

# **MPT 1**

**Butler v. Hill**

**Butler v. Hill**

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**FILE**

**Wiggins, Crawford & Samuelson  
Attorneys at Law  
322 Crescent Road  
Ocean City, Franklin 33447**

**TO:** Applicant  
**FROM:** Sophia Wiggins  
**DATE:** February 22, 2011  
**RE:** Jennifer Butler v. Robert Hill

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We represent Jennifer Butler in a suit against Robert Hill seeking a divorce and property distribution. Jennifer and Robert have two children; temporary custody and child support orders are in place that are not currently at issue. Robert has challenged the validity of the parties' underlying marriage. If there is no valid marriage, Jennifer cannot pursue a claim for divorce or a share of marital property. Even if the marriage is valid, Robert claims that the home that Jennifer and the children are living in is not marital property but instead is his individual property.

I have attached the relevant material from Jennifer's file. I will meet with her later this week in anticipation of trial. Please help me with the following two tasks:

First, draft a *short* memo which I may use to prepare for my meeting with Jennifer. In the memo, explain whether Jennifer and Robert's September 1, 2003, ceremonial marriage had any legal effect under Franklin Family Code § 301 *et seq.* Do not write a separate statement of facts, but be sure to incorporate the law and the relevant facts and reach a reasoned conclusion.

Second, draft a closing argument based on the evidence we expect to present at trial to convince the court that (1) there is a valid marriage and (2) the home is marital property and Jennifer is entitled to more than 50 percent of its value. Structure the closing argument as follows:

- (1) A *brief* introduction of the case;
- (2) Argument; and
- (3) Relief sought.

Our closing argument should tell a persuasive story about why Jennifer should prevail, highlighting the evidence that we intend to bring out at trial to support the factors enumerated in the relevant statutes and case law. Be sure to address Robert's position by showing how the evidence fails to support his case and, in fact, supports Jennifer's.

## MEMORANDUM

**To:** Jennifer Butler File  
**From:** Sophia Wiggins  
**Re:** Client Interview Notes

**August 2, 2010**

Today I met with client Jennifer Butler in regard to a family law matter. Jennifer related her story to me as follows.

In 2003, Jennifer Butler was 17 years old and pregnant with her first child when Robert Hill, the child's father, convinced her to marry him against the wishes of her parents. Robert told her he was single. In fact, unbeknownst to Jennifer at the time, Robert, age 22, was already married and had not yet been legally divorced. Jennifer's parents objected to the marriage and would not consent to it. Caught in a difficult situation, Jennifer married Robert in a civil ceremony with a forged parental consent that Robert had signed, and then she moved in with him.

From the date of the marriage ceremony, September 1, 2003, Jennifer and Robert lived together in Franklin. The parties had two children: Christina Hill, born November 14, 2003, and William Hill, born February 22, 2007. Jennifer never changed her surname. Shortly after the ceremony, Robert began verbally abusing Jennifer. Nevertheless, Jennifer stayed with Robert, living with him, taking care of their two young children, contributing financially to the support of the family, and putting up with Robert's emotional abuse. Both Jennifer and Robert were employed and contributed financially to the household; Robert consistently earned about twice as much as Jennifer. They had a joint checking account, but Jennifer also kept a separate savings account. Jennifer has a life insurance policy naming the children as beneficiaries.

In the summer of 2008, the couple was offered the opportunity to purchase the home that they had rented and had lived in for nearly five years. They put their joint income tax refund toward the down payment and purchased the home on August 12, 2008. Jennifer was not at the closing and has not seen the documents. We need to check the deed.

Four months ago, Jennifer learned that Robert had been having an affair with a coworker and had lent the woman \$10,000. Jennifer immediately decided to end the marriage. She and the children stayed in the home, and Robert moved to his mother's house one week later.

While Robert was moving out, Jennifer found in Robert's dresser drawer a copy of a divorce decree that granted Serena Hill a divorce from Robert. Jennifer had never heard of Serena before and had no prior knowledge that Robert had been previously married. When she confronted Robert, he claimed he had not bothered to tell her because he had thought he was divorced from Serena before he married Jennifer and only learned that he wasn't when he was served with the court papers.

**Supplemental notes: February 15, 2011**

Robert has recently requested that Jennifer and the children move out so that he can sell "his" house. He has told her he expects that she will move by the end of March, at which time he intends to change the locks and place the house on the market to sell.

**Excerpt of Transcript of Telephone Interview with Louisa Milligan  
(January 28, 2011)**

**Attorney Wiggins:** Louisa, how well do you know Jennifer?

**Milligan:** We've been close friends for the past five years. I live just down the block from her. We have kids who are the same ages.

**Attorney:** Do you have reason to believe that Jennifer and Robert are married?

**Milligan:** Yes, we've been to many social gatherings together, including a celebration of their wedding anniversary.

**Attorney:** When was this?

**Milligan:** September of 2009. All of their family and friends came. We had a barbecue in their backyard.

**Attorney:** Did they specifically refer to themselves as husband and wife?

**Milligan:** Yes, always. And, in fact, at the anniversary party, Robert gave a toast saying that marrying Jennifer was the smartest thing he'd ever done.

**Attorney:** Did you ever have any reason to believe that they were not married?

**Milligan:** No, not until Jennifer called me recently and told me that Robert had apparently been married before and might not have been divorced when they married. She told me that she found a copy of a divorce order in Robert's dresser drawer when they separated last spring. She had not known that Robert was ever married before.

**Attorney:** Louisa, thank you very much for offering to testify to help Jennifer. We will be calling you again before the trial. Please call me if you have any questions or concerns.

*Certificate of Marriage*  
*State of Franklin*  
*Ocean City Municipality*  
License Number 199330

*I Hereby Certify* that on the 1st day of September 2003, the following persons were by me united in marriage at the Ocean City Courthouse in accordance with the License of the Clerk of the Court in the jurisdiction shown above.

**Groom's name:** Robert Hill                      **Age:** 22                      **Birthplace:** Columbia  
**Residence:** 6226 Berkeley Blvd., Ocean City                      **Marital Status:** Single  
**Bride's name:** Jennifer Butler                      **Age:** 17                      **Birthplace:** Franklin  
**Residence:** 80 Octavia Street, Ocean City                      **Marital Status:** Single  
**Relationship to Groom if any:** None

**Consent of Parent of Underage Party (if applicable):** Yes, signed consent form presented at time of application for license.

Monica St. George  
\_\_\_\_\_  
Signature of Authorized Officer  
  
District Court Judge  
\_\_\_\_\_  
Title and Office  
  
Ocean City Municipal Building  
\_\_\_\_\_  
Address of Authorized Officer  
  
August 30, 2003  
\_\_\_\_\_  
License Date

**STATE OF COLUMBIA  
CIRCUIT COURT FOR BROOKFIELD COUNTY**

**Serena Hill,  
Plaintiff,**

v.

**Robert Hill,  
Defendant**

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**Case Number D-445-2008**

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**JUDGMENT OF DIVORCE**

The Complaint for Divorce was heard before the Magistrate on this 15th day of April, 2008, in the Circuit Court for Brookfield County, Columbia. It is hereby

ORDERED that the Plaintiff, SERENA HILL, is granted a Divorce from the Defendant, ROBERT HILL; and it is further

ORDERED that the Plaintiff is hereby restored to the use of her former name of SERENA JORDAN; and it is further

ORDERED that this judgment of divorce shall become final after 30 days.

Dated: 4/15/2008

*Richard Mc Bain*

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Hon. Richard McBain  
Magistrate Judge

**DEED**

THIS DEED, made on the 12th day of August, 2008, by and between **Martin and Ruth Griffith, a married couple, Joint Owners in fee simple** ("Sellers") and **Robert Hill, a single individual, Sole Owner in fee simple** ("Buyer")

WITNESS that in consideration of the sum of \$150,000, the Sellers hereby convey to the Buyer, in fee simple, that parcel of land, together with the improvements, rights, privileges, and appurtenances belonging to the same, situated in the State of Franklin, described as follows, to wit:

Lot 560, Square 6442, also known as 123 Newton Street, Ocean City, Franklin 33455.

And the Sellers covenant that they will warrant specifically the property hereby conveyed.

Martin Griffith  
By: Martin Griffith

Ruth Griffith  
By: Ruth Griffith

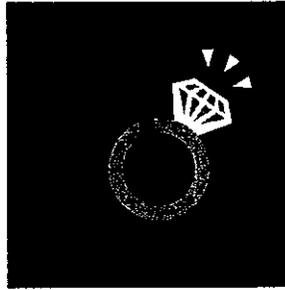
State of Franklin

I, Prudence Best, a notary public in and for the said State of Franklin, do hereby certify that Martin Griffith and Ruth Griffith are the persons who executed the foregoing Deed and did personally appear before me in said jurisdiction.

Prudence Best  
Prudence Best, Notary Public

File Number: 07-23-1800

Return after Recording to  
Robert Hill  
123 Newton Street  
Ocean City, Franklin 33455



*You are cordially invited to help us celebrate*

*the*

*6th Wedding Anniversary*

*of*

*Jennifer and Robert*

*September 1, 2009, at 6 p.m.*

*123 Newton Street*

*Drinks, Dinner, Dessert*

*RSVP: 555-9080*

*No gifts please*

**LIBRARY**

## FRANKLIN FAMILY CODE

### § 301. Marriage of a Minor; Parental Consent; Pregnancy

#### Marriage of Individual 16 or 17 Years Old

(a) An individual 16 or 17 years old may not marry unless

(1) the individual has the consent of a parent or guardian and the parent or guardian swears that the individual is at least 16 years old; or

(2) if the individual does not have the consent of a parent or guardian, either party to be married gives the clerk a certificate from a licensed physician stating that the physician has examined the woman to be married and has found that she is pregnant or has given birth to a child.

(b) A marriage by an underage person without valid consent as required by this section, though voidable at the time it is entered into, may be ratified and become completely valid and binding when the underage party reaches the age of consent. Validation of a marriage of an underage person by ratification is established by some unequivocal and voluntary act, statement, or course of conduct after reaching the age of consent. Ratification includes, but is not limited to, continued cohabitation as husband and wife after reaching the age of consent.

\* \* \* \*

### § 309. Common Law Marriage—Age Restrictions

(1) A common law marriage entered into on or after January 1, 1990, shall not be recognized as a valid marriage in this state unless, at the time the common law marriage is entered into,

(a) each party is 18 years of age or older, and

(b) the marriage is not prohibited as provided in § 310.

### § 310. Prohibited Marriages

(1) The following marriages are prohibited:

(a) A marriage entered into prior to the dissolution of an earlier marriage of one of the parties;

(b) A marriage between an ancestor and a descendant, or between a brother and a sister, whether the relationship is by the half or whole blood;

(c) ...

(2) Children born of a prohibited marriage are legitimate.

\* \* \* \*

**§ 410. Assignment of Separate Property and Equitable Distribution of Marital Property**

Upon entry of a final decree of legal separation, annulment, or divorce, in the absence of a valid antenuptial or postnuptial agreement resolving all issues related to the property of the parties, the court shall

(a) assign to each party his or her sole and separate property acquired prior to the marriage, and his or her sole and separate property acquired during the marriage by gift, bequest, devise, or descent, and

(b) distribute all other property and debt accumulated during the marriage, regardless of whether title is held individually or by the parties in a form of joint tenancy or tenancy by the entireties, in a manner that is equitable, just, and reasonable, after considering relevant factors including, but not limited to,

(1) the duration of the marriage;

(2) the age, health, occupation, employability, sources of income, and needs of each of the parties;

(3) each party's contribution as a homemaker or otherwise to the family unit;

(4) – (11) ...

