THE MPT®

MULTISTATE PERFORMANCE TEST

February 2018 MPTs and Point Sheets

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Contents

Preface

The Multistate Performance Test (MPT) is developed by the National Conference of Bar Examiners (NCBE). This publication includes the items and Point Sheets from the February 2018 MPT. The instructions for the test appear on page iii.

The MPT Point Sheets describe the factual and legal points encompassed within the lawyering tasks to be completed. They outline the possible issues and points that might be addressed by an examinee. They are provided to the user jurisdictions to assist graders in grading the examination by identifying the issues and suggesting the resolution of the problems contemplated by the drafters.

For more information about the MPT, including a list of skills tested, visit the NCBE website at www.ncbex.org.

Description of the MPT

The MPT consists of two 90-minute items and is a component of the Uniform Bar Examination (UBE). It is administered by user jurisdictions as part of the bar examination on the Tuesday before the last Wednesday in February and July of each year. User jurisdictions may select one or both items to include as part of their bar examinations. (Jurisdictions that administer the UBE use two MPTs.)

The materials for each MPT include a File and a Library. The File consists of source documents containing all the facts of the case. The specific assignment the examinee is to complete is described in a memorandum from a supervising attorney. The File might also include transcripts of interviews, depositions, hearings or trials, pleadings, correspondence, client documents, contracts, newspaper articles, medical records, police reports, or lawyer's notes. Relevant as well as irrelevant facts are included. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or a supervising attorney's version of events may be incomplete or unreliable. Examinees are expected to recognize when facts are inconsistent or missing and are expected to identify potential sources of additional facts.

The Library may contain cases, statutes, regulations, or rules, some of which may not be relevant to the assigned lawyering task. The examinee is expected to extract from the Library the legal principles necessary to analyze the problem and perform the task. The MPT is not a test of substantive law; the Library materials provide sufficient substantive information to complete the task.

The MPT is designed to test an examinee's ability to use fundamental lawyering skills in a realistic situation and complete a task that a beginning lawyer should be able to accomplish. The MPT is not a test of substantive knowledge. Rather, it is designed to evaluate six fundamental skills lawyers are expected to demonstrate regardless of the area of law in which the skills are applied. The MPT requires examinees to (1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for applicable principles of law; (3) apply the relevant law to the relevant facts in a manner likely to resolve a client's problem; (4) identify and resolve ethical dilemmas, when present; (5) communicate effectively in writing; and (6) complete a lawyering task within time constraints. These skills are tested by requiring examinees to perform one or more of a variety of lawyering tasks. For example, examinees might be instructed to complete any of the following: a memorandum to a supervising attorney, a letter to a client, a persuasive memorandum or brief, a statement of facts, a contract provision, a will, a counseling plan, a proposal for settlement or agreement, a discovery plan, a witness examination plan, or a closing argument.

Instructions

The back cover of each test booklet contains the following instructions:

> You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This 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.
>
> 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.
>
> 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.
>
> 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.
>
> Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, 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.
>
> Although there are no restrictions on how you apportion your time, you should allocate approximately half your time 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.
>
> Do not include your actual name anywhere in the work product required by the task memorandum.
>
> 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.

February 2018
MPT-1 File:
State of Franklin v. Clegane

Selmer & Pierce LLP
Attorneys at Law
412 Valmont Place
Franklin City, Franklin 33703

MEMORANDUM

To: Examinee
From: Anna Pierce
Date: February 27, 2018
Re: State of Franklin v. Clegane

We represent Sarah Karth. Sarah Karth's sister, Valerie Karth, was physically injured and incapacitated last summer when an unsupervised teenager set off fireworks at a neighborhood Fourth of July party. The teenager, a minor, was also injured. Valerie Karth was struck by the fireworks and also suffered economic injury because sparks from the fireworks started a fire that burned her garage to the ground.

The man who sold the fireworks to the teenager, Greg Clegane, was convicted of the felony of unlawful sale of fireworks to a minor. Clegane's sentencing hearing is in two weeks. Sarah Karth wishes to read victim-impact statements at the sentencing hearing both on her own behalf and on Valerie's behalf. She has also submitted a request that Clegane pay restitution for the losses she and her sister have sustained because of his actions.

Last week the prosecution notified Sarah that Clegane's counsel has filed a motion to (1) exclude the proposed victim-impact statements at the sentencing hearing, arguing that Sarah and Valerie are not victims within the meaning of the Franklin Crime Victims' Rights Act (FCVRA); and (2) deny their restitution requests. A copy of Clegane's motion is attached.

I intend to file a brief in opposition to this motion on behalf of Sarah asking that the court include Sarah's and Valerie's victim-impact statements and order Clegane to pay restitution to both of them. Please draft the argument section of our brief. In drafting your argument, be sure to follow the attached guidelines. Make the most persuasive argument possible under the FCVRA and relevant case law.

Selmer & Pierce LLP

OFFICE MEMORANDUM

To: Associates
From: Managing Partner
Date: July 8, 2012
Re: Guidelines for Persuasive Briefs in Trial Courts

The following guidelines apply to persuasive briefs filed in support of motions in trial courts.

I. Captions

[omitted]

II. Statement of Facts

[omitted]

III. Legal Argument

Your legal argument should make your points clearly and succinctly, citing relevant authority for each legal proposition. Do not restate the facts as a whole at the beginning of your legal argument. Instead, integrate the facts into your legal argument in a way that makes the strongest case for our client.

Use headings to separate the sections of your argument. Your headings should not state abstract conclusions, but rather integrate factual detail into legal propositions to make them more persuasive. An ineffective heading states only: "The court should not admit evidence of the victim's character." An effective heading states: "The court should refuse to admit evidence of the defendant's character for violence because the defendant has not raised a claim of self-defense."

In the body of your argument, analyze applicable legal authority and persuasively argue how both the facts and the law support our client's position. Supporting authority should be emphasized, but contrary authority should also be cited, addressed in the argument, and explained or distinguished.

Finally, anticipate and accommodate any weaknesses in your case in the body of your argument. If possible, structure your argument in such a way as to highlight your argument's strengths and minimize its weaknesses. Make concessions if necessary, but only on points that do not involve essential elements of your claim or defense.

The Franklin City Post

Illegal Fireworks Injure Two and Destroy Garage

July 5, 2017

FRANKLIN CITY, Franklin—The quiet neighborhood of Fair Oaks became a nightmare of exploding shells after a 17-year-old set off illegal, professional-grade fireworks during a Fourth of July celebration in a friend's backyard. The fireworks, called Little Devil Shards, sent exploding shells spraying through the yard, striking and injuring a bystander and setting a nearby garage on fire. The minor was also seriously injured.

The minor set off the fireworks to surprise his friends, Franklin City Detective Ralph Guerra said early this morning. It appears that the minor obtained the fireworks the day before the party from Greg Clegane, the proprietor of Starburst Fireworks, which sells fireworks and other party supplies from a storefront in the Third Ward of Franklin City. Clegane has three similar retail operations spread throughout the eastern part of the state. The sale of such powerful fireworks to a minor is a felony in Franklin, punishable by up to five years in prison and a $50,000 fine. The minor's name has not been released. He is a Franklin City resident.

Lena Harley, a local resident, saw the minor igniting the fireworks in the middle of a crowd of guests at the party. She watched as a spray of sparks and exploding shells flew through the air. "It was like a war zone," said Harley.

The victims were transported to an area hospital. Several shells also struck a neighbor's garage, setting it afire. The garage was totally destroyed before firefighters could control the blaze.

Franklin City police are encouraging anyone with information about the incident to contact them.

(Franklin City Associated Press contributed to this report.)

Excerpt from Transcript of Client Interview with Sarah Karth
February 26, 2018

Att'y Pierce: Good afternoon, Ms. Karth.

Sarah Karth: Good afternoon.

Pierce: Can you describe what brings you to the office today?

Karth: Yes. Are you familiar with the fireworks incident over in Fair Oaks last summer?

Pierce: I remember hearing about it on the news right after it happened.

Karth: My sister, Valerie Karth, was one of the people injured that day. Her house is next door to the yard where the fireworks went off, and she was attending the party. Sparks from the fireworks caused her garage to burn down.

I was at the criminal trial of Greg Clegane, who was convicted of the felony of selling dangerous fireworks to a minor. During the trial, the arresting officer testified that Clegane admitted selling the fireworks and that the boy had told him, "I can't wait to show these to my friends—I'm going to give everyone a big surprise." Clegane told the officer that the minor "looked like he was at least in his twenties" and that the boy's statements "didn't raise any red flags."

I want to read victim-impact statements at Clegane's sentencing hearing, one on my own behalf and one on my sister Valerie's. I also want restitution on behalf of both Valerie and myself. Last week, I heard from the prosecutor's office that Clegane's lawyer had filed a motion asking the court to keep me from making the statements and seeking restitution.

Pierce: What do you want to say? What are you asking for?

Karth: I want to make it clear to the judge, and to Clegane, that his illegal sale of dangerous fireworks to a 17-year-old had very personal and life-altering consequences for me and my family.

Pierce: Tell me more.

Karth: Clegane needs to understand that his actions have irrevocably affected our lives and that I am also a victim of his crime. I want to look him in the eyes and tell him that. I want the court to understand how Clegane's actions have ruined my sister's life. Valerie was attending the party when the fireworks went off. She was hit by fireworks and was rushed to the hospital for emergency care. Valerie was seriously

injured and was in a coma for several months. She has just come out of the coma and is still incapacitated. She remains in stable condition in the hospital but cannot come to court.

Pierce: What else do you want to tell the court about Valerie?

Karth: Valerie has always loved life and lived it to the fullest. She is bright, athletic, independent, and strong. She was the first person in our family to graduate from college. She is a rock. She is someone whom you can count on and trust. My father died five years ago, and my mother has been so traumatized by Valerie's injuries that she is too frail to participate in any court proceedings.

Pierce: And what about restitution for Valerie?

