INDIANA ESSAY EXAMINATION
QUESTION 1
JULY 2014

Robert and Pamela were married in 1999. They had two children together, Bobby and Jillian. In 2009, Pamela discovered that Robert was having an extramarital affair. Pamela filed for dissolution and swore she would do everything possible to prevent Robert from having any kind of future with Bobby and Jillian. A high-conflict divorce ensued with allegations of abuse and multiple emergency motions to change custody filed over the years.

In July 2013, Pamela shot and killed Robert. During Pamela's criminal trial for murder, the children's paternal grandmother, Edna, was awarded temporary custody of Bobby (age 12) and Jillian (age 9). Bobby, Jillian, and their dog Rufus moved into Edna's house in August of 2013 and were enrolled in a new school two blocks from Edna's home.

In January 2014, Pamela was found guilty of murder and sentenced to serve 35 years in the Indiana Women's Prison operated by the Indiana Department of Correction. Pamela is currently appealing her conviction.

The children's maternal grandmother, Catherine, filed a motion to intervene in the dissolution case and petitioned for visitation with Bobby and Jillian. Their maternal grandfather, Frank (who has been divorced from Pamela's mother Catherine for over 15 years), also filed a motion to intervene in the dissolution case and is seeking visitation and physical custody of Bobby and Jillian.

Everyone mentioned in the question lives in the same Indiana city.

1) Edna wants to care for Bobby and Jillian on a permanent basis. Identify and explain her legal options.

2) How will the court determine physical custody and visitation of Bobby and Jillian now that Pamela is incarcerated?

3) Mediation is sometimes used in family law disputes. Explain mediation, including the role of the mediator and the pros and cons of mediation in this type of proceeding.

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Question: 1
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1)

1. Edna's legal options in regards to Bobby & Jillian

Since Mother of Bobby and Jillian, Pamela, is currently incarcerated and the children's Father, Robert, is deceased, Grandmother Edna has several options going forward in how to keep custody of both Bobby and Jillian. Edna can file a Petition for Guardianship and become the children's guardian and DCS could file a Petition for Termination of Parental Rights, which would allow for Edna to adopt the Children.

Guardianship

Edna's first option is to file for Guardianship of the Children. This would preserve some of Mother's parental rights and still allow for Mother to have parenting time, or visitation with the Children. Becoming the Children's guardian would mean that Edna would have legal rights over the children and would have primary physical custody. Edna would have similar custody over the children as she would is Mother's rights were terminated, but if Mother were to ever get out of prison, her rights would not have been termianted completely, so she could possibly regain custody of the Children.

Termination of Parental Rights

Another option for Edna is for DCS to file a Petition for the Termination of Mother's Parental Rights. Courts grant Petitions for Termination after the establishment of three elements: (1) Likelihood that the situation for removal will not be remedied; (2) probability that the continuation of the parent-child relationship poses a threat to the children's well-being; and (3) whether termination is in the best interests of the child. Termination would rid all of Mother's rights to the children. DCS would then proceed to have the children adoption, which would probably be adoption by Grandmother, Edna, as long as adoption by Grandmother is in their best interest.

Adoption

After Mother's rights to the Children have been terminated, Edna could file a Petition for Adoption. Since Father is deceased and Mother's rights were terminated, Edna would not have to notify either Mother or Father. Normally, in adoption proceedings, Mother has to notify Father unless he had not registered for the Putative Father Registry, had abandoned the child for more than 6 months, or had committed certain crimes. In this case though, Adoption would likely be granted to Edna if the could found that it was in the

best interests of the Children.

2. Physical Custody & Visitation of Bobby and Jillian

Custody

There are two types of custody arrangements, joint and sole custody that apply to both physcial and legal custody. Physical custody is the parent who the child resides with the majority of the time, or if its divided evenly, its usually joint physical custody. Legal custody is who gets the decision making power of the child's health, education, religion, etc. More than likely if Edna is able to adopt the Children or get Guardianship, she will have primary legal custody and primary physcial custody. In determining custody and visitations, courts look at the best interest factors. The best interest factors are:

(1) Age and Sex of Child
(2) Wishes of the Child (more weight if over 14)
(3) Wishes of the Parent
(4) Relationships to parents, other siblings, and other people who are important in their lives
(5) Adjustment to home, community, and school
(6) Physical and Mental Health of the parties
(7) Evidence of Domestic Violence in the Home
(8) Evidence of a de facto custodian

The children have been residing with Grandma Edna for 4 months, along with their dog. They have enrolled in a new school and have probably started to adjust to a new life. Since Bobby is age 12, the courts may also talk to Bobby and see if he wishes to live with Grandma Edna or Grandpa Frank. However, courts put more weight on the child's wishes if the child is over 14, and Bobby is only 12 and Jillian is only 9. The court will balance all of the Best Interest factors to determine between Grandma Edna and Grandpa Frank which one of them would be better fit. However, since the Children are already residing with Grandma Edna and have started school nearby her house, the court will likely award custody to Grandma Edna.

The court will likely appoint a Guardian Ad Litem or CASA to help determine what is in the best interests of the children.

Visitation

After custody is decided, next the courts will look at whether to award visitation, which in Indiana is normally called "parenting time." Both Grandma Catherine and Grandpa Frank could file for Grandparent

visitation. Grandparent visitation is only awarded upon a breakdown of the marriage or death. Since Father was killed, it would apply here. In determining if Grandparent visitation should be granted here, courts look at:

(1) presumption that the parent has the child's best interests at heart;
(2) whether the custodial parent has granted any visitation at all; and
(3) whether the grandparent has proved that visitation is in the best interest of the children.

The analysis is going to be a bit different since none of the parties are parents, but instead are all grandparents. However, if the courts have a close relationship with both or either of the grandparents, then they will likley award grandparent visitation in this circumstance. Since the children basically lost both of their parents, they will want them to keep a close relationship with all of the grandparents if it is in their best interests.

3. Mediation

Mediation is the process by which both parites have decided to workout their issues through a mediator prior to having the judge decide the issues for them. Sometimes the mediator can be another attorney, but not always. The mediator is always an uninterested party in the case that is completely neutral. In family law cases, a lot of the times mediators are used in the dissolution of marriage to separate the property, come to an agreement on the custody of the children, and things of that matter. The mediator is not the judge, but simply helps the parties resolve their issues outside of court.

The benefits to mediation are that it is a lot cheaper and more efficient than litigation. The cons to mediation are that you still have to have the judge sign off on the agreement, and that mediation does not always work. Sometimes parties may still end up on a court battle when mediation fails.

INDIANA ESSAY EXAMINATION
QUESTION 2
July 2014

Ben, Chad, and Dan shared an apartment leased from their Landlord and located at 3 Oak Street in Blue County, Indiana. All three tenants signed the one-year lease for the apartment. Two months before the lease expired, a grease fire seriously damaged the kitchen. Ben and Chad, who had been planning to move when the lease expired, moved immediately after the fire and did not notify the Landlord of their new addresses. Although they moved to different addresses, Ben and Chad are still friends. Dan stayed in the apartment.

