THE MPT

MULTISTATE PERFORMANCE TEST

July 2004 MPTs and Point Sheets

In re Marian Bonner

Graham Realty, Inc. v. Brenda Chapin

Wells v. Wells

The National Conference of Bar Examiners inaugurated the Multistate Performance Test (MPT) in 1997. This publication is a reprint of the three MPTs that were administered in July 2004 in thirty-one jurisdictions: Alabama, Alaska, Arkansas, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Maine, Minnesota, Mississippi, Missouri, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Texas, Utah, Vermont, West Virginia, Guam, and the Northern Mariana Islands.

The MPT point sheets describe the factual and legal points encompassed within the lawyering task to be completed by the applicants. They outline the possible issues and points that might be addressed by an examinee. They are provided to the user jurisdictions for the sole purpose of assisting graders in grading the examination by identifying the issues and suggesting the resolution of the problem contemplated by the drafters. The point sheet is not an official grading guide and is not intended to be a "model answer." Examinees can receive a range of passing grades, including excellent grades, without covering all of the points discussed in the point sheet. User jurisdictions are free to modify the guidelines, including any suggested weights assigned to particular points. Grading the MPT is the exclusive responsibility of the jurisdiction using the MPT as part of its admissions process.

The instructions for the test appear on page iii. For further information regarding the test, see the **MPT Information Booklet** or the NCBE website at **www.ncbex.org**.

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INSTRUCTIONS

1. You will have 90 minutes to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

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

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

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

5. Your response must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

6. Although there are no restrictions on how you apportion your time, you should be sure to allocate ample time (about 45 minutes) to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

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

FILE

In re Marian Bonner

ANDREWS, EWING & OAKMAN
1656 BARRINGTON BOULEVARD
CASCADE, FRANKLIN 33339

MEMORANDUM

TO: Applicant July 27, 2004
FROM: Denise Samuels
RE: Marian Bonner matter

Dr. Nicole Hall is the daughter of Dr. Marian Bonner, one of the most prominent educational reformers in this country. Dr. Hall wants to stop the Success for Every Child Association (SECA), a for-profit educational corporation, from the unauthorized use of her deceased mother's writings and name.

We do not yet know if SECA got physical possession of the writings lawfully. Nevertheless, we have enough information to proceed with an action based on Dr. Hall's copyright in the materials and her right to assert a violation of her mother's right of publicity. However, Dr. Hall would prefer to resolve this matter informally. I told her I would write a demand letter to SECA's attorney for her to review.

I need your help in drafting the demand letter to William Drake, the attorney for SECA. We want to convince him that if SECA uses Dr. Bonner's writings and her name, it will infringe on Dr. Hall's copyright and will violate the right of publicity. In fact, SECA might have already violated the right of publicity by announcing its intended plans.

Your letter should contain

- a description of the dispute;
- a brief statement of the salient facts; and
- arguments that support our position concerning copyright infringement and the right of publicity.

Your arguments should incorporate the facts and the authorities.

You should address only Dr. Hall's claims of copyright infringement and violation of the right of publicity. Do not concern yourself with Dr. Hall's potential claims for injunctive relief, damages, or return of the papers themselves. I will address these issues and later amend your letter to include them.

TRANSCRIPT OF INTERVIEW WITH NICOLE HALL

July 26, 2004

Attorney: Good to see you, Nicole. The Library Association letter you dropped off is astounding.

Client: So much to take in. But I need to make some decisions quickly to preserve my mother's legacy. You need to help me figure out how to stop this sleazy, so-called educational group from desecrating my mother's name and using it for purposes she would have abhorred. She remained deeply committed to public education, even with its shortcomings. Making a profit from public education was anathema to her. I also don't want them misusing her writings to promote their own agenda.

Attorney: Tell me more of the background. What do you know about your mother's writing?

Client: Not much. She talked about writing another book that would help people understand why she tried all her projects, including those that had gone wrong. But she was constantly on to the next project. I never saw any writing on her desk or in her study. She was very conflicted about her academic impulses to analyze the world and her activist impulses to change it. And, at the end of her life, she became depressed, as well as disheartened. Only the kids in her classes kept her going.

Attorney: Were you involved with your mother during her last years?

Client: Sure. I visited her about twice a month in Stone Park. We got along fine.

Attorney: Tell me why you didn't end up with her papers.

Client: I didn't clean out her house. My niece, Celina Miller, lived close to my mother, and they saw each other often. Celina called me when my mother had her stroke. My mother was able to communicate only a little so there was no chance to discuss anything. In her will, she had given me everything, so I didn't think there was much about property or arrangements to talk about anyway.

Attorney: What happened after she died?

Client: After the small, private memorial service in Stone Park—my mother was very clear that this sort of event was all she wanted—Celina wanted to go through my

mother's house and pack things up. I offered to be there, but she wanted to be alone. I thought she sent everything to me. There were no papers. There were photographs and other personal stuff, but no writings.

Attorney: Have you discovered anything since you got the Library Association letter?

Client: I called Celina. She remembered two packing boxes labeled "papers" in a closet with numerous projects done by my mother's students—pottery, mobiles, posters, dioramas. Celina thought the boxes contained student papers. Celina put the boxes in her van, covered them with bags filled with the student projects, and took them to Husein Aboud—a neighbor who had been very kind to my mother—for storage in his garage. Celina meant to return them to the students, but forgot.

Attorney: Do you know how the papers got from the garage to SECA?

Client: Some people Celina thought were from the school contacted her about six months after my mother's death about papers my mother had. Celina thought they meant the student papers so she told them where they were. I called Husein, and he remembered checking with Celina and letting the people take everything. He, too, thought they were from Stone Park schools, but he doesn't know if they actually said that.

Attorney: Anything else?

Client: Nothing now. What do we do?

Attorney: A few preliminaries. Your mother did bequeath everything to you. When we probated your mother's will, all her personal property went to you, including all her personal papers and her copyright in those papers. There is an oddity of copyright law that makes ownership complex. Ownership of the physical papers and ownership of the copyright are independent of each other. When your mother died, both the physical papers and her copyright became yours. Because of this distinction, we have two routes to pursue. We need to get back the physical papers as fast as possible. I will immediately dispatch our best investigator to find out more about how SECA acquired the papers, so we can figure out if SECA obtained them lawfully. We can then decide what to do to get the papers back.

Client: I'm not sure I understand the distinction between ownership of the copyright and the papers themselves.

Attorney: Yes, it is sort of counterintuitive. Let me give you an example. Suppose you write a personal letter and send it to someone. You own the copyright in the letter and you also own the right of publication and distribution, even though the recipient owns the letter.

Client: Okay, now I think I understand. I'd like to move as fast as possible. Who knows what they're doing with my mother's papers.

Attorney: Second, we can move quickly to stop SECA from taking any actions involving the copyrighted material in the papers. We can send a letter demanding that they take no action regarding the papers. We can also include a demand in the letter that SECA stop violating what is called your mother's right of publicity. They may have already misused her name and renown for their own purposes. We may need to get SECA to reverse action they've already taken. If this doesn't work, we can file a lawsuit seeking an injunction and damages. Once we learn whether SECA has done anything unlawful in obtaining the papers, we may add a claim for return of the papers themselves.

Client: I'm relieved that there are actions that we can take—quickly.

Attorney: I know and respect SECA's lawyer, Bill Drake, and I believe a letter fully stating our position might resolve everything. SECA could avoid a lot of bad publicity and maybe damages for wrongful actions if they agree not to go ahead with any of their plans or take any other actions involving use of your mother's name or private writings without your permission. If this letter works, it would be the quickest and cleanest way to resolve the problem. If it doesn't work, we can go ahead with the other plan. We might lose a few days, but this will give SECA's lawyer time to do the right thing.

Client: My mother would have liked this all resolved quietly.

Attorney: I'll prepare a draft of a letter to the lawyer and call you by noon tomorrow.

The Franklin Library Association
452 Ocean Boulevard
Franklin City, Franklin 33100

Elizabeth Philips, *Associate Director for Acquisitions*

July 23, 2004

Dr. Nicole Hall
491 Fayette Street
Cascade, Franklin 33337

Dear Dr. Hall:

I write concerning developments of great urgency and significance to the preservation and dissemination of the work of your distinguished mother, Dr. Marian Bonner. The Franklin Library Association just learned that the Success for Every Child Association (SECA) has recently obtained a cache of your mother's personal materials, including letters and journals covering the period from 1952 to 2003, and handwritten drafts of speeches.

Yesterday, SECA, a for-profit educational corporation, announced in a press release and news conference that it had acquired previously unknown materials of great historical and social value written by your mother and is planning to change its name to the Marian Bonner Educational Group. I immediately contacted Louise Boyle, the CEO of SECA, to inquire about the material and SECA's plans for its use. Ms. Boyle referred me to William Drake, counsel for SECA. Mr. Drake said that he could not disclose how SECA had acquired the materials, but he did say that there were more than 300 letters, 50 handwritten speeches, and 10 volumes of journals, spanning the entire length of Dr. Bonner's career and all apparently written in her handwriting. Mr. Drake indicated that, in conjunction with a celebration marking its name change, SECA plans to publish and distribute to all state legislators REDISCOVERING MARIAN BONNER'S LEGACY, a small volume of excerpts from your mother's newly discovered writings that stress the need for attention to the individual needs of each child, the signature focus of SECA. Following the publication, SECA intends to sell your mother's materials to collectors. Furthermore, SECA has already been awarded contracts by state legislators to run pilot programs in three Franklin cities to take over

"under-performing" schools. SECA is positioning itself to be the major for-profit educational provider in Franklin and beyond. Identification with your mother's work will advance SECA's commercial goals.

I am sure that you understand the enormous historical significance of your mother's work. There are large gaps in our understanding of her. Scholars have her groundbreaking book, DISCRIMINATION, PUBLIC EDUCATION, AND DEMOCRACY, and the records from her work as a citizen member on the Franklin Education Commission are in our archives, but there is little personal material that provides insight into developments in her thought and in her evaluation of her own efforts. These materials are of utmost importance to scholars, however. They are a legacy for the public, especially for all who care about education, racial equality, and the creation of a better world. It is highly unlikely that research libraries can afford to go head-to-head with wealthy bidders when these materials are sold. In addition, Mr. Drake indicated that SECA intends to sell the materials in separate units, which will mean that they will be dispersed in various sites around the country and may be totally inaccessible or accessible only on a restricted basis.

I write because I fear that you may not be aware of these developments. I have also rather presumptuously assumed that you are concerned about academic and public access to your mother's work. From your own work as a physician in the leadership of public health efforts in Franklin, I know that you have worked tirelessly on behalf of expanding both public understanding and academic research. I am also aware from accounts of the latter years of your mother's life that she was reclusive. Therefore, I have made inferences that may not be correct. I am hopeful that you may wish to initiate action to forestall or halt these developments. The Library Association can do little directly. We are available, however, to assist you. The Library Association may also be able to help if you are interested in pursuing publication of an annotated edition of your mother's papers.

Elizabeth Philips, Ph.D.
Associate Director for Acquisitions

Dictionary of Historical Biography for the State of Franklin

Marian Bonner (1922-2003)—A noted scholar, dynamic social reformer, and tireless citizen advocate, Marian Bonner played a major role in designing and implementing an innovative strategy for dismantling the system of *de facto* racial segregation in the public school system in Franklin. In 1952, Bonner received a dual Ph.D. from the University of Franklin in American History and Sociology. Her dissertation analyzing the interaction of the complex historical and sociological factors that contributed to actual, although not legally mandated, racial segregation in public schooling in Franklin was published by Franklin University Press in 1954, the year of the United States Supreme Court's decision in *Brown v. Topeka Board of Education* that outlawed *de jure* segregation in public education. Bonner's work provided the first major academic analysis of how eradicating legally imposed segregation of public schools would not by itself produce racially integrated schools. DISCRIMINATION, PUBLIC EDUCATION, AND DEMOCRACY was awarded the prestigious *Hanson Prize in History* in 1955.

While a faculty member in the Sociology Department at the University of Franklin for twelve years, Bonner developed her ideas about how to achieve racially integrated schools. She worked on proposals in the areas of housing and employment. Believing that changes in residential segregation would come slowly, she developed prototypes of public educational systems with flexibly drawn school boundaries based on factors other than geographical location. Throughout her career, Bonner argued that a publicly funded, operated, and controlled school system was essential to racial justice and democratic participation.

Known as "The Great Educator," with a national reputation as a pre-eminent educational reformer, Bonner was chosen in a yearly poll conducted by the *Franklin Daily Times* as Educator of the Year fifteen times. More public schools in Franklin are named after her than any other individual. The Franklin Education Association awarded her its prestigious *Champion of Education Award*, which it has presented only four times in its fifty-year history. In 1986, the Douglas Foundation recognized Bonner with its yearly lifetime achievement award to the citizen of Franklin who most powerfully shaped national policy debate. From 1976 to 1988, Bonner served on the Committee of Trustees for the University of Franklin.

In 1988, despite her considerable power, prestige, and influence, Bonner announced publicly that she was discouraged by the continuing barriers to educational equity, even in Franklin, where many had made sustained efforts to accomplish change. Little is known about the professional and personal sources of Bonner's discontent. Bonner moved to Stone Park, a small town in northern Franklin with a high percentage of African-American residents, where she had grown up and attended public school. She taught first grade at Stone Park Elementary School, where she worked until she died of a stroke in 2003.

See also NOTABLE AMERICAN WOMEN, PROMINENT AMERICAN EDUCATORS, AFRICAN-AMERICANS IN PUBLIC LIFE.

LIBRARY

In re Marian Bonner

UNITED STATES CODE
Title 17. Copyright

* * * *

§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, ... Works of authorship include the following categories:

(1) literary works;

* * * *

(4) musical works;

* * * *

§ 106. Exclusive rights in copyrighted works

Subject to section 107 . . . , the owner of a copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies . . .;

* * * *

(3) to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

* * * *

(5) in the case of literary . . . works, . . . to display the copyrighted work publicly;

* * * *

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section 106 . . . , the fair use of a copyrighted work, including such use by reproduction in copies . . . or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

* * * *

§ 201. Ownership of copyright

(a) Initial ownership. Copyright in a work protected under this title vests initially in the author or authors of the work. . . .

* * * *

(d) Transfer of ownership.

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

* * * *

§ 501. Infringement of copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright . . . .

* * * *

Campbell v. Acuff-Rose Music, Inc.

United States Supreme Court (1994)

We are called upon to decide whether 2 Live Crew's commercial parody of Roy Orbison's song, "Oh, Pretty Woman," may be a fair use within the meaning of the Copyright Act of 1976, 17 U.S.C. § 107. The Court of Appeals held that commercial use by 2 Live Crew made it presumptively unfair.

In 1964, Roy Orbison and William Dees wrote a rock ballad called "Oh, Pretty Woman" and assigned their rights in it to respondent Acuff-Rose Music, Inc.

Petitioners Luther R. Campbell, Christopher Wongwon, Mark Ross, and David Hobbs are collectively known as 2 Live Crew, a popular rap music group. In 1989, Campbell wrote a song entitled "Pretty Woman," which he later described as intended, "through comical lyrics, to satirize the original work." Acuff-Rose sued 2 Live Crew and its record company for copyright infringement.

It is uncontested here that 2 Live Crew's song would be an infringement of Acuff-Rose's rights in "Oh, Pretty Woman," under the Copyright Act of 1976, 17 U.S.C. § 106, but for a finding of fair use. The fair use doctrine permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.

