parties' efforts. However, the court reduced the wife's share of that increase from 50% to 25% to reflect the fact that the husband's involvement, financial and otherwise, in the renovations was more extensive than the wife's.

Bower v. Bower – Franklin Court of Appeal, 2014

The statutory definition of separate property was also at issue in *Bower v. Bower*. A spouse's "separate property" encompasses "property acquired in exchange for [separate property]" as well as "the increase in value of separate property." FR. FAM. CODE § 200(d)(3). In *Bower*, the district court awarded the husband as separate property 107 head of cattle valued at \$80,000 and equipment worth \$500,000. The district court determined that these items were separate property because the husband had entered the marriage owning 32 head of cattle and dairy business equipment and that, 15 years later, the 107 head of cattle and equipment constituted "an outgrowth" of that original separate property and as such was covered by the statutory definition of separate property as "property acquired in exchange for or the increase in value of separate property." *Id.*

The appellate court reversed and remanded, concluding that the 107 head of cattle and \$500,000 worth of equipment were *marital* property because the increase in value had resulted from marital efforts and not market factors or inflation. The court clarified that separate property that is *replaced* by property greater in quantity and value and that was largely produced or paid for through the activities of the marital economic partnership no longer constitutes separate property. Rather, § 200(d)(3) should be construed as requiring a "rough equivalency" between the value of the premarital property at that time and that which was acquired in exchange for it. To hold otherwise would exclude the wife from receiving a share of the appreciation that had resulted from joint marital efforts. Accordingly, on remand, the district court was to determine the value of the 32 head of cattle and the dairy business equipment that the husband had when he entered the marriage 16 years before and credit only that amount to him as separate property.

In sum, *Bower* illustrates that "property acquired in exchange for or the increase in value of separate property" under § 200(d)(3) includes acquisitions during the marriage in *exchange* for the premarital or gift property of one of the spouses or an *appreciation* in the value of such property

so long as there is rough equivalency in value at the time between the premarital property and that which was acquired in exchange.

IV. ANALYSIS

A. Was the parties' marriage created in 2006 or 2019?

The parties' marriage was most likely created as a common-law marriage in 2006. Franklin recognizes common-law marriage. FR. FAM. CODE § 211(a). A common-law marriage may be established by the mutual agreement of the couple to enter the legal and social institution of marriage followed by conduct manifesting that mutual agreement. *Howard v. Howard* (Fr. Sup. Ct. 2015), cited in *Schwartz v. Darrow*. The key question is whether the parties mutually intended to enter a *marital* relationship—that is, to share a life together as spouses in a committed, intimate relationship of mutual support and mutual obligation. *See Schwartz*.

Here, there is substantial evidence that Kari and Eric intended to enter into a marital relationship:

- Eric proposed marriage to Kari, and she accepted.
- Eric gave Kari a diamond ring as part of that proposal.
- The couple obtained a marriage license.
- Eric referred to Kari as his wife.
- In 2007, Eric gave Kari a card referencing their one-year anniversary and referring to himself as her husband.

There are also facts indicating that Eric and Kari engaged in conduct that “manifest[ed] that mutual agreement” as discussed in *Schwartz*:

- They celebrated obtaining that license at a formal dinner with close friends.
- The couple's friends believed that they were married.
- For years, they sent Christmas cards signed “Love, Mr. and Mrs. Nolan.”
- Even Eric's grandmother believed that Eric and Kari became married in September 2006 as evinced by the cross-stitch wall hanging that she made and gave to Kari.
- The parties maintained a joint bank account and filed joint tax returns starting in the 2006 tax year.

These facts appear to present a stronger conclusion that a common-law marriage existed than was the case in *Schwartz*, in which the parties maintained separate finances and close family members knew that there had not been a ceremonial marriage.

However, a thorough discussion will recognize that there is evidence that Kari and Eric did not intend to enter a marital relationship. These facts include that in 2006, although the parties obtained a marriage license, they did not file a marriage certificate with the county clerk or hold a wedding ceremony. This could support an argument by Eric that they had decided not to get married but continue living together. Eric said that he and Kari did not have a marriage ceremony in 2006 because he was nervous about making a lifelong commitment. Apart from signing Christmas cards as “Mr. and Mrs. Nolan,” Kari did not begin using “Nolan” as part of her hyphenated last name until after the wedding ceremony in 2019.

On balance, however, the weight of the evidence indicates that Kari and Eric intended to be in a marital relationship starting in 2006. Thus, they were married in a valid common-law marriage in 2006, rather than due to their ceremonial marriage in 2019.

B. If the parties’ marriage was created in 2006, which property is marital property and which property is Eric’s and Kari’s separate property?

Note: At the end of this point sheet are two tables summarizing the characterization of the parties’ assets under each possible marriage date.

