THE MPT®

MULTISTATE PERFORMANCE TEST

July 2017 MPTs and Point Sheets

National Conference of Bar Examiners
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Contents

Preface

The Multistate Performance Test (MPT) is developed by the National Conference of Bar Examiners (NCBE). This publication includes the items and Point Sheets from the July 2017 MPT. The instructions for the test appear on page iii.

The MPT Point Sheets describe the factual and legal points encompassed within the lawyering tasks to be completed. They outline the possible issues and points that might be addressed by an examinee. They are provided to the user jurisdictions to assist graders in grading the examination by identifying the issues and suggesting the resolution of the problems contemplated by the drafters.

For more information about the MPT, including a list of skills tested, visit the NCBE website at www.ncbex.org.

Description of the MPT

The MPT consists of two 90-minute items and is a component of the Uniform Bar Examination (UBE). It is administered by user jurisdictions as part of the bar examination on the Tuesday before the last Wednesday in February and July of each year. User jurisdictions may select one or both items to include as part of their bar examinations. (Jurisdictions that administer the UBE use two MPTs.)

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

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

The MPT is designed to test an examinee's ability to use fundamental lawyering skills in a realistic situation and complete a task that a beginning lawyer should be able to accomplish. The MPT is not a test of substantive knowledge. Rather, it is designed to evaluate six fundamental skills lawyers are expected to demonstrate regardless of the area of law in which the skills are applied. The MPT requires examinees to (1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for applicable principles of law; (3) apply the relevant law to the relevant facts in a manner likely to resolve a client's problem; (4) identify and resolve ethical dilemmas, when present; (5) communicate effectively in writing; and (6) complete a lawyering task within time constraints. These skills are tested by requiring examinees to perform one or more of a variety of lawyering tasks. For example, examinees might be instructed to complete any of the following: a memorandum to a supervising attorney, a letter to a client, a persuasive memorandum or brief, a statement of facts, a contract provision, a will, a counseling plan, a proposal for settlement or agreement, a discovery plan, a witness examination plan, or a closing argument.

Instructions

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

> You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
>
> The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.
>
> You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.
>
> The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.
>
> Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
>
> Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.
>
> Do not include your actual name anywhere in the work product required by the task memorandum.
>
> This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

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July 2017
MPT-1 File:
Peek et al. v. Doris Stern and Allied Behavioral Health Services

ROBINSON & HOUSE LLC
Attorneys at Law
44 Court Drive
Fairview Heights, Franklin 33705

MEMORANDUM

TO: Examinee
FROM: Jean Robinson
DATE: July 25, 2017
RE: Peek et al. v. Doris Stern and Allied Behavioral Health Services

We represent a class of Union County women probationers in a lawsuit filed in federal court under 42 U.S.C. § 1983 of the Civil Rights Act. All probationers convicted of misdemeanors in Union County receive probation services through Allied Behavioral Health Services. Our complaint alleges that the defendants Allied and Doris Stern, in her capacity as executive director of Allied, are discriminating against women probationers based on gender.

The named plaintiff in our class action, Rita Peek, was sentenced to 18 months' probation by the Union County court in May 2016. (See attached sentencing order.) A condition of her probation was that she receive mental health counseling. To date, Peek has met all the requirements of her probation except for mental health counseling because Allied has failed to provide that counseling.

We filed suit in the U.S. District Court for the District of Franklin against Allied and Doris Stern alleging that they have developed a plan of services that disproportionately denies probation services to female probationers. Thus far, we have deposed Allied's Probation Services Unit director. During a recent case-management conference, the U.S. District Court judge raised the issue of whether the defendants are state actors and, therefore, subject to 42 U.S.C. § 1983. The judge ordered the parties to file simultaneous briefs on that issue alone.

Please prepare the argument section of our brief in support of our position that Stern and Allied are acting under color of state law and are subject to suit under 42 U.S.C. § 1983, relying on all available tests employed by the courts to determine whether parties are state actors. Follow our office guidelines in drafting your argument. Because the court ordered simultaneous briefs, you should anticipate the defendants' arguments and respond to them. Do not draft a separate statement of facts, but incorporate all relevant facts into your argument.

ROBINSON & HOUSE LLC

OFFICE MEMORANDUM

TO: All lawyers
FROM: Litigation supervisor
DATE: April 14, 2011
RE: Simultaneously filed persuasive briefs

All simultaneously filed persuasive briefs shall conform to the following guidelines:

Statement of the Case [omitted]

Statement of Facts [omitted]

Body of the Argument

The body of each argument should analyze applicable legal authority and persuasively argue how both the facts and the law support our client's position. Be sure to cite both the law and the evidence. Emphasize supporting authority but address contrary authority as well; explain or distinguish contrary authority in the argument. Because the court ordered simultaneous briefing, anticipate the other party's arguments and respond to them; do not reserve arguments for reply or supplemental briefing. Be mindful that courts are not persuaded by exaggerated, unsupported arguments.

Organize the argument into its major components. Present all the arguments for each component separately.

With regard to each separate component, write carefully crafted subject headings that illustrate the arguments they address. The argument headings should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example: Improper: Plaintiff has satisfied the exhaustion of administrative remedies requirement. Proper: Where Plaintiff requested an administrative hearing by timely completing Form 3B, but the prison has refused to schedule a hearing, Plaintiff has satisfied the exhaustion of remedies requirement.

STATE OF FRANKLIN
UNION COUNTY DISTRICT COURT

State of Franklin	)	
	)	
v.	)	**Case No. 2016-3098**
	)	
Rita Peek, Defendant	)	

SENTENCING ORDER

Rita Peek, the above-named Defendant, having been found guilty of misdemeanor battery, a violation of § 35-87 of the Franklin Criminal Code, is hereby sentenced to 10 months in jail, but that jail sentence is stayed on the condition that the Defendant successfully complete a probation term of 18 months beginning on this date and subject to the conditions listed below.

During the term of probation, the Defendant must successfully satisfy the following conditions:

1. Immediately report to the Union County Probation Officer to register as a probationer, and follow any rules or regulations established by the County Probation Officer.
2. When ordered by the County Probation Officer, report to Allied Behavioral Health Services, 806 W. Main St., Fairview Heights, Franklin, for those services ordered by this Court and any services ordered by the County Probation Officer.
3. Meet monthly with a counselor assigned by Allied Behavioral Health Services to review compliance with this Order; Allied Behavioral Health Services to inform Court of any violations of this Order.
4. Be evaluated for and undergo mental health counseling by Allied Behavioral Health Services.
5. Not consume any drugs or alcohol and submit samples of blood, urine, or both for tests to determine the presence of any prohibited substances.
6. Not violate any criminal statute of any jurisdiction.
7. Not leave the State of Franklin without the consent of this Court.
8. Pay to Allied Behavioral Health Services a fee of $50 per month.

In the event that the Defendant fails to satisfy these conditions during the probationary term, probation may be revoked and the Defendant be subject to one or more of the following: (1) reinstatement of the original 10-month jail sentence, (2) extension of probation for a term of up

to three years on any conditions the Court deems appropriate, or (3) other relief that the Court deems just and proper.

Entered: May 31, 2016.

Honorable James Finch
Union County District Court

ROBINSON & HOUSE LLC

MEMORANDUM TO FILE

FROM: Jean Robinson
DATE: June 4, 2017
RE: Peek et al. v. Doris Stern and Allied Behavioral Health Services

Ever since 2014, when Union County began contracting with Allied Behavioral Health Services to provide misdemeanor probation services in the County, Allied has in effect given male probationers priority in receiving mental health counseling. As a result, Allied typically fails to provide female probationers with counseling. It is typical that when a woman's probation term ends without her completing counseling, Allied informs the sentencing court of the failure to complete counseling. The court then usually extends the term of probation, although the court does have the power to revoke probation and impose the original jail sentence.

Rita Peek, our named plaintiff, has experienced such a delay in undergoing counseling. She was sentenced to 18 months' probation on May 31, 2016, and ordered to undergo mental health counseling. Allied has failed to initiate that counseling. Peek is now over a year into her 18-month probation term. If Allied does not provide counseling services very soon, Peek will face an extension of her probation (with additional costs assessed to her). The sentencing court also has the power to reinstate her 10-month jail sentence if she does not complete the counseling within the probationary period.

Peek's criminal defense attorney filed a motion with the Union County court in March of this year, asking it to order Allied to immediately offer counseling to Peek. The court denied that motion. Peek's criminal defense attorney then contacted us.

In April, we filed a class action lawsuit (the class has been certified) in federal court alleging that Allied and Doris Stern, in her capacity as executive director of Allied, have violated female probationers' civil rights by disproportionately denying services to women, in violation of 42 U.S.C. § 1983, which entitles them to a civil remedy for the deprivation of their constitutional rights.

Later this month we are scheduled to depose James Simmons, the director of Allied's Probation Services Unit.

Excerpts from Deposition of James Simmons
June 26, 2017

Examination by Plaintiff's Attorney Jean Robinson

Q: Please state your name and position.

A: James Simmons, director of the Probation Services Unit of Allied Behavioral Health Services.

Q: Explain the organization of Allied Behavioral Health Services.

A: Allied is a nonprofit organization formed in 1975 to provide mental health counseling and other services to residents of Union and neighboring counties. We have a board of directors that hires the executive director, who is currently Doris Stern. The board determines what services we offer, approves our entering into contracts, and sets policies, including personnel policies. Each year, Ms. Stern presents a plan detailing our program goals and means of accomplishing those goals, and the board approves it. Allied is a private entity, like any nonprofit.

Q: Who is on the board of directors of Allied Behavioral Health Services?

A: We have 11 board members. One of the county judges and the county director of public health services became members when we started offering probation services and expanded the board. Before that we had just nine board members, and those nine have always included community and business leaders, religious leaders, and active citizens.

Q: What influence do the two public officials have over the board?

