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July 2019
MPT-1 File

American Electric v. Wuhan Precision Parts

ATKINSON & CARLTON LLP
Attorneys at Law
3 Civic Center Plaza
Franklin City, Franklin 33812

To: Examinee
From: Alexandra Carlton
Date: July 30, 2019
Re: American Electric v. Wuhan Precision Parts Ltd.

Our client Wuhan Precision Parts Ltd. (WPP), a Chinese manufacturing company, seeks help in vacating a federal default judgment entered by the U.S. District Court for the District of Franklin. These court proceedings arise from an earlier arbitration between American Electric Distribution Inc. (AE) and WPP, which took place in Franklin.

WPP lost the arbitration and has paid the bulk of the monetary relief awarded to AE by the arbitrators. But because WPP did not fully comply with the arbitrators' award, AE filed a complaint in federal court to "confirm" or convert the award into a court judgment. Before WPP appreciated what was happening in federal court, AE obtained a default judgment (which converted the arbitration award into a federal court judgment) and was awarded an additional $90,000 in attorney's fees tied to the court proceedings.

WPP accepts the arbitration award but contests the court's default judgment. WPP contends that it was not properly served in the federal court action in accordance with the international service of process provisions of the Hague Convention. WPP has asked us whether the default judgment can be vacated.

The Hague Convention is a treaty to which both the United States and China are signatories. It calls for service through governmental channels. However, we expect AE to argue that WPP waived its Hague Convention service protections by agreeing to arbitrate these claims in Franklin, and that WPP should not be able to complain because it received sufficient notice of the Franklin district court proceedings.

The issues presented are ones of first impression in our federal district court of Franklin; however, federal courts in our neighboring districts of Olympia and Columbia have addressed the question, albeit in different ways. Those decisions are attached.

Draft a memorandum to me analyzing the following issues:

1. Will WPP succeed in vacating the default judgment due to improper service under the Federal Rules of Civil Procedure and the Hague Convention? Discuss both the facts that support WPP's motion to vacate and those that undermine it.

2. Are there any grounds to challenge the attorney's fee award?

Your memorandum should focus on the service of process and fee issues. Do not include a separate statement of facts but be sure to integrate the facts into your analysis. Do not address personal jurisdiction. Another lawyer at our firm is assessing WPP's contacts with Franklin and whether the district court has personal jurisdiction over WPP.

Email from Shao Wen "William" Li to Alexandra Carlton

From: William Li (w.li@wuhanprecisionparts.com)
Sent: Tuesday, July 23, 2019, 10:24 p.m.
To: Alexandra Carlton (acarlton@aclaw.com)
Subject: American Electric judgment

Dear Alexandra,

We at WPP very much appreciated the chance to speak with you by Skype yesterday afternoon about our legal problem. As we discussed, the law firm we hired to handle the arbitration ended its work at our request after the arbitration award was issued. We're glad you represent us now.

WPP operates in Wuhan, an industrial city and a principal transportation hub in central China. We do not have offices, registered agents, or employees in the United States. WPP manufactures gear motors for dishwashers designed and assembled by American Electric (AE) for subsequent sale by U.S. Clean Corporation (USCC). AE is based in Franklin.

Here's the chronology of events:

<u>2014 Supplier Agreement</u>: In 2014, USCC asked AE for assurance that replacement gear motors would be available for use in repairing the dishwashers when necessary. Based on that request, on September 21, 2014, WPP and AE entered into a supplier agreement whereby AE authorized WPP to sell replacement gear motors directly to USCC on condition that WPP pay AE a royalty of $50 for each gear motor sold. As part of the supplier agreement, we agreed to arbitrate any dispute in Franklin.

<u>2017 Arbitration</u>: In 2017, AE took us to arbitration, claiming that we had deliberately shipped different motors from the ones that we had agreed to provide in the supplier agreement. AE also claimed that we had sold 900 more replacement motors to USCC than we had reported to AE and therefore owed AE additional royalties. Even though the arbitrators ruled against us, AE did not get all it wanted. The arbitrators decided that we owed $500,000 for shipping nonconforming motors and only $25,000 for unpaid royalties on 500 of the replacement motors we sold directly to USCC. The arbitrators also ordered us to pay AE's attorney's fees in the amount of $110,000.

WPP Partial Payments on the Arbitration Award: After the arbitrators issued their award on December 15, 2017, WPP promptly paid half of the $500,000 damages award for the breach of contract claim on the motors. We have not yet paid the $25,000 award for unpaid royalties or the $110,000 attorney's fee award. We have had to delay payment due to an economic downturn resulting in foreign exchange and cash flow problems.

June 14, 2019 District Court Default Judgment: Our biggest problem is that because we had not fully complied with the arbitration award, a U.S. court has entered a judgment against us that now includes an additional $90,000 in attorney's fees for the court process over and above the $110,000 in fees awarded by the arbitrators. We do not see how additional attorney's fees could be awarded. Here's what we know:

- November 2, 2018 – AE Email of Summons and Complaint: From what you have told us, on November 2, 2018, an email attaching the summons and complaint to enforce the arbitration award was sent to our Vice President of Manufacturing, who had been our designated point of contact during the arbitration. We also understand from you that AE attempted to serve the summons and complaint through Chinese government channels. We did not receive anything from the Chinese government.

- VP Quits on November 9, 2018: We checked, and the VP quit on November 9, 2018. He did not forward the email or notify anyone about it. Just so you know, although the arbitration communications were by email, we normally do business with AE by fax and phone.

- March 8, 2019 – AE Mailing of Default Motion: We now know that AE put its motion for default judgment in the mail to us in March (return receipt requested), thinking mail service was okay because the summons and complaint had been "served" back on November 2, 2018.

- April 15, 2019 – WPP Actually Receives Motion: We did not receive AE's motion for default judgment until April 15, 2019, because the Wuhan government post office delayed delivery. In addition, the motion papers were in English, and following our company policy, they were sent to our in-house translation department. Once we translated them into Mandarin Chinese, we realized that we needed to contact you. Then we learned from you that the court had already entered a judgment against us.

- June 14, 2019 – Court Orders Entry of Default Judgment: The court's order entering the default judgment mentions that AE attempted formal service under the Hague Convention by delivering the summons and complaint to the Chinese government. All we know is that we did not receive the summons and complaint, or any other legal documents, through government channels.

We need your help. The court entered a judgment without our knowledge. We are especially concerned with the additional $90,000 in attorney's fees. If AE or its lawyers had called us, or used a fax machine, all of this could have been avoided.

Please know that we can pay your bill. Even though we have had some cash flow problems, we have had substantial profits in recent years and have paid a number of much larger judgments entered against WPP.

We appreciate your help.

Thank you,
Shao Wen "William" Li
Director of International Sales

UNITED STATES DISTRICT COURT
DISTRICT OF FRANKLIN

American Electric Distribution Inc.,
Plaintiff/Petitioner,

v.

Wuhan Precision Parts Ltd.,
Defendant/Respondent.

ORDER ENTERING DEFAULT JUDGMENT

Civil No. 13-199-SJK

Plaintiff American Electric Distribution Inc. (AE) petitions for confirmation of an arbitration award and subsequently moves for an award of $90,000 to cover the attorney's fees it incurred in pursuing relief before this court. AE is represented by Alan Richetti of Richetti & Hamill. Wuhan Precision Parts Ltd. (WPP) has made no appearance before this court in this matter.

The September 21, 2014 Supplier Agreement

This court proceeding arises from a Supplier Agreement ("Agreement") effective as of September 21, 2014, between AE and WPP. It reads in relevant part:

> 7. Attorney's Fees. In the event of breach, the prevailing party shall be entitled to recover its costs and expenses (including reasonable attorney's fees) incurred to enforce the terms of this Agreement.
>
> 8. Arbitration. Any controversy or claim arising out of or relating to this Agreement or the breach, termination, or validity thereof shall be settled by arbitration carried on in the English language, using three arbitrators selected as detailed in Paragraph 9 below, and shall be held in Franklin City, Franklin, U.S.A. Judgment upon the award rendered by the arbitration panel may be entered by any court having jurisdiction thereof.

December 15, 2017 Arbitration Award

A dispute arose, with AE eventually taking WPP to arbitration before an arbitration panel of the Franklin Center for International Dispute Resolution. The panel awarded AE the following:

First, due to WPP's sale of nonconforming motors, an award of damages of $500,000.

Second, due to WPP's failure to properly account for its replacement motor sales to U.S. Clean Corporation, the panel concluded that WPP owed back royalties on the sale of 500 replacement motors, resulting in an additional award of $25,000.

Third, the panel granted AE's request for attorney's fees tied to the arbitration proceeding, but only in the sum of $110,000—one-third of the amount requested. The panel concluded that AE had overstated its case in several material respects that caused both sides to incur unnecessary fees and costs. The panel noted, however, that its ruling did not deny or limit AE's right to recover attorney's fees, if any, that might be incurred in enforcing its rights to future accountings and/or royalties.

<u>The Court Proceedings to Confirm the Award and Motion for Default Judgment</u>

AE served its original complaint seeking to confirm the arbitration award by email to the Vice President of Manufacturing for WPP. Email service was used during the arbitration pursuant to the procedural rules governing the arbitration. AE's subsequent motion for a default judgment, which added a request for $90,000 in attorney's fees, was served upon WPP by mail. The complaint was served on November 2, 2018, and the default motion was served on March 8, 2019. WPP failed to respond. Almost eight months have elapsed since service of the complaint, and over 90 days have elapsed since the date of the service by mail of the motion for default judgment. The court notes that unlike the summons and complaint, the default motion was not translated into Mandarin Chinese, although those pleadings were short and straightforward. Moreover, the record establishes that WPP regularly conducted its international business in English, including the arbitration proceedings at issue.