Karth: Valerie's out-of-pocket medical expenses so far total $22,000—we've got the bills and receipts to prove it. Her medical providers have concluded that she will incur at least an additional $40,000 in out-of-pocket medical expenses. By the time she is able to return to work, she will have lost $120,000 in salary. The fireworks also destroyed her garage; rebuilding it has cost $17,000.

Pierce: And you want to make a victim-impact statement on your own behalf?

Karth: Yes, I truly believe that I am also a victim of Clegane's crime. Valerie and I are very close and always have been. I'm 35 and she is two years older. The day she was injured was the worst and most shocking day of my life. I spent endless days in the hospital waiting for her to come out of the coma. If not for Clegane, that teenager could not have caused me the trauma that he did. I want the court to give Clegane the maximum sentence possible—five years—so that he knows how many people his actions have harmed and will be held accountable. People think that fireworks are no big deal, but this reckless sale of fireworks has really devastated my family.

Pierce: And are you requesting restitution on your own behalf?

Karth: Yes, I have incurred $1,500 in out-of-pocket medical bills myself as a result of Clegane's criminal behavior. I've been so depressed and distraught about Valerie's future and how she will be taken care of that I've been seeing a therapist twice a month for the past six months. My insurance has a high deductible, so I've had to bear the cost of the therapist myself. I think Clegane should pay that cost, not me. We've suffered enough.

STATE OF FRANKLIN
DISTRICT COURT OF GLENN COUNTY

STATE of FRANKLIN, **Plaintiff,** **v.** **GREG CLEGANE,** **Defendant.**	**Case No. 2017-CR-238**

DEFENDANT'S MOTION TO EXCLUDE VICTIM STATEMENTS AND DENY RESTITUTION

Defendant Greg Clegane hereby moves the Court to deny the request of Sarah Karth (acting on behalf of Valerie Karth and in her own capacity) to make victim-impact statements at Defendant's sentencing hearing in this case. In addition, Defendant requests that the Court deny the Karths' requests for restitution. In support of this motion, Defendant states:

1. After a jury trial on February 2, 2018, Defendant was convicted of the felony crime of unlawful sale of fireworks to a minor, Franklin Criminal Code § 305. Sentencing is scheduled for March 14, 2018.

2. Pursuant to the Franklin Crime Victims' Rights Act (FCVRA) §§ 55 and 56, Ms. Karth has submitted proposed victim-impact statements regarding injuries she and Valerie Karth suffered as a result of fireworks that were set off at a party in Franklin City on July 4, 2017.

3. It is undisputed that Defendant was not present on that occasion and had no part in the decision to ignite fireworks in an unsafe manner.

4. The fireworks were ignited by a 17-year-old male, who was using them contrary to the instructions on the fireworks' packaging.

5. At the time Defendant sold said fireworks, he had no reason to believe that the 17-year-old was not an adult, or that the fireworks would be ignited under unsafe conditions.

6. Defendant's only connection to the injuries suffered by the Karths is that the minor who set off the fireworks had bought them from Defendant. The Karths do not qualify as crime victims under the FCVRA because they were not "directly and proximately harmed as a result of

the commission" of the offense of which Defendant stands convicted: the sale of fireworks to a minor. Fr. Crm. Code § 305.

7. In addition, because the Karths cannot be deemed crime victims under FCVRA § 55(b), the Court must deny their restitution requests. *See* FCVRA § 56.

8. Even assuming that the Karths could be considered crime victims under the statute, the restitution they seek is not supported by the evidence and is excessive, and Defendant does not have the resources to pay the amounts requested. FCVRA § 56(d).

WHEREFORE Defendant asks the Court to deny the victim-impact statements and restitution requests made by the Karths and to grant such other relief as the Court deems just and proper.

Karen Pine

Filed: February 19, 2018

Karen Pine
LAW OFFICES OF PINE, BRYCE & DIAL, LLP
Attorney for Defendant Greg Clegane

February 2018
MPT-1 Library:
State of Franklin v. Clegane

Excerpts from the Franklin Crime Victims' Rights Act

§ 55. Rights of Crime Victims

(a) A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime, or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, or sentencing, or at any parole proceeding.

(5) The reasonable right to confer with the prosecution in the case.

(6) The right to full and timely restitution under section 56 of this Act.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.

(b) Definitions—Crime Victim

(1) In general—As used in this Act, the term "crime victim" means a person directly and proximately harmed as a result of the commission of a Franklin criminal offense.

(2) Minors and certain other victims—In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court may assume the crime victim's rights under this Act, but in no event shall the defendant be named as such guardian or representative.

§ 56. Restitution

(a) The court, when sentencing a defendant convicted of an offense, shall order that the defendant make restitution to any victim of such offense.

(b) The order may require that such defendant

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense,

(A) return the property to its owner or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the repair or replacement cost of the property.

(2) in the case of an offense resulting in physical, psychiatric, or psychological injury to a victim,

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense.

(c) A defendant is presumed to have the ability to pay restitution unless the defendant establishes the inability to pay by a preponderance of the evidence.

(d) In determining the amount of restitution, the court shall consider (1) public policy that favors requiring criminals to compensate for damage and injury to their victims; (2) the financial burden placed on the victim and those who provide services to the victim as a result of the criminal conduct of the defendant; and (3) the financial resources of the defendant and the nature of the burden the payment of restitution will impose on dependents of the defendant.

State v. Jones
Franklin Court of Appeal (2006)

The issue in this appeal is whether the trial court erred when it held that the girlfriend of the defendant's cocaine customer was not a "victim" entitled to provide a victim-impact statement at sentencing pursuant to the Franklin Crime Victims' Rights Act (FCVRA). We affirm.

For approximately two years between 2004 and 2006, defendant Iggy Jones was engaged in a conspiracy with others to manufacture and distribute cocaine. Based on information conveyed to an undercover law enforcement officer, the police executed a search warrant of the defendant's home, discovering the remnants of a cocaine manufacturing operation and related paraphernalia. Jones was arrested and subsequently pled guilty to conspiracy to possess cocaine with intent to distribute in violation of the Franklin Criminal Code.

After Jones pled guilty, Gina Nocona, the former girlfriend of one of the defendant's regular cocaine customers, filed a motion claiming that she was a "victim" under the FCVRA and therefore entitled to make a victim-impact statement at Jones's sentencing hearing. She claimed that her former boyfriend, a cocaine user who regularly bought drugs from Jones, "physically, mentally, and emotionally abused" her and that her former boyfriend's "poor judgment was in large part attributable to the drugs Jones had illegally sold him." Nocona asserted that her boyfriend's behavior typically became abusive only when he was under the influence of cocaine. The trial court denied Nocona's motion, ruling that Nocona did not have standing as a "victim" under the FCVRA. Nocona appealed.

Often crime victims do not feel that their voices are heard or that their concerns are properly considered in the judicial process. The Franklin legislature attempted to address these concerns when it passed the FCVRA in 2004. Among the rights this statute specifically gives victims is the right to "be reasonably heard at any public proceeding in the district court involving . . . sentencing." FCVRA § 55(a)(4). Only a "crime victim" is afforded these rights. The FCVRA defines "crime victim" as "a person directly and proximately harmed as a result of the commission of a Franklin criminal offense." *Id.* § 55(b)(1).

In applying this definition, Franklin courts have held that a purported "crime victim" under the FCVRA must demonstrate (1) that the defendant's conduct was a cause in fact of the victim's injuries and (2) that the purported victim was proximately harmed by that conduct.

In *State v. Hackett* (Fr. Ct. App. 2003), the Franklin Court of Appeal interpreted "cause in fact" and affirmed the trial court's order that defendant George Hackett, who pled guilty to aiding and abetting methamphetamine manufacture, pay restitution to an insurance company for property damage. The damage had been caused when one of Hackett's codefendants started a fire by placing a jar of chemicals used to manufacture methamphetamine on a hot plate. The court found that Hackett had procured the supplies his codefendants used to manufacture methamphetamine, and that he had "knowledge and understanding of the scope and structure of the enterprise and of the activities of his codefendants." The court held that even though there were "multiple links in the causal chain," Hackett's conduct was a cause in fact of the resulting property damage.

In the current case, the facts do not support the same conclusion. Nocona asserts that her former boyfriend was abusive only when he was under the influence of cocaine. If true, such a statement might meet the cause-in-fact prong of the standard, although the court acknowledges that the contention raises complex questions relating to the causes of domestic violence. Nocona offered no expert testimony to support her assertion regarding causation.

Nocona's motion also fails the second prong of the definition of a crime victim under the FCVRA, which requires that this court determine whether the defendant's criminal act proximately harmed Nocona. The concept of foreseeability is at the heart of "proximate harm." The closer the relationship between the actions of the defendant and the harm sustained, the more likely that a court will find that proximate harm exists. *See State v. Thomas* (Fr. Ct. App. 2002).

Nocona is unable to demonstrate that her alleged injuries were a foreseeable consequence of the defendant's drug conspiracy. She has not provided the court with evidence that the drug conspiracy led to her injuries or that the defendant knew about the impact of the drugs on Nocona's former boyfriend. Moreover, while we deplore the many undesirable social effects of drug trafficking, we do not think that the asserted abusive conduct of Nocona's boyfriend toward Nocona falls within the range of reasonably foreseeable harms resulting from the defendant's conspiracy. Nocona is not a "victim" under the FCVRA because she is not a person "directly and proximately harmed" by the criminal act committed by the defendant.

Affirmed.

State v. Berg
Franklin Court of Appeal (2012)

The defendant, Leon Berg, contends that the trial court violated his constitutional rights and the Franklin Crime Victims' Rights Act (FCVRA) in allowing the parents of Carly Appleton to make victim-impact statements at his sentencing hearing. We find that the trial court did not err, and affirm.

