California Bar Examination

Performance Tests and Selected Answers

July 1997

THE STATE BAR OF CALIFORNIA
OFFICE OF ADMISSIONS

PERFORMANCE TESTS AND SELECTED ANSWERS

JULY 1997 CALIFORNIA BAR EXAM

This publication contains two performance tests from the July 1997 California Bar Examination and two selected answers to each test.

The answers received good grades and were written by applicants who passed the examination. The handwritten answers were typed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

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JULY 29, 1997

California Bar Examination

Performance Test A

INSTRUCTIONS AND FILE

In re Christopher Small

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INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictional state of Columbia, one of the United States. Columbia is located within the fictional United States Court of Appeals for the Fifteenth Circuit.

3. You will have two sets of materials with which to work: a File and a Library. The File contains factual information about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.

4. The Library contains the legal authorities needed to complete the tasks. 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 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 citations.

5. Your reasons must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. 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.

6. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to organizing and writing.

7. This performance test will be graded on your responsiveness to instructions and on the content, thoroughness, and organization of your response. In grading the answers to this question, the following, approximate weights will be assigned to each part:

A: 25%

B: 75%

KELLEHER and al-HIBRI
Attorneys at Law
Court House Square
Henniker, Columbia

MEMORANDUM July 29, 1997

To: Applicant
From: Leslie Kelleher
Re: Christopher Small

I was in court this morning and was asked by Judge Rosen to act as guardian ad litem in what appears to be a dispute between the Department of Social Services (DSS) and a foster parent. The hearing this morning, at which Judge Rosen issued the attached Order appointing me, was apparently ex pane under Code of Columbia §251. I have never been a guardian ad litem before, so I need your help in telling me what's expected of me and how I should proceed from here on out.

As far as I can tell, Christopher Small was placed by order of the court in permanent foster care in the home of Frances Melton in May 1992. The child, however, has actually been in the Melton's home for nine years. On July 22, Ms. Melton allegedly abused Chris and DSS removed the child from her home. DSS placed the child in the home of a temporary foster care parent. Two days later, Chris ran away and, after he was found, DSS moved him to an emergency shelter.

I have obtained the documents filed with the petition filed by DSS to rescind the Permanent Foster Care Order issued in 1992. I have also spoken very briefly with Ms. Melton. I have attached the documents filed with the petition, along with a memo summarizing my conversation with Ms. Melton. I have also attached what appears to be the relevant law on the topic, though given the limited time I spent on it, there may be more law that we need to look up.

Please do the following:

1. I'm unsure of the role of a guardian ad litem. As the guardian ad litem, am I the lawyer for the child? If not, what am I? Please don't write about the court procedures or the specifics of this case. All I want is a short memorandum describing my role as guardian ad litem.

2. More important, I need to know specifically what I am supposed to do. I want you to develop a Case Plan. I have attached the office memo that describes what a Case Plan entails. Keeping in mind that formal discovery is not available in Juvenile and Domestic Relations court, please follow the directions contained in the memo. Please also tell me what positions (e.g., flawed procedures and others) I could advocate consistent with my role as guardian ad litem.

KELLEHER and al-HIBRI
Attorneys at Law
Court House Square
Henniker, Columbia

MEMORANDUM July 29, 1995

To: Associates
From: Leslie Kelleher
Re: Case Plan

This memo provides guidance to all associates in developing uniform Case Plans. When I request a Case Plan, what I want is a memorandum explaining clearly and concisely the steps that I should take in order to handle the case from beginning to end, including researching the law, investigating and developing the facts, and taking any other necessary actions.

The case plan must cover the following:

- What is the overall goal to be achieved?
- What legal issues need to be researched? As to each legal issue, what legal research needs to be done?
- For each legal issue, what factual issues, if any, need to be resolved?
- For each factual issue, 1) what additional facts do we need and 2) how and from what source do we obtain these facts?

Where formal discovery devices are available, state what specific devices should be employed. Do not ignore informal discovery devices such as interviews of potential witnesses or asking for copies of documents.

Be sure to indicate the order in which the steps should be taken. For example, in a. product liability action you might suggest that we should take a party's deposition before serving

interrogatories. State why this is so. For example, there are a limited number of interrogatories available and follow-up questions are not allowed. Therefore, the deposition which is more open ended and allows follow-up questions should be done first. Then based on this information, the interrogatories can be used to clarify more specific and possibly narrower details.

In writing the Case Plan for investigating, researching and preparing a case for resolution, be as specific as possible. In a custody case, for example, do not just tell me I need to do informal and formal discovery to establish that placement with our client is in the best interests of the child. Tell me what statutory or case law is relevant, what factual considerations should be brought to bear to establish those interests, and specifically how (e.g., deposition, affidavit, interrogatories, requests for admission, etc.) and from whom we should obtain and present the facts.

State of Columbia
Juvenile and Domestic Relations District Court
10th Judicial District

IN RE Christopher Small

Upon petition of the Henniker Department of Social Services, it is hereby ORDERED as follows:

1. This court will conduct a hearing pursuant to Columbia Code §206.1 for the removal of Christopher Small from the physical custody of the permanent foster care parent, Frances Melton. Such hearing shall take place no later than August 12, 1997.

2. Counsel of record and the guardian ad litem shall have full access to all records relevant to the determination of this issue, including the records lodged with this court in support of this petition. This shall include all psychiatric and psychological examinations.

3. Frances Melton shall be given the opportunity to visit the child at least once each week at his current place of residence.

4. The court appoints Leslie Kelleher guardian ad litem for Christopher Small.

Sharon Rosen
Sharon Rosen, Judge

July 29, 1997
Date

CITY OF HENNIKER

Department of **Social Services**
3200 Main Street
Henniker, Columbia

July 28, 1997

TO: The Honorable Sharon Rosen

FROM: Peter N. Sherwood, Social Worker

SUBJECT: Request for Rescission of Permanent Foster Care
Child: Christopher Small
Foster Mother: Frances Melton

The above-named child was placed in Permanent Foster Care by this court in 1992. During the past nine years, including four years before permanent foster care placement, the Department has worked closely with the foster mother. This arrangement was agreeable until recently when Child Protective Services determined that there was a founded complaint of abuse of the child by Ms. Melton.

The details of the complaint are contained in the attached *Child Protective Services Report and Foster Care Plans*. In essence, Ms. Melton corporally punished Christopher in the presence of day care workers and other children. In addition, Ms. Melton requires Christopher to engage in street preaching.

The child named above has been removed from the Permanent Foster Care home of Ms. Melton at the direction of the Director of the Henniker Department of Social Services. We are requesting that this court find that the best interests of the child require, and the court therefore should order, rescission of the Permanent Foster Care order of 1992.

cc: Frances Melton

FOSTER CARE SERVICE PLAN

Child: Christopher Small Date of Birth: May 1987

Date of Custody: April 1988

Date of most recent removal from own home: April 1988

Program Goal: Continued foster care

Custody Status:

[ ] Abuse/neglect
[ ] Parental Request
[ ] CHINS
[ ] Delinquent

NOTE: Numbers 1, 2, and 3 are to be completed only upon initial removal of the child.

1. State briefly why child came into care and why placement is needed.

_____

_____

_____

_____

2. Describe services offered to prevent removal. If no services, explain why.

_____

_____

_____

3. Briefly state child's situation relative to family, health, education, etc.

Grandparents living in Middletown, Columbia

4. Type of Placement.

Temporary emergency foster care.

5. Describe efforts that have been made to place the child in the least restrictive environment consistent with the best interests of the child.

No appropriate foster care home found on short notice.

Pre-placement visit to group home has been completed

Awaiting acceptance.

6. Describe the efforts to place the child in closest proximity to parent's home.

Temporary emergency foster care home shelter is within

15 miles of neighborhood of foster mother, Frances Melton.

7. Describe how any court orders made in respect to this child were carried out.

Chris was originally placed in permanent foster care of

Frances Melton. Frances Melton was found to abuse the child. Complaint filed by day care worker.

8. Mechanisms for ensuring proper care of the child.

a. Identify the needs of the child which must be met.

Chris must be placed in a safe and secure setting in which special education needs are provided.

b. Biological Parents/Prior Custodians.

Biological mother and father are deceased.

9. List responsibilities and target dates for child/parent/foster parent.

Chris to remain in placement, attend school. not run away Target date ongoing.

Placement to maintain safe secure environment and ensure child goes to school Target date: ongoing

Peter Sherwood July 24, 1997

Social Worker *Date*

Nora Osborne July 24, 1997

Social Worker *Date*

FOSTER CARE SERVICE PLAN

Child: Christopher Small Date of Birth: May 1987

Date of Custody: April 1988

Date of most recent removal from own home: April 1988

Program Goal: Continued foster care

1. Describe the services which were offered to meet the needs identified in the last service plan. Identify barriers to goal achievement and appropriateness of services.
   Chris was removed from -permanent foster care because of founded complaint of physical abuse. Chris was placed in temporary emergency foster care home after two nights, but ran away. Chris was then placed in emergency shelter (St. Thomas Home). Services provided are: secure least restrictive environment, psychological evaluation, transportation to school counseling.

2. Describe biological family/prior custodian's current situation.
   Biological parents died when Chris was one year old.

3. Describe child's current situation and adjustment to placement.

Chris is rebellious, demands to return to Frances Melton home. Acting out behavior continues to be problem. Threatened staff if not allowed to contact attorney. Constant confrontations with peers.

4. If review based on change of placement, describe reason for change.

Worker received phone call from after school care taker, Betty Wolf. That Frances Melton had come to school and abused child.

Peter Sherwood July 28, 1997

Social Worker *Date*

Nora Osborne July 28, 1997

Supervisor *Date*

CITY OF HENNIKER

Department of Social Services
3200 Main Street
Henniker, Columbia

CHILD PROTECTIVE SERVICES REPORT

PRIMARY RECIPIENT: Christopher Small

A complaint was filed on July 22, 1997 at 3:30 p.m.

On July 23, a field contact was made at Elkbridge Day Care Center to speak to Betty Wolf, child care worker. Ms. Wolf related incident involving Christopher Small and Frances Melton. Ms. Wolf related that child has been recurring problem in the Center. The conduct involves poor peer and teacher relationships. There have been numerous confrontations between Chris and peers involving abusive language and threatening behavior. Chris has repeatedly verbally abused teachers, including complainant.

Ms. Wolf had contacted Frances Melton on several occasions complaining about Chris's behavior. On July 22, Ms. Wolf contacted Ms. Melton once again and explained the behavioral problem. On that day, when Ms. Melton came to pick up Chris from Elkbridge, Ms. Melton brought bottle of hot pepper sauce and first threatened to "wash out" child's mouth unless he apologized and promised not to engage in such behavior in the future. Chris refused to apologize and Ms. Melton forced the sauce into his mouth causing the child to gag. This incident occurred in the child's activity room in front of Ms. Wolf and approximately twelve other ten- to twelve-year-olds.

My examination of the child showed fresh bruises and abrasions to knees and elbows. Chris stated injuries were received on playground. Chris stated he did not wish to return home.

ASSESSMENT OF IMMEDIATE NEED/DANGER

Chris's situation required immediate removal from Frances Melton's home. This decision was based on Ms. Melton's method of discipline, evidence of injuries and Columbia Department of Social Services Regulations §20 (discipline). See attached regulation and Ms. Melton's acknowledgment.

CHRONOLOGICAL NARRATIVE

Lynda Frost. Director of Elkbridge

I spoke to Lynda Frost, the Director of the Elkbridge Day Care Center. She indicated that the children who witnessed the incident were still traumatized by the event. Several students have expressed fears that Ms. Melton would return and hurt them. Ms. Frost indicated that Chris had been attending their after school program since the beginning of the school year. She confirmed that Chris's behavior has been a problem and that Ms. Melton has been requested to "do something about it." She indicated she would not take Chris back into the program.