Before the lease expired, Landlord filed a complaint in the Blue Circuit Court naming Ben, Chad, and Dan as defendants. The complaint sought $50,000 in damages arising out of the kitchen fire. The clerk of the court sent copies of the complaint and the summons by certified mail, return receipt requested, to each of the three defendants at the 3 Oak Street address.

None of the defendants picked up the certified mail and each mailing was eventually returned to the clerk's office unclaimed. The Landlord then paid the additional fee to have service by the Blue County Sheriff on each defendant at the 3 Oak Street address. Dan was not home when the deputy sheriff attempted service. When no one answered, the deputy placed all three copies between the storm door and the front door of the apartment. The deputy followed up by mailing by first-class mail the complaints and summonses to each defendant at 3 Oak Street. Dan found the copies left inside the storm door but threw them all in the trash. A day later, Dan did receive his copy of the mailed summons and complaint.

Because Ben had left a forwarding order for his mail with the Post Office, he received the mailed copy of the complaint and summons. Ben then hired a lawyer who filed an appearance on Ben's behalf and an answer to the complaint denying liability and requesting a jury trial. Chad left no forwarding order with the Post Office. His mailed copy was returned to the Court as undeliverable.

The Landlord filed a motion for default judgment against Chad and Dan. At the hearing on the Landlord's motion, Dan did not appear, but Chad appeared because Ben had received notice of the hearing and told Chad about it. Chad objected to the motion because he had not received service of the complaint and summons.

The Landlord does not want a jury trial in Blue County, nor does he want the Blue Circuit Court judge to preside in the case.

1. Has the Landlord obtained sufficient service of process on each of the three defendants (Ben, Chad, and Dan)? Why or why not?
2. If the Landlord's service on any of the three defendants is insufficient, what methods of service are available and what method or methods would be preferred to achieve service?
3. What does the Landlord need to do to move his case to another county, and what are his chances of success?
4. What does the Landlord need to do to change the judge assigned to his case, and what are his chances of success?

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1. Service was perfected on both Ben and Dan, but service was not perfected on Chad. The Indiana Rules of Trial Procedure detail the available methods to perfect service of process. This is important because the Court's personal jurisdiction over the defendant is contingent on perfecting service of process. There are two methods that are used the most in Indiana. The first is certified mail service. The second is abode service. Another form is personal service, in which case an individual - typically the sheriff of the county - take the complaint and summons to the individual, usually at their home, and personally serves. That has not happened in this fact pattern, and so it will not be discussed further.

Landlord first attempted certified mail, where the complaint and the summons end up being mailed to the defendants after the plaintiff commences the action, usually by filing the complaint with the clerk, and also paying the filing fee and giving the clerk the requisite number of copies of the complaint and summons. The plaintiff will then choose the type of service they wish to use first. Here, the Landlord chose certified mail, by having the complaint and summons mailed by certified mail with a return receipt requested. If the defendant rejects the certified mail, then service is typically perfected at that point. However if the parcel of mail is returned as unclaimed, as it was here, then service has not been perfected and must be perfected in another way.

The Landlord then chose the second method, which is abode service. With abode service, a copy of the complaint and summons is taken to the defendant's last known address and left there in a conspicuous place. It could also be left with an individual of suitable age and mental capacity to hand over the complaint and summons to the defendant. The process server then must follow up by mailing a copy of the complaint and summons to the defendant by first class mail, postage prepaid. Here, the Sheriff went to the last known place of residence and left all three complaints and summonses there. He then followed up by mailing a copy of each to that address as well. While Dan found copies of the complaint at the apartment, he threw them in the trash. However, he received the copy a few days later by first class mail. At this point, service of process was definitely perfected upon Dan.

Because Ben had submitted a change of address with the Postal Service, he received the copy of the complaint and summons in the mail, after the Sheriff followed up by sending copies of each to each defendant by first class mail, postage prepaid. Ben did not need to receive the copy left at the apartment in order for service of process to be perfected on him. Moreover, Ben hired an attorney, who subsequently filed an answer to the complaint denying all liability and requesting a jury trial. There is nothing in the fact pattern to suggest that Ben challenged service of process, which he must do at the time of the answer, or must file a 12(b)(5) motion for insufficient service of process. Because he did not, he has effectively waived any defense on service of process. Thus, service of process has certainly and unquestionably been

perfected on Ben.

However, service of process has not been perfected on Chad. As stated above, Chad did not receive the certified mail. He also did not receive the copy of the complaint and summons that was left at the apartment because he had moved out from the fire. Nor did Chad receive the first-class mailed copy because he had not submitted a change of address with the postal service. According to the United States Supreme Court, service of process must be reasonably calculated to afford the defendant notice of the pending lawsuit. However, there is no way that it was reasonably calculated to provide notice to Chad of the impending lawsuit. The kitchen fire - whether the tenants' fault or not - caused extensive damage to the apartment - "seriously damaging the kitchen." A kitchen is certainly a major part of an apartment, and so this would have likely rendered the apartment uninhabitable. Ben and Chad decided to move then. Delivering the complaint and the summons to the same address that has been rendered uninhabitable by fire is certainly not a reasonable attempt to provide notice to Chad of the impending lawsuit. Thus, service of process has not been perfected against Chad - despite the fact he showed up for the default judgment hearing.

2. There are two methods that the Landlord can still use to perfect service of process on Chad. First, Chad showed up to the default judgment hearing. Simply get a copy of the complaint and a summons and have a sheriff's deputy hand them to Chad in person at the courthouse. Service of process has definitely been perfected using that method.

Another method that the Landlord can use is service by publication. This is typically known as the "last resort" method of perfecting service of process. Under service by publication, the Landlord will need to publish, in a newspaper of general circulation in the county where the lawsuit is filed, a copy of the summons. It must include the Defendant's full name, the Plaintiff's name, the contact information of Plaintiff's attorney, and a brief description of the lawsuit. This must be published three times. The second publication cannot be published less than 14 days after the first, and the third publication cannot be published less than 14 days after the second. When it has been published for the third time, service of process by publication is perfected against the defendant on that date. The plaintiff must also file something with the Court attesting to the fact that they followed the rules of service by publication by publishing the summons with the appropriate information in a newspaper of general circulation in the vicinty of where the lawsuit has been filed. Once this has occurred, the clock starts ticking as to when defendant must answer - within 21 days. If the defendant does not answer within this time period, then the Landlord can move for default judgment on Chad.

3. The Landlord will have a difficult time changing venue in this matter, because venue is proper in Blue County. As a matter of rule, venue is proper where all of the defendants live, or if not all of the defendants live in the same county, then where a majority of the defendants live. While we know that Dan still lives in the apartment, and thus still lives in Blue County - where this lawsuit has been filed - we do not know whether Ben and Chad still live in Blue County. It might be possible that Ben and Chad have moved to an

entirely different county in Indiana, thereby making venue improper. However, another proper place for venue is where real property is located when the case is about that real property or improvements upon it. Here, the apartment is located in Blue County, and so venue is certainly proper. The case arises out of damages from a grease fire in an apartment located within Blue County, and so there should not be any problem with minimum contacts or statutory provisions even if Ben and Chad have moved out of Indiana entirely. This would then render Dan as the only indivdiual still living in Indiana. Because the apartment that is the center of this action is located within Blue County, venue is proper.