A: They are simply 2 of 11 board members. The board requires a majority vote to act.

Q: How is Allied organized regarding the services it provides?

A: We have two units—the Family Services Unit and the Probation Services Unit, which I direct.

Q: To whom do you report?

A: To Doris Stern and through her to Allied's board of directors.

Q: Who pays you?

A: Allied.

Q: Who evaluates you?

A: Ms. Stern.

Q: Who evaluates the counselors who provide probation services?

A: I do, and Ms. Stern reviews those evaluations.

Q: Explain the relationship between Allied and Union County's Probation Office.

A: In 2013, the State of Franklin decided that counties could contract with private entities for probation services for those defendants convicted of misdemeanors. A year later, the Union County Probation Office asked us to contract with them for probation services. Most of what Union County wanted for those on probation for misdemeanors were counseling-related services that we already provided. So we prepared all the documents the county wanted and began providing probation services. The Probation Services Unit is the part of our agency that I direct. We carry out sentencing orders of the court. How we do so is up to us, as long as we follow court orders. We submit an annual plan and quarterly and annual reports to the county. Day to day, we do not deal with the county.

Q: How is Allied funded?

A: We are funded from several sources. The county pays for most of the probation services, with the probationers' fees making up the rest. And we get grants and funds from the community—fund-raisers, corporate donors, that sort of thing. Much of the funding for our counseling for persons not on probation comes from insurance; some comes from individual clients who pay for their own services. Altogether, Allied gets 40% of its funding from public sources and 60% from private sources.

Q: I need to clarify. Consider only the funding for the Union County probation program. How much of that is funded by a combination of funds from the county itself and fees paid by the probationers?

A: One hundred percent.

Q: Union County is a unit of local government, subject to the laws of Franklin, isn't that correct?

A: I am not a lawyer, but I believe that is correct.

Q: When operating probation services for the county, Allied must meet the requirements set by state law, isn't that true?

A: Yes.

Q: State law sets out minimum qualifications for the employees of entities like Allied which provide probation services, correct?

A: Yes.

Q: Isn't it true that Allied must set out an annual plan for providing probation services and have it approved by the County Probation Officer?

A: Yes.

Q: Each probationer served by Allied has been convicted of a misdemeanor crime in a Union County District Court in the State of Franklin, isn't that right?

A: Yes, each probationer served by us has been referred to us by the courts, but our other departments offer services that are not court-referred.

Q: Isn't it true that in each case when a person is convicted of a misdemeanor and placed on probation, the judge determines the conditions of probation?

A: Yes.

Q: Allied cannot deviate from those conditions, can it—that is, you cannot add or remove conditions?

A: We carry out whatever the judge orders.

Q: Who determines what kind of counseling services you provide to probationers?

A: Again, the sentencing court. We typically evaluate probationers to determine the extent of mental health counseling needed and decide when and how they receive those services.

Q: Are you familiar with my client, Rita Peek, the named plaintiff in this case?

A: Yes, ma'am. She is a Union County probationer and under our supervision.

Q: Isn't it true that the court ordered that Ms. Peek receive mental health counseling?

A: Yes. Among other things, the court ordered mental health counseling for her. We evaluated her during her second meeting with us, back in June 2016. The result was that she needed what we call "Level Two Counseling"—both group and individual therapy sessions. We put her on our list for mental health counseling.

Q: Have you provided such counseling to her?

A: Not yet.

Q: Ms. Peek is still on a waiting list for that counseling, 13 months after she was sentenced to probation, correct?

A: Correct.

[Testimony regarding Allied's approach to providing counseling to women probationers is omitted.]

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Q: Each quarter you report to the County Probation Officer on those probationers being served and what services were provided, correct?

A: Yes.

Q: As part of that report, the counseling waiting list is reported to, and approved by, the County Probation Officer each calendar quarter, correct?

A: Correct.

Q: During the last three quarters, at least, you have included Ms. Peek on the waiting list as needing mental health counseling and not yet served, correct?

A: I don't have the reports in front of me, but that is probably true.

Q: And the County Probation Officer has approved those quarterly reports, right?

A: Yes.

Q: I refer you to the reports Allied filed with the County Probation Officer. These show that 90% of the female probationers you serve do not even start, let alone complete, counseling within the probation term, isn't that correct?

A: If that is what the reports say, it must be true.

Q: In fact, 70% of the female probationers are given an extension of their probation term in order to complete counseling, isn't that true?

A: I believe that is true.

Q: These same reports show that, by contrast, 75% of male probationers receive and complete counseling within the period of their probation, isn't that correct?

A: If that is what the report says, then that is correct.

Q: In addition to providing mental health counseling to Ms. Peek, Allied is supposed to oversee her as a probationer, isn't that true?

A: Yes.

Q: Overseeing her means, among other things, ensuring that she reports to Allied monthly and complies with any required drug and alcohol testing, right?

A: Yes.

Q: Has Ms. Peek met all the conditions of probation imposed on her, other than receiving mental health counseling?

A: Yes, she has been a model probationer.

Q: If a probationer were to violate a condition of probation, you would report that to the court, wouldn't you?

A: Yes.

Q: If a probationer, such as Ms. Peek, failed to complete the conditions of probation, her probation could be revoked and she could be sent to jail, correct?

A: Yes.

Q: Or her probation could be extended, correct?

A: Yes.

Q: Probation is a restriction on a person's liberty, isn't it?

A: Yes.

Q: In that regard, being on probation is a restriction sort of like being in jail?

A: Well, it's a lot better than being in jail, but it is a restriction. Probationers have to comply with conditions of probation, they must meet with us in person each month, they cannot leave the state, and so on.

Q: And isn't it true that only the State of Franklin has the power to sentence someone to probation, set conditions of probation, revoke probation, and send someone to jail?

A: I am not a lawyer, but I believe that is so.

Robinson: No further questions.

July 2017

MPT-1 Library:

Peek et al. v. Doris Stern and Allied Behavioral Health Services

EXCERPTS FROM FRANKLIN CRIMINAL CODE

§ 35-210 Misdemeanor Sentencing; Probation

For a person convicted of a misdemeanor, the court may impose a jail sentence not to exceed 12 months. The court may suspend the jail sentence and place the person on probation for a term not to exceed three years. When placing a person on probation, the court shall determine the conditions of probation.

§ 35-211 Probation Services

(a) Each county shall appoint a County Probation Officer who shall be an employee of the county and shall provide probation services to the county as required by the Criminal Code, either directly or through other entities as provided by law.

(b) Any county may elect to provide probation services for those convicted of misdemeanors by contracting with a private entity, provided that the private entity:

1. Shall be a nonprofit entity.
2. Shall receive approval from the County Probation Officer of an annual Plan of Services which must include
   (i) oversight of those on probation;
   (ii) monthly meetings with those on probation unless otherwise ordered;
   (iii) drug and alcohol testing; and
   (iv) drug and alcohol counseling, anger management counseling, vocational and mental health counseling, and referral to educational programs.
3. Shall require that each individual providing such services possess at least a bachelor's degree in the relevant professional field or its equivalent as determined by the County Probation Officer.
4. Shall submit to the County Probation Officer quarterly reports listing the names of probationers served during that quarter, the services provided to those probationers, and any other information required by the County Probation Officer, and shall receive approval of those reports from the County Probation Officer.
5. Shall submit to the County Probation Office an annual report of services provided and all expenses incurred and receive approval of that report from the County.

Lake v. Mega Lottery Group
United States Court of Appeals (15th Cir. 2009)

Olivia Lake sued the Mega Lottery Group pursuant to 42 U.S.C. § 1983, claiming that it fired her without due process. Mega moved to dismiss the complaint, arguing that as a private actor, it cannot be sued under 42 U.S.C. § 1983. The district court dismissed the complaint. Lake appealed. The sole issue on appeal is whether Mega acted as a state actor when it fired Lake. We affirm.

42 U.S.C. § 1983 provides for a cause of action against persons acting under color of state law who have violated rights guaranteed by the United States Constitution. *Buckley v. City of Redding*, 66 F.3d 190 (9th Cir. 1995). The Constitution's due process clause applies to states but not to private actors. However, private actors are not always free from suit for violating the Constitution. Constitutional standards protect those harmed by private actors when it is fair to say that the state is responsible for the offending conduct. To succeed on a § 1983 civil rights claim against a private actor, a claimant must prove that the private actor was a state actor.

To determine if an apparently private actor may still be a state actor, no one set of circumstances or criteria is sufficient. Rather, courts typically consider the range of circumstances when characterizing a private actor as a state actor for § 1983 purposes. Each set of factual circumstances must be examined in light of the critical question: whether "the State is responsible for the specific conduct of which the plaintiff complains." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n,* 531 U.S. 288 (2001).

There are two tests of those circumstances creating state action that are pertinent to Lake's claims. First, state action exists where the private actor was engaged in a public function delegated by the state. If the private actor exercises a function that has traditionally been a public or sovereign function, the private actor is not free from constitutional limits when performing that function. Second, a private actor engages in state action when the state exercises its coercive or influential power over the private actor or when there are pervasive entanglements between the private actor and the state. Under this test, "a state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement . . . that the choice must in law be deemed to be that of the state." *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

Under either of these two tests, there is a further requirement to find state action: there must be such a "close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the state itself." *Brentwood*.

Public function

Lake claims that Mega is engaged in a public function, relying on *West v. Atkins,* 487 U.S. 42 (1988), and on *Camp v. Airport Festival* (15th Cir. 2001). In *West*, a privately employed doctor was a state actor when he was employed to provide medical care to inmates in a state prison. The state is required to provide medical care to those it imprisons, and when the doctor contracted with the state to provide that care, he became a state actor.