Joel Eisen. Bus Driver

I spoke to Joel Eisen, the after school bus driver for Elkbridge. Mr. Eisen picks up Chris (and seven other children) from River Elementary School. Mr. Eisen indicated that he had no problems with Chris. He indicated that although there were occasional arguments among the children, there was never any violence. He did indicate that Chris was very "aggressive" in his religious beliefs. When I asked what that meant, Eisen indicated that Chris would preach "brimstone and damnation." This is consistent with neighbor's information related below.

Martha Edwards. Teacher

I spoke to Martha Edwards, Chris's teacher. She indicated that Chris was disruptive, though he showed no violence. Language was a problem. She indicated that on numerous occasions she had suggested to Ms. Melton that stronger discipline was needed. She stated she suspects Chris has both emotional and cognitive problems, though to her

knowledge he has not been tested. She did not believe that Chris was performing to his academic ability.

Robert Jones. School Counselor

I spoke to school counselor, but was interrupted by disturbance in lunch room and he was unable to return to his office before I had to leave.

Terry Bagley, Neighbor

I went to Frances Melton's home to speak to her. Terry Bagley, a next door neighbor answered the door. She indicated she was waiting for a repairman as a favor to Ms. Melton, who had stepped out. Neighbor indicated Ms. Melton was a kind and caring individual, but that she occasionally seemed to go a bit overboard on the religion thing. When I asked what she meant, she indicated that Ms. Melton and Chris stand on the comer of Mason and Hamilton Avenues every Wednesday night while Ms. Melton uses a bullhorn to preach to the cars. Chris accompanies her, holding a sign with a religious quotation. She said she often feels sorry for Chris, who appears to be very uncomfortable. She has never seen any physical abuse of the child.

Frances Melton

Ms. Melton returned and I interviewed her. Ms. Melton appears unrepentant for having taken the action she did. She indicated that Chris was rebellious and needed to be controlled. In her words, some children just need a harsher lesson than others. I asked if she remembered signing the agreement concerning corporal punishment (see attached) and she did. She stated, however, that she was at the end of her rope with Chris. I asked why she did not come to DSS for assistance. She replied that she had spoken to Chris' teacher and her minister and that both had counseled her to be firmer. I expressed concern about the street preaching and she refused to respond. I pressed my concerns and she indicated that it was God she was concerned about, not DSS.

Peter Sherwood — *Case Worker*

July 24, 1997 — *Date*

CITY OF HENNIKER

Department of Social Services
3200 Main Street
Henniker, Columbia

STATEMENT OF WILLINGNESS TO COMPLY WITH DISCIPLINE POLICY

Department of Social Services Standards and Regulations for Agency Approved Providers §20 "Discipline of Children" provides:

1. The provider shall establish rules that encourage desired behavior and discourage undesired behavior in cooperation with the parent/guardian of the children in care.

2. The provider shall not use corporal punishment. Corporal punishment includes but is not limited , to hand spanking, shaking a child, forcing a child to assume an uncomfortable position, or binding a child.

3. The provider shall not humiliate or frighten the child in the course of disciplining the child. This includes the prohibition of any verbal abuse directed to a child. It also includes the prohibition of derogatory remarks about the child or the child's family.

4. The provider shall not withhold food, force naps, or punish toileting accidents in disciplining the child.

5. The provider shall not deny a child contact or visits with the child's family as punishment.

I fully understand the policy of the State of Columbia prohibiting the use of corporal punishment by foster parents. I have received training in the use of alternative discipline methods and techniques. I agree not to use corporal punishment in disciplining foster children in my home. I realize that any future use of corporal punishment with foster children could result in a letter of warning or the closing of my home to additional

placements.

Signed: *Frances Melton* May 21, 1994

Foster Parent *Date*

KELLEHER and al-HIBRI
Attorneys at Law
Court House Square
Henniker, Columbia

MEMORANDUM July 29, 1997

To: File

From: Leslie Kelleher

Re: Preliminary Investigation

After being appointed by Judge Rosen, I had an opportunity to talk briefly to Frances Melton. This will summarize the points discussed:

- She wants Christopher back.
- She has not adopted Christopher because she cannot afford to, since she would lose state support for him.
- She believes that "punishment should fit the crime." Chris has been a "problem" for a number of years. She doesn't feel she is getting the help at school she needs and actually fears that Christopher "has something wrong." She admitted to me that she has spanked Chris in the past, but she "doesn't think DSS knows it."
- She believes that much of the problem she has now with DSS is really over the street preaching. They have on numerous occasions complained about this activity. The complaints have increased recently after the local paper did an article on street preachers and featured her and Christopher.
- When Christopher ran away, he came back to her house.
- She works for an accounting firm as an office manager. She has no other children.

While there, I got a copy of the documents filed with the court. I'm not sure that DSS alleged the right things and followed the correct procedures in filing its "petition" and obtaining the "order" from Judge Rosen. (Does this make any difference to the guardian ad litem?)

TUESDAY AFTERNOON
July 29, 1997

California Bar Examination

Performance Test A LIBRARY

In re Christopher Small

LIBRARY

COLUMBIA RULES OF COURT

Rule 8. The roles of counsel and of guardian ad [item when representing children.

The role of counsel for a child is the representation of the child's legitimate interests. When appointed for a child, the guardian ad litem shall vigorously represent the child, fully protecting the child's interest and welfare. The guardian ad litem shall advise the court of the wishes of the child in any case where the wishes of the child conflict with the opinion of the guardian ad litem as to what is in the child's interest and welfare.

CODE OF COLUMBIA

Section 9. Guardian ad [item for persons under disability; when guardian ad [item need not be appointed for person under disability.

A. In a suit where a person under a disability is a party or when in the discretion of a judge of the juvenile and domestic relations court the judge shall deem it advisable, the court in which the suit is pending, or the clerk thereof, shall appoint a discreet and competent attorney-at-law as guardian ad litem to such person, whether such person shall have been served with process or not; or, if no such attorney be found willing to act, the court shall appoint some other discreet and proper person as guardian ad litem. Any guardian ad litem so appointed shall not be liable for costs.

Every guardian ad litem shall faithfully represent the estate or other interest of the person under a disability for whom he is appointed, and it shall be the duty of the court to see that the interest of such person is so represented and protected. The court, whenever of the opinion that the interest of such person requires it, shall remove any guardian ad litem and appoint another in his stead. When, in any case, the court is satisfied that the guardian ad [item has rendered substantial service in representing the interest of the person under a disability, it may allow such guardian reasonable compensation therefore, and his actual expenses, if any, to be paid out of the estate of such person; provided, if such estate is inadequate for the purpose of paying such compensation and expenses, all,

or any part thereof, may be taxed as costs in the proceeding.

B. Notwithstanding the provisions of subsection A or the provisions of any other law to the contrary, in any suit wherein a person under a disability is represented by an attorney-at-law duly licensed to practice in this State, who shall have entered of record an appearance for such person, no guardian ad litem need be appointed for such person unless the court determines that the interests of justice require such appointment; or unless a statute applicable to such suit expressly requires an answer to be filed by a guardian ad litem. The court may, in its discretion, appoint the attorney of record for the person under a disability as his guardian ad litem, in which event the attorney shall perform all the duties and functions of a guardian ad litem.

Any judgment or decree rendered by any court against a person under a disability without a guardian ad litem, but in compliance with the provisions of this subsection B, shall be as valid as if a guardian ad litem had been appointed.

Section 206.1. Permanent foster care placement.

place the child for adoption and such efforts have been unsuccessful or adoption is not a reasonable alternative for along-term placement for the child under the circumstances.

B. Unless modified by the court order, the foster parent in the permanent foster care placement shall have the authority to consent to surgery, entrance into the armed services, marriage, application for a motor vehicle and driver's license, application for admission into college and any other such activities which require parental consent and shall have the responsibility for informing the placing department or agency of any such actions.

C. Any child placed in a permanent foster care placement by a local department of public welfare or social services shall, with the cooperation of the foster parents with whom the permanent foster care placement has been made, receive the same services and benefits as any other child in foster care.

D. The State Board of Social Services shall establish minimum standards for the utilization, supervision and evaluation of permanent foster care placements.

E. If the child has a continuing involvement with his or her natural parents, the natural parents should be involved in the planning for a permanent placement. The court order placing the child in a permanent placement shall include a specification of the nature and frequency of visiting arrangements with the natural parents.

F. Any change in the placement of a child in permanent foster care or the responsibilities of the foster parents for that child shall be made only by order of the court which ordered the placement pursuant to a petition filed by the foster parents, local department, licensed child-placing agency or other appropriate party.

Section 248.9. Authority to take child into custody.

ment official investigating a report or complaint of abuse and neglect may take a child into custody for up to seventy-two hours without prior approval of parents or guardians provided:

1. The circumstances of the child are such that continuing in his place of residence or in the care or custody of the parent, guardian, custodian or other person responsible for the child's care, presents an imminent danger to the child's life or health to the extent that severe or irremediable injury would be likely to result; and

2. A court order is not immediately obtainable; and

3. The court has set up procedures for placing such children; and

4. Following taking the child into custody, the parents or guardians are notified as soon as practicable that he is in custody; and

5. A report is made to the local department; and

6. The court is noted and the person or agency taking custody of such child obtains, as soon as possible, but in no event later than seventy-two hours, an emergency removal order pursuant to Section 251; however, if a preliminary removal order is issued after a hearing held in accordance with Section 252 within seventy-two hours of the removal of the child, an emergency removal order shall not be necessary.

B. If the seventy-two-hour period for holding a child in custody and for obtaining a preliminary or emergency removal order expires on a Saturday, Sunday, or other legal holiday, the seventy-two hours shall be extended to the next day that is not a Saturday, Sunday, or other legal holiday, but in no event shall either such period exceed ninety-six hours.

Section 251. Emergency removal order.

A. A child may be taken into immediate custody and placed in shelter care pursuant to an emergency removal order in cases in which the child is alleged to have been abused or neglected. Such order may be issued ex parte by the court upon a petition supported by an affidavit or by sworn testimony in person before the judge or intake officer which establishes that:

1. The child would be subjected to an imminent threat to life or health to the extent that severe or irremediable injury would be likely to result if the child were returned to or left in the custody of his parents, guardian, legal custodian or other person standing in loco parentis pending a final hearing on the petition.

2. Reasonable efforts have been made to prevent removal of the child from his home and there are no alternatives less drastic than removal of the child from his home which could reasonably protect the child's life or health pending a final hearing on the petition. The alternatives less drastic than removal may include but not be limited to the provision of medical, educational, psychiatric, psychological, homemaking or other similar services to the child or family or the issuance of a protective order.

When a child is removed from his home and there is no reasonable opportunity to provide preventive services, reasonable efforts to prevent removal shall be deemed to have been made.

B. Whenever a child is taken into immediate custody pursuant to an emergency removal order, a hearing shall be held in accordance with Section 252 as soon as practicable, but in no event later than five business days after the removal of the child.

C. In the emergency removal order the court shall give consideration to temporary placement of the child with suitable relatives, including grandparents, until such time as the hearing in accordance with Section 252 is held.

Section 252. Preliminary removal order; hearing.

A. A preliminary removal order in cases in which a child is alleged to have been abused or neglected may be issued by the court after a hearing wherein the court finds that reasonable efforts have been made to prevent removal of the child from his home. The hearing shall be in the nature of a preliminary hearing rather than a final determination of custody.

B. Prior to the removal hearing, notice of the hearing shall be given at least twenty-four hours in advance of the hearing to the guardian ad litem for the child, to the parents, guardian, legal custodian or other person standing in loco parentis of the child and to the child if he or she is twelve years of age or older. If notice to the parents, guardian, legal custodian or other person standing in loco parentis cannot be given despite diligent efforts to do so, the hearing shall be held nonetheless, and the parents, guardian, legal custodian or other person standing in loco parentis shall be afforded a later hearing on their motion regarding a continuation of the summary removal order.

