THE MPT®

MULTISTATE PERFORMANCE TEST

February 2011 MPTs and Point Sheets

ncbe®

February 2011 MPTs and Point Sheets

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Preface

The Multistate Performance Test (MPT) is developed by the National Conference of Bar Examiners (NCBE). This publication includes the items and Point Sheets from the February 2011 MPT. Each test includes two items; user jurisdictions may select either one or both items for their examinees to complete. The instructions for the test appear on page v. For more information, see the *MPT Information Booklet,* available on the NCBE website at www.ncbex.org.

The MPT Point Sheets describe the factual and legal points encompassed within the lawyering tasks to be completed. They outline the possible issues and points that might be addressed by an examinee. They are provided to the user jurisdictions to assist graders in grading the examination by identifying the issues and suggesting the resolution of the problems contemplated by the drafters. An examinee need not present his/her response in the same way or cover all the points discussed in the grading materials to receive a good grade.

Description of the MPT

The MPT consists of two items, either or both of which a jurisdiction may select to include as part of its bar examination. It is administered by participating jurisdictions on the Tuesday before the last Wednesday in February and July of each year. Examinees are expected to spend 90 minutes completing each MPT item administered.

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

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

The MPT is designed to test an examinee's ability to use fundamental lawyering skills in a realistic situation. Each test evaluates an examinee's ability to complete a task that a beginning lawyer should be able to accomplish. The MPT requires examinees to (1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for applicable principles of law; (3) apply the relevant law to the relevant facts in a manner likely to resolve a client's problem; (4) identify and resolve ethical dilemmas, when present; (5) communicate effectively in writing; and (6) complete a lawyering task within time

constraints. These skills are tested by requiring examinees to perform one or more of a variety of lawyering tasks. For example, examinees might be instructed to complete any of the following: a memorandum to a supervising attorney, a letter to a client, a persuasive memorandum or brief, a statement of facts, a contract provision, a will, a counseling plan, a proposal for settlement or agreement, a discovery plan, a witness examination plan, or a closing argument.

Instructions

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

> You will have 90 minutes to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
>
> 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 taking the examination on a laptop computer, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
>
> Although there are no restrictions on how you apportion your time, you should be sure to allocate ample time (about 45 minutes) to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.
>
> This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

FILE

MPT-1: *Butler v. Hill*

Wiggins, Crawford & Samuelson
Attorneys at Law
322 Crescent Road
Ocean City, Franklin 33447

TO: Examinee
FROM: Sophia Wiggins
DATE: February 22, 2011
RE: Jennifer Butler v. Robert Hill

We represent Jennifer Butler in a suit against Robert Hill seeking a divorce and property distribution. Jennifer and Robert have two children; temporary custody and child support orders are in place that are not currently at issue. Robert has challenged the validity of the parties' underlying marriage. If there is no valid marriage, Jennifer cannot pursue a claim for divorce or a share of marital property. Even if the marriage is valid, Robert claims that the home that Jennifer and the children are living in is not marital property but instead is his individual property.

I have attached the relevant material from Jennifer's file. I will meet with her later this week in anticipation of trial. Please help me with the following two tasks:

First, draft a *short* memo which I may use to prepare for my meeting with Jennifer. In the memo, explain whether Jennifer and Robert's September 1, 2003, ceremonial marriage had any legal effect under Franklin Family Code § 301 *et seq*. Do not write a separate statement of facts, but be sure to incorporate the law and the relevant facts and reach a reasoned conclusion.

Second, draft a closing argument based on the evidence we expect to present at trial to convince the court that (1) there is a valid marriage and (2) the home is marital property and Jennifer is entitled to more than 50 percent of its value. Structure the closing argument as follows:

(1) A *brief* introduction of the case;

(2) Argument; and

(3) Relief sought.

Our closing argument should tell a persuasive story about why Jennifer should prevail, highlighting the evidence that we intend to bring out at trial to support the factors enumerated in the relevant statutes and case law. Be sure to address Robert's position by showing how the evidence fails to support his case and, in fact, supports Jennifer's.

M E M O R A N D U M

To: Jennifer Butler File
From: Sophia Wiggins
Re: Client Interview Notes

August 2, 2010

Today I met with client Jennifer Butler in regard to a family law matter. Jennifer related her story to me as follows.

In 2003, Jennifer Butler was 17 years old and pregnant with her first child when Robert Hill, the child's father, convinced her to marry him against the wishes of her parents. Robert told her he was single. In fact, unbeknownst to Jennifer at the time, Robert, age 22, was already married and had not yet been legally divorced. Jennifer's parents objected to the marriage and would not consent to it. Caught in a difficult situation, Jennifer married Robert in a civil ceremony with a forged parental consent that Robert had signed, and then she moved in with him.

From the date of the marriage ceremony, September 1, 2003, Jennifer and Robert lived together in Franklin. The parties had two children: Christina Hill, born November 14, 2003, and William Hill, born February 22, 2007. Jennifer never changed her surname. Shortly after the ceremony, Robert began verbally abusing Jennifer. Nevertheless, Jennifer stayed with Robert, living with him, taking care of their two young children, contributing financially to the support of the family, and putting up with Robert's emotional abuse. Both Jennifer and Robert were employed and contributed financially to the household; Robert consistently earned about twice as much as Jennifer. They had a joint checking account, but Jennifer also kept a separate savings account. Jennifer has a life insurance policy naming the children as beneficiaries.

In the summer of 2008, the couple was offered the opportunity to purchase the home that they had rented and had lived in for nearly five years. They put their joint income tax refund toward the down payment and purchased the home on August 12, 2008. Jennifer was not at the closing and has not seen the documents. We need to check the deed.

Four months ago, Jennifer learned that Robert had been having an affair with a coworker and had lent the woman $10,000. Jennifer immediately decided to end the marriage. She and the children stayed in the home, and Robert moved to his mother's house one week later.

While Robert was moving out, Jennifer found in Robert's dresser drawer a copy of a divorce decree that granted Serena Hill a divorce from Robert. Jennifer had never heard of Serena before and had no prior knowledge that Robert had been previously married. When she confronted Robert, he claimed he had not bothered to tell her because he had thought he was divorced from Serena before he married Jennifer and only learned that he wasn't when he was served with the court papers.

Supplemental notes: February 15, 2011

Robert has recently requested that Jennifer and the children move out so that he can sell "his" house. He has told her he expects that she will move by the end of March, at which time he intends to change the locks and place the house on the market to sell.

Excerpt of Transcript of Telephone Interview with Louisa Milligan
(January 28, 2011)

Attorney Wiggins: Louisa, how well do you know Jennifer?

Milligan: We've been close friends for the past five years. I live just down the block from her. We have kids who are the same ages.

Attorney: Do you have reason to believe that Jennifer and Robert are married?

Milligan: Yes, we've been to many social gatherings together, including a celebration of their wedding anniversary.

Attorney: When was this?

Milligan: September of 2009. All of their family and friends came. We had a barbecue in their backyard.

Attorney: Did they specifically refer to themselves as husband and wife?

Milligan: Yes, always. And, in fact, at the anniversary party, Robert gave a toast saying that marrying Jennifer was the smartest thing he'd ever done.

Attorney: Did you ever have any reason to believe that they were not married?

Milligan: No, not until Jennifer called me recently and told me that Robert had apparently been married before and might not have been divorced when they married. She told me that she found a copy of a divorce order in Robert's dresser drawer when they separated last spring. She had not known that Robert was ever married before.

Attorney: Louisa, thank you very much for offering to testify to help Jennifer. We will be calling you again before the trial. Please call me if you have any questions or concerns.

Certificate of Marriage
State of Franklin
Ocean City Municipality
License Number 199330

I Hereby Certify that on the 1st day of September 2003, the following persons were by me united in marriage at the Ocean City Courthouse in accordance with the License of the Clerk of the Court in the jurisdiction shown above.

