July 2008 MPTs and Point Sheets

The National Conference of Bar Examiners inaugurated the Multistate Performance Test (MPT) in 1997. This publication is a reprint of the MPTs that were administered in July 2008 in 34 jurisdictions: Alabama, Alaska, Arkansas, Colorado, Delaware, the District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Texas, Utah, Vermont, West Virginia, Wisconsin, Guam, and the Northern Mariana Islands.

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

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

Copyright © 2008 by the National Conference of Bar Examiners.
All rights reserved.

July 2008 Multistate Performance Tests and Point Sheets

Table of Contents

Instructions iii

MPT 1: ***Bohmer v. Bohmer***

FILE

Office Memorandum from Charles Petrilla 1

Transcript of telephone call 2

Columbia Legal Services intake form 4

Civil Protection Order (Attachment A) 7

E-mail from Alex Bohmer (Attachment B) 8

LIBRARY

Franklin Uniform Child Custody Jurisdiction and Enforcement Act 11

In re Marriage of Mills (Franklin Ct. App. 2002). 13

In re Marriage of Brickman and Young (Franklin Sup. Ct. 2003) 15

MPT 2: ***Williams v. A-1 Automotive Center***

FILE

Memorandum from Tania Miller 21

Memorandum on drafting causes of action 22

Client interview notes. 23

Memorandum to file. 25

Receipt from A-1 Automotive Center 26

LIBRARY

Foster v. Panera (Franklin Ct. App. 2003). 29

Madison v. Brooks (Franklin Ct. App. 2005). 31

Rogers v. Statewide Insurance Co. (Franklin Ct. App. 1995) 33

MPT POINT SHEETS

Bohmer v. Bohmer 37

Williams v. A-1 Automotive Center 47

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. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

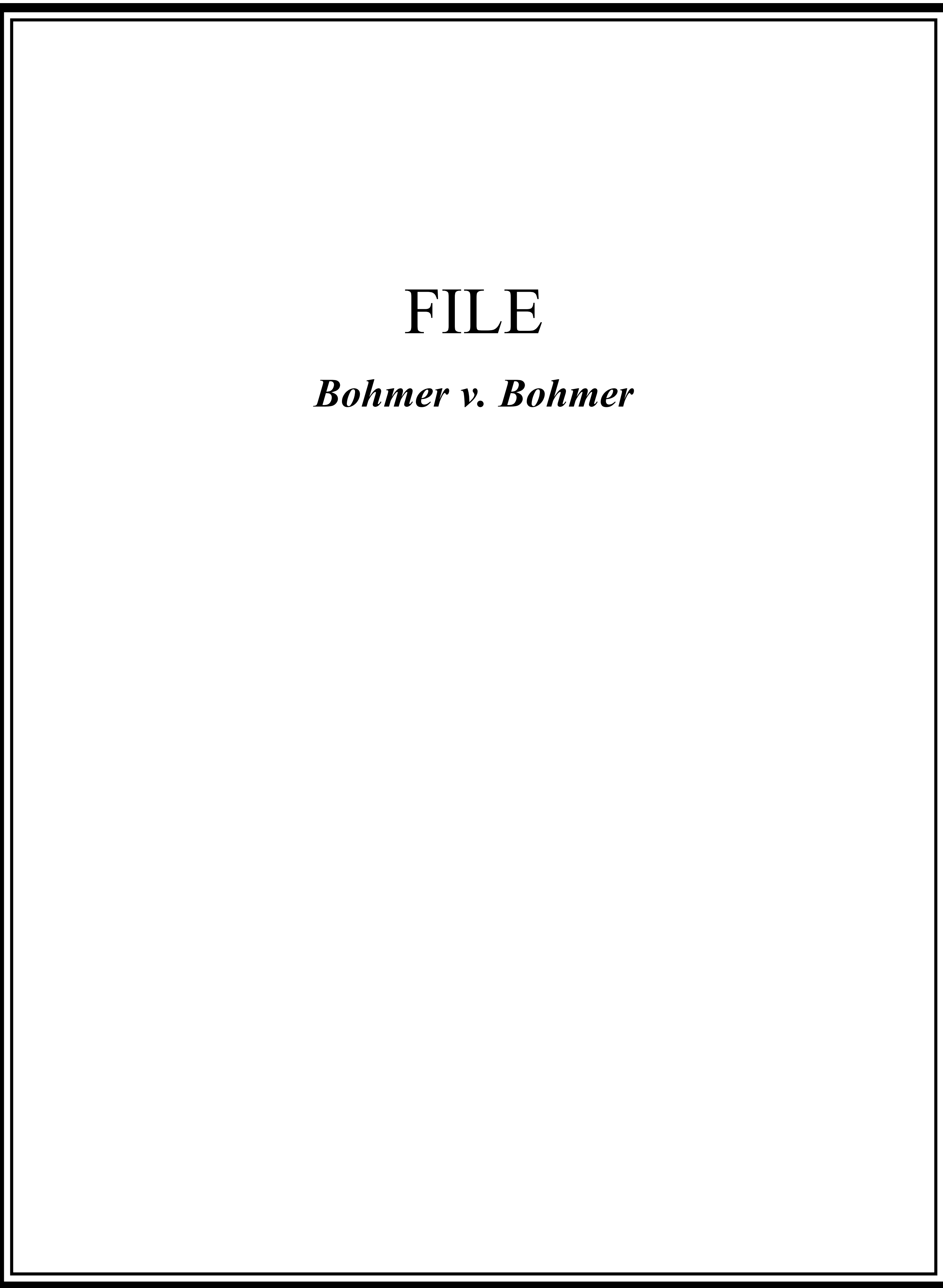
3. You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are 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 they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

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

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 the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.



FILE

Bohmer v. Bohmer

Petrilla and Associates
Attorneys at Law
222 Van Every Place
Centralia, Franklin 33703

Office Memorandum

To: Applicant
From: Charles Petrilla, Managing Partner and Pro Bono Coordinator
Date: July 29, 2008
Re: Jessica Bohmer/Interstate Custody Case

Our law firm, as part of its pro bono program, has agreed to represent Jessica Bohmer in a child custody matter that her husband, Alex Bohmer, has filed in Franklin City, Franklin. Jessica currently lives with their six-year-old daughter, Carrie, in Columbia Heights, Columbia.

No divorce proceeding has yet been filed by either party. On June 30, 2008, Jessica's husband filed a child custody petition in Franklin District Court. We hope to convince the Franklin court that the case should be heard in Columbia where Columbia Legal Services is prepared to help Jessica file a custody action and obtain a civil protection order if necessary.

I just spoke to Columbia Legal Services this morning and will be talking to Jessica and Columbia Legal Services tomorrow. I want to be able to give them some answers regarding jurisdiction. To help me advise them, please prepare a memorandum analyzing the following two issues:

1. Whether Franklin or Columbia was the home-state jurisdiction under the Franklin Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) at the time of the filing of the current custody case in Franklin.
2. Assuming for purposes of argument that the Franklin court decides that Franklin is the home-state jurisdiction, whether we are likely to be successful if we file a Motion to Decline Jurisdiction under the Inconvenient Forum provision of the Franklin UCCJEA.

Be sure to provide detailed discussion and analysis, incorporating the relevant facts and addressing the applicable legal authorities. I want to know the weaknesses as well as the strengths of a potential motion on Jessica's behalf. You need not prepare a separate statement of facts.

Transcript of Telephone Call

[Kathleen Murphy (KM), Columbia Legal Services attorney, and Charles Petrilla (CP), Franklin law firm partner, July 29, 2008]

KM: Charles, thanks very much for calling. I'm glad you've agreed to take Jessica's case because she needs representation in Franklin as well as in Columbia.

CP: Kathleen, I'm happy we can help. Thanks for faxing us a copy of the intake form and the Civil Protection Order issued in 2006 in Franklin against Jessica's husband, Alex. I've reviewed the intake form, but want to know if there have been any new developments. Have you filed a custody action on Jessica's behalf in Columbia?

KM: No, not yet. Jessica came into our office a little over two weeks ago seeking our help in obtaining sole custody of Carrie, and possibly with obtaining another civil protection order if Alex continues to threaten her. However, on June 30, 2008, Alex filed for custody of Carrie in Franklin District Court. We haven't actually seen a copy of Alex's complaint yet.

CP: I will get a copy from the court today and fax it to you. What are Jessica's concerns regarding having custody handled in Franklin?

KM: She's afraid to go back to Franklin City because of Alex's history of violence against her. She says that he owns a hunting rifle and she fears that he might use it to hurt her or Carrie. The most recent threatening episode was on February 1, 2008, when Alex became enraged when Jessica suggested a short visit to Columbia Heights to see her parents and Carrie, who was staying there with Jessica's parents. He ripped up several family photos. That really scared her—she left for Columbia the next day, on February 2, 2008, and hasn't been back since. Jessica also doesn't have the time or the money to go back and forth to Franklin City—the drive takes about an hour and a half, one way, and would require her to take time off from her new job.

CP: Does she intend to stay in Columbia?

KM: Yes. When she left Franklin on February 2, 2008, she didn't really have a plan. She told Alex that she would be back soon. However, after about three weeks in Columbia, she realized that she didn't want to go back to Franklin. She found a job and enrolled Carrie in the first grade in Columbia Heights. On March 1, 2008, she finally got up the courage and told Alex she wasn't coming back to Franklin but was going to stay with Carrie in Columbia.

CP: How did Alex react to that news?

KM: According to Jessica, he "flipped out." For weeks, he phoned her day and night, calling her all sorts of names. He also sent her a series of threatening e-mails like the one attached to the intake form.

CP: How does Jessica want to have the situation resolved?

KM: She wants sole custody of Carrie and wants to continue to live in Columbia, where her parents live. Having them nearby makes her feel safer, and they also help take care of Carrie. Jessica likes her new part-time job at a doctor's office and wants to enroll at the community college to finish her degree. Carrie's doing really well in school and has made a lot of friends. Carrie has told Jessica that she wants to stay in Columbia.

CP: We'll have to figure out which court should handle this matter. The UCCJEA is the law that controls which court has jurisdiction to hear custody cases. Both Columbia and Franklin adopted identical versions of this law. Let's see what the law is on this issue.

KM: We really hope that you can find a way to get the Franklin custody case resolved so that we can go forward here in Columbia. I will begin to prepare pleadings so that we can be ready to proceed in Columbia. Jessica is meeting with us tomorrow.

CP: Okay. I'll call you again tomorrow after we have done some research on our end.

Columbia Legal Services Intake Form

Date: July 14, 2008 **Intake** Attorney: Kathleen Murphy

I. Applicant Name: Jessica Bohmer

DOB: 5/30/1976 **Place of birth:** Columbia Heights, Columbia

Home address: 6226 Berkeley Blvd., Columbia Heights, Columbia 12111

Home telephone: 860-555-5688

Work address: Office of Stephen Tigani, MD, 10 Tulip Ave., Columbia Heights, Columbia

Work telephone: 860-555-3876

Is it safe to call the phone numbers listed? __X__ yes ______ no

Are the parties married? __X__ yes ______ no

If so, date and place of marriage: 3/29/2001, Columbia Heights, Columbia

Child(ren) in common. Include name, sex, and date and place of birth.