The notice provided herein shall include (i) the time, date and place for the hearing and (ii) a specific statement of the factual circumstances which allegedly necessitate removal of the child.

C. All parties to the hearing shall be informed of their right to counsel.

D. At the removal hearing the child and his parent, guardian, legal custodian or other person standing in loco parentis shall have the right to confront and cross-examine all adverse witnesses and evidence and to present evidence on their own behalf.

E. In order for a preliminary order to issue or for an existing order to be continued, the petitioning party or agency must prove:

1. The child would be subjected to an imminent threat to life or health to the extent that severe or irremediable injury would be likely to result if the child were returned to or left in the custody of his parents, guardian, legal custodian or other person standing in loco parentis pending a final hearing on the petition; and

2. Reasonable efforts have been made to prevent removal of the child from his home and there are no alternatives less drastic than removal of the child from his home which could reasonably and adequately protect the child's life or health pending a final hearing on the petition. The alternatives less drastic than removal may include but not be limited to the provision of medical, educational, psychiatric, psychological, homemaking or other similar services to the child or family or the issuance of a protective order.

When a child is removed from his home and there is no reasonable opportunity to provide preventive services, reasonable efforts to prevent removal shall be deemed to have been made.

F. If the court determines that pursuant to subsection E hereof the removal of the child is proper, the court shall:

1. Order that the child be placed in the care and custody of a suitable person, with consideration being given to placement in the care and custody of a nearest kin, including grandparents, or personal friend or, if such placement is not available, in the care and custody of a suitable agency; and

2. Order that reasonable visitation be allowed between the child and his parents, guardian, legal custodian or other person standing in loco parentis, if such visitation would not endanger the child's life or health.

Ruffin v. State

Supreme Court of Columbia (1987)

Alvin Leon Ruffin was convicted of operating a motor vehicle after having been declared an habitual offender in an earlier proceeding. He was sentenced to one year imprisonment. Ruffin appeals. Upon consideration of the record, the briefs and the arguments presented, we reverse.

At the time of his conviction as an habitual offender in 1982, Ruffin was imprisoned in the state penitentiary. On October 18, 1982, an order, issued October 15, 1982, by the Circuit Court of Sussex County, was served upon him. It ordered him to show cause why, as a result of incidents that had occurred before his imprisonment, he should not be deemed an habitual offender and barred from operating a motor vehicle in the State.

Shortly thereafter, on December 6, 1982, Ruffin wrote a letter to Judge Lemmond of the Sussex County Circuit Court. In that letter, Ruffin did not discuss the habitual offender case, but expressed the opinion that his attorney, James N. Barker, Jr., had not provided effective assistance of counsel in a previous case. Around that same time, Ruffin wrote Mr. Barker directly and informed him of his displeasure and that he did not want Barker to represent him in the habitual offender matter.

On September 9, 1984, after Ruffin had been released from prison, he was indicted for operating a motor vehicle while an habitual offender. Ruffin then alleged that the order declaring him to be an habitual offender was "void because there was no notice to him of the date of the proceedings."

At the trial to determine the validity of the prior judgment, the evidence revealed that the original order served on Ruffin recited a hearing date of November 9, 1982. For reasons not set forth in the record, the case was not heard at that time. The hearing ultimately was held on January 20, 1983.

On January 11, 1983, the court appointed Mr. Barker as the guardian ad litem for Ruffin because Ruffin was in prison and thus, was a "person under disability," as set forth in Section 9 of the Columbia Code. Barker was appointed despite Ruffin's previous letters to Judge Lemmond and Mr. Barker, complaining about Barker's prior representation. The evidence shows that Ruffin then sent letters to both the court and the guardian ad litem, prior to the hearing, advising them that he was unhappy with the services of Mr. Barker and requesting that he not be assigned as his guardian. At the hearing of January 20, 1983, over Barker's objections, Ruffin was declared an habitual offender.

Mr. Barker then testified that there was no information in his files indicating that he ever notified Ruffin of the hearing, nor *did* he have any independent recollection that he contacted Ruffin to tell him the hearing date.

The defendant contends that the trial court abused its discretion by appointing Mr. Barker as his guardian and in disregarding his letter.

As well, the defendant argues that, when it became known to Mr. Barker that the defendant did not desire his services, Mr. Barker had a duty to notify the court of his client's wishes and attempt to withdraw as guardian. We disagree.

The defendant cites no authority for the unique proposition that he is entitled to choose his own guardian ad litem. Code Section 9 deals with the appointment of a guardian and sets forth minimum qualifications. The actual selection of the guardian, however, is left solely in the hands of the court.

Accordingly, the court was entitled to review Ruffin's letter and accord it whatever weight it deemed proper. The court was not bound by the defendant's demands or requests. It does not appear from the evidence presented that the court abused its discretion in the selection of Mr. Barker.

The defendant also provides no authority for his argument that Mr. Barker, as guardian ad

litem, had a duty to report to the court that the defendant was unhappy with his services. To hold that the guardian ad litem has a duty to report to the court every instance in which a client expresses displeasure with his services would unduly burden both the guardian and the State. In the event that a defendant is unhappy with his guardian ad litem, it is his burden to show that the guardian is unfit to fulfill satisfactorily his obligations. Ruffin attempted to convince the court of this fact in the letter discussed above. As noted, the court was entitled to determine what weight to give the defendant's allegations and proceed at its discretion. Accordingly, we find no merit in this argument.

Finally, the defendant contends that the order was void because his guardian failed to maintain contact with him concerning his hearing or the result. On this point, we agree.

Columbia Code Section 9(A) requires that an attorney be appointed guardian ad litem if one can be found. If an attorney cannot be found then "some other discreet and proper person" may be appointed. In either case, the main requirement is that the guardian be discreet, proper, and faithfully represent and protect the interest of his charge. As such, a person who has been appointed guardian ad litem must, if possible, at a minimum discuss the matter with the person under disability.

Here, the defendant expressly stated that he did not wish to be involved with Mr. Barker. While the lower court had the discretionary right to dismiss this request and appoint Mr. Barker as guardian ad litem, Mr. Barker did not have the right to assume that he was the defendant's legal representative in any context other than as guardian ad litem.

It is the duty of the guardian ad litem to represent the interests of those for whom he is appointed faithfully and exclusively. Persons under a disability, however, always and throughout the litigation have the right to object to every step that is taken and everything that is done.

or, if he determined that it was in his better interests, to defend himself. Ruffin was not given notice of either the new hearing date or that Mr. Barker had been appointed as guardian ad litern. Thus, he had no opportunity to obtain counsel of his choosing. This was a denial of his fundamental due process rights.

We also find that Mr. Barker failed to investigate thoroughly the facts surrounding the hearing. The duties of a guardian ad litem cannot be specifically spelled out as a general rule, but the underlying criteria are stated in Code Section 9. It is clear that the guardian has a duty to make a bona fide examination of the facts in order to properly represent the person under a disability. See Division of Social Services v. Unknown Father, (1986) (guardian may be removed if he fails to faithfully represent his ward). In another context, this court has noted that the duties of a guardian ad litem when representing an infant are to defend a suit on behalf of the infant earnestly and vigorously and not merely in a perfunctory manner. He should fully protect the interests of the child by making a bona fide examination of the facts, and if he does not faithfully represent the interests of the infant, he may be removed. The duties of a guardian ad litem are the same as those of a parent when representing any person under a disability. Hence, the guardian ad litem may take a wide range of actions. For example, a guardian ad litem may consent, on behalf of his wards, for removal of a case from one court or another. Lemmon v. Herbert, (1950). And, a guardian ad litem may appeal an adverse ruling of the court. Givens v. Clem, (1907).

examined the facts surrounding the case. Accordingly, he failed to comply with the mandate of Code Section 9 in the discharge of his duties as guardian ad litem.

For the reasons stated, the order dated January 20, 1983, adjudicating Ruffin an habitual offender is declared void because of trial error in violating the constitutional due process rights of the defendant. It follows that the defendant's conviction in this case for operating a motor vehicle after having been declared an habitual offender cannot be maintained. Therefore, the judgment appealed from is reversed.

Powell v. Columbia Department of Social Services

Court of Appeals of Columbia (1986)

This case, here on appeal from the circuit court, involves a controversy between the Department of Social Services (DSS) and Margie Sparks Powell concerning the permanent foster care placement of John, born on June 20, 1976.

As a result of physical abuse of the child by Mrs. Powell's husband, the Pittsylvania County Juvenile and Domestic Relations District Court, by order dated May 20, 1981, placed John in DSS custody. Mrs. Powell appealed to the circuit court.

A guardian ad litem was appointed to represent John's interest in the circuit court proceedings. On June 23, 1985, the circuit court denied Mrs. Powell's appeal and directed that John be placed in permanent foster care with a new foster parent.

At the hearing in the circuit court, various caseworkers and mental health professionals, in addition to Mrs. Powell, were called as witnesses. The record reveals that Mrs. Powell had two children by her marriage to Mr. Powell. A fifteen-year-old son is in the custody of his father and an older daughter is in the custody of Mrs. Powell's brother. Mrs. Powell has little if any, contact with these children. At the time of the abuse of John by Mrs. Powell's husband in May 1981, Mrs. Powell had gone to Boatwright, Columbia for medical treatment.

The precise reason for this trip is unclear from the record. Mrs. Powell testified that she had bronchitis and allergies and that she was treated in the emergency room of a hospital in Boatwright for this condition. She had been taking medication for "nerves" but had discontinued taking the medication. John had been left in the care of the husband's sister, who subsequently relinquished custody of John to the husband. Upon learning of the abuse of John, Mrs. Powell returned but has not regained custody of him. Throughout these proceedings Mrs. Powell has remained separated from her husband though not divorced from him.

It is clear from the record that Mrs. Powell has never physically abused John. There is an emotional tie between the two. Pursuant to the first foster care plan, Mrs. Powell, according to her caseworker, for several years, until April 1984, made reasonable progress in establishing a stable home, attending parenting classes and providing care for John. At that time, John was concerned about alleged arguments between his foster mother and her boyfriend, as well as the facts that he had to do household chores and that his foster mother had placed him inside garbage dumpsters to locate junk. This evidence was admitted by the circuit court to establish the reasons why a new permanent foster care parent should be appointed.

Mrs. Powell explained that John was in no danger during arguments with her boyfriend, that she considered household chores to be beneficial training, and that she often sold junk for extra income. Her regular income consisted of a monthly social security disability check and food stamps. We do not find that any of these matters were the basis of the circuit court's denial of her appeal. Furthermore, the issue of their admissibility into evidence is not before us.

The crucial evidence came from the mental health professionals. It is undisputed that Mrs. Powell is mildly to moderately mentally retarded. Her therapist, Gloria Culley, testified that Mrs. Powell could function as a parent but would need supervision and assistance under stressful circumstances. Dr. Ashby, a psychiatrist, testified that Mrs. Powell "does not have the necessary capability to assume responsibility for the custody and care of John at the present time and likely as not in the foreseeable future." At the direction of the trial judge, Mrs. Powell and John were seen for evaluation by Dr. Frazier, a child psychiatrist. Dr. Frazier testified that John "should not be considered retarded but should be considered a child who is on the low side of average and who needs help with verbal skills." He further testified that "a socially and intellectually stimulating program or environment" would help to improve verbal and arithmetic skills. Dr. Frazier further testified that Mrs. Powell needs "support in parent managing, assertive discipline and to be instructed in the various needs of the different levels of development as John grows," and for that "I think she needs help in managing him and that should continue throughout his life as a child until he becomes

an adult." Although Dr. Frazier testified that John should not be in Mrs. Powell's sole care, he also stated that severing the relationship would be detrimental to the child.

