

February 2020

MPT-2

Drafters' Point Sheet

In re Eli Doran

The MPT point sheet addresses the factual and legal points encompassed within this MPT. The point sheet presents the expected issues that might be addressed by an examinee in a thorough answer to the problem, but it should not be construed as a model answer.

In re Eli Doran

DRAFTERS' POINT SHEET

In this performance test, the examinee must draft the written closing argument following a hearing in which the petitioner seeks to annul a marriage and invalidate a will. The examinee's law firm represents petitioner Carol Richards, the recently appointed legal guardian of Eli Doran. Carol is Eli's niece. After noticing a decline in his cognitive abilities and consulting his family doctor, she placed Eli in a home operated by Paula Daws.

Carol sought legal help upon learning that Paula had married Eli and assisted Eli in executing a will leaving all his estate to Paula. Two months ago, after a hearing, the court found that Eli was incompetent as a matter of law and entered an order making Carol Richards his legal guardian. Carol then filed petitions to annul the marriage and invalidate the will. Yesterday, the court heard evidence on whether Eli had the capacity to consent to marriage when he married Paula Daws and whether he had testamentary capacity when he signed the will.

The File contains the memorandum from the assigning partner, an office memo on drafting written closing arguments, and excerpts of the hearing testimony of Carol Richards and several other witnesses: Dr. Bush, a forensic clinical psychologist who evaluated Eli; Paula Daws; Rev. Simms, the minister who married Eli and Paula; and Mary Daws Johnson, Paula's daughter and a witness to the will. The Library contains two Franklin cases, one defining the legal capacity to consent to a marriage and one addressing the standard for testamentary capacity.

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

I. OVERVIEW

The examinee's work product should be in the form of a written closing argument to the court. The office memo instructs the examinee that the purpose of the closing argument is to convince the judge, as the trier of fact, that the petitioner has satisfied all the elements or requirements of each claim and has done so by meeting the required burden of proof. The examinee should state the legal standards at issue, marshal the relevant evidence, and show how the evidence satisfies the proof requirements for each claim. In doing so, the examinee should show how the witnesses are credible or how the other side's witnesses are not credible. Examinees should be convincing and persuasive that the relief requested is fair and just without relying on theatrics or overly

emotional arguments. In addition, examinees should anticipate and rebut the likely arguments that Paula Daws will present, as there will be no opportunity to file a rebuttal.

Examinees are told to organize the closing argument one claim or issue at a time. The work product should include subject headings that succinctly summarize the reasons the court should take the position being advocated.

Examinees may choose whether to challenge the marriage first and then the will or vice versa. The evidence that proves the two claims is similar. For example, the testimony that Eli suffered from a disturbance in executive functioning may be used to show that he could not understand the nature of marriage as well as of a will. Examinees need not repeat the entire testimony for each issue, but they should refer to it in support of each issue. Examinees need to be attentive to the timing of the marriage one year ago, the execution of the will four months ago, and the findings made during the two visits to Dr. Bush, 21 and 8 months ago.

A. Facts

Carol Richards is Eli's niece by marriage. After Eli's wife, Janet, died four years ago, Carol visited Eli twice a month. Over time she noticed a decline in his cognitive functioning. She assisted him with his finances and found Vera Wilson to clean and cook for him. Despite these steps, Carol noticed a further decline. About two years ago, Eli's family doctor recommended that Carol find a place for Eli to live with assistance. Carol and Eli met with Paula Daws, who operates a home for those needing assistance in daily living. Carol helped Eli move into the home soon after the visit. Three months ago, Paula told Carol that she and Eli were married in January 2019 and that he had executed a will leaving his estate to her. Carol was surprised because she did not believe Eli was competent to do these things, and she began legal proceedings.

Following a referral from Eli's family physician, Dr. Bush, a forensic clinical psychologist specializing in cognitive disorders, saw Eli twice (on May 3, 2018, and again on June 21, 2019); she interviewed him and conducted several cognitive assessments. Dr. Bush concluded that Eli suffered from multiple cognitive dysfunctions, including severe memory impairment and a significant disturbance in executive functioning, such as the ability to plan, problem-solve, reason, or think abstractly. Eli's scores on the Mini-Mental State Exam (MMSE) decreased from 21 when Dr. Ricci, Eli's personal physician, had conducted the test, to 19 on May 3, 2018, and then to 17

at Eli's last visit on June 21, 2019. A normal score for Eli should have been at least 23. Based on the MMSE scores and other assessments, Dr. Bush found that Eli was incapable of abstract thinking as well as ordinary judgment or reasoning. He could not live alone, drive, or manage his medicine or his money. In short, Eli was significantly impaired in his ability to care for himself.