Carrie Bohmer, female, born 3/22/2002, Memorial Hospital, Columbia Heights, Columbia

Residence of applicant and child(ren) for the past 5 years. Include addresses, dates, and other people living with applicant.

1. 1/15/2003 to 5/31/2004: 28 Lanier St., Columbia Heights, Columbia; both parents and child;
2. 6/1/2004 to 5/30/2006: 1311 Taylor St., Franklin City, Franklin; both parents and child;
3. 5/31/2006 to 4/1/2007: 12 Ivy Lane, Franklin City, Franklin; mother and child only;
4. 4/2/2007 to 2/1/2008: 1311 Taylor St., Franklin City, Franklin; both parents and child (mother and child moved back with father);
5. 2/02/2008 to present: 6226 Berkeley Blvd., Columbia Heights, Columbia; mother, maternal grandparents, and child (mother moved in with her parents and child on February 2, 2008; child had been visiting her maternal grandparents since December 1, 2007).

What legal services is applicant seeking?

Jessica seeks to obtain sole custody of Carrie and protection from her husband's violence.

II. Opposing Party Name: Alex Bohmer

DOB: 10/18/1976 **Place of birth:** Columbia Heights, Columbia

Home address: 1311 Taylor St., Franklin City, Franklin 33068

Home telephone: 514-555-6999

Work address: Franklin Pharmaceutical Co., 101 Industrial Blvd., Franklin City, Franklin

Work telephone: 514-555-2339

Criminal history: n/a

Weapons: owns hunting rifle

Alcohol/drug use: drinks a few beers every weekend
Participation in drug/alcohol treatment: n/a
Participation in domestic violence intervention program: n/a
Has opposing party ever put his/her hands on applicant against applicant's will? Yes
If yes, fill out Section III, Domestic Violence History

III. Domestic Violence History

Has applicant's spouse/partner forced applicant to do something by threatening applicant?
Yes, since Jessica was pregnant with Carrie, Alex has been physically and emotionally abusive. He has pushed her down, grabbed her, pulled her by the hair, slapped her in the face, and tried to choke her. He has refused to give her money, prevented her from going out with friends, and generally tried to interfere with her relationship with her large extended family.

What was the most recent incident?
On February 1, 2008, Alex got mad when Jessica told him she wanted to go for a short visit to Columbia to see Carrie and her family. He grabbed her by the shoulders and shook her. When she tried to get away, he got one of her family scrapbooks and took out several photos of her with her parents and ripped them up. Jessica was scared but managed to act calm. She left the next day for Columbia and told Alex she would be back in a few weeks.

What was the worst incident ever?
On Jessica's 30th birthday (5/30/2006), Alex pushed her down on the floor, then pulled her up and choked her. Jessica thought she was going to lose consciousness. She feared that he might really kill her. She had bruises on her neck and arms. She left the next day with Carrie and filed for a civil protection order, which was granted on 6/10/2006. She and Alex were separated for approximately 10 months before reuniting. She let the civil protection order lapse.

Has/have applicant's child(ren) been abused by applicant's spouse/partner?
Alex has never attacked Carrie directly, but she has witnessed his violence against Jessica. When Alex, Jessica, and Carrie were living together as a family, Carrie frequently said that she was afraid "Daddy would get mad" at her, which Jessica interpreted as Carrie's fear that Alex would also hit Carrie. Carrie used to have nightmares, but those have subsided since she and Jessica moved out.

Additional history:
Jessica has never told anyone all the details about the abuse, although her family has suspected serious problems for a long time. Her family has witnessed the harassing phone calls Alex made after she moved to Columbia. Jessica wants to stay in Columbia because she has a place to live and a good part-time job, and because her mother is available to watch Carrie whenever needed. Jessica also plans to enroll in a community college here and complete her college degree.

Police reports: n/a
Hospital records: n/a

Prior Protection Orders: Yes, see Attachment A.

Date Issued	Jurisdiction	Disposition
6-10-2006	Franklin District Court	Consent Civil Protection Order, expired 6-9-2007

Other documents: See Attachment B.

IV. Income

Applicant employed: yes **Approximate gross income:** $10,000
Opposing party employed: yes **Approximate gross income:** $55,000

DISTRICT COURT OF FRANKLIN

Jessica Bohmer, Petitioner,	}	
	}	**DV No. 0569-2006**
vs.	}	
	}	
Alex Bohmer, Respondent.	}	

CIVIL PROTECTION ORDER

Upon consideration of the petition filed in this case, and ☐ after a contested hearing, ☐ after a default hearing, ☒ by consent of the parties, the Court has determined:
☒ that the Petitioner has established by a preponderance of the evidence that there is good cause to believe that the parties have a family relationship and that the Respondent committed or threatened one or more acts of domestic violence within the meaning of Franklin Code § 12-105 et seq., to wit, that the Respondent threatened to seriously harm the Petitioner and that he put his hands on Petitioner's neck in an attempt to choke her.

IT IS HEREBY ORDERED that for a period of 12 months from the date of this order:

☒ Respondent shall not assault, threaten, harass, or physically abuse Petitioner in any manner.

☒ Respondent shall stay at least 100 feet away from Petitioner's ☒ person, ☒ home, ☒ workplace, ☒ vehicle.

☒ Respondent shall not contact Petitioner in any manner, except by telephone; all telephone calls must be limited to reasonable hours of the day and must abide by the other provisions of this order.

☒ Respondent may not possess any firearms and must immediately turn over any such weapons he or she owns to the Franklin City Metropolitan Police Department.

THIS ORDER WILL EXPIRE IN 12 MONTHS UNLESS IT IS RENEWED BY THE COURT. FAILURE TO COMPLY WITH THIS ORDER IS A CRIMINAL OFFENSE AND CARRIES A PENALTY OF SIX MONTHS IN JAIL AND/OR A FINE OF $1,000.

Alex Bohmer 6-10-06

Respondent's signature (required for a consent order only) **Date**

William Jack 6/10/2006

District Court Judge **Date**

Attachment B

To: jessicabohmer@mpt.com
From: alexbohmer@mpt.com
Date: March 10, 2008

Jessica,

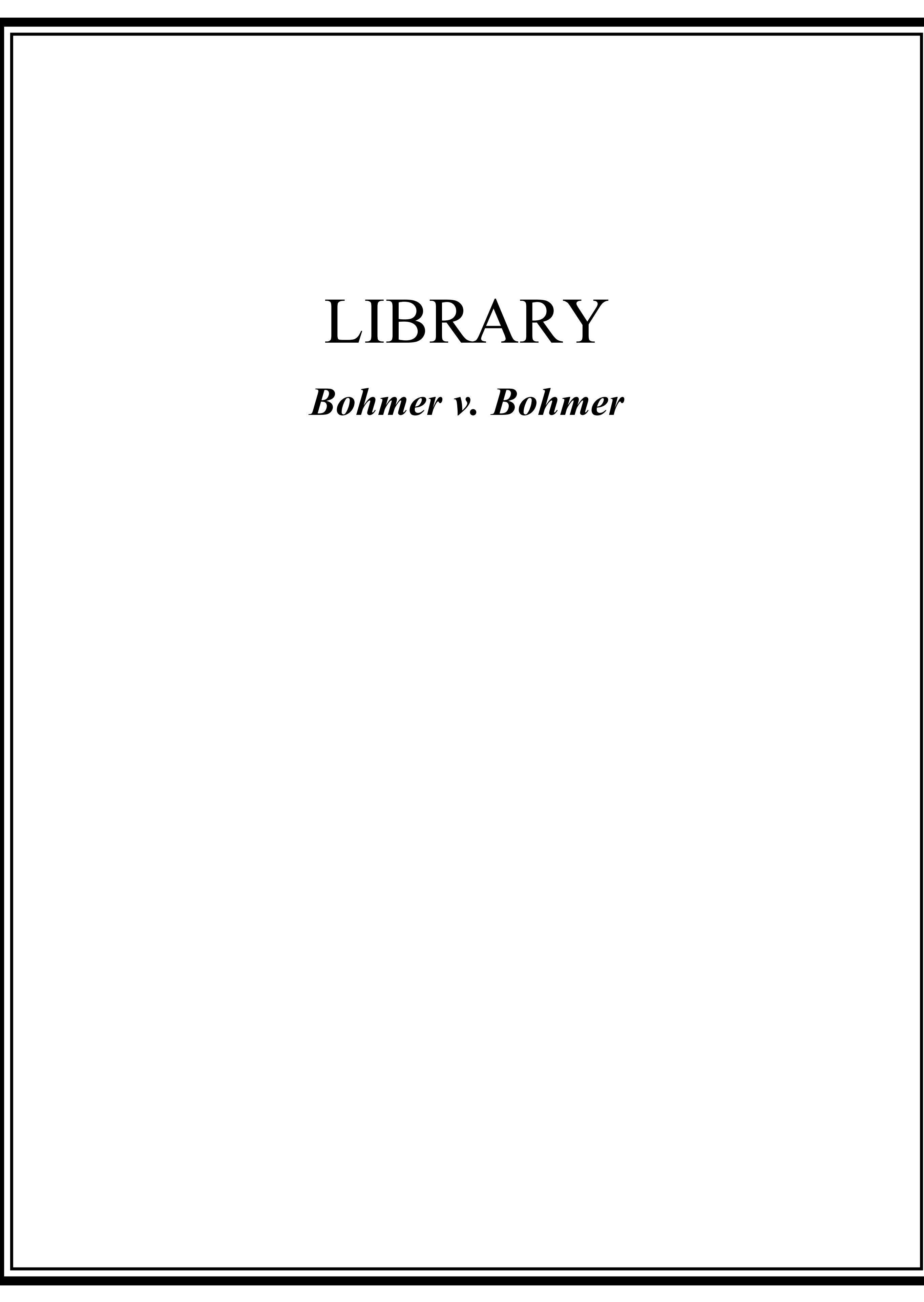
You should think twice about leaving Franklin and taking Carrie. I mean business—if you don't come back soon, I guarantee you that you'll be sorry. I'm not going to sit still and let you walk all over me!

You know you can't take care of Carrie without me. Remember what happened the last time when you ran off and then came back begging for another chance? Besides, you're taking Carrie away from her life here—her school and her friends.

This is it, Jessica. I am not playing any more of your games. For Carrie's own good, I'm not going to let you cut me out of her life.

You know we could make this work if you would just try a little harder instead of quitting and running off to your parents every time we argue. I'm willing to meet you halfway—I know I've got a bad temper, and I've got an appointment with a therapist next week—but Carrie is my daughter and she needs her daddy as well as her mommy.

Alex



LIBRARY

Bohmer v. Bohmer

FRANKLIN UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (§ 16-101 *et seq.* (1999))

* * * *

§ 16-102. Definitions. In this Act:

* * * *

(3) "Child custody determination" means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, or modification order. . . .

