

Applicant Number

02035



# THE MPT<sup>®</sup>

MULTISTATE PERFORMANCE TEST

*In re Wendy Martel*

**Read the directions on the back cover.  
Do not break the seal until you are told to do so.**



NATIONAL CONFERENCE OF BAR EXAMINERS  
302 S. BEDFORD ST., MADISON, WI 53703  
608-280-8550  
WWW.NCBEX.ORG

© 2013 by the National Conference of Bar Examiners.  
All rights reserved.

**In re Wendy Martel**

**FILE**

Memorandum from Kimberly Salter .....1  
Memorandum re: opinion letters .....2  
Transcript of interview with Wendy Martel .....3  
Notice of Lien .....5  
Email correspondence .....6

**LIBRARY**

Excerpts from Franklin Rules of Professional Conduct .....7  
State Bar of Franklin Ethics Opinion No. 2003-101 .....10  
**Clements v. Summerfield**, Franklin Supreme Court (1992) .....13

**FILE**

**Walden, Martin & Watterson LLP**  
Attorneys at Law  
1550 Fleming Boulevard  
Clayville, Franklin 33340

**MEMORANDUM**

**To:** Examinee  
**From:** Kimberly Salter  
**Re:** Wendy Martel matter  
**Date:** February 26, 2013

We have been retained by Wendy Martel, a local attorney, in a matter involving fees arising from her representation of a client, David Panelli, M.D., in a sexual harassment action against his former supervisor, Heather Kern, M.D., at the Sandoval Medical Center.

I interviewed Martel yesterday and learned the basic facts. In 2009, Panelli retained Rebecca Blair, another local attorney, to bring his sexual harassment action against Kern under a contingent fee agreement. In 2011, solely as a result of a personality conflict, Panelli discharged Blair and then retained Martel under a similar contingent fee agreement. Martel recently settled the case and obtained a recovery of \$600,000.

Martel contacted Panelli to let him know that she had received the settlement funds and that the money was ready to be disbursed. In response, Panelli instructed Martel not to disburse any of the recovery to Blair for the work she had done before he fired her, and not even to give Blair any information about the settlement. Martel seeks our advice on how to proceed.

Please draft an opinion letter in accordance with our guidelines, identifying the questions raised by these facts and advising Martel how she should proceed.

**Walden, Martin & Watterson LLP**  
Attorneys at Law  
1550 Fleming Boulevard  
Clayville, Franklin 33340

**MEMORANDUM**

**To:** Associates  
**From:** Executive Committee  
**Re:** Opinion Letters  
**Date:** December 22, 2009

The firm follows these guidelines in preparing opinion letters to clients. In such a letter to a client, *separately* discuss each question as follows:

- State the question.
- Provide a short answer to the question of no more than a few sentences.
- Analyze the issues raised by the question, including both the facts relevant to the question and how the applicable authorities combined with the relevant facts lead to your answer.

Write in a way that is suitable to the client's level of sophistication and that allows the client to follow your reasoning and the logic of your conclusions.

**Transcript of Interview with Wendy Martel**

**February 25, 2013**

**Kimberly Salter:** Wendy, good to see you. You told me a bit about the case on the phone. Why don't you fill me in on the details?

**Wendy Martel:** Sure. I've got a problem. My client is David Panelli, a psychiatrist here in Clayville. About three years ago, he sued Heather Kern, another psychiatrist, for sexual harassment. He had just completed his residency at the Sandoval Medical Center; Kern had been his supervisor.

**Salter:** I remember. It was quite a scandal.

**Martel:** Yes, it filled the papers. Anyway, Panelli hired a local attorney, Rebecca Blair, under a contingent fee agreement, setting her fee as one-third of anything she recovered during her representation.

**Salter:** So Blair was his original attorney, and she filed the sexual harassment action?

**Martel:** Right. She filed the complaint and initiated discovery. Soon after filing the action, she and Panelli started experiencing difficulties in communication. I can't say that either of them was at fault; it was just a personality conflict, but one that escalated over time. By July 2011, Panelli had had enough, and he fired Blair and hired me.

**Salter:** Did Panelli have problems with the quality of Blair's work?

**Martel:** No, not at all. It was personality, pure and simple.

**Salter:** Okay. On what basis did Panelli hire you?

**Martel:** A one-third contingent fee agreement, just like the one he had with Blair.

**Salter:** What happened next?

**Martel:** I reviewed the file after I got it from Blair and found she had done a very good job in litigating the case. I also found a copy of a notice of statutory lien she had filed early on to obtain a security interest in any recovery she obtained for Panelli during her representation. It's standard practice in Franklin in contingent fee cases to file such a lien; here's a copy. I went on to complete discovery and filed a summary judgment motion. The court denied it. Pretty soon, however, Kern's lawyer came to appreciate the strength of our case, and we started to discuss

settlement. Last month, we settled the case for \$600,000 and filed a dismissal of the action with prejudice.

In the settlement agreement, I obligated myself to pay any claim Blair might have out of the \$600,000 and to indemnify Kern and her lawyer in case Blair made any claim against them. That's standard practice in Franklin. Usually, the attorneys can work these matters out.

**Salter:** Have the settlement funds come through?

**Martel:** Yes. I just received the check. I have not even cashed it yet.

**Salter:** Then what?

**Martel:** I figured I needed to give Panelli what was his and pay Blair something—precisely how much, I didn't know. My practice in situations like this is simply to get on the phone with the other lawyer and work things out informally.

**Salter:** You didn't do that here?

**Martel:** No. I sent Panelli an email—here's a copy—telling him I had received the settlement funds. Panelli immediately replied, instructing me not to give Blair anything and not even to tell her anything. I brought his email also. That is when I realized I was in over my head and needed help. So I called you.

**Salter:** The help you want is an opinion letter, right?

**Martel:** Right. I need to know how to proceed now that I have the settlement funds. Whatever I do, I want to be sure I am in compliance with Franklin's ethical rules.

**Salter:** We'll research the issues. What's your time frame?

**Martel:** Can you get me something soon?

**Salter:** How about by Thursday?

**Martel:** That's fine. Thanks, I really appreciate it.

**Salter:** Thanks. That's all I need. I'll be in touch by Thursday.

**STATE OF FRANKLIN  
DISTRICT COURT OF SHELBY COUNTY**

DAVID PANELLI, M.D.,	)	No. Civ. 640100
Plaintiff,	)	
v.	)	<b>NOTICE OF LIEN</b>
HEATHER KERN, M.D.,	)	(Franklin Rev. Stat. § 6070)
Defendant.	)	
_____	)	

TO ALL PARTIES AND THEIR ATTORNEYS AND TO ALL OTHERS INTERESTED  
HEREIN:

PLEASE TAKE NOTICE THAT Rebecca Blair, of the Law Offices of Rebecca Blair, attorney of record for Plaintiff David Panelli, M.D., has and claims a lien, under Franklin Revised Statutes § 6070, ahead of all others on Plaintiff's interest in any recovery Blair may obtain herein on Plaintiff's behalf during her representation to secure payment for fees earned.

Date: November 20, 2009

Rebecca Blair  
Rebecca Blair  
LAW OFFICES OF REBECCA BLAIR  
Attorney for Plaintiff David Panelli, M.D.



## Email Correspondence

**From:** Wendy Martel  
**Sent:** Friday, February 22, 2013; 4:24 PM  
**To:** David Panelli  
**Subject:** Settlement Funds

Dear David:

I just received the \$600,000 settlement. Before I can proceed further, I've got to notify Rebecca Blair so that she and I can work out some arrangement about sharing the fees. I'll let you know what results.

Best wishes,  
Wendy

**Wendy Martel**  
Law Offices of Wendy Martel  
100 Drumm Street  
Clayville, Franklin 33340  
Telephone: 255.555.0859  
Email: [wmartel@martellaw.com](mailto:wmartel@martellaw.com)

---

**From:** David Panelli  
**Sent:** Friday, February 22, 2013; 4:28 PM  
**To:** Wendy Martel  
**Subject:** RE: Settlement Funds

Wendy:

You must remember, I fired Blair eighteen months ago; I want her to remain fired. I forbid you to tell her anything about the settlement or to give her anything. You got me the recovery; she didn't. You've earned your fee; take it and send me what's mine.

David

# LIBRARY

## EXCERPTS FROM FRANKLIN RULES OF PROFESSIONAL CONDUCT

### **Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer**

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

...

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

### **Rule 1.4 Communications**

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

### **Rule 1.6 Confidentiality of Information**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

. . . or

(6) to comply with other law or a court order.

### **Comment**

\* \* \*

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. This contributes to the trust that is the hallmark of the client-lawyer relationship. . . . Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the

client but also to all information relating to the representation. A lawyer may not disclose such information except as required or permitted by the Rules of Professional Conduct or other law.

\* \* \*

[16] . . . In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish one of the purposes specified in Rule 1.6(b).

### **Rule 1.15 Safekeeping Property**

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

...

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

### **Rule 4.1 Truthfulness in Statements to Others**

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

**STATE BAR OF FRANKLIN**  
**ETHICS OPINION NO. 2003-101**

**Issue:**

Client retains Attorney for representation in a personal injury action under a contingent fee agreement entitling Attorney to one-third of any recovery he obtains during his representation. Client obtains medical care from Physician, agreeing that Physician will be paid \$10,000 out of the proceeds of any recovery. Attorney and Client both have knowledge of Physician's interest in the recovery. After Attorney obtains a recovery for Client in the amount of \$300,000 and places the resulting funds in a trust account, Client instructs Attorney to disburse \$100,000 to himself for his fees, to disburse the remaining \$200,000 to Client, and not to disburse the \$10,000 to Physician. What should Attorney do in this situation?

**Digest:**

Attorney should contact Client and Physician, describing the existence and details of the dispute and stating (1) that Attorney cannot represent either Client or Physician in the dispute; (2) that if Client and Physician agree, Attorney will retain the disputed \$10,000 in trust until they resolve the dispute; but (3) that in the absence of such an agreement, Attorney will seek guidance from the court. Attorney should also disburse to Client that portion of the funds that is undisputed.