The following is a summary of the chronology of events:

- Four years ago, in 2016, Eli's wife Janet died. Shortly afterward, Eli saw his attorney and made a will leaving his estate to his church.
- About three years ago, in 2017, during an exam with his personal physician, Dr. Ricci, Eli's score on MMSE was 21 when it should have been 23.
- In January 2018, Dr. Ricci referred Eli to Dr. Bush. Around the same time, Eli moved into Paula Daws's home.
- In May 2018 (21 months ago), Eli's score on MMSE had dropped to 19.
- About one year ago (January 15, 2019), Eli married Paula.
- In June 2019, Eli saw Dr. Bush again; Eli's MMSE score had dropped to 17.
- Four months ago, on October 7, 2019, Eli signed a new will; shortly thereafter, Paula told Carol about the marriage and the new will.
- Two months ago, in December 2019, the court found Eli incompetent and appointed Carol as his guardian.

B. Legal Standards

A marriage conducted in accord with the licensing and officiating requirements of the Franklin Uniform Marriage and Dissolution Act (FUMDA) is presumptively valid. The presumption can be overcome only with clear and convincing evidence that one of the parties was unable to consent to the marriage because capacity to consent is required. The capacity to consent to marriage requires the ability to understand the nature, effect, and consequences of marriage and the duties and responsibilities it creates. It is measured at the time of the marriage. The higher standard of proof is required because of the constitutional protections to the right to marry. These standards are laid out in *In re the Estate of Carla Mason Green* (Fr. Ct. App. 2014).

Embedded in *Green* is *In re Marriage of Simon* (Fr. Ct. App. 2005). The court in *Simon* found that a woman lacked the capacity to consent to marriage because, having suffered four strokes, she was incapable of receiving or evaluating information and should not make any decisions for herself.

Moreover, she had no prior relationship with her would-be husband, who had been one of her health care aides. By contrast, in *Green*, a terminally ill woman was found to have the capacity to marry when medical personnel accepted her decisions regarding health care, decisions she should not have made unless she was capable of consent. In addition, Green had an understanding of what marriage is, had planned for a married life, and had had a two-year relationship with her spouse.

A valid will requires that the testator have testamentary capacity, meaning that the testator is capable of knowing the nature of the act he is about to perform, the general nature and extent of his property, the natural objects of his bounty, and his relation to them. The party contesting a will on a claim of lack of capacity bears the burden of proof by a preponderance of the evidence that the testator lacked testamentary capacity; a finding of legal incompetence alone is not sufficient. See *In re the Estate of Dade* (Fr. Ct. App. 2015). The time for measuring testamentary capacity is the time when the instrument is executed. *Id.*

In *Dade*, the trial court found that even if Dade was an alcoholic, he had testamentary capacity when he left intact the large gift to his natural children, gave smaller gifts to family and a longtime caretaker, and voiced an understanding of the size of his estate. The *Dade* case also noted that an appellate court will defer to determinations of witness credibility made by the trial court.

II. ANALYSIS

A. The challenge to the marriage

The presumptive validity of the Doran-Daws marriage can be overcome only with clear and convincing evidence that Eli was unable to consent to the marriage because of his impaired cognitive abilities. When he married Paula Daws, he was unable to understand the nature, effect, and consequences of marriage and confused marriage with people being nice or taking care of him.

Examinees should concede that Eli and Paula were married, thus creating the presumption of validity. A thorough answer might analyze the requirements for a marriage under FUMDA and acknowledge that Paula and Eli were married before a minister presumably licensed to perform marriages. They should concede that Rev. Simms believed that Eli had the capacity to consent to marriage. They should concede that since the marriage, Paula has been very happy, according to her daughter, and her minister testified that she was in love and that Eli brought her much

happiness. This evidence undercuts the supposition that Paula may have married Eli for his money due to her own debt. As the petitioner, Carol Richards bears the burden of rebutting the presumption that the marriage was valid and must do so by clear and convincing evidence showing that Eli lacked the capacity to consent to marriage.

