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State of Franklin v. Clegane

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State of Franklin v. Clegane

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FILE

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

MEMORANDUM

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

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

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

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

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

Selmer & Pierce LLP

OFFICE MEMORANDUM

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

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

I. Captions

[omitted]

II. Statement of Facts

[omitted]

III. Legal Argument

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

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

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

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

The Franklin City Post

Illegal Fireworks Injure Two and Destroy Garage

July 5, 2017

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

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

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

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

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

(Franklin City Associated Press contributed to this report.)

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

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

Sarah Karth: Good afternoon.

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

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

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

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

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

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

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

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

Pierce: Tell me more.

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

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

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

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

Pierce: And what about restitution for Valerie?

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

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

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

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

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

**STATE OF FRANKLIN
DISTRICT COURT OF GLENN COUNTY**

STATE of FRANKLIN,

Plaintiff,

v.

GREG CLEGANE,

Defendant.

Case No. 2017-CR-238

**DEFENDANT’S MOTION TO EXCLUDE VICTIM STATEMENTS
AND DENY RESTITUTION**

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

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

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

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

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

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

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

the commission” of the offense of which Defendant stands convicted: the sale of fireworks to a minor. FR. CRM. CODE § 305.

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

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

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

Karen Pine

Filed: February 19, 2018

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

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Excerpts from the Franklin Crime Victims' Rights Act

§ 55. Rights of Crime Victims

(a) A crime victim has the following rights:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime, or of any release or escape of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, or sentencing, or at any parole proceeding.
- (5) The reasonable right to confer with the prosecution in the case.
- (6) The right to full and timely restitution under section 56 of this Act.
- (7) The right to proceedings free from unreasonable delay.
- (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.
- (9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.

(b) Definitions—Crime Victim

- (1) In general—As used in this Act, the term “crime victim” means a person directly and proximately harmed as a result of the commission of a Franklin criminal offense.
- (2) Minors and certain other victims—In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court may assume the crime victim's rights under this Act, but in no event shall the defendant be named as such guardian or representative.

§ 56. Restitution

- (a) The court, when sentencing a defendant convicted of an offense, shall order that the defendant make restitution to any victim of such offense.
- (b) The order may require that such defendant
- (1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense,
 - (A) return the property to its owner or someone designated by the owner; or
 - (B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the repair or replacement cost of the property.
 - (2) in the case of an offense resulting in physical, psychiatric, or psychological injury to a victim,
 - (A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment;
 - (B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and
 - (C) reimburse the victim for income lost by such victim as a result of such offense.
- (c) A defendant is presumed to have the ability to pay restitution unless the defendant establishes the inability to pay by a preponderance of the evidence.
- (d) In determining the amount of restitution, the court shall consider (1) public policy that favors requiring criminals to compensate for damage and injury to their victims; (2) the financial burden placed on the victim and those who provide services to the victim as a result of the criminal conduct of the defendant; and (3) the financial resources of the defendant and the nature of the burden the payment of restitution will impose on dependents of the defendant.

State v. Jones
Franklin Court of Appeal (2006)

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

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

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

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

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

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

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

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

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

Affirmed.

State v. Berg
Franklin Court of Appeal (2012)

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

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

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

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

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

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

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

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

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

Affirmed.

State v. Humphrey
Franklin Court of Appeal (2008)

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

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

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

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

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

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

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

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

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

MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

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

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

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

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

Do not include your actual name anywhere in the work product required by the task memorandum.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

1) MPT1 - Please type your answer to MPT 1 below When finished with this question, click to advance to the next question.

III. Legal Argument

A. THE COURT SHOULD ALLOW VICTIM IMPACT STATEMENTS AS DEFENDANT'S ACTIONS WERE BOTH THE ACTUAL AND PROXIMATE CAUSE OF MS. SARAH KARTH AND MS. VALERIE KARTH'S INJURIES, MAKING THE KARTH SISTERS VICTIMS OF DEFENDANT'S CRIME.

Section 55 of the Franklin Crime Victims Rights Act (FCVRA) states that a crime victim has the right to be reasonably heard at a sentencing hearing, among other things. The FCVRA defines a crime victim as one who is directly and proximately harmed as a result of the commission of a Franklin Criminal offense. Here, Defendant, Mr. Clegane, has been convicted of the sale of fireworks to a minor under Fr. Crm. Code 305. The accident at issue is one where a minor, Ms. Valerie karth's neighbor, purchased fireworks from Mr. Clegane's store. It is a felony offense to sell fireworks to a minor in Franklin, but Mr. Clegane said he had no reason to believe that the minor was under 17 or that the minor's statement that the fireworks would be a "surprise" were troublesome. In cases such as these, victim impact statements are often allowed to be heard at sentencing hearings. It must be shown that the individuals speaking are victims themselves or representatives of the victims, and the harmed caused to the victim by the defendant was actual (but for) and proximate (foreseeable).