**Discussion:**

In *Greenbaum v. State Bar* (Fr. Sup. Ct. 1996), the Franklin Supreme Court held that an attorney must promptly disburse to the client any funds that the attorney holds in trust for the client that the client is entitled to receive. *Greenbaum* qualified its holding by stating that the attorney may nevertheless continue to hold in trust, even contrary to the client's instructions, any portion of such funds on which the attorney has a claim in conflict with the client. *Greenbaum*, however, did not address the situation in which a third party has such a conflicting claim. The Franklin Rules of Professional Conduct address this issue briefly in the comment to Rule 1.15:

Third parties may have lawful claims against funds held in trust by an attorney, such as a client's creditor who has a lien on funds recovered in a personal injury action. An attorney may have a duty to protect such a third-party claim against

wrongful interference by the client, as when the attorney has entered into a fiduciary relationship with the third party. In such cases, the attorney must refuse to surrender the funds to the client until the claim has been resolved, and must so advise the client. An attorney should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

Under the facts stated, Attorney must act as follows to remain within the parameters established by our Rules of Professional Conduct:

1. An attorney must disburse to a client such funds as the attorney holds in trust for the client *to which the client is entitled*. Under the facts stated, in representing Client, Attorney had knowledge of the existence of Physician's interest in the funds in question. As a result, Attorney entered into a fiduciary relationship with Physician by operation of law and subjected himself to the fiduciary duties to deal with Physician with utmost good faith and fairness and to disclose to Physician material facts relating to Physician's interest in the funds. *Cf. Johnson v. State Bar* (Fr. Sup. Ct. 2000) (by representing client with knowledge of chiropractor's lien, attorney entered into fiduciary relationship and subjected herself to fiduciary duties to deal with chiropractor with utmost good faith and fairness and to disclose material facts, that is, those facts that are "significant or essential to the issue or matter at hand"). Under such circumstances, Attorney's disbursement of the disputed \$10,000 to Client would violate Attorney's fiduciary duties to Physician and would make Attorney liable for compensatory and perhaps even punitive damages. Attorney's disbursement would also make Client liable for breach of contract. Franklin Rule of Professional Conduct 1.4(a)(5) requires a lawyer to "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by [these rules] or other law." For this reason, Attorney's disbursement of the disputed funds to Client would be fraught with difficulties.

2. Attorney's disbursement of the disputed \$10,000 to Physician contrary to Client's instructions would violate Attorney's duties under *Greenbaum*. *Greenbaum* requires Attorney to disburse to

Client all such funds as Client is entitled to receive. It is risky for Attorney unilaterally to determine Client's "entitlement." The reasons for Client's demand that Attorney not disburse the \$10,000 to Physician are unstated and may or may not be legitimate. For example, Client may have an evil motive, or Client may be misinformed about something and that misinformation has led to his instruction to Attorney. Whatever his reasons, they are not clear from the facts before us and may not be clear to Attorney. There are, in addition, fiduciary duties burdening Attorney in favor of Physician. For those reasons, Attorney would be ill-advised to prejudge the merits of such a dispute and act in favor of either Client or Physician.

3. If Client and Physician are unable to resolve their dispute, Attorney should seek guidance from the court and so inform Client and Physician.

This opinion is issued by the State Bar of Franklin pursuant to authority delegated to it by the Franklin Supreme Court. It is intended to guide attorneys who practice in the State of Franklin but does not purport to bind any court or other tribunal.



## Clements v. Summerfield

Franklin Supreme Court (1992)

Plaintiff Ralph Clements, an attorney, was retained by defendant Marian Summerfield to bring an action for personal injury. Clements and Summerfield entered into a contingent fee agreement, under which Summerfield agreed to pay Clements one-third of any recovery he obtained during his representation. Some time thereafter, but before any recovery had been obtained, Summerfield discharged Clements and retained another attorney.

Clements then filed the present action against Summerfield, alleging that Summerfield breached the contingent fee agreement by discharging him without cause and by refusing to pay him his fees. Clements sought a declaration that the agreement was valid and that he had a one-third interest in any recovery ultimately obtained. Summerfield moved to dismiss the action on the ground that Clements did not and could not state a claim for relief. The district court granted the motion and dismissed the action. The Court of Appeal affirmed. We granted review.

Under a contingent fee agreement, an attorney does not have any right to fees unless and until the contingency specified has occurred. Without a right to fees, the attorney does not have a cause of action

against the client for breach arising from failure to pay. The contingency specified may occur after the attorney's representation has terminated and another attorney has taken his or her place. In that case, the discharged attorney's right to, and cause of action for, fees is limited to *quantum meruit*, that is, the reasonable value of the services rendered during his or her representation, paid as a share of the total fees payable to the successor attorney—not as something in addition to those fees. Otherwise, the client's right to discharge the discharged attorney, which is absolute, might be unduly burdened by the prospect of paying the original attorney's full fees plus fees to the successor attorney as well.

We find no injustice in limiting the fees of the discharged attorney to an amount consisting of the reasonable value of the services rendered during the representation. In doing so, we preserve, as noted, the client's absolute right to discharge the discharged attorney. We also preserve the discharged attorney's right to fees that are fair. Of course, what fees are fair for the discharged attorney depends on the facts of the individual case as seen through the lens of equity, and may range from nothing out of the total fees payable to the successor attorney to the total fees in their entirety. We

expect that in all but the rarest case, a fair fee for the discharged attorney will fall somewhere between those extremes. We trust that trial courts will be able to strike an appropriate balance.<sup>1</sup>

In light of the foregoing, Clements' action is premature. Since Summerfield has yet to obtain any recovery in her personal injury action, the contingency specified in the contingent fee agreement has yet to occur. As a result, Clements does not yet have any right to fees from Summerfield, and hence does not yet have a cause of action against her for fees.

Affirmed.

---

<sup>1</sup>By way of illustration, if a discharged attorney obtained no recovery during his representation, he would be entitled to nothing under his contingent fee agreement. If a successor attorney subsequently obtained a recovery during her representation, she would be entitled to receive whatever her contingent fee agreement specified—for example, if she had a one-third contingent fee agreement and obtained a \$300,000 recovery, she would be entitled to receive \$100,000. The discharged attorney would then be entitled to receive whatever share, if any, of the \$100,000 fee received by the successor attorney that the court determined to be the reasonable value of his services under the circumstances.

1) MPT1 - Please type your answer to MPT 1 below

Â

When finished with this question, click Â to advance to the next question.  
(Essay)

=====  
===== Start of Answer #1 (1509 words) =====

Wendy Martel

Martel, Adams & Thomas, LLP

5390 Markham

Clayville, Franklin 33340

Re: David Panelli settlement issues

Wendy,

In response to our conversations regarding David Panelli and his settlement funds, I have reached the following conclusions:

(1) What is the scope of ethical disclosure regarding your informing Ms. Blair of the settlement?

First, counsel Mr. Panelli that he is attempting to use your relationship and confidentiality to defraud his former attorney. Explain to him the consequences and ramifications of his purported path of conduct, and try to reason with him to consent to splitting the funds. If he does not consent, advise him that you are not ethically able to fail to disclose the existence of the settlement to Ms. Blair because she is an interested third party with a knowledgable lien on

recovery. However, you must narrowly and reasonably disclose to Ms. Blair only the information necessary. By following these steps, you will not be violating the Franklin Rules of Professional Conduct.

Pursuant to Frankling Rules of Professional Conduct (FRPC) Rule 1.2, a lawyer shall abide by the client's decisions concerning the objectives of representation, and shall consult with the client as to the means by which they are to be pursued. A lawyer cannot counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but may discuss with said client the legal consequences of the proposed course of action and may assist the client to make a good faith effort to determine that validity, scope, meaning or application of the law. This is applicable to informing Mr. Panelli of the legal ramifications of his stated course of action, and to assisting him in making a better decision, and eventually consenting to your disclosing the settlement and releasing funds to Ms. Blair. Ideally, this would terminate the need for any further research, and the rest of this letter will be unneeded. However, in the chance that Mr. Panelli refuses to give consent, the following paragraphs will tell you how to proceed in terms of confidentiality and disclosure.

Rule 1.6 states that a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out representation, or the disclosure is permitted for 1) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyers services, or 2) to comply with other law or a court order. Further, Rule 4.1 provides that a lawyer hall not knowingly fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless it is

---

prohibited by Rule 1.6 (above). In your case, it seems that your client is attempting to use the attorney-client privilege to defraud a third-party creditor, his former attorney. Because Ms. Blair has filed a statutory lien with regards to the recovery, you may also disclose the existence of the settlement in order to comply with that document in the court.

Ethically, you may not fail to disclose the existence of the settlement to Ms. Blair. However, a disclosure adverse to the client's interests should be no greater than the lawyer reasonably believes necessary to accomplish this purpose, so be sure to only give the necessary information to Ms. Blair.

(2) In light of the ethical considerations, how should you proceed with regard to the settlement money?

Place the funds in a trust account separate from your own property. It must be either in the state of Frankin, or elsewhere with Mr. Panelli's consent. You may release any undisputed money that Mr. Panelli is entitled to (I believe 2/3 of his \$600,000 settlement would be \$400,000), but the settlement money in dispute must be kept in trust. Because the fees owed to Ms. Blair will be a portion of your own fees that Mr. Panelli is not claiming ownership to, the only part of the settlement that should not be distributed is \$200,000. Inform Mr. Panelli and Ms. Blair of the money held in trust, and that an action may be filed in the court to resolve the dispute.

In *Clements v. Summerfield*, the court held that under a contingent fee agreement, an attorney does not have any right to fees unless and until the contingency specified has occurred.

---

Where the contingency specified occurs after the attorney's representation has been terminated and another attorney has taken his place, the discharged attorney's right to, and cause of action for, fees is limited to quantum meruit: the reasonable value of the services rendered during his or her representation, paid as a share of the total fees payable to the successor attorney. Thus, the amount of fees owed to Ms. Blair will be a portion of your own fees, not an additional fee to be taken from Mr. Panelli's recovery. The fairness of the fee paid to Ms. Blair depends on the facts of the individual case viewed equitably. Given that she filed the motion and started discovery (that you say was "very good"), and you completed discovery and settled the case, you may be looking at a half-and-half split.

Greenbaum v. State Bar (Fr. Sup. Ct. 1996) provided that an attorney must promptly disburse any funds that the attorney holds in trust for the client that the client is entitled to receive. This holding was further qualified by stating that the attorney may, nevertheless continue to hold in trust, even contrary to the client's instructions, any portion of such funds on which the attorney has a claim in conflict with the client. While this holding does not specifically address a situation in which a third party has a conflicting claim, when read in conjunction with FRPC's comment to Rule 1.15 (on safekeeping property), it has been extended to protect the lawful claims of lienholders. In these cases, the attorney must refuse to surrender the funds to the client until the claim has been resolved. However, a distinguishing factor in your own case is that, when read with Clements, the money owed to Ms. Blair is not being claimed by your client for his use- it is being held up by the client's insistence that you not share any of your fees with Ms. Blair. State Bar of Franklin Ethics Opinion No. 2003-101 suggests that because you have knowledge of the existence of Ms. Blair's interests in the funds that you have entered into a fiduciary duty with Ms. Blair by operation of law and have subjected yourself to a duty to deal with Ms. Blair with utmost good faith and fairness and to disclose to Ms. Blair any material facts relating to her

---

interest in the funds. Johnson v. State Bar also addresses the issue of a fiduciary duty between a lawyer and a third-party when the lawyer has knowledge of the third party's lien. Therefore, because you knew of Ms. Blair's lien interest, you owe her a fiduciary duty of good faith: to not release that money owed to her to either the client or for your own personal use.

In light of the foregoing facts and applicable law, it is my belief that the best way to proceed is to inform Mr. Panelli that you cannot lawfully fail to disclose the recovery to his former attorney, Ms. Blair. Inform Mr. Panelli of the legal consequences of his proposed conduct: that he would be attempting to defraud his former attorney and the court's statutory lien pertaining to recovery. Advise your client that under the FRPC, you are not ethically able to conceal the presence of the settlement or deny her the portion of recovery reasonably attributed to her work. Perhaps this will give him the information necessary to make a better decision: you know as well as I do that at the end of the day, 95% of clients will eventually agree with their attorneys.