While examinees should concede that no test of Eli's cognitive abilities was done on the date of the marriage, the evidence shows that Eli did *not* have the capacity to consent to marriage:

- Dr. Bush testified that in her professional opinion, Eli did not have the capacity to consent to marriage when he married Paula Daws.
- Dr. Bush is a forensic clinical psychologist and is the only witness with the training and ability to assess Eli's cognitive functioning and the only person to conduct numerous tests of his cognitive abilities.
- Dr. Bush's testimony is unrebutted by any expert in cognitive functioning.
- Dr. Bush is a disinterested witness: She did not conduct the exam for the purpose of litigation, but upon referral from Dr. Ricci, Eli's family doctor.
- Dr. Bush reviewed the medical records of Dr. Ricci. A year or so before Dr. Bush saw Eli in May 2018, Dr. Ricci had been concerned about Eli's forgetfulness. On some unspecified date, but before the first visit with Dr. Bush, Dr. Ricci diagnosed Eli as having dementia and recommended that Eli be placed in a location where his daily care and medication would be supervised. Dr. Bush relied on Dr. Ricci's records.
- Dr. Bush examined Eli on May 3, 2018, and June 21, 2019. She conducted several assessments, including the Mini-Mental State Exam (MMSE) and the Independent Living Scale. While a score of 23 would be normal on the MMSE, Eli scored 21 when Dr. Ricci conducted the MMSE earlier. Later, Eli's scores on the MMSE dropped to 19 and 17. When the Independent Living Scale was administered, Eli could not verbalize a reasonable understanding of a will or what to do in emergencies. Based on these assessments, her interviews with Eli, and her review of the family doctor's notes, Dr. Bush concluded that Eli suffered from multiple cognitive dysfunctions, including no ability to problem-solve, reason, or think abstractly.
- Even though Dr. Bush did not examine Eli on the date of the wedding, she did examine and test him eight months before the wedding and four months after. She also testified

that Eli's condition was permanent, progressive, and deteriorating. She doubted that he would have lucid periods, but if he did, he was not capable of exercising judgment. It is a reasonable conclusion that Eli did not have the capacity to consent to marriage eight months after the first exam.

- Eli told Dr. Bush that he was married to Vera Wilson, but he was not.
- Eli believed that his wife Janet was still alive. Eli's statement that he was still married to Janet supports Dr. Bush's conclusion that Eli suffered from poor executive functioning and could not reason or make judgments, such as to consent to marriage.
- If Eli truly believed he was married to Janet or to Vera, he would have been unable to marry Paula.
- Several facts undermine Rev. Simms's opinion that Eli had the capacity to consent to marriage. Simms lacks the professional qualifications to assess Eli's mental abilities, met Eli only twice, and did not conduct any standard assessments of Eli's abilities.
- Paula kept the marriage a secret for months, did not involve Eli's minister in the wedding, and did not invite Carol, his only relative. These facts create the suspicion that Paula knew that Eli did not have the capacity to consent to marriage.
- Eli does not understand the nature of marriage and what it entails but equates it with people being nice to him:
 - When asked by Rev. Simms why he wanted to marry Paula, Eli responded that "she was taking good care of him" and that "he loved her and the way she cared for him." These statements refer to the fact that Eli needed care and Paula provided that. They do not reflect the type of love associated with marriage.
 - On one occasion, Eli told Dr. Bush that he was married to Vera Wilson. He was not. Vera was the person who cleaned and cooked for him. Eli's statement shows that he equates marriage with people who are nice to him or take care of him.
 - Mary Daws Johnson testified that Eli agreed that he wanted Paula to have his stuff and that "[Paula] takes good care of me." Eli's response is another indication that he views Paula not as a wife but as someone who is nice to him and cares for him.
 - Unlike the situation in *Green*, in which the couple had a two-year relationship and engagement, Eli and Paula did not have a long-standing dating relationship.

- Eli’s situation is more like that in *Simon*, in which the marriage was annulled because the woman was unable to make decisions for herself after several strokes, and she and her spouse had no prior relationship—he was a medical assistant at the facility where she was a patient. See *In re Estate of Simon*, cited in *Green*.
- The wedding of Eli and Paula took place just days after Eli first said “we should get married” and not after a period of engagement and preparation for marriage.
- There is no evidence from Paula or any witness that Paula and Eli prepared for a life together or discussed what life would be like after marriage. There is also no evidence of any change in their lives after the marriage.
- Unlike the relationship in *Green*, the relationship between Paula and Eli was one of caregiver and care-receiver.