It is rather difficult to change venue in a case from a proper venue to an improper venue. The Landlord will have to file a motion seeking change of venue from a proper venue to a different county. He will have to provide notice and there will likely be a hearing. The Landlord will have to show that there is generally not any way that the Landlord can get a fair trial within Blue County. The Landlord will need to show prejudice or bias on the part of the community at large, such that no jury could be impartial. This is exceedingly difficult to do, and can take a long period of time. However, if Landlord owns many apartments in Blue County, and generally has a poor reputation, he may be able to persuade a judge that he cannot receive a fair trial in Blue County.

4. The Landlord will have success on wishing to change the judge assigned to the case, if he does so within the time limit prescribed by the Indiana Rules of Trial Procedure. The Indiana Rules allows a party to change judges once, as a matter of right. However, he must submit such a motion within 10 days of the closing of the merits. Typically, this occurs when the answer is filed. So long as he does this, the judge will be changed in one of two ways. First, is by mutual agreement of the parties. Second, if the parties cannot agree, a panel of judges will determine who the judge will be.

INDIANA ESSAY EXAMINATION
QUESTION 3
July 2014

In December 2013, an agent of the Indiana Department of Environmental Management (IDEM) observed a trash truck unloading waste into a building located in Yellow County, Indiana.

When the agent entered the building, she was greeted by Gus Franklin. The agent identified herself as an IDEM agent, asked for and obtained permission to investigate and, while there, observed various forms of solid waste, including hazardous waste, being loaded into tractor trailers for transport. She also observed a rat. The agent did no further investigation of the rodent issue.

The agent asked Franklin if he owned the trucks or building. Franklin truthfully replied, "Yes, I personally own it all." The agent then asked to see Franklin's permit to operate the facility as a transfer station of waste materials. Franklin produced a valid permit to operate a solid waste transfer station in the location at issue, but relayed that his later application for a permit to transfer hazardous waste is currently pending before IDEM.

On Monday, January 6, 2014, IDEM mailed Franklin a Notice of Decision (NOD) informing him that: 1) his permit to operate as a transfer station for solid (non-hazardous) waste was being revoked immediately because of Franklin's failure to implement an effective rodent control program and 2) his request for a hazardous waste permit was denied because he engaged in the unlawful activity of transporting hazardous waste without a permit.

Assume that consistent with the relevant law, the NOD states that IDEM's determination is final unless IDEM "receives a written appeal during regular business hours (Monday - Friday, 8 a.m. to 4 p.m., Eastern Time) within 18 days of the NOD's mailing date" by any of the following methods: a) Personal delivery; b) U.S. mail (first class, registered, or certified); or c) Fax." On Thursday, January 23, 2014, at 3:58 p.m. Eastern Time, Franklin faxed a written document to IDEM stating he was appealing both decisions and requesting a hearing before an Environmental Law Judge.

Assume the Indiana Administrative Orders and Procedures Act (AOPA) applies.

1. Is there a way for Franklin to continue operating while the appeal is pending? If so, describe what he must do to continue to operate and describe any showing or burden he must meet to obtain this relief.

2. Outline the procedures Franklin should employ at the agency level to challenge IDEM's Orders as to his existing solid waste permit and the hazardous waste permit he sought.

3. Briefly describe the issues Franklin could raise in his appeal.

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3)

1. Stay of Enforcement

In this situation, IDEM will likely be deemed to be acting in its adjudicative capacity. An administrrative agency, such as IDEM, will be deemed to be acting in its adjudicative capacity because the mattter involves a specific person (i.e., Franklin) and is mostly retrospectiive in nature. The agency issued a revocation of his permit, which is retrospective, and, while it may be argueed that the denial of his request for the hazardous waste permit is prospective in nature, given that it is specific to him and that the reason for denying the permit was based on an action particular to him, it will likely be considered adjudicative. As a general rule, when an agency issues an order, the party adversly affected can seek to have a stay of the enforcement of the order. In order to obtain a stay, the adversly affected party (here, Franklin) is required to petition the "ultimate authority" of the agency to stay enforcement of the order until it can be appealed. It is question as to whether the NOD should be considered an "order", however, assuminng that it is, Franklin would have to file a petition requesting a stay on the enforcementt of IDEM's determination until the hearing and review process has been completed. In order to be successful, Franklin will have the burden of showing that he is reasonably likely to succeed on his challenge, that the harm he will suffer if enforcement is not stayed outweighs the harm that would result if enforcement were permitted and he would also have to post adequate security (i.e., a bond).

2. Challenge to IDEM's Order

Under AOPA, in order to challenge an agency's order before it becomes final, the adversly affected party must file a complaint with the agency. The agency is then required to set a hearing on the matter involved, at which an administrative law judge will preside. In an agency acttion, the parties are afforded the traditional means to seek discovery that can be used in court (e.g., depositions, interrogatories, production, etc.) While the ALJ does not have enforcement powers, once the ALJ has made a ruling, if it is not complied with, a party can seek enforcement in court. After the discovery and the presentation of evidence at the hearing the ALJ will issue a purposed "order", which is required to be based on the record and on substantial evidence. If the party receiving an adverse ruling in the purposed "order" objects, it must file an objection with the agency's "ultimate authority" within 15 days (and must also otherwise be incompliance with AOPA). The "ultimate authority" is the board, person or other group that is authorized by the legislature to exercise the authority granted to the agency by the legislature. In this case, has filed his complaint with IDEM and, after which IDEM will be required to hold a hearing on the matter. This will allow Franklin to seek discovery, and will also allow him to file traditional pleadings that he would be permitted to file under the Trial Rules. As outlined above, if the purposed order issued to Franklin is adverse, he would then need to file an objection with IDEM's ultimate authority and would also need to

otherwise comply with the procedures set forth in the order. This would preserve Franklin's right to ultimately appeal in court if the final order issued by IDEM's ultimate authority is to revoke and deny his permits. Note that, upon the filing of an objection, the ultimate authority is also required to give Franklin a chance to submit pleadings and, in certain circumstances, present additional evidence.

3. Issues Franklin Could Raise

a. Franklin could argue that issuance of the NOD violated his due process because it was issued before a hearing on the matter was convened.

b. Franklin could also challenge the basis on which the NOD was issued. The facts seem to indicate that IDEM's actions resulted from the IDEM agent's search of his premises. He could argue that the search itself was not valid, and constituted "agency action" as opposed to "mere investigation".

c. Franklin could also argue that the NOD was not based on "substantial evidence". The revocation of his permit set forth in the NOD appears to have been issued based solely on the IDEM agent's observation of a single rat in his facility. This does not appear to be enough to be considered "substantial evidence". In additon, the denial of his permit to transfer hazardous waste seems also to have been based solely on the IDEM agent's observations. Further, there are not facts to indicate that the IDEM agent actually saw him "transfer" hazardous waste in violation of applicable law - the fact that the hazardous waste was loaded on the trucks does not mean that it was transferred. In fact he acknowledged that his permitt to transfer the hazardous waste was pending, which seems to indicate that he may have been waiting to transfer it until after the decision on the permit was final.