(12) the circumstances which contributed to the estrangement of the parties.

## Hager v. Hager

Franklin Court of Appeal (1996)

This is an appeal from a decree of divorce. The trial court ruled that the parties' marriage was valid and granted a judgment of divorce to the Petitioner, Shirley Hager. Respondent Landon Hager has appealed, contending that the trial court erred in upholding the validity of the marriage. We agree and reverse.

In her petition, Shirley Hager alleged that she and Landon participated in a marriage ceremony on July 20, 1968. At that time, however, Landon had not secured a final decree of divorce from his first wife. He subsequently obtained that decree on March 2, 1969. Shirley's petition alleged that she was unaware that Landon was married to another woman at the time of their marriage and that Landon told her he was divorced. The dispositive issue on appeal is whether there was a valid marriage.

Shirley argues that the marriage was valid. But a bigamous marriage is void *ab initio*. All marriages which are prohibited by law because one of the parties has a spouse then living are absolutely void. A void marriage is one that has no effect. Notwithstanding Franklin Fam. Code § 301, it cannot be ratified. Indeed, persons who engage in such a marriage may be subject to criminal prosecution.

As a result, the marriage ceremony on July 20, 1968, could confer no legal rights. It was as if no marriage had been performed. The parties' marriage is void and cannot support an action for divorce.

The trial court held that the parties' 1968 marriage was merely voidable and that, since Landon had presented himself as Shirley's husband in all respects, he had ratified the marriage. But, as we have said, the marriage was prohibited, therefore void *ab initio*, and thus not subject to ratification.

We conclude, therefore, that the trial court's ruling that the marriage was valid was error and reverse the judgment.

## Owen v. Watts

Franklin Court of Appeal (2003)

Thomas Owen appeals from an order granting summary judgment in favor of Cora Watts, decedent Ruby McCall's surviving sister and personal representative, in her action for possession of McCall's home at 316 Forest Avenue. Owen refused to leave the home after McCall's death, claiming that he was McCall's common law husband and that he was therefore entitled to a possessory dower interest in the property. The trial court held that Owen and McCall had never entered into a common law marriage. The court further held that Owen could not claim an interest in the property. Owen appeals.

The record before the trial court on the motion for summary judgment reveals that Owen moved into McCall's home some time after her husband's death in 1981 but before his own divorce in 1986. Owen testified on deposition that following his divorce, he asked McCall to marry him, but that McCall refused because marriage would jeopardize her continued entitlement to a benefit check which she was receiving as a result of her late husband's death. Owen testified that, over the years, he repeatedly asked McCall to marry him but that she refused these requests for the same reason. Owen claimed that McCall finally agreed in 2000 to marry him in 2001, but that she died before the marriage could take place. Cora Watts, McCall's sister, stated in an affidavit that

McCall had told her that she had no intention of ever marrying Owen.

Owen represented that he and McCall cohabited and maintained joint bank accounts. He also produced affidavits from two members of the community who regarded him and McCall as husband and wife. Owen offered no evidence, however, which could persuade a rational and impartial trier of fact that, after his divorce, he and McCall had ever manifested an agreement that they were married, as opposed to a belief that they would become married at a later date.

Owen testified that, at the time he moved in with McCall, "she said, 'I want you to come and live with me. I want that we will be as man and wife.'" He claimed that he "said okay" and moved in with her. He further related that he moved in "because she asked me to come and live with her and make our home together as long as we both shall live, until death do us part."

These words, however, were evidently spoken at a time when Owen was already married and not yet divorced, and therefore could not legally agree to marry McCall. Owen was not divorced until October 22, 1986.

Under Franklin law, a common law marriage requires agreement by parties legally capable of entering into a valid marriage that they have a marriage relationship. Cohabitation continued after the removal of a legal impediment cannot ripen into a common law marriage unless it was pursuant to a mutual consent or agreement to be married made after the removal of the barrier.

Owen and McCall conducted their business affairs as single persons rather than as a married couple. McCall referred to herself as single, or as a widow who had not remarried, in deeds and other documents relating to property transactions, as well as in her tax returns. Similarly, in her will, McCall referred to Owen as a “friend” and left him a bequest in that capacity.

The question before the trial court was whether any impartial trier of fact could reasonably find by a preponderance of the evidence that Owen was McCall’s common law husband. We agree with the trial court that no reasonable judge or jury could so find.

Franklin has long recognized common law marriages, the elements of which are a manifestation of mutual agreement, by parties able to enter into a valid marriage, that they are presently married, followed by cohabitation, including holding themselves

out to the community as being husband and wife. *East v. East* (Fr. Ct. App. 1931).

Since ceremonial marriage is readily available and provides unequivocal proof that the parties are husband and wife, claims of common law marriage should be closely scrutinized, especially where one of the purported spouses is deceased and the survivor is asserting such a claim to promote his financial interest. The burden is on the proponent to prove, by a preponderance of the evidence, all of the essential elements of a common law marriage.

Owen’s testimony established at most that he and McCall had, by the end of her life, agreed to be married at an unspecified future time. This is insufficient to establish the existence of a common law marriage under Franklin law.

For the foregoing reasons, the judgment of the trial court is hereby AFFIRMED.

## Charles v. Charles

Franklin Court of Appeal (2005)

Teresa Charles appeals from the district court's judgment dissolving her marriage to Larry Charles. Teresa Charles contends that the district court erred in awarding her only 40 percent of the marital property.

The district court found that an equal division of the marital property was "not equitable under the facts of this case due to the conduct of Teresa Charles." The evidence established that Teresa was having an extramarital affair near the end of the marriage.

"The division of marital property need not be equal, but must only be fair and equitable given the circumstances of the case." *Shepard v. Shepard* (Fr. Ct. App. 2003). Generally, "the division of marital property should be substantially equal unless one or more statutory factors causes such a division to be unjust." *Id.* Pursuant to Franklin Fam. Code § 410, the district court is to distribute property upon consideration of any relevant factors supported by the evidence.

The district court, when dividing the marital property, is directed to consider the conduct of the parties during the marriage. However, it cannot use a disproportionate division of the marital property to punish a spouse for misconduct. "It is only when misconduct of one spouse changes the balance so that the

other must assume a greater share of the partnership load that it is appropriate that such misconduct affect the property distribution." *Nelson v. Nelson* (Fr. Ct. App. 2002) (trial court properly based its marital property distribution on evidence of husband's extramarital affairs and use of marital funds to pay gambling debts). "The added burden placed on a spouse sufficient to justify a disproportionate division of marital property does not have to be a financial one." *Ballard v. Ballard* (Fr. Ct. App. 2004).

An extramarital affair can be an added burden sufficient to justify a disproportionate division of marital property provided that the evidence establishes the specific added burdens that the non-offending spouse suffered as a result of such misconduct.

The record establishes that Teresa's extramarital affair placed an added burden on Larry during the marriage justifying a disproportionate division of marital property favoring him. Larry testified:

Well, she continued the relationship even after I confronted her about the affair and I told her I knew everything. She continued living under the same roof, still went on about her affair, lingerie hanging in

the laundry room, kind of an in-your-face type of thing. I was still paying all the bills. She was still not contributing anything, but she was spending our—or should I say my— income that would normally go toward the household for her so-called partying and her rendezvous with her boyfriend. And it's pretty hard to live under the same roof with somebody that you know has been sleeping with somebody else, but she's also still spending your money and eating your food, and you're just supposed to act like nothing happened. This went on like this for more than a year.

The district court properly considered the evidence of Teresa's misconduct during the marriage in distributing the marital property and awarding her only 40 percent of the marital property.

Affirmed.

# MPT 1

To: Sophia Wiggins

From: Applicant

Date: February 22, 2011

Re: Jennifer Buttler v. Robert Hill

## Question Presented

Did the ceremonial marriage between Robert and Jennifer have any legal effect in light of the fact that Robert was still legally married to Serena Hill, and Jennifer did not have the valid consent of her guardian?

## Short Answer

A bigamous marriage is *void ab initio*. A person under the age of eighteen may not marry without the valid consent of their guardian or the presentment of a letter from a physician stating the physician has examined the woman and found that she is pregnant or has given birth. In this case, Robert was still legally married to Serena Hill making the marriage to Jennifer *void ab initio*. Furthermore, Robert, not Jennifer's guardian signed the consent form, and no letter from a physician was presented.

## Argument

The ceremonial marriage between Robert and Jennifer had no legal effect. A bigamous marriage is *void ab initio*. *Hager v. Hager*. All marriages which are prohibited

[REDACTED]

by law because one of the parties has a spouse then living are absolutely void. *id.* A void marriage is one that has no effect. *id.* In this case, the ceremonial marriage between Robert and Jennifer occurred on September 1, 2003. A divorce decree dissolving Robert's marriage to Serena Hill was not issued until April 15, 2008. Like the marriage in *Hager v. Hager*, the marriage between Robert and Jennifer was a bigamous one, *void ab initio*. The marriage was also void because an individual sixteen or seventeen years old may not marry unless the individual has the consent of a parent or guardian and the parent or guardian swears that the individual is at least sixteen years old. Franklin Family Code Section 301. Here, Jennifer admits that she was only seventeen at the time the ceremony occurred. Furthermore, it was Robert, not Jennifer's guardian, who completed the paperwork consenting to the marriage. The marriage between Robert and Jennifer violated both statute and case law. For the foregoing reasons, the marriage ostensibly created between Robert and Jennifer in 2003 was absolutely void of any legal effect.

### Closing Argument

Robert and Jennifer Hill participated in a civil ceremony on September 1, 2003. Unbeknownst to Jennifer, Robert Hill was already married to Selena Hill. That marriage would not be dissolved until 2008. In the meantime, Jennifer, who was only seventeen at the time of the ceremony, would reach the age of majority and bear Robert two children, Christina and William. The couple lived together as man and wife, both contributing to the family finances, and even contributed money jointly toward the purchase of a home. During this time, Robert also subjected Jennifer to verbal abuse and engaged in extra

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[REDACTED]

  
marital affairs.

Although the ceremonial marriage between Robert and Jennifer was devoid of legal effect, Franklin has long recognized common law marriages, the elements of which are a manifestation of mutual agreement, by parties able to enter into a valid marriage, that they are presently married, followed by cohabitation, including holding themselves out to the community as being husband and wife. *East v. East* (Fr. Ct. App. 1931). A common law marriage entered into after January 1, 1990 shall not be recognized as a valid marriage unless, at the time the common law marriage is entered into, each party is eighteen years of age or older, and the marriage is not prohibited as provided in Section 310. Franklin Family Code Section 309. In this case, after Robert's 2008 divorce and at a time when Jennifer was well past the age of eighteen, Robert and Jennifer mutually agreed that they were married. In deed, Robert did not deny such a marriage until after Jennifer decided to end the marriage. From 2008 to 2010, Robert and Jennifer cohabitated. They held themselves out to the community as married as evidenced by the invitation to an anniversary party on September 1, 2009. Further evidence of the community's belief can be found in the transcript of the telephone call with Louisa Milligan. Ms. Milligan has told us that all of the friends and family were present when Robert said marrying Jennifer was the smartest thing he had ever done. Telephone Transcript, Louisa Milligan (January 28, 2008). Although they might not have been married by the civil ceremony in 2003, Robert and Jennifer are clearly common law spouses in 2010.

