

THE MPT

MULTISTATE PERFORMANCE TEST

July 1999 MPTs and Point Sheets

*In re Steven Wallace
Kantor v. Bellows
In re Emily Dunn*



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 1999 in seventeen jurisdictions: Colorado, District of Columbia, Georgia, Hawaii, Illinois, Iowa, Maine, Mississippi, Missouri, Nevada, New Jersey, New Mexico, North Dakota, Oregon, South Dakota, Texas, and West Virginia.

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**.

July 1999 Multistate Performance Tests and Point Sheets

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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 Steven Wallace

Piper, Morales & Singh
Attorneys at Law
One Dalton Place
West Keystone, Franklin 33322

M E M O R A N D U M

To: Applicant
From: Eva Morales
Date: July 27, 1999
Subject: Steven Wallace - Painting Titled "Hare Castle"

Steven Wallace, a long-time friend of mine, recently retired as Chair of the English Department at the University of Franklin to pursue full time what has until now been his avocation as an artist. He came in yesterday to get my advice and brought the documents I've included in the file. On reviewing the file, I can see that there are other facts we need in order to advise him properly.

About a year ago, Steven left one of his paintings, a canvas he had titled "Hare Castle," with Lottie Zelinka, an art dealer friend of his, with the understanding that she would try to sell it for him. Ms. Zelinka is the owner of Artists' Exchange, an art gallery here in West Keystone. Ten days or so ago, Ms. Zelinka returned the painting to Steven. A few days ago, he received a letter from Martin Feldner, a bankruptcy practitioner here in town. Mr. Feldner represents Charles Sims, the court-appointed Trustee in Bankruptcy. The letter advises Steven that Ms. Zelinka has filed for bankruptcy and demands that Steven turn "Hare Castle" over to the Trustee in Bankruptcy. Naturally, Steven is upset by this turn of events and wants to know how to respond.

Please draft for me a two-part memorandum:

First, analyze the legal and factual bases of the trustee's claim that the painting is an asset of the bankruptcy estate under the Bankruptcy Act and the Franklin Commercial Code (FCC).

Second, for each of the four defenses under FCC § 2-326(3), discuss how the facts we already know support the defense, identify additional facts that might be helpful to us, state why they would be helpful, and indicate from what sources we might be able to obtain them.

Notes of July 26, 1999 Meeting with Steven Wallace

- Steven can't believe this letter he got (copy attached) two days ago — a bankruptcy attorney is demanding that Steven turn over one of his best paintings (“Hare Castle”) to a Trustee.
 - A friend of his, Lottie Zelinka, has an art gallery in West Keystone — the gallery is called Artists' Exchange. She operates it as a sole proprietorship.
 - Lottie has a sizeable inventory of paintings and sculptures — Steven thinks (but isn't sure) that most of the art in the gallery is on consignment from artists and that Lottie doesn't really own it. That's how Steven and every other artist he knows deal with the galleries in town — i.e., by consignment. He's pretty sure that's how galleries work everywhere. Maybe Lottie owns some of the art, but, mainly, she shows the art, sells it for the artists, and makes her money on the sales commissions.
 - Steven thinks (but is not sure) Lottie had placed a sign in the window at the front of the gallery that said something like, “All offers will be considered and forwarded to the artists.”
 - About a year ago, Lottie was at Steven's house for dinner with Steven and Ella, his wife. Lottie saw “Hare Castle” (oil on canvas — about 2' x 3') hanging on the dining room wall. She admired it and said she thought she could sell it for “a lot of money,” maybe as much as \$25,000 (some of Steven's recent paintings have been fetching pretty good prices, but he'd never thought about trying to sell “Hare Castle” — it was one of his favorite paintings and had been hanging in his dining room since he finished it a couple of years ago). Lottie told Steven, if he's interested, to bring it to her gallery and she'd put it up for sale.
 - Steven and Ella talked it over and, although they had recently purchased a new rug for their dining room that coordinated with the colors in the painting, \$25,000 sounded like a lot of money, so they decided to see if Lottie was right. Steven took “Hare Castle” to Lottie's gallery, they did some paperwork (copies attached), and Steven left the painting with Lottie. He had put a label (about 2”x 3”) on the back of the painting that said: “Hare Castle — Property of Steven Wallace (+ his address and phone number).”
 - From time to time, Lottie called Steven to tell him about offers for the canvas — three offers all told — the highest one for \$6,000. Steven rejected them — not enough money.

- Maybe 10 days ago, Lottie called Steven at about 10 p.m.— told him she was going to come right over and leave “Hare Castle” at his house — she didn’t think she could sell it and she needed the space in the gallery. He thought it was strange, but he didn’t ask any questions and Lottie didn’t let on that anything was unusual. Now he realizes she tried to do him a favor by returning the painting — apparently, she filed for bankruptcy.
- Steven is now into painting full time — retired from Univ. of Franklin at the end of the last school year. His paintings seem to have caught on, and he’s been selling more and more of them (in fact, he has offered to buy back for \$750 paintings he originally sold for \$500 — says he can probably sell them now for \$2,500).
- He now has a studio in a loft on Parker St. — up until now, he’s been working out of a spare room at home.
- Steven can’t believe he jeopardizes his paintings every time he puts them up for sale in a gallery!

ARTISTS' EXCHANGE
West Keystone's Premier Gallery
9 Wharf Alley
West Keystone, Franklin 33322
(555) 942-5060

Inventory Receipt

Date: August 15, 1998
 Artist: Steven Wallace
 Agent: none
 Address: 749 Galewood Circle
 West Keystone, Franklin 33322
 Phone: (555) 942-3342

Medium	Inventory Number	Size	Title	Artist's Net
Oil/Canvas	C 6076	2' x 3'	Hare Castle	Sale price minus 40% commission to Gallery

General Conditions:

The item(s) of artwork listed above is (are) being placed by the Artist or his/her agent, as consignor, on consignment with Artists' Exchange (Gallery), as consignee, to be sold by Gallery for the account of Artist. Artist retains title to the artwork until sold by Gallery. Gallery makes no representations regarding its ability to sell any or all of said artwork or the sales price thereof. Gallery may return artwork to Artist at any time if not sold. All offers shall be communicated to Artist by Gallery, and Artist shall have the right to accept or reject any offers. Artist shall have the right to determine price of sale, except that if an offer exceeds the appraised value of the artwork plus the amount of Gallery's commission, Artist shall be required to accept the offer. Risk of loss over and above amount of Gallery's liability and hazard insurance shall be borne by Artist. Artist's Net shall be paid to Artist upon payment in full of sale price by buyer.

Lottie Zelinka

Artists' Exchange
 By: Lottie Zelinka

Steven Wallace

Artist or Agent

APPRAISAL OF ARTWORK

Date: August 15, 1998

Title: "Hare Castle"

Artist: Steven Wallace

Medium: Original Oil on Canvas

Value: \$25,000.00

Owner: Steven Wallace

THE ABOVE INFORMATION IS TRUE AND CORRECT
TO THE BEST OF OUR KNOWLEDGE.

Signed: Lottie Zelinka
Lottie Zelinka

Title: Owner
ARTISTS' EXCHANGE

Martin R. Feldner
Attorney at Law
2298 West Arden Boulevard
West Keystone, Franklin 33322
(555) 942-4324

July 23, 1999

Mr. Steven Wallace
749 Galewood Circle
West Keystone, Franklin 33322

Re: In the Matter of Lottie Zelinka dba
Artists' Exchange
Bkpcy No. 980-7 (99)

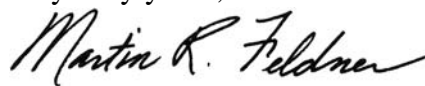
Dear Mr. Wallace:

I represent Charles A. Sims, Trustee in Bankruptcy in the Chapter 7 bankruptcy case of Lottie Zelinka dba Artists' Exchange ("Debtor"). The Debtor filed a petition for bankruptcy under Chapter 11 of the Bankruptcy Act on May 25, 1999. She converted the case to a liquidation under Chapter 7 on July 19, 1999, on which date Mr. Sims was appointed trustee.

The Debtor has recently provided us with an accounting and business records detailing certain actions taken by her after the filing of the petition. According to Ms. Zelinka, she transferred a piece of artwork titled "Hare Castle" to you on July 20, 1999. The transfer was improper under Franklin Commercial Code § 2-326 and § 544 of the Bankruptcy Act.

The Trustee has elected to exercise his power under § 549 of the Bankruptcy Act to avoid improper transfers made during the pendency of a bankruptcy case. Accordingly, demand is hereby made that you forthwith return to the Trustee the artwork titled "Hare Castle" or all proceeds from the sale thereof. If you fail to do so within 15 days of the date of this letter, the Trustee will commence legal action to recover the artwork or the proceeds.

Very truly yours,



Martin R. Feldner

LIBRARY

In re Steven Wallace

Walker On Bankruptcy (3d. Ed. 1995)
A Short Course for the Non-Bankruptcy Lawyer

§ 4 - Definitions:

* * *

§ 4.07 - Chapter 11: A petition for a Chapter 11 “reorganization” commences a proceeding in which the insolvent debtor continues to operate as an ongoing business with certain restrictions. The business operates by the direction of the Bankruptcy Court under the management either of a court-appointed trustee or the debtor (debtor-in-possession). The Bankruptcy Act provides for an automatic stay of legal and self-help proceedings against the debtor pending the preparation and execution of a “plan of arrangement” pursuant to which the debtor “works out” its obligations to its creditors over an extended period of time.

§ 4.08 - Chapter 7: Often, Chapter 11 proceedings that fail are converted to Chapter 7 cases. A petition for bankruptcy under Chapter 7 commences a proceeding for liquidation of the debtor’s assets for the benefit of its creditors. A court-appointed trustee takes possession of the business, including all items in inventory, which thereafter come under the exclusive control of the trustee. The trustee is vested with all the rights possessed by the creditors of the bankrupt debtor prior to the filing of the petition. The trustee’s principal function is to marshal and, subject to the rights of secured creditors, sell the assets and distribute the proceeds proportionately to the creditors in accordance with their interests. Under § 549 of the Bankruptcy Act, “the trustee may avoid a transfer of property of the estate . . . that occurs after commencement of the case. . . .”

* * *

§ 4.27 - Schedules of Assets, Debts, and Creditors: It is incumbent on the debtor in any bankruptcy proceeding to file with the court schedules of its assets, debts and creditors. All property, including goods delivered on consignment and accounts receivable, in which the debtor has any interest must be described and its location shown on the schedule of assets. Likewise, the amount of each debt and the name and address of the creditor to whom each debt is owed are required to be listed on the schedules of debts and creditors, with designations in each case as to whether the particular creditor is secured or unsecured. The schedules of secured creditors must describe with particularity the property of the debtor in which the creditor has a security interest.

Franklin Commercial Code

* * *

§ 2-326. Sale on Approval and Sale or Return; Consignment Sales and Rights of Creditors.

(1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is

- (a) a “sale on approval” if the goods are delivered primarily for use, and
- (b) a “sale or return” if the goods are delivered primarily for resale.

(2) Except as provided in subsection (3), goods held on approval are not subject to claims of the buyer’s creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer’s possession.

(3) Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making the delivery, then, with respect to claims of creditors of the person conducting the business, the goods are deemed to be on sale or return. The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as “on consignment” or “on memorandum.” However, this subsection is not applicable if the person making the delivery

- (a) complies with an applicable law providing for a consignor’s interest or the like to be evidenced by a sign, or
- (b) establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling goods of others, or
- (c) complies with the filing of provisions of the Article on Secured Transactions (Article 9), or
- (d) delivers goods which the person making delivery used or bought for personal, family, or household purposes.

* * *

Franklin Civil Code

§ 3533 - Sign Law.

If a person transacts business and identifies his place of business by a sign and fails by another sign or signs in letters easy to read and posted conspicuously in his place of business to state that he is dealing in property in which others have an interest and identifying such property, then all the property, stock of goods, money, and choses in action used or acquired in such business shall, as to the creditors of such person, be liable for his debts and be in all respects treated in favor of his creditors as his property unless the provisions of Franklin Commercial Code § 2-326(3)(b) through (d) are applicable.

First National Bank v. Marigold Farms, Inc.
Franklin Court of Appeal (1997)

In this case, we determine the priority of the claims of First National Bank (the Bank) and Marigold Farms, Inc. (Marigold) to \$139,000 in a bank account (the Fund) of Pacific Wholesalers (Pacific). The trial court held that the Bank was entitled to the Fund. Marigold appeals.