Section 107 of the Copyright Act sets forth four factors to be considered together, in light of the purposes of copyright.

A. The first factor is the purpose and character of the use. § 107(1). The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely "supersede[s] the objects" of the original creation or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative." Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

Parody has an obvious claim to transformative value. Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.

Parody, like other comment or criticism, may claim fair use under §107.

The "fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use." *Harper & Row v. Nation Enterprises* (U.S. Supreme Court, 1985). That tendency will vary with the context. The use, for example, of a copyrighted work to advertise a product, even in a parody, will be entitled to less indulgence under the first factor of the fair use enquiry than the sale of a parody for its own sake.

B. The second statutory factor, "the nature of the copyrighted work," § 107(2), calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied. For example, if a work is unpublished, that is "a key, although not a determinative factor," weighing heavily against a finding of fairness. *See Harper & Row*. Also, courts accord greater copyright protection to creative works, as opposed to those that are factual in nature.

The Orbison original's creative expression for public dissemination falls within the core of the copyright's protective purposes. This fact, however, is not much help since parodies almost invariably copy publicly known, expressive works.

C. The third factor asks whether "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," § 107(3), are reasonable in relation to the purpose of the copying. The enquiry will harken back to the first of the statutory factors, for we recognize that the extent of permissible copying varies with the purpose and character of the use. *See Harper & Row.* "Even substantial quotations might qualify as fair use in a review of a published work or a news account of a speech" but not in a scoop of a soon-to-be-published memoir.

In *Harper & Row*, for example, the *Nation Weekly* had taken only some 300 words out of President Ford's memoirs, but we signaled the significance of the quotations in finding them to amount to the heart of the book, the part most likely to be newsworthy and important in licensing serialization. Whether a substantial portion of the infringing work was copied verbatim from the copyrighted work is a relevant question for it may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth; a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original.

D. The fourth fair use factor is "the effect of the use upon the potential market for or value of the copyrighted work." §107(4). Since fair use is an affirmative defense, its proponent

would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets.

When a commercial use amounts to mere duplication of the entirety of an original, it serves as a market replacement for it, making it likely that cognizable market harm to the original will occur. But when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred. The parody and the original usually serve different market functions.

It was error for the Court of Appeals to conclude that the commercial nature of 2 Live Crew's parody of "Oh, Pretty Woman" rendered it presumptively unfair. The court also erred in holding that 2 Live Crew had necessarily copied excessively from the Orbison original, considering the parodic purpose of the use. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

Martin Luther King, Jr., Center for Social Change, Inc. v. Bolen Products, Inc.
Franklin Supreme Court (1982)

Three certified questions come from the United States Court of Appeals for the Fifteenth Circuit.

The plaintiff is the Martin Luther King, Jr., Center for Social Change (the Center), a non-profit corporation that seeks to promote the ideals of Dr. King. Defendant Bolen Products, Inc., which manufactures and sells plastic products as funeral accessories, developed the concept of marketing a plastic bust of Dr. King.

Bolen sought the endorsement and participation of the Center, but the Center refused. Bolen, nevertheless, hired an artist to prepare a mold and an agent to handle the promotion of the product. Bolen's advertisements offered the bust as "an exclusive memorial" and "an opportunity to support the Martin Luther King, Jr., Center for Social Change." The advertisement stated that "a contribution from your order goes to the King Center for Social Change" and promised a Certificate of Appreciation. Out of the $29.95 purchase price, Bolen set aside 3% ($.90) as a contribution to the Center. The magazine advertisements contained photographs of Dr. King and excerpts from his copyrighted speeches.

On December 19, 1980, plaintiff demanded that defendant cease and desist from further advertisements and sales of the bust, and, on December 31, 1980, moved for a preliminary injunction in United States District Court, which sought (1) an end to the use of the Center's name in advertising and marketing the busts, (2) restraint of any further copyright infringement, and (3) an end to the manufacture and sale of the plastic busts. The court, based on the defendant's agreement to discontinue the use of the Center's name in further promotion, granted this part of the injunction. The court, having found that the defendant had infringed the copyrights, enjoined all further use of the copyrighted material. In ruling on the third request, the court confronted the plaintiff's claim that the manufacture and sale of the busts violated Dr. King's right of publicity, which had passed to his heirs upon Dr. King's death. The district court concluded that it was not necessary to determine whether the right of publicity was devisable in Franklin because Dr. King had not commercially exploited this right during his lifetime.

1. Does Franklin recognize a right of publicity?

This right may be defined as a celebrity's right to the exclusive use of his or her name and likeness, most often asserted by or on behalf of professional athletes and entertainers. This case involves none of those occupations. Dr. King, a Baptist minister, was the foremost leader of the civil rights movement in the United States. He was awarded the

Nobel Prize for Peace in 1964. Although not a public official, Dr. King was a public figure.

Franklin has long recognized the right of publicity as developing out of the right of privacy. In *Pavesich v. New England Life Ins. Co.* (Franklin Supreme Court, 1905), the court found that the publication of a person's picture, without consent, as a part of an advertisement, for the purpose of exploiting the publisher's business, is a violation of the right of privacy. Although the question was not involved in the case, the court noted that while the right of privacy is personal, and may die with the person, the relatives of the deceased may, in a proper case, protect the memory of their kinsman, not only from defamation, but also from an unconsented-to invasion. Finding that Pavesich, although an artist, was not recognized as a public figure, the court also left open the question facing us involving the likeness of a public figure.

The right of publicity was first recognized in *Palmer v. Schonhorn Enterprises, Inc.* (Franklin Supreme Court, 1967). In *Palmer,* Arnold Palmer obtained summary judgment against the manufacturer of a golf game that used his name and biography without his consent. The Franklin Supreme Court held that although the publication of biographical data of a well-known figure does not per se violate the right of publicity, the use of that same data for the purpose of capitalizing upon the name by using it in connection with a commercial project other than the dissemination of news or articles or biographies does. "One should not be permitted to commercialize or exploit or capitalize upon another's name, reputation, or accomplishments merely because the accomplishments have been highly publicized." As in *Palmer*, we deal here with the unauthorized use of a person's name and likeness for the commercial benefit of the user, not with a city's use of a celebrity's name to denominate a street or school.

The right of publicity is not absolute. In *Hicks v. Casablanca Records* (Franklin Supreme Court, 1978), the Franklin Supreme Court held that a fictional novel and movie concerning an unexplained eleven-day disappearance by Agatha Christie, author of numerous mystery novels, were permissible under the First Amendment.

The Franklin courts have recognized the rights of private citizens, as well as entertainers, not to have their names and photographs used for the financial gain of the user without their consent, where such use is not authorized as an exercise of the First Amendment. A public figure prominent in religion and civil rights should be entitled to no less protection. We hold that the appropriation of another's name and likeness without consent and for financial gain is a tort in Franklin, whether the person whose name and likeness is used is a private citizen, entertainer, or a public figure. The measure of damages to a public figure for violation of his or her right of publicity is the value of the appropriation to the user.

2. Does the right of publicity survive the death of its owner?

Whether the right of publicity is inheritable is a question of first impression in Franklin. Courts are divided. In *Johnson v. Marvin Studios* (S.D.N.Y. 1975), the court held that since the right of publicity was assignable, it survived the deaths of Stanley Laurel and Oliver Hardy. The court reasoned that, if the right is descendible, the individual is able to transfer the benefits of his labor to his immediate successors and is assured that control over the exercise of the right can be vested in a suitable beneficiary. Furthermore, the court found that advertisers should not receive a windfall in the form of freedom to use with impunity the name or likeness of deceased celebrities who may have worked their entire lives to attain their status. The financial benefits of that labor should go to the celebrities' heirs.

Conversely, in *Lugosi v. Universal Pictures* (California Supreme Court 1979), the California Supreme Court declared that the right of publicity expires upon the death of the celebrity. Bela Lugosi appeared as Count Dracula in Universal Pictures' movie by that name. Universal entered into a contract with Bela Lugosi that gave Universal the right to exploit *in connection with* the movie all aspects of Lugosi's performance. Lugosi, however, retained the right to exploit his name and likeness in association with the Dracula character for all other purposes. Such a right, protectable during Lugosi's lifetime, did not survive his death. The court held that Lugosi's heirs could not prevent Universal's continued exploitation of Lugosi's portrayal of Count Dracula for purposes not connected to the movie. The California court reasoned that the very decision to exploit name and likeness is a personal one. Because the ancestor did not exploit the flood of publicity received in his lifetime for commercial purposes, the opportunity to have done so should not descend to his heirs. Now that Bela Lugosi is dead, the heirs seek to be the only ones who can exploit their ancestor's personality. The court asked, "Should similar rights automatically transfer to succeeding heirs? May remote descendants obtain damages for the unauthorized commercial use of the name or likeness of their distinguished ancestors? If not, where is the line to be drawn, and who should draw it?" Assuming that some durational limitation would be appropriate, the court thought that setting the limit went beyond the scope of judicial authority.

Recognizing important policy concerns on both sides of this judicial uncertainty, we hold that in Franklin the right of publicity may, in certain circumstances, survive the death of its owner and is inheritable. We are particularly concerned with exploitation for commercial purposes of the publicity right of a celebrity when the fame arises from noncommercial endeavors. Furthermore, we see no public purpose that would be served by the exploitation of a public figure's name

and likeness. Therefore, we hold that, in Franklin, the right of publicity of a public figure survives his or her death if the unauthorized exploitation of that public figure for commercial purposes would not serve to reward or encourage effort and creativity that serve some significant public purpose.

3. Must the owner of the right of publicity have commercially exploited that right before it can survive?

A well-known minister may avoid exploiting his prominence during life because to do otherwise would impair his ministry. Should his election not to take commercial advantage of his position during life result in permitting others to exploit his name and likeness after his death? In our view, a person who avoids exploitation during life is entitled to have his or her image protected against exploitation after death just as much if not more than a person who exploited his image during life.

Dr. King could have exploited his name and likeness during his lifetime. That this opportunity was not appealing to him does not mean that others have the right to use his name and likeness in ways he himself chose not to do. Nor does it strip his family and estate of the right to control, preserve, and extend his status and memory, and to prevent unauthorized exploitation by others.

FILE

Graham Realty, Inc. v.
Brenda Chapin

The Legal Aid Society
Briggs Neighborhood Office
Civil Division
Avon, Franklin 33210

To: Applicant
From: Joseph Murray, Supervising Attorney
Date: July 27, 2004
Re: Graham Realty, Inc. v. Brenda Chapin

Our client, Brenda Chapin, is a tenant living in an apartment owned by Graham Realty, Inc. (GRI). She has withheld her monthly rent of $1,000 for seven months because of the poor condition of her apartment. GRI is suing her for eviction and recovery of back rent. We have tried to settle the matter, but negotiations have broken off because of GRI's refusal to make any concessions regarding much-needed repairs in our client's apartment and the common areas of the building. The matter is set to be heard next week before the Housing Division Court.

To successfully defend against GRI's suit for eviction and recovery of back rent, we will have to prove that GRI breached the implied warranty of habitability. Assuming that we can prove such a breach, we also intend to seek damages available to Ms. Chapin as a result of GRI's breach.

Please draft a case planning memo for the summary eviction proceeding before the Housing Division Court. Citing the relevant legal authority, your memo should identify:

1) the elements we must establish to prove that GRI breached the implied warranty of habitability and the evidence available to establish these elements; and

2) the remedies available to Ms. Chapin, the elements of those remedies, and the evidence available to us to establish those elements. (You need not concern yourself with admissibility issues.)

You should also discuss whether there is any relief that Ms. Chapin might be entitled to pursue that *cannot* be obtained in this summary proceeding. If there is, state what it is and explain why.

Follow our office's "Case Planning Memorandum Guidelines" in drafting your memo. These guidelines include an excerpt of a case planning memorandum used in an unrelated case. As the guidelines instruct, do not include a separate statement of facts because here at the Legal Aid Society, these memos are strictly internal documents used to prepare for court.

Case Planning Memorandum Guidelines

Our office follows the practice of using a case planning memorandum (CPM) to prepare for court. A CPM is an internal document that identifies and evaluates, as applicable, the client's claims, counterclaims, defenses, and/or remedies. For each of these, cite the **Legal Authority**, including statutory and case law as applicable; the **Elements** that must be proven in order to establish the client's right to prevail; and the **Supporting Evidence** available to establish each element, including testimonial evidence, documentary evidence, and physical evidence.

A CPM should not include a separate statement of facts, as it is intended as a reference tool for attorneys already familiar with the case. Attached as an example is an excerpt from a CPM drafted for *Jimenez v. Brown Apartments*, a case we litigated in January 2002.

Excerpt from *Jimenez* Case Planning Memorandum

Claim: Breach of Franklin Fair Housing Law/Unlawful Housing Discrimination

Legal Authority: Section 530 of the Franklin Fair Housing Law prohibits a landlord from rejecting a prospective tenant's rental application solely because the application does not meet a particular income-to-rent ratio. A landlord's rejection of an application, notwithstanding the tenant's proof of actual ability to pay, is prima facie evidence of a violation of this section. (*Mooney v. Lutz Management Co.*)

Element #1: The landlord refused to lease residential premises to a prospective tenant because the tenant did not meet the minimum income-to-rent ratio.

Evidence available to show Brown Apartments refused to rent to David Jimenez based on his income level:

- Testimony of Jimenez that he completed Brown's standard rental application form, including providing information about his income.
- Copy of the application Jimenez submitted to Brown.
- Copy of Brown's standard rental application form, stating (in very fine print) that all tenants must have monthly income equal to four times monthly rent.
- Letter from Brown rejecting Jimenez's rental application.

Element #2: The prospective tenant established actual ability to pay rental amount.

Evidence available to show Jimenez's actual ability to pay rent charged by Brown:

- Jimenez's bank statement showing $5,000 in savings account.
- Written financial reference from previous landlord.

Remedy: Punitive Damages

Legal Authority: A court will award punitive damages to a tenant for a violation of § 530 when such conduct is a pervasive practice by a landlord. (*Chong v. Riverside Apartments, LLC*—punitive damages upheld where landlord exhibited repeated disregard for the rights accorded tenants under § 530.)

Element: The landlord's pervasive practice is to reject applicants based on income level without considering actual ability to pay rent.

Evidence available to prove that Brown's pervasive practice violates § 530:

- Copy of Brown's standard rental application form.
- Testimony of Brown's rental agent that the standard rental application form is used for all prospective tenants in Brown's five high-rise complexes in Avon.
- Copy of Brown's rental agent manual, which states that "rental agents must screen each prospective tenant for compliance with minimum income requirements using payroll statements only. . . ."

The Legal Aid Society
Briggs Neighborhood Office
Civil Division
Avon, Franklin 33210

To: File
From: Virginia Eilson, Intake Officer
Date: July 26, 2004
Re: Intake Notes: *Graham Realty, Inc. v. Brenda Chapin*

I interviewed Brenda Chapin, who has retained us to represent her in the summary eviction proceeding that is pending against her, *Graham Realty, Inc. v. Brenda Chapin.*

Client resides at Graham Towers, on the seventh floor in apartment 7B. Graham Towers is owned by Graham Realty, Inc. (GRI). When client moved into the apartment a year ago, some repairs were needed. She doesn't want to move if the apartment is repaired. "The housing market is so tight that I don't think I can find anything that would be better than this place at the price, but I want it to be fixed up." Client says her block is becoming "fancier." Herb London, GRI's building manager, told Ms. Albert, the owner of the grocery store at the corner and a friend of Ms. Chapin, that GRI wants to cash in on these apartments.