INDIANA ESSAY EXAMINATION
QUESTION 4
JULY 2014

Jim and Kara were married in 2006. They had no children together. Jim had one child, Sam, from a prior marriage. Kara had one child from a prior marriage, Lisa.

At the time of the marriage, Jim had $8,000,000 in assets and Kara had $200,000. They executed a prenuptial agreement stating neither would receive any assets from the estate of the other for any reason and they waived all rights to make any claims against the other's estate. For purposes of your answer, assume the prenuptial agreement is valid.

In 2009, Jim used his assets to purchase a House for $2,000,000. At the time, Jim was involved in several risky business ventures. His realtor advised him to put the House in Kara's name only and then later, when Jim retired, they could put the House in their joint names or in Jim's name. Kara agreed that would be a good idea, and the House was titled in Kara's name only.

Kara died July 1, 2014. At the time of her death, Jim and Kara had no joint assets. Their respective assets (and their values) were the following:

Jim: Cash ($800,000) and Stocks and Bonds ($3,500,000)
Kara: Cash ($600,000) and House ($2,500,000)

After the marriage, Kara made a Will that was properly executed, acknowledged, and witnessed under Indiana law. She appointed Jim Personal Representative and left her assets as follows:

1. Twenty-five percent (25%) to County Church
2. Seventy-five percent (75%) to my daughter, Lisa

After the purchase of the House, Kara decided to change her Will. She drew a line through the bequests to County Church and Lisa. In the margin she printed "See Exhibit A." She signed her name in the margin under "See Exhibit A." She then prepared a document entitled Exhibit A and took it to her neighbors, the Smiths, to sign as witnesses. She said to them, "Please sign this as witnesses," and they signed Exhibit A. The following is all of the language on Exhibit A.

EXHIBIT A

5% to County Church; 35% to my daughter, Lisa; and 60% to my husband, Jim

WITNESS: /s/ John Smith WITNESS: /s/ Sarah Jane Smith

1. Jim would like to receive one-half of the House and sixty percent of the balance of Kara's estate. What cause(s) of action should Jim pursue, if any, and what are his chances of success?
2. Identify what assets each potential heir or legatee will receive and state why.
3. Should a Federal Estate Tax Return be filed in Kara's estate? Why or why not?

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4)

Issue 1: Which Will is Valid?

Under Indiana law, a will must be signed by the testator and be acknowldeged in the presence of two disinterested witness who then must sign in the presences of the testator and each other. A valid will also requires the testator to be 18 or older, of sound mind, and have testamentary intent, and testmentary capacity. Kara's first will is valid. There may be a problem with Kara's second will. A will can be revoked by physical act or subsequent instrument. In this instance, Kara attempted to revoke her by subsequent instrument; however, she failed to sign the subsequent instrument. In additon, Kara make no acknowledgement to her neighbors that this was her will. Becasue Kara did not follow the proper formalities, her second will is not a valid rejection and her first will remains intact. There is a presumption that a person who intended to revoke a prior will and replace it will a new will, but is unable to or the subsequent will is invalid would prefer use of the first will over intestacy.

Issue 2: Jim's Claim

Jim would need to file a cause of action to have the prenupital agreement set aside and a cause of action to have the second will enforced. Jim could argue that by creating a second will Kara intended to rescind the prenuptial agreement. Jim has two major issues with his claims agaisnt Kara's estate. The first issue is the prenupital agreement. A prenuptial agreement waiving all rights to take from a spouse's estate is valid so long that is executed voluntarily and both parties have disclosed all of their assets. As the facts indicate, the agreement between Jim and Kara is valid and Jim cannot make any claims against the estate. Jim's second problem is that Kara's second will is not valid so it cannot be used. This means that her first will will govern the distribution of her estate. For both of these reasons, Jim's claims against the estate will not be successful. Jim will take nothing from the estate becasue he validly waived those rights.

For purpose of explanation, had Jim not created the prenuptial agreement he could have elected to take against the will as a subsequent surviving spouse and he would have been entitled to a survivor's allowance of $25,000, 1/4 of the value of real estate minus any liens or encumberaces and 1/3 of the personal property in Kara's estate. This would amount to $25,000 survivor's allowance, $625,000 for the house, and around $191,666 in personal property ($600,000 - $25,000 = $575,000/3).

Issue 3: Asset Distribution

At her time of death, Kara's estate consisted of the house that was solely in her name valued at $2.5 million dollars and $600,000 in cash. Based on Kara's first will, her daugher Lisa will be entitled 75% of her estate which is $2,325,000. The remainder 25% of the estate will go to the County Church.

The Indiana Intestacy statute does not apply in this instance because there was a valid will. However, if the

statute did apply, and the prenupital agreement was enforced, Kara's entire estate would pass to Lisa assuming Kara was not survived by either of her parents. If the prenuptial agreement was not enforced, under intestacy law, Jim would receive 1/4 of the net value of the real estate minus any liens or encumberances, 1/2 of the personal property, and the $25,000 survivor's allowance. The rest would pass to Lisa (3/4 of real estate, 1/2 personal property minus survivor's allowance.

Issue 4: Estate Tax

An estate tax need only be filed when the amount of the net estate is greater than $5.34 million dollars. The value of Kara's estate is $3.1 million dollars prior to any administrative or funeral expenses so no estate tax will be required. However, if Kara has any unused portion of her $5.34 million Lifetime Gift Exclusion and Jim wishes to obtain the amount left over, an estate tax will need to be filed though no tax will be due.

INDIANA ESSAY EXAMINATION
QUESTION 5
July 2014

Eighteen-year-old Fort Wayne, Indiana resident Zoe Rosewater won the nationally televised singing competition, "American Rocker." Shortly thereafter, Zoe and music industry mogul Guy Selflove appeared at a well-publicized joint press conference and announced that Guy would act as Zoe's booking manager for the sole purpose of booking a concert location for Zoe in Fort Wayne.

In May 2014, Zoe found out that Guy had booked her for two theater concerts in August. One theater was located in Fort Wayne. The other theater was located in Evansville. Each theater owner had seen the Zoe/Guy press conference.

When Zoe confronted Guy, he confirmed that he booked both the Fort Wayne and Evansville performances. Zoe told Guy she would perform in Fort Wayne, but not at the Evansville theater. Despite their differences, Zoe agreed to have Guy act as her booking manager for all future concerts. On June 1, Zoe and Guy held another well-publicized joint press conference announcing Zoe had made Guy her booking manager to secure concert locations. Privately, Zoe instructed Guy to book only locations holding 6,000 or more seats.

On June 15, Guy booked Zoe at a 500-seat theater in Bloomington and a 400-seat theater in Terre Haute. Zoe later found out from friends attending college in Terre Haute that Guy owns the theater in Terre Haute.

Zoe does not want to perform at the Evansville, Bloomington, or Terre Haute locations. Zoe fired Guy, hired a new booking manager, and quickly obtained contracts for far more lucrative locations on dates that conflict with the Evansville, Bloomington, and Terre Haute performance dates. Each of her new contracts provides that Zoe need not perform if the conflicting performances in Evansville, Bloomington, or Terre Haute cannot be cancelled.