Groom's name: Robert Hill **Age**: 22 **Birthplace:** Columbia

Residence: 6226 Berkeley Blvd., Ocean City **Marital Status:** Single

Bride's name: Jennifer Butler **Age:** 17 **Birthplace:** Franklin

Residence: 80 Octavia Street, Ocean City **Marital Status:** Single

Relationship to Groom if any: None

Consent of Parent of Underage Party (if applicable): Yes, signed consent form presented at time of application for license.

Monica St. George
Signature of Authorized Officer

District Court Judge
Title and Office

Ocean City Municipal Building
Address of Authorized Officer

August 30, 2003
License Date

STATE OF COLUMBIA
CIRCUIT COURT FOR BROOKFIELD COUNTY

Serena Hill,	)	
Plaintiff,	)	
	)	
v.	)	**Case Number D-445-2008**
	)	
Robert Hill,	)	
Defendant	)	
	)	

JUDGMENT OF DIVORCE

The Complaint for Divorce was heard before the Magistrate on this 15th day of April, 2008, in the Circuit Court for Brookfield County, Columbia. It is hereby

ORDERED that the Plaintiff, SERENA HILL, is granted a Divorce from the Defendant, ROBERT HILL; and it is further

ORDERED that the Plaintiff is hereby restored to the use of her former name of SERENA JORDAN; and it is further

ORDERED that this judgment of divorce shall become final after 30 days.

Dated: 4/15/2008

Richard McBain
_____
Hon. Richard McBain
Magistrate Judge

DEED

THIS DEED, made on the **12th** day of **August, 2008**, by and between **Martin and Ruth Griffith, a married couple, Joint Owners in fee simple** ("Sellers") and **Robert Hill, a single individual, Sole Owner in fee simple** ("Buyer")

WITNESS that in consideration of the sum of $150,000, the Sellers hereby convey to the Buyer, in fee simple, that parcel of land, together with the improvements, rights, privileges, and appurtenances belonging to the same, situated in the State of Franklin, described as follows, to wit:

Lot 560, Square 6442, also known as 123 Newton Street, Ocean City, Franklin 33455.

And the Sellers covenant that they will warrant specifically the property hereby conveyed.

Martin Griffith
By: Martin Griffith

Ruth Griffith
By: Ruth Griffith

State of Franklin

I, Prudence Best, a notary public in and for the said State of Franklin, do hereby certify that Martin Griffith and Ruth Griffith are the persons who executed the foregoing Deed and did personally appear before me in said jurisdiction.

Prudence Best
Prudence Best, Notary Public

File Number: 07-23-1800

Return after Recording to
Robert Hill
123 Newton Street
Ocean City, Franklin 33455

You are cordially invited to help us celebrate

the

6th Wedding Anniversary

of

Jennifer and Robert

September 1, 2009, at 6 p.m.

123 Newton Street

Drinks, Dinner, Dessert

RSVP: 555-9080

No gifts please

LIBRARY

MPT-1: *Butler v. Hill*

FRANKLIN FAMILY CODE

§ 301. Marriage of a Minor; Parental Consent; Pregnancy

Marriage of Individual 16 or 17 Years Old

(a) An individual 16 or 17 years old may not marry unless

(1) the individual has the consent of a parent or guardian and the parent or guardian swears that the individual is at least 16 years old; or

(2) if the individual does not have the consent of a parent or guardian, either party to be married gives the clerk a certificate from a licensed physician stating that the physician has examined the woman to be married and has found that she is pregnant or has given birth to a child.

(b) A marriage by an underage person without valid consent as required by this section, though voidable at the time it is entered into, may be ratified and become completely valid and binding when the underage party reaches the age of consent. Validation of a marriage of an underage person by ratification is established by some unequivocal and voluntary act, statement, or course of conduct after reaching the age of consent. Ratification includes, but is not limited to, continued cohabitation as husband and wife after reaching the age of consent.

* * * *

§ 309. Common Law Marriage—Age Restrictions

(1) A common law marriage entered into on or after January 1, 1990, shall not be recognized as a valid marriage in this state unless, at the time the common law marriage is entered into,

(a) each party is 18 years of age or older, and

(b) the marriage is not prohibited as provided in § 310.

§ 310. Prohibited Marriages

(1) The following marriages are prohibited:

(a) A marriage entered into prior to the dissolution of an earlier marriage of one of the parties;

(b) A marriage between an ancestor and a descendant, or between a brother and a sister, whether the relationship is by the half or whole blood;
(c) …

(2) Children born of a prohibited marriage are legitimate.

* * * *

§ 410. Assignment of Separate Property and Equitable Distribution of Marital Property
Upon entry of a final decree of legal separation, annulment, or divorce, in the absence of a valid antenuptial or postnuptial agreement resolving all issues related to the property of the parties, the court shall

(a) assign to each party his or her sole and separate property acquired prior to the marriage, and his or her sole and separate property acquired during the marriage by gift, bequest, devise, or descent, and

(b) distribute all other property and debt accumulated during the marriage, regardless of whether title is held individually or by the parties in a form of joint tenancy or tenancy by the entireties, in a manner that is equitable, just, and reasonable, after considering relevant factors including, but not limited to,

(1) the duration of the marriage;
(2) the age, health, occupation, employability, sources of income, and needs of each of the parties;
(3) each party's contribution as a homemaker or otherwise to the family unit;
(4) – (11) …
(12) the circumstances which contributed to the estrangement of the parties.

Hager v. Hager

Franklin Court of Appeal (1996)

This is an appeal from a decree of divorce. The trial court ruled that the parties' marriage was valid and granted a judgment of divorce to the Petitioner, Shirley Hager. Respondent Landon Hager has appealed, contending that the trial court erred in upholding the validity of the marriage. We agree and reverse.

In her petition, Shirley Hager alleged that she and Landon participated in a marriage ceremony on July 20, 1968. At that time, however, Landon had not secured a final decree of divorce from his first wife. He subsequently obtained that decree on March 2, 1969. Shirley's petition alleged that she was unaware that Landon was married to another woman at the time of their marriage and that Landon told her he was divorced. The dispositive issue on appeal is whether there was a valid marriage.

Shirley argues that the marriage was valid. But a bigamous marriage is void *ab initio*. All marriages which are prohibited by law because one of the parties has a spouse then living are absolutely void. A void marriage is one that has no effect. Notwithstanding Franklin Fam. Code § 301, it cannot be ratified. Indeed, persons who engage in such a marriage may be subject to criminal prosecution.

As a result, the marriage ceremony on July 20, 1968, could confer no legal rights. It was as if no marriage had been performed. The parties' marriage is void and cannot support an action for divorce.

The trial court held that the parties' 1968 marriage was merely voidable and that, since Landon had presented himself as Shirley's husband in all respects, he had ratified the marriage. But, as we have said, the marriage was prohibited, therefore void *ab initio,* and thus not subject to ratification.

We conclude, therefore, that the trial court's ruling that the marriage was valid was error and reverse the judgment.

Owen v. Watts

Franklin Court of Appeal (2003)

Thomas Owen appeals from an order granting summary judgment in favor of Cora Watts, decedent Ruby McCall's surviving sister and personal representative, in her action for possession of McCall's home at 316 Forest Avenue. Owen refused to leave the home after McCall's death, claiming that he was McCall's common law husband and that he was therefore entitled to a possessory dower interest in the property. The trial court held that Owen and McCall had never entered into a common law marriage. The court further held that Owen could not claim an interest in the property. Owen appeals.

The record before the trial court on the motion for summary judgment reveals that Owen moved into McCall's home some time after her husband's death in 1981 but before his own divorce in 1986. Owen testified on deposition that following his divorce, he asked McCall to marry him, but that McCall refused because marriage would jeopardize her continued entitlement to a benefit check which she was receiving as a result of her late husband's death. Owen testified that, over the years, he repeatedly asked McCall to marry him but that she refused these requests for the same reason. Owen claimed that McCall finally agreed in 2000 to marry him in 2001, but that she died before the marriage could take place. Cora Watts, McCall's sister, stated in an affidavit that McCall had told her that she had no intention of ever marrying Owen.