Client has about two years left on a 3-year lease at $1,000 per month. Utilities are not included in the rent. Graham Towers is a large and very old apartment building in the Briggs section of Avon. The apartment consists of two bedrooms, a living room, bathroom, and kitchen.

Client lives in the apartment with her two daughters, Harriett, age 3, and Mary, age 14. Her husband passed away two years ago. She was initially shown the apartment by Herb London. At that time, she noticed some of the repairs that were needed. Mr. London assured her that the repairs would be made, and she signed the lease. She paid rent for five months, but repairs weren't made and things got worse. Beginning in January 2004, client stopped paying her rent to try and force the owner to make the needed repairs.

Now GRI is suing to evict her and to collect the $7,000 in back rent.

Client complains that the bathroom ceiling leaks. A few chunks of plaster have fallen, injuring her daughter Mary; see copy of letter in file. Client wants to be reimbursed for daughter's medical bills as well as her (client's) lost wages. The ceiling looks like it is about to fall. One wall in

the bathroom is discolored by a smelly, slimy green fungus that is spreading. She says the smell is overpowering.

Herb London promised to repair numerous cracks and holes in walls in the apartment and to paint. Nothing has been done to date. More plaster is falling from ceilings and walls. The entire apartment needs painting and plastering. "Why should I have to keep my promise to pay rent if he didn't keep his promise to fix the place?"

Heat and hot water sometimes don't work. Client has had to use her electric stove to heat apartment sometimes and has had to buy and use electric space heater. She has had to heat water on the stove to use for washing dishes and bathing. The space heater cost $79. Her electric bills have skyrocketed because of her additional use of the heater and the stove.

Client is very angry about rats. There are rat holes in the bedrooms and kitchen. She regularly sets traps and has killed four rats. GRI's building superintendent (Victor) came up and killed a rat once. She has had to throw away food in boxes (cereal, rice, etc.) after rats got into them. Rat droppings are everywhere, but there is no extermination service. Her daughters complain that they are afraid that the rats will come out as soon as the lights are turned off at night. She wants GRI punished for ignoring her situation.

In addition, the elevator has been unreliable, sometimes out of service for three to four days at a time. All of her neighbors get angry when elevator is broken.

Client says she has constantly complained. Speaks to Victor often and has called London many times. She doesn't usually get through but leaves messages on London's answering machine and with secretary. Sent a letter to Herb London listing complaints; see copy of letter in file. She has taken pictures of some of the conditions (will bring them in if we need them) and reported her problems to the Avon Department of Buildings. Inspector came several times and gave her a copy of report. See copy of report in file. During inspections, the hot water was working.

Client believes that the repairs should be made immediately. She is willing to pay some of rent but "not much" from time she moved in until the repairs are completed. "Why should I pay good money for an apartment that is in bad condition and not worth nearly what GRI is charging? Some of my neighbors have moved out. Mr. London isn't renting those vacant units. Victor told me he's holding on to them, waiting for the rest of us to give up and leave in disgust. I really don't want to be forced out, but I refuse to pay $1,000 a month to live in a dump."

804 7th Avenue, Apt. 7B,
Avon, Franklin 33210
May 21, 2004
Re: Problems in Graham Towers Apt. 7B

Mr. Herb London
Graham Realty, Inc.
222 French St.
Avon, Franklin 33210

Dear Mr. London,

Over the past months, I have repeatedly called your office in an effort to get you to make repairs in my apartment. Usually when I call and give your secretary my name, I am told that you are not in. Other times I have left a message on your answering machine. On the few occasions when you have actually taken my calls, I have explained that there are a number of problems in the apartment. In all, my notes indicate that I have called eight times to complain.

In addition to my phone calls to you, I have spoken with Victor, the building superintendent, on many occasions about the problems in my apartment. I have even shown him the conditions that need to be fixed. Each time we talk, he tells me that he needs your permission before he can do anything. In spite of all my attempts, no repairs have been made in my apartment.

I am now upset about three particularly disturbing developments. First, two weeks ago, while my 14-year-old daughter, Mary, was using the bathroom, a large chunk of plaster fell from the ceiling, knocking her to the floor and causing a gash in her scalp, which required 10 stitches to close. This was very painful and we are both quite upset. My daughter missed a day of school and I missed a day of work. We also had to pay the hospital, and when I asked you to reimburse me, you refused. All of this could have been prevented if you had fixed the leaks in the ceiling that I have been complaining about for months.

Second, as you well know, we frequently do not have any heat in the building. When this happens, we are forced to make do by operating our electric stove, as well as the space heater we were forced to buy. It still isn't warm enough in the bedrooms. Furthermore, it is not safe to run the stove all night long. While we do not want to do anything that creates a fire hazard, we also do not want to freeze on cold nights.

Finally, late last night, Mary woke me up screaming because she was awakened by a rat that ran across her bed. We have complained about the rats before, but the problem is getting worse. My daughters are afraid to go to sleep for fear that a rat will bite them.

This situation is intolerable. You must do something to repair our apartment immediately, pay my daughter's medical bills, and compensate us for the pain you have caused. Thank you.

Very truly,

Brenda Chapin

City of Avon Department of Buildings, Office of the Building Inspector

Violation Report

Address: **804 7th Avenue, Apt. 7B, Avon, Franklin 33210** Date: July 6, 2004

HPD #	Range	Block	Lot	CD	Census Tract	Stories	A Units	B Units	Owner
3394	**801-807**	**90210**	**2141**	**10**	**21800**	**8**	**100**	**0**	Graham Realty Inc.

There are 5 violations listed below for Apartment 7B. Arranged by category—
A class: 0 B class: 2 C class: 3

Class Definitions

A: "Non-hazardous," such as minor leaks, chipping or peeling paint when no children under the age of six live in the home, or lack of signs designating floor numbers. An owner has 90 days to correct an A violation before fines will be assessed.

B: "Hazardous," such as public doors not self-closing, inadequate lighting in public areas or lack of posted Certificate of Occupancy. An owner has 30 days to correct a B violation before fines will be assessed.

C: "Immediately hazardous," such as inadequate fire exits, the presence of rodents or lead-based paint, or lack of heat, hot water, electricity, or gas. An owner has 24 hours to correct a C violation before fines will be assessed.

Apt.	**Date Reported**	**HazardClass**	**Violation ID #**	**Description**
7B	February 2004	B	270421	repair broken or defective plastered surfaces and paint walls and ceilings in the entire apartment.
7B	February 2004	C	270422	abate the nuisance consisting of rodents in entire apartment.
7B	March 2004	B	321123	abate the nuisance consisting of evidence of a water leak on the bathroom ceiling.
7B	March 2004	C	321124	abate the nuisance consisting of mold-like substance existing along the south wall of the bathroom from ceiling to floor.
All	April 2004	C	398927	restore elevator service.

Avon Gazette

Section C: **Real Estate July 20, 2004**

Uptown Boomtown

By Emily Saylor

Marianne Conrad moved to Graham Towers fourteen years ago, when more than half the apartments were vacant and neighborhood drug dealers preyed on residents. Now the courtyard mailboxes carry the names of lawyers and doctors alongside those of pensioners, and rumors of co-op conversion swirl.

"A year ago, I could have bought a house in the Briggs section of Avon, but not now," Ms. Conrad says. "I can't afford it. And I'm basically middle-class. Unless you're upper management and making close to $300,000, I don't think anyone else can afford it, either. Today, a shell of a building in this area goes for $250,000. And I'm talking about no roof, no windows."

She's determined, however, not to let this boom pass her by completely. "I'm a social character, and I know lots of folks in Briggs, so I hear about things," Ms. Conrad says. "I'm always looking for my little niche, so I went three months ago and got a real estate license. Now if I hear about a house, I need to sell it."

Reaction to these changes is mixed at Graham Towers. Most tenants are pleased to see recent renovations to the building's exterior. However, longtime residents are apprehensive about the gentrification of the towers. According to Ms. Conrad, they are also concerned that "management is trying to force existing tenants out by ignoring necessary repairs so they can bring in well-heeled tenants and charge substantially higher rents."

In 1994, movie producer Dan Jackson used Graham Towers as the all-too-believable setting for a crack factory in "Broken Dreams." Ten years later, a company Jackson co-founded with his sister, Nicki, is just as keenly capturing the moment: Urban Box Office Network is the first major media outlet to move its headquarters to Briggs. Given the trend at Graham Towers and in the neighborhood, it won't be the last.

LIBRARY

Graham Realty, Inc. v.
Brenda Chapin

Franklin Real Property Law

§ 500. Warranty of habitability

1. In every written or oral lease or rental agreement for residential premises, the landlord shall be deemed to warrant that
   (a) the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties; and
   (b) the occupants of such premises shall not be subjected to any conditions that would be dangerous, hazardous, or detrimental to their life, health, or safety.

2. Any agreement by a lessee or tenant of a dwelling waiving or modifying the rights as set forth in this section shall be void as contrary to public policy.

3. In determining the amount of damages sustained by a tenant, the court shall not require expert testimony.

Franklin District Court Act

§ 240. Housing Division of the Franklin District Court

A division of the court shall be devoted to actions and proceedings involving the enforcement of state and local laws for the establishment and maintenance of housing standards.

All summary proceedings to recover possession of residential premises or to remove tenants therefrom and to render judgment for rent due, including those cases in which a tenant alleges a defense relating to a stay of eviction proceedings or any action for rent abatement upon failure to make repairs, shall be brought in the Housing Division of the Franklin District Court.

Regardless of the relief originally sought by a party, the court may employ any remedy, program, procedure, or sanction authorized by law for the enforcement of housing standards that are effective to accomplish compliance or to protect and promote the public interest. This shall include, but not be limited to, the reduction of rent through abatement as well as the imposition of remedial and punitive damages.

Virgil v. Landy

Franklin Court of Appeal (1997)

Defendant appeals from a judgment rendered by the Housing Division of the Franklin District Court. The court ordered defendant landlord to pay plaintiff damages in the amount of $4,945 as reimbursement of all rent paid and additional compensatory damages. The award covered a 14-month period during which plaintiff rented a residential apartment in defendant's apartment building. On appeal, defendant raises two issues: first, whether the court correctly calculated the amount of damages; and second, whether the court's award to plaintiff of the entire amount of rent paid to defendant was proper since plaintiff remained in possession of the apartment for the entire 14-month period.

In October 1995, plaintiff began occupying an apartment in defendant's apartment building. Plaintiff has paid all rent due under her tenancy. Upon moving into the apartment, plaintiff discovered a broken kitchen window. Defendant promised to repair it, but, after waiting a week and fearing that her two-year-old grandchild might cut himself on the shards of glass, plaintiff repaired the window at her own expense. After moving in, plaintiff discovered that the toilet would flush only by dumping pails of water into it. The toilet remained mechanically inoperable throughout the period of plaintiff's tenancy. In addition, the bathroom light and wall outlet were inoperable. Plaintiff also discovered that the water pipes leaked down the walls of her back bedroom. As a result of this leakage, a large section of plaster fell from the back bedroom ceiling onto her bed and her grandson's crib. These conditions were brought to the attention of the defendant, but he never corrected them. Plaintiff moved her and her grandson's bedroom furniture into the living room and ceased using the back bedroom.

The court held that the state of disrepair of plaintiff's apartment, which was known to the defendant, substantially reduced the value of the leasehold from the agreed rental value and constituted a breach of the implied warranty of habitability. The district court based its award of damages on the breach of this warranty and on breach of an express contract. Defendant argues that, because plaintiff never abandoned the demised premises, it was error to award her the full amount of rent paid.

A lease is a contract between the landlord and the tenant wherein the landlord promises to deliver and maintain the demised premises in habitable condition and the tenant promises to pay rent for such habitable premises.

In the rental of any residential dwelling unit an implied warranty exists in the lease, whether oral or written, that the landlord will deliver over and maintain, throughout the

period of the tenancy, premises that are safe, clean, and fit for human habitation. *See* Franklin Real Property Law § 500. The implied warranty of habitability covers all defects in the essential facilities of the residence. This implied warranty of habitability cannot be waived.

A substantial violation of an applicable housing code shall constitute prima facie evidence that there has been a breach of the warranty of habitability. One or two minor violations standing alone that do not affect the health or safety of the tenant shall be considered *de minimis* and not a breach of the warranty.

Regardless of whether there are Housing Code violations, in determining whether there has been a breach of the implied warranty of habitability, courts should inquire whether the claimed defect has an impact on the safety or health of the tenant.

In order to bring a cause of action for breach of the implied warranty of habitability, the tenant must first show that he or she notified the landlord of the deficiency or defect not known to the landlord and allowed a reasonable time for its correction.[1]

The statute, Franklin Real Property Law § 500, and its companion provision, § 240 of Franklin District Court Act, give the court wide latitude in assessing damages. The measure of rent abatement damages shall be the difference between the value of the dwelling as warranted and the value of the dwelling as it exists in its defective condition. In determining the fair rental value of the dwelling as warranted, the court may look to the agreed-upon rent as something the two parties have agreed to as proper for the premises as impliedly warranted. Then the court should consider testimony and other evidence to determine the percentage reduction of habitability or usability by the tenant attributable to the defects.

In determining the percentage reduction of habitability, the trial court should consider the area affected, the amount of time the tenant is exposed to the defect, the degree of discomfort and annoyance the defect imposes, the quality of the defect as health-threatening or just intermittently annoying, and the extent to which such a defect causes the tenant to find the premises uninhabitable. For example, damages are recoverable when the tenant cannot bathe comfortably because there is inadequate hot water, or must worry about insect infestation spreading disease, or must avoid certain rooms if there is inadequate weather protection.

The tenant's damages are calculated by reducing the agreed rent by this percentage reduction of habitability, and multiplying the

1. As we held in *Rosenbaum v. Chavkin* (1990), a tenant may, where there has been a breach of the implied warranty of habitability, withhold the payment of rent. That permits the tenant to shift the burden and expense of bringing suit to the landlord, who can better afford to bring the action, and to then raise the breach of the implied warranty of habitability as a counterclaim.

difference by the number of months of occupancy. The tenant will be liable only for the reasonable rental value, if any, of the property in its imperfect condition during the tenant's period of occupancy.

Damages for discomfort and annoyance are not susceptible to precise calculation. For that reason, the damages awarded for rent abatement, including discomfort and annoyance, may not exceed the total rent otherwise due. Accordingly, because we hold that a 100 percent rent abatement is the maximum that may be awarded to a tenant in an ordinary breach of implied warranty case, we reverse the trial court's decision awarding $1,500 in additional compensatory damages.

Separate damages, however, are available for remedial measures taken by the tenant when the landlord is notified of the defect but fails to remedy it within a reasonable time, and the tenant has incurred out-of-pocket expenses to remedy the defect. In this case, the tenant paid for the repair of a window. Accordingly, the trial court's award of $225 for remedial measures was proper.

Punitive damages may also be awarded in the proper circumstances to punish conduct that is morally culpable. Such an award serves to deter a wrongdoer from repetitions of the same or similar actions. And it tends to encourage prosecution of a claim by a victim who might not otherwise incur the expense or inconvenience of private action.