Assume Indiana law applies.

1. Identify any legal relationship(s) between Zoe and Guy, the role of each person in the relationship(s), and how any such legal relationship was formed.

2. Is Zoe obligated to perform at the Evansville, Bloomington, and Terre Haute theaters? For each theater, state why or why not.

3. Identify and discuss any remedy(ies) Zoe has against Guy.

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5)

1. Relationship Between Zoe and Guy was a Agency Relationship

A agency relationship is formed when one, the agent, agrees to be subject to the control of and act for the osle benefit of the principal. an agency relationship is formed when three elements are met (1) Manifestation of Consent (2) Acceptance of control by the agent and (3) the prinicpal has a right to control. Here the agency relationship was formed when Guy agreed to be Zoe's booking manager for concerts. Guy Selflove gave an announcement that he was her booking manager and agent. A manager is generally someone who works for another person, and in their best interest. Additionally it was a "well-publicized joint-press conference" where the both agreed and told the world that Guy was Zoe's agent.

The Agency relationship is a fiduciary relationship that he obligation and rights required of each party. The agenct has the duty to:

- Act solely for the benefit of the principal
- Act with reasonable case and diligence
- Act with the utmost good faith and loyalty
- Obey the instructions of the principal
- Duty to disclose of all material facts
- Duty to not self-deal
- Safeguard trade secrets and trademarks
- Not compete

Additionally the agency relationship places an obligation on the principal of:

- Duty to Reimburse for expenses related to the agency
- Duty to Indemnify for acting within the agency relationship
- Duty to Compensate
- Duty to Provide For Injury During the Agency Caused by the Agency

2. Zoe is obligated to perform at Bloomington, but not Evansville or Terre Haute

An agent can bind its principal when it has the authority to do so. There are two types of authority: (1) Apparent and (2) Actual Authority. Actual authority is when the agent is given the power to act by the prinicipal explicitly. Apparent authority is when the principal, by word or conduct, holds out to a third party that the person is his agent. When acting within their authority or specificaly placed in a situation by

the principal, the agent can bind the principal legally to agreements.

You can have general and specific agents. If the agent is not a general agent though, the third party generally must investigate to see the scope of the agents authority.

Additionally, when the act is outside the authority, the Principal can ratify acts of an agent (except illegal activities). Ratification requires (1) an act outside of the agent's authorty, the principal is informed on the acting with all the material facts, and the accepts the benefits of the agents acts.

At the two press conference, it was held out to the world that Guy is her booking manager. She was present at the first press conference which made his her agent to the world for that specific purpose. Zoe can be said to approve these statements by guy through silence. This is when Guy booked the Evansville and the Fort Wayne concerts.

Later, at the second well-publizied conference, Guy's agency scope authority was expanded. Again, Zoe can be said to approve these statements by guy through silence. It was after this that he booked the venues in Terre Haute and Bloomington, absent her instructions to the contrary.

A. Bloomington Zoe is bound to perform

Silent statements to a agent by the principal will not be limiting on thir parties dealing with that agent without knowledge. Blomington at this time beleived that Guy had the authority to book concerts in general. Zoey will be bound to play these concerts even though she told him not to book a type of venue this small.

B. Zoe is not bound to perfor at the Terre Haute Location or Evansville

Zoe will not be bound to perform at Guy's location because he violated his duty of self-dealing by bookingthis location contrary to her wishes. He entered this contrat knowing it was invalid.

One could argue that Zoe was bound to perform in Evansville because she ratifies what Guy did when she let him stay on as her manager. However, she did not ratify the and accept the benefit of the location concert specifically. Moreover, Zoe can argue that this was outside the scope of guy's agency and that Evansville knew that by the well publizied conference.

III. Zoe Remedies Aganist Guy

Zoe can sue Guy for breach of his fiduciary duties and obtain the damages resulting for these performance bookings. Specifically, she can obtain an order for:

- The booking of the Bloomington location because it violated his duty to obey her instructions and she will be required to play at this location. This means he violated his duty of implied warranty stating he had the scope of authority to make the contract and can be liable on the contract.
- Second, he violated his duty of self-dealingby booking his own location of which he couldbe found liable.
- Last, he double booked the terre haute and evansville locations, which could hurt her reputation. However, if she is not required to perform then she will find it hard to recover against Guy. However, this was also a duty of his implied warranty because he may have made an explicit representation to evansvill that he had the authority.

INDIANA ESSAY EXAMINATION
QUESTION 6
July 2014

The Blue Community School Corporation operates the public schools in Blue Township, Indiana. Under the current Indiana school voucher statute, approximately 80% of the school corporation's students obtained vouchers that they are using to attend private schools. Under current law, only students from families with incomes below a statutory threshold are eligible to receive vouchers.

Because so many students are using vouchers, the public school corporation had only 200 students remaining in all grades, and it could no longer afford to operate because state funding is based on enrollment. The school board explored having Blue Community School Corporation students attend schools in adjacent school districts, but the neighboring districts opposed that proposal, stating that they were overcrowded.

The school board then voted to ask the local state representative to introduce legislation to address Blue Community School Corporation's problem. The state representative introduced a bill giving the State School Superintendent authority to exempt students who were currently attending schools in the Blue Community School Corporation district from the income limits applying to vouchers. The bill stated that the State Superintendent could exempt Blue Community School Corporation students from the voucher income limits if she found that doing so would be for "good cause." If the State Superintendent granted the exemption, the remaining Blue Community School Corporation's students would be eligible for vouchers even if they did not meet the statutory income guidelines.

The General Assembly passed the bill, and it became law when the Governor signed it. The bill did not address any other school corporations.

The school board then voted to close the Blue Community School District (assume this action is not prohibited by statute). This decision left private schools as the only remaining option for the 200 students who were previously enrolled. Without a voucher, the families of those children would have to pay for private school enrollment. The State School Superintendent stated publicly that she considered these circumstances "good cause" and would approve waivers for all Blue Community School District students to obtain vouchers.

1. List and describe all claims that could be made under the Indiana Constitution challenging:
    a. the statute,
    b. the school board's decision to shut down the schools, or
    c. the State Superintendent's decision to waive the income limit for vouchers.

2. As to each claim you have listed in response to question 1, state who (if anyone) would have standing to bring the claim and why that person or entity would have standing.

Indiana State Board of Law Examiners

Question: 6
Exam Name: INBar_7-29-14_PM

6)

Question 1

a. The Statute

1. A claim can be made that the statute is an unconstitutional special law.

The Indiana Constitution prohibits special laws that are specific rather than general in their application. In analyzing whether a law is so prohibited, there are three considerations: 1) does the law apply only to a specific jurisdiction, 2) is the subject matter of the law specifically prohibited from being the subject of a special law (there are 16 prohibited categories), and 3) is the law justified based on the special circumstances or problems unique to the particular jurisdiction.