However, in the slight chance that Mr. Nanelli does not give consent to pay Ms. Blair, you may release the settlement funds that he is entitled to, pursuant to Greenbaum (I believe \$400,000), but you must keep separate the funds allocated to contingent attorneys' fees (\$200,000). You cannot disperse the fee owed to Ms. Blair at the time because it is contrary to Mr. Panelli's wishes. Then inform both Mr. Panelli and Ms. Blair that an action may be filed to have the court resolve the dispute as to what will be paid to whom in terms of the attorneys' fees. Hopefully, however, it will not come to this, and Mr. Panelli will consent to the disclosure and release of funds to Ms. Blair.

If you have any further questions, please do not hesitate to contact me at (479) 848-5331.

Sincerely,

Lawyer McLawyersson

Walden, Martin & Watterson LLP

Attorneys at Law

1550 Fleming Boulevard

Calyville, Franklin 33340

=====  
===== End of Answer #1 =====

**END OF EXAM**



Applicant Number

02015

MPT-2

213



THE  
MPT<sup>®</sup>

MULTISTATE PERFORMANCE TEST

*In re Guardianship  
of Will Fox*

**Read the directions on the back cover.  
Do not break the seal until you are told to do so.**



NATIONAL CONFERENCE OF BAR EXAMINERS  
302 S. BEDFORD ST., MADISON, WI 53703  
608-280-8550  
WWW.NCBEX.ORG

© 2013 by the National Conference of Bar Examiners.  
All rights reserved.

**In re Guardianship of Will Fox**

**FILE**

Memorandum from Karen Pine .....1

Memorandum on writing persuasive briefs .....2

Lodens’ Petition for Guardianship and Temporary Custody .....3

Betty Fox’s Motion to Transfer Case to Tribal Court .....4

Betty Fox’s Petition for Guardianship .....6

Letter from Blackhawk Tribal Court .....8

Email from Joseph Fox .....9

Excerpt from *Journal of Native American Law*, Vol. 8 (2003) .....10

**LIBRARY**

Excerpts from the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et seq.* .....11

Department of the Interior, Bureau of Indian Affairs,  
Guidelines for State Courts; Indian Child Custody Proceedings .....13

**In re Custody of R.M.**, Franklin Supreme Court (2009) .....14

**FILE**

**PINE, BRYCE & DIAL, LLP**  
1348 W. Main Street  
Melville, Franklin 33521

**MEMORANDUM**

**To:** Examinee  
**From:** Karen Pine  
**Date:** February 26, 2013  
**Re:** Fox Guardianship and Motion to Transfer

Our client, Betty Fox, is a member of the Blackhawk Tribe, lives on the Blackhawk Reservation, and is the paternal grandmother of Will Fox, age 10. Will's mother is dead, and his father (Betty's son) is incapacitated as a result of a recent automobile accident. When the accident happened, Betty moved into her son's house to care for Will. She has been planning to move Will to her home on the Reservation and was surprised to learn that Will's maternal grandparents, Don and Frances Loden, had filed a Petition for Guardianship and Temporary Custody in Oak County District Court.

After consultation with Betty, I filed a petition on her behalf in Blackhawk Tribal Court requesting that she be appointed Will's guardian. I also filed a motion to transfer the Lodens' state court proceeding to the tribal court. The state court has ordered simultaneous briefs on our motion to transfer.

Please prepare our brief in support of the Motion to Transfer Case to Blackhawk Tribal Court. Be sure to follow the firm's guidelines on persuasive briefs, but do not include a separate statement of facts. Make all the arguments needed to establish that the state court should transfer the case. Anticipate and respond to any arguments against the transfer to tribal court that the Lodens' attorney is likely to raise.

MEMORANDUM

**To:** All Lawyers  
**From:** Litigation Supervisor  
**Date:** August 14, 2009  
**Re:** Persuasive Briefs

---

All persuasive briefs shall conform to the following guidelines:

**Statement of the Case**

In one paragraph, provide a succinct statement of the parties, the nature of the case (e.g., complaint for declaratory relief), and the matter or issue in dispute (e.g., lack of jurisdiction). When needed, note the posture of the case (e.g., discovery is completed). Finally, briefly explain the client's requested relief (e.g., grant the motion to dismiss). **For example: The patient has sued her physician for negligence in failing to diagnose colon cancer following the patient's colonoscopy. The patient's expert has testified that the cancer was readily detectable from the colonoscopy. The physician has filed a motion to dismiss, raising an issue involving the expert's qualifications. The patient objects and asks the court to deny the motion.**

**Statement of Facts [omitted]**

**Body of the Argument**

The body of each argument should analyze applicable legal authority and persuasively argue how both the facts and the law support our client's position. Supporting authority should be emphasized, but contrary authority should generally be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefing. Be mindful that courts are not persuaded by exaggerated, unsupported arguments.

Break the argument into its major components and write carefully crafted subject headings that illustrate the arguments they cover. The argument headings should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. **For example, improper: It is not in the child's best interests to be placed in the mother's custody. Proper: Evidence that the mother has been convicted of child abuse is sufficient to establish that it is not in the child's best interests to be placed in the mother's custody.**

Do not prepare a table of contents, a table of cases, or an index.

**STATE OF FRANKLIN  
DISTRICT COURT OF OAK COUNTY**

**IN THE MATTER OF THE PETITION OF**  
Don and Frances Loden, Husband and Wife,  
**FOR GUARDIANSHIP AND TEMPORARY**  
**CUSTODY OF**

Case No. 2013- FA-238

Will Fox, a minor (DOB 1/3/03)

**PETITION FOR GUARDIANSHIP AND TEMPORARY CUSTODY**

Petitioners Don and Frances Loden allege as follows:

1. Petitioners are husband and wife, of lawful age and under no legal disability, and reside in the city of Melville, Oak County, Franklin. They are the maternal grandparents of Will Fox.

2. Will Fox is 10 years of age and was born in Melville, Franklin, on January 3, 2003, and has lived here his entire life.

3. Sally Loden Fox, Petitioners' daughter, was Will's biological mother. She died in childbirth. Will's biological father, Joseph Fox, suffered an incapacitating brain injury in a car accident on November 21, 2012. Joseph is in a coma and unable to care for Will. Will has no court-appointed guardian and, since his father's accident, has been cared for by Petitioners and by his paternal grandmother.

4. Petitioners are part of Will's extended family. Will has resided with Petitioners periodically since the death of his mother. Will has attended school and has received medical care in Melville, near Petitioners' home. Will has cousins and playmates in Melville.

5. Petitioners are reputable persons of good moral character with sufficient ability and financial means to rear, nurture, and educate Will in a suitable and proper manner.

YOUR PETITIONERS PRAY THE COURT to appoint Petitioners as guardians and temporary custodians of the minor, Will Fox.



Filed: February 1, 2013

Frank Byers  
LAW OFFICES OF FRANK BYERS  
Attorney for Petitioners Don and Frances Loden

**STATE OF FRANKLIN  
DISTRICT COURT OF OAK COUNTY**

**IN THE MATTER OF THE PETITION OF**  
Don and Frances Loden, Husband and Wife,  
**FOR GUARDIANSHIP AND TEMPORARY**  
**CUSTODY OF**

Will Fox, a minor (DOB 1/3/03)

Case No. 2013-FA-238

**MOTION TO TRANSFER CASE TO TRIBAL COURT**

Betty Fox moves the Court to transfer this action to the Tribal Court of the Blackhawk Tribe, pursuant to the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901 *et seq.*, and states:

1. Will Fox is an “Indian child” as defined by ICWA, is under 18 years of age, and is a member of the Tribe.
2. Will is the biological son of Joseph Fox, a member of the Blackhawk Tribe, and Sally Loden Fox. Sally died on January 3, 2003. Joseph is incapacitated as the result of a car accident that occurred on November 21, 2012. Betty Fox is the mother of Joseph and the paternal grandmother of Will.
3. The Blackhawk Tribe is an “Indian tribe” as defined by ICWA, 25 U.S.C. § 1903.
4. The Blackhawk Tribe is “the Indian child’s tribe” as defined by ICWA, in that the child is a member of the Tribe.
5. This is a “child custody proceeding” subject to transfer to the Blackhawk Tribal Court under ICWA.
6. ICWA requires that the state court transfer a child custody proceeding involving an Indian child to the jurisdiction of the tribe when the Indian custodian petitions the state court to do so, unless there is good cause not to do so. 25 U.S.C. § 1911(b).
7. In accordance with Blackhawk tribal custom, Betty Fox is the Indian custodian of the child in that she is the only living Indian grandparent and that she has physical care, custody, and control of the child. Betty Fox has been the principal caregiver of Will since the incapacitation of his only living parent, Joseph.

8. Good cause does not exist to deny transfer of this proceeding.

9. Betty Fox filed a Petition for Guardianship of Will in the Blackhawk Tribal Court on February 11, 2013.

WHEREFORE Betty Fox asks the Court to transfer the above-captioned proceeding to the Tribal Court of the Blackhawk Tribe and to grant such other relief as the Court deems just and proper.

*Karen Pine*

Filed: February 11, 2013

Karen Pine  
LAW OFFICES OF PINE, BRYCE & DIAL, LLP  
Attorney for Petitioner Betty Fox



**IN THE TRIBAL COURT OF THE BLACKHAWK TRIBE**

**IN RE THE GUARDIANSHIP OF**                    )  
Will Fox, a minor                                )  
Betty Fox,    )        Case No. FAM 13-3  
Petitioner   )

**PETITION FOR GUARDIANSHIP**

Betty Fox petitions this Tribal Court to permit her to become guardian of the minor child Will Fox (DOB 1/3/03) and states as follows:

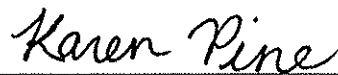
1. Betty Fox is of lawful age and under no legal disability. She is a member of the Blackhawk Tribe and resides on the Reservation of the Blackhawk Tribe within the borders of the State of Franklin. She has resided on the Reservation from birth to the present.
2. Betty Fox desires to be appointed the guardian and custodian of Will Fox, a male minor child who is 10 years of age. Betty Fox is the paternal grandmother of Will.
3. The biological mother of the child was Sally Loden Fox, a non-Indian, who died in childbirth on January 3, 2003. The biological father of the child is Joseph Fox, who was severely injured in an automobile accident on November 21, 2012, and remains in a coma. He is unable to care for Will.
4. Both Joseph Fox and Will Fox are members of the Blackhawk Tribe, as demonstrated by the letter from the Tribal Court of the Blackhawk Tribe, attached.
5. Will resided with his father in Melville, Franklin, approximately 250 miles (a three- to four-hour drive) from the Reservation, from his birth to the date of his father's accident. He has continued to reside there in the care of Betty Fox since his father's accident, visiting occasionally with his maternal grandparents, Don and Frances Loden. Since the age of six, Will has attended the annual powwows on the Reservation with Betty Fox.
6. On February 1, 2013, Don and Frances Loden filed a petition in the District Court of Oak County, State of Franklin, Case No. 2013-FA-238, seeking guardianship and temporary custody of Will. No orders have been entered in any court affecting the custody or guardianship of Will or the parental rights of Joseph.
7. Don and Frances Loden are not members of any tribe.