Owen represented that he and McCall cohabited and maintained joint bank accounts. He also produced affidavits from two members of the community who regarded him and McCall as husband and wife. Owen offered no evidence, however, which could persuade a rational and impartial trier of fact that, after his divorce, he and McCall had ever manifested an agreement that they were married, as opposed to a belief that they would become married at a later date.

Owen testified that, at the time he moved in with McCall, "she said, 'I want you to come and live with me. I want that we will be as man and wife.'" He claimed that he "said okay" and moved in with her. He further related that he moved in "because she asked me to come and live with her and make our home together as long as we both shall live, until death do us part."

These words, however, were evidently spoken at a time when Owen was already married and not yet divorced, and therefore could not legally agree to marry McCall. Owen was not divorced until October 22, 1986.

Under Franklin law, a common law marriage requires agreement by parties legally capable of entering into a valid marriage that they have a marriage relationship. Cohabitation continued after the removal of a legal impediment cannot ripen into a common law marriage unless it was pursuant to a mutual consent or agreement to be married made after the removal of the barrier.

Owen and McCall conducted their business affairs as single persons rather than as a married couple. McCall referred to herself as single, or as a widow who had not remarried, in deeds and other documents relating to property transactions, as well as in her tax returns. Similarly, in her will, McCall referred to Owen as a "friend" and left him a bequest in that capacity.

The question before the trial court was whether any impartial trier of fact could reasonably find by a preponderance of the evidence that Owen was McCall's common law husband. We agree with the trial court that no reasonable judge or jury could so find.

Franklin has long recognized common law marriages, the elements of which are a manifestation of mutual agreement, by parties able to enter into a valid marriage, that they are presently married, followed by cohabitation, including holding themselves out to the community as being husband and wife. *East v. East* (Fr. Ct. App. 1931).

Since ceremonial marriage is readily available and provides unequivocal proof that the parties are husband and wife, claims of common law marriage should be closely scrutinized, especially where one of the purported spouses is deceased and the survivor is asserting such a claim to promote his financial interest. The burden is on the proponent to prove, by a preponderance of the evidence, all of the essential elements of a common law marriage.

Owen's testimony established at most that he and McCall had, by the end of her life, agreed to be married at an unspecified future time. This is insufficient to establish the existence of a common law marriage under Franklin law.

For the foregoing reasons, the judgment of the trial court is hereby AFFIRMED.

Charles v. Charles

Franklin Court of Appeal (2005)

Teresa Charles appeals from the district court's judgment dissolving her marriage to Larry Charles. Teresa Charles contends that the district court erred in awarding her only 40 percent of the marital property.

The district court found that an equal division of the marital property was "not equitable under the facts of this case due to the conduct of Teresa Charles." The evidence established that Teresa was having an extramarital affair near the end of the marriage.

"The division of marital property need not be equal, but must only be fair and equitable given the circumstances of the case." *Shepard v. Shepard* (Fr. Ct. App. 2003). Generally, "the division of marital property should be substantially equal unless one or more statutory factors causes such a division to be unjust." *Id*. Pursuant to Franklin Fam. Code § 410, the district court is to distribute property upon consideration of any relevant factors supported by the evidence.

The district court, when dividing the marital property, is directed to consider the conduct of the parties during the marriage. However, it cannot use a disproportionate division of the marital property to punish a spouse for misconduct. "It is only when misconduct of one spouse changes the balance so that the other must assume a greater share of the partnership load that it is appropriate that such misconduct affect the property distribution." *Nelson v. Nelson* (Fr. Ct. App. 2002) (trial court properly based its marital property distribution on evidence of husband's extramarital affairs and use of marital funds to pay gambling debts). "The added burden placed on a spouse sufficient to justify a disproportionate division of marital property does not have to be a financial one." *Ballard v. Ballard* (Fr. Ct. App. 2004).

An extramarital affair can be an added burden sufficient to justify a disproportionate division of marital property provided that the evidence establishes the specific added burdens that the non-offending spouse suffered as a result of such misconduct.

The record establishes that Teresa's extramarital affair placed an added burden on Larry during the marriage justifying a disproportionate division of marital property favoring him. Larry testified:

> Well, she continued the relationship even after I confronted her about the affair and I told her I knew everything. She continued living under the same roof, still went on about her affair, lingerie hanging in the laundry room, kind of an in-your-face type of thing. I was still paying all the bills.

> She was still not contributing anything, but she was spending our—or should I say my—income that would normally go toward the household for her so-called partying and her rendezvous with her boyfriend. And it's pretty hard to live under the same roof with somebody that you know has been sleeping with somebody else, but she's also still spending your money and eating your food, and you're just supposed to act like nothing happened. This went on like this for more than a year.

The district court properly considered the evidence of Teresa's misconduct during the marriage in distributing the marital property and awarding her only 40 percent of the marital property.

Affirmed.

FILE

MPT-2: *In re Magnolia County*

COUNTY COUNSEL'S OFFICE
MAGNOLIA COUNTY
Suite 530
5400 Western Ave.
Harley, Franklin 33069

MEMORANDUM

To: Examinee
From: Lily Byron, Deputy County Counsel
Date: February 22, 2011
Re: Proposed Condemnation Action

The County is considering building a four-lane road connecting State Highway 44 (SH44) to State Highway 50 (SH50) to ease the demands on the County's transportation system. SH44 and SH50 run parallel to each other and are about five miles apart.

I have spoken with the County's Road and Bridge Department about the plans. (See attached notes.) To build the connector road, we will need to obtain easements and rights-of-way from various landowners giving us permission to construct the road. The one potential holdout is Plymouth Railroad, which owns and operates railroad facilities on a portion of the land between SH44 and SH50.

Before we can construct the connector road, we will need to obtain a 60-foot-wide easement from Plymouth over a portion of its railroad track. Our only option is to construct the connector road at ground level and have the road directly cross the railroad track. This is known as an "at-grade crossing," and it will require the installation of warning lights, railroad crossing arms, and other equipment designed to prevent cars and pedestrians from attempting to cross the railroad track while it is being used by a train.

Last week, I had a preliminary meeting with representatives of Plymouth. (See attached summary.) If we cannot reach an agreement with Plymouth, then the County will need to exercise its eminent domain powers under state law and file a condemnation action here in Magnolia County District Court to acquire the easement.

If we do so, Plymouth's representatives have told us that the railroad will claim that our condemnation action is preempted by federal law pursuant to the Interstate Commerce Commission Termination Act (ICCTA), a federal statute that governs railroad operations.

Please draft a memorandum analyzing whether a condemnation action to acquire the easement for the at-grade crossing of Plymouth's railroad track would be preempted under the ICCTA. Do not prepare a separate statement of facts, but be sure that your memorandum weaves together the law and the facts and reaches a reasoned conclusion.

COUNTY COUNSEL'S OFFICE
MAGNOLIA COUNTY

Notes of 1/18/11 meeting with James Wesson, Senior Engineer, County Road & Bridge Dept.