AE also attempted formal Hague Convention service of its pleadings via the Chinese Central Authority but received no communication in return.

Accordingly, it is hereby ordered that the plaintiff's motion for default judgment is GRANTED, and judgment is entered as follows:

1. Confirming the arbitration award of December 15, 2017, with the arbitration relief now converted to a judgment of this court; and
2. An additional award of $90,000 in attorney's fees.

Dated: June 14, 2019

Georgia York

Georgia York
United States District Judge

July 2019
MPT-1 Library

American Electric v. Wuhan Precision Parts

EXCERPTS FROM THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 4 [Summons and Complaint]

. . .

(f) Serving an Individual in a Foreign Country. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served at a place not within any judicial district of the United States

> (1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

. . .

(h) Serving a Corporation, Partnership, or Association. Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation . . . must be served . . .

> (2) at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery . . . .

Rule 5 [Post-Complaint Pleadings]

(a) Service: When Required . . . .

> (2) *If a Party Fails to Appear.* No service is required on a party who is in default for failing to appear. But a [subsequent] pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4.

Pennsylvania Coal Co. v. Bulgaria Trading & Transport Co., Ltd.
United States District Court for the District of Olympia (2001)

Before the court is the motion of defendant Bulgaria Trading & Transport Co., Ltd. (BTT) to vacate a default judgment. BTT makes a limited appearance, arguing that it had not been properly served under the Hague Convention and therefore the default judgment is void for lack of proper service.

Background

Plaintiff Pennsylvania Coal Co. (Penn Coal) contracted for the sale of used coal processing equipment to BTT, a trading company headquartered in Sofia, Bulgaria. The parties agreed to arbitration of all disputes in San Andrea, Olympia.

After a contentious and prolonged arbitration proceeding, the arbitrators awarded Penn Coal $4.5 million due to BTT's refusal to take delivery of approximately half of the equipment it had purchased. The panel also awarded $300,000 in attorney's fees to Penn Coal pursuant to a term of the contract providing for the award of attorney's fees to the prevailing party.

BTT refused all requests by Penn Coal for payment of the $4.8 million award. Penn Coal has presented evidence that BTT has since moved assets and has persisted in its contention that the Penn Coal equipment proved defective, notwithstanding the arbitration ruling to the contrary.

Penn Coal petitioned this court to confirm the award. When a court confirms an arbitration award, the arbitration award becomes a court judgment. In this way, a plaintiff can benefit from all the collection tools flowing from a court judgment. To confirm an arbitration award, the plaintiff files a complaint (or petition) in federal court and serves the defendant with a summons and complaint.

Penn Coal attempted formal Hague Convention service by delivering its pleadings to the appropriate Bulgarian governmental authority, but all subsequent governmental efforts to serve BTT were unsuccessful. Undaunted, Penn Coal took it upon itself to personally serve the summons and complaint at BTT's headquarters in Sofia, Bulgaria. Penn Coal also arranged for delivery through government postal channels (return receipt received), and it emailed a copy of the complaint to the BTT executive who had entered into the Penn Coal contract, using the same email address the parties had agreed to use for the arbitration proceeding.

Because BTT did not respond to Penn Coal's complaint or otherwise object over the nine months that followed, Penn Coal moved for, and this court granted, a default judgment for $4.8

million as awarded by the arbitrators, plus an additional $75,000 in attorney's fees tied to this proceeding.

Three weeks after this court issued its judgment, BTT appeared before this court to vacate that judgment. BTT acknowledges Penn Coal's evidence that BTT received actual notice but insists that the judgment is void because Penn Coal did not serve BTT in compliance with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (Hague Convention). The Hague Convention requires service upon a governmental authority, which in turn will effectuate service upon its own citizens and entities such as BTT. BTT challenges the fees awarded on the same basis.

Service Abroad Under the Hague Convention and Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure state that service on international parties must occur in compliance with the Hague Convention. *See* Fed. R. Civ. P. 4(f)(1). Both Bulgaria and the United States are parties to the Hague Convention. Formal Hague Convention service calls for service by the Bulgarian authorities upon BTT. Penn Coal did not properly serve BTT under the Hague Convention. BTT relies on case law holding that if a party was never properly served, subsequent judgments founded upon that improper service are void and must be vacated. *See, e.g., In re Int'l Media Services Inc.* (15th Cir. 1998) (civil litigation, not arbitration).

The Enforcement of Arbitration Awards

Our circuit court has held that entry into an agreement to arbitrate in a particular jurisdiction constitutes consent to personal jurisdiction and to venue. *Auto Dealers Ass'n v. Pearson* (15th Cir. 1996). However, it is an issue of first impression as to whether a consent to arbitrate in Olympia also relaxes the service of process requirements of the Hague Convention. When a foreign corporation, such as BTT, agrees to participate in an arbitration proceeding in the United States, it cannot expect that it can consent to an Olympia arbitration, participate in it, and then, in the event that it loses, seek refuge in the protections of the Hague Convention to avoid facing any consequences in Olympia. At the same time, this court recognizes that judicial proceedings are different from arbitration proceedings and that the expectation of parties to an arbitration must be balanced against the right of fair notice.

The service-related provisions of the Federal Arbitration Act (FAA) do not resolve the issue. Given this silence, this court will follow the line of authority holding that in cases arising from arbitration proceedings, defects in service of process may be excused where considerations of fairness so require. Where parties have consented to arbitration, actual notice of the proceedings can be sufficient as long as it is fair and no injustice results.

This court acknowledges the Supreme Court's admonition that compliance with the Hague Convention is "mandatory in all cases to which it applies." *Volkswagonwerk AG v. Schlunk*, 486 U.S. 694, 705 (1988). Here, however, Penn Coal tried in good faith to comply by delivering its pleadings to the Bulgarian authorities. More fundamentally, BTT consented to, and then participated in, an Olympia arbitration pursuant to an agreement contemplating the award's confirmation in court. In that circumstance, strict adherence to the Hague Convention is not required; actual notice and fairness are the standards. The Hague Convention is not designed to be a roadblock to those who act in good faith.

We now assess the fairness of the notice in this case. BTT clearly received notice, albeit without involvement of the Bulgarian government as the Hague Convention provides. Personal service and U.S. mail service are recognized forms of service under the Federal Rules of Civil Procedure. While email service is not typically authorized, it is the means by which the parties communicated during the arbitration. In this case, service via email was a reliable means of delivering the complaint to BTT and was reasonably calculated to give BTT actual notice. Finally, the lengths to which BTT went to evade its contract obligations and avoid accountability for the arbitrators' award cannot be rewarded. The manner in which BTT conducted its business (e.g., moving assets that could have been used to satisfy the arbitration award and claiming that Penn Coal's equipment was defective) is highly relevant and must be considered. Also, given that BTT has expressed no difficulty in comprehending the English-language documents arising from an American arbitration conducted in English, and given that BTT failed to appear in the nine months preceding this court's judgment, justice requires that this court affirm its earlier judgment confirming the arbitration award. On these facts, the actual notice given was fair.

Attorney's Fees

Even though the court grants the default judgment, the court agrees with BTT that Penn Coal's request for attorney's fees for these court proceedings is on a different footing. The additional $75,000 in attorney's fees is not referenced in the summons and complaint. Accordingly, the court will relieve BTT from the $75,000 attorney's fee judgment.

There are two reasons for denying attorney's fees in this subsequent court action. First, unlike the confirmation of the arbitration award, the request for fees for litigating before this court is a "new claim for relief." A new claim requires service that complies with the Federal Rules of Civil Procedure and the Hague Convention. *See* Fed. R. Civ. P. 5(a)(2). Under the Hague Convention, the party raising a new claim must deliver a copy of that claim to the foreign governing authority, which will then deliver it in accordance with local judicial process. Penn Coal did not follow that procedure.

A second and independent ground for denying attorney's fees centers on the role of the arbitration panel versus that of the court. While the FAA contemplates that arbitral parties can turn to courts to confirm the awards themselves, courts are careful to defer all substantive decisions to the arbitrators. Here, the contract between Penn Coal and BTT allows for the prevailing party to obtain attorney's fees but contains no reference to judicial remedies in that regard. Accordingly, Penn Coal's fee request is one that it must pursue by returning to arbitration. That conclusion is especially appropriate given that this court employed "fairness" principles when upholding the judgment confirming the arbitration award. Those principles cannot be used by Penn Coal to open the door to claims, like requests for attorney's fees, that were not previously raised with the arbitrators.

Accordingly, BTT's motion to vacate this court's earlier default judgment is DENIED as to the $4.8 million arbitration award but GRANTED as to this court's judgment for $75,000 in attorney's fees.

EduQuest Digital Corp. v. Galaxy Productions Inc.
United States District Court for the District of Columbia (2005)

Before the court is the petition of EduQuest Digital Corporation (EQ) to confirm a 2003 arbitration award and grant its subsequent motion for an award of attorney's fees tied to this judicial proceeding.

Procedural History

EQ designs educational games and licenses those products for resale by companies across the globe. Galaxy Productions Inc. (Galaxy) is based in Beijing, China. It entered into a licensing contract with EQ covering 422 of EQ's products and authorizing their resale over a five-year period from 2000 through 2004. In the event of breach, the licensing contract called for arbitration in Center City, Columbia. The contract provided that any prevailing party was entitled to attorney's fees. It also stated that "judgment upon the award rendered by the arbitration panel may be entered by any court having jurisdiction thereof."