* * * *

(7) "Home State" means the State in which a child lived with a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. . . . A period of temporary absence of any of the mentioned persons is part of the period.

* * * *

§ 16-201. Initial Child Custody Jurisdiction.

(a) Except as otherwise provided . . . a court of this State has jurisdiction to make an initial child custody determination only if:

> (1) this State is the home State of the child on the date of the commencement of the proceeding, or was the home State of the child within six months before the commencement of the proceeding and the child is absent from this State but a parent continues to live in this State;
>
> (2) . . . or a court of the home State of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under § 16-207 . . . .

* * * *

§ 16-207. Inconvenient Forum.

(a) A court of this State which has jurisdiction under this [Act] to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another State is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

(b) Before determining whether it is an inconvenient forum, a court of this State shall consider whether it is appropriate for a court of another State to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

(1) whether domestic violence has occurred and is likely to continue in the future and which State could best protect the parties and the child;
(2) the length of time the child has resided outside this State;
(3) the distance between the court in this State and the court in the State that would assume jurisdiction;
(4) the relative financial circumstances of the parties;
(5) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child; and
(6) the familiarity of the court of each State with the facts and issues in the pending litigation.

(c) If a court of this State determines that it is an inconvenient forum and that a court of another State is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated State and may impose any other condition the court considers just and proper.

In re Marriage of Mills

Franklin Court of Appeal (2002)

William and Jennifer Mills were married in 1993. They have two children. The parties separated in November 1999, when William moved from the family home to a nearby town in Franklin where he had secured a new job. Jennifer and the children remained in the family home in Franklin City.

In June 2000, the children went to Columbia for an extended visit to Jennifer's sister's farm. On August 10, 2000, Jennifer decided to leave Franklin with her mother and permanently move to Columbia and did so with the children. Thereafter, she rented a house, enrolled the children in school, and found a new job in Columbia. Jennifer has resided in Columbia with the children and her mother since moving there. However, Jennifer did not have an explicit conversation with William about her permanent relocation until sometime during the fall—the exact date is disputed, but both agree it was no earlier than November 1, 2000.

On April 1, 2001, William filed a petition in Franklin District Court seeking custody of the parties' two children.[1]

Jennifer moved to dismiss the petition, arguing that the Franklin court lacked subject matter jurisdiction to determine custody of the parties' children, on the grounds that Columbia was the children's "home state." The trial court granted the motion, concluding that it lacked subject matter jurisdiction under the Franklin Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), § 16-101 *et seq*. William appeals. We affirm.

Under the UCCJEA, a Franklin court has subject matter jurisdiction to make a child custody determination if Franklin is the "home state" of the child. "Home state" is defined as the state in which a child lived with a parent for at least six months immediately before the commencement of a child custody proceeding. *See* UCCJEA § 16-102(7). Any period(s) of temporary absence are considered part of and included in the calculation of the six-month home-state requirement. *Id*.

On appeal William contends that the district court should have asserted jurisdiction under the UCCJEA to decide custody of the children because the children were only temporarily absent from Franklin and temporary absences are considered time in the home state. Specifically, he argues that when Jennifer left the state on August 10, 2000, she did so with the intent of returning to Franklin, and that she did not inform him that she intended to remain in Columbia with the children until at the earliest November 1, 2000. He thus maintains that the children's absence from Franklin was

1. It is not unusual for child custody actions to be undertaken without a request to dissolve the marriage.

only a "temporary absence," and that they should be considered to have resided in Franklin until November 1, 2000.

While we agree that intent is a significant consideration in determining whether an absence from a state is a "temporary absence," we do not believe that the significance of intent can or should be restricted to the intent existing at the time of leaving. If it were so restricted, then an absence that began with intent to return would remain a "temporary absence" even long after a decision had been reached to permanently relocate and such relocation to another state had in fact occurred. We believe instead that an absence from a state is no longer "temporary" once the absent person has formed the intent to reside permanently in another state and is in fact doing so with such intent.

In this case the children's presence in Columbia beginning in June 2000 was originally intended to be temporary. However, the parties had separated some seven months earlier and, as of August 10, 2000, Jennifer moved to Columbia intending to permanently relocate there with the parties' children. She has since resided there with them, with that intent. We conclude that the relevant six-month period began to run on August 10, 2000. We therefore agree with the trial court that Columbia, and not Franklin, was the children's "home state" when William filed his April 1, 2001, petition for custody, and that under UCCJEA § 16-201(a), the Franklin court did not have jurisdiction to make a child custody determination. In so concluding, we reject William's contention that the children's absence from Franklin must be considered a "temporary absence" until Jennifer expressly informed him in November that her earlier move to Columbia, of which he was aware, had been made with the intent that she and the children would remain in Columbia permanently.

Affirmed.

In re Marriage of Brickman and Young

Franklin Supreme Court (2003)

Mark Brickman commenced this action seeking to modify custody of his four minor children. His former wife, Ruth Young, moved to dismiss under the Franklin Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) on the ground that Franklin is an inconvenient forum. She appeals the district court's denial of her motion, as affirmed by the court of appeal. We granted review, and now reverse and remand.

BACKGROUND

Brickman and Young married on October 1, 1988, in Livingston, Franklin. Thereafter, they separated and reconciled numerous times before finally separating in 1996.

Brickman repeatedly battered Young during the marriage, and Young obtained several court-issued protection orders during their multiple separations. Brickman pled guilty to domestic assault in 1990, 1991, 1994, and 1996. The record details Brickman's violations of the protection orders, as well as several incidents involving Brickman's violent behavior after the parties' final separation and before Young's move to Columbia.

In its March 23, 1998, marriage dissolution decree, the Franklin District Court, among other things, awarded custody of the parties' four children to Young. Shortly thereafter, Young relocated to the State of Columbia with her children. In response, Brickman filed a motion in Franklin District Court seeking to modify the court's decree and to obtain custody. Young then subsequently filed a motion requesting the Franklin District Court to decline jurisdiction as an inconvenient forum to allow the Columbia court to assume jurisdiction over the parties' ongoing child custody and visitation arrangements. Brickman opposed the motion. The Franklin District Court denied the motion; the court of appeal affirmed, and we granted review.

DISCUSSION

In this case of first impression we examine the provisions of the Franklin UCCJEA that allow a court to decline to exercise jurisdiction over child custody proceedings when the court determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum in which to make the child custody determination.

The Franklin UCCJEA sets forth six specific factors to be considered, which we discuss in turn below. We note that, while some factors may weigh more heavily than others, all must be considered by the court. The law does not allocate a burden of proof to either party, but directs the court to conduct an evaluation based upon the relevant information available to determine whether

it is appropriate for another state to exercise jurisdiction.

The first inconvenient forum factor inquires "whether domestic violence has occurred and is likely to continue in the future and which State could best protect the parties and the child." UCCJEA § 16-207(b)(1). The UCCJEA places domestic violence at the top of the list of factors that courts are required to evaluate when determining whether to decline jurisdiction as an inconvenient forum for a child custody proceeding. With regard to this factor, the court should determine whether the parties are located in different states because one party is a victim of domestic violence or child abuse. If domestic violence or child abuse has occurred, the issue is which forum can provide greater safety.[1]

Given the high propensity for recidivism in domestic violence, we hold that when a court finds that domestic violence has occurred or that a party has fled the state to avoid further iolence or abuse, the court is authorized to consider whether the party and the child might be better protected if further custody proceedings were held in another state. This factor alone is not dispositive under the UCCJEA; however, courts should give greater weight to this factor than to any other individual factor when considering jurisdictional issues under the UCCJEA.

Brickman asserts on appeal that his last act of reported domestic violence occurred in 1996 and claims that there has been "no apparent problem" during the past three years.

But Brickman's criminal record of domestic violence reveals a pattern of recurrent wife-battering of escalating intensity, which includes severely beating Young during her pregnancies. The record also establishes that Brickman has perpetrated serious injury upon his ex-wife and has exhibited obsessive and controlling behavior. Brickman testified at the May 2001 hearing that he had not received any type of psychological counseling since his last incarceration in 1996 for domestic violence. Moreover, he made no showing to the district court that his potential for future violence has abated.

This history of serious domestic violence and the threat of future domestic violence by Brickman leads us to conclude that with regard to this factor, Columbia is the state that would best protect Young and the children.

The second statutory factor asks how long the children have resided outside Franklin.

1. The compelling need to protect victims from further domestic violence is supported by the research findings of the United States Department of Justice. Those findings suggest that termination of an abusive relationship actually poses an increased risk of escalation in domestic violence. Although divorced women and separated women comprise only 10 percent of all women in America, they account for three-quarters of all battered women and report being battered 14 times as often as women still living with their partners. Divorced or separated men, as opposed to husbands living with their wives, commit 79 percent of all spousal violence.

UCCJEA § 16-207(b)(2). The district court relied heavily on the fact that the children have spent the majority of their lives in Franklin and on the extensive history of the parties in the Franklin courts. However, the four children, ranging in age from four to eleven at the time of the hearing, have now lived in Columbia for five years. Young testified that the children "have significant connections to family, school, and community" in Columbia and have developed relationships that have enhanced their sense of security and well-being, which is "a contrast from the isolation they experienced while living in Franklin." Because it has been the children's home for the past five years, we conclude that, on this factor, Columbia would be an appropriate forum for child custody proceedings.

The third factor evaluates the distance between the courts, which is approximately 400 miles in this case. UCCJEA § 16-207(b)(3). Young testified that the drive between her home and the court in Franklin takes about eight hours each way. As the primary custodial parent, Young must either bring the children with her to court proceedings or arrange for their care in her absence. Because the distance between the Franklin and Columbia courts creates a transportation inconvenience that must be borne by one of the parties, we conclude that the facts suggest that Brickman, as the noncustodial parent, may be in the better position to undertake the necessary travel.

The fourth factor concerns the relative financial circumstances of the parties, which the district court found to be disparate. UCCJEA § 16-207(b)(4). The court determined that Brickman enjoys an annual income of $41,797 while Young has an annual income of $6,500. We conclude that this factor weighs in favor of transfer to Columbia's jurisdiction.

The fifth factor examines the traditional bases for determining venue and inquires about the nature and location of the evidence required to resolve the pending litigation, including testimony of the children. UCCJEA § 16-207(b)(5). Notwithstanding Young's testimony that all current evidence regarding the children's mental health, medical, financial, and school records is in Columbia, the district court concluded that Franklin is just as convenient a forum as Columbia for review of pertinent child records. Although records may be easily transportable, the district court failed to address the convenience of the witnesses, the majority of whom reside in Columbia, including the four children. Three of the children are enrolled in school and receive therapeutic counseling in Columbia. Young maintains that Columbia is now the location of all witnesses and evidence regarding the children. Brickman did not refute Young's assertions regarding the location of evidence and witnesses. This factor weighs in favor of Columbia's jurisdiction.