- SH44 and SH50 are north-south roads that run parallel to each other. SH44 is about five miles east of SH50. Presently, SH44 is the primary means for suburban County residents who live north of the City of Harley to commute into and out of the City.
- Currently, most commuters who live northeast of the City and work northwest of the City (in the Harley Business Park) drive several miles out of their way south on SH44 into the City and then out again north on SH50 to get to the Business Park in what amounts to a big U-turn. Building a connector road between SH44 and SH50 north of the City will create a shortcut to the Business Park, and thus will ease traffic congestion.
- The connector road will also provide access to a large residential subdivision, Red Bluff, which is proposed for development adjacent to the connector road. The total size of the development will be 1,300 acres, and it will include retail, office, institutional (church, medical, etc.), multi-family residential, and single-family residential buildings, as well as recreational and greenbelt spaces. The connector road will be the only means of access to the Red Bluff development.
- The connector road will be a four-lane boulevard, with two lanes going in each direction. It will be designated as a major thoroughfare by Magnolia County and, as such, will be an integral part of the regional mobility system for the area.
- A railroad track owned and operated by Plymouth Railroad Inc. runs parallel to and in between SH44 and SH50. The proposed connector road will have to cross the track. We have investigated the feasibility of building an overpass over the railroad track or an underpass under it, but both of those are cost-prohibitive. After extensive and detailed engineering analysis, the only viable and cost-effective option is an at-grade crossing.
- The proposed at-grade crossing will traverse the existing single-track segment of Plymouth's rail line. The segment does not include a passing track and is not used to stage trains for loading and unloading or to park railcars.
- Traffic safety and control devices for at-grade crossings include a range of passive and active devices designed to warn of the existence of a railroad track and prevent automobile and pedestrian access to the track immediately before, during, and after the time that

the track is in use by a train. Passive devices include warning signs, warning pavement markings, crossing (also known as "crossbuck" or "X") signs, and number-of-track signs. Active devices include flashing-light signals (post-mounted), automatic gates, and over-head flashing-light signals. Typically, train speed must be reduced to between 5 and 15 miles per hour while the train passes an at-grade crossing, and the train's crew is required to sound the train's horn when approaching the crossing.

- However, the proposed at-grade crossing may qualify for designation as a "Quiet Zone" if enhanced safety features are installed, such as "constant warning" technology and quadruple gate systems that block vehicle traffic and prevent cars from driving around or between crossing arms into the path of an oncoming train. If so, train speed might need to be reduced by only a few miles per hour in the area of the crossing, and the train's crew would not have to sound the train's horn at the crossing. The County's budget for the connector road project includes sufficient funds to cover the cost of implementing a Quiet Zone.
- Because of the large number of significant variables to be considered, no single standard system of traffic safety and control devices is universally applicable for all at-grade crossings. The appropriate traffic control system to be used at an at-grade crossing should be determined by an engineering study involving both the government agency that is constructing the road and the railroad company.

COUNTY COUNSEL'S OFFICE
MAGNOLIA COUNTY

M E M O R A N D U M

To: File
From: Lily Byron, Deputy County Counsel
Date: February 16, 2011
Re: Meeting with Plymouth Railroad representatives

Yesterday, I met with Clark DeWitt, Assistant Director of Operations, and Monica Leo, Government Liaison for Plymouth, to discuss the County's proposed connector road between SH44 and SH50. I described the proposed location of the connector road, its purpose, and the benefits to County residents. I told the Plymouth representatives that the County wants to work with Plymouth to minimize any impact during construction of the crossing.

The Plymouth representatives expressed concern about the potential impact of the at-grade crossing on the company's railroad operations, citing problems they have encountered with at-grade crossings in other areas of the state. They declined to mention any specifics but told me that, based on Plymouth's past experience, any track crossing would increase track maintenance costs and interfere with the company's rail operations.

The Plymouth representatives also discussed the anticipated heavy use of the connector road by commuters and the potential safety risks to vehicles at the proposed crossing. They stated that the track between SH44 and SH50 is an active track that extends between Franklin and Columbia. The track is used by as many as 20 trains per day, most being heavy freight trains. They said that it takes more than half a mile to stop a heavy freight train even when emergency braking is used, and they expressed concerns about the railroad's potential liability in the event that a car or pedestrian were to be struck by a train. They also said that Plymouth would not consider granting an easement unless the County agreed to indemnify Plymouth for any harm that might result to persons or vehicles as a result of the at-grade crossing.

When I mentioned the possibility of the County instituting condemnation proceedings if Plymouth refuses to grant the easement, the Plymouth representatives stated that any condemnation action would be preempted under the Interstate Commerce Commission Termination Act.

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MPT-2: *In re Magnolia County*

Butte County v. 105,000 Square Feet of Land
Franklin Court of Appeal (2005)

Butte County appeals from the trial court's dismissal of the County's condemnation action. Butte County sought to condemn 105,000 square feet of land owned by the defendant railroad SRX in Butte County.[1] The County wanted the property for a pedestrian and bicycle trail. SRX filed a motion for summary judgment contending that the condemnation action was preempted by the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. § 10101 *et seq*. The County maintained that the ICCTA does not necessarily preempt its eminent domain authority when dealing with railroads.

The preemption doctrine is rooted in the Supremacy Clause of the Constitution and stands for the general proposition that state laws that interfere with, or are contrary to, federal law must be invalidated. Application of the preemption doctrine requires the court to examine congressional intent, whether it be express or implied. The purpose of Congress is the ultimate touchstone in the preemption analysis.

In 1995, Congress passed the ICCTA, which reinforced the federal government's continued goals "to promote a safe and efficient rail transportation system" and to "ensure development and continuation of a sound rail transportation system with effective competition among rail carriers." 49 U.S.C. § 10101(3), (4). The ICCTA provides that "[e]xcept as otherwise provided in this part, the remedies provided under this part with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." *Id.* § 10501(b)(2). By enacting the ICCTA, Congress sought to ensure that states would not regulate rail transportation in a way that would conflict with or undermine the provisions of the ICCTA.

The preemption inquiry focuses on the degree to which the challenged state action burdens rail transportation. It is well settled that state and local regulation is permissible where it does not interfere with interstate rail operations. Rather, routine, nonconflicting uses, such as nonexclusive

[1] Condemnation (also called eminent domain) is the power of federal, state, or local government to take private property for "public use" so long as the government pays "just compensation," which is typically the fair market value of the property as of a certain date. The government can exercise its power of eminent domain even if a property owner does not want to sell the property. Examples of public uses for which a government might exercise its power of eminent domain include public utilities, roads, schools, libraries, police stations, and other similar public uses. Eminent domain may involve taking ownership of the property or a lesser property interest, such as an easement.

easements for at-grade road crossings, wire crossings such as overhead electric power lines, and underground sewer crossings, are not preempted so long as they do not impede rail operations or pose undue safety risks.

Thus, here, the inquiry is twofold: (1) whether the County's intended use of SRX's property would prevent or unreasonably interfere with railroad operations, and (2) whether the County's intended use would pose undue safety risks.

With regard to the first inquiry, SRX contends that a bicycle and pedestrian trail would interfere with railroad operations because the trail would impede its access to its signal boxes and prevent railroad maintenance. The County argues that SRX could access its signal equipment from the southern side of its property and could maintain its railroad track. Because SRX would still have vehicular access to its signal equipment and would have general access for the purpose of railroad maintenance, the Court concludes that the proposed easement would not impede railroad operations. *See Morgan City v. Metro Railroad* (Fr. Ct. App. 1998) (action to condemn part of train yard for city revitalization project preempted as it would leave insufficient room for loading and unloading of railcars).

This brings the Court to the next inquiry: whether the County's intended use would pose an undue safety risk. SRX contends that when an active railroad track is in close proximity to a pedestrian and bicycle trail, SRX's policy is to have its property line a minimum of 50 feet from the centerline of the railroad track. SRX argues that the proposed easement would reduce this distance to 25 feet and create a safety risk without the appropriate setback distance, fencing, and other safety precautions. The County responds that only a parking lot for the bike trail would be within 25 feet of the active rail and that the trail itself would maintain the 50-foot setback distance. In addition, the County intends to provide security fencing between any trail facility and active rail.

While a safety risk is always present whenever an active railroad track is involved, the Court agrees with the County that its maintenance of the 50-foot setback distance from the active railroad track along with fencing to prevent access to the active rail would prevent any undue safety risk. Therefore, because the use of SRX's property would not interfere with railroad operations and the County's implementation of proper safety precautions would prevent any undue risk, the County's condemnation action is not preempted by the ICCTA.

Reversed.

City of Elk Grove v. B&R Railroad

Franklin Court of Appeal (2007)

Defendant B&R Railroad appeals from a denial of its motion for summary judgment to dismiss the City of Elk Grove's condemnation action. B&R claimed that condemnation of its property would prevent or unduly interfere with railroad operations and interstate commerce and that, as a result, the condemnation action is preempted by 49 U.S.C. § 10501(b), the Interstate Commerce Commission Termination Act (ICCTA).