In her divorce from Robert, Jennifer seeks only the relief that is fair and equitable. Distribution of all property and debt accumulated during the marriage, regardless of whether title is held individually or by the parties in a form of joint tenancy or tenancy by the entirety should be equitable, just, and reasonable in light of relevant factors

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[REDACTED]

including, but not limited to, each parties contribution as a homemaker or otherwise to the family unit and the circumstances contributing to the estrangement of the parites. Franklin Family Code Section 410. The division of marital property need not be equal, but must on be fair and equitable given the cricumstances of the case. *Shepard v. Shepard* (Fr. Ct. App. 2003). When dividing the marital property, the court may use a disproportionate division of the amrital property when misconduct of one spused changes the balance so that the other must assume a greater share of the partneship load. *Nelson v. Nelson* (Fr. Ct. App. 2002) In this case, Robert and Jennifer both contributed financially to the marriage. Additionally, Jennifer contributed her services as a homemmaker, taking on the bulk of the child rearing responsibilities. After contributing to jointly held accounts for many years, the couple had the opportunity to buy their own home. Robert used a joint tax return to make a downpayment on that family home. Unfortunately, he only titled it in his name. In the case of *Charles v. Charles*, the court upheld an unequal division of property as equitable, because one spouse had engaged in an extra-marital affair financed by marital assets. Similarly, Robert has used the jointly held assets of his marriage to loan his lover \$10,000. As a result of Robert's misconduct, an unequal distribution of marital assets is appropriate in this case. We ask that the court grant Jennifer at least sixty percent of the marital property, including the family home, and continue the existing custody and child support orders.

[REDACTED]

# **MPT 2**

In re Magnolia County

**In re Magnolia County**

**FILE**

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**FILE**

**COUNTY COUNSEL'S OFFICE**  
**MAGNOLIA COUNTY**  
Suite 530  
5400 Western Ave.  
Harley, Franklin 33069

**MEMORANDUM**

**To:** Applicant  
**From:** Lily Byron, Deputy County Counsel  
**Date:** February 22, 2011  
**Re:** Proposed Condemnation Action

The County is considering building a four-lane road connecting State Highway 44 (SH44) to State Highway 50 (SH50) to ease the demands on the County's transportation system. SH44 and SH50 run parallel to each other and are about five miles apart.

I have spoken with the County's Road and Bridge Department about the plans. (See attached notes.) To build the connector road, we will need to obtain easements and rights-of-way from various landowners giving us permission to construct the road. The one potential holdout is Plymouth Railroad, which owns and operates railroad facilities on a portion of the land between SH44 and SH50.

Before we can construct the connector road, we will need to obtain a 60-foot-wide easement from Plymouth over a portion of its railroad track. Our only option is to construct the connector road at ground level and have the road directly cross the railroad track. This is known as an "at-grade crossing," and it will require the installation of warning lights, railroad crossing arms, and other equipment designed to prevent cars and pedestrians from attempting to cross the railroad track while it is being used by a train.

Last week, I had a preliminary meeting with representatives of Plymouth. (See attached summary.) If we cannot reach an agreement with Plymouth, then the County will need to exercise its eminent domain powers under state law and file a condemnation action here in Magnolia County District Court to acquire the easement.

If we do so, Plymouth's representatives have told us that the railroad will claim that our condemnation action is preempted by federal law pursuant to the Interstate Commerce Commission Termination Act (ICCTA), a federal statute that governs railroad operations.

Please draft a memorandum analyzing whether a condemnation action to acquire the easement for the at-grade crossing of Plymouth's railroad track would be preempted under the ICCTA. Do not prepare a separate statement of facts, but be sure that your memorandum weaves together the law and the facts and reaches a reasoned conclusion.

**COUNTY COUNSEL'S OFFICE  
MAGNOLIA COUNTY**

Notes of 1/18/11 meeting with James Wesson, Senior Engineer, County Road & Bridge Dept.

- SH44 and SH50 are north-south roads that run parallel to each other. SH44 is about five miles east of SH50. Presently, SH44 is the primary means for suburban County residents who live north of the City of Harley to commute into and out of the City.
- Currently, most commuters who live northeast of the City and work northwest of the City (in the Harley Business Park) drive several miles out of their way south on SH44 into the City and then out again north on SH50 to get to the Business Park in what amounts to a big U-turn. Building a connector road between SH44 and SH50 north of the City will create a shortcut to the Business Park, and thus will ease traffic congestion.
- The connector road will also provide access to a large residential subdivision, Red Bluff, which is proposed for development adjacent to the connector road. The total size of the development will be 1,300 acres, and it will include retail, office, institutional (church, medical, etc.), multi-family residential, and single-family residential buildings, as well as recreational and greenbelt spaces. The connector road will be the only means of access to the Red Bluff development.
- The connector road will be a four-lane boulevard, with two lanes going in each direction. It will be designated as a major thoroughfare by Magnolia County and, as such, will be an integral part of the regional mobility system for the area.
- A railroad track owned and operated by Plymouth Railroad Inc. runs parallel to and in between SH44 and SH50. The proposed connector road will have to cross the track. We have investigated the feasibility of building an overpass over the railroad track or an underpass under it, but both of those are cost-prohibitive. After extensive and detailed engineering analysis, the only viable and cost-effective option is an at-grade crossing.
- The proposed at-grade crossing will traverse the existing single-track segment of Plymouth's rail line. The segment does not include a passing track and is not used to stage trains for loading and unloading or to park railcars.
- Traffic safety and control devices for at-grade crossings include a range of passive and active devices designed to warn of the existence of a railroad track and prevent automobile and pedestrian access to the track immediately before, during, and after the

time that the track is in use by a train. Passive devices include warning signs, warning pavement markings, crossing (also known as “crossbuck” or “X”) signs, and number-of-track signs. Active devices include flashing-light signals (post-mounted), automatic gates, and overhead flashing-light signals. Typically, train speed must be reduced to between 5 and 15 miles per hour while the train passes an at-grade crossing, and the train’s crew is required to sound the train’s horn when approaching the crossing.

- However, the proposed at-grade crossing may qualify for designation as a “Quiet Zone” if enhanced safety features are installed, such as “constant warning” technology and quadruple gate systems that block vehicle traffic and prevent cars from driving around or between crossing arms into the path of an oncoming train. If so, train speed might need to be reduced by only a few miles per hour in the area of the crossing, and the train’s crew would not have to sound the train’s horn at the crossing. The County’s budget for the connector road project includes sufficient funds to cover the cost of implementing a Quiet Zone.
- Because of the large number of significant variables to be considered, no single standard system of traffic safety and control devices is universally applicable for all at-grade crossings. The appropriate traffic control system to be used at an at-grade crossing should be determined by an engineering study involving both the government agency that is constructing the road and the railroad company.

**COUNTY COUNSEL'S OFFICE  
MAGNOLIA COUNTY**

**MEMORANDUM**

**To:** File  
**From:** Lily Byron, Deputy County Counsel  
**Date:** February 16, 2011  
**Re:** Meeting with Plymouth Railroad representatives

Yesterday, I met with Clark DeWitt, Assistant Director of Operations, and Monica Leo, Government Liaison for Plymouth, to discuss the County's proposed connector road between SH44 and SH50. I described the proposed location of the connector road, its purpose, and the benefits to County residents. I told the Plymouth representatives that the County wants to work with Plymouth to minimize any impact during construction of the crossing.

The Plymouth representatives expressed concern about the potential impact of the at-grade crossing on the company's railroad operations, citing problems they have encountered with at-grade crossings in other areas of the state. They declined to mention any specifics but told me that, based on Plymouth's past experience, any track crossing would increase track maintenance costs and interfere with the company's rail operations.

The Plymouth representatives also discussed the anticipated heavy use of the connector road by commuters and the potential safety risks to vehicles at the proposed crossing. They stated that the track between SH44 and SH50 is an active track that extends between Franklin and Columbia. The track is used by as many as 20 trains per day, most being heavy freight trains. They said that it takes more than half a mile to stop a heavy freight train even when emergency braking is used, and they expressed concerns about the railroad's potential liability in the event that a car or pedestrian were to be struck by a train. They also said that Plymouth would not consider granting an easement unless the County agreed to indemnify Plymouth for any harm that might result to persons or vehicles as a result of the at-grade crossing.

When I mentioned the possibility of the County instituting condemnation proceedings if Plymouth refuses to grant the easement, the Plymouth representatives stated that any condemnation action would be preempted under the Interstate Commerce Commission Termination Act.

**LIBRARY**

## Butte County v. 105,000 Square Feet of Land

Franklin Court of Appeal (2005)

Butte County appeals from the trial court's dismissal of the County's condemnation action. Butte County sought to condemn 105,000 square feet of land owned by the defendant railroad SRX in Butte County.<sup>1</sup> The County wanted the property for a pedestrian and bicycle trail. SRX filed a motion for summary judgment contending that the condemnation action was preempted by the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. § 10101 *et seq.* The County maintained that the ICCTA does not necessarily preempt its eminent domain authority when dealing with railroads.

The preemption doctrine is rooted in the Supremacy Clause of the Constitution and stands for the general proposition that state laws that interfere with, or are contrary to, federal law must be invalidated. Application

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<sup>1</sup>Condemnation (also called eminent domain) is the power of federal, state, or local government to take private property for "public use" so long as the government pays "just compensation," which is typically the fair market value of the property as of a certain date. The government can exercise its power of eminent domain even if a property owner does not want to sell the property. Examples of public uses for which a government might exercise its power of eminent domain include public utilities, roads, schools, libraries, police stations, and other similar public uses. Eminent domain may involve taking ownership of the property or a lesser property interest, such as an easement.

of the preemption doctrine requires the court to examine congressional intent, whether it be express or implied. The purpose of Congress is the ultimate touchstone in the preemption analysis.

In 1995, Congress passed the ICCTA, which reinforced the federal government's continued goals "to promote a safe and efficient rail transportation system" and to "ensure development and continuation of a sound rail transportation system with effective competition among rail carriers." 49 U.S.C. § 10101(3), (4). The ICCTA provides that "[e]xcept as otherwise provided in this part, the remedies provided under this part with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." *Id.* § 10501(b)(2). By enacting the ICCTA, Congress sought to ensure that states would not regulate rail transportation in a way that would conflict with or undermine the provisions of the ICCTA.

The preemption inquiry focuses on the degree to which the challenged state action burdens rail transportation. It is well settled that state and local regulation is permissible where it does not interfere with interstate rail operations. Rather, routine, nonconflicting uses, such as nonexclusive

easements for at-grade road crossings, wire crossings such as overhead electric power lines, and underground sewer crossings, are not preempted so long as they do not impede rail operations or pose undue safety risks.

Thus, here, the inquiry is twofold: (1) whether the County's intended use of SRX's property would prevent or unreasonably interfere with railroad operations, and (2) whether the County's intended use would pose undue safety risks.