The Bank had loaned \$600,000 to Pacific and Pacific, in turn, had executed a security agreement granting the Bank a security interest in certain assets of Pacific. The Bank had perfected its security interest by filing a financing statement with the Secretary of State. Pacific defaulted on the loan and the Bank sued. Pacific and the Bank negotiated a settlement pursuant to which cash received by Pacific in the conduct of its business would be delivered to the Bank and applied to the balance of the loan. Marigold asserted claims to the same cash and also asserted that its claims had priority over any claim of the Bank. The court approved the settlement subject to resolution of the competing claims of Marigold and the Bank and ordered \$139,000 of Pacific's cash receipts held in a "blocked" account (i.e., the Fund).

The facts of the relationship between Marigold and Pacific are undisputed. Marigold was a grower of flowers. Pacific was a flower wholesaler. They had a long-standing relationship under which Marigold would deliver flowers to Pacific and obtain a delivery receipt. Pacific would mark the flowers with Marigold's name, package

them, and attempt to sell them to retail florists at prices determined by Pacific. If the flowers were sold and Pacific received payment, Pacific would remit to Marigold 75% of the sale price, retaining 25% as its commission. If the flowers were not sold, Pacific would with Marigold's approval discard them, and Marigold would receive nothing for those flowers. It is also undisputed that the Bank had no actual knowledge of the nature of the commercial arrangement between Marigold and Pacific.

The Bank's financing statement and the security agreement between Pacific and the Bank describe the collateral as: "All inventory used in Pacific's business now owned or hereafter acquired; and all accounts and rights to payment of every kind now or hereafter arising in favor of Pacific out of Pacific's business, including all proceeds from the sale of inventory."

Under the Franklin Commercial Code, it is clear that, upon delivery of Marigold's flowers to Pacific, the flowers became part of Pacific's "inventory" because they were held by Pacific for sale. The Fund consists of "proceeds" of this inventory.

Marigold contends that its sale of flowers to Pacific was a "consignment sale," that Pacific never had title to the flowers and that, therefore, Pacific never owned the collateral (inventory) to which the Bank's security interest could attach. Marigold also asserts

that Franklin Commercial Code § 2-326(3) is inapplicable in this case.

A consignment sale is one in which the merchant takes possession of goods and holds them for sale with the obligation to pay the owner of the goods from the proceeds of the sale. If the merchant does not sell the goods, the merchant may return them to the owner (or, as in this case of perishable flowers, discard them) without obligation. In a consignment sale transaction, title to the goods generally remains with the original owner. The arrangement between Marigold and Pacific was a consignment sale arrangement; Marigold was the consignor and Pacific was the consignee. Under FCC § 2-326(3), which clearly governs this transaction, the retention of title by Marigold is irrelevant to the ability of the Bank to obtain a security interest in the collateral.

Marigold does not contend that it complied with the filing requirement under the secured transactions division of the FCC as provided for in § 2-326(3)(c). Nor does Marigold claim that it complied with an applicable “sign law” under § 2-326(3)(a) or that it had delivered goods it had “used or bought for personal, family, or household purposes” as provided for in § 2-326(3)(d).¹ Rather,

¹ The obvious reason for the exception for goods “used or bought for personal, family, or household purposes” is to avoid the situation where one who is not a merchant, and who should not therefore be deemed to know of the intricacies by which merchants protect their interests under the commercial code, unwittingly loses his right to property. If a householder occasionally delivers an

Marigold claims that, as provided for in § 2-326(3)(b), Pacific was generally known by its creditors “to be substantially engaged in selling goods of others.”

At the evidentiary hearing, Bank officials testified unequivocally that the Bank was unaware that Pacific was selling the goods of others. Three flower growers who also consigned flowers to Pacific testified that Pacific was “well-known as a commission selling agent” and that other flower growers knew it as well. Although it is true that consignors, all of whom are necessarily also creditors, might know that Pacific deals in the goods of others, such knowledge cannot be extrapolated into a fact “generally known by its creditors.” The purpose of § 2-326(3) is to protect general creditors of the consignee from claims of consignors who have undisclosed arrangements with the consignee. To impute as a matter of law the self-interested knowledge of the consignors/creditors to the general creditors does not give

item of property to a dealer to see if the dealer can sell it for him, the FCC protects that item from claims of the dealer's creditors. On the other hand, if the deliverer is one who deals in goods of the kind sold by the person to whom he delivers the goods, he should be held to the rules in the FCC that bind merchants. There are hybrid situations such as, for example, where one collects gemstones for his personal use and enjoyment but also regularly places the gems on consignment with jewelers to test the market and sell if the price is right. At some point the casual collector crosses over the line from being the householder, whom the personal goods exception is designed to protect, to being a merchant or dealer, who is bound by the filing or other protective provisions of § 2-326. In this case, Marigold is clearly at the extreme end of the merchant spectrum.

general creditors the opportunity to protect themselves from the undisclosed interests of the consignors.²

A consignor asserting that the consignee is “generally known by his creditors to be substantially engaged in selling the goods of others” must establish such general knowledge by proof other than that a few other consignors know that fact. He must establish that non-consignor creditors possess the requisite knowledge. Marigold failed to meet that burden of proof.

Accordingly, we affirm.

² The result might be different if all or most of Pacific’s creditors were flower consignors but the fact does not appear from the evidence in this case. If all or most of the creditors were consignors, then one might be able to conclude that the creditors did have such “general knowledge.”

In re Levy
Bankruptcy No. 29054
United States District Court, E. D. Pennsylvania (1993)

In December 1992, Bernard Levy, owner of a retail shoe store in Reading, Pennsylvania, filed a voluntary petition in bankruptcy. One of his suppliers, Acme Shoe Co. (Acme), had delivered a stock of shoes to Levy for resale in his store under the terms of a written agreement in which Levy, the bankrupt, acknowledged that the shoes were “on consignment” and could be returned to the consignor at any time.

Acme has filed a reclamation petition to recover the shoes it delivered to the bankrupt. The trustee resists the petition on the ground that the transaction was one of “sale or return,” and, since there had been no compliance with § 2-326(3) of the Pennsylvania Uniform Commercial Code, the stock of shoes while in Levy’s possession was subject to the claims of Levy’s creditors.

Acme concedes that it had not filed any financing statements in the public records offices. Acme did, however, produce evidence that small cards had been placed upon certain sections of shelving in Levy’s store where Acme’s shoes were stored and displayed, identifying the shoes placed on those sections of the shelving as shoes manufactured by Acme.

Under § 2-326 of the UCC, if goods are delivered to a consignor primarily for resale with the understanding that they may be returned by the consignor, the transaction is one of “sale or return” and such goods are subject to the claims of the buyer’s creditors while in the buyer’s possession even though the consignee has retained title. The consignee may avoid the consequences of having the goods subjected to the claims of the

consignor’s creditors by doing one or more of three things: (a) complying with “an applicable law” evidencing a consignor’s interest or the like by a sign to that effect, or (b) establishing that the consignor is generally known by his creditors to be substantially engaged in selling the goods of others, or (c) complying with the provisions for filing financing statements and other notice documents under UCC Article 9 having to do with secured transactions.

There was no filing under Article 9. There was an effort by Acme to protect its goods by posting signs on the sections of shelving where its shoes were kept, but Acme has failed to show that there is in Pennsylvania “an applicable [sign] law” as that term is used in § 2-326(3)(a). The phrase “an applicable law” means a statute, and there is no such statute in Pennsylvania. Absent such a statute or an Article 9 filing, Acme is left with the burden of proving that Levy was generally known by his creditors to be substantially engaged in selling the goods of others.

Acme argues that, although the absence of a sign law might mean that the cards Acme caused to be placed on the shelves did not invoke the “sign law” subsection of § 2-326, the cards nonetheless served to impart knowledge that Levy was selling the goods of others. That argument might have had some merit if Acme could have shown that the cards did in fact impart such knowledge to Levy’s creditors to such an extent that it was “generally known” by the creditors and that the cards also suggested that Levy was “substantially engaged” in selling goods not owned by him. On the record before the

court, however, the most that can be said is that the cards were designed to impart to Levy's *customers*, not his creditors, the knowledge that the shoes were Acme's. Thus, Acme's proof fell short.

Under § 544 of the Bankruptcy Act, the trustee is vested with the rights that the creditors had prior to the filing of the petition in bankruptcy. Section 2-326(2) of the UCC expressly makes goods held on sale or return subject to the claims of the debtor's creditors. That is the situation in this case.

Acme's petition for reclamation is denied.

FILE

Kantor v. Bellows

Crystal, Hughes & Bernstein
Attorneys at Law
47 Bridge Street
Oakton, Franklin 33311

Memorandum

July 27, 1999

To: Applicant
From: Pat Moore
Re: Linda Kantor

Linda Kantor has asked us to represent her in her divorce from her husband, Bill Bellows. The only contested issue is whether the enhanced earning capacity created by Bill's law degree will be treated as property, subject to division between the parties. Franklin has an equitable distribution statute as part of its divorce law, but two divisions of our Court of Appeal are in conflict on the issue of how to treat spousal contributions to professional degrees. The Franklin Supreme Court has not ruled on this issue.

I want to persuade Bill's lawyer, Shawn Martin, that we have a good chance of convincing a court that the enhanced earning capacity created by Bill's law degree and license to practice law is property subject to equitable distribution. As the law now stands in Franklin, there are two conflicting policy views. It won't do us any good to simply distinguish the two cases. Our job is to convince the other side that the Supreme Court will most likely end up adopting the view that favors us.

As the first step in the negotiation process, I want to send a letter to Shawn Martin that:

- argues that Linda is entitled to a share of Bill's enhanced earning capacity;
- addresses counter-arguments that would deny or diminish her share; and
- includes a specific dollar demand that is justified in light of these arguments.

Please draft such a letter for my signature. Be sure to discuss both the legal principles and the facts of our case in making the arguments. Shawn is a thoroughly competent family law practitioner and a straight-shooter. I have no hesitancy in honestly laying out my entire case.

Crystal, Hughes & Bernstein
Attorneys at Law
47 Bridge Street
Oakton, Franklin 33311

Memorandum

June 1, 1999

To: File
From: Pat Moore
Re: Linda Kantor - Interview Notes

Linda Kantor, who is 29, has been married to William Bellows, also 29, for seven years. They have one child, Jason, who is three. They have agreed that they want to be divorced, and Linda believes that they are in agreement as to most issues. The only issue about which there seems to be dispute is how William's law degree will be treated in the divorce.

The parties married soon after they both graduated from the University of Franklin in June 1992. Linda began work as a programmer for Computech, a computer consulting firm specializing in the development of software, and Bill as a legislative aide in the office of Andy Pepper, a state assemblyman from Oakton. Three years later, Bill entered law school at the University of Franklin Law Center, which is in Oakton. Linda was also interested in attending law school, but the parties decided that Bill would attend first, with Linda attending after Bill graduated. They both wanted to have children soon and thought it would be easier to stagger their law school careers. Jason was born just as Bill began law school in the fall of 1995. Linda got a three-month, paid parental leave from Computech, after which she returned to work full time. Linda arranged to share with another couple who have a child Jason's age the cost of hiring a child care worker to care for the two children from 8:30 a.m. to 5:30 p.m. While Bill was in law school, Linda did most of the housework and child care. (She estimates that she did more than 75% of each.) She usually did Jason's morning routine with him, picked him up from the child care worker at 5:30 p.m., gave him dinner and a bath, and played with him in the evening. Bill participated in these activities, but usually in a secondary kind of role. Because of flexible policies at Computech, Linda was able to take time off work when Jason was sick.

Linda has continued at Computech to the present, where she has advanced steadily, gaining an increasingly important role in the development of specialized software programs for small- to medium-sized institutions. The company is committed to personnel development, devoting significant resources to those employees it sees as promising. Although Linda has been identified as one of the “stars,” she has not been able to take full advantage of all the educational opportunities they offer because of her many responsibilities at home. She has been able to attend only one extended, out-of-town workshop in software design each year, but could have gone to as many as three each year at the company’s expense if her circumstances had permitted it. In addition, the company pays for employees to take up to four graduate-level courses in computer science each year at the university, but Linda has been able to take advantage of this opportunity only one semester in which she took one course. Linda has contributed all of her earnings to the family. When she first started at Computech, her salary was \$16,000. She has received steady raises as her responsibilities have increased, and she currently earns \$35,000 per year.