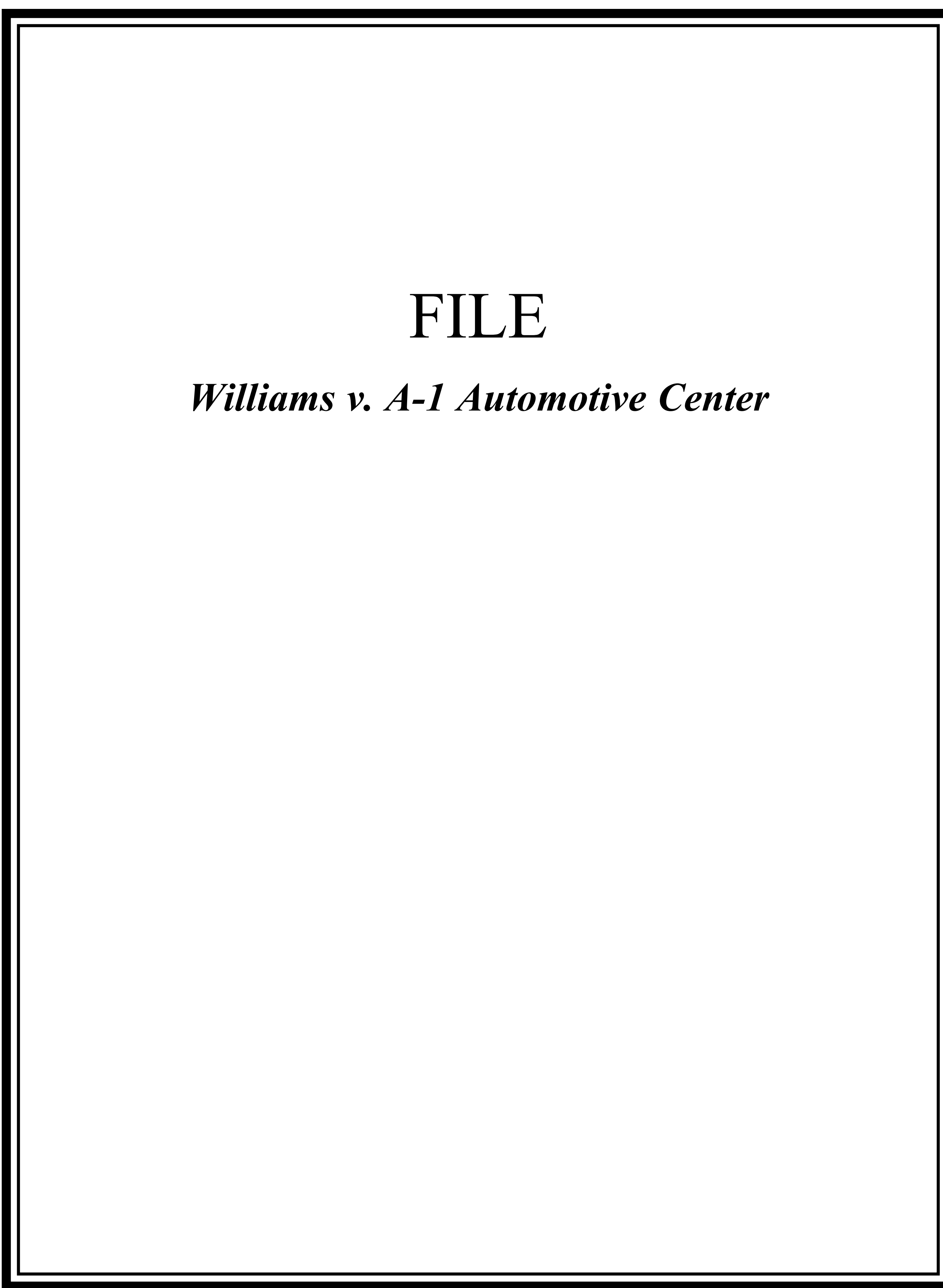
The final factor is the familiarity of the court of each state with the facts and issues in the pending litigation. UCCJEA § 16-207(b)(6). There has been extensive litigation concerning this marriage in the Franklin court—the case file is now in its fifth volume. But while the Franklin court may be well versed in the conflict, Young argues persuasively that the Columbia court also has had an opportunity to at least become familiar with the facts and issues involved in the case, when she applied for and received a permanent protection order in 2001 from the Columbia court. Therefore, under this factor, while the Franklin court might be the more appropriate forum, we conclude that the Columbia court would not be an inappropriate forum.

CONCLUSION

Weighing all the factors together, and giving added weight to the first factor concerning the existence of past and danger of continuing violence, we conclude that Columbia is the more appropriate forum to resolve this custody dispute.

Accordingly, we reverse the court of appeal's affirmance of the district court's order and remand to the district court with instructions to stay further proceedings and to direct the parties to file in Columbia, the more appropriate forum.

Reversed and remanded.



FILE

Williams v. A-1 Automotive Center

MILLER & KILLEBREW LLP
ATTORNEYS AT LAW
450 FLAMINGO DRIVE, SUITE 1000
CLEAR BAY, FRANKLIN 33002

M E M O R A N D U M

To: Applicant
From: Tania Miller
Re: Williams v. Biggs d/b/a A-1 Automotive Center
Date: July 29, 2008

We represent Robert Williams in a dispute with A-1 Automotive Center (A-1), concerning repairs that A-1 made to his minivan. He wants us to file a lawsuit on his behalf.

I believe Mr. Williams may be able to sue A-1 for fraud. I'm attaching notes of my interview with Mr. Williams and my memorandum to the file identifying four potentially actionable statements.

Please complete the following tasks:

1. Write a memo analyzing which of the four statements are actionable and which are not, and explaining the reasons for each of your conclusions.

2. For each statement that you determine to be actionable, draft a separate cause of action for fraud. Be sure to follow our firm's drafting guidelines for causes of action.

MILLER & KILLEBREW LLP

OFFICE MEMORANDUM

To: Attorneys
From: Tania Miller
Re: Drafting Causes of Action
Date: September 5, 2004

In pleading a cause of action, firm practice requires attorneys to draft the minimum allegations necessary to plead the required legal elements of the claim, presented in separately numbered paragraphs. The practice of pleading the required legal elements minimizes the risk of the court dismissing an action for failure to state a claim.

For example, a complaint for negligence must usually allege four elements: that the defendant had a duty, that the defendant breached that duty, that the defendant's breach was the proximate cause of injury to the plaintiff, and that this injury caused the plaintiff to suffer compensable damages. The following complaint for negligence provides an example of a negligence pleading consistent with the firm's pleadings practice:

1. When driving his car on the streets of Franklin City, Joe McMann owed other persons using the streets the duty to drive his car as a reasonable and prudent person would.
2. On December 5, 2002, Joe McMann breached his duty by driving his car at a speed in excess of the posted speed limit and through a red light at the corner of First Avenue and K Street in Franklin City.
3. When Joe McMann breached his duty, his car struck Sally Young, who was a pedestrian lawfully walking in a crosswalk at the intersection of First Avenue and K Street.
4. As a result of Joe McMann's breaching his duty, Sally Young suffered serious bodily injury and other damages.

Client interview notes: Robert Williams

July 24, 2008

Met with new client Robert Williams this morning concerning his dispute with A-1 Automotive Center (A-1). A-1 is a small auto-repair shop located in Navasota, Franklin, which is owned and operated by Aaron Biggs.

Last month, Williams and his family were planning to leave for a one-week vacation in Ocean City, Columbia. He intended to drive to Ocean City in his 2003 Dodge minivan. At that time, the minivan had approximately 75,000 miles on the odometer and was in perfect working condition.

Williams saw an advertisement in a local newspaper in which A-1 offered an oil change and fluid check for $29.95, and decided to take advantage of it. On Thursday, June 5, 2008, he called A-1 and spoke with Biggs, who told him to bring in the minivan and said that A-1 would do the work right away.

When Williams arrived, he was informed by Biggs that his minivan would have to be test-driven. Williams told Biggs that he would like to go along. After waiting around for half an hour, however, he saw his minivan being driven around the corner by one of the shop's mechanics. When the mechanic returned from the test-drive, Williams saw him talking and joking about something with Biggs. A few minutes later, Biggs walked over and told Williams that although the minivan was shifting fine, there might be a little slippage in the transmission, and that A-1 would have to find what was causing the problem. Because Biggs could not estimate how long that would take, Williams took a bus home.

Williams was home no more than 15 minutes when he received a call from Biggs telling him that there were problems with the minivan's transmission. Biggs told Williams that he had "checked and found a notification from Dodge about a defect causing the gears to grind down." Williams expressed surprise that there could be any problem with the transmission when the vehicle had been running perfectly, and he told Biggs not to take the transmission out of the minivan until he arrived.

When Williams arrived at the shop about 45 minutes later, the transmission had already been removed from his minivan and disassembled. Biggs told Williams, "Your transmission is going to fail, and soon!" Biggs gave him the option of having his old transmission repaired for about $1,400 or purchasing a rebuilt transmission from A-1's stock at a cost of around $1,700. Although Williams originally had had no intention of putting a rebuilt transmission into his minivan, at that point he felt he had no choice. He had no expertise in automotive repair, he was planning to leave for his vacation the next day, and Biggs told him that it would take three days to repair his own transmission but that a rebuilt transmission could be installed by that evening.

Williams told Biggs to install the rebuilt transmission. Biggs then said, “It would also help if we installed an extra cooler to keep it from running hot.” Williams told Biggs that if the minivan had needed an extra cooler, the manufacturer would have installed one. With that, Biggs dropped the subject.

Williams picked up the minivan that evening and paid the bill. As Williams left the shop, Biggs told him, “I guarantee the job.”

Williams took the minivan home and parked it in his garage. Later that evening, he noticed transmission oil all over the garage floor. He decided to delay his vacation and take the minivan back to A-1. When Williams looked at his receipt, however, he discovered that it was stamped “NO GUARANTEE.” The next morning, when he called A-1 to inquire why this was the case, Biggs told him that because he had elected not to have the extra cooler installed, A-1 could not guarantee the transmission. That same day, Williams took the minivan to Mission Dodge, a local dealership, and told them about his experience with A-1. Mission discovered that the minivan’s transmission was in fact his original transmission and not a rebuilt one. (Domestic car manufacturers mark engine transmission casings with the vehicle’s serial number.) Mission also told Williams that Dodge had not circulated any notification about any problems with the transmissions in its 2003 minivans. Mission charged Williams $128 to repair the transmission leak, which had been caused by A-1’s improper reinstallation of the transmission.

On June 17, 2008, after he returned from vacation, Williams called A-1 and attempted to get his money back. Biggs told Williams that he would look into it. Williams called back several times to follow up with Biggs. Each time, Biggs told him that he was still looking into the matter. Williams came to us to bring suit.

Miller & Killebrew LLP
Attorneys at Law
450 Flamingo Drive, Suite 1000
Clear Bay, Franklin 33002

MEMORANDUM

To: File
From: Tania Miller
Re: Williams Matter
Date: July 25, 2008

Note to file—Further research needed to determine whether any of the following statements by Biggs might support a cause of action for fraud:

1. Biggs had "found a notification from Dodge about a defect causing the gears to grind down."
2. "Your transmission is going to fail, and soon!"
3. "It would also help if we installed an extra cooler to keep it from running hot."
4. "I guarantee the job."