In *Camp*, the plaintiff sued Airport Festival, a private nonprofit entity created to organize an aviation festival, for violating his First Amendment rights when he was arrested for leafleting during the festival. The city's police department had been directed to follow the instructions of festival organizers regarding security and arrests. Only the state has the power to deprive persons of their freedom by arresting them. When festival organizers accepted the authority to instruct the police regarding arrests, festival organizers became state actors.

Other examples of activities found to be public functions constituting state action include operating a local primary election, operating a post office, and providing for public safety through fire protection and animal control. Courts have narrowly construed the public function test to require that the action be one that is exclusively within the state's powers. Thus, courts have rejected claims that those who operate hospitals, privately owned public utilities, or schools, or provide foster care are performing public functions. While the state sometimes performs these functions, they are not traditionally the *exclusive* prerogative of the state. Over the years, private organizations have often initiated and performed these functions.

Here, the State of Franklin established a state-operated lottery in 1985. In 2005, due to the financial costs of operating a lottery, Franklin entered into a contract with Mega to operate the lottery, with the profits reverting to the state. Operating a lottery is not a traditional function of state government. Many private entities operate similar activities through racetracks, casinos, sweepstakes, and other activities. Thus, Mega is not engaged in a public function.

State coercion or influence, or pervasive entanglement

Lake next argues that there is state action because the state has coerced or influenced Mega to act. Lake argues that because Franklin contracts with Mega to operate the lottery, with the profits from the lottery becoming state proceeds, its influence over Mega is significant, if not coercive. She also argues that Franklin coerces Mega through its extensive regulation of the lottery, making Mega an agent of the state.

Lake's argument fails in light of the U.S. Supreme Court's ruling in *Rendell-Baker*. That case involved employees who claimed that their First Amendment rights were violated when they were discharged by a private school. The plaintiffs argued that the state's extensive regulation of education made the school a state actor. The Court rejected this argument because the state did not regulate, encourage, or compel the private board of trustees to fire the employees. Any government regulation was directed to education of the children, and did not compel the board to follow any particular personnel policies.

The state's exercise of its coercive power or influence must be such that the private choice can be said to be that of the state. Lake has failed to show any evidence that the State of Franklin required, recommended, or even knew about this, or any, personnel action. What the state regulates is the operation of the lottery, not the hiring and firing of Mega's employees.

Lake also argues that even if the state did not coerce Mega, there are additional pervasive state-private entanglements. She relies on *Brentwood,* 531 U.S. at 288. There, the U.S. Supreme Court ruled that the "nominally private character of the Association" could not overcome the pervasive entanglement with public institutions. Lake maintains that Franklin and Mega are entangled because of Franklin's heavy regulation of the lottery.

In *Brentwood*, the defendant Association regulated interscholastic athletic competition among public and private high schools in Tennessee. The Association's board found that Brentwood, one of the Association's member schools, had violated a rule prohibiting "undue influence" in recruiting athletes and, among other things, declared Brentwood's teams ineligible to compete in playoffs for two years. Brentwood sued the Association, alleging violation of its First and Fourteenth Amendment rights when the school was penalized for violating Association rules. The Association argued that it was not a state actor. The Court found that the Association's board of directors was composed primarily of representatives of public schools. The board effectively operated the sports program for the state's public high schools. The State Department

of Education formally adopted the Association's rules as the rules for public school sports programs. Based on these findings, the Court rejected the Association's claim, concluding that the relationship of the public schools and the Association constituted a pervasive entanglement that made the Association a state actor.

Lake also points to the pervasive entanglements in *Camp* as analogous to the State's control here over the lottery. In *Camp*, although the festival was organized by a nonprofit entity, the city permitted the festival to use the airport grounds at no cost; the city's personnel were extensively involved in planning for the festival while on city time and at city expense; the city promoted the festival through its tourism bureau; and the city's airport personnel controlled access of airplanes during the festival's air show. As noted *supra*, the city's police and first responders were effectively turned over to the festival organizers for the duration of the festival. These entanglements were extensive.

In contrast, the primary relationship between the State of Franklin and Mega is a contract, no different from that between the state and any other contractor. The State of Franklin contracts with private entities to build its buildings, deliver food for its prisoners, and furnish office supplies to state legislators, to name but a few contracts. These contracts do not constitute the sort of pervasive entanglement necessary to constitute state action. When the state enters into a contract to build a state building, the contract demands compliance with many regulations, yet it is left to the contractor to execute the contract. Franklin does not involve itself in the governance of Mega. It does not endorse Mega's personnel policies as the state had in *Brentwood* when the state Department of Education approved the Association's rules. Nor does Franklin involve itself directly in the operation of Mega as the city did in running the airport festival at issue in *Camp*.

Connection to offending conduct: nexus

Even if Lake had met one or both of the tests discussed above, Lake has failed to meet the further requirement of *Rendell-Baker* that there be a nexus, meaning a connection, between the state and the challenged action. That is, Lake has not shown that the offending conduct—her being discharged without due process—was somehow connected to the state's influence over Mega. Lake was discharged by Mega in the same way that any private corporation fires any employee. The state played no role in the discharge, so Lake cannot show the required nexus. Lake offers no facts that rise to the level of the circumstances where the state and private parties

have acted in concert to engage in denial of a party's civil rights. Mega's only participation with the state is to contract with the state to operate the lottery. Mega did not involve the state in any way in its decision to fire Lake.

Affirmed.

July 2017

MPT-2 File:

In re Zimmer Farm

State of Franklin
County of Hartford
Office of the County Attorney
92 Oak Street
Glenview, Franklin 33705

MEMORANDUM

TO: Examinee
FROM: Carl S. Burns, County Attorney
DATE: July 25, 2017
RE: Complaints about Zimmer Farm

The county board president, Nina Ortiz, is concerned about activities at the John and Edward Zimmer farm on Prairie Road, and specifically about the bird rescue operation and bird festivals they operate on their farm. Ms. Ortiz has received numerous complaints from local residents about the activities at the farm. While she supports the concept of a bird rescue operation, Ms. Ortiz would like the bird operation moved to a location far away from any residential subdivisions. She also wants the festivals stopped. She has asked me to research whether the county's zoning ordinance can limit the Zimmers' operations. Further, she wants to know whether the Franklin Right to Farm Act (FRFA), which protects certain farms and farming activities, applies here.

In addition to the bird rescue operation and the festivals, the Zimmer farm produces apples and strawberries for local sale. The Zimmers' apple and strawberry cultivation and sales are permitted under the applicable county zoning ordinance. I want you to focus on the bird rescue operation and the festivals—the activities the neighbors are complaining about. Please prepare an objective memorandum for me analyzing these questions:

1. Is the Zimmers' bird rescue operation permitted under the county zoning ordinance?
2. Are the Zimmers' festivals permitted under the county zoning ordinance?
3. How, if at all, does FRFA affect the county's ability to enforce its zoning ordinance with respect to the bird rescue operation and the festivals?

In your analysis, address any counter arguments the Zimmers may make in support of the bird rescue operation and the festivals. Address only the questions I have raised above. Do not draft a separate statement of facts, but be sure to incorporate the relevant facts, analyze the applicable legal authorities, and explain how the facts and law affect your analysis.

Email to County Board President

TO: Nina Ortiz, County Board President (ctybdpres@Hartford.gov)
FROM: Sally Wendell (swendell@cmail.com)
DATE: May 8, 2017
SUBJECT: Zimmer farm complaints

I am writing on behalf of homeowners living in Country Manors and Orchard Estates, near the Zimmer farm. For the past two years, the Zimmers have run a bird rescue operation. The birds create noise and offensive smells and attract flies, all of which bother us. We cannot sit or eat outside or use our outdoor grills because of the bird noise, odors, and bugs. We did not have this problem before the Zimmers began their bird rescue operation. Just come out some evening and see for yourself how bad it is!

Last year, the Zimmers also hosted several bird festivals with music and food. People who came to these festivals parked on the streets in our subdivisions and walked to and from the farm, littering our streets and yards. Plus the music got pretty loud and we could hear it whether we wanted to or not. The Zimmers are planning more festivals, maybe even every month.

We paid good money for our homes because we wanted some quiet country living—that's why we moved here. Now our neighborhood is becoming like a downtown entertainment center. We taxpayers and homeowners want you to shut down the Zimmers' bird rescue operation and stop these festivals.

A taxpaying citizen,
Sally Wendell

MEMORANDUM

TO: Carl S. Burns, County Attorney
FROM: Judy Abernathy, Investigator
DATE: June 19, 2017
RE: Zimmer farm complaints

On June 14, 2017, I interviewed John Zimmer and his son Edward regarding neighbors' complaints about the Zimmers' farming activities.

As soon as I arrived at the Zimmer farm, Edward Zimmer said, "I know why you are here—just tell those neighbors 'Right to Farm.' They knew they were moving to a farm area—what did they expect?"

John Zimmer provided some background. When his parents, Gus and Ann Zimmer, purchased the property in 1951, it consisted of an apple orchard and a strawberry field. Gus and Ann continued that operation and began growing vegetables after purchasing additional land in 1960. They sold the fruit and vegetables to local grocery stores. In 1985, John and his wife, Darlene, took over the operation and expanded their produce sales to three farmers' markets.

In 1988, the Zimmers began a tradition of holding a one-day annual apple festival for their children's school. School families arrived by bus with their children and picked apples, which were for sale. The families played games and listened to music. There were approximately 100 persons in attendance.

In 2007, the Zimmers suffered several losses—a late spring freeze that ruined the strawberry crop, tough financial times, and some serious health setbacks for Darlene. In 2009, their son Edward moved to the farm to help. Darlene died in 2010. John and Edward continue to produce apples and strawberries for sale locally, but they discontinued the vegetable operation.

In 2015, Edward, who is trained as a veterinary assistant, began taking in wounded ducks, geese, owls, quail, pheasants, hawks—pretty much any fowl or bird that had been hurt. People from miles around bring him wounded birds. Edward made improvements in some of the outbuildings and now cares for as many as 100 birds at a time. I inspected the buildings where the birds are kept and did not observe any obvious threats to public health.