First, it is facially evident that the statute specifically applies only to Blue Community School Corporation and is therefore a special law. Second, the State Superintendent's authority over voucher income limits is not a prohibited subject for special laws. The question is therefore whether the statute is justified based on circumstances unique to Blue Community School Corporation. While it is true that the statute was motivated by the circumstances in Blue Township, it is not at all clear that this problem is limited to Blue Township. Further, because the problem in Blue Township arises under a generally applicable statute, it will be difficult to argue that Blue Township is therefore sufficiently unique to justify a special law.

For the foregoing reasons, the statute is likely unconstitutional as a special law.

2. The claim can be made that the statute violates the Indiana Constitution's equal privileges and immunities clause.

A statute that draws a distinction between classes of persons violates the equal privileges and immunities clause of the Indiana Constitution unless it is reasonably related to an inherent characteristic of the class and is applied equally to all similarly situated persons. However, courts give great deference to the General Assembly in this area.

In this case, the statute treats Blue Community School Corporation students who do not meet the voucher income limits differently from students of other school districts. There is no inherent characteristic of families in Blue Community School Corporation that justifies this disparate treatment. Further, the statute is facially not equally applicable to all Indiana students who do not meet the voucher income limits. Despite the deference normally accorded to the General Assembly, the facts of this case seem particularly egregious.

For the foregoing reasons, the statute is likely unconstitutional for violating the equal privileges and

immunities clause.

3. The claim can be made that the statute violates the separation of powers by vesting legislative authority in the executive branch without clear guidance and standards.

Ordinarily, legislative decisions are restricted to the General Assembly and executive power is granted to the executive branch. Nonetheless, the General Assembly may delegate some authority to the executive branch. However in doing so, the General Assembly must articulate clear standards by which this authority is to be executed.

By failing to articulate how the State Superintendent is to determine "good cause" or even what that phrase means, the General Assembly has improperly delegated legislative authority to the executive branch in violation of the Indiana Constitution.

b. The School Board's Decision to Shut Down the Schools

The Indiana Constitution requires that every student be provided a free public education. The shutting down of the schools is a violation of this requirement. Though the School Board may argue that the students, once the voucher limits are waived, are still able to receive a free education, this alone will not remove the government's constitutional obligation to provide an education.

c. The State Superintendent's Decision to Waive the Income Limit for Vouchers

As mentioned above in part a, the statute upon which the State Superintendent's authority rests is unconstitutional. Therefore, all actions taken under that authority are similarly invalid. If, however, the statute were to be upheld as constitutional, the State Superintendent's decision would be within its authority under a constitutional statute and therefore there would be no basis under the Indiana Constitution for challenging it (though there might be claims that it is an improper adjudication or rulemaking exercise of an administrative body).

Question 2

The Indiana Constitution by itself does not create a private right of action for violation of the Constitution. Nonetheless, where a cause of action already exists, standing may exist.

a. The Statute

Any student outside of Blue Community School Corporation, who applies for a waiver of the voucher income limit to the State Superintendent and is denied under the statute would (after exhausting their administrative remedies) be able to appeal the denial in a trial court on the grounds that the statute on which the decision was based is unconstitutional for all of the reasons listed above in response to Question 1. Because the students would have suffered an identifiable harm (the denial of their waiver application), and because due process guarantees a judicial appeal from an administrative action, the students would

have standing to bring such a claim.

b. The School Board's Decision to Shut Down the Schools

Though all of the 200 students enrolled in the Blue Community Schiool Corporation would suffer an identifiable harm by the closing of the school, this alone would not give them a cause of action against the School Board for the deprivation of their rights.

c. The State Superintendent's Decision to Waive the Income Limit for Vouchers

Because no identifiable party is *harmed* by the waiver of the income limits (other than the taxpayers as a whole), no party has standing to bring a claim for this action.

MPT-1

Indiana State Board of Law Examiners

Question: 1
Exam Name: INBar_7-29-14_AM

1)

MEMORANDUM

To: Steve Ramirez

From: Examinee

Date: July 29, 2014

Re: Kay Struckman Modification of Retainer

Ms. Struckman seeks our advice concerning modification of her retainer agreement with existing clients to include a provision requiring binding arbitration to resolve future fee disputes. As way of background, her current retainer agreement allows annual increases in her fees. She would like to modify such provision so as to require binding arbitration for future fee disputes in exchange for forgoing annual increases in fees for two years. The languages she proposes is as follows: "Any claim or controversy arising out of, or relating to, Lawyer's representation of Client shall be settled by arbitration, and binding judgment on the arbitration award may be entered by any court having jurisdiction thereof." This memo considers the ethical consequences of such modification and thereafter address whether the proposed language referenced above would be legally enforceable to cover future fee disputes.

I. Ms. Struckman can ethically modify retainer agreements with existing clients to include a provision that requires binding arbitration to resolve future fee disputes

Franklin Rule of Professional Conduct 1.8 states as follows:

(a) A lawyer shall not enter into a business transaction with a client . . . unless:

(1) the transaction and terms on which the lawyer acquires the interest are*fair* and *reasonable* to the client and are*fully disclosed* and *transmitted in writing* in a manner that can reasonably be understood by the client;

(2) the client is advised *in writing* of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives *informed consent*, in a writing signed by the client, to the essential terms of the transaction and the lawyers role in the transaction, including whether the lawyer is representing the client in the transaction.

In *Rice v. Gravier Co.* the Franklin Supreme Court recognized that "modifying a retainer agreement with an existing client amounted to a business transaction . . . ." within the meaning of Rule 1.8.

Currently, there is no case precedent or ethics opinions in Franklin regarding whether modification of a retainer agreement is ethical. Thus, I looked to Columbia and Olympia authorities which may be persuasive on a Franklin Court, if asked to hear such issue. Although these decisions are not mandatory

authority under Franklin law, they are strong persuasive authority because both Olympia and Columbia have adopted identical language pertaining to Rule 1.8.

In 2009, in Sloane v. Davis, the Olympia Supreme Court used Rule 1.8 to uphold a retainer agreement that provided parties would use binding arbitration to resolve any disputes concerning the attorney's representation. Using Rule 1.8, the court looked to a series of factors:

1) Whether the terms of the business transaction (i.e. the arbitration process) were fair?

2) Whether the attorney made full dislosure in a manner easily understandingable to the client?

3) Whether the client was advised of the desirability of seeking independent legal advice about the transaction?

Although the client in *Sloane* argued that public policy warrants not permitting attorneys to arbitrate disputes with a client, the Olympia Supreme Court disagreed. Arbitration is not merely giving up the client's right to sue, but shifts the determination from the courtroom to an arbitrator. The court recognized that attorney cannot prospectively limit liability to a client, but the relevant retainer therein, did no such thing; it also did not prevent the client from filing a charge with the Board of Attorney Discipline.

Further, the Columbia State Bar Ethics Committee issued an opinion in 2011 that held a lawyer could not modify an existing retainer to include binding arbitration of any future malpractice claim. The concern of the ethics committee were small businesses and individual clients who do not have access to in-house counsel or other resources to be advised about arbitration. There is a similar concern here because Ms. Struckman identified she works namely with small businesses and individuals. The Committee explained that more than the differences between arbitration and litigation must be explained to a client, but the major implications such as lack of formal discovery or lack of jury or judge trial must also be disclosed. The court there was primarily concerned with the fact that the clause concerned*future malpractice* claims. This is distinct from Ms. Struckman's sought advice as well because she only seeks to have the arbitration clause pertain to fee disputes.