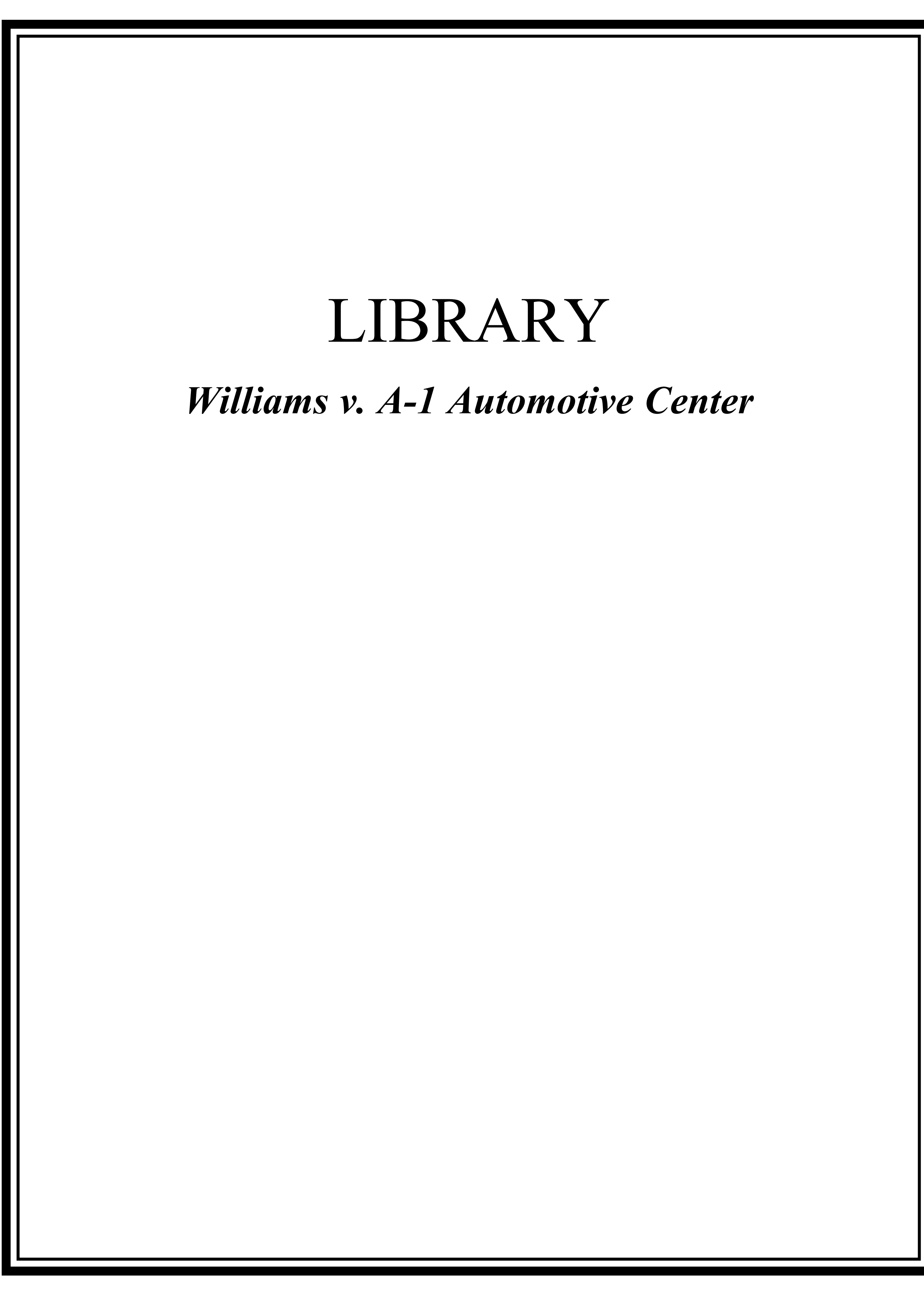
RECEIPT

A-1 Automotive Center
4834 West Avenue
Navasota, Franklin 33017
(222) 555-2115
FIRST CLASS SERVICE

Invoice #: I0023059
Date: June 5, 2008
Page: 1

Customer: Robert Williams Address: 17159 Springfield Ct. City: Diamond Springs,FR 33015 Home Phone: (222)555-3591 Work Phone: (222)555-6705	Vehicle: 2003 Dodge Grand Caravan Minivan License: E47-S19 V.I.N.: JH5SV9257RS928599 Engine: V6/150hp/3.8L Mileage: 75,249
Parts	**Labor**
REBUILT TRANSMISSION, INCLUDING HOUSING, GEARS, SEALS, PLANETARY ASSEMBLY, SPRAGS, TORQUE CONVERTER, PAN GASKET, FILTER, BANDS, SOLENOID, AND FRONT PUMP; DRAIN AND REPLACE TRANSMISSION FLUID $1400.00	CUSTOMER REQUESTED WE REPLACE ORIGINAL TRANSMISSION WITH REBUILT TRANSMISSION INSTEAD OF REPAIRING ORIGINAL 6.25 hrs @ $60.00/hr $375.00
	Labor: $375.00 Parts: $1400.00 Other Fees: $0.00 Supplies: $0.00 Subtotal: $1775.00 Sales Tax: $112.00 Total: $1887.00 Paid: $1887.00 Balance Due: $0.00

NO GUARANTEE!



LIBRARY

Williams v. A-1 Automotive Center

Foster v. Panera

Franklin Court of Appeal (2003)

This action was brought to recover damages for fraud. Plaintiff Danielle Foster appeals from the trial court's dismissal of the action for failure to state a claim against defendants Ted Panera and Abbey Furniture Company (collectively "defendants").

PLAINTIFF'S ALLEGATIONS

The pertinent allegations in the complaint are as follows:

On or about May 7, 2001, Foster told Panera, the store manager at Abbey Furniture Company, that she wished to purchase a certain set of bedroom furniture, which included a solid wood headboard. All of the items were present in the store except for the headboard. Panera told Foster that the headboard was at the store's warehouse and would be delivered to her with the other items.

Unknown to Foster, Panera made this representation knowing that it was false and intending to induce Foster's purchase of the furniture. Relying on this representation, Foster ordered and paid for the bedroom set, specifically including the solid wood headboard. She would not have ordered or purchased the bedroom set, nor any of its individual components, had she known that it would not include the matching headboard. When the furniture was delivered to Foster with a brass headboard, instead of the solid wood headboard, Foster telephoned Panera, who apologized and said that the correct headboard would be delivered to her soon. However, during the ensuing weeks and months, Panera told Foster that the headboard was on order, under manufacture, in storage, or in delivery, providing various delivery dates. The solid wood headboard was never delivered.

Panera knew that these later representations were false and, in making them, intended that Foster would be induced to keep the furniture and refrain from canceling the order. Relying on Panera's statements, Foster kept the furniture and waited for delivery of the wood headboard. Had she known that the statements were false, she would have canceled the order, returned the furniture, and demanded a refund. But because she was the customer in this transaction and because Panera, as the store manager, presumably had familiarity with the whereabouts of store inventory, Foster relied on his representations as being true.

Foster has stored but has not used the furniture. Defendants have not removed it from Foster's home, nor have they refunded the purchase price. As a direct and proximate result of Panera's initial misrepresentation,

Foster was induced to purchase the bedroom set and was damaged thereby.

As a direct and proximate result of Panera's later misrepresentations, Foster was induced to store unwanted furniture, and to refrain from canceling the contract and obtaining a refund, all to her damage in the amount of $3,500.

DEFENDANTS' MOTION TO DISMISS

Defendants filed a motion to dismiss the complaint on the ground that "the complaint fails to state a claim upon which relief may be granted against defendants." The motion was granted, and this appeal ensued.

ANALYSIS

In reviewing a trial court's grant of a motion to dismiss, we accept the plaintiff's allegations as true and give her the benefit of all fair implications therefrom. A complaint for fraud must allege the following elements: (1) a material misrepresentation of fact by the defendant, (2) made with knowledge of its falsity, (3) made with intent to deceive or induce reliance, (4) reasonable reliance by the plaintiff upon the misrepresentation, and (5) loss by the plaintiff as a proximate result of the misrepresentation.

Every element of the cause of action for fraud must be specifically pleaded and the facts constituting the fraud must be alleged with sufficient particularity to allow a defendant to understand fully the nature of the charge made. It is not sufficient to allege fraud in general terms, or in terms which amount to mere conclusions.

Defendants contend that the representations were not material and therefore cannot support an action for fraud. We disagree.

A representation is material if a reasonable person would consider it important in deciding to enter into the transaction. Here, the complaint indicates that Foster asked for a solid wood headboard, and that Panera repeatedly confirmed its eventual availability. A reasonable person seeking a solid wood headboard would have considered these assertions to be an important factor in the sale. The allegations thus clearly demonstrate that the representations were material.

CONCLUSION

Foster has properly stated a fraud claim. The judgment of the trial court dismissing the complaint is reversed, and the case remanded for proceedings consistent with this opinion.

Madison v. Brooks

Franklin Court of Appeal (2005)

This action was brought by plaintiff Jean Madison to rescind, on the ground of fraud, a written contract for the sale of certain plant nursery stock. The district court granted defendant Walter Brooks's motion to dismiss for failure to state a claim upon which relief could be granted. The sole question on appeal is whether a statement that is an expression of opinion may be actionable as fraud.

The complaint alleges that prior to executing the contract, Brooks told Madison that he had grafted 52,000 dormant buds in the trees comprising the nursery stock and that Madison "would surely see 60 to 70 percent of the dormant buds growing and producing trees." The parties stipulate that in fact only 30 percent of the dormant buds grew and produced trees.

Brooks contends that the so-called misrepresentation was the mere expression of an opinion and not a statement of a fact, and therefore could not constitute actionable fraud. He insists that a vendor has the right to freely express an opinion as to what will or will not happen in the future in relation to the sale of the property under consideration, and that such statements do not constitute actionable fraud.

As a general rule, fraud cannot be predicated upon the mere expression of an opinion which is understood to be only an estimate or a judgment. The person to whom such a statement is made has no right to rely upon the statement, and does so at his peril. For example, an auto dealer's representations that the vehicle "was a good car" and that it was "about the best one they had" were not actionable as fraud. *Bender v. Fiat Corp.* (Fr. Ct. App. 1986). Nor was the statement that certain seeds were "top quality tomato seeds" definitive enough as to how the product would perform but instead was merely the grower's opinion that the seeds were top quality. *Novotny v. Ford Farms* (Fr. Sup. Ct. 1999).

However, there is an exception to this rule where the opinion relates to a subject as to which the parties do not have equal knowledge or means of ascertaining the truth. Where the party making the misrepresentation has special knowledge of the facts underlying the opinion, or "is possessed of superior knowledge respecting such matters, with a design to deceive and mislead," the positive assertion of a matter, which stated in another form might be a mere opinion, may be actionable if the statement was false. *Novotny*. In *Novotny*, the grower also described the tomato seeds as "ones that would produce drought-resistant plants that would bear firm, uniform fruit that would not bruise during shipment." The court held that this statement could be the basis for a fraud action. *Id. See also Wong v. Hall Lumber,*

Ltd. (Fr. Ct. App. 2004) (statement made by salesman that windows were coated in a preservative that would “protect against rot and decay for at least 10 years” constituted an actionable statement).