The arbitrators, after taking 16 days of testimony, concluded that Galaxy had breached its licensing agreement with EQ by failing to remit all licensing fees for products it sold in China, and that Galaxy's sale of counterfeit copies of EQ's games warranted an additional award of lost profits of $750,000. The arbitrators awarded $225,000 in attorney's fees to EQ and directed that Galaxy submit semi-annual reports of all of its licensed sales.

Facing Galaxy's noncompliance with the arbitration award, EQ petitioned this court to convert its arbitration decision into a judgment that it can enforce. EQ initiated formal service following the Hague Convention and provisions of the Federal Rules of Civil Procedure. When Chinese entities are involved, the Hague Convention requires that the serving party translate the documents into Mandarin Chinese and deliver the documents to the Chinese Central Authority, which will effectuate service through its provincial courts. EQ fulfilled its responsibilities. However, after hearing nothing from the Chinese government, EQ opted for self-help via a combination of service by personal delivery upon a Beijing agent of Galaxy and service by international mail, return receipt requested. In light of that, EQ asks this court to deem service to have been proper.

Despite EQ's efforts at service, Galaxy failed to respond to EQ's initial petition to confirm the award. EQ seeks attorney's fees and costs of $95,000 tied to these judicial proceedings. EQ's motion for attorney's fees was served by personal delivery and international mail, return receipt confirmed.

Galaxy made a limited appearance that the court agreed would not waive Galaxy's jurisdictional objection. Galaxy appeared after receiving the fee-related motion. Galaxy challenges this court's jurisdiction, arguing that a federal court lacks jurisdiction if a defendant is improperly served, in this case pursuant to the formal governmental service provisions of the Hague Convention.

Confirmation of the Arbitration Award

The Federal Arbitration Act governs the service of petitions to confirm arbitration awards. However, that statute does not provide a method of service for a foreign party who is not a resident of any district in the United States. Some courts, facing circumstances different from those presented here, turn to principles of "fairness" to excuse defects in service of process in cases arising from arbitration proceedings. *See, e.g., Penn. Coal Co. v. Bulgaria Trading & Transport Co., Ltd.* (D. Olympia 2001) (evidence of evasion). The focus tends to be on the good faith of the underlying business conduct, as well as the reasonableness of the notice. There is sufficient evidence here of the counterfeiting of intellectual property and deliberate noncompliance with the arbitration award. From this court's perspective, however, the "fairness" standard of *Penn Coal*, which balances the equities, is too loose to serve as a guide as to when courts can excuse noncompliance with the Hague Convention and Federal Rule of Civil Procedure 4 when confirming arbitration awards.

For this court, at least on these facts, the better rationale is that by agreeing to arbitrate in Columbia and participating in those proceedings, the parties to the underlying contract agreed to the provision allowing court judgments to be entered. This serves as a "deemed waiver" of formal Hague Convention service in connection with confirmation of an arbitration award. Put another way, this court reads the parties' contract as consenting to service by actual notice that satisfies the general principles of due process and the Federal Rules, rather than the strict formality of the Hague Convention—at least in cases where the arbitration takes place in the jurisdiction contemplated in the parties' agreement. Under this analysis, Galaxy's post-award conduct is irrelevant. This court finds that by agreeing to arbitrate, Galaxy is deemed to have waived the right it possesses to formal service. The actual notice Galaxy received here was reasonable and sufficient.

Galaxy objects strongly to the court’s “deemed waiver” analysis. It contends that such an approach eviscerates the Hague Convention protections for all arbitrated matters and opens the door to uninvited judicial proceedings. This court does not intend its holding to be so broad. Here, EQ attempted formal Hague Convention service in good faith. In at least those circumstances, the “deemed waiver” approach should be available to protect good-faith litigants like EQ.

Attorney’s Fees

While this court does not adopt the “fairness” approach used in the District of Olympia pursuant to *Penn Coal* to assess proper service requirements to confirm arbitration awards against foreign parties, this court does agree with the reasoning of the *Penn Coal* court as to attorney’s fees. The fee request is a “new claim for relief,” and Rule 5(a)(2) requires formal government service under the Hague Convention. Accordingly, this court will deny EQ’s motion for an award of attorney’s fees.

EduQuest’s petition to confirm the arbitration award is hereby GRANTED, and its motion for attorney’s fees is DENIED.

July 2019
MPT-1 Drafters' Point Sheet

American Electric v. Wuhan Precision Parts

This July 2019 MPT point sheet was provided to bar examiners to assist in grading the examination. It addresses the factual and legal points encompassed within the MPT. While it is illustrative of the discussions that might have appeared in excellent responses constructed by examinees, it is more detailed than examinee responses were expected to be.

American Electric v. Wuhan Precision Parts

DRAFTERS' POINT SHEET

This performance test requires the examinee to prepare a memorandum to a supervising partner analyzing the legal issues and assessing the likelihood of success for a Chinese entity seeking to vacate a substantial default judgment entered by a United States district court judge in the District of Franklin. The client's hopes turn on the effect, if any, of improper service under the Hague Convention and the Federal Rules of Civil Procedure when the resulting district court proceeding arises from an earlier arbitration proceeding and award. The foreign entity, Wuhan Precision Parts (WPP) of China, agreed to arbitrate its dispute with American Electric (AE) in Franklin. Nevertheless, WPP now seeks to vacate the default judgment, which (1) confirms the arbitration award and (2) awards attorneys' fees tied to the court proceeding.

The File contains the task memorandum from the partner, an email from a WPP executive, and the federal district court's order entering default judgment, which references the supplier agreement between the parties and the arbitration award. The Library contains excerpts from Rules 4 and 5 of the Federal Rules of Civil Procedure. The Library also includes two court opinions from Franklin's neighboring jurisdictions of Olympia and Columbia. The two opinions provide the road map to assessing the arbitration and fee issues presented by the problem. *Pennsylvania Coal v. Bulgaria Trading* is an Olympia federal district court case addressing a motion to vacate a default judgment that confirmed an arbitration award and ordered payment of attorney's fees, and *EduQuest v. Galaxy* is a Columbia federal district court case addressing a federal court's authority to confirm an arbitration award and award attorney's fees. Neither case requires strict compliance with Hague Convention service when initiating a lawsuit arising from an arbitration in the same jurisdiction. The two cases, however, apply different legal reasoning, which examinees should address.

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

I. FORMAT AND OVERVIEW

The task for examinees is to draft an objective memorandum for the supervising partner analyzing and assessing the issues faced by a foreign client seeking to upset a default judgment in favor of a

United States entity. The default judgment enforces the arbitration award and then orders additional relief. Examinees are told not to write a separate statement of facts; rather, they should integrate the facts into their legal discussion of the following issues:

1. Will WPP succeed in vacating the default judgment due to improper service under the Federal Rules of Civil Procedure and the Hague Convention? Discuss both the facts that support WPP's motion to vacate and those that undermine it.

2. Are there any grounds to challenge the attorney's fee award?

The examinee is cautioned not to address the issue of personal jurisdiction. Rather, the examinee is told to focus on the defense of insufficient service of process and how it plays out as to the two forms of relief issued by the district court in its default judgment: the confirmation of the arbitration award and the awarding of additional attorney's fees tied to the court proceedings.

II. FACTUAL BACKGROUND

The client, Wuhan Precision Parts Ltd. (WPP), manufactures gear motors for dishwashers. It operates in Wuhan, an industrial transportation hub in central China. WPP does not have any offices, registered agents, or employees in the United States.

American Electric (AE) is based in Franklin. It designs and assembles dishwashers for U.S. Clean Corporation (USCC). AE subcontracts with WPP for the manufacture of the gear motors used in the dishwashers.

USCC asked AE for assurance that replacement gear motors would be available for use in repairing USCC's dishwashers. To accommodate USCC, AE negotiated a supplier agreement in 2014 whereby AE authorized WPP to sell the gear motors directly to USCC on condition that WPP pay a royalty of $50 for each gear motor sold. The supplier agreement included an agreement to arbitrate in Franklin.

Disputes arose between AE and WPP, which found them in arbitration in Franklin City, Franklin. Some of the motors that WPP supplied to AE were nonconforming and needed to be replaced. WPP also underreported its sales of replacement motors to USCC and therefore owed additional royalties to AE.

The arbitrators ordered WPP to (1) pay $500,000 for the nonconforming motors it supplied AE, (2) pay $25,000 in unpaid royalties on 500 replacement motors sold directly to USCC, and (3) pay $110,000 in attorney's fees to AE.

WPP's compliance with the arbitration award is mixed. On the one hand, WPP promptly paid half ($250,000) of the $500,000 damages award for the breach of contract claim on the nonconforming motors. On the other hand, WPP has been slow in paying the majority of what is still due under the 2017 award: $250,000 in contract damages, $25,000 in back royalties, and the $110,000 attorney's fee award. It contends that it is experiencing foreign exchange problems and cash flow stress related to an economic downturn. (But at the end of his email, the WPP executive states that WPP has had "substantial profits in recent years" that have allowed it to pay other, larger judgments entered against WPP.)

With WPP not in full compliance, AE turned to the district court in Franklin. AE petitioned the district court to convert the arbitration award into a judgment. The biggest problem faced by WPP is that besides simply confirming the arbitration award as ordered by the arbitrators, AE took the opportunity to seek an additional $90,000 in attorney's fees. The court granted AE's fee request. Those fees cover all of AE's fees for pursuing relief in district court.

The core complaint of WPP is that AE did not comply with the Hague Convention. As noted in the client's email to counsel and in the court's Order Entering Default Judgment, AE attempted formal Hague Convention service via delivery of its various pleadings to the Chinese Central Authority. AE did not hear back from the Chinese authorities.