Bill was successful in law school, graduating in June of 1998 *magna cum laude*, with a special award for the high quality of his performance in the clinical program. During the three years Bill was attending law school, Linda contributed her entire pay of \$85,000 to support the family. Bill’s tuition averaged approximately \$12,000 per year; he obtained loans amounting to \$25,000, and his parents gave him another \$10,000. For two of the six semesters, he worked ten hours per week, earning a total of \$3,000 from this employment. Last summer, he took and passed the Franklin bar exam. He obtained a position in the prestigious Honors Program at the Franklin State Attorney General’s Office, which he began in September 1998. In that program, he rotates for a year through the different divisions in the A.G.’s office and at the end of the year can choose a permanent position among any of the positions available, if he wishes. His salary for the first year of the program is \$35,000, but it will go up to \$40,000 the following year if he decides to work there on a permanent basis. Because of his excellent law school record and the prestige of the Honors Program, he would have no trouble getting a job with a major law firm in Oakton, or anywhere else in the state, where a beginning salary could be as high as \$61,000.

Linda and Bill have accumulated almost no assets during their marriage. Before Bill entered law school, they purchased two cars, one in the first year of their marriage and the other in the third year, both of which they continue to drive. They rent the modest two-bedroom house they live in. They accumulated savings of approximately \$3,000 when they were both working, but that

money was spent after Jason was born and Bill began law school. All of their money has gone into paying living expenses, raising a child, and putting Bill through school.

Linda feels very strongly that, as part of the divorce, she should be able to share in the benefits from Bill's law degree. They decided together that he would go to law school first, and she worked very hard for three years to make that possible. Now it's supposed to be her turn. She also is anxious to get on with her own education, although she has decided that she would like to pursue full-time graduate studies in computer science rather than go to law school. Although Computech has been a good place for her, she has become interested in the more theoretical aspects of computer science. After all her sacrifices, Linda feels that she should be able to share in the benefits of Bill's law degree.

Although Linda and Bill have been able on their own to agree that they will share joint legal and physical custody of Jason and that Bill will pay child support, they have not been able to agree on how to treat Bill's law degree. I discussed with Linda litigation of this issue, including the uncertain state of the law. She is not averse to trial on the issue, if necessary, but she would prefer to resolve the matter through negotiation because she would like to avoid the expense of a trial and maintain a cordial relationship with Bill.



Franklin State University
Bentonville, Franklin 33312

Millicent Elstein, Ph.D.
Professor of Economics

July 20, 1999

Patricia Moore
Crystal, Hughes & Bernstein
Attorneys at Law
47 Bridge Street
Oakton, Franklin 33311

Dear Ms. Moore:

Please excuse the delay in responding to your inquiry. As requested, I provide the following summary of my analysis of the value of the law degree held by Bill Bellows.

In arriving at the present value, I began by comparing the projected life earnings of an average college graduate to the projected earnings of two types of lawyers: a lawyer engaged in private practice in a large law firm and a lawyer employed in government service. I used the time between Mr. Bellows' admission to practice and his 65th birthday in making these projections. I then considered the impact of taxes, inflation, and interest rates. From all this, I calculated the present value of these projected earnings.

Based on these calculations, it is my opinion that the present value of Mr. Bellows' law degree is \$520,000 should he choose to remain in government service and \$820,000 should he enter the private practice of law.

A complete report will follow under separate cover. If I can be of any additional assistance, please let me know.

Sincerely,

Millicent Elstein

Millicent Elstein, Ph.D.

LIBRARY

Kantor v. Bellows

Franklin Domestic Relations Law

Section 3 - The term “marital property” shall mean all property acquired by either or both spouses during the marriage. Marital property shall not include separate property as hereinafter defined.

Section 4 - The term “separate property” shall mean

- A. property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse;
- B. compensation for personal injuries;
- C. property acquired in exchange for or the increase in value of separate property as defined in subpart (A) of this section, except when the increase is attributable to the direct or indirect contribution by the party not having title;
- D. property described as separate property by valid written agreement of the parties.

Section 5 - Disposition of property in divorce actions.

- A. The court, in an action for divorce, shall determine the respective rights of the parties in their separate or marital property.
- B. Separate property shall remain such.
- C. Marital property shall be distributed equitably between the parties, considering the circumstances of the case and the respective parties.
- D. In determining an equitable disposition of property under paragraph C, the court shall consider
 - (1) the income and property of each party at the time of marriage and at the time of the commencement of the action;
 - (2) the duration of the marriage and the age and health of both parties;
 - (3) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;
 - (4) the liquid or non-liquid character of all marital property;
 - (5) the probable future financial circumstances of each party;
 - (6) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining

such asset or interest intact and free from any claim or interference by the other party.

- E. In any action in which the court determines that an equitable distribution is appropriate but would be impractical or burdensome or where the distribution of an interest in a business, corporation or profession would be contrary to law, the court, in lieu of equitable distribution, shall make a distributive award in order to achieve equity between the parties.

Section 6 - Maintenance.

- A. Except where the parties have entered into an agreement, in any divorce action the court may order temporary maintenance or maintenance in such amount as justice requires, having regard for the standard of living of the parties established during the marriage, whether the party in whose favor maintenance is granted lacks sufficient property and income to provide for his or her reasonable needs, whether the other party has sufficient property or income to provide for the reasonable needs of the other, and the circumstances of the case and the respective parties. In determining the amount and duration of maintenance, the court shall consider
- (1) the income and property of the respective parties, including marital property distributed pursuant to Section 5.
 - (2) the duration of the marriage and the age and health of both parties;
 - (3) the present and future earning capacity of both parties;
 - (4) the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor;
 - (5) reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage;
 - (6) the presence of children of the marriage in the respective homes of the parties;
 - (7) contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party.
- B. The court may award permanent maintenance, but an award of maintenance shall terminate upon the death of either party or upon the recipient's valid or invalid marriage.

Reginald Morgan v. Victoria Morgan
Franklin Court of Appeal, Second Appellate Division (1998)

The question in this case is whether the defendant, Victoria Morgan, has the right to share the value of a professional business (MBA) degree earned by her former husband, Reginald Morgan, during their marriage. The court must decide whether the plaintiff's degree is "property" for purposes of Franklin Domestic Relations Law Section 3. If the MBA degree is not property, we must still decide whether Victoria can nonetheless recover the money she contributed to her husband's support while he pursued his professional education. We hold that Reginald's professional degree is not property and therefore not subject to equitable distribution but that Victoria may be reimbursed for her financial contributions to Reginald's professional training.

When the parties married in 1984, Reginald had an engineering degree and Victoria had a bachelor of science degree. From that time until the parties separated in October 1991, they generally shared all household expenses. The sole exception was the period between September 1988 and January 1990, when the plaintiff attended the Wharton School of the University of Pennsylvania and received an MBA degree.

During the 16-month period in which Reginald attended school, Victoria contributed \$26,000 to cover household expenses plus another \$10,000 for Reginald's tuition. Reginald made no financial contribution while he was a student. After receiving

his degree, Reginald went to work as a commercial lending officer for Franklin National Bank. Meanwhile, in 1989 Victoria began a part-time graduate program at Franklin State University, paid for by her employer, that led to a master's degree in microbiology one year after the parties had separated. Victoria worked full time throughout the course of her graduate schooling.

The trial court granted a divorce. At the time of trial, Reginald's annual income was \$48,200 and Victoria's income was \$40,000. No claim for maintenance was made. The parties owned no real property and they divided the small amount of their personal property by agreement. The only issue at trial was Victoria's claim for an equitable share of the present value of the enhanced future earning capacity of plaintiff attributable to the MBA degree.

The trial court did not attempt to determine the value of Reginald's MBA degree. Instead, the court held that the education and degree obtained by Reginald constituted a property right and reimbursed Victoria for the contribution she made to acquiring the degree. The court awarded her the \$10,000 she contributed to Reginald's tuition and 50% of her \$26,000 contribution to household expenses during the educational period.

This court must decide whether the legislature intended an MBA degree to be "property" so that, if acquired by either spouse during a

marriage, its value must be equitably distributed upon divorce. Since there is no legislative history on the meaning of the word “property” and the statute itself offers no guidance, statutory construction in this case means little more than an inquiry into the extent to which professional degrees and licenses share the qualities of other things that the legislature and courts have treated as property.

Franklin courts have subjected a broad range of assets and interests to equitable distribution, including vested but unmatured private pensions, military retirement pay and disability benefits, and personal injury claims. This court, however, has never subjected to equitable distribution an asset whose future monetary value is as uncertain and unquantifiable as a professional degree or license. A professional license or degree cannot be sold and its value cannot readily be determined. It represents the opportunity to obtain an amount of money only upon the occurrence of highly uncertain future events. The value of a professional degree is nothing more than the possibility of enhanced earnings that the particular academic credential will provide, income that the degree holder might never acquire. Moreover, any assets resulting from future income for professional services would be property acquired after the marriage; the statute restricts equitable distribution to property acquired during the marriage.

Valuing a professional degree in the hands of any particular individual at the start of his or her career would involve a gamut of calculations that reduces to little more than guess-

work. Even if such estimates could be made, however, there would remain a world of unforeseen events that could affect the earning potential—not to mention the actual earnings—of any particular degree holder. A person qualified by education for a given profession may choose not to practice it, may fail at it, or may practice in a specialty, location, or manner which generates less than the average income enjoyed by fellow professionals. The potential for inequity to the failed professional or one who changes careers is at once apparent; his or her spouse will have been awarded a share of something which never existed in any real sense.

Valuing educational assets, even if they were marital property, in terms of the cost to the supporting spouse of obtaining the degree would be an erroneous application of equitable distribution law. The cost of a professional degree has little to do with any real value of the degree and fails to consider at all the nonfinancial efforts made by the degree holder in completing his course of study. The cost of a spouse’s financial contributions has no logical connection to the value of that degree. The cost approach is not conceptually predicated on a property theory at all but rather represents a general notion of how to do equity. Equitable distribution in these cases derives from the proposition that the supporting spouse should be reimbursed for contribution to the marital unit that, because of the divorce, did not bear its expected fruit for the supporting spouse.

Although the trial court found that the degree was distributable property, it actually reim-

bursed the defendant without attempting to give her part of the value of the degree. This court does not support reimbursement between former spouses in maintenance proceedings as a general principle. Marriage is not a business arrangement in which the parties keep track of debits and credits, their accounts to be settled upon divorce. Rather, marriage is a shared enterprise, a joint undertaking in many ways akin to a partnership. It is improper for a court to treat a marriage as an arm's-length transaction by allowing a spouse to come into court after the fact and make legal arguments regarding unjust enrichment. Courts should assume, in the absence of contrary proof, that the decision to obtain a professional degree was mutual and took into account what sacrifices the husband and wife needed to make in furtherance of that decision. But every joint undertaking has its bounds of fairness. Where a partner to marriage takes the benefits of his or her spouse's support in obtaining a professional degree or license with the understanding that future benefits will accrue and inure to both of them, and the marriage is then terminated without the supported spouse giving anything in return, an unfairness has occurred that calls for a remedy.

In this case, the supporting spouse made financial contributions towards her husband's professional education with the expectation that both parties would enjoy material benefits flowing from the professional license or degree. It is therefore patently unfair that the supporting spouse be denied the mutually anticipated benefit while the supported spouse keeps not only the

degree, but also all of the financial and material rewards flowing from it. Furthermore, in this case a supporting spouse has contributed more than mere earnings to her husband with the mutual expectation that both of them will realize and enjoy material improvements. Also, the wife has presumably made personal financial sacrifices, resulting in a reduced or lowered standard of living. She has postponed present consumption and a higher standard of living for the future prospect of greater support and material benefits. If the parties had remained married long enough after the husband had completed his post-graduate education so that they could have accumulated substantial property, the court would have determined how much of the marital property to allocate to the wife, taking into account her contributions to her husband's earning capacity. In this sense, an award that is referable to the spouse's monetary contributions to her partner's education significantly implicates basic considerations of marital support and standard of living.

Although not explicitly provided for in Section 6 of our Domestic Relations Law, to provide a fair and effective means of compensating a supporting spouse, we now introduce the concept of *reimbursement maintenance* into divorce proceedings. Regardless of the appropriateness of permanent maintenance or the presence or absence of marital property to be equitably distributed, there will be circumstances where a supporting spouse should be reimbursed for the financial contributions he or she made to the spouse's successful professional training. Such reimbursement maintenance should

cover all financial contributions towards the former spouse's education, including household expenses, educational costs, school travel expenses and any other contributions used by the supported spouse in obtaining his or her degree or license. Although courts may not make any permanent distribution of the value of professional degrees and licenses, whether based upon estimated worth or cost, where a spouse has received financial contributions used in obtaining a professional degree or license with the expectation of deriving material benefits for both, that spouse may be called upon to reimburse the supporting spouse for the amount of contributions received.