The complaint’s allegations fall within the exception. In addition to alleging that Brooks told Madison that she “would surely see 60 to 70 percent of the dormant buds growing and producing trees,” the complaint alleges that Brooks knew that the dormant buds were poorly handled and would almost certainly not grow properly. The complaint also alleges that Madison relied upon Brooks’s skill in the business and that Madison, who was not an expert in the field of horticulture, did not possess reasonable means of ascertaining the truth of Brooks’s statement.

When we review the granting of a motion to dismiss for failure to state a claim, we take the well-pleaded allegations of fact as true. Taking these allegations as true, the statement that Madison “would surely see 60 to 70 percent of the dormant buds growing and producing trees” would be equivalent to a misrepresentation of fact, satisfying that essential element of common law fraud.

Accordingly, the trial court should not have dismissed the complaint. We reverse and remand.

Rogers v. Statewide Insurance Co.

Franklin Court of Appeal (1995)

Plaintiff Michelle Rogers appeals from a judgment entered after the trial court granted defendant Statewide Insurance Company's motion to dismiss her complaint for failure to state a claim upon which relief may be granted. The sole issue on appeal concerns the circumstances under which an unfulfilled promise to perform is actionable as fraud at common law. We conclude that when the promise is made with no intent to perform, it constitutes a misrepresentation of fact. If the other elements of fraud are present, a cause of action for fraud exists.

Rogers alleges as follows: She was involved in an auto accident with Andy Bosch, an insured of defendant. Bosch's liability was reasonably clear. Rogers obtained an estimate of $3,200 to repair her vehicle. Statewide represented to her that she was authorized to have her vehicle repaired at Capitol Ford, that Statewide's obligation to indemnify her for her damages was reasonably clear, and that Statewide would pay her for all such repairs immediately upon their completion. Rogers relied on the representations and brought her vehicle to be repaired. However, Statewide refused to pay for the repairs or to indemnify her. Because Rogers lacked the funds to complete the repairs or to obtain the release of her vehicle, she was left without its use for an extended period of several weeks until Statewide eventually settled her claim.

The gist of Rogers's fraud claim is that Statewide said it would pay for her repairs immediately upon their completion, and that it failed to do so, that Rogers could not afford to have the repairs completed or redeem her vehicle, and that she lost the use of the car for several weeks. The critical alleged misrepresentation as to immediate payment upon completion did not involve a past or existing material fact. Rather, it involved a promise to perform at some future time.

A promise is a statement of intention to perform some action in the future. If the maker of a promise honestly intends to follow through on that intention at the time of the promise, the statement cannot give rise to an action for fraud. However, if at the time of making the promise the promisor has no plans to perform, he has misrepresented his present intention, which would be a misrepresentation of fact. It is that misrepresentation that can support an action for fraud. To state such a claim, one must specifically allege, among other things, that the promisor did not intend to perform at the time the promise was made. Rogers's complaint does not contain such an allegation. Therefore, the motion to dismiss was proper.

Affirmed.

POINT SHEET

Bohmer v. Bohmer

Bohmer v. Bohmer
DRAFTERS' POINT SHEET

This performance test requires applicants, as associates of a Franklin law firm, to analyze the provisions of the Franklin Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and to predict whether the UCCJEA, and the Franklin cases interpreting it, will permit the firm to persuade a Franklin court that a state of Columbia court is the preferable venue to address a child custody dispute. The child's mother, Jessica Bohmer, is the firm's client. Jessica is still married to six-year-old Carrie's father, Alex Bohmer. Jessica has recently relocated from Franklin to Columbia with Carrie because of her concerns about Alex's violence.

The File contains an instructional memo from the managing partner, a transcript of a telephone call between the partner and a Columbia legal services attorney representing Jessica there, a Columbia Legal Services intake form, a Civil Protection Order, and a copy of an e-mail from Alex to Jessica. The Library includes excerpts from the UCCJEA and two Franklin cases.

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

I. Format and Overview

Applicants' work product should resemble a legal memorandum that an associate would write to a partner. Applicants should thoroughly discuss the two issues raised in the instructional memo, identifying the specific UCCJEA provisions and case law supporting their analyses and conclusions and incorporating all relevant facts. Applicants are told to address and analyze potential weaknesses as well as strengths of Jessica's case. Those addressing only strengths should be downgraded. The issues that should be addressed are the following:

A. Whether Franklin or Columbia was the home-state jurisdiction under the Franklin UCCJEA at the time of the filing of the custody case in Franklin

Applicants should conclude that Franklin was the home-state jurisdiction at the time Alex filed his custody suit in Franklin. They should conclude this after reading § 16-102, which defines the key concept of home-state jurisdiction; § 16-201, which prioritizes home-state jurisdiction; and *In re Marriage of Mills* (Franklin Ct. App. 2002).

Mills sets forth a test for determining whether a stay is a temporary absence or a permanent relocation to another state. The *Mills* court ruled that it is best to look at the intent of the absent parent to determine whether the move is a permanent relocation. Further, a move can begin as a temporary absence and can change to a permanent relocation because of a change in the parent's intentions. Home-state jurisdiction remains in the left-behind jurisdiction for six months from the time of the absent parent's intention to make the move permanent.

B. Assuming that Franklin is the home-state jurisdiction, whether the Franklin court is likely to grant a motion to decline jurisdiction under the UCCJEA's inconvenient forum provision, thus allowing a Columbia court to decide the Bohmer custody action

Applicants should analyze the UCCJEA inconvenient forum provision (§§ 16-207, 16-201(a)(2) (a court with home-state jurisdiction may decline in favor of another jurisdiction)) and *In re Marriage of Brickman and Young* (Franklin Sup. Ct. 2003). Applicants should discuss each of the six factors in § 16-207(b) in light of the facts and apply the appropriate standard as set forth in *Brickman*. They should conclude that the firm can make a strong argument that the Franklin court should decline jurisdiction to allow the Bohmer custody action to be heard in Columbia. However, they should also recognize that Jessica's case is not as compelling as that of the mother in *Brickman*, and thus the outcome of such a motion cannot be predicted with certainty.

II. Detailed Analysis

A. Whether Franklin or Columbia was the home-state jurisdiction under the UCCJEA when Alex filed the custody action in Franklin

Under the UCCJEA, the "home state" is the state in which a child lived with a parent for at least six consecutive months immediately before the commencement of the custody proceeding. § 16-102(3). A temporary absence is considered part of the home-state period. *Id.*

Under § 16-201, to proceed with an initial custody case, the court must either be (1) the "home-state" jurisdiction (if a home-state jurisdiction exists) or (2) the court in whose favor the "home-state" court declined jurisdiction under the UCCJEA inconvenient forum provision, § 16-207. The home-state jurisdiction has priority over all other jurisdictions except under very limited circumstances, namely, if the home-state jurisdiction declines jurisdiction in favor of another, more appropriate state. The jurisdiction must have been the child's home state on the date of the commencement of the custody action, or must have been the child's home state within six months of the commencement of the action. § 16-201. If the latter situation applies, § 16-201 further requires that a parent must continue to live in the left-behind state.

A key determination is the date of a child's permanent relocation to another state. This is the date from which the six-month period begins to run resulting in establishing another state as the new home state.

1. **Establishment of new home state: determination if absence from state is temporary absence or a permanent relocation**
   - The *Mills* court discusses the factors used to determine if a parent and child have relocated permanently. In *Mills*, the children's absence was originally intended to be temporary, but it became a permanent relocation when the mother moved to

Columbia and engaged in activities that made it clear she intended to relocate there permanently: she rented a house, enrolled the children in school, and took a new job. She did not expressly tell the father of her intent to relocate until months later. The father filed for custody in the left-behind state within six months of the date the mother notified him that her move was permanent, but more than six months from the date she first moved to Columbia. The court concluded that Franklin was no longer the home state at the time the father filed for custody and therefore the Franklin court lacked custody jurisdiction under the UCCJEA.

- The intent of the parent who has left is a significant factor in deciding whether there is a temporary absence or a permanent relocation. The court looks to the party's actions to determine intent.
- If the parent is found not to have the requisite intent to relocate, then the absence is treated as if it did not exist in determining the period of home-state jurisdiction. *See Mills*; § 16-102(7).
- Thus, the first two months that Carrie was visiting her grandparents in Columbia (December 2007 and January 2008) are most appropriately treated as a temporary absence, that is, as if Carrie were still living in Franklin for purposes of determining the home state.
- However, a stay that begins as a "temporary absence" can change and become a permanent relocation. *See Mills*. The nature of Carrie's stay with her grandparents changed, but only after February 2, 2008, when Jessica joined Carrie in Columbia and decided to relocate there.
- Franklin would continue to be the home state for six months from the time that Jessica formed the intent to relocate to Columbia and began to take steps to do so.
- Note that under *Mills*, the date that the absent parent expressly informs the other parent of the permanent nature of the move is relevant, but not controlling in deciding the date on which the absence transformed from a temporary to a permanent move. In *Mills*, the left-behind father in Franklin claimed that the key date was the date on which his wife *expressly* told him that her earlier move to Columbia was permanent, which he claimed was less than six months before his custody filing in Franklin. The *Mills* court rejected this argument, concluding that under the facts of the case it should have been clear to the father at an earlier date that the mother's move was permanent—the mother and children had been living in Columbia for months, the kids were enrolled in Columbia schools, etc.
- The period for calculating if Columbia is the home state begins to run from one of the following: February 2 (when Jessica went to Columbia), late February (when

Jessica decided not to return to Franklin, began looking for a job, and enrolled Carrie in school), or March 1 (when Jessica told Alex of her decision to stay).

- Under *Mills*, the most relevant time would be late February when Jessica made a decision to stay in Columbia and began to act upon it. However, under any one of these dates, Franklin would still remain Carrie's home-state jurisdiction on the date Alex filed for custody (June 30) because fewer than six months had passed.
  - An argument that December 1, 2007 (when Carrie left to visit her grandparents), was the relevant date for determining whether Columbia would be the home state on June 30, 2008, would <u>not</u> be meritorious.
- In short, the requisite events to start the "home-state" clock ticking in Columbia did not occur until sometime after February 2, the day that Jessica left Franklin for Columbia. Thus, Columbia could not have become the new "home-state" jurisdiction for six months from that date—sometime after August 2, at the earliest. This means that the Franklin court had the right to proceed under "home-state jurisdiction" authority in Alex's June 30 custody case because at most only five months had passed, not the six months needed to establish a new home state in Columbia.
- Jessica sent Carrie to stay in Columbia with her parents on December 1, 2007; Jessica and Alex remained in Franklin; after Alex tore up the family photos, Jessica went to Columbia on February 2, 2008, telling Alex she would stay with her parents for a short visit but would return to Franklin in a few weeks.
- Jessica did not return as promised, but decided sometime later in February to separate from Alex and stay in Columbia. She enrolled Carrie in school in Columbia, found a job, and made plans to enroll in a community college. On March 1 Jessica told Alex that she did not intend to return to Franklin.
- On June 30, 2008, Alex filed for custody in Franklin district court. This date is: seven months from December 1, 2007, when Carrie left Franklin for Columbia; five months from February 2, when Jessica left Franklin for Columbia; and four months after Jessica told Alex on March 1 that she intended to stay in Columbia.
- If the objective test of "physical presence of the child within the jurisdiction" were the rule, then Columbia would arguably be the home state because more than six months had passed since December 1, 2007, when Carrie went to stay with her grandparents in Columbia.
- Here, it is not absolutely certain if February 2, later in February, or March 1 is the relevant date for determining if Carrie's living status has changed. The best answer is that the date that Jessica decided not to return to Franklin is the relevant

date; but even assuming it is the earlier date of February 2, Franklin was still the home state on June 30, when Alex filed the custody petition. Columbia would not become the home state until sometime after July 1 at the earliest.