2006 marriage: Assets that are separate property under Fr. Fam. Code § 200(c)

Eric’s separate property includes any photography equipment he purchased before the parties entered into a common-law marriage, which is assumed to be September 2006 for this discussion. Eric acquired about \$50,000 worth of camera equipment in December 2005, in the same year that he and Kari began living together but before the parties entered into a common-law marriage. The photography equipment that Eric owned before the 2006 common-law marriage would constitute his separate property.

Kari’s separate property includes the acre of land in Frankfurt Acres and any appreciation in the value of that land, including the addition of the shed. If Eric had provided additional contributions or efforts to maintaining or improving the property, it is possible that such

appreciation would have been “due to the contributions or efforts of the nontitled spouse [Eric]” and would be marital property. *Jones* (citing *Price v. Price* (Fr. Sup. Ct. 2001)). No facts indicate that Eric made any contributions to the flower farm, either financial or by personal effort. Thus, any appreciation of the land itself is Kari’s separate property. Appreciation due to the addition of the shed is also Kari’s separate property because she used funds that were a gift from her mother to build the shed. § 200(d)(1).

2006 marriage: Assets that are marital property under Fr. Fam. Code § 200(c) & (d)

The parties’ marital property includes the bungalow at 1505 Clark Street. *See* FR. FAM. CODE § 200(c). This is because the house was purchased in 2008 after the parties entered into a common-law marriage in 2006, and Eric paid for the house with income earned from his photography. No funds that were separate property, as defined by § 200(d), were used for the purchase. The \$400,000 appreciation in the property’s value from 2008 to 2026 would also be marital property. Note that in *Bower*, the court found that a spouse’s indirect contributions to a dairy farm would create a marital property interest in the farm. Here, it is likely that Kari’s indirect contributions to the parties’ interest in the house would also create a marital property interest in the house.

Any photography equipment purchased after 2006 would constitute marital property. As noted, Eric bought about \$50,000 worth of photography equipment in December 2005, which predates the parties’ common-law marriage. Since October 2006, Eric has acquired another \$150,000 worth of photography equipment. While the current value of the equipment is uncertain (as indicated on the assets and debts worksheet), any photography equipment purchased after September 2006 with marital funds would constitute marital property.

The Toyota Tundra pickup truck and the Nissan Altima sedan are also marital property. There is no indication that separate property funds under § 200(d) were used by either party to purchase the vehicles. And, as both the truck and the car are less than two years old, they were acquired much after the creation of the common-law marriage.

Similarly, the bank account with a balance of \$120,000 is marital property. The File indicates that the parties opened a joint bank account in December 2006, after the common-law marriage began. Both parties have contributed to the bank account since then. Thus, the funds are marital property.

C. If the parties' marriage was created in 2019, which property is marital property and which property is Eric's and Kari's separate property?

2019 marriage: Assets that are separate property under Fr. Fam. Code § 200(c)

Assuming that Eric and Kari were not married until June 2019, Eric's separate property would include most of the value of the bungalow at 1505 Clark Street because it was purchased in 2008. The facts do not indicate any investment of the "contributions or efforts" of the other spouse (Kari) under § 200(d)(3) or *Price v. Price*. Thus, the appreciation of the value of the house would likely constitute Eric's separate property. There is no evidence in the item that Kari made "financial contributions to the property [or] . . . direct nonfinancial contributions, such as by personally maintaining, making improvements to, or renovating a marital residence" under *Jones v. Cardiff*. However, Kari could argue that the use of marital income from June 2019 to the present to pay the mortgage transmuted some of the appreciation into marital property.

Eric's separate property also includes any photography equipment he purchased before June 8, 2019. He bought about \$50,000 worth of camera equipment in December 2005 and has purchased another \$150,000 worth of photography equipment since October 2006. Much of this equipment may have been purchased long before 2019, but it is undetermined how much of the equipment was purchased after the 2019 marriage. The fact that the camera equipment has depreciated in value does not affect how it is characterized as separate or marital property.

Kari's separate property would include the land in Frankfurt Acres and all appreciation in the value of that land before 2019. Any increase in its value after June 2019 that was not due to any investment of the "contributions or efforts" of Eric under § 200(d)(3) or *Price v. Price* would also constitute Kari's separate property. There is no evidence that Eric contributed to the land in Frankfurt Acres. Appreciation due to the addition of the shed is also Kari's separate property because she used funds that were a gift from her mother to build the shed. *See* § 200(d)(1).

2019 marriage: Assets that are marital property under Fr. Fam. Code § 200(c) & (d)

The parties' marital property includes any appreciation of the bungalow between June 8, 2019, and the present time that is due to Kari's "contributions or efforts" under § 200(d)(3). *See also Price v. Price*.