We do not hold that every spouse who contributes toward his or her partner's education or professional training is entitled to reimbursement maintenance. Only monetary contributions made with the mutual and shared expectation that both parties to the marriage will derive increased income and material benefits should be a basis for such an award. For example, it is unlikely that a spouse who has been married to a financially successful executive and returns to school after many years of homemaking would upon divorce be required to reimburse her husband for his contributions toward her degree.

We remand the case so the trial court can determine whether reimbursement maintenance should be awarded and, if so, what amount is appropriate.

Michael Sooke v. Loretta Sooke
Franklin Court of Appeal, Fourth Appellate Division (1999)

In this divorce action, the parties' only asset of any consequence is the husband's medical degree. The principal issue is whether that degree, acquired during their marriage, is marital property. The trial court held that it was and made a distributive award in the wife's favor. It also granted her expert witness fees.

Michael and Loretta Sooke married in 1982. Both were employed as teachers. Loretta had a bachelor's degree and a temporary teaching certificate but required 18 months of post-graduate classes at an approximate cost of \$3,000, excluding living expenses, to obtain permanent certification in Franklin. She relinquished the opportunity to obtain permanent certification while Michael pursued his education. In 1984 the parties moved to Guadalajara, Mexico, where Michael became a full-time medical student. Loretta taught and contributed her earnings to their joint expenses. The parties returned to Franklin in 1987 so that Michael could complete the last two semesters of medical school and internship training here. Loretta resumed her former teaching position, where she remained at the time this action was commenced. Michael was licensed to practice medicine in 1991 and filed for divorce two months later. At the time of trial, he was a resident in general surgery. During the marriage, both parties contributed to paying the living and educational expenses. In addition to performing household work and managing the family finances, Loretta con-

tributed 76% of the parties' income exclusive of a \$10,000 student loan obtained by Michael.

Loretta presented expert testimony that the present value of Michael's medical degree was \$950,000. Her expert testified that he arrived at this figure by comparing the average income of a college graduate and that of a general surgeon between 1996, when Michael's residency would end, and 2023, when he would reach age 65. Taking into account taxes, inflation, and interest rates, he gave his opinion that the present value of Loretta's contribution to Michael's medical education was \$210,000. Michael offered no expert testimony on the subject.

The court made a distributive award to Loretta of \$380,000, representing 40% of the value of the degree, and ordered it paid in 11 annual installments. The court also ordered Michael to pay Loretta's counsel fees of \$20,000 and her expert witness fee of \$5,000. We affirm.

Our statutes contemplate only two classes of property: marital and separate. The former, which is subject to equitable distribution, is defined broadly as "all property acquired by either or both spouses during the marriage." Michael does not contend that his license is separate property, but rather, relying on *Morgan v. Morgan* (Franklin Court of Appeal, 1998), he claims that it is not property at all.

We disagree with the decision of the Second Appellate Division in that case.

The Franklin Domestic Relations Law recognizes that spouses have an equitable claim to things of value arising out of the marital relationship and classifies them as subject to distribution by focusing on the marital status of the parties at the time of acquisition. Those things acquired during marriage and subject to distribution have been classified as marital property, although they hardly fall within traditional property concepts because there is no common-law property interest remotely resembling marital property. Having classified the property subject to distribution, the legislature did not define it but left it to the courts to determine what interests come within its terms.

Section 5 provides that in making an equitable distribution of marital property, the court shall consider “any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party [and] . . . the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession. . . .” Where such difficulty exists, the court shall make a distributive award in lieu of an actual distribution of property. The words mean exactly what they say: an interest in a profession or professional career potential is

marital property which may be represented by direct or indirect contributions of the non-titleholding spouse, including financial contributions and nonfinancial contributions made by caring for the home and family.

Few undertakings better qualify as the type of joint effort that the statute’s implicit economic partnership theory is intended to address than contributions toward one spouse’s acquisition of a professional degree. The legislature has decided, by its explicit reference in the statute to the contributions of one spouse to the other’s profession or career, that these contributions represent investments in the economic partnership of the marriage and that the product of the parties’ joint efforts should be considered marital property. It does not matter whether the spouse has established a practice or whether he or she has yet to do so. An established practice merely represents the exercise of the privileges conferred upon the professional spouse by the degree, and the income flowing from that practice represents the receipt of the enhanced earning capacity that a professional degree allows.

Michael contends that alternative remedies should be employed, such as reimbursement for direct financial contributions. Limiting a working spouse to a maintenance award not only is contrary to the economic partnership concept underlying the statute but also retains the uncertain and inequitable economic ties of dependence that the legislature sought to extinguish by equitable distribution. Maintenance is subject to termination upon

the recipient's remarriage, and a working spouse may never receive adequate consideration for his or her contribution and may even be penalized for the decision to remarry. When a marriage ends, each of the spouses, based on the totality of the contributions made to it, has a stake in and right to a share of the marital assets accumulated while it endured, not because that share is needed, but because those assets represent the capital product of what was essentially a partnership entity.

Turning to the question of valuation, it has been suggested that even if a professional degree is considered marital property, the working spouse is entitled only to reimbursement of his or her direct financial contributions. Such a result is completely at odds with the statute's requirement that the court give full consideration to both direct and indirect contributions. If the degree is marital property, then the working spouse is entitled to an equitable portion of it, not merely a return of funds advanced. Its value is the enhanced earning capacity it affords the holder and, although fixing the present value of that enhanced earning capacity may present problems, the problems are not insurmountable. Certainly they are no more difficult than computing tort damages for wrongful death or diminished earning capacity resulting from injury, and they differ only in degree from valuing a professional practice, which courts routinely do. The trial court retains the flexibility and discretion to structure the distributive award equitably, taking into consideration factors such as the working spouse's need for immediate payment

and the current ability of the spouse with the degree to pay. Once it has received evidence of the present value of the degree and the working spouse's contributions toward its acquisition, it may then make an appropriate distribution of the marital property, including a distributive award for the professional degree. For these reasons, we affirm.

DISSENT by Meyer, J.

Michael Sooke's principal argument is that a professional degree is not marital property because it does not fit within the traditional view of property as something which has an exchange value on the open market and is capable of sale, assignment or transfer. I agree.

An educational degree is simply not encompassed even by the broad views of the concept of "property." It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In my view, it has none of the attributes of property in the usual sense of that term. My interpretation is in accord with the Second Appellate Division of this court. I would reverse.

FILE

In re Emily Dunn

Reilly, Ingersol & Powell, PC

Attorneys-at-Law
300 Willis Road
Jackson City, Franklin 33399

(555) 999-4567
(555) 999-4555 (Fax)
e-mail: rip@aol.com

MEMORANDUM

July 29, 1999

To: Applicant
From: Robert Reilly
Re: Emily Dunn

Yesterday I met with Emily Dunn, who was recently widowed. She has asked me to prepare a new will for her.

The transcript of the interview should give you a good overall sense of what Mrs. Dunn is trying to accomplish. Looking back over it, however, I see some potential holes in my understanding of her precise intentions. In particular, I'm concerned about how she wants to deal with the disposition of potential insurance proceeds, her gifts of stock, the equalization of gifts to her grandchildren, and the distribution of the residuary estate. These ambiguities are not surprising. There are always some unresolved details that we must review with a client at a subsequent meeting. At such meetings, however, I find it useful to have a draft of the will to help clients refine their choices. I'd like you to do the following:

1. Draft the introductory and all dispositive clauses for Mrs. Dunn's proposed new will. Please set them forth in separately numbered paragraphs and in an order consistent with our firm's Will Drafting Guidelines. Don't concern yourself with the definitional and boilerplate clauses.
2. In drafting the dispositive clauses regarding the four areas I've said I'm concerned about, you will have to fill in the gaps left in the interview by making some assumptions about exactly what Mrs. Dunn wants. Therefore, in drafting a dispositive clause that requires an assumption about the insurance, the stock, the grandchildren, or the residuary estate, following that clause write a short explanatory paragraph that does two things:
 - A. Tells me what assumptions you've made about the facts and Mrs. Dunn's intentions;
 - B. Tells me why, based on those assumptions, you drafted the particular clause the way you did.

Reilly, Ingersol & Powell, PC

MEMORANDUM

September 8, 1995

To: All Attorneys
From: Robert Reilly
Re: Will Drafting Guidelines

Over the years, this firm has used a variety of formats in drafting wills. Effective immediately, all wills drafted for this firm should follow this format:

Introduction:

- A. Set forth the introductory clause with the name and domicile of the testator.
- B. Include an appropriate clause regarding the revocation of prior testamentary instruments.
- C. Include a clause describing the testator's immediate family (parents, sibling, spouse, children, and grandchildren).

Part ONE: Dispositive Clauses (to be set forth in separate subdivisions or subparagraphs by type of bequest or topic). Bequests should be set forth in the following order, as appropriate:

- A. Specific bequests
 1. Real property
 2. Tangible personal property
 3. Other specific bequests
 4. Any other clauses stating conditions that might affect the disposition of the real and tangible personal property
- B. General bequests
- C. Demonstrative bequests
- D. Residuary clauses

Part TWO: Definitional Clauses. Clauses relating to how words and phrases used in the will should be interpreted.

Part THREE: Boilerplate Clauses. These are clauses relating to the naming of fiduciaries and their administrative and management authority, tax clauses, attestation clauses, and self-proving will affidavits.

Reilly, Ingersol & Powell, PC

Attorneys-at-Law
300 Willis Road
Jackson City, Franklin 33399

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e-mail: rip@aol.com

May 27, 1999

Mrs. Emily Dunn
23 Ipswich Lane
Jackson City, Franklin 33399

Dear Emily:

It was quite a shock to learn of Chuck's sudden heart attack given how fit he had been all of his life. He was a wonderful friend, and he will be sorely missed.

I am enclosing the completed documents finalizing your gift to the Franklin Museum of Art of the Claude Monet painting that you inherited from your grandfather.

When we last talked, you asked me to review your files and see if other things require your attention. In light of Chuck's death, it is appropriate that you review your 1965 will to see what changes you might like to make. A copy of that will is enclosed.

Please call me for an appointment to talk about possible revisions to your will. When we meet, we can talk about your family and other people to whom you might want to leave your property.

I look forward to seeing you soon.

Sincerely,



Robert Reilly

\vins
Enclosure

LAST WILL AND TESTAMENT

I am Emily Dunn, a resident of Jackson City, Franklin. This is my Last Will, and I revoke all previous wills and codicils.

- ONE:**
- A. I give all of my tangible personal property to my husband, Charles Dunn, if we are married to each other at the time of my death.
 - B. I give my family home located at 23 Ipswich Lane, Jackson City, Franklin to my husband, Charles Dunn, if we are married to each other at the time of my death.
 - C. At the present time my husband is Charles Dunn, and we have two children, Andrea and Jonathan.
 - D. I give 500 shares of Wilson Corporation stock to my cousin, Alice Dunn.
 - E. If Alice Dunn does not survive me, I give those 500 shares to her son, Drew Dunn.
 - F. I give the Claude Monet painting I inherited from my grandfather to the Franklin Museum of Art.

TWO: The remainder of my estate shall be disposed of in the following manner:

- A. I give the sum of \$25,000 to Bea Willis who for many years was my governess and who now lives in Sarasota, Florida.
- B. I give the sum of \$50,000 to Thomas Hardman who for 25 years served my parents faithfully as a gardener, provided he is married at the time of my death.
- C. The balance of my residuary estate I give to my husband, Charles Dunn, or if he does not survive me or if we are not married at the time of my death, I give the balance of my residuary estate equally to our two children if they survive me, or all thereof to the survivor, or if none of my children survives me, I give the balance of my residuary estate to the Franklin Museum of Art.

THREE: A. I nominate First Federal Bank as Executor of my estate. I empower my Executor to exercise all administrative and management powers conferred on it as Executor by the laws of the State of Franklin. I direct that my Executor not be required to post a bond.

IN WITNESS WHEREOF, I, Emily Dunn, have signed this, my Last Will, on the 18th day of January, 1965.

Witnesses:

Margaret Carnegie *Emily Dunn*
Judy Carter

EXCERPTS OF TRANSCRIPT OF INTERVIEW WITH EMILY DUNN

July 28, 1999

Attorney: By the way, are you going to be OK financially?

Dunn: I'll be fine. Chuck insured everything we own and I should be able to get by on what he left me.