Actual cause

The court should allow Ms. Karth to read her victim impact statement as Defendant's actions were the actual (but for) cause of her and her sister's

injuries. A representative of the victim or the victim themselves must read the victim impact statements, if they so choose, at a defendant's sentencing hearing. It first is important to ascertain who is a victim. A victim is one who has been proximately harmed by a criminal offense. FCVRA 55. The legislative history of the statute indicates that the term crime victim should be interpreted broadly. State v. Berg. Ms. Sarah Karth should be allowed to testify her victim impact statement as both she and her sister were actually and proximately caused by a minor teen's illegal firework purchase from Mr. Clegane, when that minor teen set off fireworks in close proximity to Valerie Karth's home and at a fourth of July party with lots of people in attendance.

Similarly, in State v. Berg, the deceased's parents were allowed to read victim impact statements over the loss of their daughter, when the defendant, Mr. Berg, plead guilty to felony of providing alcohol to a minor resulting in death. While Mr. Berg was not driving the car that ultimately ended Carly Appleton's life, her parents were allowed to read victim impact statements as they were considered as victims by the court under the FCVRA. In the case, Berg bought alcohol for the two minors (the driver and Carly), knew that the driver had been arrested for driving under the influence, but allowed her to drive his car anyway. The court found that it was "obvious" that the defendant's actions caused the driver's intoxication, which affected her ability to handle the car, and ultimately led in the crash and death of Carly Appleton. The court in Berg reasoned that but for Berg's buying the alcohol and furnishing it to the driver, Carly Appleton would still be alive. Thus, there was a direct and causal link between Defendant's conduct and the girl's death and her parents were able to read victim impact statements at Berg's sentencing.

Proximate cause

The court must also allow Ms. Karth to read her victim impact statement because the Defendant's actions were a proximate cause of her and her sister's

injury. Proximate harm is a limitation that courts place upon an actor's responsibility for the consequences of the actor's conduct; it is a means by which courts limit the scope of the actor's liability. *State v. Berg*. Foreseeability is the key concept here to determine whether the actor's conduct proximately harmed the victim. *State v. Jones*. In determining whether the harm was foreseeable, the court looks to whether the resulting harm was within the zone of risk resulting from the defendant's conduct for which the defendant should be found liable.

In *State v. Berg*, the court found that defendant providing the alcohol to his girlfriend, who had a history of driving under the influence, created a natural and continuous sequence of events without which Appelton's death would not have occurred. There was an intuitive relationship between the Defendant's conduct and the resulting harm. Here, although this minor may not have had a history of purchasing illegal fireworks, he could not have gotten them without Defendant negligently selling them to him. It is clearly within the Defendant's zone of risk if he sells fireworks to a minor, without checking his ID, and the minor in turn negligently and irresponsibly lights the fireworks. Moreover, in Defendant's Motion to Exclude Victim Statements and Deny Restitution, Defendant states that the minor appeared older than he was and that the fireworks would not be lit in an unsafe manner. However, during trial, Defendant stated that the minor told him that "I can't wait to show my friends--I'm going to give everyone a big surprise." Although it may be Defendant's opinion that this statement did not "raise any red flags," this statement coupled with the fact that Defendant did not ask the minor for his identification (thereby committing the felony of selling fireworks to a minor) and the minor subsequently lighting the fireworks irresponsibly, is aligned with the holding in *Berg* that the risk of the minor behaving negligently was within the zone of risks of Defendant's actions and there was an intuitive relationship between the selling of the fireworks without

any identification and hearing the minor's statement and the injury that resulted when the minor lit the fireworks.