8. On February 11, 2013, Betty Fox filed a motion in the District Court of Oak County, State of Franklin, seeking to transfer the state court proceeding from state court to the Tribal Court of the Blackhawk Tribe, pursuant to the Indian Child Welfare Act, 25 U.S.C. §§ 1901 *et seq.*

9. Betty Fox is a reputable person of good moral character with sufficient ability and financial means to rear, nurture, and educate the child in a suitable and proper manner. She is part of Will's extended family and is Indian.

Wherefore, Petitioner Betty Fox asks the Tribal Court:

- A. To accept transfer of jurisdiction of Case No. 2013-FA-238 from the District Court of Oak County, State of Franklin, to this Tribal Court and deny the Lodens' petition.
- B. To appoint Betty Fox guardian of Will Fox.
- C. For such further relief and for the entry of such additional order or orders as may be necessary or appropriate in this proceeding.



---

Karen Pine  
LAW OFFICES OF PINE, BRYCE & DIAL, LLP  
Attorney for Petitioner Betty Fox

Filed: February 11, 2013

**BLACKHAWK TRIBAL COURT**  
P.O. Box 752  
BLACKHAWK AGENCY, FRANKLIN 33912-0752

Re: Will Fox

Date: February 10, 2013

TO WHOM IT MAY CONCERN:

This letter confirms that the following persons are members of the Blackhawk Tribe:

Betty Fox (DOB July 31, 1959)

Joseph Fox (DOB October 6, 1982)

Will Fox (DOB January 3, 2003)

This letter attests that the Blackhawk Tribe is a recognized tribe under the Indian Child Welfare Act (ICWA) and that the Blackhawk Tribal Court is a recognized instrumentality of the Tribe. The Tribal Court has a family court unit, with power and authority over any family matter. I am the ICWA Director.



---

Sam Waters  
ICWA Director

**Email from Joseph Fox to Betty Fox**

**From:** Joseph Fox  
**Sent:** August 23, 2011  
**To:** Betty Fox  
**Subject:** Will's Visit

Mom,

Will loved attending the powwow on the Reservation last week. This was his third powwow—he can't stop talking about it. And he loved spending the week with you. He is already talking about going to the powwow next year, and of course, we will both be with you for the holidays. I know that the long drive is tiring, but it's worth it to see how much Will loves being on the Reservation. I hope he always remembers that he is a Blackhawk. Will loves visiting Sally's parents as well. I hope nothing ever happens to me, but it is great to know that Will has grandparents who love him.

Love,  
Joseph

**Excerpt from *Journal of Native American Law*, Vol. 8 (2003)**

Native American Customs Regarding Care of Children

The Indian Child Welfare Act (25 U.S.C. §§ 1901 *et seq.*) was enacted to address abuses in the removal of Native American (“Indian” as the Act calls them) children from their homes and therefore from their tribes and reservations. The Senate hearings revealed a lack of understanding of Native American customs among those officials entrusted with placement of children.

Almost all Native American tribes have a long-standing custom or practice of caring for their children within the extended family. Even where Native American parents have not appointed a custodian, tribes expect that an extended family member will become the custodian of the child. In most tribes, it is expected that the maternal grandparents, if available, will be the custodians if the natural parents are deceased or unable to parent the children. A few tribes, such as the Blackhawk, expect that the Native American grandparents, maternal or paternal, will become the custodians.

Although guardianship is established by native custom and practice, it is not unusual for those who have become guardians through native custom or practice to seek tribal court appointment as guardians. This step is taken for practical reasons because the tribal court’s order appointing the guardian avoids disputes with various entities, such as schools, medical providers, and the like.

\* \* \* \*

# LIBRARY

## EXCERPTS FROM THE INDIAN CHILD WELFARE ACT OF 1978 (TITLE 25 U.S.C.)

### § 1902 Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

### § 1903 Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term—

(1) “child custody proceeding” shall mean and include—

(i) “foster care placement” which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) “termination of parental rights” which shall mean any action resulting in the termination of the parent-child relationship;

(iii) “preadoptive placement” which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) “adoptive placement” which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

...

(2) “extended family member” shall be as defined by the law or custom of the Indian child’s tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child’s grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) “Indian” means any person who is a member of an Indian tribe . . . ;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

...

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

...

### **§ 1911 Indian tribe jurisdiction over Indian child custody proceedings**

...

#### **(b) Transfer of proceedings; declination by tribal court**

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, that such transfer shall be subject to declination by the tribal court of such tribe.



**DEPARTMENT OF THE INTERIOR**  
**BUREAU OF INDIAN AFFAIRS**  
**GUIDELINES FOR STATE COURTS; INDIAN CHILD CUSTODY PROCEEDINGS**

\* \* \* \*

Determination of Good Cause to the Contrary

(a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by [25 U.S.C. §§ 1901 *et seq.* (Indian Child Welfare Act)] to which the case can be transferred.

(b) Good cause not to transfer this proceeding may exist if any of the following circumstances exists:

- (i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.
- (ii) The Indian child is over 12 years of age and objects to the transfer.
- (iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.
- (iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

(c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

(d) The burden of establishing good cause to the contrary shall be on the party opposing the transfer.

**In re Custody of R.M.**  
Franklin Supreme Court (2009)

Joan Albers filed in the Franklin district court a Petition for the Sole Physical and Legal Custody of R.M. (DOB 4/20/2005). The Petition did not seek to terminate the parental rights of R.M.'s parents. Albers, the maternal aunt of R.M., has shared responsibility for raising R.M. since the child was two months old. Albers, R.M., and R.M.'s parents are members of the Falling Rock Tribe. The district court granted the motion by R.M.'s parents to transfer this matter to the Falling Rock Tribal Court, relying on the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1911(b). The Court of Appeal affirmed. Albers appeals.

The Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et seq.*, was the product of rising concern over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes. U.S. Senate oversight hearings yielded numerous examples documenting “[t]he wholesale removal of Indian children from their homes, . . . the most tragic aspect of Indian life today.” *Indian Child Welfare Program, Hearings before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess., 3

(1974) (statement of William Byler). The Association on American Indian Affairs reported that 25 to 35 percent of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions. It also identified serious adjustment problems encountered by these children during adolescence, as well as the impact of the adoptions on Indian parents and the tribes themselves.

Additional witnesses at the Senate hearings testified to the impact on the Indian tribes of this history. One witness testified:

Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. . . . Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptuous of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.

In enacting the Act, Congress found that “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children” and that “the States, exercising their recognized

jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.” 25 U.S.C. § 1901.

Albers argues in her appeal of the transfer of the matter to tribal court that ICWA does not apply. She contends that this is not a child custody matter because she does not seek to terminate the parental rights of R.M.’s parents. She simply wants to be able to make decisions for R.M. The parents, however, argue that what Albers seeks is a foster care placement that is governed by § 1911(b) of ICWA.

Under § 1911(b), upon receipt of a petition to transfer by a parent, an Indian custodian, or the Indian child’s tribe, the state court child custody proceedings are to be transferred to the tribal court, except in cases of “good cause,” objection by a parent, or declination of jurisdiction by the tribal court.

The critical issue in determining whether ICWA applies is not how a party captions the petition, but rather what the petition seeks. ICWA defines foster care placement as encompassing four requirements: (1) the Indian child is removed from the child’s parent or Indian custodian, (2) the child is temporarily placed in a “foster home or institution or the home of a guardian or

conservator,” (3) the parent or Indian custodian cannot have the child returned upon demand, and (4) parental rights have not been terminated. 25 U.S.C. § 1903(1).

ICWA does not define these terms. Franklin state law, however, defines the guardian of a minor as one with “the powers and responsibilities of a parent with sole legal and physical custody to the exclusion of all others.” FR. REV. STAT. § 72.04. For example, a guardian is empowered to facilitate the minor’s education and social and other activities and to authorize medical care. Under Franklin law, a “conservator for a minor” has the power to provide for the needs of the child and has the duty to pay the reasonable charges for the support, maintenance, and education of the child. *Id.* § 72.08.

Here, by seeking to have sole legal custody of R.M., Albers in effect seeks the ability to decide her care, including the ability to remove R.M. from her parents and place her temporarily in Albers’s home. The parents would not be able to have the child returned upon demand.

The terms “conservator” and “guardian” describe the very powers Albers seeks. Albers cannot avoid the effect of ICWA by calling her petition one for “sole physical and legal custody.” Thus, her petition falls within the definition of “foster care placement” to which ICWA applies.

Albers also claims that she can object to the transfer to tribal court because she is an Indian custodian. In doing so, Albers relies on the legislative history of ICWA. “[B]ecause of the extended family concept in the Indian community, parents often transfer physical custody of the Indian child to such extended family members on an informal basis, often for extended periods of time and at great distances from the parents. While such a custodian may not have rights under State law, they do have rights under Indian custom which this bill seeks to protect, including the right to protect the parental interest of the parents.” H.R. REP. NO. 95-1386 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7543.

We assume that Albers would be an Indian custodian under ICWA. Nevertheless, while Indian custodians such as Albers are eligible to *petition* to transfer, they do not have the right to *object* to the transfer. 25 U.S.C. § 1911(b). Being an Indian custodian does not give Albers the right to object to the transfer in this case.

Finally, Albers argues that good cause exists not to transfer the matter under § 1911(b) but to keep it in state court because the evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses. The Bureau of Indian Affairs has issued Guidelines to help state courts in determining good cause not to

transfer. BUREAU OF INDIAN AFFAIRS, *Guidelines for State Courts; Indian Child Custody Proceedings* (“Guidelines”). Although the Guidelines have not been promulgated as administrative regulations, they clarify the congressional intent behind this legislation. We therefore follow them.

The Guidelines recognize that undue hardship is one of the circumstances that would warrant a finding of good cause not to transfer. However, Albers has failed to meet her burden. *See Guideline (d)*. The tribal court is located just over an hour’s travel time from Albers’s home and less than two hours’ travel time from the home of R.M.’s parents. It is within one to two hours’ driving time of school and medical personnel and any other witnesses likely to be called to testify. In fact, Albers admits to often taking R.M. to the reservation to visit with family and friends, a trip that was not inconvenient to her. It has been our experience that tribal courts have the power to subpoena witnesses needed to prove parties’ allegations. We have no reason to question that power here, and our state courts will issue subpoenas upon request of tribal courts. Accordingly, good cause not to transfer does not exist here.

The district court correctly applied the law in this case by ordering the transfer to the Tribal Court.

Affirmed.

**2) MPT2 - Please type your answer to MPT 2 below (Essay)**

===== Start of Answer #2 (1787 words) =====

BRIEF IN SUPPORT OF MOTION TO TRANSFER CASE  
TO BLACKHAWK TRIBAL COURT

Statement of the Case

The maternal grandparents of minor Will Fox seek guardianship and temporary custody of their grandson, as against his paternal grandparent, Blackhawk Indian Tribe member, and current custodian Betty Fox, as a result of his father's incapacitation. In addition to seeking guardianship, Betty Fox has petitioned this court for transfer to Blackhawk Tribal Court, as governed by the Indian Child Welfare Act of 1978 ("ICWA"). At issue is the application of the ICWA to the custody of Will Fox and whether good cause exists to deny such transfer.