The defendant's girlfriend, Sheila Greene, was driving herself and Berg back from Franklin Beach to Franklin State College (FSC) in Berg's car. They offered a ride to Carly Appleton, another FSC student. Greene and Appleton were 19 years old; Berg was 22. The drinking age in Franklin is 21. They stopped at a gas station, where Berg bought a quart of vodka and a six-pack of beer. Berg and Greene drank some of the vodka and then got back into the car. Appleton did not drink anything. Berg knew that Greene had been previously arrested and fined for driving under the influence, but he allowed her to drive anyway. In fact, Berg admitted that he handed Greene a beer while she was driving. Not long after, Greene, driving considerably over the speed limit, crashed the car into a tree. Berg sustained minor injuries; Greene was killed instantly; Appleton died at the hospital four hours later. Greene's postmortem blood alcohol level was well over the legal limit for operating a motor vehicle in Franklin.

Berg pleaded guilty to the felony crime of providing alcohol to a minor resulting in death. Berg was sentenced to six months in prison followed by two years of extended supervision. Appleton's parents each petitioned the court to make victim-impact statements at Berg's sentencing hearing as representatives of their daughter, who they claimed was a victim of the defendant's offense.

We begin with an analysis of who constitutes a "victim" within the meaning of the FCVRA, which defines a "victim" as one who has been "directly and proximately harmed" by a Franklin criminal offense. § 55(b)(1). The FCVRA provides a victim with the right to "be reasonably heard at any public proceeding in the district court involving . . . sentencing." § 55(a)(4). The legislative history of the statute indicates that the term "crime victim" should be interpreted "broadly." (Citation omitted.)

Carly Appleton's life was tragically cut short as a result of the drunk driving and the car crash that occurred. It seems obvious to this court that the defendant's actions caused Greene's intoxication, which affected her ability to handle the car in the conditions leading to the crash.

But for the defendant's buying alcohol and furnishing it to Greene, the Appletons' daughter would still be alive. Thus, there is a direct causal connection between Berg's conduct and Appleton's death. This satisfies the condition that the defendant's action be a cause in fact of the person's injury. *See State v. Jones* (Fr. Ct. App. 2006).

This court must also decide whether Berg's crime proximately harmed Carly Appleton for purposes of the FCVRA. The concept of "proximate harm" is a limitation that courts place upon an actor's responsibility for the consequences of the actor's conduct; it is a means by which courts limit the scope of the actor's liability. The concept reflects ideas of what justice demands or what a court finds administratively possible and convenient. Foreseeability is at the heart of determining if an actor's conduct proximately harmed a victim. *See Jones*. In determining whether the harm was foreseeable, the court looks to whether the resulting harm was within the zone of risks resulting from the defendant's conduct for which the defendant should be found liable.

We conclude that, on these facts, it was reasonably foreseeable to Berg that if he bought alcohol and distributed it to his girlfriend, who he was aware had a history of driving drunk, then his girlfriend might drive drunk, and that her drunk driving might lead to a car crash. There is a natural and continuous sequence of events without which Appleton's death would not have occurred. In other words, there is an intuitive relationship between Berg's conduct and the resulting harm. Berg could reasonably have foreseen that he, Greene, or Carly Appleton could be seriously injured or killed as a result of Greene's drunk driving. Thus, the harm to Appleton that resulted was within the risk of Berg's actions. The loss suffered by Appleton clearly falls within the scope of Berg's conduct. Accordingly, we find that Carly Appleton was a crime victim under the FCVRA.

The trial court correctly allowed Appleton's parents to make victim-impact statements at the defendant's sentencing hearing, as they were the approved representatives of their daughter, *see* § 55(b)(2), who the trial court found was a "crime victim" under the FCVRA.

Affirmed.

State v. Humphrey
Franklin Court of Appeal (2008)

Two issues are raised in this appeal: (1) whether the trial court erred in finding that a mother, acting as the representative for her two sons, whose father had been killed, was qualified to seek restitution on behalf of her sons under the Franklin Crime Victims' Rights Act (FCVRA); and (2) whether the court erred in ordering the defendant to pay restitution under FCVRA § 56. The trial court held that the mother was an appropriate representative for the sons, who were "victims" entitled to restitution from the defendant for the loss of child-support income. We affirm with respect to the first issue and remand for further proceedings on the second.

On April 12, 2006, defendant Ted Humphrey was driving home from a party. He was texting while driving and lost control of his car. The car then skidded into the adjacent bicycle lane and hit Connor Benton, who was riding his bike home from work. Although Humphrey was able to stop his car and call 911, the first responders were unable to revive Benton, who had suffered a traumatic head injury. Humphrey was unharmed.

Humphrey was charged with one count of involuntary manslaughter, to which he pled guilty on October 30, 2006. Connor Benton's ex-wife, Kate Gove, sought restitution from Humphrey for the loss of child-support income on behalf of her two minor sons, then ages 6 and 10. Gove appeared at the defendant's sentencing hearing and testified that Connor Benton had provided critical financial support to her family before his death. The court sentenced Humphrey to 18 months in prison and ordered restitution for the lost child support provided by Connor Benton, citing the FCVRA. The defendant appeals from that decision.

One purpose of the FCVRA is to force offenders to pay full restitution to the identifiable victims of their crimes. The act applies to any "crime victim" and defines that term as "a person directly and proximately harmed as a result of the commission of a Franklin criminal offense." FCVRA § 55(b)(1). The act goes on to provide that "[i]n the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court may assume the crime victim's rights . . . . " *Id.* § 55(b)(2). It is undisputed that Gove, as the mother of Benton's minor children, is their appropriate representative under the Act.

We find that Benton's two young sons are "crime victims" in part because of the loss of financial support from their father. The FCVRA requires only that a person be "directly and proximately harmed" by an offense. The term "harm" embraces physical, financial, and psychological damage. *See* FCVRA § 56(b)(2).

We now turn to whether the court properly ordered the defendant to pay restitution in the amount of $15,200. Section 56(c) of the FCVRA creates a rebuttable presumption that the defendant is financially capable of paying restitution and places the burden of rebutting the presumption on the defendant.

The defendant did not present any evidence to establish that he was incapable of paying restitution. Apparently relying on § 56, the court ordered $15,200 in restitution for the value of lost child support without any inquiry into the defendant's financial situation and without any findings to justify the restitution order. On appeal, the defendant argues that the restitution statute requires the court to make express findings justifying a restitution order. The defendant's reading of the statute is correct. Section 56(d) identifies three factors that the court must take into account in determining the amount of restitution: (1) public policy that favors requiring criminals to compensate for damage and injury to their victims; (2) the financial burden placed on the victim and those who provide services to the victim as a result of the criminal conduct of the defendant; and (3) the financial resources of the defendant.

Before imposing restitution, the sentencing judge must make a "serious inquiry" into all three factors. *See State v. Schmidt* (Fr. Sup. Ct. 2003). While the statute places the burden of proof on the defendant to show inability to pay, the court should inquire into the additional factors. This case will be remanded with instructions to the trial court to conduct that inquiry.

Affirmed in part and remanded for further findings consistent with this opinion.

February 2018
MPT-2 File:
In re Hastings

Belford & Swan S.C.
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MEMORANDUM

To: Examinee
From: Emily Swan
Date: February 27, 2018
Re: Danielle Hastings inquiry

A friend of mine from college, Danielle Hastings, has asked me to look into a legal matter for her. Danielle currently serves on the board of directors for Municipal Utility District No. 12 (MUD 12). MUDs are local government entities, authorized by the Franklin constitution, that provide public water, sewer, drainage, and other services to suburban neighborhoods not served by a city.

Danielle has always been civic-minded, and she is very involved in her community. In addition to being a director for MUD 12, she volunteers at the local library and is a volleyball coach at the local YMCA. She is interested in getting involved in election and voting activities in her community. There are two election-related positions available in her voting precinct: county election judge and precinct chair.

Both positions sound interesting to Danielle. She is not sure which position she would want. Before making any decision, she needs our advice as to whether she is allowed to serve as a county election judge or precinct chair while at the same time remaining a MUD 12 director. I have attached several opinions by the Attorney General of Franklin, which discuss the applicable law.

Please draft a memorandum to me analyzing whether Danielle can apply for and hold the county election judge position or the precinct chair position while simultaneously serving as a member of the board of directors for MUD 12. Address the question for both the county election judge and precinct chair positions. Make sure to discuss all legal issues relating to each position. Do not prepare a separate statement of facts, but be sure to incorporate the relevant facts and legal authorities into your analysis.

Transcript of Client Interview with Danielle Hastings

February 26, 2018

Att'y Swan: Hi, Danielle, it's great to see you. Gosh, it's been a while!

Danielle Hastings: Yes, it has. I think the last time we ran into each other was a couple of years ago at our college class reunion.

Swan: How is everything going? I got your phone message indicating that you wanted my advice on a legal problem, but you didn't say what the problem was.

Hastings: Well, as I think I mentioned at our class reunion, in addition to my day job as a graphic artist, I'm also a member of the board of directors for Municipal Utility District No. 12, which provides water, sewer, and drainage services to my neighborhood, Eagle Springs.

Swan: Yes, I remember your saying you were active on a MUD board in your community. How is that going?

Hastings: Everything is fine. And I love the work I do as a MUD director. But I'm always looking for opportunities to get involved in my community, and frankly, I have higher political ambitions. Recently, I heard about two open positions that sound really interesting and would further my political career.

Swan: Tell me more.

Hastings: Well, a friend of mine who's active in local politics and highly involved in our political party mentioned that there is an open position for county election judge, which would involve supervising elections in my precinct. He also said that our political party is looking for precinct chairs to help reach out to voters and educate them about the candidates in our political party who are running for office.

Swan: What's the process for becoming an election judge or precinct chair?

Hastings: The county election judge is an appointed position, but the precinct chair is an elected position within the political party, which means that I would have to run as a candidate for precinct chair and be elected to the position.

Swan: And both of these positions are for the voting precinct that you live in?

Hastings: Yes. My precinct includes Eagle Springs as well as a handful of adjacent neighborhoods.

Swan: What else do you know about the two positions?

Hastings: Well, I've printed out some information from the Marin County website that compares the two positions. [Printout from website attached.] It's my understanding that if I'm appointed as a county election judge, then I would be the chief election judge for my precinct since the governor is from my political party.