We first consider Mrs. Powell's contention that the trial court's finding that she was incapable of assuming physical custody of John is not supported by substantial evidence. We review the record to determine whether there is clear and convincing evidence to support the determination of the trial court. Under familiar principles, we view that evidence and all reasonable inferences in the light most favorable to the prevailing party below. Where, as here, the court hears the evidence, its finding is entitled to great weight and will not be disturbed on appeal unless plainly wrong or without evidence to support it.

Code Section 206.1 provides the statutory scheme for permanent foster care placement. That scheme is intended to provide a more permanent placement for a child in a particular foster home than is generally obtained in regular foster care, and yet does not, as in the case of adoption proceedings, serve as a vehicle for terminating parental rights. Where the child has a continuing involvement with his or her natural parents, the statute provides for a continuation of that involvement through court-ordered visiting arrangements with the natural parents. Legal custody remains with the local department of welfare or social services or a licensed child-placing agency, and physical custody is granted to the foster parent. In this capacity, the foster parent is granted the authority to give parental consent in such matters as surgery, entrance into the armed services, marriage and others. The intended result is stability for the child and to ensure that foster parents know the nature and scope of their authority and responsibility. No change can occur in this placement without an order of the court which instituted the placement. A proper petition, filed by the foster parents, local department, licensed child-placing agency or "other appropriate party," is required for such a change.

As stated, under Code Sections 251 and 206.1, a child may be removed from permanent foster care custody only by order of the court originally placing the child. The termination of rights under Section 206.1 is a grave, drastic, and often irreversible action. When a court orders termination of rights, the ties between the foster parent and child are severed and

the foster parent becomes a legal stranger to the child.

Where DSS seeks to remove the child from the custody of permanent foster care parents, they must establish that need by clear and convincing evidence. Clear and convincing evidence is defined as that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is an intermediate form of proof, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.

As previously noted, the evidence established that John has remained in foster care for many years. While there is an emotional tie between them, the psychological evidence established beyond question that Mrs. Powell is mildly to moderately retarded, would need supervision and assistance under stressful circumstances, and that throughout John's life as a child, she would need help in managing and disciplining him.

Accordingly, we find no error in the trial court's denial of Mrs. Powell's petition.

ANSWER 1 TO PERFORMANCE TEST A

MEMORANDUM

To: Leslie Kelleher
From: Applicant
Date: July 29, 1997
Re: Christopher Small

Your memorandum raises two issues: the first is the nature and scope of your role as Christopher's guardian ad litem; the second is what action should be taken to fulfill that role. This memorandum will address those issues respectively.

THE ROLE OF A GUARDIAN AD LITEM

As Christopher's guardian, your duty is to protect his interests in the pending proceedings. "When appointed for a child, the guardian ad litem shall vigorously represent the child, fully protecting the child's interest and welfare. Columbia Rules of Court, Rule 8. You must "represent the interests of [Christopher] faithfully and exclusively." Ruffin v. State (1987). Although the "duties of a guardian ad litem cannot be specifically spelled out as a general rule," "it is clear that the guardian has a duty to make a bona fide examination of the facts in order to properly represent the person under a disability." Id., citing Division of Social Services v. Unknown Father (1986).

"The duties of a guardian ad litem when representing an infant are to defend a suit on behalf of the infant earnestly and vigorously and not merely in a perfunctory manner. He should fully protect the interests of the child by making a bona fide examination of the facts, and if he does not faithfully represent the interests of the infant, he may be removed. The duties of a guardian ad litem are the same as those of a parent when representing any person under a disability." Id.

Your appointment as guardian ad litem does not automatically make you Christopher's lawyer for these proceedings. A person subject to a guardianship order does not necessarily have the right to choose his guardian. Id. ("In the event that a defendant is unhappy with his guardian ad litem, it is his burden to show that the guardian is unfit to fulfill satisfactorily his obligations.") Even a person under a guardianship order, however, has an absolute right to choose his attorney. In Ruffin, a guardian ad litem purported to act as his ward's attorney in a court proceeding, despite the ward's clear objections to representation by the guardian ad litem. The Court determined that the proceeding constituted a "denial of [the ward's] fundamental due process rights" because the ward "had no opportunity to obtain counsel of his choosing."

Thus, your role as Christopher's guardian ad litem is to determine his best interests and to take steps to protect those interests. If he wants you to represent him as his lawyer, and if you deem such representation to be appropriate, you may also serve in that capacity.

CASE PLAN

1. Overall Goal

The overall goal to be achieved in this representation is to determine where the best interests of our client, Christopher Small, lie, and to vigorously pursue a judicial resolution which is favorable to those interests. A review of the facts and the law available at this time strongly indicates that Christopher's desire is to be reunited with his foster mother, Ms. Melton. If further investigation and research supports the proposition that Christopher's best interests will be served by returning him to Ms. Melton's custody, then we should zealously challenge his removal from her home.

2. Legal issues

The ultimate legal issue raised by this case is whether Christopher should be removed from his current foster placement with Ms. Melton. This raises two specific subsidiary questions: first, whether Ms. Melton has engaged in conduct which would warrant removal from the home, and second, whether the state has observed the procedural requirements for such a removal.

Generally, every removal of a child from a foster care situation requires a court order. Code of Columbia § § 251(A), 252. That order must be based upon a finding that the child "would be subjected to an imminent threat to life or health to the extent that severe or irremediable injury would be likely to result" if the child were left in his guardian's custody. Id at § § 251(A)(1), 252(E)(1). Moreover, the movant for such an order must demonstrate that 'reasonable efforts have been made to prevent removal of the child from his home and there are no alternatives less drastic than removal of the child from his home which could reasonably protect the child's life or health." Id. at H 251(A)(2), 252(E)(2).

Ms. Melton's conduct does not appear to subject Christopher to an imminent threat to life or health to the extent that severe or irremediable injury would be likely to result. It is apparent that Christopher is a child who has socialization problems, and may also have psychological problems. Therefore. it is important that Ms. Melton receive the training and support necessary to deal with those problems. There is no indication, however, that Ms. Melton's conduct at the school was anything other than an isolated incident, and there is no evidence of any other instances of physical or verbal abuse. Ms. Bagley, who lives next door to Ms. Melton, indicated that she has never seen any physical abuse of the child.

Ms. Melton has admitted to spanking Christopher, which is a violation of DSS regulations; however, spanking falls far short of the "imminent threat to life or health" which is required for removal. DSS also noted bruises and abrasions on Christopher's knees and elbows, which he attributed to failing on the playground. This is a plausible explanation given that Christopher appears to be an active ten-year-old boy, and, in the absence of evidence to the contrary, should probably be given credence.

ability of the foster parent to care for the child without outside assistance. In that case, the child had been abused by the foster parent's ex-husband, but there is no indication that the foster parent had any ongoing relationship with the ex-husband; accordingly, it is not clear whether the court determined that the abuse was subject to repetition, or, if so, what basis the court had for that finding.

The court's primary focus was upon whether the foster parent "would need supervision and assistance under stressful circumstances, and that throughout [the child's] life as a child, she would need help in managing and disciplining him." The opinion cites no authority whatsoever for its conclusion; in fact, most of the policy bases recited in the opinion would mandate the opposite result: "The intended result [of foster placement] is stability for the child and to ensure that foster parents know the nature and scope of their authority and responsibility."

"The termination of rights under Section 206.1 is a grave, drastic, and often irreversible action. When a court orders termination of rights, the ties between the foster parent and the child are severed and the foster parent becomes a legal stranger to the child." The state, in order to terminate the foster relationship, bears a heightened burden of proof: it must establish the need to remove the child by clear and convincing evidence. Notwithstanding these pronouncements, however, the Powell court terminated a foster relationship without any findings more specific than those quoted above. More research is definitely required.

We also need to research the remedy for a procedurally defective removal from foster care. It appears that DSS acted improperly in removing Christopher from Ms. Melton's custody without first obtaining a court order, or, at the least, promptly obtaining a post hoc order authorizing the removal. "No [foster] child shall be removed from the physical custody of the foster parents in the permanent care placement except upon order of the court or pursuant to Section 251 or Section 248.9. Section 251 provides that a child may be taken into immediate custody upon the issuance of an ex parte emergency removal order. There is no indication in the file that such an order was entered prior to DSS removing Christopher from Ms. Melton's home.

Accordingly, the only appropriate basis for Christopher's removal was Section 248.9. That section provides that a protective service worker may take a child into custody without prior approval, but only if, inter alia, the child is in imminent danger, a court order is not immediately obtainable, and the person or agency taking custody obtains an emergency removal order pursuant to Section 251 within seventy-two hours. In your memorandum, you indicated that this morning's hearing was a Section 251 hearing, but Judge Rosen's order does not provide for the emergency removal of Christopher from Ms. Melton's care: it merely schedules a future hearing, provides for visitation. and appoints a guardian.

There is no indication that DSS took the appropriate steps to obtain an emergency removal order. DSS received a complaint on July 22, initiated field contacts on the 23rd, and removed Christopher from Ms. Melton's home on July 24th. It has now been five days since Christopher was removed from his home; the ex parte order was to have issued no later than yesterday. Moreover, the ex parte order contains no findings of fact which would support removal, and the file contains no testimony which could support such findings. Therefore, it clearly appears that both Christopher's and Ms. Melton's due process rights have been violated. This violation should be addressed immediately. The court's scheduled hearing date of August 12 is three weeks after Christopher's removal; since the statute

requires at least preliminary determination on the merits within three days, we should probably press for immediate return to Ms. Melton's custody.

3. Factual issues

The factual issues which need to be resolved will turn, at least in part, upon the outcome of the legal research set forth above. The first and most important fact-gathering step should be a conversation with Christopher. We need to determine whether he wants to be returned to Ms. Melton's custody (apparently so, given both the DSS report stating that he demands to return to the Melton home, and Ms. Melton's statement that he returned there when he ran away) and whether he wishes to have our firm serve as counsel for him in the pending legal proceedings.

We also need to determine the nature of his relationship with Ms. Melton, and to gather as much factual information as possible about her fitness as a parent. For example, is he routinely subject to corporal punishment? What forms of discipline does Ms. Melton use? Are they effective? All of these questions must be probed in an interview with Christopher. Such an interview may also be a useful motivational tool; Christopher may be more likely to control his behavioral problems if he realizes that his misbehavior is jeopardizing his domestic situation.

Next, we need to interview Ms. Melton. We need to address the same issues with her as we address with Christopher: we need to make a complete evaluation of the fitness of her home as an environment for him. Again, this interview will also present an opportunity to impress upon Ms. Melton the importance of handling disciplinary matters in an appropriate manner.

Once we have established a rapport with Christopher and Ms. Melton, we need to undertake further factual investigations, both to verify the information we have received and to seek independent information about Christopher and his home environment. Ms. Frost, Mr. Eisen, Ms. Edwards, Mr. Jones, and Ms. Bagley all must be interviewed, as well as any other teachers, administrators, or day care providers who have regular contact with Christopher. We need to know if Christopher often is bruised or shows other signs of abuse; if he ever speaks of Ms. Melton in a manner which would suggest that their relationship is unhealthy; and every other detail which the witness can provide about Christopher's personality and his home life

Based upon Christopher's wishes and the information we receive from our fact witnesses, we need to make an informed decision regarding whether Christopher's best interests are served by remaining in Ms. Melton's custody. If so, we need to aggressively oppose DSS's pending motion to remove him from that relationship.

Other issues

Once we have undertaken representation, we will be able to petition the court for a fee award. Section 9. In the meantime, however, it is important that we immediately begin protecting our client's interests.

ANSWER 2 TO PERFORMANCE TEST A

MEMORANDUM

To: Leslie Kelleher
From: Applicant
Re: Guardian Ad Litem

You have requested a memorandum discussing the following questions:

Is a Guardian Ad Litem the Attorney for the child?
If not, what is a Guardian Ad Litem?

As you have requested, this memorandum deals solely with the role of the guardian ad litem for a child and not the court procedures or specifics of this case.

Is the Guardian Ad Litem an Attorney?