- Therefore, under the UCCJEA, Franklin has jurisdiction to the exclusion of any other state, unless it is an "inconvenient forum" under § 16-207.[1]

B. Assuming that Franklin is the home state, whether a motion to decline jurisdiction under the UCCJEA's inconvenient forum provision would be likely to succeed, thus allowing a Columbia court to decide the Bohmer custody case

UCCJEA § 16-207(a), as interpreted by *Brickman*, provides the criteria for analyzing whether the Franklin court should decline to exercise jurisdiction over the custody case despite the fact that Franklin is the home state. Applicants must discuss the strengths and weaknesses of Jessica's case in light of the court's analysis in *Brickman*.

Section 16-207(b) states: "A court of this State which has jurisdiction under this [Act] to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another State is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court."

Section 16-207 requires the home state court to determine whether a court of another state would be a more appropriate forum by considering six factors. Although the first factor carries more weight, no single factor is dispositive.

Factor One: Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child

In *Brickman*, the court of appeal reversed the trial court's denial of the mother's (Young's) motion to decline jurisdiction. It found that the trial court failed to make findings regarding Brickman's acts of domestic violence before concluding that Young had not shown that she and the children would be safer if the custody case were transferred to Columbia. The court then detailed the couple's extensive history of domestic violence in Franklin.

A finding of past domestic violence can be the basis for a Franklin court to yield jurisdiction to another state, although first the court must consider evidence regarding all of the other jurisdictional factors enumerated by § 16-207(b). The *Brickman* court emphasized that the Franklin UCCJEA places domestic violence at the top of its list of factors—if it is present, the

---

1. Under sections of the UCCJEA that were not included in the Library, there is one other circumstance where it would be appropriate to depart from the home-state jurisdiction: if "emergency jurisdiction" were appropriate in another jurisdiction. This issue is not raised by this problem and the Library does not contain legal authority for discussion of this issue.

court may consider which of two competing states can better protect the victim from further abuse unless issues arise from consideration of other factors that outweigh the safety considerations.

Here, there is a credible history of Alex's abusive behavior toward Jessica. This is set out in the telephone transcript, the legal services intake form, the civil protection order, and Alex's e-mail. The parties had a 10-month separation followed by reconciliation, past physical violence in Carrie's presence, numerous incidents that Jessica shared with the legal services attorney at intake, and Alex's possession of a rifle. In addition, there were several recent incidents: Alex was increasingly unpredictable around Jessica, he had torn up family photos in anger, and he had sent a series of threatening e-mails after Jessica told him that she intended to stay in Columbia. Jessica says she fears for her safety and is afraid to return to Franklin.

However, these facts do not weigh as heavily in favor of Jessica as was the case in *Brickman*, where the evidence of domestic violence was more compelling than here. In *Brickman*, there was an escalating pattern of violence, including the husband severely beating his wife during pregnancy, resulting in four criminal convictions and incarceration. Here, there is an established pattern of violence that led to the issuance of the Franklin protection order in 2006 and to a temporary separation. Jessica's current fears are based on an incident in which Alex shook her and ripped up family photos, after which she moved to Columbia because she feared further violence. He sent her an e-mail message, saying "I mean business" and "I guarantee you that you'll be sorry," which sounds ominous but is not explicitly threatening. Parts of the message are conciliatory and express concern for Carrie; Alex says that he is "willing to meet you [Jessica] halfway" and that "Carrie is my daughter and she needs her daddy as well as her mommy." Moreover, the *Brickman* court relied in part on the fact that the offender "had not received any type of psychological counseling since his last incarceration" and had failed to show "that his potential for future violence has abated." If Alex can show that he attended the therapist appointment mentioned in his e-mail, he may be able to make the showing that Brickman failed to make.

In sum, although Jessica has some strong evidence of domestic violence, it is not as strong as that in *Brickman*.

FACTOR FAVORS JESSICA, BUT NOT TO THE EXTENT IN *BRICKMAN*

Factor Two: The length of time the child has resided outside this state

The *Brickman* children spent the most recent five years in Columbia; before that they had lived in Franklin. They had many connections in Columbia, but had lived in relative isolation in Franklin. The court found that this factor favored finding jurisdiction in Columbia.

Here, Carrie has spent seven consecutive months in Columbia, she was born in Columbia and lived there for her first year before she and her parents moved to Franklin, and many of Jessica's extended family members live in Columbia. Jessica can testify that these relationships give her a sense of security and well-being in contrast to the fear and anxiety she felt living in

Franklin where she was relatively isolated because Alex discouraged any relationships with friends or family in Franklin.

NEUTRAL—OR SLIGHTLY FAVORS JESSICA

Factor Three: The distance between the court in this state and the court in the state that would assume jurisdiction

In *Brickman*, Young's Columbia home and the Franklin court were 400 miles apart. As the custodial parent, Young would have had to bring the children to court or arrange for their care. The court concluded that Brickman, the noncustodial parent, should bear any transportation inconvenience as he was "in the better position to undertake the necessary travel."

Here, it is 100 miles or an hour-and-a-half drive between the Franklin and Columbia courts. Because Jessica has physical care of Carrie, under *Brickman*, it would be reasonable to require Alex to bear the burden of traveling to Columbia. However, the distance is not nearly as burdensome as it was in *Brickman*. Furthermore, Jessica and Carrie live with Jessica's parents, who could presumably watch Carrie. Finally, Jessica is only working part-time, so she may be able to make the trip without missing work.

NEUTRAL

Factor Four: The relative financial circumstances of the parties

Brickman's annual income was $41,000 and Young's only $6,500. Presumably, the father's greater income made travel easier for him, but the court did not discuss this in detail.

Here, Jessica has a relatively new part-time job at a doctor's office earning $10,000 per year. Because she is a new employee, her job status may be particularly vulnerable. Alex has a presumably stable job with Franklin Pharmaceutical Co. making $55,000 per year.

FAVORS JESSICA

Factor Five: The nature and location of the evidence required to resolve the pending litigation, including testimony of the child

This factor examines the traditional bases for determining venue and inquires about the nature and location of the evidence required to resolve the pending litigation, including the testimony of the children. In *Brickman*, the court recognized that records can be transported to new courts easily, and that virtually all the witnesses lived in Columbia. Brickman did not refute Young's assertions. Therefore, the court held that this factor favored Young.

Here, the relevant evidence and witnesses appear almost equally split between Franklin and Columbia: Carrie, Jessica, and Jessica's parents and extended family are in Columbia; Carrie was born in Columbia and lived there until she was one year old; and Carrie has had extended visits with her grandparents there. On the other hand, Alex lives in Franklin; Carrie also lived there for four years; and her former preschool and friends are in Franklin. Jessica claims that they were isolated in Franklin because of Alex's abusive behavior and therefore she could argue that there is minimal evidence in Franklin. At best, it is not a clear-cut factor in favor of either party.

NEUTRAL

Factor Six: Each state court's familiarity with the facts and issues in the pending litigation

In *Brickman*, there was extensive litigation concerning the marriage in the Franklin court—the case file filled five volumes. In contrast, there was only a civil protection order in Columbia. However, despite the extensive litigation history in Franklin, the Franklin Supreme Court was satisfied that Columbia was the appropriate forum under the circumstances.

Here, there is past litigation in Franklin in that a protection order was issued against Alex in 2006. But that order did not address custody of Carrie and there is no prior custody case in either jurisdiction. The parties lived longer in Franklin as a couple than in Columbia, but got married and initially lived in Columbia. There appear to be more witnesses and possible evidence of Carrie's welfare in Columbia. Current threats might be better addressed in Columbia. A certified copy of the Franklin protection order could be obtained easily and introduced in Columbia.

NEUTRAL—OR SLIGHTLY FAVORS JESSICA

III. Conclusion

Even though Franklin is the UCCJEA home state, applicants should conclude that the Franklin court is likely to decline jurisdiction in favor of Columbia based on the overarching factor of safety and security for Jessica and Carrie in light of Alex's abusive behavior and the threat that it may continue. Although the evidence of domestic violence is not as extensive as in *Brickman*, the totality of circumstances favors Jessica and there is no other factor that outweighs the issue of her sense of safety for herself and Carrie. Therefore, it would be reasonable for the Franklin court to follow *Brickman* and rule in Jessica's favor on the firm's motion to decline jurisdiction. This initial custody case is more appropriately addressed in Columbia.

POINT SHEET

Williams v. A-1 Automotive Center

Williams v. A-1 Automotive Center
DRAFTERS' POINT SHEET

This performance test requires applicants, as associates in a law firm, to analyze several potentially actionable statements and draft causes of action for fraud in a contemplated civil action arising from a dispute between the firm's client, Robert Williams, and A-1 Automotive Center (A-1) over work performed by A-1 on Williams's Dodge minivan. Williams has attempted unsuccessfully to resolve the matter, and he now wants the firm to file a lawsuit against A-1.

Drawing upon the materials in the File and Library, applicants must complete the following tasks: (1) write a memorandum analyzing the four statements made by A-1's owner to Williams to explain which are actionable and which are not; and (2) for each statement determined to be actionable, draft a separate cause of action for fraud.

The File contains the following materials: an instructional memorandum from the supervising attorney describing the assignment, the firm's guidelines for drafting causes of action, client interview notes, a memorandum from the supervising attorney identifying the four potentially actionable statements, and A-1's receipt for the alleged repairs. The Library contains three cases concerning the pleading requirements for a fraud cause of action.

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

I. Format

With regard to the first task—analysis of the four potentially actionable statements—no specific formatting guidelines are provided. However, based on the instructions in the supervising attorney's task memo, applicants are expected to discuss each statement in turn, determining whether it is actionable and explaining their conclusion as to each.

With regard to the second task, drafting the causes of action for fraud, the task memo instructs applicants to follow the firm's drafting guidelines for causes of action. Those guidelines require applicants to draft those minimum allegations necessary to plead the specific legal elements of the claim, presented in separately numbered paragraphs, in order to minimize the risk of A-1's filing a motion to dismiss for failure to state a claim. The drafting guidelines provide an example of a well-pleaded cause of action for negligence, identifying the elements of that claim and demonstrating how that claim should be pleaded consistent with the firm's pleadings practice.