In November 2018, AE took it upon itself to serve the complaint by email upon a WPP executive in Wuhan, China. Email service had been authorized and used during the arbitration proceedings. The WPP executive, in fact, was WPP's designated point of contact during the arbitration. However, that WPP executive left the company shortly after he received the email and never forwarded it to anyone. As a result, WPP did not respond to the complaint. A few months later, in March 2019, AE served WPP with a motion seeking the default judgment eventually issued by the court. That motion was served by mail. Shao Wen "William" Li, WPP's Director of International Sales, asserts that postal delivery in Wuhan was delayed, and that by the time the documents were translated into Mandarin Chinese, the court had already entered its default judgment.

III. LEGAL ISSUES

In the task memorandum, examinees are instructed to address the effect of AE's failure to serve its summons and complaint by following the requirements of Rule 4 of the Federal Rules of Civil Procedure and the Hague Convention. Examinees must first assess the implications of the fact that the default judgment arises from an arbitration proceeding in Franklin that occurred pursuant to the parties' agreement to arbitrate. Second, examinees must identify and explain the additional arguments available to WPP to justify vacating the portion of the default judgment imposing additional attorney's fees.

A. Service Abroad Under the Federal Rules of Civil Procedure and the Hague Convention

This item is designed so that examinees work from the premise that American Electric did not follow the usual service requirements of the Federal Rules of Civil Procedure and the Hague Convention when seeking court confirmation of the arbitration award. The *Pennsylvania Coal* and *EduQuest* cases from two neighboring jurisdictions make the point that the agreement to arbitrate in Franklin will serve as a consent to personal jurisdiction and venue. The issue is service of process. *Pennsylvania Coal* and *EduQuest* address the question of when formal Rule 4 service can be excused in confirming an arbitration award. Those cases also indicate that an additional request for attorney's fees tied to the court proceedings implicates the "new claim for relief" provision of Fed. R. Civ. P. 5(a)(2).

While examinees need not lay out a step-by-step analysis of why the federal rules require compliance with the Hague Convention when serving a complaint or a later "new claim for relief" in a typical lawsuit, the highlights of the pertinent rules follow so as to provide you with the formal requirements of the Hague Convention and the Federal Rules of Civil Procedure.

Given that WPP is a foreign entity headquartered in Wuhan, China, the starting point is Rule 4(h). Because WPP is located abroad and does not have any resident agents in the United States, it must be served pursuant to the provisions of Rule 4(h)(2). That subsection, however, directs that "any manner" of service can be used that is "prescribed by Rule 4(f) for serving an individual, except personal delivery . . . ."

Because China and the United States are signatories to the Hague Convention, the service requirements of Rule 4(f)(1) apply. The Hague Convention provides an "internationally agreed means of service that is reasonably calculated to give notice." Because the United States and China have agreed to the Hague Convention, Rule 4(f)(2) and Rule 4(f)(3) do not apply in the circumstances presented by the problem and are not included in the Library.

The motion for default judgment is a later-filed pleading, the service of which is governed by Rule 5(a)(2). To the extent that the motion asserts a "new claim for relief," it must be served under Rule 4.

B. Issue One: Confirmation of the Arbitration Award

The Hague Convention is a treaty, which must be honored as "the law of the land." Its application to arbitration proceedings, however, is not well developed. Courts expect formal Hague Convention–FRCP service when a lawsuit is started to confirm an award, at least in the first instance. Once good-faith attempts at formal Convention service have been made, however, some U.S. courts decline to insist on formalities if they prove to be an unreasonable roadblock to enforcement of an arbitration award. Courts may be willing to confirm awards benefiting good-faith litigants if the parties have previously agreed to resolve their disputes in a particular U.S. jurisdiction, albeit by arbitration. The two cases in the Library mirror the reasoning used by several U.S. courts to not require formal Hague Convention–FRCP service when a prevailing party turns to the court to confirm an arbitration award.

The Federal Arbitration Act (FAA) governs the service of complaints that petition a court to confirm an arbitration award. As both the *Pennsylvania Coal* and *EduQuest* decisions explain, the FAA does not provide a method of service for a foreign party who is not a resident of any district in the United States. (For your information, The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 203, similarly does not resolve the service of process question in this context.)

Courts have taken different approaches to handling the ambiguity in the FAA over how to serve a foreign entity that has been involved in an arbitration leading to an arbitration award. The decisions from the Olympia and Columbia district courts highlight two such approaches. Both of these approaches were applied in cases where an attempt at formal Convention service had been made, and the courts declined to hold the plaintiffs to strict adherence to the Hague Convention when confirming an award from an arbitration proceeding in the same jurisdiction conducted pursuant to a forum-selection clause in an agreement to arbitrate. Although some courts might hold otherwise, the Olympia and Columbia courts relax the service requirements in such an arbitration context. The examinee should touch upon why that exception exists: once two parties have agreed to arbitrate a dispute, the losing party should not be able to demand that the prevailing party, acting in good faith, go back to square one and initiate a court proceeding confirming an award by following the formal process for lawsuits generally.

The first of the two approaches used by courts to address service of process in the arbitration context is found in the Olympia district court decision in *Pennsylvania Coal*. The *Pennsylvania Coal* court adopted a "fairness" approach, which excuses parties to an arbitration from strict adherence to the service of process requirements of the Hague Convention if a good-faith attempt at formal service has been made, if there is some form of actual notice, and if consideration of the overall circumstances suggests that confirmation of an arbitration award flowing from an agreement to arbitrate is just. In sum, the *Pennsylvania Coal* court "balances the equities."

Under the *Pennsylvania Coal* fairness approach, WPP will want to emphasize its good faith to convince the court to vacate the default judgment. It will want to refer to the facts indicating that "fairness" requires that formal Hague Convention service rules be followed as called for by Rule 4. Those facts include the following:

- WPP is a foreign entity for which requiring the type of service specified in the Hague Convention is just, even if not required by Franklin law. By agreeing to arbitrate, WPP presumably sought to avoid the U.S. court system—forcing it into court without lawful notice under the treaty is unfair.

- The court moved too fast in granting the default judgment. The mailing of the motion papers seeking a default judgment was slowed by Chinese postal authorities, something out of WPP's control.

- AE did not serve its default motion papers in Mandarin Chinese, requiring time for the documents to be sent to WPP's in-house translation department in order for WPP to understand the legal pleadings (despite its general ability to understand English).

- WPP's good faith is shown by its prompt payment of half of the contract damages.

- The parties normally did business by fax and phone over the years. Here, AE opted not to use telephone and fax communication—the forms of notice most likely to catch WPP's attention.

- WPP offers reasonable explanations for its failures: foreign exchange and cash flow problems, as well as the fact that the AE email serving the complaint went to a vice president no longer with the company.

- There is no evidence that WPP sold counterfeit goods, as did Galaxy in the *EduQuest* case. The arbitrators found WPP's motors to be "nonconforming," allowing WPP to argue that the defects related to technical specifications.

- The arbitrators determined that AE had overstated its case before the panel and caused both sides to incur unnecessary fees and costs. *See* district court order referencing arbitration award (at page 7 of the File).

- WPP has an ability to pay and has made payments on other, larger judgments (this cuts both ways, as noted below).

Examinees should also identify the facts that AE will cite to show its good faith, both in its provision of actual notice to WPP and in its reasons for obtaining arbitral relief in the first place. Also, examinees must anticipate that AE will argue that WPP has acted in bad faith, further justifying the court's denial of WPP's motion to vacate the portion of the default judgment confirming the award. Those facts favorable to AE include the following:

- WPP produced different motors than specified. AE might suggest that WPP's "nonconforming" products are comparable to the counterfeit products in *EduQuest.*

- WPP attempted to cut AE out of royalties due.

- WPP did not report all of its USCC sales to AE.

- WPP has not complied with the arbitration award; it has only paid half of the contract damages and none of the other two amounts awarded: the $25,000 back royalties payment and the $110,000 attorney's fee award.

- WPP had actual notice of the court relief sought by AE; WPP received email notice such as it had found acceptable during the underlying arbitration proceedings.

- WPP's claim that it did not receive the email forwarding the legal pleadings is incredible and highly suspect, given the history of AE's dealings with WPP.

- Despite its claims to the contrary, WPP is making up excuses for its failure to satisfy the arbitration award: foreign exchange and cash flow problems, a mailing delay, and a vice president departing *after* receiving notice. (AE might know what the WPP executive acknowledges: that WPP has had substantial profits in recent years and has paid other, larger judgments.)

- Around 18 months have passed since the arbitration award, and 9 months have elapsed since service of the complaint. *See* the order entering default judgment. There is no excuse for WPP's failure to pay royalties over that time. WPP has had sufficient time to understand the lawsuit and pay what is due to save itself from more fees.

The second of the two approaches is detailed in the *EduQuest* decision of the Columbia district court. Unlike the *Pennsylvania Coal* court, the *EduQuest* court rejected the loose "fairness" approach. The *EduQuest* court grounded its reasoning in the legal implications of a party's consenting to arbitrate in a forum and participating in the arbitral process in that forum under an agreement contemplating confirmation of the award in court. It concluded that in instances in which a party has attempted formal Hague Convention service in good faith, the parties' agreement to arbitrate a dispute is deemed to have waived any objection to having the arbitration award confirmed in district court; service is deemed sufficient if it "satisfies the general principles of due process and the Federal Rules," albeit not the formal service of foreign corporations required in general civil cases pursuant to Rule 4 or the Hague Convention. Citing *EduQuest*, examinees should refer to "deemed waiver" as the legal means to dispense with formal service when confirming an arbitration award arising from an arbitration proceeding held in the same jurisdiction. The form of actual notice extended to WPP is therefore sufficient.