As we have repeatedly held, when a landlord, after receiving notice of a defect, persistently fails to make repairs that are essential to the health and safety of the tenant, the landlord is morally culpable and an award of punitive damages is proper. *See Main v. Stocker Realty* (Franklin Court of Appeal, 1996). When such behavior points to the bad spirit and wrong intention of the defendant, and would support a finding of willful and wanton or fraudulent conduct, punitive damages may be increased.

The trial court denied an award to plaintiff of punitive damages without explaining why. The record evinces a pattern of intentional conduct on the part of defendant for which the term "slumlord" surely was coined. Defendant's conduct was culpable and demeaning to plaintiff and clearly expressive of a wanton disregard of plaintiff's rights.

The trial court found that defendant was aware of defects in the essential facilities of plaintiff's apartment and promised plaintiff that repairs would be made, but never fulfilled those promises. These findings point to the bad spirit and wrong intention of the defendant, and would support a finding of willful and wanton or fraudulent conduct. We remand to give the trial court the opportunity to reconsider or explain its refusal to award punitive damages.

Affirmed in part, reversed in part, and remanded.

Bashford v. Schwartz

Franklin Court of Appeal (2001)

This appeal is from an order of the Housing Division of the District Court, which denied a motion by petitioner landlord to sever respondent tenant's counterclaims. The issue presented is whether the aggrieved tenant may raise in this summary eviction proceeding a counterclaim seeking damages for the loss of property that allegedly occurred as a result of the landlord's failure to provide adequate security.

The tenant stated that for a number of months she had complained to the landlord that the front door to her apartment was insecure and required replacement. This was never done. She stated that following her complaints an intruder forced open her front door and burglarized her apartment. Respondent asserts that she is entitled to damages for loss of property based on the landlord's failure to replace the front door.

While tenants may, in this nonpayment proceeding, counterclaim for damages sustained by reason of landlord's breach of the implied warranty of habitability as embodied in § 500 of the Franklin Real Property Law, the proper measure of those contract damages is the difference between the fair market value of the premises if they had been as warranted, as measured by the rent reserved under the lease, and the value of the premises during the period of the breach. *See Virgil v. Landy* (Franklin Court of Appeal, 1997).

Where questions of negligence, proximate cause, and damages are contested and require discovery and proof that would delay the summary proceedings, those claims are more appropriately tried outside the limited sphere of the landlord-tenant proceeding. While § 240 contains language giving the Housing Division Court authority to "employ any remedy," the point is that these are *summary* proceedings intended to allow quick and effective resolution of traditional landlord-tenant disputes and enforcement of the Housing Code. The Housing Division of the District Court, according to the legislation that created it, is "devoted to actions and proceedings involving the enforcement of state and local laws for the establishment and maintenance of housing standards." (Franklin District Court Act § 240).

Reversed.

FILE

Wells v. Wells

Broyles and Lemansky

Attorneys at Law

2398 S. 25th Street

Franklin City, Franklin 33173-3209

MEMORANDUM

To: Applicant
From: Pamela Broyles, Senior Partner
Re: *Wells v. Wells*
Date: July 29, 2004

We have just finished the evidentiary hearing in a family court proceeding in which our client, Joan Wells, petitioned the court for permission to remove her minor son, Sammy, from the State of Franklin to the State of Columbia. We ordered an expedited hearing transcript, and it is in the file.

Joan's petition is based on the assertion that she intends to relocate to Columbia to accept a new job. Sammy's father, Fred Wells, opposes the petition.

The judge has given us two days to submit concurrent briefs. This is where I need your help.

Please draft our brief in support of Joan's petition following the instructions in the Firm's memorandum on persuasive briefs. You should use all the relevant evidence as appropriate to support the arguments in the brief. Since we will not have the opportunity to present a rebuttal brief, be sure to anticipate and refute Fred's arguments.

Broyles and Lemansky
Attorneys at Law
2398 S. 25th Street
Franklin City, Franklin 33173-3209

MEMORANDUM September 8, 1999

To: All Lawyers
From: Litigation Supervisor
Subject: Persuasive Briefs

All persuasive briefs shall conform to the following guidelines:

All briefs shall include a Statement of Facts. The aim of the Statement of Facts is to persuade the tribunal that the facts support our client's position. The facts must be stated accurately, although emphasis is not improper. Select carefully the facts that are pertinent to the legal arguments. However, in a brief to a trial court, when the evidentiary hearing has just been completed, the Statement of Facts section of the brief may be abbreviated because it can be assumed that the court has the facts in mind.

The firm follows the practice of breaking the argument into its major components and writing carefully crafted subject headings that illustrate the arguments they cover. Avoid writing briefs that contain only a single broad argument heading. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example, improper: IT IS NOT IN THE CHILD'S BEST INTERESTS TO BE PLACED IN THE MOTHER'S CUSTODY. Proper: EVIDENCE THAT THE MOTHER HAS BEEN CONVICTED OF CHILD ABUSE IS SUFFICIENT TO ESTABLISH THAT IT IS NOT IN THE CHILD'S BEST INTERESTS TO BE PLACED IN THE MOTHER'S CUSTODY.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our client's position. Authority supportive of our client's position should be emphasized, but contrary authority also should generally be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefing.

The lawyer need not prepare a table of contents, a table of cases, a summary of argument, or an index. These will be prepared, when required, after the draft is approved.

1. **TRANSCRIPT OF HEARING**
2. July 28, 2004
3.
4. THE COURT: This matter is here on the petition of Joan Wells for permission to remove
5. the minor child, Sammy, from the state, specifically to Columbia. In 2002, when
6. Joan and Fred Wells were divorced, this court awarded joint custody to the parents
7. and designated Joan Wells primary physical custodian. Because Joan Wells indi-
8. cated her intention to remove Sammy from Franklin and Fred Wells has opposed
9. that move, this court must now decide if the custody arrangement ordered in 2002
10. should be modified. Present are Joan Wells, her attorney, Ms. Broyles, and Fred
11. Wells, and his counsel, Mr. Simpson. We are ready to proceed with evidence. Ms.
12. Broyles, call your first witness.
13. THE PETITIONER, Joan Wells, WAS SWORN AND IDENTIFIED.
14. PAMELA BROYLES: What are you asking the court to do, Ms. Wells?
15. JOAN WELLS: I am asking the court to permit me to take my six-year-old son, Sammy,
16. to Columbia City so that I can take a position as an associate professor of Irish
17. Literature and Studies in the Irish Studies Department at Columbia State
18. University in Columbia City, Columbia, and can better care for Sammy.
19. Q: Why do you wish to relocate?
20. A: I have just completed my doctoral degree in Irish literature. Now I can obtain a
21. position in my field at a higher salary. This will better my life and my ability to
22. provide for Sammy.
23. Q: How will Sammy be cared for if you relocate?
24. A: Sammy will live with me. I have found a home near campus that is a bit larger than
25. our present home. Sammy will attend elementary school at the McAuliff
26. Elementary School, near campus. It is a wonderful school, being staffed with so
27. many graduates of CSU. It has an after-school program for days when I must teach
28. late. The quality of life for children in Columbia City is great—the parks, recre-
29. ational programs, youth center, great cultural opportunities in music and the other
30. arts—Sammy will have a great life.
31. Q: Can you tell us anything else about the educational opportunities for Sammy?
32. A: CSU offers a tuition discount to children of its professors so Sammy will be able
33. to attend college at half the cost of tuition. That will save me and Fred a lot of
34. money.
35. Q: What do you propose regarding Sammy's relationship with his father?
36. A: I want to be sure Sammy stays in touch with his father. I would never come
37. between him and his father. Ever since we separated, I made sure that Sammy has

1. a photo of himself and his father by his bed. Fred can send new photos from time
2. to time. I also have a digital camera and can send Fred photos of Sammy via
3. e-mail. Sammy still likes to be read to. Fred can tape books and Sammy can listen
4. to the tapes before he goes to bed. I will have Sammy send Fred a packet of school
5. papers and art projects every week so Fred can see how Sammy is doing. I know
6. Fred is very interested in Sammy's music and other activities so we can even
7. record events like Sammy's school plays, concerts, and sports activities, and send
8. a videotape to Fred.
9. Q: Anything else regarding Sammy and his father?
10. A: Fred can call him whenever he wants, and when Sammy is older, he can e-mail his
11. father as well. Whenever Sammy wants to call Fred, I will let him, of course. If
12. Fred wants to purchase a computer camera for himself and Sammy, I will see that
13. it gets hooked up at home and Sammy and Fred can see and talk with each other
14. every day.
15. Q: What about visits with his father?
16. A: While Sammy is so young, he can fly with me to Franklin, for a week at
17. Thanksgiving, a week in December, and a week during spring break. I would like
18. Sammy to see my family then too, but he can spend most of the time with Fred.
19. Of course, I will see that Sammy gets to Fred's for several weeks in the summer,
20. preferably two weeks with Fred in June and another two weeks in July. And if Fred
21. wants to go on vacation with Sammy for a week or two, he can do that. When
22. Sammy is older, he can fly to see Fred. Fred is also welcome to come visit in
23. Columbia.
24. Q: Tell the court what brought about this relocation.
25. A: Well, teaching at the university level in Irish studies has always been my dream.
26. When Fred and I had just started dating, I told him that my goal was to get a doc-
27. toral degree in Irish literature and teach at the best university possible.
28. Q: Fred has suggested that you are moving to get away from him and his new wife
29. and that you refuse to talk to Kathleen, his new wife. Can you address that?
30. A: I never said that I refused to talk to her. What I said was this: Kathleen and I have
31. a past history. When Fred married her, I suggested that it would be best if Fred and
32. I limited our discussions about Sammy to just ourselves.
33. Q: Are you concerned that Sammy will have trouble adjusting if you move?
34. A: I am concerned that we make the move as easy on Sammy as possible. That is why
35. I want to be settled before the school year starts. But Sammy is a very resilient
36. child. He has just finished kindergarten, so this is an ideal time for the move—
37. before he gets really settled into school.

1. BROYLES: I have nothing further for this witness.
2. THE COURT: Cross-examination, Mr. Simpson?
3. THOMAS SIMPSON: Thank you, Your Honor.
4. Q: Right now, Fred is with Sammy almost 40 percent of the time.
5. A: Yes, it comes to about that.
6. Q: If Sammy goes with you to Columbia, Fred will have less time with Sammy, isn't
7. that right?
8. A: That depends on how frequently Fred comes to Columbia.
9. Q: Isn't it true that Sammy has been very active in the Franklin City Children's Choir
10. here in Franklin City, Franklin?
11. A: Yes.
12. Q: Isn't it true that Fred has been an assistant director for the choir and has been able
13. to encourage Sammy to develop his musical talent?
14. A: Yes. But let's not forget—Sammy is only six years old.
15. Q: Isn't it true that there is no comparable children's choir in Columbia City?
16. A: So far, I have not found one, but I will encourage Sammy's musical talents.
17. Q: Fred cares more about Sammy's musical talent than you do, doesn't he?
18. A: I think it's important to develop all of Sammy's talents.
19. Q: Isn't it true that Fred has been a loving father who has cared for Sammy and been
20. very involved in his life?
21. A: Yes. I have never said that Fred is anything but a caring parent.
22. Q: Fred also goes to teacher's conferences and to doctor's visits, and generally is very
23. involved in all aspects of Sammy's life. Is that right?
24. A: All true.
25. Q: And isn't it true that Fred has participated in every important decision about
26. Sammy's life?
27. A: Yes.
28. Q: Haven't there been times when the two of you have disagreed about Sammy's
29. upbringing?
30. A: Occasionally.
31. Q: On those occasions, haven't the two of you been able to resolve your differences?
32. A: Sure. We've talked about the issues. I respect his opinion. In fact, because he teaches
33. children, I usually go along with him on issues involving Sammy's schooling.
34. SIMPSON: No further questions, Your Honor.
35. COURT: Call the next witness.
36. THE WITNESS, Michael McBryan, WAS SWORN AND IDENTIFIED.
37. BROYLES: How do you know Joan Wells?

1. McBRYAN: I am the department chair for English and Irish Literature at Franklin State
2. University and was the committee chair for Joan's doctoral dissertation. Joan was
3. an excellent student and shows much promise in scholarship and teaching Irish
4. literature.
5. Q: Is it possible that Franklin State University will offer her a position on the faculty?
6. A: No. We have a policy against hiring our own graduates. Even if we did not, the
7. position she has been offered at CSU is a very prestigious one. We cannot meet the
8. salary. Further, they have a whole department devoted to Irish studies so she will
9. have colleagues who will encourage her in ways that we could not. Plus, she will
10. be eligible for raises that will make her more financially secure.
11. BROYLES: I have no more questions for this witness Your Honor.
12. THE COURT: Mr. Simpson, any cross?
13. SIMPSON: Yes, Your Honor. Thank you.
14. SIMPSON: Isn't it true that Joan Wells has tenure at the community college?
15. A: True.
16. Q: Having tenure—in essence, doesn't that mean she is ensured employment at the
17. community college for the rest of her life?
18. A: In general, yes, that is what it means.
19. SIMPSON: That is all I have for this witness, Your Honor.
20. THE COURT: Ms. Broyles, any other witnesses?
21. BROYLES: We call the court's attention to the stipulations previously presented to the
22. court. Sammy's physician reports that Sammy, age six, is healthy and developing
23. normally. His teacher indicates that he did well in school during his kindergarten
24. year and is well prepared to move into first grade. He is progressing well in school
25. and seems emotionally and socially well adjusted. Finally, the parties have stipu-
26. lated that there are four nonstop flights a day between Franklin City, Franklin, and
27. Columbia City, Columbia, and that the airlines offer unaccompanied minor
28. service for children flying without an adult. Petitioner rests.
29. THE COURT: Very well. Mr. Simpson, call your first witness.
30. RESPONDENT, Fred Wells, WAS SWORN AND IDENTIFIED.
31. SIMPSON: Tell the court about your relationship with your son, Sammy.
32. FRED WELLS: Ever since Joan and I separated, I have made sure that Sammy is number
33. one in my life. I talk to him on the phone several times a week. As the court
34. ordered in the decree, Sammy is with me every weekend and one week in the sum-
35. mer, and on half the major holidays. In addition to what the court ordered, at least
36. once during the week, year round, we have dinner together, and he and I go to
37. movies and children's plays at least once a month. He has not yet shown much

1.		interest in sports but if he does, I will be at his games. We play T-ball in the yard
2.		when he is with me.
3.	Q:	What else do you and Sammy do when he is with you?
4.	A:	He and I play card games and board games and play trucks together. Normal
5.		father-son stuff. I put him to bed and work with him on his school projects, and
6.		help him get dressed in the morning, and prepare meals for him. When Joan and I
7.		were married, I was very involved in his day-to-day care. When he is with me on
8.		weekends, I read him several stories every night before he goes to bed.
9.	Q:	How is Sammy involved in the Franklin City Children's Choir?
10.	A:	Sammy is very musically talented. I am a music teacher and I could tell early on
11.		that he was talented. So we enrolled him in the Franklin City Children's Choir. The
12.		director loves Sammy's voice and has already given him several solos. At his age,
13.		they have practices three times a week for six weeks each fall and spring and put
14.		on two major concerts a year. In a few years, he will tour with the choir. The choir
15.		goes all over the United States and to Europe every other year. If he stays in the
16.		choir until he is 18, he will have outstanding experiences and be well prepared for
17.		a college audition, if that is what he wants. There is no children's choir like this in
18.		Columbia City.
19.	Q:	Do you think Sammy has the talent to have a career in music?
20.	A:	It is very, very possible. Talent like his is rare and needs to be cultivated if he is
21.		to have a chance at a career. Joan will not develop it like I would. Taking him to
22.		choir is just too much hassle for her. Plus, I help him with singing practice and can
23.		really be his singing mentor.
24.	Q:	Where are Sammy's grandparents, cousins, and other family located?
25.	A:	My parents live about 80 miles south of Franklin City. Joan's parents are 40 miles
26.		away in the other direction. On Joan's side of the family, Sammy has two cousins
27.		his age and on my side there are also two cousins his age, all in Franklin City. They
28.		are his most frequent playmates. Plus, he has three older cousins and one younger
29.		one, all in the area.
30.	Q:	What concerns do you have if Joan moves away with Sammy?
31.	A:	Sammy had a lot of trouble adjusting after the divorce. He was almost four at the
32.		time. He regressed to baby talk for a while and went through a period of not want-
33.		ing to play with other kids or go to anyone's home. In fact, Joan and I arranged for
34.		the daycare counselor to work with him. He has gotten over all that and seems fine
35.		now. I am afraid he will regress again if he moves. I am concerned that he will lose
36.		me as a father. A child needs a mother and a father. I would never take Sammy
37.		from his mother, but it seems she wants to take him from me. As far as I know,