Although the cases and statutory law are not explicit on this point, there seems to be an implicit distinction separating an attorney from a guardian ad litem (GAL). In fact, the Code, Section 9, provides that a non-attorney may be appointed as GAL. In addition, Ruffin suggests that, while the defendant had a fundamental right to choose an attorney, he had no right to choose a GAL. Ruffin at 10-1 1. Finally, the duties of the GAL seem to extend beyond those duties required of counsel. In addition to duties under the professional responsibility code, counsel for a child has a duty to represent the child's legitimate interests. On the other hand, a GAL has the duty to "vigorously represent the child, fully protecting the child's interest and welfare." Rules of Court, Rule 8.

Given these distinctions, I must conclude that a GAL is not merely an attorney for the child, but had heightened duties of representation explained below.

Role of Guardian Ad Litem

1. Power of the Court to Appoint a Guardian Ad Litem

A judge of the juvenile and domestic relations court has the sole discretion to appoint discreet and competent attorney as guardian ad litem (GAL). Code, Section 9; Ruffin at 9. Alternatively, the court also has the discretion to remove and replace the GAL. Id. Even if the represented person is unhappy with the GAL, the represented party has the burden to show the court the guardian is unfit. Ruffin at 10.

2. Guardian Ad Litem's General Duties and Resl2onsibilities

A GAL must faithfully represent the interests of the child. Code, Section 9A. As stated above, while counsel for a child merely has a duty to represent the child's legitimate interests, a GAL has the duty to 'vigorously represent the child, fully protecting the child's interest and welfare." Rules of Court, Rule 8.

In addition, implicit in the judge's discretion to appoint an GAL is the requirement that the attorney be discreet and competent. Code, Section 9; see also Ruffin at 10.

Competence in this respect would mean an attorney who has experience as a GAL or will educate herself to become competent in this field. In addition, the GAL must, at a minimum, discuss the matter with the represented person. Ruffin at 10. Failure to communicate with the represented party can result in a breach of duty by the GAL. Id. at 11-12. In fact, the represented person has a right to object to everything that the GAL does. Id. at 10.

3. GAL's Specific Duties and Responsibilities

If the wishes of the child conflict with the GAL's opinion, the GAL must disclose the child's wishes to the court. Rules of Court, Rule 8. However, the GAL does not need to disclose every instance in which a client expresses displeasure. Ruffin at 10.

If the court is satisfied that the GAL has performed "substantial service" in her representation, it has the discretion to reasonably compensate the GAL and pay for actual expenses out of the estate of the represented party. Id. If the estate is inadequate, then the compensation and expenses may be taken as costs in the proceeding. Id. A GAL is not liable for costs. Code, Section 9.

In order to satisfy its duty of competence, the GAL must make a bona fide examination of the facts. Ruffin at 11.

4. Powers of the GAL

Since it has the same duties as a parent of a child, the GAL has broad authority to take a wide range of actions. Ruffin at 11. This includes consenting on the represented person's behalf to removal from one court to another and appealing an adverse ruling of a court. Id.

MEMORANDUM

To: Leslie Kelleher
From: Applicant
Re: In re Christopher Small Case Plan

You have requested a case plan discussing the steps which need to be taken regarding the case of Christopher Small (Chris). This memorandum will be divided into two sections. The first section will objectively discuss the goals, legal issues, and factual issues. The second section will discuss an order of steps to be taken.

I. Goals. Legal Issues. Factual Issues

A. What is the overall goal to be achieved?

As discussed in the memorandum describing the role of the Guardian Ad Litem (GAL), the GAL must faithfully represent the interests of the child. She must do so vigorously and must fully protect the child's interest and welfare. She must be discreet and competent. In addition, if the wishes of the child and the opinion of the GAL conflict, the GAL must disclose the conflict to the court.

In order to fulfill her duties, it seems a GAL must not only determine what the wishes of the child are, but also form an opinion as to what is in the child's best interest.

1. Child's Best Interest

Department of Social Services (DSS) case worker Peter Sherwood states that Chris told him that he did not wish to return home to Frances Melton. However, this statement should be taken with a grain of salt because it was made soon after the incident and to someone with whom Chris did not have an ongoing, trustworthy relationship.

However, the facts show that Chris returned home to Ms. Melton after he ran away from temporary care. This indicates that Chris desires, in some respect, to stay with Ms. Melton. Because the facts are in conflict, we should, after establishing a good rapport with Chris, determine what his real wishes are.

2. GAL's Opinion

In addition, after reviewing the facts and investigating this case, the GAL must make her own evaluation of what is in the best interests of Chris. In doing so, we should consider all of the legal issues and facts discussed below. In addition to these considerations, we may want to focus on the following: what is the likelihood of future abuse from Ms. Melton, how strong is the relationship between Chris and Ms. Melton and what damage would occur if Chris is separated from her, what is the likelihood of Ms. Melton being able to help Chris correct his destructive behavior, and will placement in another home help Chris overcome his various problems. In making these considerations, we should conduct the various interviews and investigation as outlined below.

The ultimate goal of our representation of Chris will depend on a balancing of his wishes and the GAL's opinion. If they conflict, we must disclose such conflict with the court. Obviously, whether we decide to allow Chris to remain with Ms. Melton or to request removal from her permanent foster care will have a significant impact on the steps we take. This memorandum will reflect both options.

B. What legal issues need to be researched? As to each issue. what legal research needs to be done?

1. If Goal is to Maintain Chris in Melton Permanent Foster Care

If the goal is to allow Chris to stay with Ms. Melton, we will need to fight the DSS's request for removal. The following is a legal summary and analysis of this effort.

A court must make an order pursuant to Code section 248.9 (authority to take child into custody) or Code section 251 (emergency removal order) in order to remove a child from permanent foster care. Code section 206.1 A. Under 248.9, a DSS worker investigating abuse or neglect may take a child into custody for 72 hours without prior guardian approval and (1) circumstances present an imminent danger to the child resulting in severe or irremediable injury, (2) a court order is not immediately obtainable, (3) court has procedures for placing such children, (4) guardian is notified as soon as practicable, (5) report is made to local DSS, and (6) court is notified and no later than 72 hours after an emergency removal order (section 251) or preliminary removal order (section 252) is

obtained. Here, no emergency removal order was obtained. In addition, the preliminary removal order has not yet been obtained.

The complaint in this case was made on July 22. Soon afterwards, Chris was taken into temporary emergency foster care. Two days later Chris ran away and returned to Ms. Melton. DSS found him and moved him to an emergency shelter. More than 72 hours has passed from the emergency removal, yet no court order has been obtained either under section 251 or 252. In addition, the DSS notes fail to state why Chris is in imminent danger of future harm. Thus, for these two reasons the removal of Chris seems to be procedurally defective.

However, nothing states what the remedies are for these defects. The first area of legal research should be done on this issue. Certainly, this is not the first time that DSS has failed to follow procedure. The statutory code, rules, and case law should certainly be searched for any instance of procedural deficiency and the remedy for such. In addition, it may be worthwhile to research DSS internal regulation and procedures to see what they believe should happen under these circumstances.

2. If Goal is to Remove Chris from Melton Permanent Foster Care

If our goal is to remove Chris from Ms. Melton's care, we must be ready to defend against the procedural violations stated above. In addition to doing similar research, we should be ready to argue similar instances where procedural defects were overlooked to obtain the remedy that is in the best interest of the child. Similar cases in other situations would be helpful (e.g. divorce custody cases).

In addition, we must be ready to present evidence in a preliminary removal hearing. There we will have the right to present evidence and conduct cross-examination. In order to be successful, we must prove (1) the child will be subjected to an imminent threat to life or health, that severe or irremediable injury would be likely to result if the child were returned to custody and (2) reasonable efforts have been made to prevent removal and there are no alternatives less drastic than removal. When a child is removed and there is no opportunity for preventive services, reasonable efforts is presumed. Code Section 252.

If a court grants a preliminary removal order, it should give consideration to placement in the care of a nearest kin and order that reasonable visitation be allowed if it would not endanger the child's life or health. Id.

Powell is an example where the appellate court upheld a trial court's determination that removal was appropriate. There the child had remained in foster care for many years, but the foster parent was mildly retarded and needed supervision to care for the child.

More case law is needed to determine what are appropriate considerations for removal. More specifically, a determination will be made about imminent threat of harm. We need to determine how "imminent" a threat must be to satisfy the requirement. In addition, we must determine what kind of harm is recognized.

Finally, as an alternate basis for removal, we may try to use Ms. Melton's signing of the Statement of Willingness to Comply with Discipline Policy and her subsequent violation and disregard for the statement as a basis for removal. Breach of her agreement may be

sufficient grounds to revoke her qualification as a foster parent. However, such a remedy may be subject to equitable powers of the court. If it is in the best interests of the child to stay with Ms. Melton despite her breach of promise, the Court may disregard remedies under that promise. Further legal research will need to be done regarding enforcement of remedies with this kind of promise.

C. For each legal issue. what factual issue need to b resolved? For each factual issue (1) what additional faces do we need and (21 how and from what source do we obtain these?

1. Imminent danger resulting in severe or irreparable injury

First we need to determine whether there is a past history of abuse by Ms. Melton. This would include going over all her past reports prepared by DSS, even those before Chris' foster care. We should interview Lynda Frost, Martha Edwards, Robert Jones at school regarding any reports by Chris of abuse at home and whether other events of abuse occurred at school. Terry Bagley indicated she never saw any physical abuse, but we should ask her again to see if she was intimidated by the presence of the DSS worker. She may be more willing to discuss past events if we explain our position as Chris' representative. Also, we should try to find other neighbors, friends, or family who may be able to answer some questions about past abuse.

We should ask Ms. Melton about this and ask her to clarify her statement regarding corporal punishment. Finally, we should talk with Chris and see if he will admit to prior abuse.

In addition, we should look at Peter Sherwood's statement about fresh bruises and ask detailed questions about how fresh they look, their size, and location. We should seek medical advise as to those bruises, and if possible have Chris see a physician to evaluate the extent of the abuse.

Secondly, we should try to determine the likelihood of future abuse. Ms. Melton has signed a statement stating she would not abuse Chris, but she has disregarded this before. Questioning her about her beliefs and her view on corporal punishment may lead to a better understanding of her future actions. Also, if possible, we should try to look into her home and see if there is evidence of broken items leading to a conclusion of a violent personality.

II. Order of Steps to Take

1. Conduct preliminary questioning of witness over the phone to get suggestions on how best to build a rapport with Chris. Include questioning Martha Edwards (the Teacher) and Joel Eisen (the bus driver) since he seems to be the only one with a non--violent relationship with Chris.

2. Contact Chris. Try to set up a meeting in a non-threatening environment, somewhere where he'll feel safe. Ask him the above listed questions, including what he would like and whether there was abuse in the past. Determine the strength of the bond between Chris and Ms. Melton and try to determine how severe a separation would be.

3. Interview various witnesses. Include all the witnesses listed in Peter

Sherwood's report. Ask the questions detailed above. Also include Chris' classmates, and other residents of the temporary shelter to see if Chris has said anything.

4. Obtain copies of medical reports regarding Chris if available. Obtain copies of any medical reports regarding Ms. Melton.

5. Form a formal opinion as to the best interests of Chris. If there is a conflict with Chris' wishes notify the court.

6. If the goal is to seek removal, file the appropriate motion with the court. If the goal is to stay with Ms. Melton file the appropriate motion attacking the DSS position.

7. Clearly separate attorney's compensation, expenses, and costs. The GAL is not liable for costs.

THURSDAY AFTERNOON
JULY 31, 1997

California Bar Examination

Performance Test B
INSTRUCTIONS AND FILE

The Merida Discovery Group v. Consortium of Maritime Insurers

The Merida Discovery Group v. Consortium of Maritime Insurers

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictional state of Columbia, one of the United States. Your firm represents The Merida Discovery Group (MDG) in an action against the Consortium of Maritime Insurers (CMI).