II. Analysis of the Four Potentially Actionable Statements

The first case in the Library, *Foster v. Panera* (Fr. Ct. App. 2003), sets forth the five required elements of an actionable claim for fraud: (1) a material misrepresentation of fact by the defendant, (2) made with knowledge of its falsity, (3) made with intent to deceive or induce reliance, (4) reasonable reliance upon the misrepresentation by the plaintiff, and (5) loss by the plaintiff as a proximate result of the misrepresentation. A misrepresentation is material "if a reasonable person would consider it important in deciding to enter into the transaction." *Foster*. An opinion may be treated as a misrepresentation of fact when the parties are on unequal footing and the person making the statement has superior knowledge and/or experience. *Madison v. Brooks* (Fr. Ct. App. 2005). An unfulfilled promise made with no present intent to perform may constitute a misrepresentation of fact where the other elements of fraud are present. *Rogers v. Statewide Ins. Co.* (Fr. Ct. App. 1995).

The supervising attorney's memo to the file has identified four potentially actionable statements made by Aaron Biggs, A-1's owner, to Williams during the course of the parties' dealings; only two of these statements can support claims for fraud.

A. Actionable Statements

Applying the analysis in *Foster* and *Madison* to the facts presented here, applicants should conclude that the following statements are actionable:

(1) Biggs's statement that he had "found a notification from Dodge about a defect causing the gears to grind down."

- This statement was a material misrepresentation of fact. It was material in that a reasonable person would have considered it to be an important factor in authorizing the repairs to be undertaken. *Foster*. Furthermore, as confirmed by Mission Dodge, the statement was a misrepresentation because it was false.
- In *Foster*, the plaintiff's fraud cause of action was based on the defendants' repeated assertions that a solid wood headboard would be delivered to the plaintiff as part of the bedroom furniture set she purchased. The court concluded that a reasonable person looking for a bedroom set with a wood headboard would have considered the defendants' statements regarding the eventual availability of a wood headboard an "important factor" in purchasing the furniture.
- Here, too, a court would likely conclude that Biggs's statement concerning the alleged notification from Dodge about a defect in its transmissions to be an important factor in Williams's decision to authorize the repairs.
- The other elements of fraud are also present. Given that Mission Dodge informed Williams that no such defect notification had been issued by Dodge, it appears certain that Biggs uttered the statement knowing it was false and

with the intent to deceive Williams. It was reasonable for Williams to rely on this statement by Biggs, the owner of the automotive repair shop. Finally, the misrepresentation caused Williams a loss of $1,887 for work that was not performed and an additional $128 paid to Mission Dodge to repair the leak caused by A-1's faulty re-installation of the transmission.

(2) Biggs's statement that "Your transmission is going to fail, and soon!"

- There appears to be little question that this statement is material; most consumers would deem it very relevant information that an experienced automotive mechanic had warned them that their transmission was about to fail.
- However, applicants should recognize that this statement is Biggs's opinion regarding the condition of the minivan's transmission. As a general rule, an action for fraud cannot be predicated upon the mere expression of an opinion that is understood to be only an estimate or a judgment and not a statement of fact. *Madison v. Brooks*. Indeed, the person to whom such a statement is made ordinarily has no right to rely on the statement, and does so at his peril. *Id.*
- An exception to this rule exists where the opinion relates to a subject as to which the parties do not have equal knowledge or means of ascertaining the truth. *Id*. Thus, "where the party making the misrepresentation has special knowledge of the facts underlying the opinion, or 'is possessed of superior knowledge respecting such matters, with a design to deceive and mislead,' the positive assertion of a matter, which stated in another form might be a mere opinion, may be actionable if the statement was false." *Id*. (quoting *Novotny v. Ford Farms*). So, a grower's statement that the tomato seeds were "ones that would produce drought-resistant plants that would bear firm, uniform fruit that would not bruise during shipment" could serve as the basis of an action for fraud. *Id.*
- Applying this standard, Biggs's statement that "Your transmission is going to fail, and soon" is distinguishable from the examples of inactionable opinions cited in *Madison* (that a vehicle was a "good car" (*Bender v. Fiat Corp*.) and that certain seeds were "top quality tomato seeds" (*Novotny v. Ford Farms*)). Those statements were not definitive enough about how the products would perform to take them out of the realm of mere opinion.
- Instead, Biggs's statement predicting the transmission's future nonperformance falls within the *Madison* exception to opinion statements, in that it was made by an individual (Biggs) who had expertise and knowledge superior to that possessed by Williams in a situation where the parties were not on equal

footing. The facts indicate that Williams relied on Biggs's opinion in authorizing the alleged repairs, just as the inexperienced plaintiff in *Madison* relied upon the experienced defendant's assurance that 60 to 70 percent of the dormant buds would produce trees when purchasing the defendant's nursery stock.

- The Williams-Biggs interaction is also analogous to two cases cited in *Madison* where the defendants had special knowledge or expertise: *Novotny* (grower's statement that seeds would produce "drought-resistant plants that would bear firm, uniform fruit that would not bruise during shipment" was actionable) and *Wong v. Hall Lumber Ltd.* (viable action for fraud existed where salesman stated that windows were coated with a preservative that would "protect against rot and decay for at least 10 years").
- Further, given the totality of the circumstances, it appears certain that Biggs's statement was also made with the intent to deceive (the fact that Biggs reinstalled the minivan's original transmission gives lie to his statement that it was in imminent danger of failing), that Williams's reliance was reasonable (he was not knowledgeable about engine repair, nor was he in a position to get a second opinion when the transmission was already disassembled), and that Williams suffered loss as a result of Biggs's misrepresentations (the $1,887 paid to A-1 and the $128 paid to Mission Dodge to fix the leak caused by A-1's faulty reinstallation of the transmission).

B. Statements That Are Not Actionable

The following representations would not be considered actionable under *Foster*'s definition of materiality and the holding in *Rogers v. Statewide Insurance Co.:*

(1) Biggs's statement that "It would also help if we installed an extra cooler to keep [the transmission] from running hot."

- The facts indicate that this statement was made *after* Williams had authorized the transmission repairs to be made and that Williams in fact declined to have the cooler installed. Thus, an action based on this statement would fail to state a claim for fraud because according to the sequence of events, Williams did not rely on this statement in making his decision to have A-1 replace the transmission and he did not sustain any loss as a result because the cooler was never installed.
- Applicants could also receive credit for discussing whether or not this statement was material and concluding that it was not actionable because it was

not an important factor in deciding whether to enter into the transaction. *See Foster.*

(2) Biggs's statement that A-1 would "guarantee the job."

- A promise is a statement of intention to perform some action in the future. *Rogers v. Statewide Ins. Co*. If the maker of the promise honestly intends to follow through on that intention at the time of the promise, the statement cannot give rise to an action for fraud. *Id.* However, an unfulfilled promise to perform may constitute a misrepresentation of fact if it is made with no intent to perform and if the other elements of fraud are present. *Id.*
- Biggs's statement that the work was guaranteed was a promise that he clearly did not intend to perform. (The facts that the receipt was stamped "No Guarantee" and that Biggs refused to refund any money to Williams because Williams had not agreed to have the extra cooler installed both show that when Biggs stated that he guaranteed the work, he had no intent at all of making good on that promise.) Thus, at first blush, it would appear that his statement would be actionable.
- However, *Rogers* holds that an unfulfilled promise is actionable only where the other elements of fraud are present. Here, the harm had already been done when the statement was made, in that Williams had already authorized and paid for the alleged repairs. Clearly he could not have relied upon this statement in authorizing or paying for the transmission work.

III. Drafting the Fraud Causes of Action

The task memo instructs applicants to draft a separate cause of action for fraud based on each statement that applicants determine to be actionable. As discussed above, only two of the four statements are actionable—Biggs's statement about the alleged notification from Dodge and Biggs's statement that the transmission would fail.

Foster v. Panera, Rogers v. Statewide Insurance Co., and *Madison v. Brooks* provide the legal framework for determining the elements and essential allegations necessary to sustain a fraud cause of action. Although applicants need not cite to the cases by name in this portion of their answer, they should incorporate the following pleading requirements and concepts into their work product:

- The elements of fraud are (1) a material misrepresentation of fact by the defendant, (2) made with knowledge of its falsity, (3) made with intent to deceive or induce reliance, (4) reasonable reliance upon the misrepresentation

by the plaintiff, and (5) loss by the plaintiff as a proximate result of the misrepresentation. *Foster.*

- Every element of a cause of action for fraud must be specifically pleaded and the facts constituting the fraud must be alleged with sufficient particularity to allow the defendant to understand fully the nature of the charge made. *Id*. It is not sufficient to allege fraud in general terms, or in terms which amount to mere conclusions. *Id.*

Following the example of a well-pleaded negligence cause of action provided in the firm's drafting guidelines, applicants should craft separately numbered paragraphs identifying each element of both causes of action for fraud and the relevant facts in support thereof.

(1) A Material Misrepresentation

Applicants should quote or at least closely paraphrase the specific statements which form the basis for each fraud cause of action, and identify the facts surrounding each statement (e.g., the date, the sequence of events, and the fact that they were verbal statements made by A-1's owner, Biggs, to Williams). *See Foster* (requiring pleading with particularity to allow the defendant to understand the nature of the charge made).

(2) Made with Knowledge of the Misrepresentation(s)'s Falsity

Applicants should allege that Biggs made the statements with knowledge that they were false at the time he made them (e.g., Biggs knew that in fact Dodge had not issued any notification about problems with minivan transmissions; the fact that Biggs reinstalled Williams's original transmission belies Biggs's warning that the transmission was about to fail).

(3) Made with Intent to Deceive or Induce Reliance

It is sufficient for applicants to simply state that Biggs made the statements intending to induce Williams to agree to and pay for the proposed unnecessary repair work.

(4) Reasonable Reliance upon the Misrepresentation by the Plaintiff

The allegations for this element should indicate that (1) Williams relied on the representations of Biggs, a person with greater knowledge and expertise in the field of automotive repair, and (2) Williams's reliance was reasonable because he was the customer in this transaction and because of Biggs's superior knowledge, presumed expertise in the area of automotive repair, and position as the owner of the repair shop (in other words, the parties were on unequal footing), and (3)

Williams would not have authorized the alleged repairs had he known that the statements were false.

(5) Loss by the Plaintiff as a Proximate Result of the Misrepresentation

It is essential that a plaintiff establish loss or harm that is proximately caused by his reasonable reliance on the defendant's misrepresentation. Following the lead provided in *Foster*, applicants should allege that "as a direct and proximate result" of Biggs's misrepresentations (or words to this effect), Williams was induced to authorize unnecessary transmission work that A-1, in fact, never performed, and that he was damaged at least in the amount he paid to A-1 for the alleged repairs ($1,887), plus the cost of the repair of the transmission leak by Mission Dodge ($128).

NOTES