Swan: Do you have a preference between the two positions?

Hastings: No, both sound very interesting, and either position would provide an opportunity to get more involved in the election process, which is something that I've been wanting to do. If you tell me that I can hold either position while remaining on the MUD board, then I would have to decide which of the new positions to pursue. On the other hand, if you tell me that I can't hold either of the positions while simultaneously serving on the MUD board, then I won't need to choose because my decision will be made for me.

Swan: Tell me more about the MUD board. I think that it is important to understand what you do as a MUD director in order to evaluate whether you could hold the position of county election judge or precinct chair while simultaneously serving on the MUD board.

Hastings: As you know, MUDs provide public water, sewer, drainage, and other basic services to suburban residents who are not served by a city. MUD 12 provides these services to residents of Eagle Springs, about 1,500 homes in all. Basically, the MUD owns, operates, and maintains all the facilities necessary to supply water to Eagle Springs residents, collect and treat wastewater from their homes, and collect, store, and drain storm water from land within the MUD's boundaries. This includes a water plant, a wastewater treatment plant, and drainage ditches, all located within Eagle Springs. In addition, the MUD provides trash collection service for our residents, and we also own and operate two public parks within the Eagle Springs community.

Swan: MUDs are political subdivisions of the State of Franklin, right?

Hastings: Correct. MUDs operate independently of county government. I've heard them described as being one of the most fundamental forms of local government

because they provide municipal-level services, have elected officials who live in the MUD, and are authorized to charge fees to their residents, assess and collect taxes, and sell bonds in order to pay the costs of constructing and operating the facilities that provide services to their residents.

Swan: Can you tell me more about the MUD board of directors election process? Are your elections handled by Marin County?

Hastings: No. Under state law, MUDs conduct their own elections, which are held in May. MUDs also appoint their own election judges for the MUD elections. The partisan or political elections, like those for governor and state assembly, are held in November, and those are the ones the Marin County election judges oversee.

Swan: So if you were appointed as a county election judge for your precinct, you wouldn't be involved in overseeing any MUD elections?

Hastings: Right, MUD elections are totally separate. MUD boards really aren't all that political in the party sense—they're nonpartisan. Nobody runs for a MUD position as a "Democrat" or "Republican." They run for the MUD board because they live in the MUD, they care about the basic services that are being provided, and they want to be involved in their community and make a difference.

Swan: How long have you served on the MUD 12 board?

Hastings: This is my second four-year term on the board. Our last election was in May 2016, so I am midway through my current term. I want to remain on the MUD board for at least another term or two.

Swan: Okay, I think I have enough basic information to start looking into this issue. I should have answers for you within a week or two, which will give you plenty of time to weigh your options.

Hastings: Great. Thanks.

Printout of
Marin County Board of Elections
Position Descriptions

Source: www.marincountyfranklin.gov

COUNTY ELECTION JUDGE [Summary prepared based on state election law]

What is a county election judge?

County election judges conduct the city, county, state, and federal elections in a precinct during the year. Election judges are the head officials in charge of election-day activities.

What does an election judge do?

County election judges administer the election procedures set forth in the Franklin Election Code to help ensure that elections are secure, accurate, fair, and accessible to all voters. Responsibilities include handling and securing election equipment and ballots, locating and retaining election clerks to work at their polling location, organizing the setup of the election equipment and the operation of the election, handing out and collecting ballots, setting up and closing down the polling site, and certifying the polling site results.

Election judges also serve on a panel to resolve any voting-related challenges that may arise. Election judges are responsible for following the Franklin Election Code and conducting a fair election. Although each judge is nominated by his or her political party, no display of any party affiliation is allowed during the election.

How do you get to be an election judge?

Election judges are nominated by their respective parties and are appointed by the Marin County Board of Commissioners to two-year terms. If possible, election judges reside in the precinct.

What is a chief election judge?

Two judges, one from each major political party, are appointed for each precinct. The chief election judge is from the party that received more votes in the last governor's election. The second judge works closely with the chief election judge and is responsible for conducting the election in the chief judge's absence. Both judges are required to attend training.

Is election judge a paid position?

Election judges are volunteers. They are reimbursed for the cost of any training, supplies purchased, or other expenses incurred, but are otherwise not compensated.

PRECINCT CHAIR [Summary prepared based on party bylaws]

What is a precinct chair?

A precinct is the smallest political subdivision in Franklin. Franklin counties are divided into individual precincts, each consisting of a collection of adjacent neighborhoods. Precinct chairs are political positions created by their political parties and not by statute. They are the primary political agents for the Democratic and Republican parties in their precincts. They are responsible for contacting, guiding, and organizing voters from their respective political parties in their precincts. Precinct chairs also represent their home precincts on their party's Executive Committee (EC), which conducts the local business of that political party.

What does a precinct chair do?

In addition to serving on his or her party's EC, each precinct chair is the contact person for his or her respective political party in his or her precinct. Organizing and campaigning are important duties of a precinct chair. Precinct chairs are responsible for working with others to mobilize and organize voters and get them to the polls, bridging the gap between voters and elected officials, and promoting their party's candidates and events. This includes organizing phone banks to place telephone calls to voters, organizing block walks (going door-to-door) to distribute campaign materials, and encouraging neighbors to vote in upcoming primary and general elections.

What is the Executive Committee?

Marin County has two Executive Committees: a Democratic EC and a Republican EC. Each party's EC is the governing body of that political party in Marin County and conducts all official party business. Each party's EC usually meets three times a year, sometimes more in election years. Precinct chairs are voting members of their ECs.

How do you get to be a precinct chair?

Candidates for precinct chair are elected to serve two-year terms by voters in their precincts in the respective Democratic or Republican primary election every two years.

Is precinct chair a paid position?

Precinct chairs are volunteers and are not compensated for their service.

February 2018
MPT-2 Library:
In re Hastings

STATE OF FRANKLIN CONSTITUTION

ARTICLE XII

§ 25. HOLDING MORE THAN ONE OFFICE; EXCEPTIONS

(a) No person shall hold or exercise, at the same time, more than one civil office of emolument, except for justices of the peace, county commissioners, and officers and enlisted men and women of the United States Armed Forces, the National Guard, and the Franklin State Guard, or unless otherwise specially provided herein.

(b) Exceptions: . . .

(4) a public schoolteacher or retired schoolteacher may receive compensation for serving as a member of a governing body of a municipal utility district (MUD).

Excerpts from the Franklin Election Code

§ 465. Appointment of Election Judges for Each Election Precinct. Election judges shall be appointed by each county for each election precinct in which an election is held.

* * *

§ 471. General Responsibility of County Election Judges.

(a) The chief judge is in charge of and responsible for the management and conduct of the election at the polling place of the election precinct that the judge serves.

(b) The chief judge for each election precinct shall appoint election clerks to assist the judge in the conduct of an election at the polling place served by the judge.

(c) The chief judge shall designate the working hours of and assign the duties to be performed by the election clerks serving under the judge.

. . .

(f) The chief judge shall preserve order and prevent breaches of the peace and violations of this code in the polling place and in the area within which electioneering and loitering are prohibited. In performing duties under this subsection, the chief judge may appoint one or more licensed persons to act as special peace officers for the polling place.

. . .

(h) An election judge may administer any oath required to be made at a polling place.

* * *

§ 480. Ineligibility of Candidate for Office. A person who is a candidate in an election for a contested public or party office is ineligible to serve, in an election to be held on the same day as that election, as an election judge or clerk in any precinct in which the office sought is to be voted on.

* * *

§ 492. Judges for Elections of Other Political Subdivisions. The governing body of a political subdivision other than a county shall appoint the election judges for elections ordered by the political subdivision.

ATTORNEY GENERAL OF FRANKLIN

Opinion No. 2003-9
March 17, 2003

Re: Whether Franklin Constitution article XII, section 25 prohibits a constable from simultaneously serving as a commissioner of an emergency services district

The issue presented is whether article XII, section 25 of the Franklin Constitution prohibits a constable from serving as a commissioner of an emergency services district (ESD) in the same county. We must examine each of the offices at issue.

Article XII, section 25(a) provides that "[n]o person shall hold or exercise, at the same time, more than one civil office of emolument." The constitutional dual-officeholding prohibition applies if both positions (1) qualify as "civil offices" and (2) are entitled to an "emolument."

First, we have previously determined that a constable holds a civil office of emolument. Fr. Att'y Gen. Op. No. 1999-8 (1999); *see also* Fr. Local Gov't Code § 453 (defining a constable as a "peace officer" and mandating that constables be paid on a salary basis).

Next, we must examine whether the position of ESD commissioner is also a civil office of emolument subject to article XII, section 25. The determinative factor distinguishing an officer from an employee is "whether any sovereign function of the government is conferred upon the individual to be exercised by the individual for the benefit of the general public largely independent of the control of others." *Morris Indep. Sch. Dist. v. Lehigh* (Fr. Sup. Ct. 1965).

ESDs independently exercise various governmental powers for the benefit of the public, including the power to appoint agents and employees, enter into contracts, purchase and sell property, borrow money, sue and be sued, impose and collect taxes, and perform other necessary acts relevant to providing emergency services. Fr. Local Gov't Code § 752. ESD commissioners serve as the ESD's governing board. Based on the broad, independent authority granted to ESDs, we conclude that ESD commissioners meet the *Morris* test and are thus civil officers.

Next we determine whether an ESD commissioner holds an office of "emolument." An emolument is "a pecuniary profit, gain or advantage." *State v. Babcock* (Fr. Ct. App. 1998). If an officeholder is entitled to compensation, his or her office is an "office of emolument" even if the

person refuses to accept any compensation. However, the term "emolument" does not include the legitimate reimbursement of expenses. While the reimbursement of actual expenses does not constitute an emolument, any amount received in excess of actual expenses is an emolument. *Id*. Likewise, an amount received as compensation for each meeting (e.g., a fixed per diem amount) is also an emolument. *Id*.