With regard to the first inquiry, SRX contends that a bicycle and pedestrian trail would interfere with railroad operations because the trail would impede its access to its signal boxes and prevent railroad maintenance. The County argues that SRX could access its signal equipment from the southern side of its property and could maintain its railroad track. Because SRX would still have vehicular access to its signal equipment and would have general access for the purpose of railroad maintenance, the Court concludes that the proposed easement would not impede railroad operations. *See Morgan City v. Metro Railroad* (Fr. Ct. App. 1998) (action to condemn part of train yard for city revitalization project preempted as it would leave insufficient room for loading and unloading of railcars).

This brings the Court to the next inquiry: whether the County's intended use would

pose an undue safety risk. SRX contends that when an active railroad track is in close proximity to a pedestrian and bicycle trail, SRX's policy is to have its property line a minimum of 50 feet from the centerline of the railroad track. SRX argues that the proposed easement would reduce this distance to 25 feet and create a safety risk without the appropriate setback distance, fencing, and other safety precautions. The County responds that only a parking lot for the bike trail would be within 25 feet of the active rail and that the trail itself would maintain the 50-foot setback distance. In addition, the County intends to provide security fencing between any trail facility and active rail.

While a safety risk is always present whenever an active railroad track is involved, the Court agrees with the County that its maintenance of the 50-foot setback distance from the active railroad track along with fencing to prevent access to the active rail would prevent any undue safety risk. Therefore, because the use of SRX's property would not interfere with railroad operations and the County's implementation of proper safety precautions would prevent any undue risk, the County's condemnation action is not preempted by the ICCTA.

Reversed.

## City of Elk Grove v. B&R Railroad

Franklin Court of Appeal (2007)

Defendant B&R Railroad appeals from a denial of its motion for summary judgment to dismiss the City of Elk Grove's condemnation action. B&R claimed that condemnation of its property would prevent or unduly interfere with railroad operations and interstate commerce and that, as a result, the condemnation action is preempted by 49 U.S.C. § 10501(b), the Interstate Commerce Commission Termination Act (ICCTA).

In its condemnation complaint, the City claimed it was entitled to obtain an easement across B&R's property to construct, install, operate, and maintain an underground storm sewer. The City alleges that before filing the condemnation action, it asked B&R to grant an easement allowing the City to move forward with construction and installation of the storm sewer. By letter, B&R advised the City that it would grant an easement only if the City agreed to indemnify B&R against any liability related to the existence and construction of the storm sewer on its property. The letter did not mention any concern that railroad service would be disrupted by the storm sewer project.

The City and B&R entered into negotiations for the storm sewer easement but were unable to reach an agreement regarding the terms of the easement. Among other things, the parties disputed whether the City should

be required to "replace" rather than "restore" any railroad track that might be removed or disturbed by the storm sewer project and whether the project must be completed within B&R's specified timetable rather than the 120 calendar days proposed by the City. The City also refused to agree to B&R's proposed indemnification provisions, which would have required the City to contractually indemnify B&R for any environmental contamination resulting from the storm sewer construction and any property damage or bodily injury claims related directly or indirectly to the sewer line construction. After negotiations broke down, the City filed the instant condemnation action.

In its summary judgment motion, B&R claimed that the City's proposed storm sewer project would interfere with B&R's railroad operations and that therefore the project is subject to the ICCTA. The City conceded that construction of the storm sewer project would cause B&R's spur track (which is used for loading and unloading railcars) to be out of service for about one week (and possibly less with careful planning), but that railcar loads received by B&R could be unloaded from the main track during this brief period of time. The City further asserted that B&R's railcar volume on the track is low (approximately only 50

cars a year) and that construction of the storm sewer would not burden B&R's rail service. Finally, the City indicated that it would work with B&R in designing and constructing the storm sewer in order to minimize any interference with B&R's railroad operations caused by the construction and existence of the storm sewer.

As the party seeking summary judgment, B&R bore the burden of proving that condemnation of an underground easement on B&R's property for the storm sewer project would impede rail operations or pose an undue safety risk. It failed to meet its burden. The arguments raised over the terms of insurance coverage and written indemnification provisions involve allocation of risk, not the regulation of rail transportation.

Moreover, B&R has not explained how the distinction between "replacing" and "restoring" its track following construction of the storm sewer would affect its continued use of the track for rail transport. Though B&R contends that the City must comply with its timetable for completion and should hire only subcontractors experienced in working with railroad beds and tracks, it is questionable whether these issues are really in dispute, and the possible impact of the project's timing and the subcontractors' experience level with rail

transportation is too speculative to justify preemption.

Affirmed.

**Conroe County v. Atlantic Railroad Co.**

Franklin Court of Appeal (2009)

Atlantic Railroad Co. appeals the judgment in condemnation granting Conroe County an easement for an at-grade crossing. We hold that the condemnation action is preempted under the Interstate Commerce Commission Termination Act (ICCTA) and reverse.

Atlantic operates an interstate rail network; its railroad facilities here include a regular railroad track and a passing track. A passing track is an integral component in the operation of a single-track line, as it enables multiple trains to use one main track by allowing trains on the same track heading in opposite directions to pass each other. One train switches to the passing track to allow the other train heading in the opposite direction to continue on the single main track. A passing track, like a main track, is “transportation” as defined by the ICCTA.

Here, Atlantic uses the passing track to stage meets and passes of trains for its rail operations, to load and unload trains, and to park coal trains. The County condemned a strip of Atlantic’s land containing a segment of the passing track and proposes to make it a public crossing with a four-lane boulevard, which will access a planned residential development. This proposed crossing would cut the passing track into two pieces, each being approximately 4,900 feet long. There is another crossing available to access the

proposed development at one end of the passing track. The existing crossing does not bisect the passing track.

In support of its position that there is no preemption, the County relies on *Butte County v. 105,000 Square Feet of Land* (Fr. Ct. App. 2005). *Butte* holds that routine crossings with nonconflicting uses are not preempted. However, if such crossings impede rail operations or pose undue safety risks, they are preempted by the ICCTA. *Id.*

Whether a state action is preempted by the ICCTA is determined on a case-by-case basis. It is a fact-specific inquiry. Here we are not considering a routine crossing with a nonconflicting use. The record shows that the proposed crossing would cut through Atlantic’s passing track—a track used to meet and pass trains, to park 8,500-foot-long coal trains, and as a staging area for loading and unloading trains within a 30-mile area. In order to recover what it had prior to the taking—a 1.86-mile (9,820-foot) uncut passing track necessary to its railroad operations—Atlantic must move part of the passing track or the crossing must be removed.

Preemption cannot be avoided by simply invoking the convenient excuse of a state government entity’s condemnation power.

The County cannot do anything to Atlantic's property that would directly burden or impede the interstate traffic of the company or impair the usefulness of its facilities for such traffic. The record contains ample evidence establishing that placing the public crossing over the regular and passing tracks would interfere with railroad operations and cause safety hazards.

As to the impact of the crossing on rail operations, Atlantic has presented affidavits and testimony detailing the interference that would be caused by the crossing. Atlantic has demonstrated, among other things, that the passing track is the only uncut passing track within 30 miles and that the proposed crossing would affect the entire line.

Atlantic has also shown that it parks coal trains on the passing track approximately four days a week and that Atlantic is paid a fee based on the number of trains it is able to park on the passing track. These parked trains would block the crossing for extended periods of time. Atlantic's evidence further demonstrates that (i) by law, any train that blocks a public crossing for more than 10 minutes must be "broken" (divided into segments); (ii) when trains are broken, there is a delay of approximately 45 minutes for the reconnection; and (iii) if the train sits broken for longer than 4 hours, a federal law is triggered specifying that an air-brake test must be done before moving the train, which delays the train approximately 90 minutes.

Atlantic has stated that when the track is used to pass trains, other trains may have to be broken and the same time added to their connection, causing scheduling problems and time delays throughout the line, not just at the passing track.

As to the issue of undue safety risk, Atlantic has presented evidence that citizens worry about emergency vehicles being able to proceed through the blocked crossing. Atlantic has also produced evidence of citizens' complaints that broken trains sitting approximately 140 feet from the crossing create a visual hazard and that, therefore, the trains need to be parked at least 250 feet from each side of the crossing so that drivers can see past both tracks. To park the trains farther from the crossing would take away the use of an additional 220 aggregate feet of the passing track.

Atlantic does not argue, and we do not hold, that the entire field of eminent domain law is preempted. However, when state eminent domain law amounts to a regulation of the railroad, it is expressly preempted. A state law may not impose operating limitations on a railroad's economic decisions, such as those pertaining to train length, speed, or scheduling. Moreover, when a law has the *effect* of requiring the railroad to undergo substantial capital improvements, it is preempted by the ICCTA. Here, the County chose to sever the passing track instead of expanding the existing crossing at the end of

the track. It is hard to understand why the County insists on pursuing a crossing over two *active* railway lines that will interfere with railroad operations when other viable entrances to the proposed residential development are physically available.

According to the evidence presented, the condemnation has the effect of regulating Atlantic now and in the future by affecting the speed and length of its trains, interfering with current railroad operations, and causing more federally mandated air-brake tests and, as a result, has a negative economic effect on the railroad.

The County's proposed crossing, which would bisect Atlantic's passing track with a four-lane boulevard, would impermissibly interfere with railroad operations. Moreover, as discussed above, the proposed crossing would create traffic hazards and therefore would pose an undue safety risk. Accordingly, we hold that the County's proposed action is preempted. We reverse and direct the trial court to dismiss the action.

# MPT 2

Memorandum

TO: Lily Byron  
FROM: Applicant  
DATE: Feb 22, 2011  
RE: Proposed Condemnation Action

Issue: Is a condemnation action to acquire the easement for the at-grade crossing of Plymouth's railroad track preempted under the ICCTA?

Short Conclusion: A condemnation action to acquire a 60 foot wide area for an at-grade crossing of a single-track of railroad is not preempted under the ICCTA.

Discussion:

The preemption doctrine developed out of the Supremacy Clause of the Constitution and provides that no state law that interefers with or is contrary to federal law, is valid. Application of the preemption doctrine requies the court to examine congressional intent. The intent of Congress is the key component in the preemption analysis. As stated in the ICCTA, the goal of Congress was to "promote a safe and efficient rail transportation system" and to "ensure development and continuation of a sound rail transportation system with effective competition among rail carriers." As stated in Butte County, "Congress sought to ensure that states would not regulate rail transportation in a way that would conflict with or undermine the provisions of



the ICCTA." (Fr. Ct. App. 2005). Thus the court will look to the degree to which the challenged state action burden rail transportation. As also stated in Butte County, "it is well settled that state and local regulation is permissible where it does not interfere with interstate rail operations. Rather, routine, nonconflicting uses, such as nonexclusive easements for at-grade crossing [...] are not preempted so long as they do not impede rail operation or pose undue safety risks.

Under the case law of Franklin, the Court of Appeals has determined that the ICCTA analysis is twofold. First, does the County's intended use of the railroad property prevent or unreasonably interfere with railroad operations? Second, does the County's intended use pose undue safety risks?

1. The County's intended use as an at-grade crossing does not prevent or unreasonably interfere with railroad operations.