In its condemnation complaint, the City claimed it was entitled to obtain an easement across B&R's property to construct, install, operate, and maintain an underground storm sewer. The City alleges that before filing the condemnation action, it asked B&R to grant an easement allowing the City to move forward with construction and installation of the storm sewer. By letter, B&R advised the City that it would grant an easement only if the City agreed to indemnify B&R against any liability related to the existence and construction of the storm sewer on its property. The letter did not mention any concern that railroad service would be disrupted by the storm sewer project.

The City and B&R entered into negotiations for the storm sewer easement but were unable to reach an agreement regarding the terms of the easement. Among other things, the parties disputed whether the City should be required to "replace" rather than "restore" any railroad track that might be removed or disturbed by the storm sewer project and whether the project must be completed within B&R's specified timetable rather than the 120 calendar days proposed by the City. The City also refused to agree to B&R's proposed indemnification provisions, which would have required the City to contractually indemnify B&R for any environmental contamination resulting from the storm sewer construction and any property damage or bodily injury claims related directly or indirectly to the sewer line construction. After negotiations broke down, the City filed the instant condemnation action.

In its summary judgment motion, B&R claimed that the City's proposed storm sewer project would interfere with B&R's railroad operations and that therefore the project is subject to the ICCTA. The City conceded that construction of the storm sewer project would cause B&R's spur track (which is used for loading and unloading railcars) to be out of service for about one week (and possibly less with careful planning), but that railcar loads received by B&R could be unloaded from the main track during this brief period of time. The City further asserted that B&R's railcar volume on the track is low (approximately only 50 cars a year) and that construction of the

storm sewer would not burden B&R's rail service. Finally, the City indicated that it would work with B&R in designing and constructing the storm sewer in order to minimize any interference with B&R's railroad operations caused by the construction and existence of the storm sewer.

As the party seeking summary judgment, B&R bore the burden of proving that condemnation of an underground easement on B&R's property for the storm sewer project would impede rail operations or pose an undue safety risk. It failed to meet its burden. The arguments raised over the terms of insurance coverage and written indemnification provisions involve allocation of risk, not the regulation of rail transportation.

Moreover, B&R has not explained how the distinction between "replacing" and "restoring" its track following construction of the storm sewer would affect its continued use of the track for rail transport. Though B&R contends that the City must comply with its timetable for completion and should hire only subcontractors experienced in working with railroad beds and tracks, it is questionable whether these issues are really in dispute, and the possible impact of the project's timing and the subcontractors' experience level with rail transportation is too speculative to justify preemption.

Affirmed.

Conroe County v. Atlantic Railroad Co.

Franklin Court of Appeal (2009)

Atlantic Railroad Co. appeals the judgment in condemnation granting Conroe County an easement for an at-grade crossing. We hold that the condemnation action is preempted under the Interstate Commerce Commission Termination Act (ICCTA) and reverse.

Atlantic operates an interstate rail network; its railroad facilities here include a regular railroad track and a passing track. A passing track is an integral component in the operation of a single-track line, as it enables multiple trains to use one main track by allowing trains on the same track heading in opposite directions to pass each other. One train switches to the passing track to allow the other train heading in the opposite direction to continue on the single main track. A passing track, like a main track, is "transportation" as defined by the ICCTA.

Here, Atlantic uses the passing track to stage meets and passes of trains for its rail operations, to load and unload trains, and to park coal trains. The County condemned a strip of Atlantic's land containing a segment of the passing track and proposes to make it a public crossing with a four-lane boulevard, which will access a planned residential development. This proposed crossing would cut the passing track into two pieces, each being approximately 4,900 feet long. There is another crossing available to access the proposed development at one end of the passing track. The existing crossing does not bisect the passing track.

In support of its position that there is no preemption, the County relies on *Butte County v. 105,000 Square Feet of Land* (Fr. Ct. App. 2005). *Butte* holds that routine crossings with nonconflicting uses are not preempted. However, if such crossings impede rail operations or pose undue safety risks, they are preempted by the ICCTA. *Id*.

Whether a state action is preempted by the ICCTA is determined on a case-by-case basis. It is a fact-specific inquiry. Here we are not considering a routine crossing with a nonconflicting use. The record shows that the proposed crossing would cut through Atlantic's passing track—a track used to meet and pass trains, to park 8,500-foot-long coal trains, and as a staging area for loading and unloading trains within a 30-mile area. In order to recover what it had prior to the taking—a 1.86-mile (9,820-foot) uncut passing track necessary to its railroad operations—Atlantic must move part of the passing track or the crossing must be removed.

Preemption cannot be avoided by simply invoking the convenient excuse of a state government entity's condemnation power. The County cannot do anything to Atlantic's

property that would directly burden or impede the interstate traffic of the company or impair the usefulness of its facilities for such traffic. The record contains ample evidence establishing that placing the public crossing over the regular and passing tracks would interfere with railroad operations and cause safety hazards.

As to the impact of the crossing on rail operations, Atlantic has presented affidavits and testimony detailing the interference that would be caused by the crossing. Atlantic has demonstrated, among other things, that the passing track is the only uncut passing track within 30 miles and that the proposed crossing would affect the entire line.

Atlantic has also shown that it parks coal trains on the passing track approximately four days a week and that Atlantic is paid a fee based on the number of trains it is able to park on the passing track. These parked trains would block the crossing for extended periods of time. Atlantic's evidence further demonstrates that (i) by law, any train that blocks a public crossing for more than 10 minutes must be "broken" (divided into segments); (ii) when trains are broken, there is a delay of approximately 45 minutes for the reconnection; and (iii) if the train sits broken for longer than 4 hours, a federal law is triggered specifying that an air-brake test must be done before moving the train, which delays the train approximately 90 minutes. Atlantic has stated that when the track is used to pass trains, other trains may have to be broken and the same time added to their connection, causing scheduling problems and time delays throughout the line, not just at the passing track.

As to the issue of undue safety risk, Atlantic has presented evidence that citizens worry about emergency vehicles being able to proceed through the blocked crossing. Atlantic has also produced evidence of citizens' complaints that broken trains sitting approximately 140 feet from the crossing create a visual hazard and that, therefore, the trains need to be parked at least 250 feet from each side of the crossing so that drivers can see past both tracks. To park the trains farther from the crossing would take away the use of an additional 220 aggregate feet of the passing track.

Atlantic does not argue, and we do not hold, that the entire field of eminent domain law is preempted. However, when state eminent domain law amounts to a regulation of the railroad, it is expressly preempted. A state law may not impose operating limitations on a railroad's economic decisions, such as those pertaining to train length, speed, or scheduling. Moreover, when a law has the *effect* of requiring the railroad to undergo substantial capital improvements, it is preempted by the ICCTA. Here, the County chose to sever the passing track instead of expanding the existing crossing at the end of the track. It is hard to understand why the

County insists on pursuing a crossing over two *active* railway lines that will interfere with railroad operations when other viable entrances to the proposed residential development are physically available.

According to the evidence presented, the condemnation has the effect of regulating Atlantic now and in the future by affecting the speed and length of its trains, interfering with current railroad operations, and causing more federally mandated air-brake tests and, as a result, has a negative economic effect on the railroad.

The County's proposed crossing, which would bisect Atlantic's passing track with a four-lane boulevard, would impermissibly interfere with railroad operations. Moreover, as discussed above, the proposed crossing would create traffic hazards and therefore would pose an undue safety risk. Accordingly, we hold that the County's proposed action is preempted. We reverse and direct the trial court to dismiss the action.

POINT SHEET

MPT-1: *Butler v. Hill*

Butler v. Hill

DRAFTERS' POINT SHEET

In this performance test, examinees' firm represents Jennifer Butler in a divorce proceeding against Robert Hill. Examinees must perform two tasks. First, they must write a short objective memorandum for the senior partner to use to prepare for a meeting with Jennifer analyzing the validity of the parties' ceremonial marriage. Examinees should state the reasons and cite the authorities for their conclusions. Next, examinees must draft a closing argument to prepare the partner for a trial in the divorce and property distribution case.