1. Joan knows no one in Columbia City. Sammy knows no one there—no school
2. pals, no cousins, no playmates. He will be lonely. He could be here with me.
3. Q: You have remarried. How does Sammy relate to Kathleen, your new wife?
4. A: Sammy gets along with my new wife. I was very careful to introduce Kathleen to
5. Sammy early in our relationship to be sure he could get along with her. The only
6. problem since I remarried has been Joan. Joan used to work with Kathleen at the
7. community college, and they did not get along. Joan will not even talk to her. If
8. Kathleen answers the phone when Joan calls for Sammy at my house, Joan imme-
9. diately asks for me and will not even say hello to Kathleen. I am afraid that Joan
10. is moving in order to avoid dealing with Kathleen. Or else she is jealous that I have
11. moved on with my life and she has to make a bigger splash by getting a new job
12. and moving to a new city.
13. Q: If Joan did move away with Sammy, how would you be able to spend time with him?
14. A: There is no way I could see Sammy on a regular basis if he moves to Columbia. I
15. cannot afford to fly out there and the drive is too much for a weekend. It's more
16. than 10 hours one way. Even if I could get there, where would I stay with Sammy?
17. I would have no way to be with him in a home environment. He is too young to
18. fly to Franklin by himself. Joan's proposal means that I will see Sammy about
19. eight weeks a year—eight out of 52! Now, if you add up all the time, he currently
20. spends about 20 weeks a year with me. I am afraid he will forget me. I won't be
21. there for school plays and concerts and his Little League games and whatever else
22. he does. I cannot be a father to him and children need a father.
23. Q: Fred, how will you be able to make decisions about Sammy's education, health,
24. and the like if Joan moves?
25. A: I won't be able to. Because I will be hundreds of miles away, I won't go to school
26. conferences, doctor appointments, etc.
27. Q: Then, how would you have input into these decisions?
28. A: I would have to rely on Joan to fill me in. I would never feel that I had firsthand
29. information or that I was involved in the decisions.
30. SIMPSON: Thank you, Mr. Wells. Your Honor, I have no more questions for this witness.
31. THE COURT: Ms. Broyles, do you wish to cross-examine?
32. BROYLES: Yes. Thank you, Your Honor.
33. BROYLES: Isn't it true that Joan has been a good mother?
34. A: Yes.
35. Q: Isn't it true that the choir was your idea, not Sammy's?
36. A: I believe it was a joint decision—mine, Joan's and Sammy's.
37. Q: Isn't it true that Joan has never gotten in the way of your time with Sammy?

1. A: True.
2. Q: In fact, she has voluntarily agreed that you can spend significantly more time with
3. Sammy than even what the court ordered in the divorce decree, isn't that right?
4. A: Yes. I guess so.
5. Q: You can always telephone or e-mail doctors and teachers to get information about
6. Sammy, can't you?
7. A: Yes.
8. Q: Except for this proposed move, you and Joan have resolved disagreements about
9. Sammy's welfare, haven't you?
10. A: Yes.
11. BROYLES: That is all I have for this witness, Your Honor.
12. THE COURT: Mr. Simpson, call the next witness.
13. THE WITNESS, Maria Niro, WAS SWORN AND IDENTIFIED.
14. SIMPSON: How do you know Sammy Wells?
15. A: I am a counselor at the day care center Sammy attended. At the time of the divorce,
16. his parents asked me to help Sammy through the adjustment period. I am trained
17. to work with children going through losses, like death or divorce. I do play thera-
18. py to help them express their feelings. So I worked with Sammy for about eight
19. weeks.
20. Q: Was Sammy having adjustment problems?
21. A: Yes, the normal ones. Like any child whose parents are divorcing, Sammy direct-
22. ly and indirectly expressed fears about where his bed and his clothes and toys
23. would be, who would feed him and put him to bed and take him to day care.
24. SIMPSON: Thank you, Ms. Niro. I have no more questions, Your Honor.
25. THE COURT: Ms. Broyles?
26. Q: You are not a licensed social worker or counselor, are you?
27. A: No, no, but I have been trained to work with kids experiencing divorce and death.
28. Had I thought Sammy needed professional counseling, I would have told the Wells
29. family to take him to a professional. But all he needed was some help through
30. some difficult months.
31. Q: So, Sammy didn't exhibit an unusual level of stress as a result of his parents'
32. divorce?
33. A: No. It was a relatively mild case, as these matters go.
34. Q: And while you were working with him, Sammy got over these fears?
35. A: Yes. Like most children, he adapted to the new routine.
36. Q: So, he has adjusted well to living separately with his mother and father?
37. A: Yes.

1. Q: And you haven't worked with Sammy in the last year?
2. A: That's right.
3. BROYLES: No further questions, Your Honor.
4. SIMPSON: The respondent rests, Your Honor.
5. THE COURT: All right. We have concluded the evidence. It's clear that, constitu-
6. tionally, the court does not have the authority to prohibit Ms. Wells from moving.
7. The sole issue, therefore, before the court is whether Joan can take Sammy with
8. her. I want to make a decision very soon. I want both counsel to submit a post-trial
9. brief within 48 hours. There will be no rebuttal briefs, so address all the issues in
10. this post-trial brief. We are adjourned.

LIBRARY

Wells v. Wells

FRANKLIN DISSOLUTION OF MARRIAGE ACT

Section 30. Definitions.

For purposes of this article, the following words shall have the following meanings:

(1) JOINT CUSTODY. Joint legal custody and joint physical custody.

(2) JOINT LEGAL CUSTODY. Both parents have equal rights and responsibilities for major decisions concerning the child, including the child's education, health care, and religious training. The court may designate one parent to have sole power to make certain decisions while both parents retain equal rights and responsibilities for other decisions.

(3) JOINT PHYSICAL CUSTODY. Physical custody is shared by the parents in a way that assures the child frequent and substantial contact with each parent. Joint physical custody does not necessarily mean physical custody of equal durations of time. The court may designate one parent as the primary physical custodian.

(4) SOLE LEGAL CUSTODY. One parent has sole right and responsibility to make major decisions concerning the child, including the child's education, health care, and religious training.

(5) SOLE PHYSICAL CUSTODY. One parent has sole physical custody and the other parent has rights of visitation except as otherwise provided by the court.

Section 109. Removal of child.

The court may grant leave, before or after judgment, to any party having sole legal custody or sole or primary physical custody of any minor child or children to remove such child or children from Franklin whenever such approval is in the best interests of such child or children.

Section 402. Best interests of child.

The court shall determine custody in accordance with the best interests of the child. The court shall consider all relevant factors including:

(1) the mental and physical health of all individuals involved;

(2) the child's adjustment to the child's home, school, and community;

(3) the interaction and interrelationship of the child with the child's parent or parents, the child's siblings, and any other person who may significantly affect the child's best interests;

(4) the wishes of the child's parent or parents as to the child's custody.

Marshall v. Marshall

Franklin Supreme Court (2001)

Sue Ellen Marshall petitioned the court for leave to remove the parties' son, Michael, from the State of Franklin to the State of Columbia. As a result of their divorce in 1998, Sue Ellen and Forest were awarded joint custody of Michael, then three years old. The court designated Sue Ellen the primary physical custodian.

The record in this case reveals on Sue Ellen's side that Sue Ellen has been offered a job in her field of nursing administration in Phillips, Columbia, at a salary significantly higher than she is currently earning and with greater career potential; and Michael has an asthma condition that will be controlled more effectively in Columbia, although it is being adequately controlled in Franklin City.

The evidence on Forest's side shows that he has been a loving and involved parent; since the divorce, he has taken full advantage of all the time he has physical custody to be with Michael; he telephones Michael twice a week, although Sue Ellen requires advance notice of the calls and limits them to five minutes each; Forest coaches Michael to develop his swimming skills and, although Sue Ellen has lodged objections with Michael's school, Forest has chaperoned school-related field trips; both sets of grandparents, whom Michael visits frequently and who are an important part of Michael's life, live within 20 miles of Franklin City; Sue Ellen has steadfastly refused to allow Forest any flexibility in the physical custody arrangements or the telephone communications. Forest has been actively involved in decisions about Michael's medical care, education, and religious upbringing through direct contact with the pediatrician, teachers, coaches, and ministers.

The only evidence presented by Sue Ellen concerning her plans for visits between Forest and Michael after the move was that Michael would spend three weeks in the summer and one week during winter break with Forest, with flights to be at Forest's expense. She also agreed to permit the twice-weekly telephone calls of five minutes' duration, also at Forest's expense.

The trial court denied the petition because it was not in Michael's best interests to be separated from his father. The appellate court reversed, holding that the trial court had failed to properly apply the judicially created presumption that a parent with sole legal custody or sole or primary physical custody may move the child from Franklin. The appellate court noted that Sue Ellen had provided a valid reason for the move. The appellate court did not address Sue Ellen's motivation or the effects of the move on Michael.

On this appeal, Forest asserts that the appellate court's interpretation of Section 109 of the Franklin Dissolution of Marriage Act

failed to account for the objecting parent's relationship with the child by not requiring findings concerning the effect of Michael's separation from his father in determining the best interests of the child.

In interpreting Section 109 in the context of joint custodial situations, the court must balance the benefits derived from the parent's move, the need for finality in custody decrees, the rights of both custodial parents to make decisions for the child, and the interest of the child in having a loving relationship with both parents, and the rights of both parents.

We interpret Section 109 to require the parent with primary physical custody who wishes to move with the child from this state to present a legitimate reason for the move. Once a legitimate reason has been established, a presumption is created in favor of the parent petitioning to move. The other parent can rebut the presumption by showing that the move is not in good faith or it is not in the best interests of the child. The parent seeking to rebut the presumption has the burden of persuading the court that the move is in bad faith or is not in the best interests of the child. This standard, although fact-based, recognizes the realities of a mobile society, while also seeking to prevent the primary custodial parent from undermining a child's relationship with the other parent.

Improved employment, educational opportunities, or health of the custodial parent, the new spouse, or the child are examples of legitimate reasons for a move. A move designed primarily to interfere with the relationship between the other parent and the child does not constitute a legitimate reason.

Sue Ellen has established a legitimate reason for the move—better employment for herself and improved health for Michael. There is a question, however, as to whether Forest carried his burden of persuading the court that the move is not in the best interests of Michael. Unquestionably, the move will affect the time Forest spends with Michael. The amount of time alone is not sufficient to harm the parent-child relationship, where there is a strong relationship and where the parents take other steps to encourage the relationship.

More troubling was the evidence that in the past Sue Ellen may have sought to interfere with Forest's relationship with Michael through limiting telephone calls and other measures. Based on the record, this court cannot determine whether Forest demonstrated that the move is not in the best interests of Michael. Because we cannot determine whether the trial court understood the proper test or whether the court properly considered the factors concerning best interests, we must remand to the trial court to determine whether Forest has rebutted the presumption and carried his burden of persuasion.

Feldman v. Feldman

Franklin Court of Appeal (2002)

Howard and Ruth Feldman were granted joint custody of their daughters at the time of their divorce in 1998. Ruth, who is the primary physical custodian, now petitions for removal of the daughters from Franklin to Columbia.

The daughters lived with Howard between August of 2000 and December of 2001, while Ruth completed a master's degree in speech therapy, and thereafter, lived primarily with Ruth.

Ruth's new husband has recently been promoted and transferred by his company to Columbia. The daughters, who are now 13 and 15, are in good health, do well in school, and are active in tennis. Ruth has testified that the school district in Columbia has an active tennis team as well as a solid academic program.

Howard opposes the move because of its effect on his relationship with the girls. At a minimum, Howard sees the girls every weekend and has dinner with them once during the week. He regularly attends parent-teacher conferences and the girls' sports competitions, even when their mother does not. Because of the distance, if the girls move, the girls will not see their father on a regular basis. Further, Howard cannot afford to fly to Columbia to participate in their activities.

Howard concedes that, until now, he and Ruth have been able to jointly reach decisions about the girls and resolve disagreements about their care. However, he believes that Ruth is moving so far away so that the girls will develop a closer relationship with their new father that will drive a wedge between him and the girls.

Ruth proposes that the girls can fly, at her cost, to Franklin for one three-day weekend each month, September through February. She will bring the girls to Franklin for Thanksgiving, the winter break, and an extended summer break so they can spend time with their father, his family, and Ruth's family who remain in Franklin. Further, the girls have cell phones so that they can call their father regularly. She also suggests that Howard and the girls can e-mail every day to maintain contact. Finally, Ruth will arrange with the schools to send duplicate report cards to Howard.

In *Marshall v. Marshall*, our Supreme Court created a presumption that the primary custodial parent may remove the children from the state provided the parent seeking to relocate shows a legitimate reason for the move. Ruth has shown a legitimate reason for the move—improved employment of a parent or the spouse. Howard attempts to establish bad faith by presenting evidence

that the move is designed to ruin his relationship with his daughters.

Howard relies on the case of *Davis v. Davis*, in which this court prohibited Mr. Davis from removing the children because he himself conceded that his reason for removing the children was to stop the mother's "bad influence." The court determined, however, that the mother was a loving parent whose influence was one of a concerned parent. Additionally, Ms. Davis presented evidence that Mr. Davis had a long history of trying to alienate the children from their mother. No such evidence was presented here, where Ruth has supported a close relationship between the girls and their father. Howard failed in his effort to show bad faith.

Howard's second contention is that the move is not in the best interests of the children. In determining "best interests," the court is guided by the factors listed in Section 402 of the Franklin Dissolution of Marriage Act. Section 402 directs the court to consider the child's health, adjustment to home, school, and community, and the interaction of the child with parents and siblings.

Howard cites the case of *Lewis v. Lewis*, in which this court denied a petition for removal because of the negative effect the move would have on the health and adjustment of the child. The child was developmentally disabled and deaf. Expert testimony established that she needed very specialized care that was available in Franklin but not in Columbia, and that any change in routine, especially a relocation, would set back her progress by a year or more.

Unlike the *Lewis* case, the *Feldman* girls are healthy, well adjusted in their present home, and capable of adjusting to a new environment. They have visited the school they will attend if the move is permitted. Whether they remain in Franklin or move to Columbia, they will have promising careers, educationally and socially.