Statement of Facts

[omitted]

Argument

Pursuant to the ICWA, upon receipt of a petition by an Indian Custodian to remove child custody proceedings from state court to tribal court, the state proceedings must be transferred to the tribal court, unless good cause exists to deny the transfer. The application of the ICWA is

a prerequisite to the removal of a state child custody proceeding to tribal court and will thus be analyzed first, followed by a discussion of the absence of good cause to deny such transfer.

A. The ICWA applies to the guardianship and transfer actions of Will Fox because his maternal grandparents seek a "foster care placement" of Will, an Indian child, which is an action within the scope of the Act.

The ICWA, as codified in 25 U.S.C. §§ 1901 et seq., governs the child custody proceedings of Indian children. Child custody proceedings under this Act do not turn on how a party captions the case, but rather on the nature of the proceeding. In re Custody of R.M. (Franklin S.Ct. (2009)). One such proceeding involves foster care placement which requires: (1) the Indian child is removed from the child's parent or Indian custodian, (2) the child is temporarily placed in a "foster home or institution or the home of a guardian or conservator," (3) the parent or Indian custodian cannot have the child returned upon demand, and (4) parental rights have not been terminated. Id. In the case at bar, the maternal grandparents of Will Fox seek guardianship and custody of their grandson, as against his paternal grandmother and current Indian custodian, Betty Fox. Despite the captioning of "Guardianship and Temporary Custody," the maternal grandparents are actually seeking what the ICWA terms a foster-care placement. Therefore, the ICWA applies to this proceeding. A discussion of each element follows.

i. Indian Child Removed from the Child's Parent or Indian Custodian.

A child is considered an Indian child if he or she is under the age of 18 years old and is a member of a recognized Tribe. ICWA §1903 (4). An Indian Custodian is a person who has

temporary physical care, custody, and control of the child. ICWA § 1903(5). Here, Will Fox is an Indian child because he is ten years old and is a member of the Blackhawk Tribe, as recognized by the ICWA. In addition, Betty Fox is an Indian Custodian because she has been caring for and in primary custody of Will Fox since the incapacity of his father, Joseph Fox, in 2012. The maternal grandparents of Will Fox, who have been involved in Will's life, seek to remove Will from the custody of Betty. Therefore, this element is met.

ii. The Child is Temporarily Placed in the Home of a Guardian or Conservator.

While the ICWA has not defined "guardian" or "conservator," the state law of Franklin defines "guardian" as one with the "powers and responsibilities of a parent with sole and physical custody to the exclusion of all others." In re Custody of R.M. (Franklin S.Ct. (2009). Here, the maternal grandparents of Will Fox seek to establish custody of Will to the exclusion of Betty Fox. Therefore, they qualify as "guardians," thus satisfying this element.

iii. The Parent or Indian Custodian cannot have the Child Returned upon Demand.

Here, if the court were to grant the maternal grandparents' petition for guardianship and custody, Betty Fox could not have Will Fox returned upon demand to her custody. Therefore, this element is met.

iv. Parental Rights have not been Terminated.

In the case at bar, Will's only living parent, Joseph Fox, has been rendered incapacitated by a recent car accident. His parental rights have not been terminated. Therefore, this element is

---

met.

Because all four elements of foster care placement are met, this is a child custody proceeding subject to the ICWA and is therefore entitled to transfer to tribal court, absent a showing of good cause for the denial of such transfer. The maternal grandparents have the burden of establishing good cause to deny the transfer. Dept. of the Interior Bureau of Indian Affairs Guidelines for State Courts - Determination of Good Cause to the Contrary.

B. The maternal grandparents have failed to establish good cause to deny transfer under the ICWA due to the early stage of the proceedings, Will's failure to object, the availability of necessary evidence in Blackhawk Tribal Court, and Will's connection to the Blackhawk Tribe.

Good cause to deny the transfer of state child custody proceedings exists if the Tribe does not have a tribal court (which is not at issue in this case, given Blackhawk's recognition under the ICWA), or any of the following: "(1) the proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing, (2) the Indian child is over 12 years of age and objects to the transfer, (3) the evidence is necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses, or (4) the parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe." Dept. of the Interior Bureau of Indian Affairs Guidelines for State Courts - Determination of Good Cause to the Contrary. These factors should be balanced with the widespread acknowledgement of the Indian culture's long-standing custom and practice to care for their children with extended family. See Excerpt from Journal of Native American Law, Vol. 8 (2003).

---



i. Stage of the Proceeding

This factor weighs in favor of Betty Fox. In the case at bar, the maternal grandparents filed their Petition for Guardianship and Temporary Custody in this court on February 1, 2013. Within 10 days, Betty Fox filed her Motion to Transfer Case to Tribal Court (February 11, 2013). Given the timely nature of Betty's filing, the maternal grandparents cannot show good cause as to denial on this factor.

ii. Age and Objection of the Indian Child

Here, Will, the Indian child, is only ten years old and has not objected to the transfer. Therefore, the maternal grandparents cannot establish good cause on this factor.

iii. Adequacy of Evidence Presented to Tribal Court without Undue Hardship to Parties or Witnesses

In *In re Custody of R.M.*, the Franklin Supreme Court held that the petitioner had failed to meet her burden of showing undue hardship as a ground to deny transfer. In that case, the Court noted that the tribal court was located just over an hour from the petitioner's home and less than two hours' from the child's home. In addition, it was within one-two hours of the school and medical personnel and other witnesses that may be called to testify. The Court also noted a tribal courts' power to subpoena witnesses if necessary.

Here, the adqueacy of evidence presented to the Blackhawk Tribal Court is without

---

undue hardship, though the maternal grandparents will argue otherwise. Will currently resides with his father, where Betty Fox has cared for him since 2012, in Melville, Franklin. Melville is 250 miles from the Blackhawk Reservation, which is estimated to be three-to-four hours' driving time. He has occasionally visited his maternal grandparents during this time, though he has consistently attended the annual powwows on the Reservation with Betty. Because the Reservation is in the same state and within a three to four hour drive, the parties or witnesses necessary to the case will not be unduly burdened by traveling such distances.

The maternal grandparents may rely on the *In re Custody of R.M.* case to allege that the three-to-four hour commute is too long for witnesses and parties to travel. Specifically, they may argue that since Will has lived in the Melville area all of his life, all of his connections by way of relationships, school, and medical care are in that area. In addition, Joseph's express acknowledgment of how tiring the drive is to the Reservation in his letter to Betty dated August 23, 2011, supports the maternal grandparents' position. While this all may be true, other facts overcome any possible undue hardship. For example, Will has traveled to the Reservation at least once every year for the last few years to attend the powwows. In addition, in the same letter mentioned above, Joseph announced his intention for he and Will to spend the holidays on the Reservation with Betty. This establishes that the travel was not such a hardship as to deny it. Finally, the tribal court has the power to subpoena witnesses, if travel proves to be burdensome. Therefore, the necessary evidence is adequate such that a transfer to Blackhawk Tribal Court is appropriate.

iv. Parents of Child over Age Five are Not Available and Child lacks Contact with the Tribe or Members thereof.

---

As mentioned above, Will is over the age of five. In addition, his only living parent, Joseph, was rendered incapacitated by a car accident, which has unfortunately left him in a coma. Therefore, he is unavailable. While the maternal grandparents may seize upon this factor as evidencing good cause for the denial of the transfer based on those facts, their position is without merit. As noted, Will has attended the powwows for the last few years. In fact, his father Joseph documented his excitement and eagerness to return to the following years' powwow in 2011, before his accident. Joseph even mentioned his desire for his young son to "always remember[s] that he is a Blackhawk." In addition, Betty, a member of the Blackhawk Tribe, has been Will's primary caregiver since his father's accident. These facts are sufficient for the requisite contact necessary to defeat a showing of good cause for removal.

As the above factors show, the maternal grandparents have not satisfied their burden of establishing good cause to the contrary. Most importantly, the overarching concern for the preservation of Indian culture lends itself to the granting of Betty Fox's Motion to Transfer Case to Blackhawk Tribal Court.

=====  
=====  
**END OF EXAM**

## MEE Question 1

In 2008, a landlord and a tenant entered into a 10-year written lease, commencing September 1, 2008, for the exclusive use of a commercial building at a monthly rent of \$2,500. The lease contained a covenant of quiet enjoyment but no other covenants or promises on the part of the landlord.

When the landlord and tenant negotiated the lease, the tenant asked the landlord if the building had an air-conditioning system. The landlord answered, "Yes, it does." The tenant responded, "Great! I will be using the building to manufacture a product that will be irreparably damaged if the temperature during manufacture exceeds 81 degrees for more than six consecutive hours."

On April 15, 2012, the building's air-conditioning system malfunctioned, causing the building temperature to rise above 81 degrees for three hours. The tenant immediately telephoned the landlord about this malfunction. The tenant left a message in which he explained what had happened and asked the landlord, "What are you going to do about it?" The landlord did not respond to the tenant's message.

On May 15, 2012, the air-conditioning system again malfunctioned. This time, the malfunction caused the building temperature to rise above 81 degrees for six hours. The tenant telephoned the landlord and left a message describing the malfunction. As before, the landlord did not respond.

On August 24, 2012, the air-conditioning system malfunctioned again, causing the temperature to rise above 81 degrees for 10 hours. Again, the tenant promptly telephoned the landlord. The landlord answered the phone, and the tenant begged her to fix the system. The landlord refused. The tenant then attempted to fix the system himself, but he failed. As a result of the air-conditioning malfunction, products worth \$150,000 were destroyed.

The next day, the tenant wrote the following letter to the landlord:

I've had enough. I told you about the air-conditioning problem twice before yesterday's disaster, and you failed to correct it. I will vacate the building by the end of the month and will bring you the keys when I leave.

The tenant vacated the building on August 31, 2012, and returned the keys to the landlord that day. At that time, there were six years remaining on the lease.

On September 1, 2012, the landlord returned the keys to the tenant with a note that said, "I repeat, the air-conditioning is not my problem. You have leased the building, and you should fix it." The tenant promptly sent the keys back to the landlord with a letter that said, "I have terminated the lease, and I will not be returning to the building or making further rent payments." After receiving the keys and letter, the landlord put the keys into her desk. To date, she has neither responded to the tenant's letter nor taken steps to lease the building to another tenant.

On November 1, 2012, two months after the tenant vacated the property, the landlord sued the tenant, claiming that she is entitled to the remaining unpaid rent (\$180,000) from September 1 for the balance of the lease term (reduced to present value) or, if not that, then damages for the tenant's wrongful termination.

Is the landlord correct? Explain.

1) Please type your answer to MEE 1 below

Â

Â

**When finished with this question, click Â to advance to the next question.**  
(Essay)

===== Start of Answer #1 (552 words) =====

The landlord is entitled to remaining unpaid rent under a commercial lease agreement, or, in the alternative, damages for the tenant's wrongful termination.