Edward's goal is to care for the birds until they can be released back to the wild, but those that cannot be rehabilitated stay on the farm. Edward does not sell the birds, does not make any profit from the operation, and does not intend to do so. He loves to rescue birds.

Last year, Edward and John said they took a clue from agritourism, a development in the last 20 years that uses entertainment and public educational activities to market and sell agricultural products. The Zimmers held four weekend festivals at their farm in 2016. They showed me a flyer used to advertise the fall festivals. It was titled "Fall Bird Festival" and said "Support injured birds, listen to music, have a good time. Buy apples and discover the best recipes for baking with fruit." The flyer listed details such as hours of the festival, directions, etc.

As many as 200 people attended the festivals each day. To attract people to the festivals, the Zimmers had vendors provide food and drinks, and local musicians offered musical entertainment. A local chef offered two sessions on cooking and baking with fruit; the Zimmers also sold apples or strawberries, depending on the season, and cookbooks.

Each day of the festival, Edward gave a one-hour program about birds. To raise funds for his bird rescue operation, Edward sold bird-related souvenirs, including T-shirts, caps, and books. Guests were encouraged to "adopt" a wounded bird by donating to its care and upkeep. Profits from the bird-related souvenirs, along with the donations, were used to underwrite the bird rescue operation. The Zimmers plan more bird festivals this year.

I also visited the two adjoining subdivisions, both of which were developed in the 1990s. Before that residential development, the land on both sides of the 30-acre Zimmer property was farmland for over 100 years. Presently, all lots in both subdivisions have been sold and developed. Country Manors, which lies to the east of the Zimmer farm, consists of upscale homes. Orchard Estates, which lies to the west of the farm, consists of moderately priced homes very attractive to families due to a number of playgrounds and park areas within the subdivision. About 20 of the homes in Country Manors border the Zimmer Farm, and about 30 of the Orchard Estates properties border the farm. Both subdivisions are zoned R-1, single-family residential.

On June 15, I reviewed public records and confirmed that Zimmer Farms Inc. has owned the property in question since 1951. The Zimmer farm is zoned Agricultural A-1. As you know, Hartford County has countywide zoning. Most property is either single- or multi-family residential, light industrial, or agricultural. The permitted uses for A-1 zoned areas are specified in the zoning ordinance. Growing apples and strawberries for commercial sale, as the Zimmers have done, is permitted in an A-1 zone.

July 2017
MPT-2 Library:
In re Zimmer Farm

EXCERPTS FROM HARTFORD COUNTY ZONING CODE

Title 15. ZONING

§ 22. Agricultural A-1 District Permitted Uses

(a) Within an A-1 district, the following uses are permitted:

(1) any agricultural use;

(2) incidental processing, packaging, storage, transportation, distribution, sale, or agricultural accessory use intended to add value to agricultural products produced on the premises or to ready such products for market;

. . .

(b) Definitions

. . .

(2) "Agricultural use" means any activities conducted for the purpose of producing an income or livelihood from one or more of the following agricultural products:

(a) crops or forage (such as corn, soybeans, fruits, vegetables, wheat, hay, alfalfa)

(b) livestock (such as cattle, swine, sheep, and goats)

(c) beehives

(d) poultry (such as chickens, geese, ducks, and turkeys)

(e) nursery plants, sod, or Christmas trees

. . .

An agricultural use does not lose its character as such because it involves noise, dust, odors, heavy equipment, spraying of chemicals, or long hours of operation.

(3) "Agricultural accessory use" means one of the following activities:

(a) a seasonal farm stand, provided that it is operated for less than six months per year and is used for the sale of one or more agricultural products produced on the premises;

(b) special events, provided that they are three or fewer per year and are directly related to the sale or marketing of one or more agricultural products produced on the premises.

EXCERPTS FROM FRANKLIN AGRICULTURE CODE
Ch. 75 Franklin Right to Farm Act

§ 2. Definitions

(a) "Farm" means the land, plants, animals, buildings, structures (including ponds used for agricultural or aquacultural activities), machinery, equipment, and other appurtenances used in the commercial production of farm products.

(b) "Farm operation" means the operation and management of a farm or an activity that occurs on a farm in connection with the commercial production, harvesting, and storage of farm products.

§ 3. Farm not nuisance

(a) A farm or farm operation shall not be found to be a public or private nuisance and shall be protected under section 4 of this Act if the farm or farm operation existed before a change in the land use or occupancy of land that borders the farmland, and if, before that change in land use or occupancy of land, the farm or farm operation would not have been a nuisance.

(b) A farm or farm operation that is protected under subsection (a) shall not be found to be a public or private nuisance as a result of any of the following:

(i) a change in ownership;

(ii) temporary cessation or interruption of farming;

(iii) enrollment in a governmental program; or

(iv) adoption of new technology.

§ 4. Local units of government

Except as otherwise provided in this section, a local unit of government shall not enact, maintain, or enforce an ordinance, regulation, or resolution that conflicts with this Act and undermines the purpose of this Act.

Effective July 1, 1983.

REPORT FROM FRANKLIN SENATE COMMITTEE ON AGRICULTURE
Pertaining to S.B. 1198, May 3, 1983

S.B. 1198 will be known as the Franklin Right to Farm Act and will protect Franklin farmland. During each of the past several years, two to three million acres of U.S. farmland have been converted to nonagricultural uses. Franklin's agricultural resources play an important role in feeding the population of Franklin, the United States, and the world. Loss of farmland imperils 2.2 million agriculture-related U.S. jobs, the habitats of 75% of our wildlife, and open spaces necessary for a healthy environment. Loss of farmland creates urban sprawl with the attendant stresses on the infrastructures of Franklin's formerly rural counties and small towns.

When land that was formerly agricultural is converted to residential land, new home dwellers, not familiar with rural life, complain of odors, noise, dust, and insects caused by animals, crops, and farm machinery. Too often these new residents file nuisance suits against their farming neighbors. Additionally, local ordinances enacted in response to residents' concerns threaten farmers with fines and/or closure if they are in noncompliance with the restrictions imposed by the ordinances. These restraints and costly lawsuits by nonfarming neighbors discourage farmers from investing in their farms and remaining on them.

S.B. 1198 protects those who farm for a living. A farming operation that was not previously a nuisance does not become one when residential development moves in next to the farmland. To qualify for this protection, farmers must show that the farm operation would not have been a nuisance at the time of the changes in the area. This protection applies to those who make their living farming, whether in an agricultural area or in a residential area, not to those with gardens for personal use. Under the common law, "coming to a nuisance," such as building a home next to a cattle operation, was ordinarily a defense for the farmer. However, courts have been reluctant to afford this defense wide applicability. This reluctance adds to the uncertainty facing farmers. S.B. 1198 codifies this common law defense and protects those who farm for a living.

Accordingly, this Committee declares that it is this state's policy to conserve, protect, and encourage the development and improvement of its agricultural land for the commercial production of food and other agricultural products, by limiting the circumstances under which a farming operation may be deemed to be a nuisance.

Shelby Township v. Beck
Franklin Court of Appeal (2005)

The issue on appeal is whether the Franklin Right to Farm Act (FRFA or "the Act") preempts a local zoning ordinance.

In 1995, the Becks purchased 1.75 acres of property in Shelby Township. The property had been used for raising chickens, and there were chicken coops on the property when the Becks purchased it. In 1995, the land use plan for the township allowed farming on this land. In 1996, the Becks began raising chickens for sale at local butcher shops. In 1998, Shelby Township passed Zoning Ordinance 7.0, which requires farms to have a minimum size of three acres. In 2000, several real estate developers began to build homes near the Becks' property. Neighbors began complaining to the Township Board about the smells and noise from the Becks' chickens. The neighbors filed a petition with the Township Board, asking it to close down the Becks' operation because it was a nuisance. In 2004, the Township Board decided that the best way to close down the Becks' farm was to enforce its ordinance regarding minimum farm size. The Township sued to enforce its ordinance, and the Becks moved to dismiss, claiming that FRFA preempts the ordinance. The trial court granted the motion, and the Township appealed.

State law can preempt a municipal ordinance in two ways. First, preemption occurs when a statute completely occupies the field that the ordinance attempts to regulate. FRFA does not "occupy the field," because the legislature has also authorized local governments to enact zoning laws concerning agricultural properties. Second, preemption occurs when an ordinance conflicts with a state statute and undermines its purpose. A conflict exists when the ordinance permits what the statute prohibits or vice versa. Determining whether there is a conflict requires a careful reading of the statute and the ordinance in light of the policy and purposes behind the statute and measuring the degree to which the ordinance frustrates the achievement of the state's objectives.

If Shelby Ordinance 7.0 is in effect, the Becks cannot raise chickens on their property because it is under the minimum size required for a farm. However, Section 4 of FRFA provides that a local ordinance is preempted when it conflicts with FRFA. The question then is whether there is a conflict. Section 2 of FRFA defines a "farm" as "land, plants, animals, buildings, structures . . . and other appurtenances used in the commercial production of farm products." The Act does not set a minimum acreage for farms. Here, the Becks' operation—raising chickens for sale—is protected by FRFA because it is the commercial production of farm products, even

though the operation takes place on only 1.75 acres. Thus, there is a conflict between the size requirement of the ordinance, which prohibits the Becks from raising chickens, and FRFA, which does not. Thus the ordinance and FRFA are in direct conflict, as the ordinance prohibits what is permitted by the Act. The ordinance undermines the very purpose of the Act by prohibiting this farm operation.

The Township's effort to use its size ordinance to prevent what the neighbors believe is a nuisance is the very sort of enforcement action that FRFA is designed to prevent. FRFA states that a farm shall not be found to be a nuisance if it existed before the change in land use and if, before that change, it would not have been found to be a nuisance. The Becks' operation began in 1995, before the residential development neighboring it was created. In 1995, the Becks' farm operation was a permitted use and would not have been a nuisance. Accordingly, the Becks' operation is protected by FRFA.