In Butte County, the Franklin Court of Appeal reversed a dismissal of a County's condemnation action of 105,000 square feet for the use of a pedestrian and bicycle trail. In that case the court found that requiring a large portion of land used by a commercial railroad company to be ceded to the county for a non-commercial purpose of bike riding was valid. As the railroad company would still be able to access the track and the signal equipment, the easement would not impede railroad operation. Similar to this case, the county is seeking a condemnation of land from the railroad, however, under the facts with Plymouth, the amount of land required is considerably less. At-grade vehicle crossings are common across active rail lines, especially within cities. As the court found for the county in a condemnation for a non-commercial city improvement, it is arguable that a much smaller condemnation for the continued growth and

[REDACTED]

safety of the daily commute of county citizens is a reasonable condemnation that does not prevent or unreasonably interfere with railroad operations.

In City of Elk Grove (Fr. Ct. App. 2007), the Court of Appeal affirmed a dismissal of a motion for summary judgment against the City of Elk Grove's condemnation action. The defendant B&R Railroad claimed the condemnation would prevent or unduly interfere with railroad operations and interstate commerce. In this action the city was seeking to construct and maintain an underground storm sewer. This case involved a spur track that was used for loading and unloading railcars. The track would be out of commission for approximately one week and the railroad had alternative means to load and unload cars. Additionally the railcar volume on the track was considered low (50 cars a year). The railroad failed to meet its burden. The court noted that the railroad's push for insurance coverage and written indemnification amounted to allocation of risk and not the regulation of rail transportation. Similar to this case, Magnolia county is seeking to make an improvement for the city. Plymouth did not mention any issues with construction of the crossing delaying the daily train traffic, like the defendant railroad claimed. Additionally, it does not include a passing track and is not used to load, unload, or park railcars. Unlike this action, Plymouth uses the track substantially more than the defendant railroad did in this action.

The only case where Franklin Court of Appeal has stated that the condemnation action of a local government was preempted under the ICCTA was Conroe County (2009). In that case the county wanted to install an at-grade crossing over a section of passing track. This action would cause the passing track to be bisected into two large unusable passing tracks that would have to be expanded. It was also the only passing track within 30 miles and the proposed crossing would affect the entire line. Additionally the railroad company gains a portion of its business



from parking trains on this passing track. In order for them to maintain this practice and still follow federal guidelines for blocking at-grade crossings, the railroad would be forced to split trains and undergo significant delays for reconnection and inspection. Further, in this case the County has other options that would not have involved dividing up the passing track of the railroad as well as other crossings already in place. Plymouth has stated that the at-grade crossing will only transverse a single-track segment of the rail line. Additionally, it does not include a passing track and is not used to load, unload, or park railcars. Finally Plymouth has not mentioned how a single at-grade crossing will interfere with its ability to compete in the railroad business. if the "quiet zone" safety gate is in place, then Plymouth will have the added benefit of being able to maintain a higher speed for its trains. this would ensure that there are fewer, if any, scheduling modifications.

2. The County's use of the at-grade crossing with a combination of passive and active safety devices, or "Quiet Zone" technology does not pose undue safety risks to either the railroad or citizens of Magnolia County.

Again in Butte County, the second step of the analysis found that an active railroad within 25 feet of a parking lot and 50 feet from pedestrians does not constitute a safety risk (a security fence will be provided by the County between the trail and the active rail). The court found that the distance between pedestrians and the train, as well as the construction of a safety fence to prevent access to the active rail would prevent undue safety risks. In the present case with Plymouth, there are no pedestrians around the track. There is a variety of active and passive safety features which the county will install or the "quiet zone" enhanced safety featches will block the passing of all traffic between the crossing arms when in the path of an oncoming

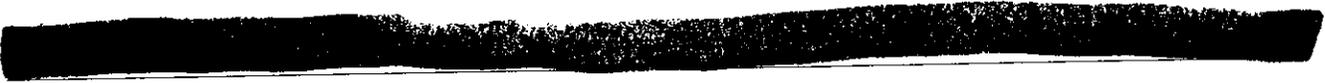


train. as the county is willing and able to implement this technology, Plymouth's safety argument is weak.

In Conroe county, the railroad also brought to issue the inability of emergency vehicles to pass the track if the crossing was blocked due to a parked train. There was also the issue of a visual hazard for trains parked too near the crossing. The court further stated that a "state law may not impose operating limitations on a railroad's economic decisions such as those pertaining to train length, speed, or scheduling. Moreover, when a law has the effect of requiring the railroad to undergo substantial capital improvement, it is preempted by the ICCTA." Although this case did involve a four-lane road, similar to the facts at hand, the overwhelming evidence from this case lends itself to show that the primary issue was the parking of trains and split track nature of the railroad section that was of concern. As Plymouth does not park trains on the track there is no issue of a visual hazard or blocking of emergency vehicles. Further, as the rail road runs parallel to both SH44 an SH50, in order to connect the two roads, there will have to be an at-grade crossing some where along the line. Although the new development of Red Bluff will add to the traffic along the route, so long as adequate safety measures are in place there shouldn't be an increase in safety hazard.

Conclusion:

Based on the single-track nature of the proposed at-grade crossing, the fact that Plymouth does not park, load, or unload cars at or near the at-grade crossing, it is unlikely that a court will find the ICCTA preempts the county's condemnation action. Additioanlly the use of active, passive, and Quiet Zone safety equipment will allow the railroad to continue to operate as usual while adequately protecting the citizen of Magnolia county from the dangers of an active



railroad. The small amount of land required by the county, along with no arguments by Plymouth for the construction delays by the crossing, coupled with the wide variety of safety measures that will be enacted by the country, the balance will likely fall in favor of the county's condemnation act.

**END OF EXAM**

## MEE Question 1

Astronomy Corporation (Astronomy) sells expensive telescopes to home stargazers. Astronomy has a long-term financing arrangement pursuant to which it borrows money from Bank. In a signed writing, Astronomy granted Bank a security interest in all its present and future inventory to secure its obligations to Bank under the financing arrangement. Bank filed a properly completed financing statement reflecting this transaction. The financing statement lists Astronomy as the debtor and Bank as the secured party. The financing statement indicates that the collateral is inventory.

Astronomy sells telescopes to some of its customers on credit. For a credit sale, Astronomy requires the customer to sign an agreement granting Astronomy a security interest in the purchased item to secure the customer's obligation to pay the balance of the purchase price.

Six months ago, Johnson, an amateur stargazer, went to Astronomy's showroom, saw a \$3,000 telescope that he liked, and bought it on credit from Astronomy. Johnson paid \$500 in cash and agreed to pay the \$2,500 balance in installment payments of \$100 per month for the next 25 months, interest free. Consistent with Astronomy's policy for credit sales, Johnson signed an agreement granting Astronomy a security interest in the telescope to secure Johnson's obligation to pay the balance of the purchase price. Astronomy did not file a financing statement with respect to this transaction. At the time of the sale of the telescope to Johnson, Johnson was unaware of the financial arrangement between Astronomy and Bank.

One month ago, Johnson sold the telescope for \$2,700 in cash to his neighbor, Smith, another amateur stargazer. Smith had no knowledge of any interest of Bank or Astronomy in the telescope. Johnson then left the country without paying the remaining \$2,000 owed to Astronomy and cannot be located.

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

Both Bank and Astronomy have discovered that Johnson sold the telescope to Smith. Bank and Astronomy each have demanded that Smith surrender the telescope on the grounds that it is collateral for obligations owed to them.

1. Does Bank have a security interest in the telescope that is enforceable against Smith? Explain.
2. Does Astronomy have a security interest in the telescope that is enforceable against Smith? Explain.

# MEE 1

## 1. Bank's security interest in the telescope vs. Smith

To have a security interest that is enforceable against a third party the creditor must have a lien that has attached to the collateral and creditor must have perfected his/her security interest. To show attachment there must be an agreement between the debtor and the secured party, the secured party must give value, and the debtor must have rights in the collateral. The agreement must be signed, it must show an intent to create a security interest and it must describe the collateral.

At the time that Bank to a security interest in the telescope, the Bank and Astronomy had a financing agreement. Bank gave value by financing Astronomy through the line of credit. And Astronomy had rights in the collateral because it owned the telescopes as inventory. Also, the problem says that Astronomy signed the agreement, the agreement shoed an intent by saying that it granted a security interest and it covered all the present and future inventory so it described the collateral. Describing future inventory is fine. Therefore, all the requirements for attachment are met.

A secured party can perfect his/her interest in the collateral by filing, by taking possession or control of the collateral, or by automatic perfection. When perfection is by filing, the financing statement must identify the debtor and describe the collateral.

Here, Bank perfected its interest by filing. The financing statement adequately described teh

[REDACTED]

debtor (Astronomy) and it described the collateral. Therefore, the Bank's security interest was perfected.

Normally, a secured party that can show attachment and perfection will have rights in the collateral as against unsecured third parties. However, there is an exception to that general rule that applies in this case. When the collateral is inventory, and the debtor sells the collateral in the ordinary course of business to a buyer, the secured party cannot reach the collateral when in the hands of that buyer. This is just such a situation. Astronomy is in the business of selling telescopes. It sold the telescope to Johnson. Therefore Johnson took free of Bank's lien. When Johnson sold to Smith, Smith was perfected by the shelter rule and he received Johnson's rights. Therefore, Bank's interest is not enforceable against Smith.

## 2. Astronomy's interest in the telescope against Smith.

To have a security interest that is enforceable against a third party the creditor must have a lien that has attached to the collateral and creditor must have perfected his/her security interest. To show attachment there must be an agreement between the debtor and the secured party, the secured party must give value, and the debtor must have rights in the collateral. The agreement must be signed, it must show an intent to create a security interest and it must describe the collateral.

When Astronomy took its security interest in the telescope, it was pursuant to a financing arrangement with the buyer of the telescope. That qualifies as an agreement. Astronomy gave value because it financed the sale of the telescope. And debtor had rights because it was the owner of the telescope. Also, the agreement was signed by Johnson (the debtor), it granted a

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[REDACTED]

[REDACTED]

security interest showing an intent to create a security interest, and it described the telescope. Therefore, Astronomy's interest in the collateral had attached.

A secured party can perfect his/her interest in the collateral by filing, by taking possession or control of the collateral, or by automatic perfection. One way in which automatic perfection can occur is when the security interest is created by the sale of consumer goods. This is just such a case. When Astronomy sold the telescope (a consumer good) to Johnson, the interest was automatically perfected when Johnson took possession of the goods. Therefore, Astronomy's interest in the telescope had been perfected.

Normally, a secured creditor would have superior rights in the collateral as compared to an unsecured third party. However, there is an exception that applies in this case. When a consumer good is sold by a non-merchant, the so-called "garage sale exception" applies and the buyer of the goods takes free of any security interest of which he does not have knowledge. Here, Johnson is a non-merchant because he does not deal in the business of buying and selling telescopes. When Smith bought from Johnson he did not know of any liens. Therefore, Smith takes free of Astronomy's security interest in the telescope.

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[REDACTED]

## MEE Question 2

After recent terrorist threats, Metro Opera (Metro) decided to place metal detectors in its lobby. Metro also marked off an area just beyond the metal detectors in which to search patrons who failed the metal-detector test. Metro posted a sign near the entrance that read: "Warning! No metal objects allowed inside. All entrants are screened and may be searched."

Claimant and Friend saw the warning sign as they entered Metro. After entering, they observed several patrons being frisked. Claimant said to Friend, "I'm certainly not going to allow anyone to touch me!"

Claimant then walked through the metal detector, which buzzed. Without asking Claimant's permission, Inspector, a Metro employee, approached Claimant from behind and began to frisk Claimant. Claimant leaped away from Inspector and snarled, "Leave me alone!" Guard, another Metro employee, then used a stun device, which administers a painful electric shock, to subdue Claimant.