Any photography equipment purchased after the 2019 wedding date would constitute marital property. It appears that the bulk of the photography equipment may have been acquired

before 2019. While the current value is uncertain (as indicated on the assets and debts worksheet), any equipment purchased after June 8, 2019, would likely be marital property as it was presumably bought with marital funds.

The characterization of the parties' vehicles stays the same, regardless of whether a court determines that Eric and Kari were married in 2006 or not until 2019. The pickup truck and the sedan are marital property as they were purchased after June 8, 2019.

Similarly, the joint bank account with a balance of \$120,000 is marital property. The joint account was opened in 2006 with funds that then commingled with their marital property after their 2019 marriage. Thus, the funds are marital property.

IN THE EVENT OF A VALID 2006 COMMON-LAW MARRIAGE:

Property	Characterization	Reason
Bungalow	Marital	Purchased in 2008 with Eric's earnings <i>after</i> the common-law marriage
Appreciation in bungalow	Marital	Occurred <i>after</i> common-law marriage
Kari's indirect contributions to the parties' interest in the bungalow	Marital	A spouse's indirect contributions to property may create a marital property interest in the asset; <i>see Bower</i>
Land in Frankfurt Acres	Separate (Kari's)	Purchased by Kari in 2001, <i>before</i> the common-law marriage
Appreciation in land in Frankfurt Acres	Separate (Kari's)	Kari bought the land <i>before</i> marriage, and the property improvement was made with funds she received as a gift
Photography equipment acquired in December 2005	Separate (Eric's)	Purchased <i>before</i> the common-law marriage with separate money
Photography equipment acquired after September 2006	Marital	Purchased <i>after</i> common-law marriage with marital funds
Pickup truck and sedan	Marital	Purchased <i>after</i> the common-law marriage with earnings that were marital property
Joint checking account	Marital	Opened <i>after</i> the common-law marriage

IN THE EVENT OF NO VALID MARRIAGE UNTIL 2019:

Property	Characterization	Reason
Bungalow	Separate (Eric's)	Purchased in 2008 with Eric's separate money <i>before</i> the 2019 marriage
Appreciation in bungalow before June 8, 2019	Separate (Eric's)	The appreciation that occurred <i>before</i> a valid marriage in 2019 is Eric's separate property
Appreciation in bungalow after June 8, 2019	Marital	The appreciation that occurred <i>after</i> a valid marriage in 2019 is marital property
Kari's indirect contributions to the parties' interest in the bungalow	Marital	Per <i>Bower</i> , a spouse's indirect contributions to separately held property may create a marital property interest in the property
Land in Frankfurt Acres	Separate (Kari's)	Purchased by Kari <i>before</i> the 2019 marriage
Appreciation in land in Frankfurt Acres	Separate (Kari's)	The land was purchased by Kari <i>before</i> the 2019 marriage with her separate money, and the improvement of the shed was made with funds Kari received as a gift
Photography equipment purchased before June 8, 2019	Separate (Eric's)	Purchased <i>before</i> the 2019 marriage with separate money
Photography equipment purchased after June 8, 2019	Marital	Purchased <i>after</i> the 2019 marriage with marital funds
Both vehicles	Marital	Purchased <i>after</i> the 2019 marriage with marital funds
Franklin Bank joint checking account	Marital	The account was opened in 2006 with funds that then commingled with their marital property after their 2019 marriage

February 2026 MPT-2 Item

In re Franklin Defenders of the Earth

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In re Franklin Defenders of the Earth

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CITY OF WHITNEY

OFFICE OF THE CITY ATTORNEY

Municipal Building Annex
130 W. Fifth Street
Whitney, Franklin 33875

MEMORANDUM

To: Examinee
From: Maria Delatorre, City Attorney
Date: February 24, 2026
Re: Measure 15

The City Council has requested our opinion as to whether it must adopt a new city ordinance that was approved by a ballot initiative.

As you know, the City of Whitney maintains three flagpoles on the City Hall building itself; the flagpole in the center is 30 feet high, and the two on either side of it are 20 feet high. The flag of the United States is always flown on the center (highest) flagpole. The flags of the State of Franklin and of the City of Whitney are flown on the lower flagpoles.

Franklin Defenders of the Earth (FDE) is a not-for-profit organization that is devoted to ecology and the well-being of the planet. Last year, they submitted an application for a permit to hold an event on City Hall Plaza on the upcoming April 22, "Earth Day," celebrating the day. City Hall Plaza is an open space in front of the City Hall building that the City makes available to the public for events. The City routinely allows such events, treating the Plaza as a public forum, subject to standard regulations and safety and security measures. The permit was granted.