3. You will have two sets of materials with which to work: a File and a Libra [y. The File contains factual information about your case.

4. The Libra contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this examination. Although the legal authorities may appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that the cases were decided in the jurisdictions on the dates shown. In citing cases from the Library, you may use abbreviations and omit volume and page citations.

5. Your answer must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided, but you should bring to bear on the problem your general knowledge of the law. 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.

6. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to organizing and writing your response.

7. This performance test will be graded on your responsiveness to instructions and on the content, thoroughness, and organization of your response. The following weights will be

assigned to each part:

A: 60%

B: 40%

SMITH, RENZO & SIMON
555 Benjamin Street
Oceanside, Columbia 00020

MEMORANDUM July 31, 1997

To: Applicant
From: Steve Cunningham
Re: In Re an Unidentified and Abandoned Vessel Thought to be the S.S. Merida

As you know, we represent The Merida Discovery Group (MDG), a partnership of scientists, undersea recovery specialists and others engaged in locating and retrieving valuables from the wreck of the S.S. Merida, a ship that capsized and sank some 120 miles off the coast of our state, Columbia, during a violent storm almost 150 years ago in 1857. The Merida was carrying about $2 million in gold when it went down, consisting of a cache in gold bullion, other gold items, and additional artifacts, all of which are sure to be valued at more than $200 million in today's dollars.

About a year ago, after MDG discovered what it confidently believed to be the remains of The Merida, we filed an in rem action in the U.S. District Court for the Southern District of Columbia. In this suit, we seek to protect our client's right to explore and recover treasure from the site of the wreck within a two-square mile area of the ocean bounded by certain degrees and minutes of longitude and latitude. Once we gave public notice of the in rem action, a number of maritime insurance companies (Sojourner Insurance of the U.S., Leeds, Ltd. of London, and others), entered an appearance in the action, contesting MDG's claim of ownership of the "Treasure of Merida." The various insurance carriers were consolidated into a class of defendants known as the Consortium of Maritime Insurers (CMI).

While under the protection of the District Court's mandatory injunction that prevented others from interfering with its recovery operations, MDG conducted deepwater exploration of the wreck site. With extraordinary skill and innovative equipment developed by its maritime engineering team, MDG has so far been able to retrieve bullion, chains, and artifacts valued at more than $13 million. One of the items recovered from the shipwreck is a ship's bell, positively identified as that of The Merida.

CMI claims that its members are the rightful owners of the treasure discovered and to be recovered by MDG by subrogation to the interests of those who originally owned and lost the property. The consortium carriers assert that they insured those who suffered the loss in 1857 and they paid claims totaling about $1 million shortly thereafter. As a result, CMI maintains its members are the legal owners of the rescued property. Accordingly, CMI argues that MDG is entitled only to a salvage award.

Our client, MDG, contends that to the limited extent that CMI members once held ownership interests in some of the shipwrecked property by subrogation, they have abandoned those claims. Therefore, we argue that MDG is a finder, entitled to full and complete ownership interest in the property found and that still to be recovered.

Shortly after CMI filed its answer, the parties exchanged settlement proposals. On behalf of MDG, we offered to pay off the insurers' claims for $5 million. CMI rejected this offer, but counter offered payment of a salvage claim to MDG upon completion of the recovery. CMI's offer was twenty percent of the ultimate proceeds from the sale of all recovered property, from which MDG would also have to bear its cost of recovery. We estimate that this would net MDG no more than $45 million and as little as $10 or $15 million in profit. The recovery could be worth between $150 to $350 million, depending on the value and number of coins, other gold, and artifacts finally recovered. MDG therefore rejected the counteroffer.

After our unsuccessful attempt to settle, MDG and CMI agreed to submit their differences to a form of arbitration, commonly known as "forced choice arbitration." Under this form of arbitration, each side submits its one best settlement proposal to the arbitrator in what is called an Arbitration Settlement Statement. The arbitrator must choose one of the settlement proposals and has no authority to formulate any other solution. The process is designed to elicit what each side believes is truly a fair and reasonable solution consistent with its position on the prevailing law.

I want you to draft our Arbitration Settlement Statement. The Statement contains two parts:

- Part A consists of a persuasive brief that details the strength of our legal position. This part should be written in accordance with the firm's policy on writing persuasive briefs which I have attached.

- Part B sets out and justifies one specific settlement proposal covering all claims. Because Part A provides the legal justification for our settlement proposal, do not repeat legal arguments in Part B. Instead, you should propose a specific settlement of all claims and justify in detail why the solution is fair and reasonable with our position on the law.

Thus, as part of your draft of our Arbitration Settlement Statement, you must formulate MDG's new settlement proposal. If I agree with the proposal, we will recommend it to MDG for approval before submitting the final document to the arbitrator. I assume that we should offer more than the $5 million previously offered, but I have not concluded what our offer should be either in dollar amount or in terms of percentage of recovery. I prefer to see what you propose.

To assist you, I asked MDG's accountants**,** Munson & Peters, to prepare a cost/benefit analysis. You will need to use the information and estimates in this analysis in the Arbitration Settlement Statement. However, the document itself should not be attached to the Statement.

You need not bother addressing the question of the admissibility of newspaper articles from the 1850's as evidence of the insurers' losses. A memo prepared by another associate convinced me that such articles are admissible under the Ancient Documents evidence rules.

Thanks for your help.

SMITH, RENZO & SIMON
555 Benjamin Street
Oceanside, Columbia 00020

MEMORANDUM June 30, 1996

To: All Associates
From: Executive Committee
Re: Persuasive Briefs

To clarify the expectations of the firm and to provide guidance to associates, all persuasive briefs, including Briefs in Support of Motions (also called Memoranda of Points and Authorities), whether directed to an appellate court, trial court, arbitration panel, or administrative officer, shall conform to the following guidelines.

All briefs include a Statement of Facts. Select carefully the facts that are pertinent to the legal arguments. The facts must be stated accurately, although emphasis is not improper. The aim of the Statement of Facts is to persuade the tribunal that the facts so stated support our client's position.

The firm follows the practice of writing carefully crafted subject headings which illustrate the arguments they cover. The argument heading 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: COLUMBIA HAS PERSONAL JURISDICTION. PROPER: DEFENDANTS RADIO BROADCASTS INTO COLUMBIA CONSTITUTE MINIMUM CONTACTS SUFFICIENT TO ESTABLISH PERSONAL JURISDICTION.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our client's position. Authority supportive of our clients' position should be emphasized, but contrary authority should generally be cited and addressed in the argument. Do not reserve arguments for reply or supplemental briefs.

The associate should not prepare a table of contents, a table of cases, a summary of argument, or the index. These will be prepared, where required, after the draft is approved.

The Columbia Times

July 29, 1858

S.S. MERIDA CLAIMS PAID
SALVAGE EFFORTS PURSUED

When Erasmus, the Dutch scholar, mused that "a common shipwreck is a consolation to all" he did not foresee problems faced by insurers in the aftermath of the sinking of the S. S. Merida. Almost *nine months* after the disaster, the final claims of the owners of the gold bullion lost when the ship went down in a violent storm more than 100 miles off the Columbia coast have been paid by the insurers. Representatives of the Sojourner Insurance Company and Leeds of London said each had paid the last claims filed with them. Nine other insurance companies resolved their claims earlier .with those who had losses in the shipwreck. In all, the 11 companies paid between $690,000 and $975,000 in claims for the lost bullion and the loss of the vessel itself, the largest set of insurance payments for vessel and cargo losses on record.

The Merida was en route from San Francisco to New York and London carrying 451 passengers and a cargo of gold valued at $1,600,000 being shipped from the California gold fields to the world's financial centers. Apart from the insured bullion, it is estimated that the passengers, many successful prospectors and other entrepreneurs, were carrying as much as $600,000 in the precious metal on their persons, some of which was deposited with the Purser, and some kept on their person or with their
baggage. One survivor claimed a passenger who died in the wreck "carried a money belt containing about *$20,000* in gold coins." None of the individual losses was covered by insurance.

On the night of November 5th last, The Merida was plowing through heavy seas when it was struck by a fierce storm. The ship, gripped in the force of the crashing waves and mighty winds of nature's most awesome phenomena, was lifted like a matchstick on mountainous crests to be plummeted in the next instant into deep troughs of the ocean. Tons of seawater crashed over the railings of The Merida, extinguishing the fires in the boilers and casting the ship adrift. The shriek of the wind drowned out the screams of seamen and passengers washed overboard to their deaths.

The black-hulled, coal-fired, three-decked, threemasted sidewheeler with a cruising speed of eleven knots capsized and sank within a few minutes, according to reports from 72 survivors who were picked up later by a passing schooner, The Richmond.

The sinking of The Merida is certainly the worst maritime mishap in the history of the nation. In addition to the tragic waste of human life, the loss of the incredible amount of gold bullion has rocked the financial world. A pronounced decline in the economy of the country has been dubbed by some as the "Panic of *1857. "*

their losses. The Sojourner and Leeds Companies contracted with Dr. Brutus Villeroi, the inventor of a submarine boat, to salvage the wreck. The agreement with Dr. Villeroi provides that the companies will not incur any expenses or liability in connection with the attempted salvage. Dr. Villeroi, however, has not made any excursions to date to recover items from the wreck.

Marine experts scoff at the idea of raising the ship. The Merida, they say, is on the bottom, thousands of feet below the surface and at a location no one can pinpoint with any accuracy. "Even if they knew where she went down," said Professor Moore of the University of Columbia, "they could not predict her present location, given the shifting underwater currents and tides. The Merida is lost forever!"

Despite these dire predictions concerning possible recovery of the "Treasure of Merida, " insurers, survivors and the families of those who went down with the ship hope that Dr. Velleroi is successful. Of course, there is no hope for the return of the more than 500 souls, passengers and crew, lost in the nation's worst maritime disaster.■

The Columbia Times
May 25, 1997

PROMISES OF RICHES FROM THE BRINY DEEP LURE MARINE EXPLORERS AS WELL AS INSURANCE LAWYERS

It's the stuff of Robert Ludlum and James Bond novels: one-man submarines prowling the deep, reconnaissance flights over desolate stretches of the sea, technicians poring over sonar photos and computer printouts, venture capitalists and more. But it may be that a courtroom drama will be the final chapter in this lifelike version of *Goldfinger*.

The adventure began more than six score years ago when the S.S. Merida went down in 8,000 feet about 100 miles off the coast of Columbia in a violent storm. The ship was carrying 500 or so passengers and crew, less than a hundred of whom survived, and about $2 million in gold. That $2 million is worth a cool $1 billion today, according to conservative estimates, more than enough to pique the interest of well-heeled teams racing to capture the prize.

Nothing much happened for about 130 years. Just after the sinking of The Merida, there was a flurry of activity. The insurance companies paid off claims totaling somewhere between a half and $1 million. They then hired an engineer named Brutus Villeroi who claimed to have invented a submarine. If Villeroi had developed an underwater craft, there is no evidence that he ever actually used it to explore for "The Treasure of Merida." After Villeroi's "non-search," the effort to find the ship apparently was abandoned.

Technological breakthroughs in recent years have made what was once impossible - the recovery of items more than a mile and one-half below the surface of the ocean - a task within the grasp of the daring. And daring, persevering, patient, skillful and lucky are the members of The Merida Discovery Group.

MDG, as the group is known, is headed by Dr. Paulette Ansello and Buck Miller. Ansello, an ocean engineer and scuba enthusiast, and Miller, a deep sea recovery specialist who has dived for treasure all over the world, hooked up about five years ago, drawn together by the challenge of raising The Merida's gold.