By statute, an ESD commissioner "is entitled to receive compensation of $50 for each day the commissioner attends a commission meeting," and additionally "may be reimbursed for reasonable and necessary expenses incurred in performing official duties." Fr. Local Gov't Code § 775. The $50 per diem compensation qualifies as an emolument.

Because an ESD commissioner receives compensation for his or her services and holds a civil office of emolument, he or she cannot hold another civil office of emolument—here, constable.

SUMMARY

Article XII, section 25 of the Franklin Constitution prohibits a person from simultaneously serving as a constable and an ESD commissioner. Because we conclude that article XII, section 25 prohibits dual service in this circumstance, we need not consider whether simultaneously holding the positions of constable and ESD commissioner would implicate the common law doctrine of incompatibility.

ATTORNEY GENERAL OF FRANKLIN

Opinion No. 2008-12
February 6, 2008

Re: Whether an individual may simultaneously serve as director of a municipal utility district and member of the city zoning commission

The issue presented is whether an individual who serves as a member of the board of directors for Montgomery County Municipal Utility District No. 6 (MUD 6) may also serve as a member of the Planning and Zoning Commission (PZC) for the City of Waterford. We conclude that one person is barred from holding both offices by the common law doctrine of incompatibility.

Civil office of emolument

Article XII, section 25(a) of the Franklin Constitution provides that "[n]o person shall hold or exercise, at the same time, more than one civil office of emolument," subject to exceptions that are not relevant in this situation. MUD directors are entitled to receive compensation for serving on the MUD board—specifically, a $150 per diem payment as compensation for attending MUD board meetings or engaging in other MUD-related activities. Fr. Water Code § 46. In contrast, members of the PZC serve without compensation. Because PZC commissioners do not receive compensation, they are not civil officers of emolument. Therefore, article XII, section 25 of the Franklin Constitution does not bar a person from serving on the PZC and holding another office.

Common law doctrine of incompatibility

The common law doctrine of incompatibility may, however, prevent this dual service, whether or not a member of the PZC receives compensation for that position, because compensation is not relevant to determining whether offices are incompatible. The common law doctrine of incompatibility bars one person from holding two civil offices if the offices' duties conflict. *Spencer v. Lafayette Indep. Sch. Dist*. (Fr. Ct. App. 1947). The doctrine has three aspects: self-appointment, self-employment, and conflicting loyalties. Self-appointment and

self-employment are only implicated if the responsibilities of one position include appointing or employing the second position. Here, the MUD does not appoint or employ members of the PZC and vice versa. Therefore, the only inquiry is whether the two positions involve conflicting loyalties.

The opinion in *Spencer* held that the offices of school trustee and city council member were incompatible because the boundaries of the school district's and city's jurisdictions overlapped, and the city council had authority over health, quarantine, sanitary, and fire prevention regulations applicable to school property. The court reasoned that if a person could be a school trustee and a member of the city council at the same time, school policies could be influenced or even controlled by the city council instead of the school trustees. *Id*.

As a threshold matter, in order for the conflicting-loyalties prong to apply, each position must constitute a "civil office." Therefore, we must first consider whether directors of MUDs and members of the PZC are civil officers. The Franklin Supreme Court has articulated the following test for determining whether an individual holds a civil office: "The determining factor which distinguishes a civil officer from an employee is whether any sovereign function of the government is conferred upon the individual to be exercised by the individual for the benefit of the general public largely independent of the control of others." *Morris Indep. Sch. Dist. v. Lehigh* (Fr. Sup. Ct. 1965).

Municipal utility districts provide water, sewer, drainage, and other services to suburban communities. They are local (as opposed to state or county) government entities authorized under the Franklin Constitution and are subject to the Fr. Water Code. They are governed by a board of directors, who are elected to four-year terms. Fr. Water Code § 35. A MUD board is responsible for "the management of all the affairs of the district" (*id*. § 37) and may levy and collect a tax for operation and maintenance purposes, charge fees for provision of district services, issue bonds or other financial obligations to borrow money for its purposes, and exercise various other powers set out in the Franklin Water Code (*id*. § 39). A director of a MUD is a civil officer within the test stated by the Franklin Supreme Court in *Morris* based on the number of independent functions delegated to MUD boards under the Water Code, several of which are discussed above.

We next consider whether members of the Waterford PZC are civil officers. Cities such as Waterford have zoning authority and are authorized to appoint a zoning commission. If the

Waterford PZC exercises governmental powers delegated by the city council, its members will be civil officers.

The Waterford PZC consists of nine citizens of Waterford who are appointed by the city council for a term of two years. The Waterford PZC is responsible for final approval of plats for residential development in the City. In our opinion, members of the Waterford PZC exercise a sovereign function of the government "for the benefit of the general public largely independent of the control of others" within the *Morris* test and are therefore civil officers.

Our next consideration is whether members of the Waterford PZC have powers and duties that are incompatible with the powers and duties of a MUD director. During the plat approval process, the PZC requires submission of preliminary utility plans identifying the nature and location of water and sewer services such as water and sewer plants. A PZC member who is also a director of a MUD may have divided loyalties when the proposed development is located within the MUD on whose board the PZC member serves. In this situation, the PZC is able to control and impose its policies on the MUD by determining the manner and placement of the MUD's facilities.

We conclude that the two civil offices are incompatible, and that a member of the PZC who also serves on a MUD would have divided loyalties in facing decisions that affected his or her MUD. We conclude that the common law doctrine of incompatibility prevents a member of the Waterford PZC from serving simultaneously as a director of a MUD with territory within the zoning authority boundaries of Waterford.

SUMMARY

A MUD director holds a civil office, as does a member of the PZC of the City of Waterford. Because the duties of those two offices are in conflict where the offices have overlapping jurisdictions, the common law doctrine of incompatibility bars one person from simultaneously holding both offices.

ATTORNEY GENERAL OF FRANKLIN

Opinion No. 2010-7
September 5, 2010

Re: Whether a member of a school district board of trustees may simultaneously hold the office of county treasurer

The issue presented is whether a trustee of an independent school district may simultaneously hold the office of county treasurer. For the reasons explained below, we conclude that she may do so. In the situation presented, the individual was elected for a three-year term on the board of trustees of Winfield Independent School District. Subsequently, she was appointed by the Board of Commissioners of Winfield County to fill the balance of a four-year term as the Winfield County Treasurer.

Civil office of emolument

When we consider article XII, section 25 of the Franklin Constitution and our Opinion No. 2003-9, we conclude that an individual is not barred by article XII, section 25 from simultaneously holding the offices of school trustee and county treasurer. Section 384 of the Franklin Education Code requires that trustees of an independent school district "serve without compensation." Because the office of school trustee is therefore not an "office of emolument," it follows that an individual is not barred by article XII, section 25 from simultaneously holding the offices of school trustee and county treasurer.

That does not end our inquiry, however.

Common law doctrine of incompatibility

Common law incompatibility is independent of article XII, section 25. The three aspects of the doctrine are self-appointment, self-employment, and conflicting loyalties. Self-appointment and self-employment are not implicated here because the county treasurer neither appoints nor employs members of the school board of trustees. Nor does the school board of trustees appoint or employ the county treasurer.

The third aspect of common law incompatibility, conflicting loyalties, bars the holding of simultaneous civil offices that would prevent a person from exercising independent and disinterested judgment in either or both positions. It most often arises when one person seeks to be a member of two governing boards with overlapping jurisdictions. If, for example, two governmental bodies are authorized to contract with each other, one person may not serve as a member of both.

Conflicting loyalties

Based on these principles, we must determine whether there are any duties ascribed to the office of county treasurer that would render its holding incompatible with that of school district trustee. The county treasurer is the chief custodian of county funds and is responsible for accounting for and managing all money belonging to the county, including depositing funds received by the county and disbursing county funds to pay county debts as required by law. Fr. Local Gov't Code § 411.

A number of statutes peripherally relate to the duties of the county treasurer with respect to school funds, but all of these appear to prescribe purely ministerial duties or duties that do not apply in this circumstance, such as collecting debts and maintaining the original financing records for schools in counties that do not have any independent school district. In this case, Winfield County has its own independent school district (i.e., Winfield Independent School District). The school district is a separate, distinct governmental entity with separate authority to acquire and hold real and personal property, sue and be sued, and maintain its own funds. Fr. Educ. Code § 1251.

Conceivably, a county treasurer could initiate actions to recover funds owed to Winfield County by the Winfield Independent School District. However, the county treasurer's authority is not exclusive. The Board of Commissioners, as the executive head of the county, is vested with authority to determine when suits or other actions should be instituted to recover funds belonging to the county and can separately sue to collect debts owed to the county. If it were determined that funds were owed to Winfield County by the Winfield Independent School District, the Board of Commissioners would be the proper party to sue to recover those funds. Therefore, in our opinion, the county treasurer's non-exclusive authority to sue to recover funds

owed by the school district to the county does not rise to the level of incompatibility contemplated by the common law doctrine of incompatibility.

Because a county treasurer's authority to sue an independent school district is limited to the recovery of funds owed by the school district to the county, and because even that limited authority is not exclusive, we conclude that conflicting-loyalties incompatibility is not, as a matter of law, a bar to an individual's simultaneously holding the offices of county treasurer and trustee of an independent school district located within his or her county.

SUMMARY

A county treasurer is not, as a matter of law, barred either by article XII, section 25 of the Franklin Constitution or by the common law doctrine of incompatibility from simultaneously holding the office of trustee of an independent school district located within her county.

February 2018
MPT-1 Point Sheet:
State of Franklin v. Clegane

State of Franklin v. Clegane

DRAFTERS' POINT SHEET

This performance test requires examinees to draft an argument in support of the reading of victim-impact statements and requests for restitution, as authorized under the Franklin Crime Victims' Rights Act (FCVRA), at the sentencing hearing for defendant Greg Clegane. The law firm's client is Sarah Karth, who wishes to make such statements on behalf of her sister, Valerie Karth, and on her own behalf.