FDE then notified the City that, as part of its event, it would hoist the "Earth Flag," symbolizing Earth Day and FDE's political viewpoint, above the United States flag on the center flagpole atop the City Hall building itself. The City Services Administration, the agency that grants such permits, informed FDE that it would not allow any flag to be flown above the United States flag.

FDE then launched a ballot initiative ("Measure 15") by which the City's electorate would be asked to vote to approve its request and require the City Council to adopt a local

ordinance requiring the City to fly the Earth Flag above the national flag; the initiative met all local requirements. The City's voters approved Measure 15 by a vote of 55% to 45%.

Given the passage of Measure 15, the City Council has now requested our opinion as to whether it must adopt the ordinance as described in the ballot initiative.

Please prepare a memorandum for me separately analyzing the issues noted below, even if you believe that one or more is dispositive. For each issue, state and explain your conclusion as to that specific issue. After you have analyzed each issue separately, state and explain your overall conclusion of what advice to give to the City Council as to whether it must adopt the ordinance. Note that the relevant governmental action by the City to be considered in your analysis is its initial denial of FDE's request.

- (1) Does the United States Flag Code bar the flying of the Earth Flag above the United States flag?
- (2) Does Franklin state law bar the flying of the Earth Flag above the United States flag? Is Measure 15 enforceable under Franklin state law?
- (3) Does the First Amendment to the United States Constitution require that FDE be allowed to fly the Earth Flag above the United States flag?

Do not include a restatement of the facts in your memorandum, but you should refer to relevant facts in presenting your analysis.

CITY SERVICES ADMINISTRATION

CITY OF WHITNEY

Rules and Regulations – Events on City Hall Plaza

[Rules regarding permissible events, permit requirements, security and safety issues, etc., omitted]

4.0 Displays

4.1 Permit holders may temporarily erect kiosks and displays, including posters, statues, product demonstrations, and the like, on City Hall Plaza for the duration of the event, subject to conformity with the City fire code and safety and security concerns.

4.2 No event activities shall occur on or in City Hall itself. . . . City Hall is not part of City Hall Plaza.

FULL TEXT OF MEASURE 15

Purpose of Measure 15

The voters of the City of Whitney require that the Whitney City Council enact an ordinance stating that it shall be the official policy and practice of the City of Whitney on Earth Day (April 22) to fly the Earth Flag at the top of the tallest city-owned flagpole on City Hall, above the flag of the United States of America, the Franklin flag, the City flag, and any other flags that the City may choose to display.

The reasons for the proposed action are as follows:

Logic and Symbolism

The American flag flies at the top of the highest flagpole on the City Hall building. But isn't the well-being of the entire Earth more important than merely national considerations? Flying the Earth Flag above all others—including the United States flag—will recognize the importance of our planet's health above all other considerations. We should at least do so on the one day a year when the primacy of the Earth is celebrated—Earth Day.

Patriotism

It is not unpatriotic to fly the Earth Flag above the United States flag. After all, our country is part of the iconic image reproduced on the Earth Flag—the "Blue Marble" photograph of the Earth taken December 7, 1972, by the Apollo 17 spacecraft crew. And taking this action will show how our country values the well-being of the Earth.

Priorities

Our world is threatened by challenges such as climate change and nuclear war. Our focus should be shifted from narrow national interests to the safety and health of the entire planet. Flying the Earth Flag above all others will demonstrate our commitment to meeting these challenges.

Stabilizing the climate and advancing peace require that we meet in good faith with other nations and develop a positive plan of action. We can proudly negotiate as Americans, but we must prioritize the overall well-being of our planet and be willing to make political and economic concessions.

Ordinance to be Adopted by the City Council

The people of the City of Whitney do ordain as follows:

On every Earth Day (April 22), it shall be the official policy and practice of the City of Whitney to fly the Earth Flag at the top of the tallest city-owned flagpole on City Hall, above the flag of the United States of America and any other flags that the City may choose to display.

For the purpose of this measure, the Earth Flag shall be defined as the flag featuring the "Blue Marble" image of Earth, photographed from the Apollo 17 spacecraft in 1972.

WALKER'S TREATISE ON LEGISLATION

§ 201 Principles of Statutory Interpretation

...

(h) The use of terms such as "shall" or "must," and similar terms, make the action set forth in the legislation mandatory. The use of terms such as "should" or "may," and similar terms, sometimes called "precatory" terms, make the action set forth in the legislation permissive, but not mandatory.

UNITED STATES FLAG CODE

4 U.S.C. § 1 *et seq.*

§ 7 Position and manner of display

The flag, when carried in a procession with another flag or flags, should be either on the marching right; that is, the flag's own right, or, if there is a line of other flags, in front of the center of that line.

...

(c) No other flag or pennant should be placed above or, if on the same level, to the right of the flag of the United States of America, except during church services conducted by naval chaplains at sea, when the church pennant may be flown above the flag during church services for the personnel of the Navy. . . .