Ansello and Miller approached a number of insurance companies that had paid claims on The Merida disaster for information on the location of the wreck. They also sought financial support from the insurers for an attempt to recover the gold. The insurance companies made it clear they were not interested in cooperating with the explorers or in mounting

Using historical data, contemporary meteorological information on the nature of hurricanes and modern search theory mathematics, Dr. Ansello produced a computer analysis that predicted The Merida was located within a 750-square mile area of the ocean.

Miller, meanwhile, recruited a small group of investors who collected $3.5 million, more than the original value of the cargo. With money in hand, Miller organized a sophisticated search team. Employing wide-swath sonar technology that scanned the ocean floor and produced images on a computer monitor aboard The Landmark, MDG's leased research vessel, the search team prepared a probability map. In what is in reality a new field of science and in which little work had been done before, the team predicted sinking rates, drifting patterns and wind-blown currents. Combining incredible skill and great luck while being supported by deep pockets, the team succeeded in pinpointing a wreck they believed to be The Merida in October 1996.

MDG was forced to quickly complete construction of a tele-operated deep water robotic device that can operate under 5,000 pounds-per-square-inch of pressure and in complete darkness. Named The Atlantis and designed by Ansello with Miller's advice, the submersible is capable of recovering a 1,200 pound anchor or a single gold coin from the ocean floor. According to Miller, MDG feared that other search groups would "try to poach on our find once word leaked out that we'd found The Merida." Miller claims his fears were well-founded as the site of The Merida was "criss-crossed by spy planes launched by the insurance consortium. "

While a representative of the insurers admits the companies conducted air reconnaissance, he objects to the term "spy." "The insurance companies that paid claims on The Merida more than a hundred years ago are the legal owners of the ship's valuables," said a spokesman for Leeds, Ltd. "We merely want to protect our property. "

Anticipating such claims by the insurers, MDG filed an in *rein* action, one claiming a legal interest in property, in the federal court in Columbia. Represented by Smith, Renzo & Simon of Oceanside, the top-rated admiralty law firm in the region, MDG sought and received temporary protection against all others who claim an interest in the remains of The Merida.

After an infusion of another $2 million, MDG launched The Atlantis. In its first dive, tragedy struck. Arturo Ansello, Dr. Ansello's son and himself an experienced diver, was killed while attempting to correct a malfunction on the robot's recovery claw. Eventually, the team returned with a new, redesigned robot explorer, and brought up the bronze bell of the ship, positive proof that MDG had discovered "The Treasure of Merida. " Since then MDG has recovered hundreds of gold bars and thousands of rare, privately minted "pioneer" coins whose value, according to a representative of Tristie's Auction House of New York, is "beyond belief."

gold dust, unless protected in the ship's safe, is simply beyond our ability to gather, given today's technology. "

In its search for the treasure MDG is carefully preserving the scientific, historical and archeological details of the wreck and the site. Working closely with marine biologists and other researchers from the Smithsonian, MDG is protecting the integrity of the area and separating out those items of special significance.

Who will ultimately benefit most from the discovery of The Merida must await the conclusion of a lawsuit. CMI, a group of insurance companies, claim MDG is entitled only to a salvage fee for recovering their property. However, under the law, a salvage fee is bound to be in the many millions given the considerable investment of MDG and the risks associated with the recovery. However, Pam Licord, the lawyer for CMI, stated that "money was less important than the principles at stake in this matter." According to Licord, the insurance industry "must preserve the concept that insurers who pay claims on property lost at sea are the owners of anything recovered and their rights cannot be involuntarily lost by the mere passage of time." To demonstrate its "commitment to principle," Licord said, "CMI pledges to donate to museums all historically significant artifacts recovered from The Merida, regardless of value."

All voyages, whether eventful or calamitous, must eventually complete their course. The Merida's journey, long and tortuous, has temporarily dropped anchor in the federal court. Soon the cargo of gold that left San Francisco more than a century ago will be off-loaded at its final port, be that a museum, the coffers of some insurance companies or the bank accounts of some intrepid fortune hunters.

EXCERPTS FROM DEPOSITION OF
ALAN JOHN BIRCH, COMPTROLLER OF LEEDS, LTD AND
DOCUMENT DIRECTOR OF THE CONSORTIUM OF MARINE INSURERS

Mr. Cunningham: Please state your name and position.

Mr. Birch: I am Alan John Birch and I am the Comptroller of Leeds, Ltd., London, England. I also serve as the Document Director for the Consortium of Marine Insurers in this lawsuit.

Q: How long have you been with Leeds?

A: Well, I began in the claims division forty-three years ago.

Q: Describe your present position.

A: I am an officer of the company and the person responsible for the financial and other records of Leeds, Ltd.

Q: Are records relating to ships lost at sea included among those for which you are in charge?

A: Yes, indeed.

Q: What is your role as Document Director for CMI?

A: As you know, a number of insurance companies from the U.K. and the U.S. have joined together to challenge the MDG's claim of ownership of the property recovered from the wreck of The Merida. To coordinate our position a number of persons from the different insurers have assumed leadership roles within the group. I am the person in charge of conforming the various administrative policies of the several companies and taking charge of the records of each company as they pertain to The Merida incident.

* * *

Q: Now, within the marine insurance industry, is there a general practice concerning document retention?

A: Yes. The average period for document retention is ten years. A few of the companies

within CMI have a twelve-year rule.

Q: How long have such policies been in effect?

A: Quite as long as I have been with Leeds, certainly, and it appears to have been the case earlier. So far as the other insurers within the group, the ten-year rule has been in place for at least forty or fifty years, perhaps much longer.

Q: What type of files are destroyed under the document retention programs in place within the CMI group?

A: All types of files; across the board.

Q: Are claims files within that policy?

A: Of course.

* * *

Q: Does Leeds or any of the other companies within CMI have copies of any of the policies that may have covered goods on board The Merida in 1857?

A: At present, none of the companies have any such policies.

Q: Do any of the CMI companies have copies of any of the invoices of shipment for the goods on board The Merida?

A: No, sir.

Q: Any documents relating to the value of the shipment on board The Merida?

A: No. Well, do you mean original documents as opposed to news accounts and the like?

Q: Any original documents or copies of them?

A: No.

Q: How about bills of lading or other proof of loss. Are there any records relating to that?

A: No, sir.

Q: Well, how about the amounts paid by companies in CMI? Do any of the companies you represent have proof that they paid losses under The Merida accident?

No, there are no records within the companies, but there are newspaper accounts of the

fact that our members paid for losses.

Q: So all of the records that might be kept relating to the commercial aspects of this event have been destroyed, is that right?

A: That is correct.

* * *

Q: And in the case of a ship that sinks today, if you thought there was any hope of recovering goods, you wouldn't let supporting documents such as we have described be destroyed, would you?

A: No, we wouldn't.

Q: And is that the approach taken by other members of the CMI group?

A: Absolutely, it's standard practice.

Q: And if you have hopes of recovering goods lost at sea, you retain records of the lost ship, right?

A: Of course.

Q: So, when the company expects to recover property lost at sea, what is done?

A: Leeds policy - and the policy of other carriers, also - is to retain documents for so long as the carrier feels they are necessary. If we believe it could be financially feasible to mount a recovery action, the documents pertaining to a loss are separated and exempted from the destruction policy and retained.

Q: So, from the fact that neither Leeds nor any other member of CMI retained any records of The Merida, I take it that none of you believed it would ever be possible to recover The Merida?

A: Absolutely not. There are many other reasons why we don't have those records today.

Q: Such as?

A: To begin with, these are current policies on document retention, not those of 150 years ago.

Q: Any other reasons?

A: Yes. Most of these insurance companies have moved at least once since the mid nineteenth century. That necessarily involves consolidation of some records and destruction of others.

* * *

Q: So, a few newspaper accounts are the sum of all the records concerning The Merida that you have located at Leeds or at the other insurance companies within the CMI group?

A: Actually, it's quite a bit of information that has been accumulated. As you know, Leeds is one of the oldest marine insurers in the world. When we celebrated our 300th anniversary in the 70s, we published a marvelous history of the company. There was a very interesting section relating to the loss of The Merida, the "Panic of '57" and our role in paying off claims to help stave off financial disaster throughout the world. That part of the history drew on quite a bit of material about the sinking of the ship contained in our company's historical files.

Q: But other than historical data, you found no records relating to ownership claims to Merida property in the files of Leeds or the other companies, is that correct?

A: Well, of course, all companies have records beginning about twenty years ago when deep sea technology developed to the point that it seemed possible if not economical to consider recovery of long lost treasure. Those files contain every reference made in the media to The Merida and letters from potential salvors. And you realize that MDG was not the first group - nor the last, for that matter - to attempt to secure a release of any claim by the company to The Merida. All the CMI companies have correspondence from treasure seekers asking them to transfer or sell rights of ownership in The Merida.

Q: What efforts have the CMI companies made to recover The Merida?

A: What do you mean by efforts?

Q: Have the CMI companies themselves made any attempt at recovery?

A: No.

Q: Have you authorized anyone to do so?

A: No.

Q: You just mentioned that about twenty years ago, deep sea technology developed to the point that it seems possible to recover long lost treasures. Since then, have the CMI companies done anything to investigate the feasibility of recovering The Merida?

A: No.

Q: Why not, if it's possible and maybe economically feasible?

A: Well, frankly, we saw no need to risk our own capital to recover what is, after all, our own property. If others wish to do so, that's their venture or adventure, and if they succeed, they will be reimbursed.

MUNSON & PETERS
Certified Public Accountants
One Financial Center Plaza
Capitol City, Columbia

Steven Cunningham, Esq.
SMITH, RENZO & SIMON
555 Benjamin Street
Oceanside, Columbia 00020

Dear Steve:

At the joint request of you and Archie Yeats of Merida Discovery Group, we have prepared an analysis of cost and projected return on MDG's recovery of The Merida site. We also have prepared an estimate of costs associated with pursuing pending litigation to conclusion.

MDG hopes to be able to recover and sell gold bullion (which is in the form of gold bars), gold coins, and if recoverable, gold dust and nuggets, and other artifacts (e.g., bells, anchors, cannons, jewelry and other personal effects). The bullion is easier to recover and set a value on. The gold coins will be much harder to recover, and these privately minted pioneer coins could be extremely valuable. The gold dust and nuggets may not even be recoverable using today's technology, but no one will say that even these may not some day be recovered. The recoverability and value of the artifacts are also difficult to predict.

The recovery expenses and income to date are accurate figures. Estimates of future costs and return on recovered property, on the other hand, are relatively soft. Costs assume no significant difficulties in recovering the treasure and bringing it to port. Income is projected in a conservative manner because we are unsure of the actual value of the artifacts that will be recovered.

Actual litigation costs to date (five court days and 43 preparation days) are firm. Future costs are based on your estimates of 60 preparation days before trial, nine expert witnesses, 20 trial days, and 22 days preparing for an expected appeal by the unsuccessful litigant at trial. Given your explanation of the novelty of this case, these calculations appear to be quite reasonable.

Given MDG's estimated litigation expenses, you have asked us to project the CMI's costs of litigation. We suggest you multiply MDG's costs by a factor of 3.6 based on an assumption of similar charges by counsel, eleven separate insurance companies in the consortium, and a consolidated defense. Thus, we suggest that CMI has or will incur litigation costs of about $5.29 million.

As usual, please be cautious in using this data, especially in this situation where our projections are made in a state of uncertainty about the value of goods more than 100 years old.

If you have questions concerning our estimates, please give me a call. We look forward to being of assistance in the future.