The File contains the task memorandum, the partner's client interview notes, a transcript of a telephone interview with Louisa Milligan, Jennifer and Robert's marriage certificate, the judgment of divorce obtained by Serena Hill against Robert Hill, the deed for the parties' residence, and an invitation to Jennifer and Robert's anniversary party. The Library contains sections of the Franklin Family Code and three cases bearing on the subject.

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

I. FORMAT AND OVERVIEW

Task One: Memo: Examinees' first work product should resemble a memorandum from one attorney to another and will be used by the partner to advise Jennifer as to the validity of her 2003 ceremonial marriage. Examinees should use the relevant facts along with the legal authorities and reach a reasoned conclusion as to the validity of the ceremonial marriage. Examinees are instructed *not* to write a separate statement of facts.

Task Two: Closing Argument: Examinees must draft the closing argument in the upcoming divorce trial to convince the court that (1) there is a valid marriage and (2) the home is marital property and Jennifer is entitled to more than 50 percent of its value. Their work product should resemble a well-developed draft, following the structure set forth in the call memorandum (introduction, argument, relief sought), and should be persuasive. In addition to setting forth the most persuasive story about the client's claims, examinees should anticipate the arguments that will be raised by Robert and must craft arguments, citing the applicable rules and case law, that will persuade the trial court that it should find that Jennifer has a valid common law marriage, is

entitled to a divorce, and has an enforceable right to arguably more than 50 percent of the value of the house at 123 Newton Street because it is marital property.

II. DETAILED ANALYSIS

Task One: Is the couple's ceremonial marriage valid? Memo to Sophia Wiggins

Summary Response: No, the ceremonial marriage is not valid. Examinees must analyze the issue correctly. That Jennifer was underage at the time of the marriage without proper parental consent or doctor's certification would not render the marriage void because Jennifer could have ratified the marriage upon turning 18. However, the fact of Robert's prior marriage without a divorce created an absolute impediment to the validity of the ceremonial marriage. Thus the initial ceremonial marriage is invalid and void *ab initio* (*Hager v. Hager*).

Analysis:

- Robert has challenged the validity of the underlying marriage to protect his interest in the house. The property deed lists Robert as the sole owner in fee simple. If there is no valid marriage, Jennifer has no right to claim that the house on Newton Street is marital property, nor does she have the right to seek a divorce.
- Key facts: At the time of the ceremony in 2003, Jennifer was only 17 years old and was pregnant with their first child. Robert was 22, and, unbeknownst to Jennifer at the time, he was already married to Serena Hill and had not yet been legally divorced. Jennifer's parents objected to the marriage and would not give their consent to it.
- Under Franklin Family Code § 301(a), because Jennifer was only 17 years old, the parties were required to have either Jennifer's parents' consent or a doctor's certificate stating that she was pregnant. Jennifer and Robert had neither. Despite the fact that Jennifer was pregnant, they did not get a doctor's certificate attesting to this fact. Instead, Robert forged the parental consent form, which did not satisfy the statute's parental consent requirement and therefore is the equivalent of having no consent.
- Underage issue: Under Franklin law, the fact that Jennifer was underage at the time of the marriage ceremony does not render the marriage completely void. Franklin statute § 301(b) states that such a marriage is voidable at the time it is entered into; however,

if it is ratified when the underage party reaches the age of consent (i.e., 18 years of age), then the marriage becomes completely valid and binding.

- Jennifer and Robert continued to live together for the next six-plus years and had two children. If Jennifer's age were the only problem with the ceremonial marriage, the marriage would have been ratified by the parties' continuing cohabitation as husband and wife after Jennifer was 18, and thus the initial marriage would be valid despite the lack of consent or doctor's certification. Franklin Fam. Code § 301(b).
- Prior existing marriage: Jennifer did not know that Robert was already married to Serena and was not yet divorced when he married Jennifer. Examinees should conclude that this is a serious defect and, in fact, renders the September 1, 2003, ceremonial marriage absolutely invalid and void. *See Hager v. Hager* (Franklin Ct. App. 1996). According to *Hager*, parties in a bigamous marriage cannot overcome the impediment to marriage. Any marriage under these circumstances is void *ab initio*, not merely voidable. A bigamous ceremonial marriage cannot be ratified; nor does it become effective once the prior marriage is legally dissolved. *Hager*.
- **Ultimate analysis:** The ceremonial marriage was not effective when entered into and did not become valid after Jennifer turned 18 or after Robert's divorce became final.

Task Two: Closing Argument, Part One: The parties have a valid common law marriage.

- Franklin is one of the minority jurisdictions that recognize the validity of common law marriages. Franklin Fam. Code § 309. Under § 309, a party who is 18 years or older and not subject to a legal impediment as set forth in § 310 (i.e., if prior undissolved marriage exists or if relationship between the parties would be incestuous) can enter into a valid common law marriage. §§ 309 & 310**.**
- *Owen v. Watts* (Franklin Ct. App. 2003) sets forth the elements of a common law marriage in Franklin: a mutual agreement to be married in the present tense by parties able to enter into a valid marriage, followed by cohabitation and holding themselves out to the community as being husband and wife. *East v. East* (Franklin Ct. App. 1931) (cited in *Owen v. Watts*).
- *Owen* involved the personal representative (Cora Watts) of the woman who was allegedly the common law wife (Ruby McCall) and the man alleging to be her common law husband (Thomas Owen) in a dispute over rights to McCall's home.

- Owen alleged that he and McCall had a common law marriage. He moved into McCall's home after her husband died but before Owen's divorce had become final. After his divorce became final, Owen repeatedly asked McCall to marry him; however, she refused because she did not want to jeopardize her benefits as a widow. Finally, after many years of cohabitation, she agreed to marry him the next year, but she died before the marriage could take place.
    - Owen also alleged other facts that he claimed proved that he and McCall had a common law marriage: McCall's statements evincing her intent to be married to him when he moved in with her, joint bank accounts, and two affidavits of community members saying that they thought he and McCall were married.
    - McCall's sister testified that McCall had told her that she had no intention of marrying Owen; they filed separate income tax returns as single individuals and maintained separate business affairs. In McCall's will, she referred to Owen as a "friend" and left him a bequest in that capacity.
    - The *Owen* court held that there was no common law marriage because the parties did not have a present agreement to be married when Owen was legally capable of entering into a marriage relationship.
    - The burden of proof is on the proponent of a common law marriage to prove all elements by a preponderance of the evidence.

The following evidence favors a common law marriage between Jennifer and Robert:

- Robert's first wife, Serena, obtained a divorce judgment from Robert in Columbia on April 15, 2008. The order became final in 30 days, on May 15, 2008.
- Once Robert divorced, a common law marriage between him and Jennifer became possible. A preponderance of the evidence establishes that they had a valid common law marriage.
    - Mutual intent: Jennifer initially expressed her intent to marry Robert by participating in the ceremonial marriage. She had no idea that Robert had been married, let alone still was married. So in her mind, she and Robert were validly married. There is no evidence that Jennifer ever changed this intent while they cohabited. Robert claims that he thought his first wife had already finalized a divorce before his marriage ceremony with Jennifer. He went ahead

with the ceremony and held himself out as being married to Jennifer. After the divorce was final, he continued to live with Jennifer and hold himself out as her husband, and he also stated at a public forum (i.e., their wedding anniversary party) how smart he had been to marry Jennifer.

- Cohabitation: The parties continued to cohabit as husband and wife after the divorce became final. They continued to raise their two children together. They shared household expenses and bought a house. They had a joint bank account and filed at least one joint income tax return. Until Robert moved out in 2010, Jennifer had no idea that there was a serious legal impediment to their marriage and in fact thought they were married. This is strong evidence demonstrating that both Jennifer and Robert had a present intent to be married at a time when a common law marriage could have been formed.
- Community reputation: Robert and Jennifer both held themselves out to the community as being married. Despite the fact that Jennifer had never adopted Robert's surname, neighbors believed that they were married.
- Louisa Milligan, a neighbor and friend, said that Robert and Jennifer always referred to themselves as married. Robert told everyone that marrying Jennifer was the smartest thing he had ever done. This evidence should establish that Robert also had a present intent to be married to Jennifer. The divorce had become final in May 2008 and the party occurred well thereafter, so this statement was made at a time when a common law marriage was possible.