Based on the foregoing, it seems that Ms. Struckman can modify her existing retainer agreement. Although there is no mandatory authority under Franklin law pertaining to the ethical issues surrounding such modification, the above authority from Columbia and Olympia more directlly pertain to modifications relating to an attorneys' representation, not the fees associated with such representation. So long as we ensure that the proposed language and actions of Ms. Struckman comply with Rule 1.8, there should be no ethical issues in modifying such agreement. Thus we need to make sure the proposed language is: 1) fair and reasonable to the client and fully disclosed in a writing that is reasonably understood by the client; 2) the client is advised of the desire of seeking and provided the opportunity to seek the advice of independent legal counsel; and 3) the client provides informed consent.

As mentioned above the proposed language provided by Ms. Struckman is:

"Any claim or controversy arising out of, or relating to, Lawyer's representation of Client shall be settled by arbitration, and binding judgment on the arbitration award may be entered by any court having jurisdiction thereof."

In order to ensure that we can enforce this provision, it would be ideal to more narrowly tailor such clause. Rather than including language "Lawyer's representation of client" we should narrowly tailor the class to the

fee disputes (i.e. relating to,*fee disputes that arise from* Lawyer's representation of Client). Further, including language in the clause that advises the Client has received an informational brochure relating to arbitration, like in *Sloane*, and providing such brochure to the client will also ensure that they are informed of the implications of arbitration and what rights they would be waiving. Ms. Struckman should also personally disclose such information to her clients, including the abiliity to not have an increased fee for the two years following. Lastly, it is important that Ms. Struckman provide her clients with written notice that they have a reasonable amount of time to consult another attorney before signing the retainer. Although they may not actually do so, if Ms. Struckman provides them with a week to review the retainer it shows that she in good faith attempted to provide them with the chance to seek independent legal advice.

II. The modification will be legally enforceable so long as it provides notice, is explained, and meets the standards identified in *Johnson*.

Arbitration represents an appropriate and even desirable approach to resolving disputes. *Lawrence*. It is often a much speedier process and less costly to reach a resolution of a dispute. In addition, the rules of evidence and procedure are more flexible. Due to the implications of arbitration agreements, courts enforce such agreements only where the client was explicitly made aware of the existence of such provision and its implications. Without such notice and explanation, the client is not seen as having a real choice to enter into the agreement. *Lawrence v. Walker*.

In *Lawrence v. Walker*, the Franklin Court of appeals held that the binding arbitration of malpractice claims was not legally enforceable. The language included in such agreement read: "disputes regarding legal fees and any other aspect of our attorney-client relationship." The attorney sought to enforce the agreement to cover malpractice claims, but the court ruled that the agreement did not specify malpractice claims were the type of matters that should be arbitrated therein. 'The language of the agreement should be interpreted most strongly against the party who created the uncertaintly." Thus, the attorney bears the relationship of proving good faith of any agreement and is advised to draft such agreement clearly.

Further, courts will carefully scrutinize agreements to determine that the terms are fair and reasonable. *Johnson v. LM Corp.* In *Lawrence*, the court recognized that the attorney-client context was analogous to the employee employer context decided in *Johnson.* Employees (like clients) afterall are particularly dependent on, and vulnerable, to their employers and deserve safeguards to protect such interests. *Lafayette v. Armstrong*. There the court looked to 5 minimum requirement for a legally enforceable employment agreement requiring binding arbitration:

1) provide for a neutral arbitrator
2) provide for more than minimal discovery
3) require a written, reasoned decision (*see Lake v. Whiteside-*
4) provide for all types of relief that would otherwise be available in court; and
5) not require employees to pay unreasonable fees or costs as a condition of access to the arbitration forum

Thus, in order to ensure that the arbitration agreement is legally enforceable, our goal should be to ensure that the above five requirements can be satisifed should Ms. Struckman need to engage in arbitration. In order to do so, we could include along with the above mentioned language that the arbitration be before a neutral arbtirator and otherwise include language addressing the issue of minimal discovery and requiring a written, reasoned decision. However, we need not specifically include a provision that ensures all possible relief is provided for because review of the arbitrator's decision will recognize whether that requirement is met. Lastly, we must ensure that exorbitant fees and costs do not frustrate the client's ability to puruse their claims because if so, it may be deemed lawful.

III. Proposed Revised Arbitration Clause.

In the interest of clarifying the above discussion, it may be best for me to include a proposed arbitration clause that Ms. Struckman may adopt in order to ensure compliance with the ethical issues under Rule 1.8, and also ensure that the clause is legall enforceable.

"Any claim or controversy arising out of, or relating to, fee disputes that arise from Lawyer's representation of Client shall be settled by arbitration, and binding judgment on the arbitration award may be entered by any court having jurisdiction thereof. Arbitration shall take place before a neutral arbitrator, provide for more than minimal discovery, and the arbitrator shall issue a written, reasoned decision (*see Lake v. Whiteside*)."

In addition, as mentioned above, the client should be provided with a brochure that discusses the arbitration process and also given a reasonable amount of time (a week should suffice) to seek independent legal counsel if they so choose. Ms. Struckman should do her best as well to explain the impact of such clause to her clients.

Please see me if you have any additional questions regarding this matter.

Examinee

MPT-2

Indiana State Board of Law Examiners

Question: 2
Exam Name: INBar_7-29-14_AM

2)

Mr. Steven Glenn

Vice President of Human Resources

Signs, Inc.

Dear Mr. Glenn,

I am Henry Flnes, an attorney at Burton and Fines LLC, and I represent Ms. Linda Durham in her Family and Medical Leave Act (FMLA) claim against your company.

I write this demand letter to inform you of our position that Ms. Durham is entitled to the Family and Medical Leave Act (FMLA) leave that she requested from your company in July of 2014. This letter will outline our arguments in favor of her position and also respond to the arguments that you have put forth in favor of her probation and possible future termination.

Ms. Durham requested five days leave under the FMLA to accompany her terminally ill grandmother to her sister's funeral on July 7, 2014. Ms. Durham noted that the grandmother's sister passed away on July 6 and the funeral was on July 9. She also outlined the seriousness of the situation, briefly detailing not only her relationship with her grandmother but also the significant need that teh grandmother had of her care. (Email Correspondence). Your response on the same day denied Ms. Durham's request for leave and noted that her request was denied under FMLA regulations and that if she was absent without approval, this would be grounds for discipline and/or discharge. Despite this warning, Ms. Durham had no choice but to accompany her ailing grandmother on her trip and thus was gone from teh office for five days. You then sent her another message letting her know that she was placed on probation pursuant to your earlier warning and any future approved absences would be grounds for immediate termination.

It is our claim that Ms. Durham did not violate any FMLA guidelines and that in fact, it was your company who did not comply with the FMLA. Ms. Durham's grandmother qualifies under the FMLA guidlines as one who stands in loco parentis to Ms. Durham. It is also a fact corroborated by her cardiologist of 10 years that Ms. Durham's grandmother has a serious illness that will lead to her death in a few months and requires constant care. Ms. Durham is entitled to leave under teh FMLA to care for a family member in such a condition and even if she is not entitled to the full 12 allocated work weeks, she certainly gave the proper notice under teh circumstances when she was forced to leave work to assist her grandmother in travel.