...

(e) The flag of the United States of America should be at the center and at the highest point of the group when a number of flags of States or localities or pennants of societies are grouped and displayed from staffs.

(f) When flags of States, cities, or localities, or pennants of societies are flown on the same halyard [*] with the flag of the United States, the latter should always be at the peak. When the flags are flown from adjacent staffs, the flag of the United States should be hoisted first and lowered last. No such flag or pennant may be placed above the flag of the United States or to the United States flag's right.

[* Halyard: a rope or line for hoisting and lowering something (such as a sail or flag)].

FRANKLIN STATE GOVERNMENT CODE

TITLE 1 - GENERAL

DIVISION 2 - STATE SEAL, FLAG, AND EMBLEMS

CHAPTER 3 - Display of Flags

...

§ 436 Where the national and state flags are displayed, they shall be of the same size. If only one flagpole is used, the national flag shall be above the state flag and the state flag shall be hung in such manner as not to interfere with any part of the national flag. At all times the national flag shall be placed in the position of first honor.

FRANKLIN MILITARY AND VETERANS' CODE

...

§ 617 No other flag or pennant shall be placed above, or if on the same level, to the right of, the flag of the United States of America, except during church services, when the church flag may be flown.

FRANKLIN STATE CONSTITUTION

...

Article 4, section 1. The legislative power of this State is vested in the Franklin Legislature, which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum.

Mastai v. Ross

Franklin Court of Appeal (2004)

In 2003, defendant and appellee Emily Ross won reelection to a third consecutive term on the Lakeville City Council. A city ordinance limits council members to two consecutive terms. Plaintiff and appellant Warren Mastai contested the election, seeking declaratory and injunctive relief to invalidate Ross's election. The trial court ruled that the ordinance was invalid as preempted by state law. Mastai appeals. We affirm.

DISCUSSION

A local ordinance is preempted by state law if "the subject matter has been so fully covered by general law as to clearly indicate that it has become exclusively a matter of state concern," *In re Hubbell* (Fr. Sup. Ct. 1964), or if "the subject matter has been partially covered by general law couched in such terms as to indicate a paramount state concern [that] will not tolerate further . . . local action." *Jefferson School Board v. County of Jefferson* (Fr. Sup. Ct. 1980).

Lakeville's local ordinance limits a person's eligibility for city council to two successive terms. The city's voters adopted the ordinance by ballot initiative after several years of debate over the efficacy of term limits. We note, however, that numerous Franklin State Government Code provisions also affect eligibility for local offices in a city such as Lakeville. For example, Franklin state law provides that a person is not eligible to hold office as council member unless he or she is an elector at the time of assuming office and was a registered voter of the city at the time nomination papers were issued to the candidate. [Citation omitted.] We must determine whether, by adopting these State Government Code provisions, the State Legislature has either fully occupied the field or so fully covered it as to indicate a paramount state concern. *In re Hubbell, supra; Jefferson School Board, supra.*

A similar statute relating to eligibility of county elected officers has been held to constitute evidence of the Legislature's intent to exercise *statewide* control over the qualifications of elected county officers. *Elder v. Board of Supervisors* (Fr. Sup. Ct. 1979). To support his argument that the ordinance is not preempted by state law, Mastai attempts to distinguish *Elder* on the ground that the local governmental entity in *Elder* was a county

and Lakeville is a city. This distinction is not pertinent in this case. The State Government Code establishes that the Legislature intends to preempt *all* local regulation of eligibility for election to local governing bodies, whether they are counties or cities.

Mastai also contends that the city is a distinct, individual entity and is not a political subdivision of the state. He is incorrect. "Cities are simply creatures of the state and as such are parts of the machinery by which the state conducts its governmental affairs. . . . [Voters] have the right to pass upon the composition of their local government *only within the legal framework established by the constitution of the state and the laws enacted by the Legislature.*" *Mancini v. City of Greenwich* (Fr. Sup. Ct. 1965) (emphasis added). Indeed, local governments do not possess even federal constitutional rights against the state that created them. *E.g., Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907).

Finally, Mastai argues that the local ordinance must prevail, as it was adopted by ballot initiative as referenced in Article 4, section 1 of the Franklin State Constitution. But, as *Mancini* teaches, no matter the source of the *local* regulation, whether by initiative in a city or county, it cannot be contrary to the laws adopted by the *state* legislature.

The trial court correctly found that the city ordinance was preempted by state law. Affirmed.