The children have a strong and healthy relationship with each parent. Both parents have been closely involved in the upbringing of the girls. Certainly, if the move is permitted, it will affect the time the girls spend with their father. The issue, however, is whether the move is in their best interests. It is, of course, in their best interests to have a good relationship with their father, as well as with their mother. While their relationship with Howard will be changed, we do not believe it will be destroyed. Ruth's plans for continuing contact provide Howard meaningful involvement in the children's lives.

Ruth has proposed reasonable means by which the girls can communicate with Howard on a regular, indeed daily, basis. Further, they will see Howard face-to-face at least once every month, during all but spring tennis season.

The trial court's order permitting the removal is affirmed.

POINT SHEET

In re Marian Bonner

In re Marian Bonner

DRAFTERS' POINT SHEET

In this performance test item, the law firm represents Dr. Nicole Hall, the daughter of the deceased Dr. Marian Bonner. During her lifetime, Dr. Bonner achieved great prominence and gained widespread respect as an educational reformer who was instrumental in combating de facto racial discrimination in the public school system in the state of Franklin. Dr. Bonner bequeathed all her property to Dr. Hall.

When Dr. Bonner died, Celina Miller, Dr. Hall's niece, took charge of packing up Dr. Bonner's belongings. Among her personal effects were two packing boxes labeled "papers," which Celina thought contained assorted classroom projects and student papers that Dr. Bonner had saved up over her years of teaching. Celina stored the boxes in a neighbor's garage. Later, when Celina received an inquiry from people she thought were connected with the school where Dr. Bonner taught, Celina allowed the people who had called to take the boxes.

It turns out that the boxes contained a cache of Dr. Bonner's personal writings, including letters, journals, and drafts of speeches and that the people who were allowed to take the boxes were representatives of a for-profit, private corporation called the Success for Every Child Association (SECA), which runs public schools under contract with the State of Franklin. Dr. Hall recently received an alarming letter from the Franklin Library Association telling her that SECA was planning to exploit Dr. Bonner's writings and name for SECA's commercial advantage and expressing concern that the historical significance of Dr. Bonner's work would be lost if SECA were allowed to go forward with its plans.

Dr. Hall seeks the firm's assistance in stopping SECA from using her mother's writings and name. Her rights arise as the successor in interest to Dr. Bonner's copyright in the written materials and the right of publicity in Dr. Bonner's name. Applicants' task is to draft a letter to SECA's attorney demanding that SECA refrain from making any unauthorized use of the materials and Dr. Bonner's name.

The File contains the instructing memo from the supervising partner, a transcript of an interview with Dr. Hall, the letter from the Franklin Library Association, and a biographical sketch of Dr. Bonner. The Library contains excerpts from the copyright statutes and two cases bearing on the subject.

The following discussion covers all of the points the drafters intended to raise in the problem. Applicants need not cover them all to receive passing or even excellent grades. Grading is entirely within the discretion of the graders in the user jurisdictions.

I. Overview: Applicants' work product should be in the form of a letter to William Drake, SECA's attorney, to persuade him that if SECA goes forward with its proposed actions it will infringe upon Dr. Hall's copyright and the right of publicity in Dr. Bonner's name and expose itself to significant damages. As Dr. Hall's attorney also suggests, the letter should point out to SECA that it could avoid a lot of adverse publicity by refraining from the unauthorized use of the writings.

Applicants are told that the letter should set forth Dr. Hall's position fully and should contain the following components:

- A description of the dispute;
- A *brief* statement of the salient facts;
- Arguments that support Dr. Hall's position concerning the copyright infringement and violation of the right of publicity.

They are specifically told not to concern themselves with the question of how SECA acquired the physical materials, who owns them, whether SECA must return them, and Dr. Hall's potential claims for damages and injunctive relief.

II. Description of the Dispute: This part need be only a short statement informing SECA's attorney what the dispute is and why he is receiving the letter. It might reasonably include the following points:

- An introduction of Dr. Hall, i.e.,
  - she is Dr. Bonner's daughter and
  - Dr. Bonner's successor in interest by virtue of having inherited all of Dr. Bonner's property.
- Dr. Hall recently received information to the effect that SECA acquired boxes containing the personal writings of Dr. Bonner and that SECA intends to use the writings and Dr. Bonner's name to advance SECA's commercial interests.
- The purpose of this letter is to try to avoid litigation and the attendant adverse publicity to SECA, to demand that SECA refrain from all such uses, and to explain the consequences of not refraining.

III. Statement of Facts: In this segment, applicants should set forth the basic facts regarding Dr. Hall's interests and the information she has about SECA and its intentions. These facts can be gleaned from the lawyer's interview with Dr. Hall, the letter from the Library Association, and the biographical summary.

- Dr. Hall inherited all of her mother's property.
  - So far as is known, Dr. Bonner owned all of her writings at the time of her death, i.e.,
    - she had not transferred either the physical papers or the copyrights to anyone else.
  - Thus, ownership of the papers and the copyrights passed to Dr. Hall at Dr. Bonner's death.
- As SECA well knows, Dr. Bonner had worked her entire adult life to develop means of achieving racial integration in the Franklin public schools.
  - One of her principal tenets was that a publicly funded, operated, and controlled school system is essential to the achievement of racial justice and democratic participation.
    - Central to her ideas was the notion that the individual needs of each child required attention.
  - Dr. Bonner was universally recognized and respected for her work and her influence in shaping the national policy debate on public education.
- Dr. Hall recently received a letter from the Franklin Library Association informing her that
  - SECA is a private, for-profit corporation in the business of running public schools under contract with the state of Franklin;
  - SECA has acquired Dr. Bonner's papers consisting of some 300 letters, 50 speeches, and 10 volumes of journals, all in Dr. Bonner's handwriting;
  - SECA intends to identify itself with Dr. Bonner's work by:
    - changing its name to the "Marian Bonner Educational Group."
    - publishing a volume containing excerpts of Dr. Bonner's writings under the name REDISCOVERING MARIAN BONNER'S LEGACY and distributing that volume to state legislators to announce SECA's name change;

            - The excerpts will emphasize Dr. Bonner's notion that attention must be given to the needs of each child.
                - Coincidentally, that goal is SECA's corporate "signature focus."
        - selling the writings in separate lots to the highest bidders.

IV. Arguments: Applicants must recognize that there are separate issues relating to copyright and the right of publicity, and discuss them both.

A. Copyright: The object of this part of the letter to Drake is to persuade him that Dr. Hall has protectable copyright interests that SECA will violate if it carries out its plans. This task will require applicants to apply the facts to the four factors set out in § 107 of Title 17 of the United States Code, weigh the factors as indicated in the *Campbell* case, and reach a reasoned conclusion as to why SECA's intended use of the writings is not a "fair use" under the copyright law.

- <u>Dr. Hall has a protectable copyright:</u> The following points should be made on this issue:
- Dr. Bonner's writings qualify under § 102 as the subject matter of copyright because they are
    - original works of authorship and
    - fixed in a tangible medium of expression, i.e., on paper in her handwriting.
    - As such, they can probably be characterized as "literary works" under § 102.
- Ownership of the copyright and the physical papers are distinct property rights.
    - The copyrights, which are separately transferable, were properly transferred to Dr. Hall by Dr. Bonner's will. *See* 17 U.S.C. § 201.
    - Thus, even if SECA has lawful possession of the papers themselves, the copyrights remain Dr. Hall's.
- Accordingly, unless SECA can establish that its intended use of the writings is a "fair use" under § 107, Dr. Hall has the *exclusive* rights under § 106 to
    - reproduce the writings;
    - distribute copies of the writings to the public by sale or other transfer of ownership; and
    - display the writings publicly.

- And, since fair use is an *affirmative defense* to a claim of copyright infringement (*Campbell*), it is clear that it is SECA's burden to prove a fair use.
- Application of the facts to the four factors in § 107 clearly shows that SECA's intended use is not "fair use" and would thus infringe on Dr. Hall's copyright: In this segment, applicants must discuss the four factors and, using the weighing approach the court used in *Campbell*, reach a reasoned conclusion that publishing the excerpts, distributing the volume, and selling off the works would be infringements of Dr. Hall's copyright. The tenor of the letter should be to the effect that, even though it is SECA's burden to establish fair use, Dr. Hall's attorneys will demonstrate that the intended use would not, under any circumstances, constitute fair use.
- **First factor: The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.** There are two concurrent considerations on this point. One is whether the intended use is for commercial gain. The other is whether the work is "transformative."

  Commercial Gain:

  - SECA's intention to publish a volume of excerpts and distribute it to state legislators to announce SECA's name change is not for nonprofit educational purposes.
  - The only reason SECA wants to publish the volume of excerpts is to enhance its image with the state's legislators, who can obviously influence the award of contracts to SECA in its quest to secure a dominant position as a for-profit education provider in Franklin. This is clearly a commercial motive.
  - Likewise, SECA's plan to sell off the works in separate lots to the highest bidders is purely commercial in nature.
  - Although, standing alone, a commercial motive in using the copyrighted work is not determinative, it is "a separate factor that tends to weigh against a finding of fair use." *Campbell*.

  Transformative:

  - The commercial use of a copyrighted work can nevertheless be a fair use if it is "transformative."

        - A transformative use is one which "adds something new, with a further purpose or different character, altering the [original] with new expression, meaning, or message." *Campbell*.
        - Here, assuming that the Library Association's description of what SECA intends to do is correct, there is nothing transformative about the volume SECA intends to publish.
            - SECA intends simply to pull selected excerpts out of Dr. Bonner's writings, print them, and distribute them, presumably without comment, critique, or other editorial embellishment.
                - An applicant might anticipate that SECA could argue that even printing verbatim excerpts and arranging them in such a way as to highlight the author's differing views or internal contradictions could be found to be transformative and receive extra credit for attempting to refute such an argument.
    - Coupling SECA's purely commercial motive with the non-transformative nature of the use, the purpose and character of the proposed use weigh heavily against a finding of fair use.
    - **<u>Second factor</u>: The nature of the copyrighted work.** The inquiry under this factor focuses on a "recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish." *Campbell*. Just as in *Campbell*, there is not much in the File that sheds light on the application of this factor, but there are *some* facts that might be brought to bear.
        - One important fact is that Dr. Bonner's works are currently unpublished. *See Campbell*, citing *Harper & Row* (finding that although not determinative, the fact that a work is unpublished is a factor weighing against a finding of fair use).
        - In the interview, Dr. Hall suggests that Dr. Bonner had intended to write another book, presumably drawing on the matters recorded in her papers.

- The Library Association's letter posits that the papers in SECA's possession are the only source of information that sheds light on Dr. Bonner's thought development and evaluation of her own efforts.
    - If Dr. Bonner in fact intended to write another book about why she "tried all her projects, including the ones that had gone wrong" (*see* the interview transcript in the File), her writings are necessarily at the "core of intended copyright protection," i.e.,
        - the writings would be the source materials for her book, and to allow others to use them would have preempted her next publication.
- Thus, *any* use without the specific authorization of Dr. Bonner, and now Dr. Hall, would cut to the "core of intended copyright protection" and would militate against a finding of fair use.

• <u>**Third factor:**</u> **The amount and substantiality of the portion used in relation to the copyrighted work as a whole.** The focus of this factor is whether the parts of the writings that SECA intends to use are reasonable in relation to the copyrighted work as a whole. *Campbell*. This goes both to the relative amount of the work the user intends to use as well as to the substance of the parts that will be copied. Also, this inquiry is not totally separate from the question of whether the parts to be used are verbatim reproductions or transformative.

- The Library Association letter states that SECA intends to publish a "small volume" of excerpts from Dr. Bonner's writings that stress the need for attending to each child's needs.
- It is clear that SECA intends to merely copy verbatim those excerpts.
- This plan is calculated to create the perception that SECA's corporate focus furthers Dr. Bonner's laudable goals.
- Although these excerpts constitute a relatively small part of the overall volume of Dr. Bonner's writings, it is clear that the excerpts deal with a central part of her pedagogical theories.
    - As pointed out in the letter from the Library Association, those excerpts are the parts that are most likely to be important to scholars and the public.

    - Coupled with the likelihood that SECA's publication will have no transformative character, use of the excerpts will not be reasonable in relation to the copyrighted work as a whole.
- Moreover, SECA also intends to eventually sell off the entirety of the work. This action would constitute a wholesale infringement on Dr. Hall's exclusive right to distribute copies to the public by sale or otherwise. § 106(3). (*See* attorney's comments regarding right of publication in the interview transcript.)
- Given the central, substantial nature of the excerpts SECA intends to use, this third factor also weighs against a finding of fair use.
- **Fourth factor: The effect of the use upon the potential market for or value of the copyrighted work.** The inquiry here is whether SECA's intended use would amount to a market replacement such that it would harm the market for the original work. Again, whether the use is transformative or merely reproductive bears on this factor. *Campbell*.
    - There are two "markets" SECA intends to reach: legislators who can influence state contracting, and wealthy collectors who will pay good money for Dr. Bonner's work.
- Both markets clearly "belong" to Dr. Hall as the successor to her mother's writing.
    - Dr. Hall herself has an interest in "expanding public understanding and academic research." Any desire she might have in implementing her mother's lifelong work would necessarily have to be done through the legislators and the legislative process.
        - SECA's publication would completely preempt the original presentation of Dr. Bonner's ideas to the current legislators.
        - Dr. Hall should be entitled to profit from the sale of the contents of the writings.
        - SECA's plans to sell them would completely preempt that market as well.
- There is another market that would also be destroyed by SECA's sale of the writings—the academic and scholarly market.

        - If the Library Association's letter is correct, SECA's sale of the writings to wealthy collectors in separate lots would put them out of the reach of this market.
        - Thus, it is plain that SECA's intended actions, amounting to mere duplication of part or all of the writings, would effectively replace the writings and their value in the relevant markets.
- Conclusion: Weighing all the factors together, it is abundantly clear that SECA's intended uses of the writings fall far short of fair use and will infringe on Dr. Hall's copyrights.
    - The letter should demand that SECA refrain from all of its intended uses.

B. Right of Publicity: In this part of the letter, applicants must persuade Drake that SECA will violate Dr. Hall's right of publicity if it proceeds with its plan to change its name to the "Marian Bonner Educational Group" and, indeed, may already have violated that right by announcing its intention to do so in a press release and news conference. (*See* Library Association's letter.)

- The right of publicity is defined as "a celebrity's right to the exclusive use of his or her name and likeness." *Martin Luther King, Jr., Center*.
    - That right is recognized in Franklin.
    - The right is violated "by using [the celebrity's name] in connection with a commercial project other than dissemination of news or articles or biographies." *Id*.
    - Likewise, the right of publicity is inheritable and survives the death of the celebrity if the exploitation of the celebrity
        - is unauthorized,
        - is for commercial purposes, and
        - would not serve to reward or encourage effort and creativity that serve some other significant public purpose. *Id*.
- There is no question that Dr. Bonner was a "public figure." (*See* the biographical summary in the File.)
    - She was preeminent in her field, i.e., "The Great Educator" with a national reputation as an educational reformer.
    - Her book was awarded a prestigious prize.