Attorney: Good. I know we could go on talking about Chuck for hours and that it's hard to go from talking about Chuck to talking about your own will, but we need to go over a number of facts so that I can revise the will you signed in 1965.

Dunn: I realize my will is really out of date. Both Bea Willis and Thomas Hardman are dead.

Attorney: Let me go over some basics. When and where were you born?

Dunn: 1928 in Jackson City, Franklin.

Attorney: When did you and Chuck marry?

Dunn: On June 15, 1947. He died on April 30, 1999.

Attorney: What are the names and ages of your children and their spouses?

Dunn: I have three children: Andrea Dunn Little, age 45; Jonathan Dunn, age 42; and Bertha Dunn, age 30. My daughter Andrea is married to Elliott Little. Jonathan and Bertha are single.

Attorney: What are the names and ages of your grandchildren?

Dunn: I have four grandchildren. Andrea's kids are Nelson Little, age 12; Becky Little, age 9; and Steven Little, age 5. Also, there is my grandson, Sidney Dunn, age 8, who is my daughter Bertha's only child.

Attorney: Let's talk about how you'd like to divide your property. Is there anyone to whom you would like to give cash?

Dunn: Yes, \$20,000 to Helen Rossini, a good friend of mine whose husband, Harry, recently died. He left her his car. Apparently, it has been stolen and now there is some question about whether the insurance proceeds are payable to her or to her husband's children from his first marriage. She is very upset, as she should be. What a terrible thing.

Wouldn't you think that she would get the insurance if she also got the car under his will?

Attorney: That must have been very hard for Helen, but that's a lesson to us about how careful we have to be when we're setting up our wills. How old is Helen?

Dunn: Oh, she's a little older than I am, about 75.

Attorney: What would you like to have happen with the \$20,000 if Helen doesn't survive you?

Dunn: If Helen dies before me, I suppose I don't really care, although I'd like the money to stay in my family.

Attorney: What else do you have that you'd like to give away?

Dunn: Well, I have 10,000 shares of Wilson Corporation stock, and I want to give my grandchildren, Nelson, Becky, Steven, and Sidney, 500 shares each. Of course, if I have more grandchildren before I die, as I hope, I'd like each of them to receive 500 shares, too. Oh, and I'd like to give some stock to the children of my cousin, Alice Dunn. She's dead now, but she had three children, Drew, Bobby, and Marilyn, who is the child of her husband from his first marriage whom she adopted. While I haven't had much contact with any of them, I'd still like to leave her kids 600 shares of Wilson. After all, it is the family-owned company founded by our great-grandfather. The 600 shares should be divided equally among any of Alice's three children if they are still alive when I die.

Attorney: So you want to treat your grandchildren equally with respect to the gift of stock.

Dunn: Yes, I've always tried to treat them equally. After all, I love them all the same.

Attorney: Now, if your grandchildren die before you, you can make the gift to another person, including any of their children. What would you like to have happen with the stock if one of the grandchildren does not outlive you?

Dunn: If any of them dies before me, I suppose the stock should go to their kids. I mean, I would want any children of a grandchild who might die before me to get what his or her parent would have gotten.

Attorney: What about other personal property?

Dunn: I want Andrea and Bertha to have my jewelry. They should split it up between them as they see fit.

Attorney: What if Andrea and Bertha can't agree on how to divide it?

Dunn: Then my executor will have to divide it up as equally as possible.

Attorney: What if one of them dies before you?

Dunn: In that case, let my executor divide it up and then sell the share of the one who died before me.

Attorney: Other than the jewelry, how would you like the rest of your property divided?

Dunn: Jonathan should get the things located in my home, as well as the house itself.

Attorney: What if Jonathan dies before you?

Dunn: If he dies before me, the house and the things in the house should be sold and the money from the sale should be distributed along with everything else I have left.

Attorney: OK. Then let's talk about how you would like the balance of your estate to be disposed of.

Dunn: Now that Chuck's gone, I want what's left of my estate to go equally to my kids, or their families, of course.

Attorney: When you say "family," do you mean to include spouses of your children?

Dunn: No. Just my kids.

Attorney: What if all your children and grandchildren outlive you?

Dunn: Then I would just want things divided up equally among the kids, not the grandchildren.

Attorney: What if one or two of your children die before you, leaving grandchildren? Would you still want the balance of your estate divided into three equal parts?

Dunn: Yes. But would that mean my grandchildren wouldn't be treated equally?

Attorney: It might, depending on whether any of your children dies before you.

Dunn: It's hard for me to think about that now. Let me tell you this. I want my estate divided equally among my three children whether or not they are alive when I die. Then, I want all the children of my deceased children to be treated equally.

Attorney: We may not be able to do that without setting up a trust because we don't know at this time whether any of your kids will die before you.

Dunn: No, I don't want a trust. I want my heirs to have the total freedom to do what they want with my property when I die.

Attorney: OK, I think I have a fairly clear picture of how you would like your estate handled. I'll have a revised will prepared for you within the next few weeks. I'll call you to set up an appointment so that we can go over it together and make sure it's what you want.

Dunn: Well, you won't be able to reach me for a few weeks. I always wanted to see the Great Wall of China, and Helen and I are leaving tomorrow for Beijing and beyond. I'll call you when I return.

Attorney: Have a wonderful trip, Emily. We'll get together when you get back.

LIBRARY

In re Emily Dunn

In re Estate of Rich
Franklin Supreme Court (1996)

Harry Dawson, a legatee under the will of Michael Rich, and the Estate of Tom Rich appeal the judgment of the Franklin Probate Court approving the final accounting of the executor of the Estate of Michael Rich.

Decedent, Michael Rich, died on April 15, 1994, a domiciliary of Parklane, Franklin, leaving a Last Will dated February 4, 1991. Under the terms of this will, decedent bequeathed:

1. All of my household goods to my daughter, Sylvia Rich Yankow;
2. My summer home on Lake Forest, State of Franklin to my best friend, Harry Dawson;
3. 100 shares of New Pioneer, Inc. common stock to my aunt, Nancy Rich, if she survives me;
4. \$50,000 to my friend, Ellen Gray, if she survives me; and
5. The residue of my estate to my daughter, Sylvia Rich Yankow, and my son, Tom Rich, in equal shares.

Other than his son, Tom Rich, who died during the Gulf War, all of decedent's named beneficiaries survived him.

Decedent died leaving an estate of over \$1,000,000, including his summer home on Lake Forest. Two months following decedent's death, the summer home was totally destroyed by fire. Home Casualty Insurance Company, which had issued the fire insurance policy on this home, immediately paid \$150,000, the value of the home, to the executor.

In the final accounting for the estate, the executor determined that the insurance proceeds and all of the other residuary assets of the estate should be paid to Sylvia Rich as the sole surviving residuary legatee under the will. Both Harry Dawson, the legatee of the summer home, and the Estate of Tom Rich appeal.

Harry Dawson claims that, as the specific legatee of the summer home, all insurance proceeds payable thereon as a result of its destruction following the decedent's death are payable to him rather than to the residuary legatee under the decedent's will. The Estate

of Tom Rich claims that one-half of the residuary estate should have been distributed to it under the terms of the residuary clause in the will.

Walker on Wills, one of the country's leading treatises on wills, notes that all bequests under wills are classified as either (1) general, (2) specific, (3) demonstrative, or (4) residuary.

A *general* legacy (typically a gift of money) is defined as a "bequest payable out of general estate assets or to be purchased for a beneficiary out of general estate assets." Walker on Wills, § 501.

A *specific* legacy is defined as a "bequest of a specific asset." Id. at § 502(a).

A *demonstrative* legacy is a bequest of a "specific sum of money payable from a designated account. Such legacy is specific as to the funds available in the account to pay the bequested amount and general as to the balance." Id. at § 502(b).

Lastly, Walker states that a *residuary* bequest is a "bequest that is neither general, specific or demonstrative and includes bequests that purport to dispose of the whole estate." Id. at § 503.

The bequest to Harry Dawson is of specific property, the summer home of the testator. If the identical thing bequeathed is not in a decedent's probate estate, the legacy is "adeemed" and the legatee's rights are gone. Walker on Wills, § 600. In this case, the summer home was in existence at the time of the decedent's death, so the bequest to Harry Dawson did not adeem. On the other hand, it was totally destroyed by fire following the decedent's death. The question raised is whether the specific legatee is entitled to receive the casualty insurance proceeds payable as a result of the fire. In resolving this question, the court, as it does in construing wills generally, must consider the testator's intent. Here, testator's will is completely silent regarding who should receive the insurance proceeds under the facts as they occurred. Thus, we are unable to ascertain the testator's intent. As such, the insurance policy must be treated like any other estate asset that is not the subject of a specific bequest. While there are cases in other jurisdictions to the contrary, we believe that the insurance policy insuring the summer home is merely another asset of the decedent's estate and forms part of the residuary estate because it was not specifically bequeathed to any other legatee. Accordingly, the Franklin Probate Court correctly upheld the decision of the executor to distribute such proceeds as part of the residuary estate.

Having determined that the insurance proceeds were part of the residuary estate, we turn to the claim of the Estate of Tom Rich.

Section 331 of the Franklin Probate Code (“Lapse Statute”) provides that: “If a legatee or devisee predeceases the testator, the bequest or devise that would have passed to the deceased legatee or devisee passes to his issue that survive the testator, unless the will otherwise provides.” Cases in this jurisdiction have repeatedly held that unless a decedent’s will *expressly* conditions a residuary or other bequest on survivorship, the bequest passes to the estate of a deceased legatee unless the legatee dies leaving issue who survive the testator.

Unlike the specific bequest of the stock and the general bequest of cash, decedent’s will does not expressly condition the residuary bequests to Sylvia Rich Yankow and Tom Rich on survivorship, and Tom Rich predeceased the testator leaving no surviving issue. In light of the statute and relevant cases, the probate court erred in holding that the Estate of Tom Rich was not entitled to one-half of the decedent’s residuary estate.

Order of the Franklin Probate Court affirmed in part and reversed in part.

In re Estate of Young
Franklin Supreme Court (1978)

Decedent, Harry Young, died on March 12, 1974, a resident of Jackson City, Franklin. Mr. Young was a successful businessman in Jackson City and by the time of his death had accumulated a substantial fortune.

Two provisions of Mr. Young's will were called into question by the residuary legatees under his will. The first reads: "I give 100 shares of Gemet Corporation stock to my nephew, Ron Winky." Gemet Corporation stock is publicly traded on the New York Stock Exchange. Mr. Young did not own any Gemet Corporation stock at the time of his death and there is no evidence whether he ever owned any such stock. Mr. Winky argues that the bequest of stock was a general bequest to be purchased for his benefit with assets of Mr. Young's estate. The residuary legatees argue it is a specific bequest that adeemed because no such stock was in the decedent's probate estate at the time of his death.

Generally, whether a gift of specific shares of stock is a specific or general bequest depends on the intent of the testator. Gifts of specific stock are presumptively specific. If the stock was not owned at the time the will was signed, the bequest is more likely gener-

al. See generally, Walker on Wills, § 10320. If the stock was owned by testator at the time the will was executed or was stock in a closely held corporation—or if there is language in the will evidencing such ownership at the time the will was signed, such as "my stock"—the bequest is specific and, if such stock is not in the estate when testator dies, the bequest adeems. In the absence of evidence to the contrary and given the presumption of classification as specific, we affirm the Probate Court's finding that the gift to Ron Winky adeemed.

The second contested provision of the will reads: "I give \$100,000 to my friend, Phil Darby, or if Phil predeceases me, to his children." Phil Darby predeceased decedent. While none of Darby's children survived the decedent, he had two grandchildren who did. One of these grandchildren had been adopted by Mr. Darby's deceased child. The grandchildren claim to be entitled to the \$100,000 as alternate beneficiaries under the will. The residuary legatees claim the bequest lapsed under § 331 of the Franklin Probate Code.

The question on appeal is what the decedent meant or intended when he used the word

“children.” Mr. Darby’s grandchildren argue that, when Mr. Young signed his will, Mr. Darby’s children had already been dead for five years and that his grandchildren who lived with him were known to the decedent. Thus, they argue, it is reasonable to believe that, when decedent referred to “Mr. Darby’s children,” he was thinking of these grandchildren. We find this argument persuasive and hold that, for *purposes of this case*, the word “children” means *issue*.

We hold that the \$100,000 passes to the grandchildren of Mr. Darby and affirm the judgment of the Probate Court.