Unfortunately, the stun device, manufactured by Alertco, malfunctioned and produced a shock considerably more severe than that described in Alertco's product specifications. The shock caused minor physical injuries and triggered a severe depressive reaction that necessitated Claimant's hospitalization. Claimant had a history of depression but was in good mental health at the time of the shock. Claimant was the first person who had ever experienced a depressive reaction to the Alertco device.

The Alertco device malfunctioned because it was incorrectly assembled at the factory and therefore did not meet Alertco's specifications. Alertco's assembly-inspection system exceeds industry standards, and it is widely recognized as the best in the industry. Nonetheless, it did not detect the assembly mistake in the device that injured Claimant.

Claimant has filed two tort actions seeking damages for her physical and psychological injuries: (1) Claimant sued Metro, claiming that both the frisk and the use of the stun device were actionable batteries, and (2) Claimant brought a strict products liability action against Alertco.

Metro has conceded that the actions of Inspector and Guard were within the scope of their employment. Metro had instructed its employees to ask permission before frisking patrons, but on the day Claimant was frisked, a supervisor told employees to frisk without asking permission in order to speed up the entrance process.

1. Can Claimant establish a prima facie case of battery against Metro for (a) the use of the stun device and (b) the frisk? Explain.
2. Does Metro have a viable defense to either battery claim? Explain.
3. Can Claimant establish the elements of a strict products liability claim against Alertco based on the malfunction of the device? Explain.
4. Assuming that Claimant establishes either Metro's or Alertco's liability, can Claimant recover for her depressive reaction to the stun device? Explain.

# MEE 2

1. Yes, Claimant can establish a prima facie case of battery against Metro for the use of the stun device. Claimant can probably establish a prima facie case of battery with respect to the frisk.

First, it is important to establish that Metro is liable for the torts of Inspector and of Guard. An employer is liable for the torts of its employee if the tort was committed in the scope of employment. An employer is not normally liable for the intentional torts of his or her employees, but employers can be liable for the intentional torts of employees when the employer directs the employee to perform the intentional tort, or when the intentional tort is committed to further the business operations of the employer. Here, the facts clearly state that Inspector and Guard are employees of Metro. Furthermore, Inspector and Guard were both most likely performing acts within the scope of their employment -- Inspector was probably employed to inspect patrons as they entered the building, and Guard was most likely employed to ensure the safety of the patrons. It is likely that Metro instructed Inspector and/or Guard to perform pat-downs of those who failed the metal detector, as it appears that many patrons were having to undergo this procedure. Additionally, unless Guard brought his own stun gun to work, Metro probably authorized him to commit the tort of battery by supplying him with the stun gun in the first place. Undoubtedly, both Guard and Inspector touched Claimant in an effort to further the business operations of Metro, in that it was attempting to keep patrons safe at the Opera so they would continue to patronize the establishment, which ensures adequate revenue for Metro. In either case, Claimant should be able to establish that Metro is liable for the torts of Guard and Inspector in this particular instance -- even intentional torts, since they may have

[REDACTED]

been actually or impliedly authorized by Metro.

The elements required to establish a prima facie case of battery are (1) the harmful or offensive touching of another, (2) that was intentionally caused by the defendant. Importantly, damage to the plaintiff is NOT an element of battery. A touching will be considered harmful or offensive if it is outside what is normally considered in society to be acceptable, based on an objective reasonable person standard. Here, the stun device undoubtedly produced a harmful or offensive touching of Claimant. The stun device "administers a painful electric shock," and its intent is to subdue its subjects. There is no question that this is a harmful or offensive touching. Additionally, the stun gun was intentionally caused by the defendant. The defendant need not intend to cause a particular harm; he merely needs to intend to do the act that results in the harm. Here, Guard aimed the stun gun at Claimant, and the stun device made contact with Claimant. Therefore, the act was intentional. Because both of the elements are met, Claimant can establish a prima facie case of battery with respect to the stun device.

Claimant can probably also establish a prima facie case with respect to the frisk, but this is less certain. The elements are (1) the harmful or offensive touching of another, (2) that was intentional. Here, there is no doubt that Inspector intended to make contact with Claimant's body. However, it is less certain whether this kind of touching would be considered harmful or offensive. A touching is considered harmful or offensive if it is outside what is normally considered in society to be acceptable, based on an objective reasonable person standard. Given the recent terrorist threats, the public at large might find frisks after failing a metal detector to be a completely reasonable touching. However, on the other hand, an Opera is not generally the type of place one would expect to find an extremely high level of security. Given the uncertainty, a court would probably allow this to survive a motion to dismiss for failure to

[REDACTED]

state a claim. In all likelihood, Claimant may be able to establish a prima facie claim of battery with respect to the frisk as well.

2. Yes, Metro has a viable defense to the battery claim with respect to the frisk. Battery is an intentional tort, and the defense of consent is available to defend against an intentional tort. To succeed on a defense of consent, the defendant has the burden of proving that the plaintiff consented to the touching. This consent can be express, or it can be implied by conduct. Here, Metro may be able to assert the consent defense based on its warning signs. The signs read: "Warning! No metal objects allowed inside. *All entrants are screened and may be searched.*" Furthermore, Claimant witnessed several people ahead of her being frisked. Despite the written warning and her observations, she continued to proceed through the line. This action can be reasonably perceived by Metro as Claimant's consent to being frisked. Claimant's statement to Friend is ineffective to negate implied consent. Consent may be revoked at any time, but it must be communicated either through conduct or expressly. Here, Claimant expressly said she did not consent to being frisked, but she did not communicate her lack of consent to the defendant. Therefore, Metro can viably assert the defense that Claimant, by her conduct, consented to the frisk.

Metro probably has no viable defense to the battery claim with respect to the stun device. Consent is inapplicable here because there was no warning that a stun gun might be used, so Claimant could not have impliedly consented based on her conduct. Other defenses may be available, but none are likely to succeed.

3. Yes, Claimant can establish the elements of a strict products liability claim against Alertco based on the malfunction of the device. To establish a strict products liability claim, the



plaintiff must merely show that (1) the defendant was a manufacturer or commercial supplier of a consumer good, (2) proximate causation, and (3) injury. Here, Alertco is the manufacturer of the stun gun. As a result, Alertco owes a strict duty to consumer to ensure that the product is safe for its ordinary and intended use. Second, Claimant can show that the stun gun was the proximate cause of her injuries. Third, Claimant can show both minor physical injuries and severe resulting depression from the stun gun use. Therefore, Claimant can establish a strict products liability claim against Alertco.

Note that Alertco's assembly inspection standards are irrelevant here. There is no indication that the product was being used for anything other than its ordinary use, nor had it been modified. Certainly, this may go to prove that Alertco was not negligent, but a strict products liability action pays no mind to the manufacturer's negligence. If the manufacturer's product causes an injury, it is liable for the damage under a strict products liability theory, notwithstanding the absence of negligence.

4. It is likely that Claimant can recover for her depressive reaction to the stun device, provided she can prove the stun gun was the proximate cause of those damages. Tortfeasors owe a duty to all foreseeable plaintiffs. Foreseeability is the touchstone of proximate cause -- if the defendant can foresee that its activities might cause an injury to this particular plaintiff or class of plaintiffs, it owes a duty to keep those plaintiffs safe. Here, both Metro and Alertco could reasonably foresee that patrons may be injured by use of the stun gun device. Therefore, it owes a duty to Metro patrons. However, the general rule is that defendants must take the plaintiff as he finds the plaintiff. The extent of the injuries need not be foreseeable; only the fact that any injury could occur needs to be foreseeable. Once the duty is established, the defendant is liable for all the plaintiff's injuries that result from the defendant's actions. Here,



both Metro and Alertco owed a duty to patrons of Metro (and Alertco more generally to those on whom the device would be used notwithstanding location). Here, Claimant can show that, although she had a history of depression, she was not depressed at the time, and the stun gun incident led directly to her depressive state. Therefore, because the stun gun was the proximate cause of the injuries, Claimant can probably recover them from either defendant.

**END OF EXAM**

### MEE Question 3

Husband and Wife married 12 years ago. Two years later, Wife gave birth to Child. Both Husband and Wife are employed, and each earns approximately \$80,000 per year.

Four months ago, Husband and Wife decided to divorce and entered into a written separation agreement drafted by their respective attorneys. Under this agreement, Wife obtained sole title to assets worth \$175,000 and Husband obtained sole title to assets worth \$125,000. All assets were acquired during the marriage with employment income; there were no other assets. The separation agreement provided that Wife would have sole custody of Child. It required Husband to pay to Wife \$500 per month in spousal support until her death or remarriage and \$400 per month in child support until Child reaches the age of 18.

At the time he signed the separation agreement, Husband was living with Fiancée, a woman with two teenage children. Indeed, his planned marriage to Fiancée was the primary reason for Husband's willingness to sign the separation agreement.

Three months ago, Child was injured in an automobile accident. As a result of blood tests performed following the accident, Husband discovered that he is not Child's biological parent.

Two months ago, at a hearing in the Husband-Wife divorce action, Husband petitioned the trial court to invalidate the separation agreement based on unconscionability and fraud. The trial court refused and entered a divorce decree incorporating the terms of the separation agreement.

After entry of the divorce judgment, Husband and Fiancée got married. Husband then filed a motion to modify the divorce decree to:

- (a) grant him an equal share of the marital assets,
- (b) award Wife no more than \$200 per month in spousal support so that Husband could "meet the needs of [his] new family," and
- (c) eliminate his child-support obligation based on Husband's "nonpaternity of Child."

The trial court denied Husband's motion to modify the divorce decree.

1. Did the trial court err in denying Husband's petition to invalidate the separation agreement on the basis of unconscionability and fraud? Explain.
2. Did the trial court err in denying Husband's motion to modify the divorce decree according to each of the terms set forth in his motion? Explain.

# MEE 3

1. The issue is whether the contract was unconscionable when both parties were represented by counsel and whether or not the court was obligated to accept the agreement regarding the custody of the child and the amount of child support despite the fact that the child was later determined not to be the biological child of the husband.

To meet the standards of unconscionability, the husband (h) would have to prove unequal bargaining power or extreme unfairness so much so that the agreement should be invalidated. Some courts use the term that the terms "shock the conscience" because they are so one-sided or unfair. From the facts, it does not appear that the agreement was unconscionable. Both the parties were represented by counsel and there is really no indication that there was any unequal bargaining power between the husband and wife. The wife got \$175,000 in assets and the husband received \$125,000 in assets. This does not seem to be unconscionable on its face. While the wife may have received more, \$50,000 does not seem to meet the requirements for unconscionability. Furthermore, we are not told how the parties came to the amount for alimony but there doesn't seem to be any problem with that amount as the husband is making \$80,000 per year and there is no indication that he found this to be unfair at the time the parties entered into the contract.