Under the law, a landlord is typically not liable for repair unless it is stated in the contract. Here, the facts tell us that there was a covenant of quiet enjoyment (whereby the landlord claims that there will not be someone with superior claim to the property come and kick you out), but no other covenants were made. This is not particularly unusual in a commercial lease. The facts do tell us that tenant specifically asked whether there was air conditioning, then proceeded to tell landlord why tenant would need that air conditioning. However, the landlord merely being told about the need for the air conditioning does not change the fact the contract did not provide for the landlord to repair the air conditioning. Additionally, landlord told tenant on August 24, 2012 that he would not repair the air conditioning. The fact that tenant made a failed attempt to repair has no bearing on landlord's responsibility.

Tenant may have an argument that landlord should have answered the phone calls regarding the malfunctioning system and let tenant know that tenant would be responsible for the repairs, however this argument is likely to fail. In a commercial lease contract, the responsibility for knowing what is in the contract lies on the tenant. The tenant should have referred to the lease, where tenant would have discovered landlord had no duty to repair.

Tenant will also likely argue that the implied warranty of habitability should apply, and he therefore had a right to terminate the lease. Tenant may argue that under the implied warranty of habitability, it was landlord's duty to ensure the premises had air conditioning. However, this argument would only apply to a residential property. Therefore, the argument will fail because this is a commercial property and there is no implied warranty of habitability. The lease could not be terminated based upon this argument.

Tenant's liability to landlord will likely be reduced by some amount due to landlord's failure to mitigate damages. When a tenant terminates a lease before the end date, a landlord has several options. She can ignore the breach and sue for damages as the rent comes due, or she can accept the surrender and relet. Regardless of which she chooses, she will be required to make an attempt to mitigate her damages in order to be awarded the full amount she is due. Mitigation of damages is where the landlord attempts to relet the premises. She would not have to do much, but at least list the property for lease, put a sign up, etc. Here, it appears landlord has decided to ignore the surrender and sue for the full amount of rent. Due to the fact the tenant has stated he will not pay the remainder of rent due, the court will likely allow her to sue on the full amount due. She has made no effort to mitigate his damages, however, and therefore the court will likely frown upon this and may limit the amount of his recovery.

Therefore, tenant will likely be liable to landlord for the amount of unpaid rent minus any amount the court might take out for failure to mitigate damages.

=====  
===== End of Answer #1 =====



**END OF EXAM**

## MEE Question 2

On June 1, a bicycle retailer sold two bicycles to a man for a total purchase price of \$1,500. The man made a \$200 down payment and agreed to pay the balance in one year. The man also signed a security agreement that identified the bicycles as collateral for the unpaid purchase price and provided that the man “shall not sell or dispose of the collateral until the balance owed is paid in full.” The retailer never filed a financing statement reflecting this security interest.

The man had bought the bicycles for him and his girlfriend to use on vacation. However, shortly after he bought the bicycles, the man and his girlfriend broke up. The man has never used the bicycles.

On August 1, the man sold one of the bicycles at a garage sale to a buyer who paid the man \$400 for the bicycle. The buyer bought the bicycle to ride for weekend recreation.

On October 1, the man gave the other bicycle to his friend as a birthday present. The friend began using the bicycle for morning exercise.

Neither the buyer nor the friend had any knowledge of the man’s dealings with the retailer.

1. Does the buyer own the bicycle free of the retailer’s security interest? Explain.
2. Does the friend own the bicycle free of the retailer’s security interest? Explain.



2) Please type your answer to MEE 2 below

Â

Â

**When finished with this question, click Â to advance to the next question.**

*(Essay)*

===== Start of Answer #2 (945 words) =====

1. Yes, the buyer owns the bicycle free of the retailer's security interest. At issue is whether the "consumer-to-consumer transaction" or "garage-sale" exception applies in this context so that buyer takes the bicycle free of retailer's security interest.

Article 9 of the UCC governs secured transactions. First, it is important to determine whether there is attachment under Article 9, as a creditor is only deemed secured if there is attachment. There are three requirements for attachment: 1) the debtor must have rights in the collateral; 2) there must be value given; and 3) an authenticated security agreement. Here, the bicycle retailer is the secured party, and the man would be the debtor. The man had rights in the bicycles when he purchased them on credit with a down payment to the retailer, and there was value given. Also, we are told that the man signed a security agreement which identified the bicycles as collateral for the unpaid purchase price.

Importantly, the transaction between retailer and the man is a "purchase money security interest" or PMSI under Article 9. A PMSI simply means that the debtor uses the value given to obtain rights in the collateral. Here, the man acquired rights in the collateral (the bicycles) by entering into a financing agreement with the retailer. This fits the category of a PMSI.

In dealing with secured transactions, it is important to classify the type of collateral at issue in

---

the transaction. One type of collateral under Article 9 is a "consumer good," which is an item used or intended to be used primarily for household, personal or family purposes. Here, man bought the bicycles to use on a vacation with his girlfriend. The bicycles intended to be used primarily for personal purposes. The fact that man never used the bicycles is of no consequence, as Article 9 allows the parties to look at the intent of the debtor at the time of entering into the security agreement. Therefore, we are dealing with consumer goods based upon the facts.

The next issue becomes whether buyer owns one of the bicycles free of retailer's security interest. In determining the rights as between a secured creditor and some third party, the rules regarding perfection apply. Perfection may be done by filing a UCC-1 financing statement with the Secretary of State's office, or, in some instances, there is automatic perfection. A secured creditor who takes a security interest in a consumer good by way of a PMSI (discussed above) enjoys automatic perfection of his security interest. Here, we are told that the retailer never filed a financing statement reflecting this security interest. While this would generally not be problematic for retailer, it is a problem with respect to the buyer because of the "consumer-to-consumer" or "garage sale" exception.

Under the "consumer-to-consumer transaction," which is also referred to as the "garage sale" exception, a buyer takes free of a security interest in consumer goods if the following things are met: 1) the buyer gives value; 2) the buyer acts in good faith; 3) the buyer does not have notice of the secured party's security interest in the goods; and 4) the transaction is one where the collateral is a consumer good in the hands of both the buyer and the seller. This exception is somewhat similar to the buyer in the ordinary course of business rule (BIOCB), though it is not the same since with a BIOCB, a purchaser takes free of a security interest if he buys some

---

goods from a person in the business of selling those goods. Here, a simply BIOCB analysis would not work because we have absolutely no facts to support the notion that man was in the business of selling bicycles. Simply holding a garage sale does not cut it. Nonetheless, the "garage sale" exception will work so that buyer takes free of retailer's security interest in the bike.

Here, the buyer paid \$400 for one of the bicycles and therefore gave value. Next, we have no facts to suggest that buyer did not act in good faith. Buyer did not have notice of retailer's security interest in the bicycle since retailer did not file a UCC-1 financing statement. Also, the transaction between the man and the buyer was in fact a consumer-to-consumer transaction. As discussed above, it does not matter that the man did not actually use the bicycles as he intended to use them for personal purposes. Also, we are told that buyer bought the bicycle to ride for weekend recreation, which also falls into the category of a consumer good.

It should be noted that had retailer filed a UCC-1 financing statement, the buyer would not be able to use the "garage sale" exception because the buyer would be deemed to have notice of the security interest by virtue of the public filing.

2. No, the friend does not own the bicycle free of the retailer's security interest. The issue here is also whether the "consumer-to-consumer transaction" or "garage-sale" exception applies to enable friend to take free of the retailer's security interest. As more fully discussed above, there are certain requirements that must be met for this exception to apply. If the exception does apply, then a third party is able to take free of a secured party's security interest in the goods.

Here, the man gave the other bicycle to friend for a birthday present. The man did not give

---

value for the bicycle, and while it appears that the other requirements for the "garage sale" exception are met in this case, the lack of value means that the friend does not own the bicycle free of the retailer's security interest.

=====  
===== End of Answer #2 =====

**END OF EXAM**

### MEE Question 3

Mother and Son, who are both adults, are citizens and residents of State A. Mother owned an expensive luxury car valued in excess of \$100,000. Son borrowed Mother's car to drive to a store in State A. As Son approached a traffic light that had just turned yellow, he carefully braked and brought the car to a complete stop. Driver, who was following immediately behind him, failed to stop and rear-ended Mother's car, which was damaged beyond repair. Son was seriously injured. Driver is a citizen of State B.

Son sued Driver in the United States District Court for the District of State A, alleging that she was negligent in the operation of her vehicle. Son sought damages in excess of \$75,000 for his personal injuries, exclusive of costs and interest. In her answer, Driver alleged that Son was contributorily negligent in the operation of Mother's car. She further alleged that the brake lights on Mother's car were burned out and that Mother's negligent failure to properly maintain the car was a contributing cause of the accident.

Following a trial on the merits in Son's case against Driver, the jury answered the following special interrogatories:

Do you find that Driver was negligent in the operation of her vehicle? Yes.

Do you find that Son was negligent in the operation of Mother's car? No.

Do you find that Mother negligently failed to ensure that the brake lights on her car were in proper working order? Yes.

The judge then entered a judgment in favor of Son against Driver. Driver did not appeal.

Two months later, Mother sued Driver in the United States District Court for the District of State A, alleging that Driver's negligence in the operation of her vehicle destroyed Mother's luxury car. Mother sought damages in excess of \$75,000, exclusive of costs and interest.

State A follows the same preclusion principles that federal courts follow in federal-question cases.

1. Is Mother's claim against Driver barred by the judgment in *Son v. Driver*? Explain.
2. Does the jury's conclusion in *Son v. Driver* that Mother had negligently failed to maintain the brake lights on her car preclude Mother from litigating that issue in her subsequent suit against Driver? Explain.
3. Does the jury's conclusion in *Son v. Driver* that Driver was negligent preclude Driver from litigating that issue in the *Mother v. Driver* lawsuit? Explain.

3) Please type your answer to MEE 3 below

Â

Â

When finished with this question, click **Â** to advance to the next question.  
(Essay)

===== Start of Answer #3 (750 words) =====

1) Is Mother's claim barred by Claim Preclusion:

Claim Preclusion bars the litigation of an entire claim where (1) the party asserting the claim was a party or in privity with a party in prior litigation, (2) the prior litigation arose out of the same transaction and occurrence as the current claim. It is not necessary for a claim to have been actually litigated for it to be barred in the subsequent suit.

Same Party or Privity: since the mother was not actually joined in the suit between the son and driver, the driver's only argument is that the mother and son were in privity with each other. Privity only applies to situations where individuals have a vested contractual relationship with each other. Even if it were to extend to familial relationships since the son was not in infancy it is unlikely the courts would extend privity to their relationship. Also, there is no privity created simply because mother let son borrow the car, a licensee relationship does not create privity.

Same Transaction: since the suit arise out of the same incident, the care accident between the son and driver, this element is satisfied.

Therefore, because the mother was neither a party nor in privity with a party in hte prior

suit, claim preclusion does not bar her suit.

2) Is Mother precluded from litigating the issue of her brake lights?

Issue Preclusion, or collateral estoppel, bars the relitigation of an issue if (1) the issue was actually litigated, (2) necessary to the judgment, (3) the party against whom preclusion is being sought had the same or similar interests in the prior suit, (4) Mutuality.