Contrasted with the facts of *State v. Jones*, in which a girlfriend of one of the defendant's cocaine customer's tried to claim that she was a victim under the FCRVA because her boyfriend was abusive to her when he was under the influence of cocaine, the Karth's injuries are much more close in respect to Defendant's injuries. The Court in *Jones* held that the girlfriend was not a victim, as the foreseeability of supplying cocaine to someone and their subsequent domestic abuse was too attenuated to make the girlfriend a victim of defendant's crime. The girlfriend in *Jones* was not able to demonstrate that her alleged injuries were a foreseeable consequence of Defendant's crime--she did not prove that the conspiracy led to her injuries or that the defendant knew about the impact of the drugs on girlfriend's former boyfriend. Here, however, as discussed above, the Defendant's actions were intuitively linked between the crime and the injuries, as but for Mr. Clegane selling the fireworks to the minor (the crime), the minor would not have lit the fireworks in an irresponsible way, causing harm to his neighbor (and attendee at the party), Ms. Valerie Karth, leading to her family's (Sarah Karth) distress in caring for her (discussed below). While the Defendant may draw from *Jones* and state that while perhaps Valerie's injuries were foreseeable, making her a victim, Sarah's were not and she is not a victim. However, the FCRVA considers injuries broadly and a family facing the repercussions of incredible harm done to another close family member is foreseeable and this makes Sarah a victim.

Thus, as both Sarah and Valerie Karth were injured actually and proximately by the Defendant's selling of fireworks to a minor, they are victims under the FCRVA and the Defendant's actions actually and proximately caused their harm. As such, Sarah Karth should be allowed to read her victim statements.

B. THE COURT SHOULD ALLOW MS. KARTH TO READ HER VICTIM IMPACT STATEMENT ALONG WITH HER SISTERS AS MS. VALERIE KARTH IS INCAPACITATED

Valerie Karth, the minor's neighbor, was struck by a firework while attending the minor's fourth of July party. She was rushed to the emergency room and was in a coma for several months. She is still incapacitated and in this hospital. The Franklin City Post reported that Valerie was struck by one of the fireworks named "Little Devils Shards" that sent exploding shells spraying through the yard. One bystander said it "looked like a war zone." Moreover, Valerie Karth's garage was burned by the fireworks display and the firefighters could not save it. Valerie's medical expenses currently are at \$22,000, she will incur at least an additional \$40,000, and will have lost \$120,000 in salary due to not working because of her injuries. The garage is completely destroyed and rebuilding will take \$17,00. Sarah Karth, the victim's sister and a victim herself, has incurred \$1,500 in out of pocket medical bills as a result of Defendant's behavior. Sarah has become depressed and distraught over her closest sister's coma and medical expenses and had begun seeing a therapist. Sarah and Valerie are very close sisters, only two years apart, and this accident has caused the family, and Sarah, extreme distress.

Close relatives have the right to read victim statements of their own or of their close relatives under the FCRVA if the relative is a minor, incapacitated, etc In State v. Humphreys, the court held that a mother was allowed to read her son's victim impact statements when their father was killed by a negligent driver as the children were victims under the FCVRA entitled to resitution for the loss of child support income. While the court in Humphreys allowed the mother to testify for her sons because they lost financial support from their father, Sarah Karth should be allowed to testify for her sister as she is a victim as she has suffered physical, economical, and proprietary loss from Defendant's acts. Moreover, Sarah Karth, while her sister may not have provided her with

economic support, has a right to be called a victim as the FCRVA includes injury broadly and includes psychological damages. Sarah Karth has lost her once bright, energetic sister from Defendant's actions and has paid out of pocket expenses to deal with her psychological trauma. As such, as an appropriate representative as Valerie Karth as a victim and as herself as a victim, Ms. Sarah Karth should be able to read her victim impact statement.

C. RESTITUTION SHOULD BE AWARD TO THE KARTHS AS PUBLIC POLICY FAVORS RESTITUTION, THE KARTHS HAVE EXPERIENCE EXTREME FINANCIAL HARDSHIPS DUE TO THE INJURIES, AND DEFENDANT IS IN A POSITION TO PAY THE RESTITUTION.

The FCRVA includes harm that is physical, financial, and psychological. One of the purposes of the FCRVA is to force offenders to pay full restitution to identifiable victims of their crimes. As discussed above, the Karths are victims of the Defendant's crime of selling fireworks to a minor. In *State v. Humphreys*, the court stated that the FCRVA creates a rebuttable presumption that the defendant is financially capable of repaying restitution and places the burden of rebutting the presumption on the defendant. Here, the Defendant has merely stated in his motion that he cannot pay the restitution in his Motion. The court must take into account three factors when determining the amount of restitution: 1. public policy that favors requiring criminals to compensate for damages and injury to their victims and 2. the financial burden placed on the victim and those who provide services to the victim as a result of the criminal conduct of the defendant and 3. the financial resources of the defendant. The judge must make a serious inquiry into these three things, although the burden is on the defendant and he has not rebutted this presumption.