Our conclusion that the state law preempts the local ordinance also serves the purpose of the Act, which is to conserve land for agricultural operations and protect it from the threat of extinction by regulation from local governmental units. *See* Sen. Rpt. Comm. Agric. 1983.

Affirmed.

Wilson v. Monaco Farms
Franklin Court of Appeal (2008)

Defendant Monaco Farms (Monaco) has operated a dairy farm on its property from 1940 to the present, with changes in the ownership passing from father to son in 1970, and to granddaughter in 2000. Monaco increased the number of dairy cows on the farm from 40 to 60 in 2005, and from 60 to 200 in 2007.

Plaintiff Bill Wilson has lived in the subdivision immediately to the east of Monaco since 1990. In 2007 he filed a private nuisance action against Monaco, alleging that the flies, dust, and odors from the dairy cows interfered with his enjoyment of his property. Monaco moved to dismiss, relying on the Franklin Right to Farm Act (FRFA), which it claims continues to protect a farm operation when it expands or changes its operation. In response, Wilson argued that FRFA does not protect a farm whose expansion created a nuisance not present at the time he purchased his property. The trial court granted the motion to dismiss, and Wilson appealed. We affirm.

The present situation is the very sort of farm operation the legislature intended to protect when it enacted FRFA. Monaco has existed since 1940, and it would not have been a nuisance at that time. In 1984, the land bordering Monaco was subdivided and developed into a residential area and was zoned residential.

There were no complaints about the operation of Monaco until 2007, when it expanded from 60 to 200 cows. The question is whether FRFA continues to protect Monaco after the expansion. When it enacted FRFA, the legislature understood that circumstances could change and provided that certain changes would not affect the protections of FRFA. Section 3(b)(i) of FRFA addresses the issue of change in ownership but does not address changes in size or nature of the operation.

Wilson argues that because the legislature listed four, and only four, contemplated interruptions or changes in farm operations, those are exclusive and exhaustive. If Wilson is correct, the only changes the legislature intended to protect are the four items specified in the statute, and those four do not include expansion of farm operations.

Monaco, on the other hand, argues that where the legislature provides a list, the court must determine what is common among the items on the list and then consider whether the matter at issue is sufficiently similar to the items listed as to be included. Monaco argues that the

change in size of the operation is similar to a change in technology, which does not destroy the protections of FRFA. Both changes have as their purpose the opportunity to increase farm production and thus profitability.

Both parties assume that the court must look to § 3(b) of FRFA. A better approach is to examine § 3(a), which provides that a farm "shall not be found to be a public or private nuisance . . . if the farm or farm operation existed before a change in the land use or occupancy of land that borders the farmland . . . ." Thus, the statute provides a date for measuring whether a nuisance exists, namely the date when the use of the neighboring land changed. In this case, that date is 1984, the year that the neighboring land was subdivided and developed into a residential area. The legislature may have assumed that farms might expand. Indeed, it noted in § 3(b) the possibility of change in technology. Nevertheless, the legislature established only one date for measuring whether a nuisance exists.

The purpose of FRFA is "to conserve, protect, and encourage the development and improvement of [Franklin's] agricultural land for the commercial production of food and other agricultural products, by limiting the circumstances under which a farming operation may be deemed to be a nuisance." Sen. Rpt. Comm. Agric. 1983. Relying solely on the legislature's date for determining whether a nuisance exists serves the statutory purpose.

When he bought his home in 1990, Wilson knew that he was moving next to a dairy farm. It remains a dairy farm, albeit a larger one. Nothing in FRFA prohibits expansion of farm operations. Despite the expansion of Monaco's dairy operation, it is protected by the Act, and the trial court properly dismissed Wilson's nuisance action.

Affirmed.

Koster v. Presley's Fruit
Columbia Court of Appeal (2010)

In this case, the court is asked to determine the applicability of the Columbia Right to Farm Act (CRFA). The precise issue on appeal is whether the production of wooden pallets for use in harvesting peaches is an agricultural activity protected by the Act.

Defendant Presley's Fruit (Presley's) has grown and sold peaches at its location since 1960. In 2006, Presley's added a new building and began manufacturing wooden pallets for use in harvesting and transporting peaches.

In 1997, plaintiffs Matt and Kathleen Koster purchased residential property that abuts Presley's. They had no complaints about Presley's until 2006, when they began experiencing noise and dust associated with the manufacturing of the wooden pallets. The Kosters filed a nuisance suit against Presley's, claiming that the noise and dust is a nuisance that substantially and unreasonably interferes with their enjoyment of their property.

Presley's moved to dismiss, claiming the protections of CRFA. CRFA states that a farm operation which existed one year before the change in the area is not a nuisance if it would not have been a nuisance at the time of the change in the property. The trial court granted the motion.

On appeal, the Kosters argue that CRFA protects only farm activities and not manufacturing. Presley's claims that the pallets are needed to harvest and transport the peaches (a farm product) to market and that therefore the manufacturing of the pallets is protected by CRFA.

Resolving this question requires the court to interpret and apply the provisions of CRFA. Our role in construing a statute is to "ascertain and give effect to the legislative intent." *Brady v. Roberts Electrical Mfg., Inc.* (Columbia Sup. Ct. 1999).

We must examine the Columbia statute's text and give the words their natural and ordinary meaning in light of their statutory context. If the statutory language is clear and unambiguous, the court must apply the statute's plain language and not venture beyond the text to add words not there. However, when the statutory language is unclear, the court may refer to the purpose of the legislation and the legislative history of the statute, such as legislative committee reports, to aid us in interpreting the text.

In this case, an examination of the statutory language provides the answer. CRFA defines a farm product as "those plants and animals useful to human beings produced by agriculture and includes, but is not limited to, forages and sod crops; grains and feed crops; dairy and dairy products; poultry and poultry products; livestock, including breeding and grazing animals; fruits; vegetables; or any other product which incorporates the use of food, feed, or fiber." Although that is a broad definition of farm product, there is no mention of products produced from wood.

The pallets are constructed of wood and nails or staples. The wood used for the pallets originates from outside the defendant's property. The products, therefore, are not grown, raised, or bred on the farm premises, but are only assembled there from materials purchased elsewhere. The pallets do not match any of the definitions of farm products set forth in the Act, nor are they like any of those farm products defined by the statute. The manufacturing of these wooden pallets is not an activity protected by CRFA.

We reverse the trial court's order dismissing this case. If, on remand, the Kosters are successful in their nuisance action and convince the court to order Presley's to cease producing the pallets at the farm, there will be no loss of farmland. If the Kosters succeed, Presley's land will continue to be used for the production of peaches. The land will remain agricultural. Presley's would manufacture the pallets off the farm premises rather than on the premises, or purchase the pallets from some outside source. Purchasing pallets should be no more a threat to Presley's than purchasing a truck for hauling the peaches to market.

Reversed and remanded.

July 2017
MPT-1 Point Sheet:
Peek et al. v. Doris Stern and Allied Behavioral Health Services

Peek et al. v. Doris Stern and Allied Behavioral Health Services

DRAFTERS' POINT SHEET

This performance test requires examinees to write a brief for submission to the U.S. District Court, addressing the issue of whether the defendants are state actors, a requirement for a lawsuit brought pursuant to 42 U.S.C. § 1983. Rita Peek is the named plaintiff for a class of women who have sued Doris Stern and Allied Behavioral Health Services, alleging gender discrimination for disproportionately failing to provide them with the ordered probation services because of their gender. Peek was convicted in state court of a misdemeanor and sentenced to 10 months in jail, with the jail sentence stayed on the condition that she successfully complete 18 months of probation. The state court imposed certain conditions of probation, including receiving mental health counseling.

The statutes of the State of Franklin permit counties to contract with private entities to provide probation services for those sentenced to probation after being convicted of misdemeanors. Union County contracted with Allied to oversee probationers, subject to the requirements of Franklin law. Doris Stern is the executive director of Allied.

After Allied continually failed to provide counseling for Peek, she filed this action in federal court. During a case-management conference in federal court, the issue arose whether the defendants are state actors. The federal court ordered the parties to file simultaneous briefs, addressing the issue of whether the defendants are state actors and thus subject to suit under 42 U.S.C. § 1983. Examinees' task is to draft the plaintiffs' brief, arguing that the defendants are state actors, and to do so in accordance with office guidelines for drafting simultaneously filed persuasive briefs.

The File consists of the memorandum from the supervising partner, the firm's guidelines for drafting simultaneously filed persuasive briefs, the sentencing order, a memo to the File, and excerpts from the transcript of the deposition of James Simmons, an Allied employee. The Library contains the relevant Franklin statutes on probation and a case from the U.S. Court of Appeals.

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

I. FORMAT AND OVERVIEW

Examinees are directed to prepare the plaintiffs' brief, in accordance with the firm's guidelines, arguing that Doris Stern and Allied Behavioral Health Services are state actors. Examinees are told to anticipate the defendants' arguments and respond to them.

The firm's memorandum regarding drafting of persuasive briefs directs examinees to draft the body of the argument, analyzing applicable legal authority and persuasively arguing that the facts and the law support the client's position. They are told that exaggerated arguments

are not persuasive. They are to break the argument into its major components and write carefully crafted subject headings that illustrate the arguments. The assigning memo directs examinees not to draft a separate statement of facts but to integrate the facts into the argument.

Examinees must read the U.S. Court of Appeals case in the Library to learn the various conditions under which the U.S. Supreme Court has found private parties to be state actors. They should identify supporting authority and explain or distinguish contrary authority. Examinees must show how the requirements of the Franklin statute and the facts presented in the deposition transcript and the sentencing order meet the several criteria for state action presented in the item. They should distinguish the facts in this case from those in *Lake v. Mega Lottery Group*, U.S. Court of Appeals (15th Cir. 2009), and embedded cases.