    - She was selected by the *Franklin Daily Times* as Educator of the Year for 15 years.
    - She received the Douglas Foundation's lifetime achievement award.
    - She was a Trustee at the University of Franklin.
    - She has more Franklin public schools named after her than any other individual.
- This celebrity conferred upon Dr. Bonner a right of publicity that descended to Dr. Hall through her mother's will.
    - In Franklin, Dr. Hall is entitled to protect that right against unauthorized commercial use by SECA because
        - her mother's fame arose from purely noncommercial endeavors;
        - SECA's intended use is an attempt at commercial exploitation;
        - SECA's use would not reward Dr. Hall or her mother; in fact, it would deprive Dr. Hall of valuable rights; and
        - the use of Dr. Bonner's name would not serve any significant public purpose other than to advance SECA's own commercial interests.
    - It is immaterial to Dr. Hall's right to enforce the right of publicity that her mother never sought to exploit her own name commercially.
        - Indeed, that is all the more reason to protect the right. *Martin Luther King, Jr., Center*.
- Further, it is likely that by making the announcement in its press release and news conference that it intended to change its name to the Marian Bonner Educational Group, SECA has already violated Dr. Hall's right of publicity for all of the foregoing reasons.
    - Applicants might note that the announcement, having been made in a press release and news conference, might raise a First Amendment issue.
    - As the court notes in *Martin Luther King, Jr., Center*, there may be an exception if the publication and use of Dr. Bonner's name were entitled to First Amendment protection.

    - To make such a case, SECA would have to show that the announcement was for the purpose of disseminating news and not simply designed to advance its own commercial interests.
    - Under the circumstances, it is unlikely that there would be First Amendment protection.
- Conclusion: SECA has already likely violated Dr. Hall's right of publicity and will do so in the future if it carries out its plan to change its name.
    - The letter should demand that SECA refrain from using both Dr. Bonner's name and her writings.
    - It should also urge SECA to cooperate in order to avoid bad publicity. (*See* attorney's comments in interview transcript.)
    - The letter should also set a deadline for a response by SECA in order to avoid further action by Dr. Hall.

POINT SHEET

Graham Realty, Inc. v.
Brenda Chapin

Graham Realty, Inc. v. Brenda Chapin

DRAFTERS' POINT SHEET

The Avon, Franklin, Legal Aid Society represents Brenda Chapin, a tenant in Graham Towers, an apartment building owned by Graham Realty, Inc. ("GRI"). GRI has sued Ms. Chapin in a summary proceeding to evict her and collect the rent she has withheld for the past seven months. The suit is brought in the Housing Division of the Franklin District Court. The procedures are governed by § 240 of the Franklin District Court Act, which is contained in the Library.

Ms. Chapin has two years left to go on her lease and has been withholding her $1,000 monthly rent payments for seven months because of the deplorable condition of her apartment. She has repeatedly given notice to GRI of the very severe defects but GRI has failed to make any repairs.

Section 500 of the Franklin Real Property Law creates an implied warranty of habitability, and one of the cases in the Library, *Virgil v. Landy*, holds that a tenant may defend against eviction by asserting her claims for breach of this implied warranty.

The supervising attorney has asked applicants to draft a case planning memorandum to prepare for the upcoming hearing before the Housing Division Court. The memorandum should, citing the relevant law, identify the elements necessary to prove that GRI breached the implied warranty of habitability and the evidence available to establish those elements. Applicants must also identify the remedies available to Ms. Chapin, the legal bases and elements thereof, and the evidence supporting her right to recover them. Finally, applicants are to identify any relief that Ms. Chapin may be entitled to but that is not attainable in this summary proceeding and explain why.

The format and purpose of a case planning memorandum are explained in the File's Case Planning Memorandum Guidelines. The Guidelines also include an example of an unrelated case planning memorandum for applicants to refer to in drafting theirs. They are specifically told not to include a separate statement of facts and not to concern themselves with issues of admissibility of the evidence.

The following discussion covers the points the drafters intended to raise in the problem. Applicants need not cover them all to receive passing or even excellent grades. Grading is entirely within the discretion of the graders in the user jurisdictions.

I. Breach of the Implied Warranty of Habitability: As a predicate to her defense against GRI's action for eviction and recovery of back rent, Ms. Chapin will have to prove that GRI has breached the implied warranty of habitability.

- The Legal Authority: Section 500 of the Real Property Law and *Virgil v. Landy* are the relevant authorities on this point:
    - Section 500 implies in every lease of residential premises a warranty that
        - the premises are fit for human habitation and the uses reasonably intended, and
        - the occupants will not be subjected to conditions that would be dangerous, hazardous, or detrimental to their life, health, or safety.
    - *Virgil* requires that the tenant notify the landlord of the defects.
- The Elements to Be Proved and the Available Evidence:
    - Element: The claimant is a lessee and a tenant of the apartment.
        - Evidence:
            - Ms. Chapin signed a written lease, which she can presumably produce.
            - She can testify that she and her daughters have occupied the apartment for the past year.
            - The court could presume the existence of a landlord-tenant relationship because Graham must have alleged that relationship in order to maintain its claim for eviction.
    - Element: The premises are not fit for human habitation or the uses reasonably intended by the parties.
        - Evidence:
            - Ms. Chapin and, presumably her older daughter, Mary, can testify that since they moved in, there have been water leaks, falling plaster, a spreading "smelly, slimy green fungus," cracks and holes in the walls, rat infestation, and erratic hot water, heat, and elevator service.
            - She can produce the Violation Report from the City of Avon Department of Buildings.

            - This evidence should satisfy the dictum in *Virgil v. Landy* that, “A substantial violation of an applicable housing code shall constitute prima facie evidence that there has been a breach of the warranty of habitability.”
    - Element: The premises subject the tenant to conditions that are dangerous, hazardous, or detrimental to life, health, and safety.
        - Evidence:
            - The Violation Report shows five violations that have persisted for three to five months (since February 2004) that are classified as “hazardous” and “immediately hazardous.” The rodent infestation, the mold-like substance, and erratic elevator service are classified as “immediately hazardous.”
            - Ms. Chapin and Mary can testify as to these conditions.
            - They can also testify to the lack of hot water, which certainly adversely affects their ability to maintain personal hygiene (not being able to bathe regularly) and health (not having hot water to wash their dishes).
    - Element: The tenant gave notice to the landlord.
        - Evidence:
            - Ms. Chapin can testify that when Herb London, GRI’s building manager, first showed her the apartment, she pointed out certain defects to him.
            - She can testify that she spoke to Mr. London by phone and left numerous messages reporting the defects.
            - She can produce the notes of her attempted telephone contacts referred to in her letter to Mr. London.
            - Presumably, GRI has a copy of the Violation Report.
            - She reported the rats and other defects to Victor, GRI’s building superintendent, who killed a rat in the apartment.
- Thus, there is ample evidence that GRI breached the implied warranty of habitability and that GRI had notice of its breach.

II. Available Remedies: Applicants should glean from § 240 and *Virgil* that Ms. Chapin can obtain the following remedies:

- rent abatement, specified in § 240 and explained in *Virgil*;
- damages for remedial measures (i.e., out-of-pocket losses), also in § 240 and *Virgil*;
- punitive damages, the bases for which are explained in *Virgil*.

III. Rent Abatement:

- The Legal Authority: Section 240 of the District Court Act and *Virgil*:
  - Section 240 provides for rent abatement as a remedy for breach of the warranty of habitability.
  - *Virgil* articulates the measure of and the components for this remedy.
    - The measure of rent abatement damages is "the difference between the value of the dwelling as warranted and the value of the dwelling as it exists in its defective condition."
    - The percent of rent abatement is a matter for the court, and, in figuring the amount, the court considers the following factors:
      - the area affected;
      - the amount of time the occupant has been exposed to the defects;
      - the degree of discomfort the defects impose;
      - the quality of the defects as health-threatening as opposed to merely intermittently annoying;
      - the extent to which the defects cause the tenant to find the premises uninhabitable.
  - *Virgil* holds that the tenant remains liable for only "the reasonable rental value, if any, of the property in its imperfect condition during the tenant's period of occupancy," and that the court may make a reasonable estimate of the percent of rent abatement.
- In further support of the notion that damages need not be precisely ascertainable, § 500 provides that in determining the amount of the tenant's damages, no expert testimony shall be required.

- <u>The Elements to Be Proved and the Available Evidence:</u> To establish her right to recover rent abatement, Ms. Chapin will have to prove the following:
    - <u>Element:</u> The fair rental value of the apartment in its warranted condition.
        - <u>Evidence:</u>
            - The lease document will show the rent at $1,000 per month, which is presumed to be the reasonable value of the apartment in its warranted condition. *See Virgil*.
    - <u>Element:</u> The factors the court will use to estimate the percent rent abatement:
        - <u>Evidence regarding the area affected:</u>
            - Ms. Chapin can testify that the apartment consists of two bedrooms, a living room, bathroom, and kitchen.
            - She can testify that the bathroom has a ceiling leak, falling plaster, and a spreading mold-like substance.
            - She can testify that there are cracks and holes in the walls throughout the apartment.
            - She can testify that the entire apartment needs painting.
            - She can testify that the bedrooms and kitchen have rat holes.
            - She can testify as to the presence of rats and probably produce the corroborating testimony of Victor, GRI's building superintendent, who killed a rat in her apartment.
            - She can produce the photos she has taken of these conditions.
            - She can testify and produce neighbors' testimony as to the erratic elevator service, which would be considered a breach under § 500 because it occurs in the common area of the building.
            - She can produce the Building Department's Violation Report, which shows the areas affected and states that, as to the paint and plaster defects and the rat infestation, it is the "entire apartment."

    - She can testify about the sporadic availability of heat and hot water and presumably produce her electricity bills to corroborate it.
- <u>Evidence regarding amount of time she has been exposed to the conditions:</u>
    - She can testify that she has been exposed to some of the conditions from the first day of occupancy (when Herb London first showed her the apartment and promised to fix the defects).
    - The Violation Report will show how long the violations listed in the report have persisted.
    - She can testify and produce the testimony of neighbors as to the frequency, duration, and total time that the elevator was inoperable and heat and hot water weren't available.
    - She can testify as to how long she has seen signs of rats.
    - Her electricity bills will corroborate the stretches of time during which she has been without hot water and heat.
- <u>Evidence regarding the degree of discomfort:</u>
    - This will be established by the testimony of Ms. Chapin and Mary (e.g., fear of rats, inability to sleep, repeated calls to landlord, call to the inspector, the photos, etc.).
    - Perhaps it can be corroborated by testimony from neighbors.
    - Ms. Chapin's letter to Herb London corroborates the discomfort endured ("It isn't warm enough in the bedrooms").
    - Her testimony and that of the neighbors about the erratic elevator service is evidence of extreme discomfort, given that the apartment is on the 7th floor.
- <u>Evidence regarding the quality of the defects as health-threatening versus merely annoying:</u>
    - The Violation Report is evidence that all of the violations for which GRI was cited fall into the "hazardous" and "immediately hazardous" categories.

        - Ms. Chapin's testimony about the rats and their droppings will show a health-threatening condition.
        - Her testimony and corroborating evidence about the lack of hot water and heat will show the same.
        - Her testimony about the "smelly, slimy green fungus" will show a health threat.
        - Likewise, her testimony about the erratic elevator service will establish evidence of a health threat, given that is it a 7th floor apartment.
    - <u>Evidence regarding the extent to which Ms. Chapin found the premises uninhabitable:</u>
        - This is fairly subjective and can be established from the testimony of Ms. Chapin and her daughter.
        - Testimony about having to heat water for bathing and doing dishes and keeping the kitchen stove lit and buying an electric heater to provide heat will show the extremes to which she had to go to make it barely liveable.
- Although applicants are not asked to argue what *amount* the rent abatement should be, it would not be out of order for them to argue that, as in *Virgil*, the circumstances here justify the court abating the entire amount, especially in light of GRI's reprehensible lack of responsiveness to the conditions.
    - The recommendation would include requiring GRI to refund $5,000 for the five months Ms. Chapin paid and denying GRI recovery of the $7,000 she has withheld.
    - This recommendation would be based on the evidence of the serious, pervasive, and hazardous conditions in the apartment.
    - Under § 240, the court has broad powers to fashion the remedies.

IV. Damages for Remedial Measures (Out-of-Pocket):

- <u>The Legal Authority:</u> Section 240 and the *Virgil* holding that damages for remedial measures are recoverable "when the landlord is notified of the defect but fails to remedy it within a reasonable time."

    - The items at issue here are the space heater and the exorbitant electric bills.
    - Applicants may try to include Mary's hospital bills and Ms. Chapin's loss of a day's pay. However, the *Bashford v. Schwartz* case should provide a strong enough hint that these expenses are not recoverable in a summary proceeding.
- <u>The Elements to Be Proved and the Available Evidence:</u> To establish her right to recover out-of-pocket losses, Ms. Chapin will have to prove the following:
    - <u>Element:</u> The tenant notified the landlord of the defects.
        - <u>Evidence:</u>
            - Ms. Chapin can testify that she repeatedly called and left messages for Herb London regarding the various defects, including the lack of heat in the apartment.
            - She can produce the letter she wrote to Mr. London, which mentions specifically that, as a result of his failure to restore heat in the building, she had to buy a space heater.
            - Notice to London/GRI as to the lack of hot water (which is partly the reason why her electric bills ran up) may be problematic because there is no mention of it in her letter or in the Violation Report. Presumably, however, she can testify that she told GRI about it in one or more of her many telephone messages to Mr. London and her discussions with Victor.
            - Since the court has "wide latitude in assessing damages" under *Virgil*, it may be enough for her to show that her skyrocketing electric bills attributable to the space heater, of which she *did* give notice, are sufficient to encompass the bulk of the amount.
    - <u>Element:</u> The landlord failed to remedy the defects in a reasonable time.
        - <u>Evidence:</u>
            - Ms. Chapin can testify that, notwithstanding notice and repeated requests, the defects have *never* been remedied.
            - The Violation Report.

- Element: The tenant incurred out-of-pocket expenses specifically in order to remedy the defects she had reported to the landlord.
    - Evidence:
        - She can testify that she had to buy a space heater because there were extended periods when the building had no heat.
        - Presumably she can produce the heater and its receipt.
        - She can testify that she had to use electricity to heat water for bathing and doing dishes when there was no hot water.
        - She can presumably produce her skyrocketing electric bills to contrast what she normally would have used with what she had to use under the conditions caused by the lack of heat and hot water.
        - Ms. Chapin might also be able to recover the cost of the food she had to throw away because of the rat droppings; the evidence would consist of her testimony, and, perhaps the testimony of Victor, the building superintendent.

V. Punitive Damages:

- The Legal Authority: Section 240 specifically authorizes an award of punitive damages and *Virgil* articulates the requisite bases.
    - *Virgil* states that punitive damages are appropriate "when a landlord, after receiving notice of a defect, persistently fails to make repairs that are essential to the health and safety of the tenant."
        - There must be "willful and wanton or fraudulent conduct."
- The Elements to Be Proved and Available Evidence: To establish her right to recover punitive damages, Ms. Chapin will have to prove the following.
    - Element: The landlord received notice of the defects that are detrimental to the tenant's health and safety.
        - Evidence:
            - See above discussion under "Remedial Measures" regarding the notice issue as to the lack of hot water and heat, which are health and safety issues.