The Defendant may claim that he should not have to pay restitution because of his financial inability and also because he did not know what the minor was planning to do with the fireworks. As seen in *State v. Hackett*, an individual was

obligated to pay restitution when his codefendant started a fire by placing methamphetamines on a hot plate. The court found that Hackett had procured the supplies to manufacture the methamphetamine and he had knowledge and knew the scope and structure of the enterprise and the activities of the codefendants. Thus, Hackett was required to pay restitution. As discussed above, Mr. Clegane knew what the minor planned to do with the fireworks--cause a big surprise--which should have led him to inquire about the activities or at least identify the purchaser. However, Defendant did not. While Defendant may not have known the entire scope of the minor's plans with the fireworks, the causal chain between the buying and selling is enough to render Clegane as responsible for the restitution, as the selling of fireworks to a minor and the resulting harm to nearby property, personal injury, and psychological harm are all foreseeable, and Defendant's actions were the actual and proximate cause of such.

Based on the three factors above, the court should rule that Defendant should repay the victims as public policy favors it, there has been a hefty financial burden placed on the Karths from Valerie's medical bills and Sarah's psychological distress, and the Defendant, while claiming not to have any financial resources (but not offering any evidence of the lack thereof), supplies fireworks from his store in Franklin and from three other similar operations in the state. It appears that the Defendant has substantial financial resources to pay and the court should comply with Section 56 of the FCRVA which states that when sentencing a defendant of an offense, the court SHALL order that the defendant make restitution to ANY victim of such offense (emphasis added). This order should require, in alignment with the statute, that since the return of the garage to Valerie would be impractical, pay the amount equal to the repair and replacement. Moreover, in Sarah's case of the result of psychiatric injury and Valerie's physical injuries, Defendant should pay an amount equal to the cost of necessary medical and related professional services and devices related to the physical, psychiatric, and psychological care, including nonmedical care

and treatment; pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and reimburse the victim for income lost due to the offense.

As discussed above, the Karths have receipts and experienced much pecuniary, property, and psychological damage due to the Defendant's crime and should be entitled to full restitution as Defendant has not rebutted the presumption of the burden on him to pay the restitution. Additionally, even after serious inquiry, the court will see that Defendant has the ability to pay.

D. CONCLUSION

As Defendant's actions were both the but for cause and the proximate cause of the Karth sister's injuries, the sisters are victims under the FCRVA and should be allowed to make victim impact statements to the court during Defendant's sentencing. Additionally, Defendant should be obligated to pay to the Karths restitution based on Valeries medical bills, future medical bills, lost income, and the psychological trauma that her sister, Sarah, has experienced due to the nature and severeness of Valerie's injury. Public policy supports restitution when there is strong financial hardship on the victims and the Defendant is in a position to pay.

END OF EXAM

Applicant Number

MPT-2

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In re Hastings

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In re Hastings

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FILE

Belford & Swan S.C.
Attorneys at Law
6701 San Jacinto Avenue, Suite 290
Marin City, Franklin 33075

MEMORANDUM

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

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

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

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

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

Transcript of Client Interview with Danielle Hastings

February 26, 2018

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

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

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

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

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

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

Swan: Tell me more.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Hastings: Great. Thanks.

**Printout of
Marin County Board of Elections
Position Descriptions**

Source: www.marincountyfranklin.gov

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

What is a county election judge?

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

What does an election judge do?

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

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

How do you get to be an election judge?

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

What is a chief election judge?

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

Is election judge a paid position?

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

PRECINCT CHAIR [Summary prepared based on party bylaws]

What is a precinct chair?

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

What does a precinct chair do?

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

What is the Executive Committee?

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

How do you get to be a precinct chair?

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

Is precinct chair a paid position?

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

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STATE OF FRANKLIN CONSTITUTION

ARTICLE XII

§ 25. HOLDING MORE THAN ONE OFFICE; EXCEPTIONS

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

(b) Exceptions: . . .

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

Excerpts from the Franklin Election Code

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

* * *

§ 471. General Responsibility of County Election Judges.

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

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

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

...

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

...

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

* * *

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

* * *

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

ATTORNEY GENERAL OF FRANKLIN

Opinion No. 2003-9
March 17, 2003

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

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

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

First, we have previously determined that a constable holds a civil office of emolument. Franklin Att’y Gen. Op. No. 1999-8 (1999); *see also* FRANKLIN LOCAL GOV’T CODE § 453 (defining a constable as a “peace officer” and mandating that constables be paid on a salary basis).