As far as fraud goes, while the child may not have been the husband's, it is not clear whether the mom knew about this or not. That makes a determination as to fraud a little more difficult. However, it is important to note that at common law and in many states, there is a presumption that a child born to a woman is the husband's child. At the time of the agreement, the husband

[REDACTED]

was presumed to be the child's father and there was really nothing to dispute that fact. The husband would have a hard time meeting the standard for fraud in this case. It is also important to note that while parents may agree to issues on child custody and child support figures, the court is not bound to those decisions. The court is bound to make a determination of child custody on a number of factors with the best interest of the child at the forefront. Moreover, most (if not all) states have enacted child support guidelines that create a presumptive amount of child support based upon the income of the parents, the age of the children, the number of children and a other factors indicating need and ability to pay and these guidelines will give the court a presumptive amount for the child support. The court's are left with little discretion in the area of determination of child support. Therefore, in any event, the court was not obligated to accept any part of the agreement that the wife and husband make regarding the custody and child support amount. (These are both rights belong to the child and the parents cannot contract that away from the child.) Therefore, it is unlikely that the husband would be able to prove unconscionability or fraud and thus the court did not err in denying the husband's petition to invalidate the separation agreement.

(It is also important to note that the father may be estopped from denying that he is the father of the child after acting as the child's father and supporting the child for around 10 years. Courts have required non biological parents to pay support in many cases. This is further evidence that the father's claim may be weak)

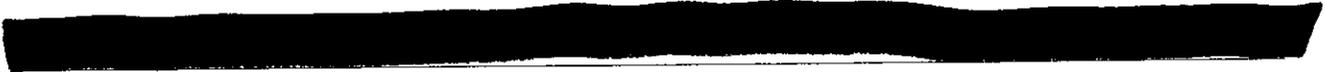
2. To begin, a divorce decree is a final valid judgment and is not likely going to be overturned except in extreme cases of fraud or other serious problems with the decree. It is treated like a final judgment on the merits and thus is not likely going to be modified in any case. This is especially true to decrees regarding the division of property. Division of property is a final

[REDACTED]

judgment and will not be modified unless the husband can show strong evidence to overturn the judgement but courts are not likely to disturb a final decree with substantial proof or fraud or something along those lines. Thus the court was correct in refusing to modify the decree as far as the property goes as he did not offer substantial proof to overturn the decree.

As for the award of spousal support, the H would have to show a substantial change in circumstances either in his ability to pay or a substantial change in the wife's needs for him to be able to modify her award of spousal support. (Note, this is assuming that this is permanent periodic support as that is the only type that is readily modifiable...sometimes rehabilitative support can be modified but only under extreme circumstances.) It is not likely that the husband will be able to show a substantial change in circumstances regarding his ability to pay or a change in his wife's needs as he filed the petition right after the decree was entered. It is extremely unlikely that circumstances have changed enough to warrant modification in this short amount of time. Also, courts typically require that the changes occur after the divorce was entered, i.e., the circumstances warranting modification must not have been present when the decree was entered. Thus, the court likely was correct in refusing to modify the spousal support award.

As for the modification of child support award, the husband would have to show a substantial change in circumstances based on his ability to pay or a change in the child's need to justify modification. Also, many courts require that a certain time elapse before modifying a child support order. Here, the husband cannot show a change in his ability to pay (he didn't change jobs, retire, become seriously ill, etc) and there is no indication that the needs of the child have changed. Furthermore, a court will not likely punish the child for any misconduct of the mother. Child support is a right belonging to the child. Also, the father has supported this child since



birth and the court may not change that. (Note: it is possible that a court may determine that the discovery that the child was not the biological child of the father may be a substantial change and would allow for modification of the child support or terminate it all together. This would be left up to the discretion of the judge.)

**END OF EXAM**

### MEE Question 4

On September 1, Adam, Baker, and Clark formed a shoe manufacturing business called Delta Incorporated (Delta). Each was to be a shareholder. Adam was named president of Delta.

Adam agreed to prepare and file articles of incorporation and bylaws for Delta, in accordance with the state's corporation statute, which is identical to the Model Business Corporation Act (1984, with 2000 amendments). Adam, Baker, and Clark agreed to include a provision in Delta's articles of incorporation stating that the corporation's existence would begin on September 1.

On October 1, Adam, acting on behalf of Delta, entered into a contract with Mega Stores Corporation (Mega) pursuant to which Mega was to purchase shoes from Delta for \$3,000. Following delivery of the shoes and after Mega had paid in full, Mega discovered that the shoes did not conform to the contract specifications and returned the shoes to Delta. It is undisputed that Delta owes Mega the \$3,000 purchase price.

On October 15, Baker learned that Delta's articles of incorporation had not been filed.

On November 1, Adam, acting on behalf of Delta, entered into a contract with Sole Source, Inc. (Sole), a supplier of shoe soles, pursuant to which Delta purchased shoe soles from Sole for \$100,000. The soles were delivered to Delta, and it is uncontested that Delta owes Sole the \$100,000 purchase price. Adam learned of the opportunity to contract with Sole from Baker, who had worked with Sole in the past. Baker helped Adam negotiate the contract with Sole.

On November 15, Adam filed Delta's articles of incorporation with the appropriate state official.

When Delta did not pay either Mega or Sole the amounts it owed them, each company sued Delta, Adam, Baker, and Clark for the amounts owed.

At all times, Clark believed that Delta's articles of incorporation had been filed.

1. When did Delta's corporate existence begin? Explain.
2. Is Adam, Baker, or Clark personally liable on the Mega contract? Explain as to each.
3. Is Adam, Baker, or Clark personally liable on the Sole contract? Explain as to each.

1. Delta's corporate existence began on November 1, when its articles of incorporation were filed with the appropriate state official. Under the Model Business Corporation Act, corporations are legal entities that come into existence upon the filing of the appropriate document of incorporation with the appropriate state official. Usually, the corporation must file articles of incorporation with the secretary of state. While corporations are free to delay the effective date of incorporation, retroactive incorporation is not possible. Here, Adam, Baker & Clark agreed to form Delta on September 1, but the articles were not actually filed until November 1. Because retroactive incorporation is not possible under the Model Business Corporation Act, the Delta's corporate existence began on November 1, when the articles were filed.

2. Adam is personally liable on the Mega contract. At issue here is whether a promoter of a corporation is personally liable on contracts entered into on behalf of the corporation. A promoter is a person who procures business and/or contracts for a corporation before the corporation has lawfully been incorporated and formed. The general rule is that promoters are individually liable on the contract with the third party until the corporation is formed and votes to adopt the contract as an obligation of the corporation. If the corporation is never formed, or if the corporation does not adopt the contract, the promoter remains liable on the contract. Additionally, contracts cannot generally be adopted by a director or officer unless the board of directors gives the director or officer the power to do so. Here, Adam is clearly a promoter. He procured contracts for Delta before filing its articles of incorporation with the appropriate state office. Additionally, Delta had not been formed at the time the contract was entered into.



Therefore, because Adam is a promoter, he is liable on the contract.

Baker is not personally liable on the Mega contract. Before formation of the corporation, individual shareholders of a corporation cannot be held liable on promoter contracts with third parties absent the shareholder's knowledge of the contract or of a defect in incorporation and failure to address such defect. Here, Adam, as promoter, entered into the Mega contract on October 1, before the articles had been filed for Delta. However, Baker had no knowledge of the Mega contract. He also had no knowledge of a defect in Delta's attempt to incorporate, which would have given him an implied duty to address such a defect. Baker did not learn of the absence of articles of incorporation until October 15, a few weeks after the negotiaton of the Mega contract. Therefore, Baker is not liable on the contract.

Clark is not personally liable on the Mega contract. Before formation of the corporation, individual shareholders of a corporation cannot be held liable on promoter contracts with third parties absent the shareholder's knowledge of the contract or of a defect in incorporation and the failure to address such defect. Here, Adam was the promoter who entered into the Mega contract on October 1. The articles had not been filed at this point. Clark had no knowledge of the Mega contract, nor did he have knowledge that the articles had not been filed. Therefore, Clark is not personally liable on the Mega contract.

3. Adam is personally liable on the Sole contract. At issue here is again whether a promoter of a corporation is personally liable on contracts entered into on behalf of the corporation. A promoter is a person who procures business and/or contracts for a corporation before the corporation has lawfully been incorporated and formed. The general rule is that promoters are individually liable on the contract with the third party until the corporation is

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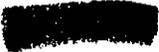


formed and votes to adopt the contract as an obligation of the corporation. If the corporation is never formed, or if the corporation does not adopt the contract, the promoter remains liable on the contract. Additionally, contracts cannot generally be adopted by a director or officer unless the board of directors gives the director or officer the power to do so. Here, Adam is clearly a promoter. He procured contracts for Delta before filing its articles of incorporation with the appropriate state office. Additionally, Delta had not been formed at the time the contract was entered into. Therefore, because Adam is a promoter, he is liable on the contract.

Baker is personally liable on the Sole contract. Before formation of a corporation, individual shareholders normally have no liability on promoter contracts with third parties. However, a shareholder can be held individually liable if (1) he knew about the contract, or (2) he knew of a defect in incorporation and did nothing to address it. Here, Baker did both. Baker helped Adam negotiate the Sole contract, so he not only knew about the contract, he personally negotiated it. Baker also learned of the defect in incorporation on October 15, and the Sole contract was not entered into until November 1. Additionally, Baker may be personally liable as a promoter. In any case, Baker is personally liable on the Sole contract.

Clark is not personally liable on the Sole contract. Before formation of a corporation, individual shareholders normally have no liability on promoter contracts with third parties. However, a shareholder can be held individually liable if (1) he knew about the contract, or (2) he knew of a defect in incorporation and did nothing to address it. Here, Clark did not know about the Sole contract. Clark also did not know of the defect in incorporation -- at all times, Clark believed Delta's articles of incorporation had been filed. Therefore, Clark cannot be held liable individually on this contract.

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### MEE Question 5

Plaintiff, a citizen of State B, was vacationing in State A, where he visited the O.K. Bar. While he was at the bar, Plaintiff was attacked and seriously beaten by Dave, a regular bar patron and a citizen of State A. Bartender, a citizen of State A, attempted to stop the attack and was also injured by Dave.

Plaintiff sued Dave and Bartender in the United States District Court for the District of State A, properly invoking the court's diversity jurisdiction. Plaintiff's complaint states a state law battery claim against Dave, seeking damages from Dave in excess of \$75,000. Plaintiff's complaint also states a claim against Bartender based on Bartender's alleged negligence in serving alcohol to Dave after Dave became visibly intoxicated and belligerent. Plaintiff's complaint seeks damages from Bartender in excess of \$75,000. Plaintiff's damages claims are reasonable in light of the injuries Plaintiff suffered in the attack.

Dave was personally served with the summons and complaint. However, the process server could not find Bartender. He therefore taped the summons and complaint to the front door of the O.K. Bar, where Bartender found them the next day.

Bartender made a timely motion to dismiss Plaintiff's complaint for failure to state a cause of action. When that motion was denied by the district court judge, Bartender filed a second motion to dismiss for insufficiency of service of process. The judge also denied that motion.

Bartender then filed an answer to the complaint, denying liability. The answer also stated a state law claim for battery against Dave, seeking \$20,000 damages for the injuries Bartender suffered when he tried to stop Dave's attack on Plaintiff.

Dave has moved to dismiss Bartender's cross-claim on the grounds of improper joinder and lack of subject-matter jurisdiction.

1. Did the United States District Court for the District of State A properly deny Bartender's motion to dismiss for insufficiency of service of process? Explain.
2. Do the Federal Rules of Civil Procedure permit Bartender to join a claim for battery against Dave in Bartender's answer to Plaintiff's complaint? Explain.
3. Assuming that the Federal Rules of Civil Procedure permit Bartender to join his state law claim against Dave, does the United States District Court for the District of State A have subject-matter jurisdiction over that claim? Explain.