Walker on Wills

§ 11200: In construing wills, all courts adhere to the principle that testator's intent controls in the interpretation of the language in the will. For this reason, there is a very high premium on drafting wills in which the language is clear and unambiguous. Attorneys who draft wills also must be aware of governing rules of law that can affect how wills might be construed if the language is not clear.

For example, suppose a testator bequeaths "my 100 shares of X Corporation stock to B" but at the time of the testator's death, she owns 200 shares of X Corporation stock. Is B entitled to only 100 shares of the X Corporation stock or to the 200 shares of that stock that testator owns at death? The answer to this question often depends on how testator acquired the additional 100 shares of stock.

If the additional shares were acquired either as a stock split or stock (as distinguished from cash) dividend, most courts hold that they pass to the specific legatee because they represent the stated gift in its current form. However, since this matter is not always free of doubt, if a testator intends that result, a will construction proceeding to resolve the question could be avoided if, for example, the will had read: "I give my 100 shares of X Corporation stock to B, including any additional shares I receive between the date of the execution of this will and the date of my death as either a stock split or as a dividend paid to me by X Corporation in its own shares."

* * * *

§ 14920: There had been much confusion surrounding how property should be distributed among class members where the class gift is limited to persons potentially of different generational levels to the named ancestor, such as a gift to "issue." Fortunately, the matter has been universally resolved in all states by their adoption of the Uniform Act on Per Capita and Per Stirpes Distributions. This act provides that:

1. If property is distributed "per capita" to the "issue" or "descendants" of a named ancestor, each person who is an issue or descendant of the named ancestor takes an equal share.
2. If property is distributed "per stirpes" to the "issue" or "descendants" of a testator, the property is distributed among the issue or descendants most closely related to the testator. However, if there would have been other issue or descendants at the same generational level who,

had they survived, would have participated in the gift, then their issue or descendants, if any, take the share these deceased persons would have taken. The following example illustrates distribution “per stirpes”:

- (1) Testator (T) had three children, A, B, and C.
 - A dies before T and had 7 children.
 - B dies before T and had 1 child.
 - C survives T and has 1 child.
- (2) A’s children each take $\frac{1}{7}$ of the $\frac{1}{3}$ share A would have received had he lived.
- (3) B’s child gets the entire $\frac{1}{3}$ share B would have received had he lived.
- (4) C takes a $\frac{1}{3}$ share and C’s child takes nothing.

As can be seen, in a “per stirpes” distribution, grandchildren with dead parents get a proportionate share of what their parents would have gotten.

3. If property is distributed “per stirpes but per capita at each generation” to the “issue” or “descendants” of a testator, the outcome is quite different. The following example, using the same facts that were used to illustrate “per stirpes” distribution, illustrates distribution “per stirpes but per capita at each generation”:

- (1) Testator (T) had three children, A, B, and C.
 - A dies before T and had 7 children.
 - B dies before T and had 1 child.
 - C survives T and has 1 child.
- (2) A and B’s children each take $\frac{1}{8}$ of the $\frac{2}{3}$ share A and B would have received had they lived.
- (3) C takes a $\frac{1}{3}$ share and C’s child takes nothing.

As opposed to a pure “per stirpes” distribution, in this case the grandchildren with dead parents each get an equal share of what all the dead parents would have gotten. In this example, B’s child gets much less. Instead of a $\frac{1}{3}$ share, B’s child shares equally with all the grandchildren whose parents have died.

POINT SHEET

In re Steven Wallace

In re Steven Wallace
DRAFTERS' POINT SHEET

In this performance test item, Steven Wallace, an artist, delivers a painting to Lottie Zelinka, an art dealer, on consignment. Lottie files bankruptcy under Chapter 11 and later converts it to a straight Chapter 7 case. Thereafter, she returns the painting to Steven, and the trustee demands that Steven return the painting to the bankrupt estate. Steven consults Eva Morales, the supervising attorney in this case.

The task for the applicant is to draft a two-part memo in which he/she: first, analyzes the facts and the law regarding the bankruptcy trustee's claim that the painting is an estate asset; second, identifies what UCC defenses are available to Steven, explains how the facts currently known support the defenses, and suggests what additional facts might be developed to support the defenses.

The File consists of the assignment memo from Ms. Morales to the applicant, notes of the interview with Steven, and some documents Steven left with Ms. Morales. The Library contains excerpts from a basic bankruptcy treatise, § 2-326 of the Franklin Commercial Code (FCC), a section of the Franklin Civil Code, and two cases. All of the materials the applicants will need to work their way through the problem are contained in the test item.

The following points that might be discussed by an applicant are suggested by the problem. Grades will be assigned depending on the degree of thoroughness, and an applicant can get an excellent grade without covering all of these points.

1. Based on the facts as they appear in the file, does the bankruptcy trustee have a legitimate claim to the painting?

- The facts make it clear that the painting was redelivered to Steven by Lottie after the bankruptcy proceeding began. Thus, she made a “post-petition transfer” of property that was in the possession of the bankruptcy estate.
- Drawing on the excerpts from *Walker on Bankruptcy* and *In re Levy*, the applicants should conclude that the trustee has the right to “avoid a transfer of property of the estate . . . that occurs after the commencement of the case.” *Walker on Bankruptcy* § 4.08.

- The real question then becomes whether the painting was “property of the estate.” That calls for an in-depth analysis of the FCC provision on consignments — § 2-326.
 - The interview notes and the Inventory Receipt show clearly that Steven (consignor) delivered the painting to Lottie (consignee) on a true consignment; i.e., he delivered it to her to see if she could sell it for him, he retained title, she would get a commission if she could sell it, and she could return it without obligation if she couldn’t sell it. Thus, it was a “sale or return” transaction under FCC § 2-326.
 - Unless one or more of the exceptions provided for in § 2-326(3) applies, the FCC makes it clear that “goods held on sale or return are subject to [claims of the consignee’s creditors] while in the [consignee’s] possession,” irrespective of whether the consignor (Steven) retained title. This point is fully discussed in the *First National Bank* and *Levy* cases, and the applicants should have no problem understanding the concept.
 - Thus, on the face of it, the trustee, standing as he does in the shoes of a lien creditor of Artists’ Exchange, has a legitimate claim to the painting.
- 2. The defenses and the current and additional facts that might support them.**
- **Known facts:** The applicants should discuss each of the defenses under § 2-326(3) exceptions and whatever known facts there are to support them; and, if there are no supporting facts, simply say so and move on.
 - The “sign law” exception (§ 2-326(3)(a)) probably doesn’t apply on the known facts. Although Steven put a 2” x 3” label on the back of the painting identifying himself as the owner, it is not likely that it was “posted conspicuously” within the meaning of Franklin Civil Code § 3533. See, also, the discussion in *Levy* as to whether the label was calculated to inform creditors or just possible customers. Whether there was a sign posted by Lottie in the front window (as Steven seems to “think” there was) is not known at this point.

- There is no basis, on the facts currently known, to conclude that it was “generally known to [Lottie’s] creditors” that she was “substantially engaged in selling goods of others.” It is arguable that the very name of the art gallery, “Artists’ Exchange,” communicates such a notion and that the sign Steven “thinks” he saw in the window (i.e., “All offers will be considered and forwarded to the artists”) does too, but there are not enough facts currently known. Thus, the § 2-326(3)(b) exception doesn’t help at this stage.
- There is no current information that Steven filed a UCC financing statement, so there is no basis for invoking the § 2-326(3)(c) exception.
- The strongest defense based on the known facts is that the painting, before Steven delivered it to Lottie, was “used . . . for personal, family, or household purposes,” and that the exception in § 2-326(3)(d) applies.¹ The interview notes are ambiguous on that point. On the one hand, they show that Steven had the painting hanging in his dining room and hadn’t thought about selling it until Lottie suggested it. It is also helpful that Steven and his wife had purchased a new rug with colors that complemented the colors in the painting; this is evidence that they intended to keep the painting for personal use. On the other hand, it is clear enough that Steven did regularly sell his paintings. More facts are needed on what their intentions were.
- **Additional facts, sources, and why the additional facts are important:** The notion in this part of the test item is to require the applicants to scour materials for facts that are hinted at in the File and Library, focusing on facts that would help invoke the protective exceptions listed in § 2-326(3).
- **Whether Steven filed a UCC financing statement.**
 - **Why important:** Although it is not probable that he did file a financing statement, it does not appear affirmatively from the facts that Ms. Morales

¹ This exception, found in the library version of § 2-326, is not part of the official version of the UCC. It is part of the California UCC and is included here because it makes a good test issue.

even asked the question. It would help if he had because it would invoke the protective exception of § 2-326(3)(c) and might get him home free.

- **Sources:** Ask Steven himself or make a search with the Secretary of State’s office or other public filing offices.
- **Whether the painting can persuasively be characterized as “goods . . . used . . . for personal, family or household purposes.”**
 - **Why important:** If that can be shown, it will, without more, invoke the protective exception of § 2-326(3)(d) and establish Steven’s right to keep the painting. The footnote in *First National Bank* suggests the inquiry, and it is possible that, as to this painting, Steven might still be a “casual collector.” After all, he has only recently retired to go into painting full time.
 - **Sources:** Get the facts from Steven and Ella, his wife. The interview notes suggest that, even though Steven regularly sold some of his paintings, perhaps there are some he painted and intended to keep for his own personal use. Check whatever records he maintains because they may help to show that some of his paintings (e.g., the ones he hangs in his home) are intended for “personal, family or household purposes.” Ascertain what discussions they had about keeping the painting when they purchased the rug to complement the colors in the painting. Identify what other paintings, if any, they intended to keep for themselves as opposed to selling.
- **Whether Lottie dba Artists’ Exchange was in fact substantially engaged in selling goods of others.**
 - **Why important:** The threshold question (as opposed to the ensuing question whether Lottie’s general creditors had such knowledge) is whether Lottie’s business was in fact predominantly a consignment business. If so, then the applicant can proceed to the inquiry regarding whether the general creditors knew it sufficiently to invoke the protective exception. This inquiry is prompted by Steven’s suggestion during the

interview that most of the art at Artists' Exchange was on consignment and that most artists he knows of deal with galleries on a consignment basis.

- **Sources:** Lottie herself is probably the best source of this information. The property schedules filed with the court will at least identify the inventory of art and maybe even whether a particular item was on consignment or owned by Lottie. The consignors are also creditors (see, *First National Bank*), so they will have to be listed on the bankruptcy schedules as well. The schedules will furnish their names and addresses in case it becomes necessary to contact them directly.

The question whether art galleries in general do business predominantly on a consignment basis may be a subject for expert testimony, so a suggestion that an expert be consulted as a source for this information would be in order.

- **Whether the general creditors of Lottie dba Artists' Exchange knew that the gallery sold predominantly the goods of others.**
 - **Why important:** Proof of such "general knowledge" is essential to the invocation of the protective exception of § 2-326(3)(b). See, *First National Bank and Levy*. If it can be shown, it will get Steven home free.
 - **Sources:** The bankruptcy schedules will disclose the names and addresses of all the creditors. It may be necessary to contact the bulk of them to find out what they knew when they extended credit. Perceptive applicants might distinguish *First National Bank*. There, the court found that the knowledge of other consignors was irrelevant to the knowledge of "general" creditors. Here, if it can be shown that almost all of Lottie's creditors were consignors, as is suggested in the footnote in *First National Bank*, then their knowledge is perforce relevant to establish general knowledge.

Ask Lottie and check correspondence and other records of communication between Lottie and her creditors for the possibility that the extent of her dealing in the goods of others was disclosed to her creditors.

Steven said during the interview that he thinks there was a sign posted in the front window of the gallery to the effect that, “All offers will be considered and forwarded to the artists.” If so, that could be evidence of notice to creditors that Lottie was selling the goods of others.

The very name of the gallery, Artists’ Exchange, is another source of the knowledge of the creditors. It suggests that Lottie is dealing in the goods of others and that the creditors must therefore have known it. Finally, expert testimony might help establish that creditors of art galleries were on constructive notice because almost all galleries do business on a consignment basis.

- **Whether there was a sign such as Steven thinks he saw in the front window of the gallery.**
 - **Why important:** It can serve two purposes: (1) to establish that the general creditors knew that Lottie was dealing predominantly in the goods of others, thus bringing into play § 2-326(3)(b), and (2) as evidence of compliance with the “sign law” (Franklin Civil Code § 3533). Either one will get Steven home free.
 - **Sources:** Perhaps a visit to the gallery will show that the sign is still there. Lottie herself can be asked about it. Inquiry can be made of the “general” creditors, including other consignors whose names and addresses can be obtained from the bankruptcy schedules. Photographs, if any, of the front of the gallery might be a source. If the sign was purchased by Lottie, perhaps the vendor can be ascertained and asked about it.
- **Whether other consignors of art filed UCC financing statements.**
 - **Why important:** If any significant number of the other consignors filed financing statements, it could be argued that the public nature of such filings served at least constructive notice of the fact that some substantial portion of Lottie’s business was dealing in the goods of others. This, too, would help invoke the protective exception of § 2-326(3)(b).