II. OVERVIEW OF THE LAW

The equal protection clause of the Fourteenth Amendment to the U.S. Constitution applies to the state, not to private parties. But private parties are not necessarily free to act unconstitutionally. The Constitution protects individuals harmed by private actors when it is fair to say that the state is responsible for the conduct complained of. Thus, to succeed on a civil rights claim brought pursuant to 42 U.S.C. § 1983, a claimant must prove that the defendant was a state actor.

In interpreting the state actor requirement, the U.S. Supreme Court has used various approaches or tests over the years. The critical question is whether "the State is responsible for the specific conduct of which the plaintiff complains." *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001). No one set of circumstances or criteria is sufficient. Rather, the courts typically consider the range of circumstances that could lead to a private party being deemed a state actor.

Examinees are given the Fifteenth Circuit case of *Lake v. Mega Lottery Group*, which sets out the critical question and addresses two tests: the public function test and the coercive force or pervasive entanglement test. Additionally, *Lake* requires examinees to show a nexus between the behavior complained of and the state. An overview of the tests follows.

First, the U.S. Supreme Court and lower courts have found state action where a private actor was engaged in a public function delegated by the state. If the private actor exercised a function that has traditionally been a public or sovereign function, the state cannot free itself of its constitutional obligations by delegating that function to a private entity. This is, perhaps, the easiest test and is one of the more traditional tests. Examinees should argue that Allied engaged in a public function when it assisted the state in offering services related to sentences of probation, a type of restriction on a person's liberty. Only the state can restrict a person's liberty.

Second, courts have found state action when the state exercised its coercive or influential power such that it can be said that the private action was effectively that of the state. Put another way, state action exists when there are pervasive entanglements between the private actor and the state. An alternative analysis of coercion is that state action is found where the state so regulates the activities of the private actor that the private actions can be said to be those of the state.

Examinees should argue that, when overseeing probationers, Stern and Allied are governed by Franklin law, the Union County court orders, and the oversight of the Union County Probation Officer. This extensive regulation of Allied by the county is sufficient to make Stern and Allied agents of the state. Further, there are pervasive entanglements between the county and Allied, including Allied's fulfilling a public function, being funded by the county, reporting to the county, and even appearing by name and address on the court orders.

Lastly, the courts require a plaintiff to show a nexus between the conduct complained of and the state. Examinees must show that the conduct complained of—discrimination in failing to provide mental health counseling to women—is linked to the state through the court's order, the regulation of Allied by state statute, and the reporting made to the County Probation Officer.

The memorandum from the partner instructs examinees to rely on all available tests; examinees should apply both the public function test and the coercive force or pervasive entanglement test and also demonstrate that the nexus requirement has been met. Examinees must use the facts available to them to demonstrate how the various tests have been met. They should distinguish the instances (*Rendell-Baker* and *Lake*) where courts found insufficient evidence of state action.

Note: Examinees who discuss the merits of the case—that there has been gender discrimination—are not responding to the task assigned.

III. ANALYSIS

A. By overseeing Peek as a probationer, requiring her to submit to blood and urine testing, requiring her to report monthly to Allied, and reporting on her behavior to the court, all with the possibility that Peek's liberty will be further restricted, Stern and Allied perform a public function and are state actors.

One of the traditional tests of state action is whether the actor performs a public function. The *Lake* case discusses two instances of public functions—providing medical care to prisoners and arresting persons. It also discusses instances where the courts have found no public function: operating a lottery, a hospital, or a utility; educating children; and providing foster care. The key is whether the function is one that is traditionally and exclusively performed by the state.

Only the state can find a person guilty of a crime and sentence the person to probation, thereby restricting the person's liberty. Examinees should rely on the *Camp v. Airport Festival* case (discussed in *Lake*), in which the court found that depriving persons of liberty by arresting them is a function only the state can perform. Probation is also a restriction on liberty, because it imposes conditions that the probationer must meet.

In this case, it was the court of Union County that established the terms of probation and provided that it could reinstate the 10-month jail sentence if Peek violated those terms. The County Probation Officer, appointed to provide the probation services through which the sentence is carried out, is a state agent. *See* Franklin Criminal Code § 35-211(a). Stern and Allied stand in the place of the County Probation Officer by performing the services that would

otherwise be performed by that officer. In carrying out the probation services, Stern and Allied must adhere to the conditions imposed by the court, including supervising probationers, meeting with them monthly, and reporting violations to the court. The state cannot delegate these functions to a private actor without the actor being subject to constitutional limits. Doris Stern (in her capacity as Allied's executive director) and Allied perform a public function.

Stern and Allied may argue that Allied is simply providing counseling services and that such services have *not* traditionally and exclusively been a state function. Courts have found that education and foster care services, while often performed by the state, are not traditional and exclusive functions of the state. Allied may argue that counseling is more like education or foster care. Indeed, Allied offered counseling services long before contracting with Union County to offer probation services.

Examinees should rebut that argument by noting that Allied's counseling services are provided to probationers as part of their probation services. In addition to providing counseling, Allied also supervises probationers. Allied requires, per court order, that probationers report to it monthly and report on compliance with other aspects of the probation order: submitting to blood and urine tests, not leaving the state, not violating any criminal statute, and not consuming drugs. Allied is to inform the court of any violations of the probation order. These requirements are not typically part of counseling. They are restrictions on the liberty of a person. Only the state can restrict someone's liberty. While counseling services on their own are admittedly not a state function, the critical point is that by offering probation services, Stern and Allied act as agents of the Union County court in carrying out the sentences imposed by the court. Insofar as the counseling services in question are provided as part of the terms of an individual's probation sentence, offering and/or performing them constitutes a public function.

B. Because Franklin requires its County Probation Officer to oversee the plan of probation services offered by Allied Behavioral Health Services and because state law specifies the conditions Allied is to meet in offering probation services, Franklin coerces and influences Allied and creates pervasive entanglements between Franklin and Allied sufficient that Stern and Allied are state actors.

Another test courts consider in determining state action is the extent of state coercion or influence, often through regulation, of the private entity. The U.S. Supreme Court in *Rendell-Baker* stated that the coercive power or influence must be so great that the decisions of the private party must be deemed those of the state. *Rendell-Baker v. Kohn,* 457 U.S. 830 (1982).

Franklin state law permits counties to contract with private entities to provide probation services to those convicted of misdemeanors. Union County contracts with and pays Allied for these services. While *Lake* rejected the argument that contracting is sufficient state regulation, the contract here is subject to much greater oversight by the county. Franklin heavily regulates the provision of probation services. The state establishes minimum qualifications for the persons offering the probation services. *See* Franklin Criminal Code § 35-211(b). Stern and Allied must submit an annual plan of services that meets the requirements of the Franklin statute. The plan

then must be approved by the County Probation Officer. Stern and Allied must also submit a quarterly report to the County Probation Officer, listing the probationers served and the services offered.

Franklin also regulates Stern and Allied with regard to the provision of probation services through its courts. Here, the Union County court determined the conditions of probation Peek must meet and the services Stern and Allied must provide. The court order sentencing Peek to probation requires that she report to Allied for probation services and provides the name and address of Allied in the order. It requires that Peek meet monthly with a counselor from Allied, be evaluated for mental health counseling by Allied, and receive the appropriate counseling from Allied. Allied cannot deviate from the terms set by the court. The court sets the fee the probationer is to pay to Allied ($50 per month). Examinees should argue that Franklin, through its statutory scheme for probation and its courts' orders, provides extensive regulation, if not coercion, of Allied. Thus, Allied acts as an agent of the state and must be regarded as a state actor.

Allied may argue that it is no more than a contractor with the state, like the contractor in *Lake*. However, Allied is different from the contractors discussed in the *Lake* case. Allied does not contract with the state to deliver office supplies or to build buildings—activities provided by private entities to other entities, private and public. Rather, Allied contracts with Union County to supervise and counsel probationers, functions assigned to it by the court and overseen by the County Probation Officer, as discussed above. It cannot vary from the conditions set by the county and the court.

Additionally, examinees should argue that Allied is more like the defendant association in the *Brentwood* case. The association, while a private entity, set the rules for sports for the public high schools, rules that the state Department of Education approved. Here, under Franklin law, Allied must set out the plan for providing probation services and have it approved by the County Probation Officer. Allied must also submit quarterly and annual reports to the County Probation Officer and have them approved. This sort of required oversight by the county makes Allied an agent of the state, rather than a mere contractor.

State action also exists when there are pervasive entanglements between the private actor and the state. In *Brentwood*, the Court found such pervasive entanglements where a seemingly private association was governed by a board composed mainly of public school representatives. The board effectively operated the sports program for the state's public high schools, and the state Department of Education approved the rules of the association. Similar entanglements are present in this case.

The County Probation Officer asked Allied to submit a plan to become a provider of probation services for Union County. Allied chose to take advantage of Franklin law, which permits private entities to contract with the state to offer probation services. In doing so, Allied agreed to comply with state law and with the conditions imposed by the Union County court.

The county court order sentencing Peek identifies Allied as the provider and supervisor of probation services. The order lists Allied by name and provides its address. The order requires that Peek report to Allied for probation services, meet monthly with a counselor from Allied, be evaluated for mental health counseling by Allied, and receive that counseling from Allied. The order sets the fee that Peek must pay Allied for probation services. These are indicators of the close entanglement between the state and Allied.

In response, Allied may argue that it is a private entity, controlled by a private board of directors and funded by public and private dollars. It has existed since 1975 with no apparent connection with the state. It was not created to provide probation services. And the service it offers to probationers—mental health counseling—is no different from that offered to its private clients.