For ease, we will discuss each of your claims against Ms. Durham and provide information and evidence

detailing how she in fact complied with the Act and was thus entitled to the leave.

First, you claim that the Act does not apply to care for grandparents. Although this is true, the term "parent" as defined in the FMLA means not only the biological parent of an employee but also "an individual who stands in loco parentis to an employee when the employee was a son or daughter." The issue of who qualifies as a parent was addressed by the 15th Circuit in *Carson v. Houser Manufacturing, Inc.* (*Houser*) where the Plaintiff appealed teh judgment of a district court holding that he did not meet the definition of parent under the FMLA. In that case, the court clearly articulated the meaning of the term in loco parentis as "a person who intends to and does put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities of legal process (such as guardianship, custody, or adoption). the court may consider factors such as teh child's age, the child's degree of dependence, or the amount of support provided by the person claiming to be in loco parentis. In *Carson*, teh court decided that the plaintiff did not meet the definition of in loco parentis because teh child did not come to live with the plaintiff until the child was 15 years old. He lived with the plaintiff approximately 3 years and even though he returned to the plaintiff's home for vacations and the plaintiff provided him financial support and moral advice, this was not sufficient to qualify him as in loco parentis.

In further articulating the in loco parentis test, the Court relies on the Phillips case, where a three year old child was raised by his grandfather when his father died and his mother became depressed and could not care for him. She did not relinquish legal rights and teh grandfather did not seek to adopt the child but the child lived in his home, teh grandfather enrolled him in school, took him to doctor's appointemnts, provided day to day financial support, etc. This was deemed sufficient by teh court to meet the in loco parentis standard.

This case is extremely similar to Ms. Durham. When she was six years old, she moved in with her grandparents due to her parents having drug abuse problems. All throughout grade school, Ms. Durham and her brother lived with their grandparents for months at a time until she turned 12 when both of her parents were sent to prison and she moved in with her grandparents. Six months after her parent's return, Ms. Durham and her brother were returned to her grandparents home for three months. When her parents came back, they moved in with teh grandparents as well and went back to prison a few years later. Although her grandparents never adopted Ms. Durham and her brother, they fed them, clothed them, gave them gifts on holidays, too, them to school, doctor's appointments, etc. The paid for extracurricular activities and attended school events. They also loaned the brother and sister money to get a car so they could go to school. All of these factors are sure to impress a court that Ms. Durham's grandparents were in loco parentis to her and her brother and thus, they qualify as a parent under the FMLA.

Second, you claim that even if the Act did apply to care for grandparents, it only applies to care

provided in a home, hospital, or similar facility, not to travel. This issue requires careful analysis of phrasing. Teh FMLA and teh Code of Federal Regulations requires that a serious medical condition be one that involves care provided in a home, hosptial, or similar facility. You claim that this does not extend to travel but it is difficult to imagine that one would only care for the seriously ill family member when they are confined to a room. In the event that they must travel, they certainly require the same, if not greater care, and thus the FMLA can be interpreted as applying to the taking care of the individual who needs this type of serious involvement.

Third, you claim that the Act does not apply to funerals. Although the Act does not apply specifically to funerals, it does apply to serious health conditions and an employee is entitled to leave to care for parents with serious health conditions. A serious health condtion, as defined by the FMLA, means "an ilness, injury, impariment, or physical or mental condition taht involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider." Ms. Durham's grandmother most certianly has a serious health condition. In teh affidavit provided by her cardiologist, Dr. Oliver, it is stated that Ms. Durham's grandmother has a cardiac condition and high blood pressure and in addition has been diagnosed with end-stage congestive heart failure which will lead to her death in a few months. Ms. Durham's grandmother cannot perform basic functions on her own (i.e. walk, bathing herself, taking medicaiotns, etc.) and she sues a wheelchair and oxygne. (Affidavit of Dr. Oliver).

The court has looked at what the FMLA term, "care for" means in this context. *Shaw v. BG Enterprises.* In *Tellis*, the court held that the FMLA required that there be some actual care, some level of participation in ongiong treatment of a seriousl health condition, and that the person giving the care must be in close and continuing proximitiy to the ill family member.

Ms. Durham's grandmother, along with having the power of attorney over her grandmother's health care decisions, attends to her with other family members and health care workers and has care for her for the past two months. Ms. Durham is therefore quite familiar with teh procedures necessary to keep her grandmother going on a day to day basis. Dr. Oliver has been caring for Ms. Durham's grandmother for the past 10 years which obviously qualifies as continuing treatment by a health care provider. The health care workers in her home as well go to show she has a seirous medical condition and yet she needed Ms. Durham to be able to travel to the funeral; there was no one else would could go. So even though a funeral and travel is not explicitly detailed, taking care of the parent with teh serious medical condition certainly is.

Fourth, you claim that Ms. Durham failed to give the requisite 30 days notice. The FMLA adresses notice in 29 U.S.C. §2612(e), entitled Foreseeable leave. The title alone is sufficient to state the first claim, that Ms. Durham's leave was not foreseeablea and thus is exempt from this requirement. The section states that if leave is foreseaable based on an expected birth or placement, the employer is required to give 30

days notice to their employee before the date of leave is to begin. However, there is an exception provided that state if the situation begins in less than 30 days from the time the employee needs the leave, they shall provide notice as is practicable. A death is certainly not foreseeable and thus there is no possible way that Ms. Durham could have given 30 days notice of her need to leave work. Therefore she falls under the exception. The same is true in the Code of Federal Regulations, which requires notice to be given as soon as practicable when 30 days notice is not practicable becasue of lack of knowledge of approximatley when leave will be required to begin, a change in circumstances, or a medical emergency. In addition, there is a requirement that an emloyee provide sufficient information for an employer to reaosnalby determine whether the FMLA may apply to the leave request. Ms. Durham did this in her initial email to your requesting leave, where she explained that she was raised by her grandmother and her care is needed to give medications and therapies. Upon hearing of her grandmother's sister's death, she notified you in a very practicable time, at the opening of the very next business day. Ms. Durham surely complied with the FMLA and Code of Federal regarding notice under the circumstances. Further, under the Code of Federal Regulations, employers covered by the FMLA as is your company are required to grant leave to eligible employees (as Ms. Durham is) to care for the employee's parent with a serious health condition.

Under teh FMLA Ms. Durham is required to a total of 12 workweeks of leave during any 12 month period in order to care for a parent if such parent has a serious health condition (FMLA). Not only should Ms. Durham be excused for the 3 unexcused days at work, she should be allocated a signifiant amount of time more to take care of her grandmother.

Therefore, for the above reasons, we demand that pursuant to FMLA guidelines, Ms. Durham be removed from probation and also that the probation be removed from her work record so that she will not be penalized in the future based on this issue. I look forward to your prompt response to our demands.

Respectfully,

Henry Fines, Esq.
Burton and Fines, LLC