B. The challenge to the will

A valid will requires that at the time of the execution of the will, the testator possesses testamentary capacity, meaning that he is capable of knowing the nature and extent of his property, the nature of the act he is about to perform, the names and identities of the persons who are the natural objects of his bounty, and his relation to them. See *In re the Estate of Dade* (Fr. Ct. App. 2015).

Examinees should acknowledge that while the court found Eli legally incompetent two months ago, that determination is not proof that Eli lacked testamentary capacity at the critical time—when he executed the will on October 7, 2019. See *In re the Estate of Tarr* (Fr. Sup. Ct. 2011) (cited in *Dade*). Here, testimony by Mary Daws Johnson, a witness to Eli’s will, indicates that Eli showed some awareness of making a gift to Paula when he was asked “[D]o you want my mother to have your stuff when you die?” and responded, “Yes.”

Examinees should concede that no doctor or psychologist examined Eli at the time he executed the will. However, they should cite Dr. Bush’s testimony that on June 21, 2019, months before the will was executed, Eli already lacked testamentary capacity and that his condition was permanent and progressively worsening. Dr. Bush doubted that Eli would have lucid periods.

Note that on cross-examination, Dr. Bush admitted that Eli was “getting the care he needed” and that she did not notify Franklin Elder Protective Services about his situation, as she is required to

do if she believes that an elderly person is in danger of being abused or exploited. However, when she met with Eli, Dr. Bush was unaware of the marriage between Eli and Paula Daws.

The following evidence supports the position that Eli lacked testamentary capacity:

- Dr. Bush testified that in her professional opinion, Eli did not have testamentary capacity when he executed the will on October 7, 2019.
- Dr. Bush is a forensic clinical psychologist. She is the only witness with the training and ability to assess Eli's cognitive functioning. She and Dr. Ricci are the only persons to have conducted tests of Eli's cognitive abilities.
- Dr. Bush's testimony is the only expert testimony regarding Eli's cognitive abilities.
 - Dr. Bush is a disinterested witness: She does not take under either will, nor did she conduct the exam for the purpose of litigation.
- Dr. Bush examined Eli twice and conducted assessments. There was a significant drop in Eli's MMSE scores between the first visit in May 2018 and the second in June 2019. On the Independent Living Scale, Eli could not verbalize a reasonable understanding of a will. Based on these assessments, her interviews with Eli, and her review of Dr. Ricci's notes, Dr. Bush concluded that Eli suffered from multiple cognitive dysfunctions, including no ability to problem-solve, plan, or think abstractly.
- Two years before Dr. Bush saw Eli, Dr. Ricci had been concerned about Eli's forgetfulness. Sometime before the 2018 visit with Dr. Bush, Dr. Ricci diagnosed Eli as having dementia and recommended that Eli be placed in a location where his care and medication would be supervised. Dr. Bush relied on Dr. Ricci's records.
- Dr. Bush concluded that, as of June 21, 2019, Eli's condition had worsened. She opined that his condition was permanent and progressive and that he was unlikely to have periods of lucidity.
- Even though Dr. Bush did not examine Eli on October 7, 2019, the day of the execution of the will, she had examined him four months earlier and testified that at that time, Eli's condition was permanent, progressive, and deteriorating. He would not have been capable of having testamentary capacity on October 7, 2019.

- Dr. Bush's opinion is consistent with the many examples from other witnesses of Eli's lack of memory and cognitive abilities.
- Carol Richards observed many instances of Eli's cognitive decline:
 - He needed help cleaning and cooking at home.
 - He made numerous errors in maintaining his checkbook.
 - He repeatedly asked the same questions about her car and what she did for a living.
 - He failed to recognize her family.
 - Carol is a disinterested witness. She is not a blood relative likely to inherit from Eli, nor does she take under either will. Her observations of Eli are not colored by a desire to benefit from his death.
- The 2019 will was not the result of independent legal advice and counsel.
 - It came from an online kit.
 - It was prepared by Paula, who is also the sole beneficiary.
 - It was witnessed by Paula's daughter and son-in-law. Paula's daughter could benefit from the gift to her mother under the will.
 - It varied significantly from the will Eli drafted, with the assistance of legal counsel, after the death of his wife. In the 2016 will, Eli left his estate to his church.
 - A major change between the two wills is that Eli's cognitive abilities have declined to the point where he cannot live alone and cannot plan or problem-solve.
 - Another change from 2016 is that Eli is now a resident in Paula's home and has become dependent on her for his daily needs.
 - When Mary, Paula's daughter and a witness to the will, asked Eli whether he wanted her mother to "have [his] stuff," Eli said, "[Paula] takes good care of me."
 - His response is that of someone paying for or rewarding someone for a service.
 - His response was not unprompted.
 - Mary is not a disinterested witness because she stands to inherit from her mother, the beneficiary of Eli's 2019 will.
- Eli did not understand the nature and extent of his property.
 - Dr. Bush testified that Eli cannot manage his money, from which the court should conclude that Eli could not understand the nature and extent of his estate.