# MEE 5

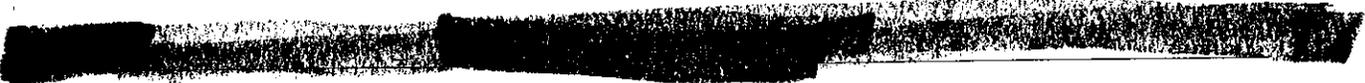
1. Yes, the District Court properly denied Bartender's motion to dismiss for insufficiency of service of process. Under Federal Rule of Civil Procedure (FRCP) 12(b)(5), a complaint can be dismissed for insufficiency of service of process. However, all Rule 12(b) motions to dismiss must be timely made. The Supreme Court has interpreted this "timely" requirement to mean that all defenses must be made at the same time or they are waived. Only nonwaivable defenses cannot be waived. Nonwaivable defenses include lack of subject matter jurisdiction, lack of capacity of a person to sue, and failure to join a required party under FRCP 19. All other defenses are waivable, and if they are not made together, all subsequent defenses are waived. Any subsequent motion asserting a waived defense is properly dismissed as untimely. Here, Bartender made a timely motion to dismiss Plaintiff's complaint for failure to state a cause of action under FRCP 12(b)(6). Bartender apparently made no other motions in conjunction with his 12(b)(6) motion. Therefore, when he filed his motion for failure to state a cause of action, Bartender waived all nonwaivable defenses, and any subsequent motion asserting a waived defense would be properly dismissed as untimely. Because insufficiency of service of process is a waivable defense, Bartender's later assertion of this defense was untimely. Therefore, the Court properly dismissed Bartender's claim for insufficiency of service of process.

2. Yes, the FRCP permit Bartender to joint his state law claim against Dave as a cross-claim. Under the FRCP, co-defendants may, but are not required to, assert any claims or causes of action it has against any other co-defendant, provided that the basis for the claim arises from the same transaction, occurrence, or underlying event as the plaintiff's original lawsuit. This assertion is made by way of a cross-claim against the co-defendant. It is not a



suit against the plaintiff; rather, it is a separate, stand-alone cause of action against another co-defendant to which the plaintiff is not technically a party. Cross-claims can be, and often are, made in the same pleading as a defendant's answer (sometimes called "answer and cross-claim"). Here, Bartender's claim for battery against Dave arose from the same barfight in which Plaintiff was injured. Plaintiff's claims arise from the same barfight, so Bartender may properly assert his causes of action against Dave in this same lawsuit. Bartender may do so by alleging its cause of action as a cross-claim against Dave. The cross-claim may be contained in the same document as Bartender's answer to Plaintiff.

3. Yes, the District Court has subject matter jurisdiction over Bartender's battery claim against Dave. United States District Courts are courts of limited jurisdiction, meaning they can only exercise subject matter jurisdiction when it is clearly given to them by statute. Under 18 USC 1332, District Courts may properly exercise subject matter jurisdiction when the parties are diverse, meaning they are from different states, and when the amount in controversy exceeds \$75,000. Under 18 USC 1367, District Courts may also exercise supplemental jurisdiction over any party's claim, provided that claim is "so related" to the plaintiff's original claim that it actually forms one case or controversy under Article III of the United States Constitution. District Courts may exercise supplemental jurisdictions over claims even if the District Court would not have had jurisdiction over the claim had it been brought alone. Here, the case is properly in front of the District Court because all plaintiffs are from a different state than all defendants -- Plaintiff is from State A and defendants are from State B -- and more than \$75,000 is in controversy. Plaintiff's claim is for battery arising out of a barroom brawl that involved Dave and Bartender. Therefore, under Section 1367, the District Court may exercise supplemental jurisdiction over all claims that are "so related" to Plaintiff's original claim that they constitute one case or controversy. Here, all claims arise out of the same barroom brawl.



There are common questions of law or fact that must be decided for each of these claims.

Undoubtedly, this is the same transaction or occurrence and is "so related" under Section 1367 that it forms the same claim or controversy. Therefore, the District Court may properly exercise subject matter jurisdiction over Bartender's claim. Note, however, that this exercise of supplemental jurisdiction is discretionary, not compulsory -- the District Court need not exercise jurisdiction over the claim if it prefers to defer to the state courts in State A to hear law suits between State A residents.

**END OF EXAM**

## MEE Question 6

Two years ago, Testator purchased a \$50,000 life insurance policy and named Niece as beneficiary.

One year ago, Testator invited three friends to dinner. After dessert had been served, Testator brought a handwritten document to the table and stated, "This is my will. I would like each of you to witness it." Testator then signed and dated the document. The three friends watched Testator sign her name, and immediately thereafter, they signed their names below Testator's name.

One month ago, Testator died. Testator was survived by Niece, Cousin, and Son. Son is Testator's child from her first marriage. Testator's second husband, Husband, died six months before Testator. Husband's daughter from a prior marriage also survived Testator.

The handwritten document that Testator signed and that the three friends witnessed was found in Testator's desk. Its dispositive provisions provide in their entirety:

*I, Testator, hereby make my Last Will and Testament.  
I give my life insurance proceeds to Cousin.  
I give the items listed in a memorandum to be found in my safe-deposit box to Niece.  
I give \$25,000 each to Church, Library, and School.  
I give \$40,000 to Husband.  
I give the remainder of my assets to Son.*

At Testator's death, she owned the following assets:

1. The \$50,000 life insurance policy, payable on Testator's death "to Niece"
2. Jewelry worth \$15,000
3. A bank account with a balance of \$60,000

The jewelry was found in Testator's safe-deposit box with a handwritten memorandum signed and dated by Testator the day before she signed her will. The memorandum lists each piece of jewelry and states, "I want Niece to have all the jewelry here."

The terms of Testator's life insurance contract provide that the beneficiary may be changed only by submitting the change on the insurer's change-of-beneficiary form to the insurance company.

State law explicitly disallows "all holographic wills and codicils." To be valid, a will must be "acknowledged by the testator to the witnesses and signed by the testator in the presence of at least two attesting witnesses, who shall sign their names below that of the testator within 30 days."

1. Is Testator's will valid? Explain.
2. Assuming that Testator's will is valid, who is entitled to
  - (a) Testator's life insurance policy? Explain.
  - (b) Testator's jewelry? Explain.
  - (c) Testator's bank account? Explain.

# MEE 6

MEE 6

(1) The testator's will is valid. At issue is whether the execution of the will met the required formalities, under state law.

To constitute a valid will, a testator with capacity must execute the will with certain formalities, which normally revolve around attesting witnesses and those witness signing in the testator's presence. The Uniform Probate Code offers a four-part test for valid execution - the testator must sign or acknowledge the will; in the presence of the attesting witnesses; there must be at least 2 attesting witnesses; who, finally, sign the will in the testator's presence within a reasonable time. Here, however, the State has supplied its own statutory requirements for the valid execution of a will: (1) the will must be *acknowledged by the testator* to the witnesses, and (2) *signed by the testator*, (3) *in the presence of at least two attesting witnesses*; who then (4) *sign their (the witnesses) names below that of the testator*, which must be done (5) *within 30 days* of the testator having signed. The state also explicitly disallows holographic wills and codicils - those that are unwitnessed, but wholly in the testator's handwriting and signed by him. However, that does not appear to be an issue in the present situation, as detailed below.

Here, the Testator invited three friends to witness her execute her last will and testament. (It should be noted that all of them, under the present facts, appear to be disinterested witnesses, although that is no longer required at law.) The Testator acknowledged her will ("This is my will.") and signed it in the presence of all three witnesses, who then, in turn, signed their names,

as witnesses, below the Testator's signature. Under either test for "presence" -- either the line-of-sight, or the "conscious presence" test -- the witnesses and Testator both were in each other's presence, in a contemporaneous transaction.

Therefore, the Testator appears to have validly executed her will according to applicable state law.

(2) Assuming the testator's will is valid, the property should be distributed as follows:

a. The Testator's life insurance policy will go, in its entirety of \$50,000, to the Niece.

Certain assets, including ones such as life insurance policies that are governed pursuant to contract, are considered **non-probate assets**. Such non-probate assets fall outside of the probate process and are not considered to be a part of the estate when it is administered; rather, they are distributed in accordance with their contractual terms.

Here, the life insurance policy is a valid, non-probate asset. It names Niece as the beneficiary. Further, by its very terms, the policy states that the only way to change the beneficiary is via the insurer's change-of-beneficiary form. The law respects this contractual provision between the Testator and the life insurance company; thus, Testator's attempted change to give the insurance proceeds to her Cousin, via her will, fails.

Therefore, the \$50,000 proceeds from the insurance policy will go to the Niece, under the terms of the insurance policy.

b. The Testator's jewelry will also go to the Niece, due to the doctrine of **incorporation by reference**. Under this doctrine, a validly executed will may make reference to an extrinsic document that disposes of certain property, if certain conditions are met: (1) the extrinsic document must be in existence at the time the will was executed; (2) it must be properly identified in the will so that it is capable of ready identification; and (3) it must state the intent to dispose of property.

In the present facts, the Testator's will references the memorandum to be found in her safe deposit box, and it appears to have been signed before she actually executed the will; thus, it was obviously in existence at the time the will was executed. Further, it was capable of ready identification, as it was found exactly where it was purported to be, and was signed and dated by the Testator. As such, it was properly incorporated by reference into the Testator's validly-executed will.

Therefore, the Niece will also receive the specific devise of \$15,000 worth of jewelry, according to the terms of the memorandum signed by the Testator.

c. The Testator's bank account will be distributed to proportionately -- \$20,000 each -- to the Church, Library, and School. At issue is the fact that there is not enough remaining assets in the Testator's estate to cover all of her general legacies, thus invoking the doctrine of **abatement**.

Under common law, when there are not enough assets to either pay the creditors or cover all of

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the bequests in a will, the doctrine of abatement dictates other gifts may have to be lessened, in order to fulfill the testator's general testamentary intent as closely as possible. Abatement of the bequests usually moves in the following order: first, from any intestate property; second, from the residuary estate; third, from general legacies - abated pro-rate at this level; and finally, from specific devises. Demonstrative legacies are treated as specific devises, to the extent that assets exist to cover the legacy, and as general legacies for the remainder.

Here, there has been a complete distribution of her estate, so there is no intestate property. There is also no residual effects or property under these facts; thus, her Son will unfortunately receive nothing. At the general legacy level, however, there are the gifts of \$25,000 each to the CHurch, Library, and School - totally \$75,000. These general legacies should be satisfied out of general assets of the estate - namely, the bank account. However, as stated, there is only \$60,000 left in the account today. Thus, these gifts must be abated accordingly so that each general legatee receives a pro-rata share of the remaining available estate.

Therefore, the Church, Library, and School will split the bank account -- with each receiving \$20,000 as general legatees.

As a last issue, it should be noted that the attempted \$40,000 general legacy to the Husband lapsed, because he predeceased the Testator. Although we are not told whether the state has a valid anti-lapse statute, it would likely not encompass the Husband's daughter from the previous marriage, as she is not a blood relative of the Testator. Thus, that gift lapsed and it is not necessary to account for it when the estate is probated.

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