Examinees should rebut that claim by citing the U.S. Supreme Court's conclusion that the nominally private character of an entity cannot overcome pervasive entanglements that make it a state actor. Although it is governed by a private board of directors, Allied expanded its board to include two public officials—one of the county judges and the Union County director of public health services. These additions were made at the time Allied took on the probation work. Even though the public officials do not control the board, their presence on the board, coupled with the timing, suggests that Allied wanted to align itself more closely with the county. Further, the county and Allied are entangled by the regular plans and reports that Allied and Stern must submit and that the county must approve. Allied, in effect, stands in the place of the County Probation Officer, is heavily regulated by the state, is funded by the state and the probationers' fees for its probation services, and carries out court orders of the state. These facts constitute sufficient entanglements to make Allied a state actor.

C. Stern and Allied's discriminatory conduct in failing to provide Peek with probation services is related to the state's regulation of Allied through the Union County Sentencing Order and the Franklin statute governing how Allied provides probation services, and is sufficient to meet the requirement that there be a nexus between the challenged action and the state.

In addition to demonstrating the close relationship between Franklin and Allied, Peek also meets the requirement to show a nexus between the challenged action and the state. In *Rendell-Baker*, the court rejected the plaintiffs' argument that the private school was a state actor when it fired the employees. The challenged conduct—firing the employees—had little connection with the state's regulation concerning education of the children. In *Lake*, the conduct complained of—firing Lake, an employee—had nothing to do with the contract between the state and Mega to operate the lottery.

Unlike the plaintiffs in *Rendell-Baker* and *Lake*, Peek clearly demonstrates the nexus between the challenged action and the state. The challenged action is Allied's discrimination against women in providing probation services. That conduct is linked directly to the state, which acted through the Union County Court Sentencing Order to impose a condition of probation and through the county's contract with Allied to offer probation services. It is also directly linked

to the state because Allied submits an annual plan of services and a quarterly report of services rendered, all of which are approved by the County Probation Officer and all of which would show that women are not provided with counseling. The state expected Stern and Allied to provide the court-ordered mental health counseling. Allied has not done so, and that is the reason Peek has sued Stern and Allied. Thus, Peek has satisfied the requirement of showing the nexus between the state and Stern and Allied's conduct.

Allied may argue that there is no nexus because the county is not involved in the day-to-day operation of the mental health counseling program. However, examinees should argue that the entanglements and regulation discussed above provide a substantial nexus.

July 2017
MPT-2 Point Sheet:
In re Zimmer Farm

In re Zimmer Farm

DRAFTERS' POINT SHEET

The task for examinees in this performance test is to draft an objective memorandum to the attorney for the County of Hartford, analyzing whether a local family farm's activities are permitted under the Hartford County zoning ordinance and discussing the effect of the Franklin Right to Farm Act (FRFA) on enforcement of the ordinance.

John and Edward Zimmer, a father and son who operate a local farm, have held periodic festivals on their farm for many years without incident. In recent years, however, they have begun operating a bird rescue sanctuary on the farm; they have also increased the festivals on the farm to four per year; these activities have both drawn complaints from local residents. The county board president wants the bird rescue operation moved off the Zimmers' farm and has directed the county attorney to find a way to stop the festivals. The county attorney is to research whether the county can limit the Zimmers' operations.

The File contains the instructional memorandum from the supervising attorney, an email from a complaining resident, and the investigator's report about the Zimmers' farm. The Library contains an excerpt from the Hartford County Zoning Code, excerpts from the Franklin Agriculture Code comprising the Act, a Franklin Senate Committee report on FRFA, and three appellate court cases, two from Franklin and one from Columbia.

Examinees are not given a specific format for drafting the memorandum. The following discussion covers all the points the drafters of the item intended to raise in the problem.

I. OVERVIEW

Examinees are directed to draft an objective memorandum to the county attorney, analyzing three questions:

1. Is the Zimmers' bird rescue operation permitted under the county zoning ordinance?
2. Are the Zimmers' festivals permitted under the county zoning ordinance?
3. How, if at all, does FRFA affect the county's ability to enforce its zoning ordinance with respect to the bird rescue operation and the festivals?

Examinees are instructed not to draft a separate statement of facts but are told to integrate the facts into their analyses. Examinees are not given a specific format to follow, but they should organize their memoranda to address each of the three questions.

II. THE FACTS

The Zimmers have operated a farm on their land since 1951, raising apples, strawberries, and, for a time, vegetables. Two years ago, Edward Zimmer began to take in wounded birds as part of a bird rescue operation; people from miles around now bring him injured birds. He cares for the birds before releasing some of them back to the wild, and those that cannot be released stay on the farm. He does not sell the birds or make a profit from them.

In 1988, the Zimmers began a tradition of hosting a one-day apple festival for schoolchildren to pick and purchase apples. The children and their parents also listened to music and played games, and there were no problems with the neighbors. Last year, however, the Zimmers increased the number of festivals—they hosted four weekend "Bird Festivals" on their farm and advertised them as such on flyers. Local vendors sold food and drink, and local artists provided music. The Zimmers sold fruit and cookbooks and offered talks on cooking and baking with fruit. Additionally, Edward sold bird-themed souvenirs such as T-shirts, caps, and books, gave a talk about birds, and encouraged guests to "adopt" birds by donating to the bird rescue operation. Donations and profits from the sales of souvenirs supported the bird rescue operation.

The county board president has received complaints from nearby residents about the noise, bugs, and smells from the birds. Other complaints have been about the noise, parking, and littering issues associated with the festivals.

Country Manors and Orchard Estates are residential subdivisions bordering the Zimmer farm on the east and west. Both subdivisions were developed in the 1990s and are zoned R-1, single-family residential; before the development of these subdivisions, the land was farmland for over 100 years. The Zimmer farm is zoned A-1, Agricultural, which permits the commercial production of fruit.

III. THE LAW

The Hartford County zoning ordinance § 22(a) permits "any agricultural use" within A-1 Agricultural districts; an agricultural use is defined as any activity conducted for the purpose of producing an income or livelihood from an agricultural product. 15 HCC § 22(b)(2). The ordinance also permits, among other uses, agricultural accessory uses, including farm stands and special events, such as the festivals, but with limitations. Examinees are told that the apple and strawberry production is permitted under the ordinance. They must first discuss and determine whether the bird rescue operation and the festivals are uses permitted under the ordinance.

The term "agricultural product" is not defined in the ordinance, although the ordinance includes a list of agricultural products, and the strawberries and apples are clearly agricultural products. [Examinees need not be familiar with agricultural products but must read the critical portion of the ordinance: an agricultural use is one conducted for the purpose of *producing an income or livelihood*.] Additionally, *Koster v. Presley's Fruit* (Col. Ct. App. 2010), decided

in Columbia and analyzing its Right to Farm Act, rejected wooden pallets as "farm products" because they did not match any of the definitions of farm products in the Act and were not like any of those farm products; the fact that the wood for the pallets was not "grown, raised, or bred on the farm premises" also weighed against their being considered "farm products." One question for examinees will be whether the rescued birds on the Zimmers' farm are "agricultural products."

A state statute may have some bearing on the County's ability to curtail the Zimmers' activities through enforcement of the ordinance. The Franklin Right to Farm Act (FRFA) was enacted in 1983 to conserve, protect, and encourage the development and improvement of Franklin agricultural land for the commercial production of food and other agricultural products. FRFA declares that no farm can be found to be a nuisance if the farm existed before a change in the use of the land that borders the farm and if, before the change occurred, the farm was not a nuisance. Further, local units of government cannot enforce an ordinance that conflicts with the Act and undermines the purpose of the Act. Therefore, where FRFA applies, it preempts the Hartford County zoning ordinance if there is a conflict between them that undermines the purpose of the Act. *See Shelby Township v. Beck* (Fr. Ct. App. 2005).

Examinees must determine how, if at all, FRFA affects enforcing the ordinance; to do so, they must determine whether FRFA applies to the Zimmer operation. Critical to applying FRFA to the Zimmer operation is the fact that FRFA applies only to *commercial* farm operations.

Wilson v. Monaco Farms (Fr. Ct. App. 2008) and *Koster* offer guidance to examinees in interpreting statutes and provide examples of statutory interpretation useful in interpreting FRFA and the zoning ordinance.

IV. ANALYSIS

1. Is the Zimmers' bird rescue operation permitted under the county zoning ordinance?

An A-1 agricultural district, under the Hartford County zoning ordinance, permits "any agricultural use." The ordinance also permits some uses that are "incidental" to farm operations, including "agricultural accessory use[s]." Examinees are given no other language about permitted uses, and they are expected to conclude that activities not falling into these categories *are not permitted* in an A-1 agricultural district.

The ordinance also provides definitions for its terms: "'Agricultural use' means any activities conducted for the purpose of *producing an income or livelihood* from one or more of the . . . agricultural products" listed in the ordinance, among them fruits, livestock, and poultry. 15 HCC § 22(b)(2) (emphasis added). "Agricultural accessory use" includes farm stands and "special events, provided that they are three or fewer per year and are directly related to the sale or marketing of one or more agricultural products produced on the premises." *Id*. § 22(b)(3).

(a) Is the Zimmers' bird rescue operation an "agricultural use"? Because a critical term in the zoning ordinance's definition of "agricultural use" is the *production of an income or livelihood*, the Zimmers' bird rescue operation is not an agricultural use. Edward Zimmer told the investigator that he does not sell the birds or profit from the bird rescue operation. In the Zimmers' case, maintaining the bird rescue operation is not an activity for the production of an income or livelihood.

Some examinees might point out that the zoning ordinance permits the keeping of poultry, and arguably, some of the birds that Edward keeps are poultry. But he does not raise birds, and the birds he has were taken in with the expectation that they would be released into the wild. And even if the birds would qualify as "agricultural products," the rescue activity is not conducted to make money. As explained in *Koster*, if the language of the statute is clear and unambiguous, the court will give the words of the statute "their natural and ordinary meaning" and not "venture beyond the text." Here, the ordinary meaning of "producing an income or livelihood" is clear. The Zimmers have not produced an income from the bird rescue operation, nor do they intend to do so. The bird rescue operation is not an "agricultural use."