- Dr. Bush testified that she conducted the Independent Living Scale assessment and found that Eli could not pay a bill.
- Dr. Bush testified that Eli had no ability to plan, problem-solve, or think abstractly.
- Carol Richards testified to Eli's inability to manage his checkbook as of two years ago—long before his execution of the 2019 will.
- Paula testified that Eli said, "When I am gone, I want you to have it all." And "I want you to have what I have."
 - Eli did not make reference to his savings account.
 - Eli did not describe what he meant by "it all."
 - The context of his statement is Paula's prior statement that "you have a lot of stuff in your room."
- Mary Daws Johnson testified that she asked Eli if he wanted Paula to have his stuff when he died and he simply said, "Yes."
 - Eli did not describe what he thought would be included as "[his] stuff."
 - Eli's response was not unprompted. Rather, it was prompted by Mary, Paula's daughter, asking "[D]o you want my mother to have your stuff when you die?"
- Eli did not know the natural objects of his bounty (his heirs):
 - Eli sometimes believes that relatives who are long deceased are still living.
 - Eli twice told Dr. Bush that his wife Janet was still alive.
 - Eli told Dr. Bush that his parents were alive, even though they died years ago.
 - On one occasion, Eli told Dr. Bush that he was married to Vera Wilson, but he was not. Vera was the person who cooked and cleaned for him for a time.
 - In June 2019, when Dr. Bush asked Eli who Carol was, Eli did not recognize her as his niece but described her as his driver. Carol is his only living relative.
 - Eli is not like Matthew Dade, who was found to have testamentary capacity. Dade bequeathed most of his estate to his adult children and told others about his adult children and their families, even while executing a codicil providing for additional gifts to others. *In re Estate of Dade*.
- Eli did not know the nature of the act he was performing in executing the will:

- Carol Richards had seen the will Eli drafted, with the assistance of legal counsel, after the death of his wife four years ago. The 2019 will varied significantly from the earlier one in which Eli left his estate to his church, which he loved.
- When planning the wedding, Paula did not involve Eli's minister. Had she done so, that might have triggered some memory of his church as the object of his estate.
- Between the drafting of the 2016 will and the 2019 will, Eli's cognitive abilities declined to the point that he cannot live alone, plan, or problem-solve.
 - Eli has become dependent on Paula for his daily needs.
- Paula is not the natural object of Eli's estate.
 - Except for the marriage (which should be annulled), Paula is not related to Eli.
 - Eli's only living relative is his niece, Carol, who is related by Eli's marriage to her aunt Janet, not by blood to Eli.
 - When Mary asked Eli whether he wanted Paula to have his stuff when he died, Eli said "[Paula] takes good care of me." This is another indication that he may have thought he was paying for Paula's care or rewarding her for her care of him rather than providing an inheritance for Paula.
 - Paula's credibility should be challenged. She is an interested witness who has \$15,000 in credit card debt, which she could pay off with the money in Eli's estate.

C. Relief requested

Examinees should state the relief requested. They should conclude their argument by stating that because the clear and convincing evidence shows that Eli did not have the capacity to understand what marriage was, he was incapable of consenting to marriage, and that the marriage between Paula and Eli should be annulled. Examinees should argue that where the state-of-mind requirement for marriage is absent, the only appropriate relief is annulment.

Likewise, examinees should conclude that the evidence shows that more probably than not Eli did not know he was making a will, did not know the natural objects of his bounty, and did not know the extent of his estate. As a result, the will that Paula prepared and Eli signed in October 2019 should be set aside. The will that he executed four years ago, in 2016, will be valid, assuming there is no evidence to the contrary. A complete conclusion should remind the court that when the testator lacks testamentary capacity, the only just relief is to set aside the instrument.