Note that under the *Pennsylvania Coal* "fairness" approach, an examinee may reasonably conclude that WPP will not succeed in its effort to vacate that part of the default judgment confirming the arbitration award. There are facts that support WPP's motion to vacate the default judgment and facts that undermine it. Accordingly, the examinee's conclusion regarding WPP's likelihood of success under the *Penn Coal* "consideration of fairness" approach is less important than the examinee's consideration of the pertinent facts, both favorable and unfavorable, applicable to WPP's situation and a thoughtful analysis of those facts in light of the *Penn Coal* approach. A particularly astute answer would recognize that some facts, such as whether WPP had actual notice of AE's action to confirm the arbitration award, will likely be given more weight by the court.

Finally, an astute examinee will point out that WPP can also seek to have the Franklin court reject the approaches of the Olympia and Columbia courts and hold AE to strict compliance with the formal service requirements of the Hague Convention and the Federal Rules of Civil Procedure. The case law provided, however, does not strongly support that result, and examinees should not be expected to advance that argument given the guidance of the Columbia and Olympia decisions.

C. Issue Two: The Additional Claim for Attorney's Fees

The award of attorney's fees in the default judgment exceeds the remedies ordered by the arbitrators. Thus WPP has two arguments to vacate that portion of the default judgment.

1. Contractual Duty Requiring All Disputes to Be Resolved in Arbitration, Including Fee Claims

The *Pennsylvania Coal* court concluded in part that an attorney's fee award cannot be imposed unless ordered by the arbitration panel. The dispute over fees, in other words, is a new and additional contract dispute. The parties agreed that all disputes are to be resolved by arbitration. *See* the supplier agreement at ¶ 8, as referenced in the district court order. Accordingly, AE must go back to the arbitrators if it wants additional fees awarded.

Astute examinees will point out, however, that the supplier agreement awards attorney's fees to the prevailing party. See the supplier agreement at ¶ 7, as referenced in the district court order. Similarly, the arbitration award reimbursed AE for some of its fees expended during the arbitration and specifically noted that its award did not preclude future fee requests. Does that justify the district court award of fees? In other words, did the arbitrators open the door to allow the court to add more fees when confirming the award? Despite that creative possibility, *Pennsylvania Coal*, which interprets an attorney's fees clause similar to that found in ¶ 7 itself, supports the conclusion that a district court will not award additional fees to reimburse a prevailing party for its expenses in confirming the award.

2. The Fee Claim Is a "New Claim for Relief" Under Rule 5, Requiring Formal Rule 4 Service

The *Pennsylvania Coal* court also concluded that a claim for additional fees beyond those ordered to be paid by the arbitrators is a "new claim for relief" under Rule 5. Thus, procedurally, this request for a remedy beyond what the arbitrators ordered triggers formal service requirements under Rule 4: in this case, the requirement of Hague Convention service pursuant to Rule 4(f)(1). The *Pennsylvania Coal* court recognized that service shortcuts cannot be endorsed when additional remedies are sought beyond those awarded by the arbitrators.

The *EduQuest* court adopted this prong of the *Pennsylvania Coal* court's reasoning as to attorney's fees, and also denied the request for attorney's fees tied to the additional court proceedings. Accordingly, examinees should conclude that based upon *Pennsylvania Coal* and *EduQuest*, the district court's award of attorney's fees should be vacated.

Note: An astute examinee can again argue that the Franklin court may reject the fee reasoning of the Olympia and Columbia courts. For example, the "deemed waiver" approach of *EduQuest* could lead a court to conclude that the arbitration clause is broad enough to extend the "deemed waiver" to attorney's fees as well.

July 2019
MPT-2 File

Estate of Carl Rucker

Buckman & Carraway

Attorneys at Law

240 West End Highway

Middleburg, Franklin 33905

MEMORANDUM

To: Examinee
From: Dana Carraway
Date: July 30, 2019
Re: Carl Rucker

Carl Rucker has asked for our advice about the disposition of his property after his death. Mr. Rucker owns a house in Middleburg, which he has owned for nearly 45 years. He has two children by his first wife: Fred and Andrew. His first wife died 24 years ago. He remarried 18 years ago to his current wife, Sara Rucker.

Mr. Rucker would like to arrange his affairs so that, if he dies first, Mrs. Rucker can live in the house for the rest of her life. He wants to make sure that the house passes to his two sons after her death. However, his current wife and his two sons do not get along. He expects that, if given the chance, his sons would try to remove Mrs. Rucker from the house if she were living in the house after his death. He also believes that, if she owned the house, Mrs. Rucker would leave the house to a charity rather than to his sons. Mr. Rucker would like our advice about how to assure the result that he wants while minimizing the possibility of extended legal battles.

I'd like you to focus on two of the possible approaches that Mr. Rucker might consider: (1) creating a life estate in the house for Mrs. Rucker while she is alive, with the remainder to his sons; and (2) contracting with his wife to write wills that leave the house to his sons after both he and Mrs. Rucker have died.

Please prepare a memorandum for me that discusses the advantages and disadvantages of these two approaches. Make sure to discuss the impact, if any, on a surviving spouse's elective share. Your memorandum should also include a recommendation as to which approach will better accomplish Mr. Rucker's stated goals: (1) to assure that Mrs. Rucker can live in the house for the rest of her life, (2) to assure that his sons receive the house after she dies, and (3) to minimize the risk of litigation between them.

As you will see, the client does not want a trust; do not address that topic.

Transcript of client interview: Carl Rucker
July 17, 2019

Attorney Carraway: Hello, Mr. Rucker. Thank you for coming today.

Carl Rucker: Thank you for making the time.

Attorney: I understand that you want to talk about a will.

Rucker: Well, yes, although I'm not sure it's a will I want.

Attorney: Tell me how I can help.

Rucker: To help you understand the situation, I have to tell you a little about my background. I'm 67 years old now, but I got married when I was 19. My first wife, Frances, was the same age, and we started a family right away. We had two boys within about three years.

Attorney: What are their names?

Rucker: Fred is 47. And Andrew, or Andy, is 45. They're both married. Fred has two kids of his own.

Attorney: When your sons were born, did you live in Middleburg?

Rucker: Yes. I've lived in Middleburg my whole life. After Andy arrived, we bought the house that I live in now, on Cherry Tree Road.

Attorney: I know that neighborhood. You say that only you live there. . . . Is Frances . . . ?

Rucker: Yes, she passed away the year Andy turned 21. Cancer.

Attorney: I'm sorry.

Rucker: I was on my own for years after that. Then I met Sara. She was a receptionist at my doctor's office, and we just hit it off. We got married about 18 years ago. And that's the problem.

Attorney: How so?

Rucker: My sons do not like her. I mean, they really don't like her. She is very different from their mother, it's true. But I'd have thought they'd get over it. Sara made an effort, but she couldn't do a thing about it. Things have been hard for years. It's at the point where I only see the boys on my own. I visit them, and Sara doesn't come with me. The boys and Sara don't talk at all. And if I'm honest, I think Sara has come to dislike them too.

Attorney: I am very sorry to hear this. I know how hard that can be. Can you explain what you're looking for from me?

Rucker: It has to do with the house. It's a beautiful place. The boys love it because it's where they grew up. They resent Sara because they think she wants to take it away from them. Sara loves the house because it's where she and I have made a life together. We're very happy there. She worries that they will kick her out as soon as I die.

Attorney: Who owns the house?

Rucker: I do. Frances and I owned it jointly, but I took over when she died. We had a 30-year mortgage on the place, but I paid that off years ago. Sara has never asked to become an owner, and I never saw the need to put her on the deed. Now . . . I don't know.

Attorney: Do you know how much the house is worth?

Rucker: I don't. I have never put it on the market, and never plan to do so. I think the fair market value is $250,000, maybe higher. The property taxes are around $1,700 a year.

Attorney: By the way, Carl, how old is Sara?

Rucker: Sara is 65.

Attorney: And are you retired?

Rucker: I will retire next year. I don't have a pension or a retirement account, since I never worked anywhere that offered one. So I will be relying on Social Security. Sara is working now but will retire a few years from now. She doesn't have a pension or retirement account either. So all she'll have is her Social Security.

Attorney: Do you have any other assets?

Rucker: Yes, I own several long-term certificates of deposit that total around $200,000. These are all in my name alone. I plan to give them to Sara when I die.

Attorney: Luckily, your assets will not raise any estate tax concerns. Let me ask something different: are you both healthy?

Rucker: Yes, and with luck, we'll stay that way.

Attorney: Of course. It's my job to help you plan for the worst.

Rucker: I know. And I have already lost Frances. It could happen again, to either of us.

Attorney: Tell me exactly what you want to happen.

Rucker: If I die first, I want Sara to be able to have the house as long as she is alive. Then I want it to go to my sons. If Sara dies before I do, then I want my two sons to have the house after I die. They get along and will figure out what to do with it.

Attorney: If you die first, and Sara gets the house outright, will she make sure that your sons get the house eventually?

Rucker: She says she will, but I am not so sure. There's just too much bad blood between them. Also, she has been very involved in a charity and may want to leave the house to that charity when she dies.

Attorney: If your sons get the house outright, will they let Sara live there as long as she wants?

Rucker: Again, I hate to say it, but no, they won't. I'm sure they would try to kick her out.

Attorney: Let's say that we find a way for Sara to keep the house while she is alive. Would she be able to afford it?

Rucker: Well, between her Social Security and whatever Social Security she gets as my widow, she might be able to pay the taxes and keep the place up, but I worry that she might not be able to afford unexpected repairs or emergencies. It's possible she would have to borrow against the house. That's why I plan to leave her the $200,000 certificates of deposit when I die.

Attorney: Your sons, are they well off?

Rucker: Yes, they're doing okay. They won't need the Cherry Tree house. But I know that they would like to keep it in the family.