In the underlying criminal action, Clegane illegally sold dangerous fireworks to a minor who later ignited those fireworks at a party. The fireworks caused injuries and started a fire that burned down a garage. Clegane was convicted of a felony with the maximum sentence of five years in prison and a $50,000 fine. He has not yet been sentenced.

Valerie was at the party and was seriously injured by the fireworks; it was her garage that was destroyed by the fire. She remains hospitalized and cannot appear in court herself. Sarah was not at the party, but she wants to submit a victim-impact statement and seek restitution on Valerie's behalf, as her representative, and to do those things on her own behalf as well, because of the trauma she suffered as a result of her sister's injury.

Sarah recently learned that Clegane's defense counsel has moved to exclude the sisters' victim-impact statements at the sentencing hearing and to deny their requests for restitution. Examinees' task is to draft the argument section of the brief opposing Clegane's motion.

The File contains the task memorandum from the supervising partner, the firm's guidelines for writing persuasive trial briefs, a newspaper article about the fireworks incident, excerpts from the client interview, and the defendant's motion. The Library contains excerpts from the FCVRA and three Franklin Court of Appeal cases: *State v. Jones* (defining "crime victim"), *State v. Berg* (defining "crime victim" and "direct and proximate harm"), and *State v. Humphrey* (addressing victim representatives and restitution).

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

I. FORMAT AND OVERVIEW

The examinee's task is to draft the argument section of a persuasive trial brief in response to the defendant's motion opposing the client's victim-impact statements and restitution requests at the sentencing hearing. The File includes a format memorandum containing Guidelines for Persuasive Briefs in Trial Courts. Examinees are instructed that their legal argument should be brief and to the point and should cite relevant authority for each legal proposition. Instead of preparing a separate statement of facts, examinees should integrate the facts into the legal argument to make the strongest case for the client. In addition, examinees should break the argument into the key issues, introducing the separate sections with carefully written subject headings that summarize the arguments they cover. Contrary authority should also be addressed

in the argument and explained or distinguished. Examinees are expected to follow the guidelines and make the most persuasive case possible under the FCVRA and relevant case law.

II. ANALYSIS

Examinees are to argue that, under the FCVRA, Sarah Karth should be permitted to present written victim-impact statements and restitution requests on behalf of both Valerie and Sarah herself at Clegane's sentencing hearing. Examinees' work product should make a persuasive case through a careful but forthright analysis of the issues as applied to each client.

A. Sarah Karth is entitled to make victim-impact statements at the defendant's sentencing hearing on behalf of Valerie and on her own behalf.

In his motion, Clegane asserts that Valerie and Sarah Karth do not qualify as crime victims under FCVRA § 55(b) because they were not "directly and proximately harmed as a result of the commission" of the offense of which he was convicted, the sale of fireworks to a minor, under Franklin Criminal Code § 305. And, because the motion claims that they are not crime victims under the FCVRA, Clegane argues that Valerie and Sarah Karth are not entitled to make victim-impact statements or to seek restitution.

1) Valerie Karth is a crime victim under the FCVRA.

Summary: Examinees should craft a persuasive argument that Valerie Karth, who was personally injured at the party by the fireworks and whose property was destroyed, is a "victim" under the FCVRA. Note that defendant Clegane is not the person who ignited the fireworks but is the person who illegally sold the fireworks to the minor who did set them off. Similarly, the crime involved addresses the illegal sale of such dangerous fireworks to a minor; it is not the criminal prosecution of the minor who bought and ignited the fireworks. The brief must argue that Valerie is a victim of defendant Clegane's illegal sale and that the harm she suffered when these fireworks were later ignited at a party was a direct and proximate result of the illegal sale. The cases in the Library that interpret the FCVRA, *State v. Jones* and *State v. Berg,* reach conflicting results regarding victims and proximate harm. Examinees should emphasize the favorable parts of *Jones* and *Berg* and distinguish the aspects of those cases that do not favor the Karths. If Valerie is a victim of Clegane's crime under the FCVRA, she has the right to make a victim-impact statement at the sentencing hearing and also has a right to make a claim for restitution.

Analysis:

- Defendant Clegane has been convicted of the unlawful sale of dangerous fireworks to a minor. According to the *Franklin City Post* article, in Franklin, Clegane's conduct constitutes a felony with the potential for a five-year prison term and a $50,000 fine. Thus, the issue of whether a victim should be allowed to weigh in on sentencing and restitution could have serious consequences for the defendant.

- FCVRA § 55(a)(4) provides victims of a criminal offense the "right to be reasonably heard at any public proceeding in the district court involving release, plea, or sentencing, or any parole proceeding." This encompasses making a victim-impact statement at a defendant's sentencing hearing.

- Valerie Karth's right to make a victim-impact statement turns on whether or not the court finds her to be a "crime victim" of Clegane's crime as defined by the FCVRA.

- FCVRA § 55(b)(1) defines "crime victim" as "a person directly and proximately harmed as a result of the commission of a Franklin criminal offense."

- The Franklin cases interpreting the term "crime victim" hold that the FCVRA requires a purported crime victim to demonstrate (1) that the defendant's conduct was a "cause in fact" of the victim's injuries and (2) that the purported victim was "proximately harmed" by the defendant's conduct. *State v. Jones* (Fr. Ct. App. 2006).

    - In *Jones,* the defendant had sold cocaine to the ex-boyfriend of Gina Nocona. Nocona sought to make a victim-impact statement at sentencing, claiming that because her boyfriend had physically abused her after using drugs bought from Jones, the latter's drug dealing had contributed directly to her abuse. The court denied the motion to submit a victim-impact statement. First, there was an insufficient factual basis to establish that Jones's conduct was a cause in fact of the violence against Nocona (e.g., no expert witness testified regarding a causal connection between the drug use and domestic violence). As to proximate harm, the court held that Nocona could not show that her injuries were a foreseeable consequence of Jones's drug distribution conspiracy. Nocona had not provided evidence showing that it was reasonably foreseeable to Jones that his customer would use the drugs and, because of this drug use, would then abuse his girlfriend.

- Examinees should distinguish *Jones* from the facts at hand. Here, the link between Clegane's conduct and Valerie Karth's injuries is much more direct.

- More helpful to the Karths' argument is *State v. Hackett* (cited in *Jones*). In *Hackett,* the court allowed a restitution claim by an insurance company against defendant Hackett for damage caused not by Hackett himself, but by one of his coconspirators, who had started a fire by placing chemicals Hackett had supplied on a hot plate, causing extensive property damage. The court found that Hackett had knowledge and understanding about the nature of the drug-manufacturing enterprise and his coconspirator's activities. Thus, even though there were "multiple links in the causal chain," Hackett's conduct was a cause in fact of the resulting property damage.

- Examinees should argue that the analysis of who is a "crime victim" found in the *Berg* and *Humphrey* cases applies here.

- The court in *State v. Berg* (Fr. Ct. App. 2012) interpreted "direct and proximate harm," noting that the term "crime victim" should be broadly construed. In *Berg,* Carly Appleton was killed in a car accident. Leon Berg, another passenger in the car, had purchased alcohol and illegally provided it to his girlfriend, the driver of the car, and had allowed her to drive, knowing her history of drunk driving and that she was underage. Berg was convicted of the crime of supplying alcohol to a minor.

  Appleton's parents sought to present victim-impact statements at Berg's sentencing. Looking to tort law principles to interpret the "directly and proximately harmed" language in the FCVRA, the court concluded that, but for Berg's conduct, Appleton would not have been harmed. Thus, Berg's conduct was a "cause in fact" of the harm to Appleton. The court then considered whether Berg's actions proximately harmed Appleton, noting that "proximate harm" is the concept by which courts "limit the scope of the actor's liability" and that "[f]oreseeability is at the heart of determining if an actor's conduct proximately harmed a victim." *Berg.* In making this determination, the court "looks to whether the resulting harm was within the zone of risk resulting from the defendant's conduct . . . ." *Id.*

  The court found that Berg's actions proximately caused the harm to Appleton. Berg had knowledge that his girlfriend might drive drunk when he bought her alcohol and gave it to her to consume while she was driving. "[T]here is an intuitive relationship between Berg's conduct and the resulting harm" to Appleton. *Id.* Thus, the court found that it was reasonably foreseeable to Berg that his girlfriend might crash the car and that she or the passengers might be injured.

- Examinees should argue that the key facts of *Berg* are analogous to Valerie Karth's situation, and that therefore the court should find that Valerie is a "crime victim." In her interview, Sarah describes the arresting police officer's trial testimony that Clegane had admitted that when he sold the fireworks, the minor told him, "I can't wait to show these to my friends—I'm going to give everyone a big surprise." This should have been enough notice to make it reasonably foreseeable to Clegane that the minor intended to use the fireworks in a dangerous manner and that people and property could be harmed. Clegane also told the officer that the minor "looked like he was at least in his twenties" and that his statements "didn't raise any red flags." This statement simply is not credible under the circumstances. Just as Berg disregarded the risk that his girlfriend would drive drunk and crash the car, Clegane ignored the warning signs that a young man purchasing professional-grade fireworks was "going to give everyone a big surprise."

- In sum, Valerie is a "crime victim" under the FCVRA because she was directly and proximately harmed by Clegane's offense, illegal sale of dangerous fireworks to a minor, and the court should follow *Berg* and apply a tort-based interpretation of direct and proximate harm. Here the fireworks seller had knowledge that the minor purchaser might use the fireworks in an inappropriate way, around other people and buildings, and that it was therefore reasonably foreseeable that Valerie, a neighbor attending the

party mentioned to Clegane, might in fact be harmed when the dangerous fireworks were ignited.

2) Sarah Karth can serve as a representative of Valerie Karth.

Summary: Examinees should argue that Sarah, the sister of Valerie Karth, who was directly injured by the fireworks explosion, is a valid representative of her sister under the FCVRA. Valerie was severely injured, suffering a coma for months, and is still hospitalized. She cannot participate directly in the court proceedings. Valerie's father is deceased, and her mother is too traumatized and frail to act as her representative. Under these circumstances, Sarah would like to act as Valerie's representative at sentencing.