        - Ms. Chapin can testify about having given oral notice to Victor, GRI's building superintendent, regarding the rat infestation.
        - She can also produce the letter and the Violation Report to establish notice of the rat infestation.
            - According to the Violation Report, GRI had 24 hours in which to abate this "immediately hazardous" violation and did not do so.
        - She can testify about the lapses in elevator service and produce the Violation Report to show the same thing.
            - Again, this is classified as an "immediately hazardous" violation, which GRI had 24 hours to correct but did not do so.
        - With respect to the mold-like substance, the broken plaster, and need for paint, she can testify and produce the Violation Report, which classifies these defects as "hazardous."
            - The Violation Report gives GRI 30 days to correct these defects, and the Report is only 21 days old. Thus, GRI still has a few days.
            - However, Ms. Chapin can probably testify that she gave notice more than 30 days ago (her letter of complaint to Herb London is dated 60 days ago).
- <u>Element:</u> The landlord failed to repair these defects affecting health and safety.
    - <u>Evidence:</u>
        - Again, Ms. Chapin can testify that, notwithstanding notice and repeated requests, the defects have never been remedied.
- <u>Element:</u> The landlord's conduct was willful and wanton or fraudulent.
    - <u>Evidence:</u>
        - Ms. Chapin can testify as evidence of fraudulent conduct that when Herb London first showed her the apartment, she

pointed out several defects and he "assured" her that the repairs would be made.

    - She signed the lease in reliance on those assurances, and it now appears that London/GRI never intended to make the repairs.

- Ms. Chapin's testimony, her notes, her letter, and the Violation Report show frequent and repeated complaints, which GRI has ignored for a whole year. Since there is no doubt that GRI had ample notice of the serious and pervasive defects, its failure/refusal to act is willful and wanton as applied by the court in *Virgil*.
- Further evidence of a "bad spirit and wrong intention" (*See Virgil*) is found in the *Avon Gazette* article in the File. The irresistible inference is that GRI's *real* intention is to make living in Graham Towers so intolerable that the tenants will move out so that GRI can take advantage of the neighborhood's gentrification.
    - GRI's studied indifference to the defects in Graham Towers, coupled with evidence of gentrification, will be clear and convincing evidence of willful and wanton conduct supporting an award of punitive damages.

VI. Remedy Not Obtainable in This Summary Proceeding:

- Ms. Chapin has said she wants to be reimbursed for her daughter's medical costs as a result of the wound caused by the falling plaster and for one day's lost wages.
- Applicants should draw on *Bashford v. Schwartz* for the proposition that "Where questions of negligence, proximate cause, and damages are contested and often require discovery and proof that would delay the summary proceedings, those claims are more appropriately tried outside the limited sphere of the landlord-tenant proceeding," which is "intended to allow quick and effective resolution of traditional landlord-tenant disputes."

- These damages are beyond “remedial measures,” for which recovery is allowed.
- GRI probably would contest these claims, and the delays suggested by the *Bashford* court would occur.
- Accordingly, Ms. Chapin will probably not be able to recover these damages as part of her counterclaims in this case.

POINT SHEET

Wells v. Wells

Wells v. Wells

DRAFTERS' POINT SHEET

In this performance test item, applicants are asked by the senior partner who represents Joan Wells to prepare a brief in support of Joan Wells' petition to remove her child from the state in order to take new employment in a neighboring state. Under the Franklin Dissolution of Marriage Act Section 109, Joan is required to submit the petition to the court because she has joint custody of the child with Fred Wells.

When Joan and Fred Wells were divorced in 2002, they were granted joint custody of their son, Sammy. Joint custody is defined as joint legal custody and joint physical custody. In Franklin, joint physical custody does not mean equal durations of time with each parent. Now Joan has the opportunity for a new position in her field, requiring her to relocate from Franklin to Columbia.

Joan wishes to move in order to accept a position as an associate professor of Irish Literature and Studies at Columbia State University in Columbia City, Columbia. She wishes to take Sammy with her. In anticipation of the move, Joan has arranged for Sammy's care and upbringing and for various means of maintaining a relationship with his father, Fred. Fred opposes the petition to remove the child from the state on several grounds. He argues that Sammy's development in general and especially in music will be adversely affected. Fred also claims that it will be hard for him to carry out his responsibilities as a legal custodian if Sammy is separated from him. He believes that the move is motivated by a desire to separate him from his son or by Joan's jealousy toward his new wife.

Both parties presented testimony to the court during a hearing and the senior partner ordered an expedited transcript of the testimony. At the conclusion of the testimony, the court ordered the parties to file concurrent briefs, with no rebuttal. The task for applicants is to prepare the persuasive brief that Joan will file.

The File contains the instructing memorandum from the senior partner, an office memorandum regarding persuasive briefs, and the transcript of the hearing, which includes the stipulations entered by the parties. The Library contains excerpts from the Franklin Dissolution of Marriage Act, a Franklin Supreme Court opinion, and a Franklin Court of Appeal opinion. The File does not contain evidence concerning the effect of separation of a six-year-old from his

father. Nor does the Library contain any law that makes the child's wishes a factor to be considered. Applicants who discuss those issues are acting outside the materials given.

The following discussion covers all of the points the drafters intended to raise in the problem. Applicants need not cover them all to receive passing or even excellent grades. Grading is entirely within the discretion of the graders in the user jurisdictions.

I. Overview: The office memorandum regarding persuasive briefs gives applicants the template for writing their answers in the form of a brief. Thus, it is expected that the work product will resemble a brief such as a lawyer would file with a court. Graders will have to decide how to weight the subjective components of "persuasiveness."

- There should be a statement of facts that explains the nature and essential features of the case, although, as the office memo explains, it should be abbreviated.
- The argument section should be broken down into carefully crafted headings that summarize the ensuing arguments. The arguments themselves should weave the law and the facts together into persuasive (as opposed to objective) statements of the case for the client.

Applicants are told that both sides are to file the briefs within 48 hours and that there will be no rebuttal briefs; therefore, applicants should anticipate the arguments of the opposite side and address them here.

II. Statement of Facts: This should include a brief recitation of the operative facts. Inasmuch as the trial judge already knows the facts, applicants should include only the key facts in the Statement of Facts and expand on them when they incorporate them into the legal argument part of the brief, but the Statement of Facts should at least describe the essence of the dispute.

- Essentially, applicants should explain that:
    - Joan and Fred Wells were divorced in 2002, and they were awarded joint custody of Sammy, now 6. Joan has primary physical custody of Sammy.
    - Joan Wells has completed her doctoral studies and has been offered a position as an associate professor in Irish Literature and Studies, her chosen field, at Columbia State University in Columbia City, Columbia.
    - She wishes to move to Columbia and take Sammy to live with her in Columbia.
    - Fred Wells, Sammy's father, opposes the move.

III. Argument: The argument section should reflect the steps in the legal analysis. Applicants should argue that the Franklin Supreme Court has interpreted Section 109 of the

Franklin Dissolution of Marriage Act to require that the parent who has sole or primary physical custody and who seeks to remove the child from the state establish a legitimate reason for the move. *Marshall v. Marshall*. Once that parent has done so, there is a presumption that the parent may remove the child. The presumption may be rebutted by evidence from the objecting parent that the move is not being made in good faith or that it is not in the best interests of the child. *Marshall v. Marshall*.

The following headings are suggestions only and should not be taken by the graders to be the only acceptable ones.

- Moving to Take a Position as an Associate Professor, Which Will Improve Her Employment Opportunities and Her Financial Security, Constitutes a Legitimate Reason for the Move and Entitles Joan Wells to a Presumption That the Petition Should Be Granted.

The first issue is whether Joan Wells has met her burden of offering a legitimate reason for the move. Franklin Dissolution of Marriage Act Section 109; *Marshall v. Marshall*. Legitimate reasons include improvements in the education, employment, or health of the parent or child. *Marshall v. Marshall*. Joan Wells has presented evidence of a legitimate reason for the move:

- The predicate for Joan's entitlement to the judicially created presumption is that she is a parent with "primary physical custody." She meets that requirement. *See* the court's introductory statement in the transcript.
- She has been offered a position as an associate professor in Irish Literature and Studies at Columbia State University, Columbia City, Columbia.
- The position is in her field of study and offers a better career path for her than her present position at the community college, and at Columbia State University, she will have colleagues to encourage her work.
- She is not likely to be hired by the Franklin State University, which has a policy against hiring its own graduates.
- The new position offers a higher salary, the promise of raises, and the potential for reduced tuition for Sammy, her child.

Thus, Joan has met her burden. She is entitled to a presumption in favor of granting her petition. *Marshall v. Marshall*.

Because the court instructed the parties that there will be no rebuttal briefs, applicants must anticipate the arguments that Fred Wells is likely to make and must address them as well.

- Sammy's Ability to Maintain a Father-Son Relationship with Fred Wells and Sammy's Health and Normal Development Rebut Any Speculation About Sammy's Possible Regression, the Lack of Opportunity to Join a Children's Choir, or the Possible Harm to the Father-Son Relationship.

A parent who objects to the petition to remove a child from the state may try to show that it is not in the best interests of the child. *Marshall v. Marshall*. To determine the best interests of the child, the court must consider the factors specified in Section 402 of the Franklin Dissolution of Marriage Act. *Feldman v. Feldman*. These factors include:

- The mental and physical health of all involved;
- The child's adjustment to the child's home, school, and community;
- The interaction and interrelationship of the child with the child's parents, siblings, and any other person who significantly affects the child's best interests; and
- The wishes of the child's parents as to custody.

The applicants should distinguish the *Lewis* case in which the court denied the petition to move where the *Lewis* child was deaf and developmentally disabled and in need of a routine. There, expert testimony supported the belief that the move would cause the *Lewis* child to regress by at least a year. Unlike the *Lewis* child, Sammy is developing normally and has demonstrated his ability to adjust to past changes. There is no expert testimony in this case predicting his likely regression, simply some speculation by a day care center counselor who also allowed that he is as likely to adjust well.

Fred may claim that the move is not in the best interests of Sammy. To prove that the move is not in the best interests of Sammy, Fred may assert:

- At the time of the divorce, Sammy regressed and needed assistance in dealing with the divorce;
- Sammy has no friends or family in Columbia;
- Sammy will not have the unique opportunities for developing his talent that he has with the Franklin City Children's Choir because Columbia does not have a comparable children's choir;
- Joan will not develop the talent as would Fred, who is a music teacher;

- Sammy will see his father only eight weeks a year instead of weekly as at present;
- Unlike the children in *Feldman*, Sammy is young;
- Fred will not be able to participate in Sammy's activities.

Applicants should argue, however, that Joan has effectively rebutted this evidence by showing:

- Sammy did adjust after the divorce with some limited assistance, and the counselor who worked with him at that time, a witness called by Fred, cannot predict that he will regress. The counselor had not worked with Sammy for over a year;
- Sammy is resilient as evidenced by his past ability to adapt, and the move is being made in advance of the start of the school year in order to give him a chance to adjust;
- Sammy is developing normally and is well adjusted and ready to advance in school;
- It is too early to realistically assess Sammy's musical talents but Joan will encourage the development of those talents along with others;
- As described above, Joan has a history of supporting Sammy's relationship with Fred.

Applicants should argue that the evidence taken as a whole fails to show that the move is not in the best interests of the child. In fact, the evidence shows that this move is much like that in the *Feldman* case where the court approved the petition to remove the children.

- <u>Fred Will Be Able to Carry Out His Responsibilities after the Move as a Joint Parent Through Telephone and E-mail Contact with Schools, Doctors, and Others.</u>

Fred may argue that he will be unable to carry out his responsibilities as a parent with joint legal custody (i.e., his decision-making responsibilities and his ability to maintain a loving relationship), if the move is permitted. He may suggest that the move is a ruse to set aside the court's original custody order because it will completely deprive him of joint physical custody. A parent, such as Fred, with joint legal custody has equal rights and responsibilities for major decisions concerning the child, including but not limited to the education of the child, health care, and religious training. See Section 30 of the Franklin Dissolution of Marriage Act. Fred may claim that he cannot effectively participate in decisions about Sammy because:

- He cannot effectively obtain firsthand information about Sammy and will have to rely on Joan for information about Sammy;

- He will not be able to be present for teacher-parent conferences or for doctor visits. However, Joan has countered this evidence by testimony that:
- Fred can obtain this information through telephone or e-mail contact with the teachers and doctors;
- Joan will arrange for Sammy to regularly send packets of his schoolwork to Fred.
- Joan and Fred have a history of discussing issues that arise concerning Sammy and have been able to work out their differences in the past.

Based on this evidence, applicants should persuade the court that Fred will be able to continue to be a joint legal custodian for Sammy, even though his physical custody will be diminished.

- Evidence That Teaching Irish Literature Is a Lifelong Dream and That Joan Will Support the Father-Son Relationship through Telephone, E-mail, and Computer Conferencing as Well as In-Person Visits Rebuts Any Suggestion of Bad Faith.

A parent objecting to the removal of the child from the state may rebut the presumption by showing that the move is in bad faith. A move is in bad faith if it is designed to interfere with the parent-child relationship. *Marshall v. Marshall*; *Davis v. Davis*. Applicants should distinguish *Davis*, in which the father admitted that the reason for the move was to eliminate the "bad influence" of the mother. The court determined that the mother was a loving parent and denied the father's petition.

The facts in this case are much closer to those in *Feldman* where the court permitted the move. In *Feldman*, the mother had encouraged the close relationship between the children and their father and had proposed reasonable means of sustaining it, such as regular in-person visits, regular telephone contact, and daily e-mail communications.

Fred Wells may claim that the move interferes with the parent-child relationship:

- Fred's time with Sammy will be reduced from regular weekly contacts, totaling about 20 weeks a year, to eight weeks per year;
- Sammy will not see relatives on a regular basis;
- Fred will no longer engage in activities on a weekly basis with Sammy.

But time is not the only factor courts use in assessing bad faith. The courts have permitted moves where they affect the time a parent has with the child but where the relationship can be sustained through other means. *Feldman v. Feldman*. Courts are more suspicious of the

moving parent's motive where there has been a history of interference with the relationship between the objecting parent and the child. *Marshall v. Marshall*; *Davis v. Davis*. Unlike the situations in those cases, Joan has been supportive of the father-son relationship and has proposed means of supporting the relationship despite the distance between Fred and Sammy. Applicants should detail what Joan has done and has offered to do in support of the father-son relationship:

- Joan has kept a photo of Sammy and his father in Sammy's room ever since the separation and has not interfered in the time Sammy spends with his father.
- If the move is permitted, Joan has offered that Fred may make tapes of books for Sammy to listen to, Fred may call Sammy whenever he wants, Fred and Sammy can communicate daily by computer conferencing and later, when Sammy is older, by e-mail.
- Joan will have Sammy send his father packets of his schoolwork every week.
- She will also record Sammy's activities and send them to his father.
- She will take Sammy to visit his father in person eight weeks a year and when Sammy is older, he can fly on his own for these visits.

Fred may also claim that the move is in bad faith because it is motivated by Joan's jealousy over Fred's remarriage to someone she dislikes:

- Joan will not talk with Fred's new wife, Kathleen.
- Joan is jealous of Kathleen or of Fred's remarriage or both.

Joan will rebut this evidence by showing that her desire to move to take the position in Irish Studies is part of a lifelong dream expressed long before Fred remarried.

Applicants should argue to the court that the sort of evidence Fred introduced is insufficient to show bad faith and is rebutted by Joan's history of pursuing her career goal.

IV. Conclusion: Applicants should persuade the court that Joan has met her burden by offering a legitimate reason for the move and that therefore she is entitled to a presumption in favor of the petition. While Fred has attempted to rebut that presumption by offering evidence of bad faith and evidence that the move is not in the best interests of Sammy, Joan has effectively rebutted such evidence. In light of the case law in Franklin, Joan is entitled to remove Sammy.

NOTES