Shurtleff v. City of Boston

596 U.S. 243 (2022)

[Just outside the entrance to Boston City Hall, on City Hall Plaza, stand three flagpoles. Boston flies the United States flag from the flagpole on the right (on the left as an observer regards them), the Massachusetts state flag on the second, and, usually, the Boston city flag on the third. In 2017, Harold Shurtleff, the director of an organization known as Camp Constitution, asked to hold an event at which the "Christian" flag (a blue field with a red cross) would be hoisted. The city, concerned that this would violate the Establishment Clause of the First Amendment to the Constitution, refused to give permission. This litigation ensued.]

Justice Breyer delivered the opinion of the Court.

When the government encourages diverse expression—say, by creating a forum for debate—the First Amendment prevents it from discriminating against speakers based on their viewpoint. [Citation omitted.] But when the government speaks for itself, the First Amendment does not demand airtime for all views.

. . .

Boston makes City Hall Plaza available to the public for events. Boston acknowledges that this means the plaza is a "public forum." For years, since at least 2005, the city has allowed groups to hold their flag-raising ceremonies on the plaza. . . . Boston has no record of refusing a request to [hoist a flag] before the events that gave rise to this case.

. . .

The first and basic question we must answer is whether Boston's flag-raising program constitutes government speech. If so, Boston may refuse flags based on viewpoint.

The First Amendment's Free Speech Clause does not prevent the government from declining to express a view. [Citation omitted.] When the government wishes to state an opinion, to speak for the community, to formulate policies, or to implement programs, it naturally chooses what to say and what not to say. [Citation omitted.] That must be true for the government to work.

The boundary between government speech and private expression can blur when, as here, a government invites the people to participate in a program. In those situations,

when does government-public engagement transmit the government's own message? And when does it instead create a forum for the expression of private speakers' views?

In answering these questions, we conduct a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression. Our review is not mechanical; it is driven by a case's context rather than the rote application of rigid factors. Our past cases have looked to several types of evidence to guide the analysis, including the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression. [Citation omitted.]

Considering these indicia in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), we held that the messages of permanent monuments in a public park constituted government speech, even when the monuments were privately funded and donated. In *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015), we explained that license plate designs proposed by private groups also amounted to government speech because, among other reasons, the State that issued the plates "maintain[ed] direct control over the messages conveyed" by actively reviewing designs and rejecting over a dozen proposals.

[Applying these factors to the case at hand, the Court noted that for many years, Boston has allowed groups to hold ceremonies on the Plaza, during which they hoisted a flag of their own choosing in place of the city flag. The Court stated that, as far as the history of the expression at issue is concerned, while the flags flying on the Plaza usually represent the nation, state, and city, this is not always the case. Thus, as far as the public perception is concerned, the flag at issue would not be perceived as a government speech, as it would be associated with Shurtleff's group. And, as to the extent the city actively controlled the flag raisings and the messages the flags sent, the answer is not at all. The Court concluded that Boston was not speaking for itself in allowing private flags to be flown, noting that it could have made clear that it wished to speak for itself. As to the Establishment Clause argument,] [w]hen a government does not speak for itself, it may not exclude speech based on "religious viewpoint"; doing so "constitutes impermissible viewpoint discrimination." [Citation omitted.]

For the foregoing reasons, we conclude that Boston's flag-raising program does not express government speech. As a result, the city's refusal to let Shurtleff and Camp Constitution fly their flag based on its religious viewpoint violated the Free Speech Clause of the First Amendment.

[Concurring opinions omitted.]

February 2026
MPT-2
Drafters' Point Sheet

*In re Franklin Defenders
of the Earth*

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**In re Franklin Defenders of the Earth
DRAFTERS' POINT SHEET**

In this performance test item, the examinee is an attorney in the office of the City Attorney of the City of Whitney, State of Franklin. Franklin Defenders of the Earth (FDE) has obtained a permit to hold an event on City Hall Plaza on Earth Day (April 22). As part of the event, it wishes to fly the “Earth Flag” above the United States national flag on City Hall itself. When the City refused to allow this, FDE sponsored a ballot initiative (Measure 15), which passed at a special election and would require the City Council to adopt an ordinance mandating that the “Earth Flag” be flown above the United States national flag on the flagpole on City Hall itself on Earth Day. The City Council has asked the City Attorney whether it must adopt the ordinance.

Given the passage of Measure 15, the examinee is asked to draft a memorandum addressing the following issues individually:

- (1) Does the United States Flag Code bar the flying of the Earth Flag above the United States flag?
- (2) Does Franklin state law bar the flying of the Earth Flag above the United States flag? Is Measure 15 enforceable under Franklin state law?
- (3) Does the First Amendment to the United States Constitution require that FDE be allowed to fly the Earth Flag above the United States flag?

In each case, examinees are instructed to state and explain their conclusion as to that specific issue.

After examinees have analyzed each issue separately, they must state and explain the overall conclusion of what advice to give to the City Council as to whether it must adopt the ordinance.