Attorney: One last thing. Do you think that there is any chance that Sara and your sons will figure out a way to get along with one another?

Rucker: The way things have been, no, not a chance. I really worry about it. The last thing I want is for the three of them to end up fighting in court, spending money on lawyers, and selling the house to end up with nothing.

Attorney: Okay. Thank you, Carl. I know that this is hard to discuss. We will look into the choices that you might have. I'll start by focusing on what happens if Sara survives you. I will schedule an appointment when we have some ideas. I would normally recommend a trust for this kind of situation.

Rucker: I don't want a trust. I had a close friend who left his property in a trust and it caused him and his wife and children nothing but trouble. And I don't want anyone else to have control of the property.

Attorney: You and I will have to go over what a trust can and cannot do. But I hear you. When we meet next, we will be sure to go over other options as well.

Jill Baker
Certified Residential Appraiser
1 Vicker Place
Centralia, Franklin 33705

MEMORANDUM

To: Dana Carraway
From: Jill Baker
Date: July 23, 2019
Re: Valuation of Carl Rucker Residence and Life Estate

You asked me to determine the current fair market value for the residence of Carl Rucker and to assess the value of a life estate held by Mrs. Rucker, currently age 65, in that residence, assuming Mr. Rucker were deceased.

<u>Fair Market Value</u>

The Rucker residence is located at 1513 Cherry Tree Road in Middleburg, Franklin. It is a 2,700-square-foot two-story house, with garage, attic, and basement. The house sits on three acres of land in a neighborhood zoned R10 for residential use. The house is set back about 60 feet from the road and has a large backyard.

I spoke with agents at different real estate agencies about the neighborhood and about comparable properties. These agents indicated that houses in that neighborhood have retained their value, even in down times for real estate; and, as you know, the housing market is coming back in our region. Based on sales of comparable houses, these agents agreed that current fair market value for the house would be roughly $250,000. This value is likely to change over time.

<u>Value of Life Estate</u>

As you know, the value of a life estate is less than the value of the fee ownership of the whole property. For purposes of advising your client at this time, I have calculated that the present value of a life estate for Mrs. Rucker in the residence is $80,000, assuming Mr. Rucker is deceased.

July 2019
MPT-2 Library

Estate of Carl Rucker

Excerpt from Walker's Treatise on Life Estates

The owner of real property, by deed effective immediately or by will, can create successive ownership interests in the realty. An interest created in a person currently entitled to possession for that person's life is called a life estate, and that person is called a life tenant; an interest created in a person whose right to possession arises only after the death of the life tenant is called a remainder. Life estates and remainders can be created in one or more persons.

Life Tenant: A life tenant has absolute and exclusive right to use of the property during his or her lifetime. Life estates can be held by one or more persons, such as spouses or siblings. The life tenant is entitled to possession of the property during his or her life or to rents from the property should the life tenant rent it to another. The rights of a life tenant expire automatically upon the death of the life tenant. The life tenant is responsible for real estate taxes, insurance, and maintenance costs related to the property.

Generally, the life tenant can sell or otherwise transfer that interest. However, any transferee from a life tenant can have an estate only for so long as the life tenant lives. Similarly, if the life tenant mortgages the life tenant's interest, that mortgage expires when the life tenant dies. However, a deed or will can empower a life tenant to sell or mortgage the property from which the life estate is carved without the consent of the owners of the remainder interest.

Remainder Owner: The owner of the remainder following a life estate automatically becomes owner of the real estate immediately upon the death of the last life tenant. The remainder owner has no right to use of the property or the income from the property during the life tenant's lifetime. Remainders may also be created in one or more persons.

Considerations

Creating a life estate in real property while the owner is alive (as opposed to one created by the owner's will) can be accomplished by executing a new deed from the owner of the property to the life tenant(s) and remainder owner(s). It is generally advisable to record the deed. However, the decision to transfer the property to a life estate is almost always irreversible. If the owner changes his or her mind, a change cannot occur without the consent of all life tenants and remainder owners. Their mutual consent may be difficult to obtain.

All owners, including remainder owners, must agree to sign a deed to sell the property in fee or to sign a mortgage to borrow money secured by the full value of the property. Disagreement among the owners severely restricts the marketability of the property and may make it nearly impossible to borrow money to make major repairs or improvements to the real property.

If a life estate in real property is created while the owner is alive, then upon the death of the last life tenant, the real property automatically belongs to the remainder owner, with no need for probate of that property, avoiding the costs and delays of probate. A life estate is worth less than full ownership in the same property.

The remainder owner cannot affect the life tenant's interest in the property. For example, if a parent who owns real property gives her children a remainder interest and retains a life estate in the property for herself, neither the children nor the children's creditors can affect the parent's possession. If the life tenant's actions or neglect harm the property, the remainder owners can sue the life tenant (or the life tenant's estate) for the damage in an action for waste.

The risk of litigation should be considered, especially for life estates created by a will. In addition to the time and costs of litigation, there is a risk that the court could award the monetary value of the life estate to the life tenant instead of possession of the property. Such a result would defeat the testator's wishes to permit the life tenant to live in the residence. Transferring property by deed, as opposed to by will, minimizes this risk.

Elective share

Creating a life estate by deed in the owner's spouse may have implications for the distribution of the owner's probate estate. Franklin law permits a surviving spouse to claim a percentage share of the deceased spouse's "augmented estate" (the deceased spouse's probate estate increased by, among other things, lifetime gifts to the surviving spouse). This share is called the "elective share." For many years, it was unclear what should happen when the surviving spouse held a life estate transferred by deed from the deceased spouse while alive. Recent cases have clarified that the value of such a life estate should be included in calculating the elective share of the surviving spouse.

No requirement of spousal consent

Some states limit the ability of one spouse who has sole title to a residence to transfer that residence to anyone without the other spouse's consent. Franklin law does not recognize this limitation with respect to a residence titled solely in one spouse's name prior to the marriage. Nor is Franklin a community property state. Thus, in Franklin, a spouse who has sole title to a residence may transfer a life estate to anyone without the other spouse's consent.

In re Estate of Lindsay
Franklin Court of Appeal (2008)

Joseph Lindsay, spouse of the decedent, Nancy Lindsay, filed a petition in the probate court seeking to take his elective share of the decedent's estate. The probate court determined that Mr. Lindsay's elective share had been satisfied by a life estate transferred to him by the decedent and an outright bequest in the decedent's will and that Mr. Lindsay was not entitled to anything further from the decedent's estate. Mr. Lindsay appeals from that determination.

The decedent and Joseph Lindsay were married on June 16, 1990. Mr. Lindsay was the decedent's second husband. The decedent had two children by a prior marriage, both of them adults at the time of her second marriage. The decedent owned a residence and 25 acres of surrounding land, acquired before her second marriage. On July 20, 2005, the decedent transferred this real property to herself and Mr. Lindsay as life tenants, granting a remainder interest to her two children. Joseph Lindsay's life estate was valued at $200,000. The assets of Nancy Lindsay's estate that would pass by will (stocks, bonds, savings accounts, and other personal property) totaled $900,000, of which Joseph Lindsay was bequeathed $400,000. Mr. Lindsay elected not to receive this bequest and instead to claim the elective share.

Franklin law states that Joseph Lindsay is entitled to claim an elective share equal to 50% of the "augmented estate" or, in the alternative, what was bequeathed in the will. Franklin Probate Code § 2-202. The question before the court is whether the value of the life estate should be included in the augmented estate, in addition to the assets passing by will, when determining the elective share. We hold that the value of the life estate should be included.

The percentage size of the surviving spouse's share depends on the length of time the surviving spouse had been married to the decedent. *Id*. A spouse like Mr. Lindsay, who was married for 15 years or more, is entitled to claim a 50% elective share of the augmented estate. Permitting a surviving spouse to claim an elective share of a deceased spouse's augmented estate protects that spouse from the harsh effects of the decedent's decision to leave the spouse little or nothing through probate. The purpose of the elective share is to give the surviving spouse a fair share of the economic partnership maintained by the couple before the decedent's death.

An augmented estate, according to Franklin law, includes four categories of assets, only three of which are relevant here: (1) the net assets held in the probate estate, Franklin Probate Code § 2-204; (2) the assets transferred by the decedent to the decedent's spouse before death, Franklin

Probate Code § 2-206; and (3) the surviving spouse's own assets and pre-death transfers, Franklin Probate Code § 2-207. Using these three provisions, the probate court calculated the value of the "augmented estate," described earlier, at $1.1 million.

Petitioner Lindsay's calculation: exclude value of life estate from augmented estate and claim 50% elective share

Mr. Lindsay claimed his elective share of the estate pursuant to Franklin Probate Code § 2-202. As Mr. Lindsay calculates his elective share in the augmented estate, he claims to be entitled to 50% of the $900,000 probate estate (or $450,000). He also claims that the value of the life estate (worth $200,000) should be disregarded in computing the elective share. If he is correct, he would receive a total of $650,000 of benefits: $450,000 as his elective share plus the earlier transfer of the life estate worth $200,000.

The personal representative's calculation: include value of life estate in augmented estate

The personal representative of the decedent's estate agrees that the elective share is 50% of the augmented estate. However, the representative takes a different view of how that share is calculated, claiming that the value of the augmented estate includes both the probate estate *and* the value of the life estate. By including Mr. Lindsay's life estate, the "augmented estate" totals $1,100,000: the $200,000 life estate plus the $900,000 in probate assets. Therefore, the 50% elective share equals one-half of $1,100,000 (that is, $550,000). Because Mr. Lindsay has already received the $200,000 life estate, he would be entitled to receive only $350,000 of the probated assets via an elective share.