For Sarah to assert her sister's rights under the FCVRA, the court must first find that Valerie is a "crime victim" and that Sarah is a statutorily appropriate representative under the FCVRA. (Examinees need not repeat the analysis for whether Valerie is a victim.)

Analysis: Sarah is Valerie's valid representative under the FCVRA:

- Victims of a Franklin offense have the "right to be reasonably heard at any public proceeding in the district court involving . . . sentencing." FCVRA § 55(a)(4).
- FCVRA § 55(b)(2) states: "In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim . . . , family members, or any other persons appointed as suitable by the court may assume the crime victim's rights under this Act, but in no event shall the defendant be named as such guardian or representative."
- Examinees should explain how Sarah qualifies as a "representative" of her sister. In the client interview, Sarah describes how Valerie was severely injured and remains hospitalized and is unable to come to court. Thus, Valerie is "incapacitated" under § 55(b)(2). Valerie's father is deceased, and her mother is traumatized and too frail to participate in the court proceedings. This eliminates other potential family member representatives, such as the victim's parents.
- Sarah and Valerie have a very close relationship. Sarah, age 35, is a responsible adult representative who can speak effectively for her sister. The court should find that Sarah is an appropriate representative for Valerie under § 55(b)(2).
- Examinees could cite *State v. Humphrey* (Fr. Ct. App. 2008), in which the ex-wife of the deceased party acted as a representative for their two minor children for purposes of an FCVRA restitution claim on behalf of the children.
- Note that Sarah, in her representative capacity, can assume only those rights that would be Valerie's under the FCVRA. This means that if Valerie is a "crime victim" and Sarah is her approved "representative," Sarah can make a victim-impact statement on behalf of Valerie and can also seek restitution for Valerie's financial harm, namely, out-of-pocket medical expenses ($22,000), future medical expenses ($40,000), lost wages ($120,000), and property damage ($17,000).

- Accordingly, Sarah is the suitable representative for her sister and should be so recognized by the court under FCVRA § 55(b)(2).

3) Sarah Karth also qualifies as a crime victim in her own right under the FCVRA.

- Examinees should argue that Sarah Karth should be designated as a victim for purposes of the FCVRA in her own right, even though she was not present when the fireworks exploded and thus did not suffer physical injuries.

- Examinees could reference the *Humphrey* case, in which the mother of two minor children argued for an FCVRA restitution claim on their behalf. Like the children in *Humphrey,* Sarah is a "victim" in her own right because of the emotional harm and psychological damage she suffered from seeing her beloved sister in the hospital and wondering if she would recover. Sarah seeks to make a victim-impact statement about her own personal trauma and also seeks restitution for therapy she sought for herself after her sister was injured.

- The court in *Humphrey* found that the term "harm," as used in the FCVRA, "embraces physical, financial, and psychological damage."

B. Valerie and Sarah are entitled to seek restitution from the defendant.

Summary: FCVRA § 56 establishes a right to seek restitution for crime victims. Examinees should argue that if Valerie and Sarah Karth are found to be "crime victims," Sarah, as Valerie's representative, would be entitled to seek restitution for Valerie's specific personal and property damages, and directly on her own behalf for her own damages for out-of-pocket medical therapeutic expenses. In making the case for restitution, examinees must respond to Clegane's argument that, even assuming that Valerie and Sarah are crime victims, "the restitution they seek is not supported by the evidence and is excessive, and Defendant does not have the resources to pay the amounts requested," citing FCVRA § 56(d). Examinees should argue that the amounts of restitution sought by Valerie and Sarah are reasonable and limited and should be allowed for policy reasons.

Analysis:

- Sarah, on behalf of Valerie, is seeking out-of-pocket medical expenses ($22,000), an additional $40,000 in expected future out-of-pocket medical expenses, lost wages ($120,000), and the cost of rebuilding her garage ($17,000).

- Sarah, on her own behalf, is seeking $1,500 in out-of-pocket therapy bills.

- Victims of a Franklin offense have the "right to full and timely restitution under section 56." FCVRA § 55(a)(6).

- A "crime victim" is "a person directly and proximately harmed as a result of the commission of a Franklin criminal offense." *Id.* § 55(b)(1).

- In *State v. Hackett,* the court ordered restitution to an insurance company for property damage caused by a codefendant's placing methamphetamine chemicals on a hot plate. This case can be helpful to the examinee's arguments for restitution.

- "A defendant is presumed to have the ability to pay restitution unless the defendant establishes the inability to pay by a preponderance of the evidence." *Id.* § 56(c). This is a rebuttable presumption, with the burden placed on the defendant to demonstrate the inability to pay. *See State v. Humphrey.*

- Under FCVRA § 56(d), in awarding restitution to crime victims, the court must consider three factors: (1) public policy that favors requiring criminals to compensate for damage and injury to their victims; (2) the financial burden placed on the victim and those who provide services to the victim as a result of the criminal conduct of the defendant; and (3) the financial resources of the defendant.

- Public policy favors holding a criminal financially responsible to his victims. The crime here, the sale of professional-grade fireworks to a minor, presents risk of grave harm to innocent bystanders. The minor who actually ignites the explosives is unlikely to have insurance or assets that may be available to pay for damage caused by an accident. It makes sense that the court can order restitution when sentencing an adult who enabled a minor to obtain such powerful fireworks.

- While there are few details in the File regarding Clegane's financial status, the July 5, 2017, article from the *Franklin City Post* reports that Clegane is "the proprietor of Starburst Fireworks, which sells fireworks and other party supplies from a storefront in the Third Ward of Franklin City. Clegane has three similar retail operations spread throughout the eastern part of the state."

- The implication is that Clegane is not destitute and in fact may have access to substantial financial resources. So factor three of § 56(d) supports the court awarding restitution to the Karths.

- Sarah's statements in the client interview depict, in specific terms, how both she and Valerie have been affected by the fireworks incident. These facts support awarding restitution under the second factor, the financial burden placed on the victim(s) as a result of the defendant's conduct. Sarah can document amounts for both Valerie and herself that quantify their financial losses due to medical bills, lost income, property damage, and in Sarah's case, therapy expenses.

- The restitution that Valerie and Sarah are seeking is limited, reasonable, and supported by documentation: out-of-pocket medical expenses, lost income, and property damage (Valerie); and out-of-pocket psychological therapy expenses (Sarah). Sarah seeks reimbursement for therapy related to the emotional trauma of having her sister so seriously injured.

- While Sarah's claim for restitution on her own behalf is the most tenuous and difficult argument here, examinees should analogize her situation to that of the deceased's sons in the *Humphrey* case, given that there is no direct support in the statute or cases for her recovery. There is a basis to make a good-faith claim for such recovery for Sarah, and the amount of restitution she seeks, $1,500 paid for therapy in the last six months, is quite modest.
- At a minimum, nothing in Clegane's motion suggests that he is unable to pay the restitution requested. He has merely made a conclusory assertion that he does not have the resources to pay the amounts requested. This falls far short of meeting his burden under the statute to demonstrate the inability to pay restitution.

February 2018
MPT-2 Point Sheet:
In re Hastings

In re Hastings

DRAFTERS' POINT SHEET

In this performance test, the client, Danielle Hastings, is seeking legal advice as to whether she can hold an election-related position in her voting precinct while simultaneously serving on the board of directors for Municipal Utility District No. 12 (MUD 12), a local government entity that provides public water, sewer, drainage, and other services to her neighborhood. She is considering two election-related positions in her voting precinct: county election judge and precinct chair. Hastings doesn't want to pursue either position if doing so would jeopardize her ability to remain on the MUD 12 board.

Examinees' task is to draft an objective memorandum analyzing whether Hastings can apply for and hold the county election judge position or the precinct chair position, while simultaneously serving as a member of the board of directors for MUD 12. This requires examinees to analyze the interplay between state constitutional provisions that prohibit dual officeholding in certain circumstances and the common law doctrine of incompatibility, which imposes additional limitations on an individual's ability to hold two civil offices at the same time.

The File contains the instructional memo from the supervising attorney, a transcript of the client interview, and descriptions of the two new positions that Hastings is considering. The Library contains Franklin Constitution article XII, section 25; excerpts from the Franklin Election Code; and three Franklin Attorney General (AG) opinions.

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

I. OVERVIEW

No specific formatting guidelines are provided. However, examinees are instructed not to prepare a separate statement of facts but to incorporate the relevant facts and legal authorities into their analyses. They are specifically instructed to "discuss all legal issues relating to each position" (i.e., MUD director, county election judge, and precinct chair).

II. THE STATUTES AND CASES

The following points, which examinees should apply in formulating their analyses, emerge from the Franklin constitutional provisions and the Franklin Attorney General opinions in the Library:

- Article XII, section 25 of the Franklin Constitution provides that, subject to certain exceptions, "[n]o person shall hold or exercise, at the same time, more than one civil office of emolument." Fr. Const. art. XII, § 25(a).