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

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

Next we determine whether an ESD commissioner holds an office of “emolument.” An emolument is “a pecuniary profit, gain or advantage.” *State v. Babcock* (Franklin Ct. App. 1998). If an officeholder is entitled to compensation, his or her office is an “office of emolument” even if the person refuses to accept any compensation. However, the term “emolument” does not include the legitimate reimbursement of expenses. While the reimbursement of actual expenses does not constitute an emolument, any amount received in excess of actual expenses is an emolument. *Id.* Likewise, an amount received as compensation for each meeting (e.g., a fixed per diem amount) is also an emolument. *Id.*

By statute, an ESD commissioner “is entitled to receive compensation of \$50 for each day the commissioner attends a commission meeting,” and additionally “may be reimbursed for reasonable and necessary expenses incurred in performing official duties.” FRANKLIN LOCAL GOV’T CODE § 775. The \$50 per diem compensation qualifies as an emolument.

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

SUMMARY

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

ATTORNEY GENERAL OF FRANKLIN

Opinion No. 2008-12
February 6, 2008

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

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

Civil office of emolument

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

Common law doctrine of incompatibility

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

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

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

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

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

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

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

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

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

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

SUMMARY

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

ATTORNEY GENERAL OF FRANKLIN

Opinion No. 2010-7
September 5, 2010

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

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

Civil office of emolument

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

That does not end our inquiry, however.

Common law doctrine of incompatibility

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

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

Conflicting loyalties

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

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

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

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

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

SUMMARY

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

NOTES

MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

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

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

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

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

Do not include your actual name anywhere in the work product required by the task memorandum.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

2) MPT2 - Please type your answer to MPT 2 below

To: Emily Swan

From: Examinee

Date: February 27, 2018

Re: Danielle Hastings Inquiry

You have asked me to research whether our client, Danielle Hastings ("Hastings"), can, while serving as a member of the board of directors for Municipal Utility District No. 12 ("MUD 12"), apply for and hold either 1) a county election judge position, or 2) a precinct chair position. This analysis requires consideration of whether the offices are civil offices of emolument, and whether such offices have conflicting loyalties.

I. When can a person hold more than one public office at the same time?

The general rule is that no person may hold or exercise more than one "civil office of emolument" at the same time. *Franklin Constitution*, Article XII, Section 25(a) There are exceptions for justices of the peace, county commissioners, and other enumerated positions that are inapplicable to our analysis. *Id.* Also, notably, a public schoolteacher or retired schoolteacher may receive compensation for serving on a Municipal Utility District ("MUD") board, implying that MUD directors do fall within this prohibition, subject to this exception. *Id.*, at Section 25(b). The prohibition to holding multiple offices applies only if both positions 1) qualify as "civil offices", and 2) are entitled to an "emolument." *Att. Gen. Op. 2003-9.*

A. Are the offices of MUD director, county election judge, and precinct chair civil offices?

The Franklin Attorney General ("AG") has noted that the determinative factor distinguishing "civil officers" from employees is "whether any sovereign function of the government is conferred upon the individual to be exercised by the individual for the benefit of the general public largely independent of the control of others. *Att. Gen. Op. 2003-9*, citing, *Morris Indep. Sch. Dist.* (Franklin Supreme Ct. 1965). The AG concluded that a commissioner of an emergency services district was a "civil officer," because such commissioner had the power to 1) appoint agents and employees, 2) enter into contracts, 3) purchase and sell property, 4) borrow money, 5) sue and be sued, 6) impose and collect taxes. *Id.*

i) MUD directors are civil officers.

The AG has concluded that a director of a MUD is a civil officer based on the number of independent functions delegated to MUD boards under the Water Code, including the provision of water and water services, the ability to levy and collect taxes for operation and maintenance, and the ability to issue bonds and borrow money. Thus since a MUD director is a civil officer, we must consider whether the two positions Hastings is considering are civil officer positions.

ii) Election Judges are civil officers.

Under the Franklin Election Code (the "Code"), election judges are appointed positions. Section 465. The chief county election judge supervises the management and conduct of elections, appoints clerks, and designates working hours and duties of such clerks. *Code*, Section 471. The chief county election judge further preserves order and prevents breaches of the peace in the polling area. *Id.* The chief judge has the authority to appoint special peace officers for such duties. *Id.* Additionally, any county election judge may administer any oath required at a polling place. *Id.* Hastings would be the chief election judge for her precinct, since the governor is from her political party. She would have appointment power, the ability to hire employees to fulfill election duties, and

the ability to enter into contracts related to election day activities. She would additionally have to serve to resolve election day disputes, administer oaths, and certify election results. These duties fall within the category of "sovereign functions of the government" and Hastings, particularly as chief judge, would be operating largely independent of the control of others. Therefore, election judges are civil officers.

iii) Precinct chairs are not civil officers.