Actually Litigated: here the issue was raised in the answer and actually decided by the jury, therefore it was actually litigated.

Necessary to the Judgment: since the jury found in favor of the son, it does not appear that the decision was necessary for the judgment.

Same or Similar Interests: This measures the amount of energy a party would have decided to put into litigating a prior suit, i.e. how much was at risk to the party if they lost the suit. Here, the mother was not even a party to the prior suit so it is not met, even if she had been a party, since the suit was not by her or against her, there was little to lose.

Mutuality: At CL both the party seeking preclusion, and the party to be precluded must have been parties to the prior litigation. non-mutuality is allowed in most Jx today, but all Jx. retain the requirement that the party against whom preclusion is sought must have been a party or in privity in the prior suit. Since Mother was not a party, nor was she in privity (see above). this element is not met.

Therefore, Mother is not precluded from relitigating the issue of whether she was negligent with respect to the brakes.

3)Is Driver precluded from litigating the Negligence Issue:

Issue Preclusion, or collateral estoppel, bars the relitigation of an issue if (1) the issue was actually litigated, (2) necessary to the judgement, (3) the party against whom preclusion is being sought had the same or similar interests in the prior suit, (4) Mutuality.

Actually Litigated: here the issue was raised in the answer and actually decided by the jury, therefore it was actually litigated.

Necessary to the Judgment: The Jury found in favor of the Son, therefore the finding of the Driver's negligence was necessary for the disposition of the case.

Same or Similar Interests: This measures the amount of energy a party would have decided to put into litigating a prior suit, I.e. how much was at risk to the party if they lost the suit. Here the driver was the defendant in the prior suit, the suit was about whether or not she was negligent. therefore she had a tremendous interest to litigate the issue fully.

Mutuality: At CL both the party seeking preclusion, and the party to be precluded must have been parties to the prior litigation. non-mutuality is allowed in most Jx today, but all Jx. retain the requirement that the party against whom preclusion is sought must have been a party or in privity in the prior suit. Here, since the Driver was a party in the prior suit, Mother should be able to use offensive non-mutual issue preclusion to bar relitigation of that negligence issue.

Therefore, Driver is precluded from relitigating the issue of whether or not she was negligent.

=====  
=====  
End of Answer #3  
=====





**END OF EXAM**

#### MEE Question 4

Over 5,000 individuals in the United States operate hot-air balloon businesses. A hot-air balloon has four key components: the balloon that holds the heated air, the basket that houses the riders, the propane burner that heats the air in the balloon, and the propane storage tanks.

The owner of a hot-air balloon business recently notified several basket and burner manufacturers that she or her agent might be contacting them to purchase baskets or burners. The owner did not specifically name any person as her agent. Basket and burner manufacturers regularly receive such notices from hot-air balloon operators. Such notices typically include no restrictions on the types of baskets or burners agents might purchase for their principals.

The owner then retained an agent to acquire baskets, burners, and fuel tanks from various manufacturers. The owner authorized the agent to buy only (a) baskets made of woven wicker (not aluminum), (b) burners that use a unique “whisper technology” (so as not to scare livestock when the balloon sails over farmland), and (c) propane fuel tanks.

The agent then entered into three transactions with manufacturers, all of whom had no prior dealings with either the owner or the agent.

(1) The agent and a large manufacturer of both wicker and aluminum baskets signed a contract for the purchase of four aluminum baskets for a total cost of \$60,000. The agent never told the manufacturer that he represented the owner or any other principal. The contract listed the agent as the buyer and listed the owner’s address as the delivery address but did not indicate that the address was that of the owner rather than the agent. When the baskets were delivered to the owner, she learned for the first time that the agent had contracted to buy aluminum, not wicker, baskets. The owner immediately rejected the baskets and returned them to the manufacturer. Neither the owner nor the agent has paid the basket manufacturer for them.

(2) The agent contacted a burner manufacturer and told him that the agent represented a well-known hot-air balloon operator who wanted to purchase burners. The agent did not disclose the owner’s name. The agent and the burner manufacturer signed a contract for the purchase of four burners that did not have “whisper technology” for a total price of \$70,000. The burner contract, like the basket contract, listed the owner’s address for delivery but did not disclose whose address it was. The burners were delivered to the owner’s business, and the owner discovered that the agent had ordered the wrong kind of burners. The owner rejected the burners and returned them to the manufacturer. Neither the owner nor the agent has paid the burner manufacturer for the burners.

(3) The agent contracted with a solar cell manufacturer to make three cells advertised as “strong enough to power all your ballooning needs.” The agent did not tell the manufacturer that he was acting on behalf of any other person. One week after the cells were delivered to the agent, he took them to the owner, who installed them and discovered that she could save a lot of money using solar cells instead of propane to power her balloons. The owner decided to keep the solar cells, but she has not paid the manufacturer for them.

Assume that the rejection of the baskets and the burners and the failure to pay for the solar cells constitute breach of the relevant contracts.

1. Is the owner liable to the basket manufacturer for breach of the contract for the aluminum baskets? Is the agent liable? Explain.
2. Is the owner liable to the burner manufacturer for breach of the contract for the burners? Is the agent liable? Explain.
3. Is the owner liable to the solar cell manufacturer for breach of the contract for the solar cells? Is the agent liable? Explain. (Do not address liability based upon restitution or unjust enrichment.)

4) Please type your answer to MEE 4 below

Â

Â

When finished with this question, click Â to advance to the next question.  
(Essay)

===== Start of Answer #4 (1267 words) =====

1. The owner is not liable to the basket manufacturer for breach of the contract for the aluminum baskets, but the agent is likely liable. At issue is whether or not the agent had the authority to enter into the contract for aluminum baskets. As a general rule, a principal is liable for the contracts entered into by his agent if the agent has been given (1) actual express authority, (2) actual implied authority, (3) apparent authority, or through (4) ratification. First, actual express authority is shown through words either oral or written and is authority that is expressly detailed. Actual implied authority occurs when there is not necessarily authority for a particular act on the part of the agent, but through, custom or necessity, it is one that is traditionally bestowed upon an agent in regards to the actual express authority that he or she has. Apparent authority occurs when the principal holds the agent out to having authority and cloaks that agent with authority and third parties rely upon that. Finally, ratification occurs when even though the agent likely did not have the authority to enter into a contract and bind the principal, the principal subsequently accepted the benefit and in a sense adopted the contract.

Additionally, agents are generally not liable for the contracts that they enter into on behalf of their principals if the principal is known. However, if the principal is undisclosed or only partially disclosed, the agent can also be found liable on the contract.

In this case, the agent and a large manufacturer of both wicker and aluminum baskets signed a

contract for the purchase of four aluminum baskets for a total cost of \$60,000. There is definitely not actual express authority bestowed upon agent to bind principal to this contract because the owner only authorized the agent to buy baskets made from woven wicker, and expressly said not aluminum. Additionally, it is unlikely that the agent had actual implied authority or apparent authority because even though the owner principal notified several basket and burner manufacturers that she or her agent might be contacting them to purchase baskets or burners, the owner did not specifically name any person as her agent. Furthermore, the agent never told the manufacturer that he represented the owner or any other principal. The contract listed teh agent as the buyer and only listed the owner's address as teh delivery address, but did not indicate that the address was that of teh owner rather than the agent. These facts show that this contract between the agent and the manufacturer was likely not relied upon by the manufacturer to be one of an agent-principal relationship because the manufacturer did not know a principal existed and did not know that the agent was an actual agent. Therefore, because the authority for the agent to buy aluminum baskets was not express, implied, apparent, or ratified, and even was definatly contrary to the authority given by the owner, the owner is unlikely to be liable under breach of the contract.

Moreover, the agent is likely liable under the contract. As stated above, agents are generally not liable for the contracts that they enter into on behalf of their principals if the principal is known. However, if the principal is undisclosed or only partially disclosed, the agent can also be found liable on the contract. In this case, the principal owner was undisclosed and the manufacturer had no reason to know that the agent was acting on the behalf of a principal. For this reason, the agent will likely be found to be liable under the contract.

2. The owner may be liable to the burner manufacturer for breach of the contract, and the

---

agent is likely also liable. At issue is whether or not the agent had the authority to enter into the contract for aluminum baskets. As a general rule, a principal is liable for the contracts entered into by his agent if the agent has been given (1) actual express authority, (2) actual implied authority, (3) apparent authority, or through (4) ratification. First, actual express authority is shown through words either oral or written and is authority that is expressly detailed. Actual implied authority occurs when there is not necessarily authority for a particular act on the part of the agent, but through, custom or necessity, it is one that is traditionally bestowed upon an agent in regards to the actual express authority that he or she has. Apparent authority occurs when the principal holds the agent out to having authority and cloaks that agent with authority and third parties rely upon that. Finally, ratification occurs when even though the agent likely did not have the authority to enter into a contract and bind the principal, the principal subsequently accepted the benefit and in a sense adopted the contract.

Additionally, agents are generally not liable for the contracts that they enter into on behalf of their principals if the principal is known. However, if the principal is undisclosed or only partially disclosed, the agent can also be found liable on the contract.

In this case, the agent and a burner manufacturer entered into a contract for the purchase of four burners that did not have "whisper technology." This situation is different however from the aluminum baskets because the agent told the manufacturer that he represented a well-known hot-air balloon operator who wanted to purchase burners. However, the agent did not disclose the owner's name. There is definitely no actual express authority for the agent to bind the owner to this contract because the owner specifically said that he only wanted burners that use a unique "whisper technology." However, there is likely some sort of either implied authority or apparent authority. The facts state that notices such as the one the principal gave to the

---

manufacturers generally include no restrictions on the types of baskets or burners agents might purchase for their principal and this would likely be normal in the custom of this industry.

Additionally, the principal cloaked the agent with authority by telling the manufacturers that his agent was going to be entering into contracts and did not list any restrictions. Additionally, the burner manufacturer relied upon this. Therefore, it is likely that the agent did have implied or apparent authority to bind principal to this contract. Additionally, because the principal was only partially disclosed, the agent is likely to be liable upon this contract as well.

3. Both the agent and principal are liable to the solar cell manufacturer for breach of the contract for the solar cells. At issue is whether or not the owner can be seen to have ratified the conduct of the agent. Ratification occurs when even though the agent likely did not have the authority to enter into a contract and bind the principal, the principal subsequently accepted the benefit and in a sense adopted the contract. In this case, the owner received the solar cell and she installed them and discovered that she could save a lot of money using them instead of propane to power her balloons. Even though the principal, when she notified the manufacturers, did not say the agent was going to be purchasing fuel tanks, the fact that she ratified the authority she gave the agent and accepted the benefit will be enough to hold her liable under this contract. Additionally, because the agent did not tell the manufacturer that he was acting on behalf of another person, the principal would be considered undisclosed, and the agent would also likely be liable under this contract.

=====  
===== End of Answer #4 =====

**END OF EXAM**

### MEE Question 5

A woman who owns a motorized scooter brought her scooter to a mechanic for routine maintenance service. As part of the maintenance service, the mechanic inspected the braking system on the scooter. As soon as the mechanic finished inspecting and servicing the scooter, he sent the woman a text message to her cell phone that read, "Just finished your service. When you pick up your scooter, you need to schedule a follow-up brake repair. We'll order the parts."