We agree with the personal representative that Mr. Lindsay's life estate should be included in the calculation of the augmented estate for determination of his elective share. In addition, the court correctly used the value of the life estate, or $200,000, and not the full fair market value of the house, in calculating the elective share.

Accordingly, we affirm the probate court's decision.

Manford v. French
Franklin Court of Appeal (2011)

On January 27, 1997, Opal French and her husband, George, executed a single will that recited only that it was a "joint" will. This will would have transferred all the property of the first spouse to die to the survivor; then, upon the death of the survivor, all the survivor's property, including the property acquired from the first spouse to die, was to go to Mary Elizabeth Manford, their only child. George predeceased Opal in 1998. Opal received all property held by him pursuant to the joint will.

In 2004, Opal French drafted a new will, expressly revoking the 1997 joint will. This new will transferred all of her property to her two children by a previous marriage. It also expressly disinherited Manford. The will stated that Opal had "given Mary Elizabeth Manford her part of the estate before my death, through significant loans that she has not repaid. I forgive these loans, but she has received enough."

Opal died in February 2010. Her children from the previous marriage, acting as co-executors, offered the 2004 will for probate. Manford contested, claiming that (1) the 1997 joint will was intended to be contractually binding; (2) Opal could not revoke the 1997 will after she had benefited from its probate; and (3) because of this fact, her 2004 will was invalid. Manford sought specific performance of the 1997 will, or in the alternative, money damages.

Manford filed an affidavit maintaining that Opal and George had conducted a family meeting in 1996 and expressed a plan to execute a will that would devise the estate to Manford after their deaths. The parties filed cross-motions for summary judgment. The trial court ruled for the co-executors. Manford appealed.

We must decide whether Opal had any contractual obligation to George arising from the 1997 will that prevented her from revoking that will after George's death and thereby preventing Manford from receiving all her mother's estate. This question depends on whether the creation of a joint will on its own creates such a contractual obligation.

An individual who receives an unrestricted bequest under a will has complete freedom to dispose of the property he or she receives. She can sell the property, mortgage it, or dispose of it by will. Given this, some spouses seek to restrict the ability of the surviving spouse to dispose of property in a will, especially where one or both spouses have children by a previous marriage.

Two methods exist to accomplish such a restriction. First, the spouses may enter into a contract to make a will, one that restricts the right of the surviving spouse to alter an agreed-upon testamentary disposition. A contract to make a will requires the survivor not to change the terms of an already-agreed-upon will, but it does not prevent the survivor from transferring the property during the survivor's lifetime. The survivor could sell the property or encumber the property with debt without breaching the contract, provided the agreed-upon will remains the same. *Kurtz v. Neal* (Franklin Sup. Ct. 2005).

Second, spouses can restrict the rights of the survivor through a joint will or a mutual will that reflects a contractual agreement between them. A joint will is one will, signed by two or more testators, that deals with the distribution of the property of each testator. Mutual wills are separate wills of two or more testators that make "mirror-image" dispositions of each testator's property.

Franklin Probate Code § 2-514 provides in general terms that any contract to make a will or not to revoke a will must be in writing:

> A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, may be established only by (i) provisions of a will stating material provisions of the contract, (ii) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract, or (iii) a writing signed by the decedent evidencing the contract.

This statutory provision resolved a long-standing line of cases that dealt with questions about "oral contracts to make a will." As specified in the current statute, there must be some written evidence of the existence and terms of such a contract. This requirement assures that the parties' intentions can be determined and minimizes the risk of future litigation over the contract. Breach of a contract to make a will or not to revoke a will gives rise to two possible remedies: specific performance of the contract or money damages.

Manford claims that the mere fact of drafting a joint will provides written evidence of both the existence and terms of a contract binding both testators to the terms of the joint will. Whatever the merits of this proposition in general, Franklin Probate Code § 2-515 undercuts it: "The execution of a joint will or of mutual wills does not create a presumption of a contract not to revoke the will or wills." The 1997 will executed by Opal and George French is a joint will. The fact of its execution, standing alone, does not create an obligation that Opal may not revoke it and make a new and different will.

In the alternative, Manford claims that the terms of the joint will imply the existence of a contract not to revoke a will and that the family meeting in 1996 provides "extrinsic evidence proving the terms of the contract." Franklin Probate Code § 2-514(ii). This argument fails for two reasons. First, the statute requires "an express reference . . . to a contract" in the joint will; no such reference exists. Second, the "family meeting" described in Manford's affidavit entails little more than a statement by George and Opal that they planned to make a will at some point in the future, *not* that they had executed or intended to execute a contract to do so.

Thus, the 1997 will imposed no contractual obligation on Opal not to execute a new will revoking the 1997 will's terms. George and Opal could have entered into a contract binding Opal not to do so, but nothing in the record indicates that they did so or that such a contract was reduced to writing.

Affirmed.

July 2019
MPT-2 Drafters' Point Sheet

Estate of Carl Rucker

This July 2019 MPT point sheet was provided to bar examiners to assist in grading the examination. It addresses the factual and legal points encompassed within the MPT. While it is illustrative of the discussions that might have appeared in excellent responses constructed by examinees, it is more detailed than examinee responses were expected to be.

Estate of Carl Rucker

DRAFTERS' POINT SHEET

In this performance test, the examinee is asked to draft an objective memorandum. Specifically, the examinee is required to analyze and assess two different estate-planning approaches to the client's goals for his residence: a life estate and a contract to write a will.

The File contains the task memorandum, a transcript of the initial interview with the client, Carl Rucker, and a memo on the value of the residence.

The Library contains an excerpt from a treatise on Franklin law, *Walker's Treatise on Life Estates*, and two cases: *In re Estate of Lindsay*, a Franklin Court of Appeal decision addressing how ownership of a life estate affects a spouse's ability to elect a share of his or her deceased spouse's estate; and *Manford v. French*, a Franklin Court of Appeal decision addressing the requirements for creating a valid contract to write a will (or not to revoke a will).

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

I. FORMAT AND OVERVIEW

The examinee is directed to draft a memorandum assessing the usefulness of two different approaches to the client's problem: creation of a life estate and creation of a contract to write a will or not to revoke a will. The File does not include a separate "format memorandum." However, the task memorandum provides instructions on what the examinee should discuss. The examinee should describe each approach and analyze its advantages and disadvantages for achieving Rucker's goals and minimizing the risks that he has identified. The examinee is specifically instructed to make a recommendation about which of these approaches Rucker should choose. The examinee is also instructed *not* to address the possibility of a trust.

II. FACTS

The task memorandum asks the examinee to describe two legal devices and to assess how they might accomplish the client's goals. This requires the examinee to assess the legal principles involved given the facts and considerations described in the File. The assignment does not call for a separate statement of facts.

This section presents the basic facts of the problem, arranged in chronological order. Other facts will appear below in the discussion of the legal argument.

- Carl Rucker married his first wife, Frances Rucker, when he was 19.
- Carl had two children with Frances: Fred Rucker and Andrew Rucker ("Andy").
- Shortly after Andy's birth, Carl Rucker purchased his current residence, located at 1513 Cherry Tree Road in Middleburg. Carl and Frances owned the house jointly and took a 30-year mortgage on the property, which has since been paid off.
- Frances Rucker died in the year that Andy Rucker turned 21. Upon her death, Carl Rucker assumed sole ownership of the property.
- After several years, Carl Rucker met Sara; he married her about 18 years ago.
- After their marriage, Carl Rucker maintained sole ownership of the property. He did not seek to transfer a joint interest to Sara, nor did she request it.
- Over time, hostility developed between Sara and Carl Rucker's two adult sons.
- The hostile relationship between Sara Rucker and the two sons has come to focus on the residence.
- Carl Rucker believes that if his sons could do so, they would try to kick Sara out of the house after he dies.
- Carl Rucker believes that if Sara had a choice, she would not leave the house to his sons after she dies.
- Sara is currently 65 years old; the sons are 47 and 45 respectively.
- The house has a likely fair market value of $250,000.
- Rucker also owns certificates of deposit worth $200,000.
- If Sara currently owned a single life estate in the residence, the present value of that life estate, as calculated by a certified appraiser, would be $80,000. That value would decrease as Sara ages.
- After Rucker's death and her retirement, Sara will have Social Security as her income.
- Sara is currently healthy, but if that changes, she may need to have the capacity to borrow against the house to make ends meet.
- Rucker wants to do what he can to assure that Sara has enough assets to care for herself in case her retirement income does not meet her needs. To that end, he plans to bequeath

her his certificates of deposit, worth $200,000.

- If he left her none of this $200,000, and if Sara had a life estate in the house at the time of his death, she would have the right to seek an elective share from his estate.
- If she did so, she would retain the life estate and receive $60,000 from the certificates of deposit for a total benefit of $140,000, calculated as follows using the present known values of the property:

Value of Carl's probate estate:	$200,000 (the CDs)
Value of Sara's life estate:	$80,000
Total of augmented estate:	$280,000
Value of elective share (50%)	$140,000

Since in this scenario Sara already has the life estate worth $80,000, she would only receive $60,000 from the CDs to bring her elective share to $140,000.

- On the other hand, if Sara did not seek an elective share, she would retain the life estate (worth $80,000) and receive the entire value of the certificates of deposit, currently $200,000, for a total benefit of $280,000.
- The two sons have no current financial need for the Cherry Tree Road property.
- Rucker does not want either Sara or his two sons to fight in court, to spend money on lawyers, or to waste his property on disputes. Since his sons are well-off financially, he does not expect them to object to his leaving the CDs to Sara, provided that they eventually obtain possession of the Cherry Tree Road property.