Task Two: Closing Argument, Part Two: Jennifer is entitled to more than 50% of the value of the Newton Street house.

Because the legal impediment to a common law marriage (i.e., Robert's prior marriage) was removed by the April 15, 2008, Columbia divorce order (final on May 15, 2008), it is likely that the court will find that Robert and Jennifer had a valid common law marriage when the house on Newton Street was purchased on August 12, 2008. If so, then the house is marital property even though the deed is in Robert's name alone. Under Franklin Family Code § 410(b), the court has the power to distribute all property accumulated during the marriage, regardless of whether title is held individually or by the parties as joint tenants. Thus Robert's attempt to make

the house his individual property by putting his name alone on the deed was ineffective to prevent the house from becoming marital property.

Under Franklin law, the court is authorized to divide the marital property in a manner that is equitable, just, and reasonable. Franklin is not a community property state; instead it uses principles of equitable distribution. The court is directed to look at all relevant factors, including the circumstances that contributed to the marriage's breakup. Here the factors weigh heavily against Robert, and the court is likely to find that Jennifer is entitled to at least 50 percent, if not more, of the value of the house. It is highly unlikely that the court will order Jennifer to vacate the house. *Charles v. Charles* (Fr. Ct. App. 2005) supports Jennifer's position that Robert's adultery, his $10,000 loan, and his other behavior placed a greater burden on Jennifer. Thus, the court should award her more than 50 percent of the property. In *Charles*, the innocent spouse was awarded 60 percent of the marital property. Jennifer should be awarded at least that much.

Analysis:

- Robert and Jennifer had rented the house at 123 Newton Street for several years before they purchased it on August 12, 2008, three months after Robert's divorce became final on May 15, 2008. Therefore, it is highly probable that a common law marriage existed between Robert and Jennifer on the date of purchase.
- If the parties were married at the time of purchase, then the property is marital property, subject to equitable distribution at divorce, despite the fact that the house is titled solely in Robert's name.
- Jennifer contributed financially to the down payment, just as Robert did.
- Robert is attempting to deny Jennifer her rights to the marital property, first by putting the house in his name alone and later by telling Jennifer that she and the children must move out because the house is his sole property. This behavior is likely to demonstrate his lack of good faith in his dealings with Jennifer about the property.
- Robert has been deceitful with Jennifer throughout the marriage. He misrepresented his marital status. He convinced Jennifer to marry him and presented a forged parental consent form to accomplish this. The File memorandum notes that he was verbally and emotionally abusive to Jennifer. He also had an affair with a coworker while he and Jennifer were still together, and he loaned his paramour $10,000. Finally, Robert demanded that Jennifer and the children move out of "his" house.

- In *Charles*, the court held that the wife's extramarital affair could place an added burden on her husband sufficient to justify disproportionate division of marital property provided that the evidence established the specific added burdens that he suffered as a result of the misconduct. Jennifer should be able to argue that the factors above placed additional emotional and financial burdens on her.
- Examinees might cite the other factors in Franklin Fam. Code § 410(b)(1)–(12) that the court may consider in dividing property at divorce in support of their arguments that Jennifer is entitled to more than 50% of the value of the home.

POINT SHEET

MPT-2: *In re Magnolia County*

In re Magnolia County
DRAFTERS' POINT SHEET

In this performance test item, examinees are employed by the Magnolia County Counsel's Office. The County is considering connecting State Highway 44 (SH44) to State Highway 50 (SH50) in order to ease the demands on the County's transportation system due to population growth. SH44 and SH50 run parallel to each other and are about five miles apart. Building a connecting road between these two highways will reduce traffic congestion into and out of the City of Harley caused by suburban commuters traveling to the Harley Business Park. It will also provide access to Red Bluff, a residential subdivision that is proposed for development midway between SH44 and SH50. Before the County can construct the connector road, it must obtain a 60-foot-wide easement from Plymouth Railroad Company over a portion of Plymouth's railroad track and install an at-grade crossing of the track.[1] If Plymouth refuses to grant the easement, then the County will need to exercise its eminent domain powers under state law and file a condemnation action in state court to force Plymouth to grant the easement. Plymouth is digging in its heels and contending that a condemnation action would be preempted by the Interstate Commerce Commission Termination Act (ICCTA), a federal statute that governs railroad operations. Examinees' task is to draft an objective memorandum analyzing whether a condemnation action to acquire the easement for the at-grade crossing of Plymouth's railroad track would be preempted under the ICCTA.

The File consists of the instructional memo from the supervising attorney, notes from a meeting between the supervising attorney and the senior engineer of the County's Road & Bridge Department, and a memo summarizing the preliminary meeting between the supervising attorney and Plymouth representatives. The Library contains three Franklin cases bearing on the subject.

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

[1] An at-grade crossing occurs when a road directly crosses a railroad track, rather than going over the railroad track by way of an overpass or going under the railroad track by way of an underpass. Typically, an at-grade crossing requires the installation of warning lights, crossing arms, and other equipment designed to prevent cars and pedestrians from attempting to cross a railroad track that is being used by a train.

I. Overview

The task is to write an objective memorandum analyzing whether the ICCTA would pre-empt a condemnation action by the County against Plymouth. No specific formatting guidelines are provided, except that examinees are instructed not to prepare a separate statement of facts. Instead, they are instructed to "weave[] together the law and the facts and reach[] a reasoned conclusion."

II. Legal Authority

The following points, which examinees should extract and use in formulating their analyses, emerge from the cases in the Library:

- The preemption doctrine is rooted in the Supremacy Clause of the Constitution and stands for the general proposition that courts implement Congress's intent for a federal law to trump, and therefore supersede the enforceability of, a state law. The purpose of Congress is the ultimate touchstone in the preemption analysis. *Butte County v. 105,000 Square Feet of Land* (Franklin Ct. App. 2005).
- The ICCTA provides that "[e]xcept as otherwise provided in this part, the remedies provided under this part with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." *Butte County* (quoting 49 U.S.C. § 10501(b)(2)).
- By enacting the ICCTA, Congress ensured that states would not impose regulations on the railroads that conflict with or undermine those set forth in the ICCTA. *Butte County*.
- However, state and local regulation is permissible where it does not interfere with interstate rail operations. *Id*.
- Routine, nonconflicting uses, such as nonexclusive easements for at-grade road crossings, wire crossings such as overhead electric power lines, and underground sewer crossings, are not preempted so long as they do not impede rail operations or pose undue safety risks. *Id.*
    - Where there is no impediment or undue safety risk involved, the ICCTA does not preempt a city's local condemnation proceeding to install subsur-

face utilities under the main line of an active railroad track. *City of Elk Grove v. B&R Railroad* (Franklin Ct. App. 2007).

- Under the two-prong preemption test articulated in *Butte County*, acquisition of an easement by eminent domain to permit a crossing of a railroad track in connection with construction of a new public road would not implicate 49 U.S.C. § 10501(b)'s preemption unless the road would (i) "prevent or unreasonably interfere with railroad operations" or (ii) "pose undue safety risks."
- On the other hand, proposed uses that prevent or unreasonably interfere with railroad operations or otherwise impose operating limitations on a railroad's economic decisions (such as those pertaining to train length, speed, or scheduling) will likely be preempted under the ICCTA. *Conroe County v. Atlantic Railroad Co.* (Franklin Ct. App. 2009).
    - Moreover, when a law has the *effect* of requiring a railroad to undergo substantial capital improvements, it is preempted by the ICCTA. *Id.*

III. Analysis

A. The ICCTA Is Implicated by the Proposed At-Grade Crossing and Any Related Eminent Domain Action.

As a preliminary matter, examinees should conclude that the ICCTA is implicated by the County's proposed connector road and at-grade crossing.