The woman read the mechanic's text message and returned the next day to pick up her scooter. As the woman was wheeling her scooter out of the shop, she saw the mechanic working nearby and asked, "Is my scooter safe to ride for a while?" The mechanic responded by giving her a thumbs-up. The woman waved and rode away on the scooter.

One week later, while the woman was riding her scooter, a pedestrian stepped off the curb into a crosswalk and the woman collided with him, causing the pedestrian severe injuries. The woman had not had the scooter's brakes repaired before the accident.

The pedestrian has sued the woman for damages for his injuries resulting from the accident. The pedestrian has alleged that (1) the woman lost control of the scooter due to its defective brakes, (2) the woman knew that the brakes needed repair, and (3) it was negligent for the woman to ride the scooter knowing that its brakes needed to be repaired.

The woman claims that the brakes on the scooter worked perfectly and that the accident happened because the pedestrian stepped into the crosswalk without looking and the woman had no time to stop. The woman, the pedestrian, and the mechanic will testify at the upcoming trial.

The pedestrian has proffered an authenticated copy of the mechanic's text message to the woman.

The woman plans to testify that she asked the mechanic, "Is my scooter safe to ride for a while?" and that he gave her a thumbs-up in response.

The evidence rules in this jurisdiction are identical to the Federal Rules of Evidence.

Analyze whether each of these items of evidence is relevant and admissible at trial:

1. The authenticated copy of the mechanic's text message;
2. The woman's testimony that she asked the mechanic, "Is my scooter safe to ride for a while?"; and
3. The woman's testimony describing the mechanic's thumbs-up.



**5) Please type your answer to MEE 5 below**

Â

Â

**When finished with this question, click Â to advance to the next question.**  
(Essay)

===== Start of Answer #5 (669 words) =====

1. The authenticated text message to the mechanic is relevant to show whether the woman had knowledge that her brakes needed repair. Relevant evidence is any evidence that tends to make any fact more or less likely. Here, the text message speaks directly to the Woman's notice that her breaks needed repair. Therefore, it is relevant

The text message may be hearsay under the Rules of Evidence. Hearsay is an out of court statement offered for the truth of the matter asserted. Here, the statement is certainly out of court. It is possible that the text is offered for the truth of the matter asserted. The text message if offered for the purpose of showing that the Woman's scooter needed brake repair is inadmissible hearsay. However, this statement can be offered to show notice or the effect on the listener. Here, the listener is the Woman. If the pedestrian offers the text to show that the woman was on notice of the needed repair and based on her inaction, the statement may be considered non-hearsay.

There is also an issue as to the opinion within the mechanics text. The statement with regard to the need of repair may be improper lay opinion under the Federal Rules. If the expert opinion of the mechanic is needed to explain the need for brakes and if the opinion would assist the trier of fact, then this statment may be improper lay opinion.

2. The Woman's statement to the mechanic is relevant to show the Woman's knowledge of

whether the brakes are needed. The rule for relevance is stated above. It specifically speaks to negligent and whether she acted reasonably under the circumstances by asking the mechanic if the scooter was safe.

There is an issue that the Woman's question to the Mechanic is hearsay. As stated, hearsay is an out of court statement offered for the truth of the matter asserted. The statement must actually be a statement, that is an assertion. An assertion is a statement of fact. Here, the woman's question is not an assertion. It is not offered for the truth of the matter asserted because nothing is asserted. Moreover, if the court were to determine that this question is offered for the truth of the matter asserted, then it falls into the category of an admission by a party opponent. An admission of a party opponent is non-hearsay when offered against a party. Here this statement would probably be offered by the woman and thus will not be an admission under the rules of evidence.

3. The Woman's testimony describing the mechanic's thumbs-up is relevant to show the Woman's negligence. The rule for relevance is discussed in (1) above. This testimony addresses whether it was reasonable for the woman to rely on this thumbs-up assertion and operate the scooter. This testimony is likely relevant.

The thumbs-up is admissible at trial. Under the rules of evidence, a witness is competent to testify when he or she has personal knowledge of an event. Personal knowledge is gained through the senses, that is sight, hearing, smell, etc. Here, the Woman saw the thumbs-up from the Mechanic. She perceived this event. It is admissible as it is within her personal knowledge.

There is an issue as to whether this thumbs-up is hearsay and thus inadmissible. Hearsay is an out of court statement offered for the truth of the matter asserted. A non-verbal act that is meant to be an assertion will qualify as a statement under the hearsay rule. Here,

---

the thumbs-up will likely be offered for its truth. It will be offered to show that the scooter was safe to ride for a while. While this technically qualifies as hearsay, it may be offered to show the affect on the listener. If offered to show the affect on the listener, a statement is not precluded by the hearsay rule. Here, the Woman will argue that the thumbs-up caused her to actually operated the scooter. Therefore, the thumbs-up testimony is likely admissible.

=====  
===== End of Answer #5 =====

**END OF EXAM**

## MEE Question 6

Ten years ago, Settlor validly created an inter vivos trust and named Bank as trustee. The trust instrument provided that Settlor would receive all of the trust income during her lifetime. The trust instrument further provided that

Upon Settlor's death, the trust income shall be paid, in equal shares, to Settlor's surviving children for their lives. Upon the death of the last surviving child, the trust income shall be paid, in equal shares, to Settlor's then-living grandchildren for their lives. Upon the death of the survivor of Settlor's children and grandchildren, the trust corpus shall be distributed, in equal shares, to Settlor's then-living great-grandchildren.

The trust instrument expressly specified that the trust was revocable, but it was silent regarding whether Settlor could amend the trust instrument.

Immediately after creating the trust, Settlor validly executed a will leaving her entire estate to Bank, as trustee of her inter vivos trust, to "hold in accordance with the terms of the trust."

Five years ago, Settlor signed an amendment to the inter vivos trust. The amendment changed the disposition of the remainder interest, specifying that all trust assets "shall be paid upon Settlor's death to University." Settlor's signature on this amendment was not witnessed.

A state statute provides that any trust interest that violates the common law Rule Against Perpetuities "is nonetheless valid if the nonvested interest in the trust actually vests or fails to vest either (a) within 21 years of lives in being at the creation of the nonvested interest or (b) within 90 years of its creation."

Recently, Settlor died, leaving a probate estate of \$200,000. She was survived by no children, one granddaughter (who would be Settlor's only heir), and no great-grandchildren. The granddaughter has consulted your law firm and has raised four questions regarding this trust:

1. Was Settlor's amendment of the inter vivos trust valid? Explain.
2. Assuming that the trust amendment was valid, do its provisions apply to Settlor's probate assets? Explain.
3. Assuming that the trust amendment was valid, how should trust assets be distributed? Explain.
4. Assuming that the trust amendment was invalid, how should trust assets be distributed? Explain.

**6) Please type your answer to MEE 6 below**  
(Essay)

===== Start of Answer #6 (904 words) =====

1.

Settlor's amendment to the inter vivos trust was valid. At issue is how a trust may be amended.

Under the law of trusts, an otherwise validly executed trust may be amended with a writing signed by the settlor. No other formal requirements to validly amend a trust are necessary. There is not requirement that amendments to a trust must be witnessed, as is the case with wills.

Here, the settlor has made an otherwise valid inter vivos trust. He has then attempted to modify the trust to change one of the beneficiaries to University with a writing that he has signed. The fact that the amendment here was not witnessed is not relevant to whether the amendment was valid. As such, all applicable requirements for amending a trust have been met here and the University is the new beneficiary of the trust as amended.

Therefore, Settlor's amendment of the inter vivos trust was valid as all formal requirements to amend a trust have been met here.

2.

Assuming that the amendment was valid, the amendments do apply to Settlor's probate assets. At issue is whether assets given to a trust through a provision in a will are subject to the

terms of the trust.

Under the applicable trust law, a Settlor may make a provision in his will leaving assets to a trust. Such a provision is called a pour over provision and is a common method used in estate planning. When such assets in the probate estate are transferred to the trust, they will be subject to the terms of the trust even though the trust was amended after the execution of the will.

Here, Settlor has made an amendment to his trust that changes one of the beneficiaries to the trust. He has done this after executing a will that leaves her estate to the trust. Upon the Settlor's death the probate estate will thus be transferred to the trust and will be distributed according to the terms of the trust. This gift will not fail as a testamentary disposition that does not comply with the statute of wills because the assets are left to Bank as trustee and furthermore the Bank is trustee of a revocable trust that Settlor is free to amend.

Therefore, the provisions of the trust as amended will apply to the Settlor's probate estate.

3.

Assuming that the trust was valid, all trust assets should be distributed to University. At issue is how Settlor's estate should be distributed if the amendment is effective.

Under the rules of trust law, the beneficiary of named in a trust will receive the distribution of the trust assets upon the stated condition in the trust. the common law rule against perpetuities applies to trust beneficiaries if not changed by the jurisdiction. Here, the stated condition as

---

amended was that upon Settlor's death the property was to be distributed to University.

Assuming that the amendment was valid, the trust assets should be distributed to University now that Settlor is deceased. The rule against perpetuities at common law and as revised by this jurisdiction will have no effect on the validity of the gift to University because it will vest immediately upon the death of the Settlor, which is when the perpetuities period will begin to run for a revocable trust.

Therefore assuming that the trust amendment was valid, the assets of the trust should be distributed to University upon Settlor's death.

4.

Assuming that the trust amendment was invalid, the trust assets should be distributed to . At issue is how the trust assets should be distributed upon the event that the amendment was invalid.

Under the applicable trust law as above, the trust assets should be paid out upon the settlor's death according to the beneficiaries of the trust and according to the applicable state law. As noted, the rule against perpetuities applies to gifts in a trust. However, the jurisdiction here has revised the common law rule by statute and provided that the gifts that would otherwise violate the rule will not fail if they actually vest within the perpetuities period. This is sometimes referred to as the "wait and see" method of modifying the common law RAP. The perpetuities period for a revocable trust begins to run at the settlor's death.

Here, the trust unamended, gives trust assets to the children, grandchildren and then great

---

grandchildren of the testator. Several of these gifts might have failed under the common law rule against perpetuities. However, the jurisdiction here has saved the gifts to the great grandchildren. Therefore, upon Settlor's death, the property would be distributed to settlor's surviving children for life. As Settlor has no living children, the estate will go all to his granddaughter. Upon her death the the granddaughter the assets should be distributed to the great grandchildren regardless of the statute. This is because granddaughter was alive at the creation of the interest and is therefore a life in being for perpetuities purposes. Thus the remainder in her children, the settlor's only possible great-grandchildren, will vests, if at all, within 21 years after a life in being at the creation of the interest.

Therefore, the trust assets, if the amendment is invalid, should be distributed to granddaughter upon settlor's death with a remainder in the great grandchildren of the Settlor that will not be invalidated by either the common law RAP or the jurisdiction's revised RAP.

=====  
=====  
=====  
=====  
=====  
**END OF EXAM**