III. LEGAL ISSUES

A. Life Estate and Elective Share

1. *Legal analysis*

The problem requires the examinee to use both *Walker's Treatise on Life Estates* and the case of *In re Estate of Lindsay* for two purposes: to describe how a life estate operates and to assess its relationship to property transferred by will. *Walker's Treatise on Life Estates* offers the familiar definition of a life estate as a possessory interest in real property measured by the life of the life tenant. Typically, where a life estate is created in one person, another interest, called a remainder, is created in another. Thus ownership is divided between the life tenant, who has the full and exclusive right to possess and use the property while alive, and the remainderman. On the death of the life tenant, the remainderman acquires full ownership of the property. A life estate can be created by a lifetime transfer from the original owner to the life tenant/remainder owners.

In *In re Estate of Lindsay*, the Franklin Court of Appeal discusses the relationship between a life estate created by the decedent in her surviving spouse while alive and the spouse's elective share. In Franklin, a surviving spouse has the option of claiming the elective share or, in the alternative, taking what was bequeathed in the will. The case cites the Franklin Probate Code, which is modeled on the current Uniform Probate Code. In *Lindsay*, the decedent had created a life estate in herself and her spouse, with a remainder interest in her children. Upon the decedent's death, her husband became the sole life tenant of the realty. The decedent left a probate estate of $900,000. The value of the husband's life estate was $200,000. The decedent bequeathed $400,000 to her husband by her will.

The husband claimed that the life estate was not part of the augmented estate (the base against which the husband's 50% elective share is calculated). Rather he claimed that the life estate was excluded from the augmented estate. If he was correct, his elective share would have been $450,000 of the probate estate. In addition, he had received the life estate worth $200,000, for a total benefit of $650,000.

The court rejected that claim and accepted the argument presented by the estate's personal representative. The court discusses the concept of an "augmented estate," by which a probate court may include assets transferred during the decedent's lifetime in computing a surviving spouse's elective share. The opinion holds that a life estate transferred during life to the decedent's spouse and held by him at her death should be included in the augmented estate to which the spouse's percentage share is applied.

Using the approach for which the personal representative argued, the augmented estate was $1,100,000: the $200,000 life estate plus the $900,000 in other assets. The spouse's elective share would be $550,000, an amount that would be further reduced by the $400,000 he would take under the will and the $200,000 life estate. Since these two amounts together would total more than the elective share, the spouse would receive no more than $600,000.

This case and *Walker's Treatise on Life Estates* should lead the examinee to several conclusions:

- Rucker can create a life estate either while he is alive or in his will.
- The value of a life estate is less than the full fair market value of the property.
- Sara would have no incentive to claim an elective share under the will, assuming that Rucker follows through on his stated intention and leaves her all of his interest in the certificates of deposit ($200,000).
- If he left her none of the value of the certificates of deposit, Sara would have an incentive to claim an elective share.
- Carl Rucker's stated intention to leave Sara a bequest of his cash assets ($200,000 in CDs) will have two consequences: first, this will assure that she has sufficient assets to meet her needs after his death; and second, it will minimize her incentive to claim an elective share.

2. *Assessment of life estate as an option for Carl Rucker*

Walker's Treatise on Life Estates discusses the practical advantages and disadvantages of a life estate in general. An examinee should use this discussion to analyze the same advantages and disadvantages in the context of Rucker's goals and concerns.

(a) Advantages

- **A life estate is almost always irreversible:** Neither Sara, nor Rucker's sons, nor the probate court can undo a life estate. To mortgage or sell the property requires the agreement of all owners. But the certainty associated with a life estate would accomplish two of Rucker's primary goals of assuring that Sara can live in and use the property while she is alive and that his sons receive it upon her death.
- **Sons cannot interfere:** Under normal circumstances, the sons cannot try to evict Sara from the property or otherwise interfere with her use of it.
- **Ease of creation:** Rucker can create a life estate through a lifetime deed.
- **Automatic operation:** Once created, a life estate requires no further action to operate.

In particular, as stated in *Walker's Treatise*, the transfer from the life tenant to the remainder owner occurs with no need for an order of the probate court.

- **Reduced risk of litigation:** Because it is both automatic and almost certainly irrevocable, a life estate minimizes the chance that Sara and Rucker's sons will find occasion to litigate over the terms of the transfer. This would be most likely if Rucker follows through with his stated intention to leave Sara the $200,000 in certificates of deposit, which reduces the risk that she will claim an elective share.

(b) Disadvantages

- **Sara does not receive the full value of the real estate:** The value of a life estate for Sara will be less than the full value of the real estate.
- **Sara will bear the costs of maintaining the property:** Rucker believes that Sara will be able to bear these costs, provided she remains healthy, especially as he intends to leave her the $200,000 in certificates of deposit. But if Sara becomes sick or if some other crisis occurs, she could run through those funds, and it could be difficult to find the funds to maintain an older home.
- **Sara cannot borrow against the life estate:** As *Walker's Treatise on Life Estates* makes clear, Sara cannot use the underlying property as collateral for a mortgage without the consent of Rucker's sons as remainder owners. This may defeat another of Rucker's primary goals: to leave Sara enough to care for herself if her income does not meet her needs. But note that *Walker* does mention that a deed or will could authorize a life tenant to sell or mortgage the underlying estate without consent of the remaindermen.

B. Contract to Make a Will (or Not to Revoke a Will)

1. *Legal analysis*

The examinee is asked to assess whether Rucker can accomplish his goals by entering into a contract with his wife for her to write a will leaving the house to his sons after she dies. The *Manford v. French* case provides the relevant legal principles relating to a contract to make a will or not to revoke a will. In that case, the Franklin Court of Appeal held that such a contract can be enforced against one of the contracting parties, but only if the contract complies with the requirements of the Franklin Probate Code. The relevant statute, modeled on the Uniform Probate Code, requires written evidence of this contract: in the will itself, in a separately executed contract signed by the first decedent, or by written reference in the will coupled with extrinsic evidence of the agreement.

Manford arose from a controversy over a "joint will." The case holds, however, that the mere fact of creating a joint will (or a "mutual will," defined separately by the court) does not evidence the creation of a contract to make or not to revoke a will. The contracting parties must evidence their separate agreement explicitly and in writing. Just titling the will instrument as a "joint will" is not sufficient. The court also pointed out that even if spouses enter into a contract to make a will, that does not prevent the survivor from encumbering or selling the property received pursuant to the will, "provided the agreed-upon will remains the same." *Manford* (*citing Kurtz v. Neal* (Fr. Sup. Ct. 2005). And as with any contract, there is a risk of breach and ensuing litigation, which could result in a court order for specific performance or monetary damages.

This case should lead the examinee to several conclusions:

- Rucker can execute a will leaving the Cherry Tree house to Sara.
- At the same time, Rucker and Sara can enter into an agreement that Sara will then leave the property to his sons upon her death.
- That agreement will be enforceable against Sara after Rucker's death, provided that the contract complies with the statutory requirement of a writing evidencing the agreement. Rucker has several options for creating the agreement, including (1) a separate agreement or (2) language in his <u>and Sara's</u> wills.
- In a lawsuit seeking to enforce such an agreement, the two sons can seek either specific performance or money damages.

2. *Assessment of contract to make a will for Carl Rucker*

The examinee should use the *Manford* case to analyze advantages and disadvantages in the context of Rucker's goals and concerns.

(a) Advantages

- **Binding:** If properly executed, a contract to make (or not to revoke) a will can accomplish Rucker's main goals: to leave the property to Sara for her life and to his sons after she dies.

- **Ease of creation:** Rucker and Sara can create this contract by will or by a separate contract.
- **Sara receives full value and the capacity to borrow:** Sara will receive the full value of the house upon Rucker's death and will have, if she needs it, the ability to borrow against the house for improvements or just to obtain money for her personal use.

(b) Disadvantages

- **Sara can sell the house:** Since Sara receives the house with no restriction on her property interest, she can in theory sell the house with any proceeds remaining at her death passing to Rucker's sons if they are the beneficiaries of the contractual will.
- **Sara can give the house away:** Sara is free to gift the house to others in her lifetime.
- **Any encumbrance on the house could affect Rucker's two sons:** If Sara were to mortgage the house, Rucker's sons would take the house subject to any remaining balance due on that mortgage at her death. That might not be so bad if the mortgage debt was used to improve the house, but Sara could also use the money for her personal expenses and exhaust those funds before she died.
- **Reliance on Sara's good faith:** Given the above, this option requires Rucker to assess and to rely on Sara's willingness to follow through on her agreement after he dies. Rucker has indicated that he believes that Sara will not want the two sons to receive the house after her death.
- **Higher risk of litigation:** In light of the possibility of Sara's future illness and of a future breach of good faith by her, this option creates a somewhat higher risk of litigation between Sara and Rucker's sons.

C. Recommendation

The examinee is asked to weigh these two legal devices against each other. At a minimum, the examinee should make an effort to compare and contrast them, an effort which the examinee can begin during his or her discussion of each option above.

By way of summary, the examinee should note that a life estate is practically irrevocable, relatively simple to create, and likely to minimize litigation. It does not depend on Sara's good faith. However, it may require Sara to find sources of support other than borrowing against the house, a risk that Rucker can mitigate by bequeathing his certificates of deposit to Sara.

By contrast, a contract to make a will is contractually binding and relatively simple to create. However, it relies to some extent on Sara's good faith, which a future illness, a failure of income, or ongoing animus with Rucker's sons might test severely. Since under this option Sara retains the right to sell the property, this may increase the risk of litigation.

The examinee will likely conclude that, as between these two options, creation of a life estate is preferable. However, examinees should be assessed not only on the conclusion they reach but also on how well they identify and analyze the factors leading to that conclusion.