(b) Is the Zimmers' bird rescue operation an "agricultural accessory use"? The only other way the bird rescue operation could be permitted under the ordinance would be as an "agricultural accessory use." *See* 15 HCC § 22(b)(3). However, the bird rescue is clearly not a farm stand, as that term is commonly used, and the Zimmers would be hard pressed to demonstrate that the rescue operation is a "special event."

Thus the bird rescue operation is not within the agricultural uses permitted by the zoning ordinance.

2. Are the Zimmers' festivals permitted under the county zoning ordinance?

The A-1 agricultural district permitted uses under the Hartford County zoning ordinance include certain incidental activities such as "agricultural accessory use[s] *intended to add value to agricultural products produced on the premises or to ready such products for market*." 15 HCC § 22(a)(2) (emphasis added). Included in accessory uses are "special events," provided that they are "three or fewer per year and are *directly related to the sale or marketing* of one or more agricultural products produced on the premises." § 22(b)(3)(b) (emphasis added).

Without the bird rescue emphasis, the festivals would seem to qualify as special events because they are related to the marketing of the Zimmers' fruit, but in the last year, the Zimmers exceeded the ordinance's limit of three or fewer per year. The investigator reported that the Zimmers held four festivals last year. If the festivals continue to be held four or more times per year, they are not a use permitted under the ordinance.

If, however, the Zimmers limit themselves to three or fewer festivals and if they concentrate the festivals on the produce grown on the farm, the festivals will likely qualify as a permitted use under § 22(b)(3)(b).

The Zimmers have used the festivals to sell and market their apples and strawberries, which are crops produced on the farm for commercial purposes. Selling fruit is their livelihood and has been for decades. Past festivals have included sessions on cooking and baking with apples and strawberries, aimed at marketing the fruit. During the festivals, the Zimmers have sold cookbooks with recipes for fruit, again designed for the sale and marketing of fruit. The flyer used to attract people to the festivals includes the following language: "Buy apples and discover the best recipes for baking with fruit." These facts would support an argument by the Zimmers that the festivals (limited to three per year) should be permitted under the ordinance as special events directly related to the sale or marketing of the fruit.

However, there are also several facts that can be used to argue that past festivals have not been primarily about selling and marketing the fruit grown on the premises but have been focused on the bird rescue operation. Notably, the Zimmers have advertised the festivals as "Bird Festivals." They have used the festivals to encourage donations for the bird rescue by asking attendees to "adopt a bird." They have sold bird-related goods such as books, T-shirts, and hats, with the profits going to the rescue operation. The music and food provided by vendors have been used to attract festival goers to the events, which were primarily devoted to supporting the rescue operation.

If future festivals are focused on the bird rescue operation, the festivals will not be permitted under the ordinance regardless of their number, because the birds are not an agricultural product produced on the premises. More astute examinees will note that if the county is successful in shutting down the bird rescue operation, the question of any future *bird-themed* festivals will become moot.

In conclusion, if the Zimmers limit any festivals to three or fewer per year and make them directly related to the marketing of their agricultural products (and not the bird rescue, if it survives the county's actions), the festivals will be permitted under the ordinance.

3. How, if at all, does FRFA affect the county's ability to enforce its zoning ordinance with respect to the bird rescue operation and the festivals?

Examinees must first determine whether FRFA applies to the county's enforcement of its ordinance with respect to both the bird rescue operation and any future festivals. In interpreting FRFA, examinees should seek to give effect to the intent of the legislature. If the statute's language is clear, they must apply the language in its ordinary meaning. *See Koster*.

FRFA protects (1) a farm or farm operation (2) that existed before change in the use of the land bordering the farm, (3) if before the change in land use, the farm or farm operation was not a nuisance. FRFA § 3(a). Under the Act, a farm consists of land and buildings "used in the commercial production of farm products." FRFA § 2(a). A farm operation means "operation and management of a farm or an activity that occurs on a farm in connection with the commercial production, harvesting, and storage of farm products." *Id.* § 2(b). The Zimmer farm qualifies as a farm because it consists of land used for the commercial production of farm products; it produces

apples and strawberries for sale at its festivals and at local grocery stores and farmers' markets. For the same reason, the Zimmers run a farm operation under FRFA.

The Zimmer farm meets the requirement of having existed before a change in the use of the bordering land. *See id*. § 3. The Zimmer farm has existed since 1951, before the adjoining land was developed into residential subdivisions in the 1990s. The ordinance enforcement, however, would target farm *operations* of the Zimmers, not the farm itself. The nuisance complaints focus on the bird rescue operation and the festivals. The bird rescue operation does not predate the change in the use of the bordering land because it began two years ago, long after the change in the land use. The festivals, however, do predate the change, having begun in 1988, before the 1990s development of the subdivisions. Some form of the festivals existed in the 1990s, which is the date of the change in land use and the date used to measure when a nuisance may have existed. *See Wilson*.

(a) Does FRFA protect the bird rescue operation? FRFA does not apply to the Zimmers' bird rescue operation for two reasons. First, the bird rescue operation does not predate the change in the land use. Second, the bird rescue operation does not meet the definition of a farm operation as defined in § 2(b) of FRFA. FRFA defines a farm operation as one involved in commercial production of farm products. As described above, the Zimmers are not involved in the bird rescue operation for commercial gain. Finally, *Koster*, which is persuasive but not authoritative, offers some guidance in determining what is or is not a farm product. If the item in question is not "grown, raised, or bred on the farm premises," that weighs against its being considered a "farm product." The birds on the Zimmer farm, which are brought to Edward Zimmer for care, are not bred or raised on the farm. Therefore, because FRFA does not apply to the bird rescue operation, it does not affect the county's ability to enforce its ordinance as to the bird sanctuary.

(b) FRFA may or may not apply to protect the festivals. If the real purpose of the festivals is to fund the bird rescue operation, as discussed above, FRFA will not protect them because they do not meet the requirement that an activity be in connection with "the *commercial* production of farm products." FRFA § 2(a) (emphasis added). But given that the bird rescue operation is not protected by FRFA and is not allowed under the county ordinance, the county will likely be able to shut down the operation. In that case, the festivals will no longer be bird-related.

It could be argued that, even if the Zimmers eliminate the bird-related activities from the festivals, the festivals still fail to meet the statutory definition of a farm operation as one related to the commercial production, harvesting, and storage of farm products. FRFA § 2(b). The lesson of *Koster* and *Wilson* is that interpreting the statute requires examining the actual text. If words such as "festivals," "special events," or "sales and marketing" do not appear in FRFA, they should not be added. Examinees may note that had the Franklin legislature intended to include marketing and sales in FRFA, it could have. Because it did not, one assumption is that the legislature did not intend to protect these activities.

However, the Zimmers may reasonably argue that the term "commercial production" necessarily includes the sale and marketing of a farm product, such as the fruit, and that the festivals promote fruit consumption and purchase. If the Zimmers eliminate the bird-related activities from the festivals, they can argue that they meet the statutory definition of farm activity and that the festivals predate the change in the land use. The festivals predate the change because the Zimmers, in 1988, began offering a one-day apple festival for schoolchildren, complete with apples for sale, music, and games. The purpose of the festivals, as long ago as 1988, was to sell the fruit produced on the farm and to educate the public about how to use the fruit. The current two-day festivals are an expansion of these earlier festivals. Under *Wilson*, an expansion normally will not cause a farm operation to lose the protections of FRFA.

Examinees should also consider the purpose of the legislation as stated in the available legislative history, the Report from the Senate Committee on Agriculture. The Report states that the purpose of the Act was to conserve and protect agricultural land and goes on to explain that the legislature wanted to protect farm operations from the threat of nuisance suits and the enforcement of restrictive regulations. *See also Wilson*. The Zimmers' festivals do not seem necessary to preserve the land or the farm. The Zimmers have sold their produce for decades at local stores and markets without the need for the festivals. There is no indication that they cannot continue to do so without the festivals. There is no need to add words to the legislation to have it apply to festivals in order to honor the purpose of the Act.

On the other hand, examinees might note that the Zimmers could make a plausible argument that the sweeping language in the Senate Committee Report about conserving and protecting land and shielding farmers from nuisance suits might warrant a broader reading of the statute.

In short, there are arguments on both sides of this statutory interpretation issue. Given that *Koster* is only persuasive rather than binding authority, it is unclear what result a Franklin court might reach in interpreting this language in FRFA.

(c) If FRFA applies to the festivals, how, if at all, does FRFA affect the county's ability to enforce its zoning ordinance? The plain language of FRFA provides that a local unit of government shall not enact or enforce an ordinance that conflicts with it. The *Shelby Township* case clarifies that the Act preempts local zoning ordinances where there is a conflict with the Act that undermines the purpose of the Act.

Because there is a good argument that the Zimmers' festivals, or at least their future festivals, are focused on marketing and selling their fruit and are therefore protected by FRFA, the issue is whether the county ordinance's limit of three festivals per year conflicts with the Act and undermines its purpose—to conserve farmland and protect farmers from nuisance suits.

Limiting the festivals to three per year is not the sort of conflict that existed in *Shelby Township*. In that case, enforcing the ordinance meant that the farm operation could not continue.

Here, nothing in the ordinance prohibits the use of farmland for the production and sale of the fruit. Enforcing the ordinance will not undermine FRFA's purpose, which, as stated in *Wilson*, is to conserve farmland. Thus, the ordinance does not appear to conflict with FRFA or to undermine its purpose. While the Zimmers will likely be required to shut down the bird rescue operation by enforcement of the ordinance, they will likely be allowed to continue putting on no more than three fruit-related festivals per year.

NOTES

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