- Plymouth owns and operates railcars, tracks, and other equipment related to rail transportation, and the rail track in question is used by heavy freight trains.
- The situation here involves interstate railroad transportation, thus falling within the parameters of the statute.
    - Plymouth's track extends from Magnolia County, Franklin, into the neighboring state of Columbia. (*See* Memo to file.)
- By enacting the ICCTA, Congress sought to ensure that states would not regulate rail transportation in a way that would conflict with or undermine the provisions of the ICCTA. *Butte County*.
- Preemption analysis requires a factual assessment of the degree to which the challenged state action burdens rail transportation.

- It is a fact-specific inquiry determined on a case-by-case basis. *See Conroe County*.

B. A County Eminent Domain Action Would Not Be Preempted under the ICCTA Because the Crossing Would Not "Prevent or Unreasonably Interfere with Railroad Operations" or "Pose Undue Safety Risks."

At the meeting with the supervising attorney, the Plymouth representatives raised a number of concerns and issues about the proposed at-grade crossing. However, careful evaluation of Plymouth's claims and a thorough analysis of the cases in the Library should lead examinees to conclude that the proposed crossing would not prevent or unreasonably interfere with railroad operations or pose undue safety risks. A well-reasoned analysis should include the following points:

- With regard to the potential for interruption of Plymouth's rail operations, the memo summarizing the meeting with Plymouth representatives references the railroad's assertions that increased maintenance costs and other unspecified problems may result if the connector road and at-grade crossing are installed, based on its experiences in other areas of the state.
- In *City of Elk Grove*, the Court rejected generalized concerns about the potential impact of an underground storm sewer, concluding that the possible impact of the timetable for completing installation of the storm sewer and the subcontractors' experience level with rail transportation were "too speculative" to justify ICCTA preemption.
    - Here, Plymouth's concerns are even more amorphous and thus all the more speculative.
    - Even if the installation of the crossing increases track maintenance expenses, as mentioned by the Plymouth representatives, in order for there to be preemption based on the effect on rail operations, the state action must *prevent or unreasonably interfere with* railroad operations.
    - It is unlikely that an unquantified increased maintenance expense for the railroad rises to that standard.

- This is in contrast to *Morgan City v. Metro Railroad* (Franklin Ct. App. 1988, cited in *Butte County*), in which the court held that the plaintiff city was pre-empted from condemning part of a train yard for a city revitalization project because it left too little land for the railroad to load and unload cars.
- There is no allegation that the connector road would prevent or unreasonably interfere with Plymouth's operations. The proposed site has no passing track or yard for loading or parking railcars.

- Also, like the municipality in *City of Elk Grove*, here the County is offering to work with Plymouth to minimize any impact that construction of the connector road and at-grade crossing might have on Plymouth's operations.
  - This is not a situation like the one in *Conroe County*, where the proposed crossing would have bisected a railroad company's passing track[2] and was of questionable necessity given the existence of another crossing that provided access to the proposed subdivision without interfering with the railroad company's operations.
  - Examinees may note that if the crossing qualifies as a Quiet Zone (and the County has already budgeted for such a designation), then train speeds at the crossing will be reduced by only a few miles per hour. (*See* Notes of meeting with James Wesson.)
- Plymouth's stated concerns about the potential safety risks to vehicles as a result of anticipated heavy use of the connector road can be addressed through the installation of appropriate safety measures, including passive devices (e.g., warning signs, warning pavement markings, crossing signs, and number-of-track signs) and active devices (e.g., post-mounted flashing-light signals, automatic gates, and overhead flashing-light signals). *Id.*
  - Installation of warning lights, railroad crossing arms, and other equipment would effectively prevent cars and pedestrians from attempting to cross the railroad track while it is being used by a train.

[2] A passing track is an integral component in the operation of a single-track line in that it enables multiple trains to use one main track by allowing trains on the same track heading in opposite directions to pass each other. One train switches to the passing track to allow the other train heading in the opposite direction to continue on the single main track. A passing track is "transportation" as defined by the ICCTA. *Conroe County*.

- Moreover, if the County is able to obtain Quiet Zone designation for the crossing, the additional safety features required (such as quadruple gates and "constant warning" technology) further reduce the risk of harm to any persons or vehicles at the crossing.
- Perceptive examinees may cite to *Butte County* for the proposition that while safety risk is "always present" whenever an active railroad track is involved, the proper inquiry is not whether there is *any* safety risk involved, but rather whether the proposed government action poses an *undue* risk.
    - The inability to eliminate any risk altogether is not a ground, standing alone, for preventing a government entity from exercising its eminent domain power under state law. *See Butte County*.
    - Indeed, in *Butte County*, the Court allowed a county to proceed with a state court action to condemn portions of a railroad's land for use as a bike and pedestrian trail.
    - Here, arguably, the proposed condemnation would serve more compelling public purposes, namely the construction of a much-needed connector road between two state highways that will not only alleviate traffic congestion but also provide the only means of access to the proposed Red Bluff development.

- Like the railroad in *City of Elk Grove*, Plymouth seems more concerned about protecting itself from liability than it does about genuine safety or operational issues. In both instances, the railroad is demanding that it be indemnified by the government agency against harms that may arise from the challenged governmental action (in *City of Elk Grove*, the storm sewer; here, the at-grade crossing). However, as the court noted in *City of Elk Grove*, any dispute over the terms of insurance coverage or written indemnification provisions "involve[s] allocation of risk, not the regulation of rail transportation." Thus, Plymouth's concern about indemnification cannot serve as a basis for ICCTA preemption.
- The *Conroe County* case is factually distinguishable on several grounds:
    - That case involved a passing track that was used to meet and pass trains, load and unload trains, and park 8,500-foot-long coal trains. The proposed crossing

would have had significant, documented impacts on railroad operations, including loss of revenue due to the inability to continue parking coal trains along the crossing and delaying trains by up to 90 minutes to allow federal brake tests to be performed.

- Here, as in *Butte County,* the proposed at-grade crossing would not impede Plymouth's access to its equipment or its railroad track; nor would the crossing affect any special-purpose railroad track (such as a passing track or a track used for parking trains).
- It does not appear that the crossing would cause scheduling problems and delays, or any significant loss of capacity to the railroad's operations. At least the Plymouth representatives have not stated these problems specifically.
- But note that, according to Plymouth, as many as 20 trains per day travel on this railway, and most are heavy freight trains. Conceivably, if 20 long trains have to slow down while passing through the crossing, there could be some impact on the railroad's schedule. However, there is nothing in the facts to indicate other possible schedule disruptions, such as the long delays in *Conroe County* required to comply with federal air-brake test regulations.
- Nor does it appear that the crossing would directly burden or impede the interstate traffic of the railroad or the usefulness of the railroad's facilities for such traffic.

- While not the focus of the preemption inquiry, the *Conroe County* court questioned why in that case the county chose to locate its crossing over a passing track when other non-passing-track sites for the crossing were available. Here, there does not appear to be an alternative site that would have less impact on Plymouth's rail operations and yet would still serve the planned subdivision of Red Bluff and link SH50 and SH44. Examinees may note this when distinguishing Magnolia County's situation.

- Also, in *Conroe County,* there were citizen complaints about a potential "visual hazard" to vehicle drivers and blockage of emergency vehicles due to the railroad's use of the passing track for parking trains.
    - Here, per the supervising attorney's notes, the track is not used for parking trains, and thus there should not be any reduced visibility to motorists or blockage of emergency vehicles.

IV. Conclusion

Condemnation is a form of state regulation. State and local regulation is permissible where it does not prevent or unreasonably interfere with railroad operations or pose undue safety risks. However, such state action may be preempted by the ICCTA when it amounts to regulation of rail transportation.

For the reasons set forth above, it is likely that the County's proposed at-grade crossing of Plymouth's railroad track would be considered "routine" and "nonconflicting" and thus not preempted by the ICCTA.