- **Sources:** The other consignors and secured creditors, whose names and addresses can be obtained from the bankruptcy schedules, can be asked directly or a search can be made of the filings at the Secretary of State's office. This will help establish the breadth of constructive knowledge imputable to other creditors.
- **Whether any of the other consignors of art complied with the "sign law."**
 - **Why important:** If enough of them did so effectively, it would be evidence that there was at least a form of public notice that the goods of others were in Lottie's gallery. And, if it were widespread enough, it could be argued that it imparted knowledge to the general creditors. It would, however, have to be shown that the signs were intended to impart knowledge to others than the customers of the gallery. C.f., *Levy* (small cards kept with the shoes satisfied neither the sign law nor the general knowledge requirements).
 - **Sources:** Again, the other consignors would be the best source of this information. Their identities can be obtained from the bankruptcy schedules. Lottie might also be able to provide information on this point.

POINT SHEET

Kantor v. Bellows

Kantor v. Bellows
DRAFTERS' POINT SHEET

This performance test asks the applicant to write a persuasive letter to an opposing attorney proposing a settlement as a prelude to negotiations in a divorce case. It is set in the context of an impending divorce in which the only open issue is the treatment as divisible property of the husband's law degree and license, which were acquired during the marriage. The applicant works for the firm representing the wife. The question is whether the enhanced earning capacity attributable to the law degree and license constitutes "property" and is subject to division as marital property. The intermediate appellate courts of the jurisdiction (Franklin) are split, and the Franklin Supreme Court has not ruled on the issue.

The instructional memorandum to the applicant from the partner, the partner's interview notes, and an opinion letter from an expert contain the necessary factual materials. The Library contains the jurisdiction's Domestic Relations Law and the two divergent decisions of the Franklin Court of Appeal.

The applicant is told to draft a letter to the husband's attorney, arguing persuasively that the wife is entitled to a share of the enhanced earning capacity created by the husband's law degree, taking into account as much as possible the arguments that cut against the wife, and making a settlement demand in a specific amount.

The following points were intended by the drafters to be covered in varying degrees of depth by the applicants and to affect the grading of the test item:

1. Overview: The applicants are expected to observe the specific instructions set forth in the memo from the partner and to exhibit a good deal of judgment in what the communication to the other attorney says and how it says it:

- The answers should be in the form of a letter to opposing counsel, using fairly formal language, but not relying on legal jargon.
- Applicants must "discuss" the facts and legal principles in formulating their arguments. This instruction from the partner (i.e., to "discuss") is intended to require the applicants to integrate the facts and the law, not merely recite them.

- Similarly, the instruction to conclude the letter with a dollar demand is intended to require the applicants to work with the numbers in the file and to calculate a demand using the principles stated in the statutes and the cases.
- Better answers will emphasize the facts and law that favor the wife but will avoid the use of hyperbole (particularly the framing of legal arguments that cannot be sustained by the case law) and inflammatory language, recognizing that the letter is the first step in a series of negotiations that will require some give and take.
- Better answers will also frankly recognize the conflicting authorities and formulate the settlement demand accordingly. An answer that makes an extreme monetary demand will not be as persuasive as one that makes a reasoned reduction taking into account the effect of the conflicting authorities.
- A good answer will present principled justifications of the dollar amount chosen, rooted in the law and the facts of the case.

2. The Statutes and Cases: The following points, which the applicants should extract and use in formulating their arguments and demand, emerge from the Domestic Relations Law (DRL) and the cases:

- There is nothing in the DRL itself that limits the meaning of the term “property.” It is wide open for interpretation, as, indeed, is exemplified by the divergent views of the court in *Morgan* and *Sooke*.
- *Morgan*, a 1998 case, adopts a somewhat wooden view and holds that the law degree is not property because it is not physically subject to equitable division and because the ultimate fruits of the degree have an element of futurity, i.e., the income, of which Linda seeks a share, will have been earned after the dissolution of the marriage and is therefore not “property acquired during marriage.”
- *Sooke*, a slightly more recent case (1999), takes a more flexible view, holding that, absent any statutory proscription, it is up to the courts to define what is property. This division of the Court of Appeal finds language in the DRL that aids in the characterization of the law license as property, i.e., Section 5 talks about “evaluating . . . any interest in a . . . profession.” That language, says the court, means that “an interest in a profession or professional career potential is marital

property. . . .” The applicants, however, must deal with the dissent in *Sooke*, which takes much the same position as does the court in *Morgan*.

- Both divisions of the court, however, recognize that Linda made a contribution to the acquisition of Bill’s degree and license for which she is entitled to compensation. Both courts acknowledge the “economic partnership” theory in determining the financial interests of a spouse in the assets of the marriage, differing in how they characterize the asset (property vs. joint undertaking) and how they calculate the amount of the compensation. One point to be extracted by the applicants is that, under either holding, Linda is going to receive some measure of compensation.
- The *Morgan* court would use the concept of “reimbursement maintenance” to compensate Linda. On that basis, Linda would be entitled to a return of the amount of her investment in the partnership, i.e., the actual amount that she contributed during the marriage to allow Bill to acquire his degree. The underlying notion is that, in traditional partnership terms, Linda would not have made the investment had she not expected it to generate future benefits; upon the dissolution of the partnership, she is entitled to get her investment back to the extent that the asset (i.e., the degree) exists at the time of dissolution.
- The *Sooke* court also applies the partnership theory and considers the contribution by Linda to have been an investment in the partnership, but parts company with the *Morgan* court on the amount to which Linda is entitled. The *Sooke* court holds that Linda is entitled not just to reimbursement of her actual investment, but to the fruits of her investment. In this case, her investment in the law license contributed to the creation of an “enhanced earning capacity,” of which she is entitled to a share.
- The *Sooke* court also differs with the *Morgan* court on the question whether a value can rationally be placed on the degree or license. The *Morgan* court says a value cannot be placed on the degree because of the inherent uncertainties relating to career choices of the degree holder, whereas the *Sooke* court says that valuing the license is no different from valuing professional practices and damages in other

types of actions. Accordingly, the *Sooke* court would allow expert testimony on the present value of the enhanced earning capacity resulting from the law license and would make a “distributive award” (*see* Section 6(e) of the DRL), payable over time, based on the wife’s contribution measured by the factors enumerated in Section 5(d) of the DRL. The *Sooke* court would also allow Linda to recover her expert witness fees and attorneys fees.

- Both courts reject an award of traditional maintenance under Section 6 of the DRL as a substitute for division of the degree as property. Such an award, say the courts, would perpetuate economic dependence of the wife on the husband long after the termination of the marriage. Moreover, a maintenance award under Section 6 would be subject to termination, a circumstance that might deprive the wife of the benefit of her investment and confer a windfall on the husband.
- A minor difference between the two cases is that *Morgan* addresses a professional degree and *Sooke* deals with a professional license. For the purposes of this case, the difference is of no consequence as Linda contributed to both Bill’s degree and license. The real issue is the enhanced earning capacity resulting from the degree and/or license.

3. Application of the Facts: Having in mind Linda’s goal of attempting to reach a negotiated settlement, the applicants should compose a letter designed to make Bill’s attorney appreciate the benefits of engaging in settlement talks and the risks of not resolving the matter out of court:

- First, Linda is intent on realizing the benefit of her contribution to Bill’s enhanced earning capacity. She considers it property acquired during the marriage, and she claims an equitable share of it.
- Linda is willing to negotiate a settlement, but her willingness should not be taken as a sign that she is unprepared to litigate the matter to a conclusion. In view of the split in the Franklin courts, this case, if litigated, will almost certainly go to the Franklin Supreme Court for final resolution. Litigation will be an expensive proposition for both parties, and, since Linda views her chances of success to be better than even, the ultimate cost of the litigation will probably be borne by Bill.

- Linda is entitled to an award under either the *Morgan* or the *Sooke* view. The only question is how much.
- The facts are all in her favor on the issue of whether she made a cognizable contribution to the acquisition of Bill's enhanced earning capacity: she put off her own schooling in favor of allowing Bill to go to law school; she worked to support the family; she had a child and did most (75%) of the child-rearing and housework; she contributed all her earnings (\$85,000) to the support of the family.
- While it is true that Bill essentially financed his own tuition (\$25,000 in loans plus \$10,000 from his family), he earned only \$3,000 that could possibly have been used for family support, plus one-half of the \$3,000 savings he and Linda had accumulated.
- Had it not been for Linda's earnings, which supported the family, Bill would not have been able to get his degree.
- Linda gave up opportunities for her own professional advancement (workshops, courses).
- Even if Linda's claim were limited to the "reimbursement maintenance" amount favored by the *Morgan* court, she would receive at least 50% of the \$85,000 she contributed, and probably more, in light of her 75% non-monetary contributions in the form of child-rearing and housework.
- At the other extreme, if the *Sooke* view is adopted, Linda could get an award of up to 50% and maybe more of the \$820,000 estimated by the expert to be the present value of the high end of Bill's earning capacity, plus costs and fees.
- The applicants should use as the framework for these arguments the factors enumerated in DRL Section 5(d), which the court would use in determining the equitable division of the property.
- The fact that Linda is earning an amount equal to Bill's earnings (i.e., \$35,000) should not militate against Linda. The issue, at least under *Sooke*, is whether she is entitled to a share of Bill's earning power, ". . . not because that share is needed, but because those assets represent the capital product of what was essentially a partnership entity."

- There are facts that support the uncertainty concern of the *Morgan* court, and should not be ignored. Bill does not know what his career choice will be. Linda herself has had a change of heart, wanting to move from law to computer science. Why should Bill be denied this same flexibility to planning his life?
- Bill's economic prospects are particularly good because of his own intellectual achievements. He graduated with high honors and got the clinic award. Should Linda be entitled to compensation for these aspects of his enhanced earning capacity?
- Although Linda gets compensation under either *Morgan* or *Sooke*, her recovery under *Sooke* is far greater and, therefore, the facts supporting the future benefit Linda anticipated should be identified, i.e., they planned for each to attend graduate school, going one at a time in order to have a child soon and realize the benefits from their advanced training while having children at the same time.
- Applicants should address the short duration of the marriage and the likelihood that Linda will be able to benefit from the enhanced earning capacity she will have in getting an advanced degree herself.

4. The Demand: It is important for the applicants to realize that they are making an opening demand. It must not be so high as to be deemed by Bill to be outrageous, but it must be high enough so that it leaves Linda room to negotiate. It must be based on a rational construct, justified by the law and the facts of the case. Something along the following lines would show that the applicant has taken into account the strengths and weaknesses of the relative positions and the sensitive points of the situation:

- The parameters are already set: under the *Morgan* view, a minimum of 50% of the \$85,000 Linda actually contributed; under the *Sooke* view, a maximum of something more than 50% of the high end of the expert's present value calculation of \$820,000, plus fees and costs.
- For openers, the applicants could, and perhaps should, argue that, because of Bill's academic record, it is more likely that Bill will pursue the more promising career as a major law firm lawyer. This puts in issue the \$820,000 figure.

- It would be reasonable to suggest that the base figure for a settlement would be \$670,000, the average of the high and low present value figures (because of the uncertainty about Bill's choice), and to concede that Linda's demand would be limited to 50%, notwithstanding Linda's greater-than-50% contribution. This would put the demand at \$335,000.
- Propose that Linda is willing to accept payment over time (i.e., as a "distributive award" under *Sooke*), but that she requires a substantial up-front payment to cover her immediate needs. A satisfactory up-front payment would be \$42,500, being the amount she would almost certainly receive as a lump-sum award under the *Morgan* view (i.e., one-half of her actual contribution of \$85,000). The balance could be paid in escalating quarterly installments over, say, a 10-year period, the amounts of the quarterly payments increasing in proportion to increases in Bill's income.
- Suggest that, if a settlement is reached, Linda would be willing to bear her own fees and costs.
- The letter should suggest a willingness to negotiate and expressly invite a response. Perhaps it should even set a deadline for the response, suggesting that Linda has authorized the commencement of litigation if no timely, meaningful response is received.