The analysis of this question involves application of the facts, as revealed in the File, to the law, as set forth in the material in the Library.

The File contains (1) the instructional memorandum, which also sets forth the factual background of the item; (2) excerpts from the rules and regulations of the City of Whitney for events on City Hall Plaza; and (3) the full text of Measure 15. The Library contains (1) an excerpt from *Walker’s Treatise on Legislation* dealing with principles of statutory interpretation; (2) excerpts from the United States Flag Code; (3) excerpts from the Franklin State Government Code

and the Franklin Military and Veterans' Code, dealing with display of flags; (4) an excerpt from the Franklin State Constitution, dealing with the right of initiative and referendum; (5) *Mastai v. Ross*, a Franklin Court of Appeal case dealing with state legislative preemption; and (6) *Shurtleff v. City of Boston*, a 2022 U.S. Supreme Court case dealing with flag display as protected expression under the First Amendment.

The following discussion covers all the points the drafters intended to raise in the problem.

I. FORMAT AND OVERVIEW

The examinee must, first, master the facts as set forth in the instructional call memorandum, the City rules and regulations regarding events on City Hall Plaza, and the text of Measure 15, the ballot initiative, all contained in the File; second, master the law, as set forth in the statutes provided (the federal Flag Code and the Franklin state statutes dealing with flag display); third, analyze the text of those statutes based on the principles set forth in the treatise excerpt provided; fourth, determine whether the principles of state legislative preemption, set forth in *Mastai*, apply to Measure 15; fifth, determine whether the First Amendment jurisprudence in *Shurtleff* would require the City Council to adopt the ordinance contained in Measure 15; and finally, advise the City Council as to the ultimate conclusion whether it must adopt the ordinance contained in Measure 15.

Analyzing each issue presented, the examinee should conclude that

- The Flag Code does not bar the flying of the Earth Flag above the national flag because it is advisory, not mandatory.
- Based on *Mastai*, the Franklin statutes, standing alone, bar the flying of the Earth Flag above the national flag because the state statutes preempt Measure 15 and the ordinance it would have the City Council adopt.
- The First Amendment jurisprudence in *Shurtleff*, which would be the final word on the issue, could bar the flying of the Earth Flag above the national flag because, although City Hall Plaza is a public forum, the flag display on City Hall itself, which is not part of City Hall Plaza and is not part of the public forum, is governmental speech as per state law, not private speech, and the government cannot be compelled to speak.

The examinee should therefore conclude that the City Council should be advised that it need not adopt Measure 15's ordinance.

II. DISCUSSION

A. Facts

The City of Whitney, a general law city under Franklin state law, maintains three flagpoles on City Hall itself; the flagpole in the center is 30 feet high, and the two on either side of it are 20 feet high. The flag of the United States is always flown on the center (highest) flagpole. The flags of the State of Franklin and of the City of Whitney are flown on the other (lower) flagpoles.

Franklin Defenders of the Earth (FDE) is a not-for-profit organization that is devoted to ecology and the well-being of the planet. In 2025, they applied for a permit to hold an event on City Hall Plaza on the next upcoming April 22, “Earth Day,” celebrating the day. City Hall Plaza is an open area in front of City Hall and is a public forum available to the public for events. The City routinely allows such events, subject to standard regulations and safety and security measures. The City’s rules and regulations specifically state that City Hall itself is not part of City Hall Plaza. The permit was granted.

After receiving the permit, FDE notified the City that, as part of its event, it would hoist the “Earth Flag,” symbolizing Earth Day and FDE’s political viewpoint, above the United States flag on the center (highest) flagpole on City Hall itself. The Earth Flag reproduces a photograph, taken by astronauts on Apollo 17, of the entire globe of the Earth, on a blue field. The City Services Administration, the agency that grants permits for events on City Hall Plaza, informed FDE that it would not allow any flag to be flown above the United States flag.

FDE then launched a ballot initiative (“Measure 15”), asking the City’s electorate to approve its request and require the City Council to adopt an ordinance allowing the Earth Flag to fly above the national flag on City Hall itself on Earth Day; the initiative met all local requirements. The express explanation for the initiative was that the interests of the entire planet supersede those of any nation, and flying the Earth Flag above the national flag expresses that viewpoint. At that election, by a vote of 55% to 45%, the City’s voters approved Measure 15.

The City Council has asked the City Attorney for advice on whether it must adopt the ordinance and allow the Earth Flag to be flown above the national flag.

B. Legal Analysis

Overview

Examinees are asked to analyze three issues individually, in each case stating and explaining their conclusion as to that specific issue, standing alone. They must then, as a fourth issue, state and explain their ultimate conclusion as to whether the City Council must adopt the ordinance.