- An emolument is "a pecuniary profit, gain or advantage." Attorney General Opinion No. 2003-9 (2003 Opinion) (citing *State v. Babcock* (Fr. Ct. App. 1998)). It includes salaried compensation as well as compensation per meeting or a fixed per diem. *Id.*
- Importantly, however, the term "emolument" does not include the legitimate reimbursement of expenses. *Id.*
- If an officeholder is entitled to compensation, his or her office is an "office of emolument" even if the person refuses to accept any compensation. *Id.*
- There are a number of exceptions to this general rule that are also listed in article XII, section 25, none of which apply in Hastings's situation.
- The constitutional dual-officeholding prohibition applies if both positions (1) qualify as civil offices and (2) are entitled to an emolument. 2003 Opinion.
- With regard to the first inquiry, the determinative factor distinguishing an officer from an employee is "whether any sovereign function of the government is conferred upon the individual to be exercised by the individual for the benefit of the general public largely independent of the control of others." 2003 Opinion (citing *Morris Indep. Sch. Dist. v. Lehigh* (Fr. Sup. Ct. 1965)). This is known as the *Morris* test.
- If only one of the positions in question qualifies as a "civil office" and/or both do not involve entitlement to compensation, then article XII, section 25 does not bar dual service. *See* Attorney General Opinion No. 2008-12 (2008 Opinion) (planning and zoning commissioners who did not receive pay were not civil officers of emolument).
- However, the common law doctrine of incompatibility may prevent simultaneous dual service that would otherwise be allowable under article XII, section 25 of the Franklin Constitution. 2008 Opinion.
- The doctrine of incompatibility prohibits the simultaneous holding of two civil offices that would prevent a person from exercising independent, disinterested judgment in either or both positions. AG Opinion No. 2010-7 (2010 Opinion).
- Compensation is not relevant in determining whether offices are incompatible. Rather, the common law doctrine of incompatibility bars one person from holding two civil offices if their duties conflict. 2008 Opinion (citing *Spencer v. Lafayette Indep. Sch. Dist.* (Fr. Ct. App. 1947)).
- The doctrine of incompatibility has three aspects: self-appointment, self-employment, and conflicting loyalties. *Id.* Self-appointment and self-employment are implicated only if the responsibilities of one position include appointing or employing the second position.
- As a threshold matter, in order for the conflicting-loyalties prong to apply, each position must constitute a "civil office." *Id.*

- The same *Morris* test for determining whether dual positions constitute "civil offices" under article XII, section 25 of the Franklin Constitution also applies to the determination of whether dual positions constitute "civil offices" under the doctrine of incompatibility. *Id.* If both positions constitute "civil offices" subject to the doctrine of incompatibility, then the analysis shifts to whether the positions have powers and duties that are incompatible with each other. *Id.*

- If one position is able to control and impose its policies on the other position, such that the individual would have divided loyalties, then the two offices are incompatible. *Id.*

III. ANALYSIS

Examinees should begin by noting that there are overlapping constitutional and common law limitations on an individual's ability to simultaneously hold dual civil offices. One constitutional limitation, article XII, section 25 of the Franklin Constitution, applies where the two positions are "civil offices of emolument," involving compensation paid to the person beyond reimbursement for actual expenses. In addition, the common law doctrine of incompatibility requires an independent analysis of whether the two positions conflict, apart from whether they trigger the article XII, section 25 limitations. Examinees must apply these constitutional and common law principles in determining whether Hastings can pursue the county election judge or precinct chair position while simultaneously serving as a MUD director.

A. Dual MUD Director/County Election Judge Positions

- As a preliminary matter, examinees should conclude that the position of MUD director is a civil office within the meaning of article XII, section 25. The exceptions to the rule against dual offices of emolument do not apply. Hastings is a director on a MUD board interested in holding a second, election-related position. She is not a member of the military or one of the other excepted groups, nor is she a schoolteacher.

- As set forth in the 2008 Opinion and as discussed in the client interview transcript, MUDs provide water, sewer, drainage, and other basic municipal services to suburban communities. They are local (as opposed to state or county) government entities created under the Franklin Constitution, are subject to the Franklin Water Code, and are responsible for "the management of all the affairs of the district." 2008 Opinion (citing the Franklin Water Code).

- Also, as noted in the client interview transcript, MUDs may be viewed as one of the most fundamental forms of local government because they provide municipal-level services, have elected officials who live in the MUD, and are authorized to charge fees to their residents, assess and collect taxes, and sell bonds in order to pay the costs to construct and operate the facilities that provide services to their residents.

- Because Hastings's position on the MUD board constitutes a civil office, the next step is to analyze whether the position of county election judge is also a "civil office" within the meaning of article XII, section 25 of the Franklin Constitution.

- In the 2003 Opinion, the AG concluded that emergency service district commissioners were civil officers under the *Morris* test because they exercised various governmental powers for the benefit of the public (including the power to appoint agents and employees, impose and collect taxes, and perform other necessary acts relevant to providing emergency services).
- Similarly, in the 2008 Opinion, the AG concluded that planning commissioners were civil officers within the meaning of *Morris* by virtue of the fact that they were appointed by the City and delegated certain city powers.
- According to the position description in the File, county election judges are appointed by the Marin County Board of Commissioners and are responsible for conducting elections and ensuring that the elections are secure, accurate, fair, and accessible to all voters.
- Their responsibilities include handling and securing election equipment and ballots, locating and retaining election clerks to work at their polling location, organizing the setup of the election equipment and the operation of the election, handing out and collecting ballots, setting up and closing down the polling site, certifying the polling site results, and serving on a panel to resolve any voting-related challenges that may arise. In sum, they are delegated authority to conduct all aspects of the elections in their precincts.
- The client interview transcript indicates that if appointed as a county election judge, Hastings would be the chief election judge for her voting precinct.
- Under the Franklin Election Code, the chief election judge "is in charge of and responsible for the management and conduct of the election at the polling place of the election precinct that the judge serves." Fr. Elec. Code § 471.
- This includes (1) appointing election clerks to assist the judge in the conduct of elections, (2) designating the working hours of and assigning the duties to be performed by the election clerks, (3) preserving order and preventing breaches of the peace and violations of the election code, including appointing special peace officers, and (4) administering any oaths required or authorized to be made at a polling place. *Id.*
- These powers and responsibilities are delegated to the chief judge by the state legislature through the Franklin Election Code and exercised by the chief judge for the benefit of the general public largely independent of the control of others.
- Therefore, examinees should conclude that county election judges qualify as civil officers under the *Morris* test.
- The next issue is whether both offices in question, MUD director and county election judge, are offices of emolument.
- The 2003 Opinion indicates that an amount received as compensation for each meeting, such as a fixed per diem amount, is considered to be an emolument. The 2008 Opinion makes clear that, just like the emergency services district commissioners in the 2003

Opinion, MUD directors also receive a per diem payment for their services. Fr. Water Code § 46. Therefore, MUD directors hold civil offices of emolument.

- In contrast, county election judges receive reimbursement only for actual expenses incurred, per the comparison chart in the File. Reimbursement for actual expenses is not considered an emolument (*see* 2003 Opinion). Thus, the position of county election judge is not a civil office of emolument, and article XII, section 25 of the Franklin Constitution does not bar Hastings from serving as a MUD director and a county election judge at the same time.

- But, as discussed in the 2008 and 2010 Opinions, the common law doctrine of incompatibility may nonetheless prevent simultaneous dual service that would otherwise be allowable under article XII, section 25 of the Franklin Constitution.

- Accordingly, examinees will need to determine if the two positions are incompatible under the common law doctrine, which requires the examination of three potential conflicts: self-appointment, self-employment, and conflicting loyalties.

- MUD directors do not appoint or employ county election judges, nor do county election judges appoint or employ MUD directors. Rather, MUD directors are elected officials and county election judges are appointed by the county commissioners. Thus, the first and second prongs of the incompatibility doctrine do not apply.

- Whether the two offices involve conflicting loyalties requires a more in-depth analysis, especially since MUD 12 is located in Hastings's voting precinct, MUD directors are elected officials, and county-appointed election judges oversee elections.

- However, the client interview transcript indicates that MUDs hold separate elections for their director positions. This is reinforced in the Franklin Election Code, which states that each political subdivision is responsible for appointing its own election judges. Fr. Elec. Code § 492. Therefore, although there is geographic overlap between the MUD and Hastings's voting precinct, there is no overlap in jurisdiction between MUD directors and county-appointed election judges. County-appointed election judges cannot impose their policies on MUD directors and vice versa. *Cf.* 2008 Opinion (and *Spencer* case cited therein).

- The circumstances presented here are more analogous to those of the 2010 Opinion (a school trustee *could* also serve as a county treasurer) than to those of the 2008 Opinion (a MUD director *could not* simultaneously serve on the city's planning and zoning commission).

- Examinees should conclude that the common law doctrine of incompatibility does not bar Hastings from simultaneously serving as a MUD director and a county election judge.

- Moreover, there is nothing in the Franklin Election Code that would prevent Hastings from being appointed as a county election judge. MUD director elections are held separately from county elections, so there is no possibility that Hastings would be

a candidate for a contested MUD director position on the same day and in the same election as she would serve as chief election judge. *See* Fr. Elec. Code § 480.

B. Dual MUD Director/Precinct Chair Positions

- As discussed above, MUD directors hold civil offices of emolument. Therefore, examinees must determine whether the position of precinct chair also qualifies as a "civil office" within the meaning of article XII, section 25 of the Franklin Constitution and whether it involves emolument.
- Precinct chairs are the "primary political agents for the Democratic and Republican parties" in their precincts, and they are responsible for contacting, guiding, and organizing voters from their respective political parties in their precincts and campaigning for candidates. (*See* position descriptions in File.)
- Although precinct chairs represent their home precincts on their party's Executive Committee and are voting members of the Executive Committee, that role is also political and partisan.
- The *Morris* test requires that a position involve a "sovereign function of the government" that is conferred upon an individual "for the benefit of the general public . . . ." Campaigning and organizing voters are political activities, not sovereign governmental functions. Moreover, the activities of a precinct chair do not benefit the general public. Rather, they only benefit voters of one political party.
- Unlike county election judges, who have delegated statutory authority under the Franklin Election Code, precinct chairs are not creatures of statutory creation and have no similar authority.
- For all these reasons, examinees should conclude that the precinct chair position is not a civil office subject to article XII, section 25 of the Franklin Constitution or the doctrine of incompatibility.
- Moreover, even if a precinct chair could conceivably be considered a civil officer, (1) the position is a volunteer position, so it would not be considered a civil office of emolument; and (2) precinct chair responsibilities do not overlap with those of a MUD director, so there would be no incompatibility under the common law doctrine.
- Therefore, examinees should conclude that Hastings may run for precinct chair and, if elected, continue to serve as a MUD director.

IV. CONCLUSION

Hastings can be appointed as a county election judge or be elected as precinct chair in her voting precinct while continuing to serve as a director on the MUD 12 board. There are no constitutional or common law restrictions on her ability to do so.

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