POINT SHEET

In re Emily Dunn

In re Emily Dunn
DRAFTERS' POINT SHEET

The task for the applicants in this test item is to draft the introductory and dispositive clauses of a will for a client, Emily Dunn. The recent death of Mrs. Dunn's husband is the reason for rewriting her will. Most of the will is straightforward but there are special problems associated with the disposition of insurance policies and stock in the family company, equalizing gifts to the grandchildren, and the disposition of the residuary estate. In addition to drafting dispositive provisions dealing with these latter issues, the applicants are directed to write an explanation after each of the relevant clauses articulating the factual assumptions used in resolving the insurance, stock, grandchildren, and residuary clause issues and giving the reasons why they drafted the provisions the way they did.

The File contains the instructional memo from the supervising attorney, a transcript of an interview with Mrs. Dunn, an office memo prescribing the wills format used by the firm, and a copy of the client's old will. The client's wishes regarding the disposition of her property are to be gleaned from the transcript of the interview. There are some ambiguities and factual gaps in the wishes expressed by the client. These are intentional, and the applicants are expected to recognize and deal with them.

The Library consists of two decisions of the Franklin Supreme Court. One of them, *Estate of Rich*, deals with the treatment of insurance proceeds when a casualty loss occurs to bequeathed property, defines the different categories of bequests, and illustrates an application of the Franklin lapse statute. The other, *Estate of Young*, deals with gifts of corporate stock and a question of interpretation, i.e., whether the testator's use of the term "children" can be construed to mean "issue." These are all relevant to the resolution of the problems in the test item.

The other authority in the Library is an excerpt from *Walker on Wills*, the leading treatise in Franklin. It instructs the applicants on bequests of stock and, more importantly, provides the wherewithal for resolving the problem of distributing the residuary estate in a way that equalizes the gifts to the grandchildren if one or more of Mrs. Dunn's grandchildren predeceases her.

The following discussion covers all the points the authors of the item intended to incorporate, but applicants can certainly receive passing and even excellent grades without covering them all. That is left to the discretion of the user jurisdictions.

1. Overview: Applicants are expected to use the format set forth in the firm's will drafting guidelines. It is not merely a formality. In part, the format memo, by setting forth the order of bequests, tests whether applicants can classify the gifts properly as specific, general, demonstrative and residuary bequests. It also sets up a template for grading consistency.

No particular style of language is necessary, but Mrs. Dunn's old will should serve as guide to the kinds of words the applicants can use to express the dispositive wishes of the client. They have to be careful not to follow the form of that will blindly because, as suggested in the will drafting guidelines, the firm's preferred format has changed since 1965 when Mrs. Dunn's old will was drafted. The authors of the test item did this intentionally so that the task would not become merely an exercise in copying from the old will.

There is no particular format for the explanations regarding issues relating to the insurance, stock, equal gifts to the grandchildren, and gift of the residuary. However, it calls for them to do two things. First, they must articulate whatever factual assumptions they have to make to fill in the factual gaps in the File. For example, there is a suggestion, which is less than clear in the interview with Mrs. Dunn, that there is insurance on all her personal and real property, and the applicants will have to make the assumption that the insurance exists or at least account for the possibility that it might exist at the time of Mrs. Dunn's death.

Second, they must explain why they have drafted the will provisions in the particular way they have. For example, regarding Mrs. Dunn's wish to treat her grandchildren equally, they will have to explain why the language they have chosen adequately satisfies the "per stirpes but per capita at each generation" concept set forth in *Walker on Wills*.

2. The Introductory Clause: This is a fairly straightforward task. The office memo tells the applicants what it must include:

- Mrs. Dunn's name and domicile, Jackson City, Franklin;
- Revocation of "all prior wills and codicils";
- Recitation of Mrs. Dunn's immediate family, i.e., her three children and the grandchildren. In the old will, the immediate family recitation is incorporated into

one of the bequest sections. In the new will, it should be in the introductory clause. The better applicants might recite that Mrs. Dunn is widowed.

3. Part One A - Specific Bequests: In this section, the applicants are expected to recognize which of Mrs. Dunn's bequests fall into the category of specific bequests, to set them forth in the order specified in the will drafting guidelines according to the kind of property being bequeathed and to express any conditions that might affect the disposition of the property.

- **Real Property - Bequest of her house and the contents to Jonathan:** This is a specific bequest because these are "specific assets." See *Estate of Rich*. Mrs. Dunn wants Jonathan to have the house and the contents ("the things in the house"), so the language should simply and plainly say that she gives these assets to him.
 - A strict reading of the will drafting guidelines would seem to require that the gift of the house be set forth in one paragraph and the gift of the contents in another. It might be more efficient, and certainly acceptable, if an applicant makes in a single paragraph the gift of "my home and its contents that are not otherwise disposed of" to Jonathan.
 - **Insurance:** There should be an expression in the language of this bequest that, in the event there are casualty losses affecting the house or the contents, Mrs. Dunn wants the insurance policies or proceeds to follow the assets and to go to Jonathan, not to the residue. See *Estate of Young*. This intention is clear from the concern she expressed during the interview.
 - **Lapse Issue:** Mrs. Dunn says that, if Jonathan predeceases her, she wants the house and contents sold and added to the residue (i.e., "sold and distributed along with everything else I have left").
 - Although Jonathan has no issue right now, it is possible that he might have issue when Mrs. Dunn dies. In light of that possibility, the will should specifically condition this gift upon Jonathan's survival in order to avoid the effect of the lapse statute and comply with Mrs. Dunn's wish.
- **Points re insurance for the explanatory paragraph:** It is fair from the interview transcript to make the factual assumption that there is insurance

on the house and the contents (i.e., “Chuck insured everything we own . . .”) and that Mrs. Dunn wants the insurance policies to follow the assets. The explanation should make this assumption and explain how the language in the dispositive clause complies with that wish.

- **Tangible Personal Property - Bequest of the jewelry to Andrea and Bertha:** Again, this is a gift of specific property and therefore a specific bequest. The language should state simply and plainly that Mrs. Dunn gives the jewelry to Andrea and Bertha to be divided between them as they see fit.
 - The clause should also account for the contingencies that:
 - If they can’t agree on how to divide the jewelry, the executor should divide it as equally as possible; and
 - If either predeceases Mrs. Dunn, the executor should divide the jewelry and “sell the share of the one who died before me.”
 - In this respect there is something of an ambiguity. Does Mrs. Dunn intend that the proceeds of the sale by the executor go to the issue of the deceased daughter or to the residue? Applicants should probably resolve it in favor of the residue in light of Mrs. Dunn’s desire to treat all grandchildren equally, but it would be acceptable for them to allow the proceeds to go to the issue of the deceased daughter. Remaining silent on the point will allow the lapse statute to operate to pass the decedent’s share to her issue.

The better papers, however, will cover the point explicitly.
- **Insurance:** Here also, the clause should recite that the insurance policies and the proceeds follow the assets in case of casualty loss affecting the jewelry.
- **Points for the explanatory paragraph:** Again, it is a fair assumption that there is insurance to cover the jewelry (“Chuck insured everything we own . . .”). The same assumption and explanation should be made here as was made regarding the house and contents. Also, the applicants should state

whatever assumption is made about the descent of the proceeds of a sale of a deceased daughter's share of the jewelry and explain how the language of the bequest supports the assumption.

- **Intangible Personal Property - Bequests of Wilson Corporation stock:** There are two specific bequests of Wilson Corporation stock, which is intangible personal property, each requiring different treatment.
 - **In General:** Mrs. Dunn currently owns 10,000 shares of Wilson stock. Wilson Corporation is apparently a closely held corporation and presumably not available on the open market. As suggested in *Walker*:
 - The clause should make it clear that she is bequeathing “shares of ‘my’ Wilson Corporation stock”;
 - It should also cover the possibility that the corporation might split the stock or pay stock dividends, which would increase the number of shares. Presumably, Mrs. Dunn would want the corresponding increase to accompany the bequests.
 - **500 shares to each grandchild:** The clause should name the existing grandchildren and state clearly that each of them, Nelson Little, Becky Little, Stephen Little, and Sidney Dunn, are to receive 500 shares of “my Wilson Corporation stock” and adapt the language in *Walker* regarding share increases on account of stock splits or dividends.
 - Mrs. Dunn has also expressed the desire that afterborn grandchildren also each receive 500 shares, so the clause should provide for it. The only condition she has expressed is that the grandchildren be born before she dies.
 - Mrs. Dunn has also said she wants the shares bequeathed to any predeceased grandchild to pass to the “kids/children” of that grandchild. It is probably fair to assume that she means “issue,” and the holding in *Estate of Young* can be brought to bear on that point.
 - Likewise, it is possible that one or more individuals might become “grandchildren” by adoption. The disposition clause should provide

for this contingency one way or another, but the fact that Mrs. Dunn is willing to include her cousin Alice's adopted child in the will (*infra*) is an indication that she would intend to include adopted grandchildren.

- The lapse statute will operate to pass the shares bequeathed to a predeceased grandchild to that decedent's issue if the will is silent on the point, but better applicants will make it explicit.
- **Points re this bequest of stock for the explanatory paragraph:** One assumption the applicants need to make is that Mrs. Dunn intends that only shares she owns at her death shall be used to satisfy this bequest. Another is that she would intend the increase on account of stock splits or dividends to go to the individual legatees. These assumptions are inferable from the fact that Wilson Corporation is a family company and that she has a desire to treat the grandchildren equally. The applicants should then explain why it is that the language they have used accomplishes these things. The assumption regarding who Mrs. Dunn intends to include among the afterborn grandchildren is disposed of by her statement that "more grandchildren" means those born before she dies. This should probably be expanded to include those who became grandchildren by adoption before she dies.
- **600 shares to the children of deceased cousin, Alice Dunn:** This specific bequest is essentially a class gift to a closed class, i.e., there will be no more children of Alice Dunn because she is dead. The clause should name the three children, Drew Dunn, Bobby Dunn and Marilyn Dunn (the adopted child of Alice Dunn) and state that Mrs. Dunn wants to leave them 600 shares of "my Wilson Corporation shares."
- The shares are to be divided equally among those of Alice's children who survive Mrs. Dunn. The survival condition removes any question about the application of the lapse statute.

- Again, it can be presumed that Mrs. Dunn wants any increase on account of stock splits and dividends to follow the bequest.
- If the bequest specifically names the three children, the fact that Marilyn is an adopted child is moot because she is specifically named beneficiary. If, however, the words of the bequest refer only to “the children of my deceased cousin, Alice Dunn,” the applicants should make it clear that Mrs. Dunn intended to include Marilyn in the class. See *Estate of Young*.
- **Points re this bequest of stock for the explanatory paragraph:** As with the bequest of stock to the grandchildren, the same assumptions can be made regarding the bequest being only of shares owned at her death and the disposition of splits and stock dividends. If Marilyn Dunn is not specifically mentioned as a beneficiary, the fact that she was adopted should be mentioned and the assumption made that Mrs. Dunn intended that Marilyn be treated as a “child” of Alice. In both cases, the applicants should explain why the language supports the assumptions.

4. Part One B - General Bequest: There is only one general bequest as that is defined in *Estate of Rich*: the gift of \$20,000 to Helen Rossini. The clause should simply make the gift to Helen and make it clear it is conditioned on Helen’s surviving Mrs. Dunn. Since Mrs. Dunn wants the money to “stay in my family” if Helen does not survive, the applicants should state specifically that the money drops to the residue if Helen predeceases Mrs. Dunn.

5. Part One D - Residuary Clauses: Mrs. Dunn wants “what’s left of my estate to go equally to my kids, or their families . . .”, not including the spouses of her children. More specifically, she wants the residue “divided equally among my three children, whether or not they are alive when I die. Then I want all the children of my deceased children to be treated equally.” *Walker on Wills* furnishes the means of satisfying this intent.

Applicants can either try to craft language that expresses Mrs. Dunn’s wish that each of her children should get one-third and that the shares of any of her children who predecease her are aggregated and divided equally among all the children of her deceased children or they can

use the shorthand given in *Walker*; i.e., she wants the residue to be distributed “to my issue per stirpes but per capita at each generation.”

- **Points re equal treatment of grandchildren in distribution of the residue for the explanatory paragraph:** Applicants should recognize that this is the closest they can come to insuring equal treatment of grandchildren because, unless both Andrea and Bertha predecease Mrs. Dunn, the grandchildren by the survivor of those two daughters will take nothing under the will. They must make the assumption that Mrs. Dunn will be satisfied with that result and explain how the language they have written accomplishes that result.