The precinct chair is an elected position within a political party, which oversees the party's efforts to reach out to and educate voters about the candidates. They are responsible for contacting, guiding and organizing voters in their political party within the precinct. None of these duties are sovereign functions. Additionally, the precinct chairs operate under the control of an Executive Committee, thus Hastings would not be operating independent of the control of others. For these reasons, precinct chairs are not civil officers.

B. Are the offices of MUD director, county election judge, and precinct chair entitled to emoluments?

An emolument is "a pecuniary profit, gain or advantage." *Att. Gen. Op. 2003-9, citing State v. Babcock*. The AG noted that when an officer is entitled to compensation, including a fixed amount for each meeting attended, his or her office is an "office of emolument," even if such person rejects the compensation. *Id.* Emolument does not, however, include the reimbursement of actual expenses. *Id.* When a position is statutorily required to serve without compensation, the AG has found that it was not an office of emolument. *Att. Gen. Op. 2010-7.*

i) MUD directors are entitled to emoluments.

The AG has determined that MUD directors are entitled to receive emolument, specifically, a per diem for attending meetings. *Att. Gen. Op. 2008-12*. MUD directors therefore hold civil offices of emolument.

ii) Election judges are not entitled to emoluments.

State election laws require election judges to be volunteers. They are only reimbursed for expenses, but receive no compensation. Pursuant to the AG's opinion, such reimbursement is not considered emolument, and therefore, election judges are not civil offices of emolument.

iii) Precinct chairs are not entitled to emoluments.

The bylaws of Hastings political party state that precinct chairs are volunteers and are not compensated for their services. Thus precinct chairs are not civil offices of emolument.

II. Are there other conflicts that would prohibit Hastings from holding dual-offices?

Under the doctrine of incompatibility, a person is barred from holding two civil offices at the same time if the duties of the offices conflict. *Att. Gen. Op. 2008-12.*, citing *Spencer v. Lafayette* (Frankling Ct. App. 1947). Duties conflict in instances of duties of self-appointment, self-employment, and conflicting loyalties. *Id.* Self-appointment and self-employment issues only arise if one position has the power to appoint or employ the second position. *Id.* The prohibition on conflicting loyalties bars the dual-holding of civil offices that would prevent a person from exercising independent and disinterested judgment in either or both positions. *Att. Gen. Op. 2010-7*. An issue of conflicting loyalties arises when there is overlapping jurisdiction between the offices, and the policies of one office could be influenced or controlled by the other office. *Att. Gen. Op. 2008-12*. The AG has noted this conflict occurs when two

governmental bodies are authorized to contract with each other. *Att. Gen. Op. 2010-7.*

As noted above, both MUD directors and election judges hold civil offices, thus an analysis under the doctrine of incompatibility must be considered. MUDs are political subdivisions of the State of Franklin, which provide municipal level services and operate independently of county governments. MUDs conduct their own elections and appoint their own election judges. County election judges are not vested with the authority to appoint election judges for elections ordered by a different political subdivision, so if Hastings was appointed as a county election judge, she would not be involved in overseeing a MUD election, or appointing MUD election judges. *Code*, Section 492. Additionally, precinct chairs are elected in their precinct by their party's constituents. MUD 12 would not be able to appoint Hastings as a precinct chair, nor would Hastings, as a precinct chair, be able to appoint MUD 12 directors. Thus self-employment and self-appointment considerations are not at issue. Additionally, there do not appear to be any conflicting loyalties. MUD operates independently from election judges and political party precinct chairs. There is no danger of Hastings exerting control or influence over one by virtue of her position on another, despite the fact that their jurisdictions overlap geographically. Their powers and duties are independent.

III. Conclusion.

While MUD directors do hold civil offices of emolument, election judges and precinct chairs do not, as neither office is entitled to emoluments. Additionally, the doctrine of incompatibility would not bar Hastings from holding the position of MUD director while holding either the precinct chair or election judge position, because there are no overlapping appointment rights, and there are no conflicting loyalties. Therefore Hastings may hold the MUD 12 director office while simultaneously holding either the election judge or precinct chair office. I

commend her commitment to civic service. She can make her decision based on which position is best for her goals and strengths.

END OF EXAM