1. The United States Flag Code does not bar the flying of the Earth Flag above the United States flag.

The United States Flag Code (4 U.S.C. § 1 *et seq.*) states in § 7 that “[n]o other flag or pennant should be placed above . . . the flag of the United States of America. . . .” This would seem to bar the flying of the Earth Flag above the national flag. But the language of the Flag Code is precatory—that is, permissive, not mandatory. As *Walker’s Treatise on Legislation* states, “[t]he use of terms such as ‘should’ [the term used in the Flag Code] . . . make the action set forth in the legislation permissive, but not mandatory.” Hence, the federal Flag Code does not bar the flying of the Earth Flag above the national flag. (Astute examinees might note that language negating the permissive terms [e.g., “no flag may” or “no flag should”] might render that language mandatory, rather than permissive. Examinees so noting should receive credit.)

2. Franklin state law does bar the flying of the Earth Flag above the United States flag.

The Franklin State Government Code provides that “[a]t all times the national flag shall be placed in the position of first honor.” There is no definition of “position of first honor.” But the Franklin Military and Veterans’ Code provides that “[n]o other flag or pennant shall be placed above . . . the flag of the United States of America” This indicates that the “position of first honor” is the top position and that no flag shall be flown above the national flag. And in both cases, the term used is “shall”; as *Walker’s Treatise on Legislation* states, “The use of terms such as ‘shall’ . . . make the action set forth in the legislation mandatory.” This indicates that the ordinance would run afoul of the state legislation.

However, those advocating for the ordinance would argue that Measure 15, the ballot initiative passed by the Whitney electorate, would override the state legislation, citing the Franklin State Constitution’s provision that, notwithstanding the power of the State Legislature, “the people reserve to themselves the powers of initiative and referendum.”

That argument is refuted by the holding in *Mastai v. Ross* (Fr. Ct. App. 2004). In that case, a local Lakeville city ordinance, adopted by local ballot initiative, limited city council members to two consecutive terms. Ross was elected to a third term, and Mastai contested the election. The Franklin Court of Appeal, upholding the lower court, concluded that the local ordinance was invalid as contrary to state law; the Franklin legislature had completely preempted the subject of eligibility of local officers, no matter what the local jurisdiction's ordinances would require. That Whitney is a city does not matter, as *Mastai* also involved a city, and the state legislature's action applied equally to counties or cities. Nor did it matter that the ordinance was adopted by ballot initiative even given the state constitution's provision, for local law, no matter the source, cannot supersede state legislation. Based on the state statutes governing flag display, the state legislature had completely preempted the subject matter and made it exclusively a matter of state concern, as per *Mastai*. Hence, the ordinance proposed in Measure 15 would be preempted by Franklin state legislation.

3. The First Amendment would not require the Earth Flag to be flown above the United States flag.

Although the Franklin state statutes would seemingly end the analysis, examinees must also consider First Amendment jurisprudence, which would override any state considerations.

In *Shurtleff*, the city of Boston allowed participants in events on a public plaza to fly their flag on the same flagpole as was otherwise used for the city flag. Shurtleff wished to fly the "Christian" flag, consisting of a red cross on a blue field, in connection with an event on the plaza. The city refused, citing the Establishment Clause of the First Amendment. Given that, as Boston admitted, the plaza was a public forum, the question in *Shurtleff* was whether the city's flag-raising program constituted government, rather than private, speech. If so, the city could refuse permission to fly the flag. The Court stated that when the government encourages diverse expression (as was the case before the Court), the First Amendment prevents it from discriminating against speakers based on their viewpoint. But when the government speaks for itself, the First Amendment does not demand that other views be presented.

To make that determination, the Court looks at the following: (1) the history of the expression at issue, (2) the public's likely perception of who is speaking, and (3) the extent to which the government has actively shaped or controlled the expression. In the Franklin Defenders case, examinees should note (1) that the government's expression of the primacy of the national

flag has been the historical standard, as shown by the federal Flag Code and Franklin state statutes; (2) that the flagpoles in question fly the national, state, and city flags and are on City Hall itself rather than in the City Hall Plaza and that only the Plaza is a public forum used for public events and City Hall itself is explicitly not part of the Plaza, so flying a flag from the City Hall flagpole would be perceived as governmental expression; and (3) that the Franklin state statutes and the Whitney city rules and regulations show that the government actively shaped its expression of the primacy of the national flag. The conclusion, therefore, is that flying the national flag from the tallest flagpole on City Hall itself involves government, not private, speech, and so the City Council may refuse to adopt Measure 15's ordinance without violating the First Amendment.

C. Conclusion

The examinee should conclude that applying the constitutional test in *Shurtleff*, as per the requirements of Franklin state law, the flagpole is reserved for government, not private, speech, and the City Council need not adopt the ordinance proposed by Measure 15.