Sincerely,

Louis Munsen

Louis Munson

MERIDA RECOVERY COSTS:

Original exploration costs (discovery of The Merida, etc.).....	$2,757,000
Construction and outfitting of The Atlantis.....	2,346,000
Initial series of dives (through June 30, 1997).....	4,611,000
Second series of dives (through January 31, 1998).....	6,500,000
Final series of dives (through July 31, 1998).....	7,900,000
Other costs (including litigation).....	2,235,000
TOTAL:.....	$26,349,000

VALUE OF PROPERTY REMOVED FROM THE MERIDA:

Value of property already removed from the ship (through June 30, 1997):

(a)	Gold bullion.....	$7,680,000
(b)	Other	5,945,000
	SUBTOTAL:.....	$13,625,000

Value of gold bullion yet to be removed from ship (estimated to be 3.4 tons)[1] … 48,640,000

Value of gold other than bullion yet to be removed from ship
(includes coins as well as gold carried by passengers)[2] …… 220,000,000

Value of all other artifacts yet to be recovered from ship …… 45,000,000

TOTAL: .....…… $327,265,000

ESTIMATED COSTS OF LITIGATION (in actual dollars):

Litigation costs already incurred (through June 30, 1997)…… $388,255

Trial preparation ($7,460/day)…… 447,600

Trial (except experts) ($13,495/day)…… 269,900

Expert witnesses ($20,000/witness, plus expenses)…… 198,000

Appeal preparation…… 164,120

TOTAL:…… 1,467,875

[1]Based on $400 per ounce. Gold is presently selling above that amount on the world market and many expect the price to rise. However, we are presenting a conservative figure on which to base your calculations.

[2] While it is relatively easy to estimate the value of the gold being carried by passengers based on information contained in several newspaper sources, it is impossible to predict the value of privately minted gold coins and the like because of the value of this form of gold has increased at a much greater rate than the value of bullion. With the help of professionals at Tristie's and Notheby's Auction Houses, we have come up with a figure that is a "best guess."

THURSDAY AFTERNOON
July 31, 1997

California

Bar

Examination

Performance Test B

LIBRARY

The Merida Discovery- Group V. Consortium of Maritime Insurers

LIBRARY

Zvch v. The Unidentified- Wrecked anti Abandoned Vessel.
Believed to be the SB "Lady Elgin"

United States District Court, Northern District, Illinois (1991)

This admiralty action was commenced by plaintiff Harry Zych, doing business as American Diving and Salvage Co., as an in rem complaint against a shipwreck located in Lake Michigan and believed to be the "Lady Elgin." The complaint alleges that the ship was abandoned after it sank in 1860 and Zych claims an interest in the vessel and its cargo by reason of his efforts to locate the wreck and recover certain items from the sunken ship.

Subsequently, the Lady Elgin Foundation intervened in the action, claiming it was the present owner of the shipwreck. The Foundation asserts that the Aetna Insurance Co. became the owner of the shipwreck when, in 1880, it paid out $11,993.20 pursuant to an insurance contract covering the vessel and her cargo, on a loss claim by the insured ship owners. After Zych filed his action, the Foundation alleges that it acquired the ownership interest in the shipwreck from Aetna in exchange for twenty percent of the gross proceeds from the sale of any property or artifacts recovered from the shipwreck. Accordingly, the Foundation contends that it now has title to the shipwreck.

Zych asserts title to the shipwreck pursuant to the law of finds. This doctrine awards title of abandoned property to the first finder who takes possession of the property with intent to exercise control over it. Zych concedes the facts asserted by the Foundation, but argues that Aetna abandoned the vessel. The sole dispute between Zych and the Foundation is whether the vessel has been abandoned. "Abandonment" is the voluntary relinquishment of one's rights in a property. It occurs "by an express or implied act of leaving or deserting property without hope of recovering it and without the intention of returning to it." 3A Benedict on Admiralty §134 (7th ed. 1980). It must be voluntary, with a positive intent to part with ownership, and without coercion or pressure. To show abandonment, a party must prove (1) intent to abandon, and (2) physical acts carrying that intent into effect. Abandonment may be inferred from all of the relevant facts and circumstances. A finding of abandonment must be supported by strong and convincing evidence, but it may and often must be determined on the basis of circumstantial evidence.

an officer of a subsidiary of Aetna. Avery reviewed a Letter Book containing correspondence from July 23, 1860, through March 5, 1861, and found therein five letters relating to the Lady Elgin wreck. He notes that the Letter Book would only have contained the most significant correspondence because of the difficulty and expense of copying documents at that time.

- The first document is a letter dated September 11, 1860, from Thomas Alexander, an officer of Aetna, to Gordon Hubbard, an agent of Aetna, in which Alexander states that he has been informed of the loss of the Lady Elgin and expresses hope that the company will escape claims on the cargo.

- Also on September 11, 1860, Alexander wrote to Captain E. P. Door, the surviving captain of the Lady Elgin, inquiring as to ongoing litigation against the owners of the schooner Augusta, which had caused the Lady Elgin to sink by ramming her during a storm.

- On September 22, 1860, Aetna President E.G. Ripley wrote Hubbard instructing him to pay on the Lady Elgin claims as soon as possible upon the receipt of invoices.

- On October 10, 1860, Alexander wrote again to Hubbard. In this letter, he states "permit us to confirm Capt. Door's instructions not to accept an abandonment of the vessel, for the reason which he informs us he gave you on his recent visit to Chicago."

- The final letter is from Alexander to Hubbard on November 15, 1860, noting the payment of $11,993.20 as "constituting payment in full on the policy on the Lady Elgin."

The Foundation also submitted the affidavit of Christopher Parson, its Executive Director. Parson states that the Lady Elgin has been the subject of intensive search efforts by a number of prominent salvors and underwater explorers as well as many less organized efforts by sport divers. Parson also describes the search methods which were used in conducting both Zych's earlier, unsuccessful efforts to locate the wreck and those used in his recent, successful effort. Because of the location of the wreck, in very deep water and spread out among boulders and large stones in the lake bed, the wreck could not have been found without the state-of-the-art technology which Zych used to discover the wreck, which was not available until the 1980's.

stipulated that the documents show that Aetna insured the Lady Elgin's hull and cargo, that Aetna received claims and supporting documentation for the loss, that Aetna paid the claims in full for $11,993.20, and that Aetna instructed its agents not to abandon the Lady Elgin. Zych also concedes that Aetna acquired title to the Lady Elgin by subrogation. However, Zych disputes the legal significance of these facts. He argues that Aetna abandoned the wreck through the lapse of time and the failure to take any steps to recover the vessel.

Historically, courts have applied the maritime law of salvage when ships or their cargo have been recovered from the bottom of the sea by those other than their original owners. Under this approach, the original owners still retain their ownership interests in the property, although the salvors are entitled to a very liberal salvage award. Such awards often exceed the value of the services rendered. If no owner should come forward to claim the recovered property, the salvor is normally awarded its total value.

A related legal doctrine is the common law of finds, which treats property that is abandoned as returned to the state of nature and thus equivalent to property with no prior owner. The first person to reduce such property to "possession," either actual or constructive, becomes its owner. Admiralty has historically disfavored the law of finds, preferring instead the policies of the law of salvage. Would-be finders are encouraged to act secretly, and to hide their recoveries, in order to avoid claims of prior owners or of other would-be finders which could entirely deprive them of their property. The aims, assumptions, and rules of the law of salvage fit well with the needs of maritime activity and encourage less competitive and secretive forms of conduct than does the law of finds. The primary concern of salvage law is the preservation of property on oceans and waterways. Salvage law specifies when a party may be said to have acquired, not title to, but the right to take possession of property (e.g., vessels, equipment, and cargo) for the purpose of saving it from destruction, damage, or loss, and to retain it until proper compensation has been paid.

Salvage law assumes that the property being salved is owned by another, and thus that it has not been abandoned. Admiralty courts have adhered to the traditional and realistic premise that property previously owned but lost at sea has been taken involuntarily out of the owner's possession and control by the forces of nature at work in oceans and waterways. Sunken cargo and vessels are in general deemed "abandoned" in admiralty only in the sense that the owner has lost the power to prevent salvage; a finding that title to such property has been conclusively lost requires strong proof, such as the owner's express declaration abandoning title.

In this case, of course, there is no affirmative act which indicates an intent by Aetna to abandon the wreck of the Lady Elgin. Indeed, one of the documents submitted to the Court and acknowledged by Zych appears to show a specific intent not to abandon it.

There remains, however, the argument that the failure to take any steps to recover the wreck is sufficient evidence of intent to abandon, when considered in light of the lapse of 130 years.

In support of this argument, Zych refers to Wiggins v. 1100 Tons of Italian Marble (E.D.Va. 1960). In Wiggins, property was recovered from the Bark Clythia which had been sunk for 66 years with only a portion of her top mast visible above the water. The court there held that although lapse of time and nonuse are not sufficient in themselves to constitute abandonment, they did imply an intent to abandon when considered along with the failure to conduct sufficient efforts to recover property when both its location and availability could be determined. Zych urges that Aetna's failure to attempt to recover the Lady Elgin for 130 years, twice the period involved in Wiggins, dictates a finding of abandonment.

The Foundation contends that Aetna's failure to act should be deemed inconsequential because the technology has not previously been available to locate this particular wreck - as evidenced both by the affidavit of Parsons and by the lack of previous success in locating the Lady Elgin, despite numerous search efforts. Zych responds that the lack of 1980's technology, however, did not dissuade others from attempting to locate the wreck.

In light of the law's hesitancy to find abandonment and the concomitant requirement that abandonment be supported by strong and convincing evidence, the Court finds that Aetna was not required to engage in efforts to recover the wreck in order to avoid abandoning its interest, when such efforts would have had minimal chances for success.

Zych has not provided sufficient evidence from which a reasonable fact-finder could conclude that Aetna abandoned the wreck of the Lady Elgin. Accordingly, the Court finds that the Foundation's claim to the wreck must be upheld and Zych's claim for ownership must be dismissed.

Judgment for the Lady Elgin Foundation.

Treasure Salvors. Inc. v. The Unidentified. Wrecked and Abandoned Sailing Vessel Believed to be The Nuestra Sẽnora de Atocha

United States Court of Appeals, Fifth Circuit (1988)

Treasure Salvors, Inc. sued for possession of and confirmation of title to an unidentified wrecked and abandoned vessel thought to be the Nuestra Senora de Atocha. The United States government intervened, asserting title to the vessel. Summary judgment was entered for the plaintiff and the government has appealed that judgment.

In late summer of 1622, a fleet of Spanish galleons, heavily laden with bullion exploited from the gold mines of the New World, set sail for Spain. As the fleet entered the Straits of Florida, it was met by a hurricane which drove it into the reef-laced waters off the Florida Keys. A number of vessels went down, including the richest galleon in the fleet, Nuestra Senora de Atocha. Five hundred fifty persons perished, and cargo with a contemporary value of perhaps $250 million was lost. A later hurricane shattered the Atocha and buried her beneath the sands.

For well over three centuries the wreck of the Atocha lay undisturbed beneath the wide shoal west of the Marquesas Keys, islets named after the reef where the Marquis of Cadereita had camped while supervising unsuccessful salvage operations in behalf of the Spanish government, soon after the shipwreck occurred. Then, in 1981, after an arduous search, aided by survivors' accounts of the 1622 wrecks and an expenditure of more than $2 million, plaintiff located the Atocha. Plaintiff retrieved gold, silver, artifacts, and armament from the wreck, valued at $6 million.

The government argues that the district court erred in applying the law of finds to this recovery. We believe the government is incorrect.

The Atocha is indisputedly an abandoned vessel. The parties stipulated that "the wreck believed to be the Nuestra Senora de Atocha, her tackle, armament, apparel and cargo has been abandoned by its original owners." The Spanish Government long ago gave up attempts to recover the Atocha. We know of no others who are in position to assert a credible claim of ownership, nor is any such claim identified by appellant. Whether salvage law or the adjunct law of finds should be applied to property abandoned at sea is a matter of some dispute.

Martin J. Norris, in his treatise on salvage law, states that under salvage law the abandonment of property at sea does not divest the owner of title. M. Norris, The Law of Salvage, § 150 (1958).' Some courts, however, have rejected the theory that title to such property can never be lost, and have instead applied the law of finds. Wiggins v. 1100 Tons of Italian Marble (E.D.Va. 1960). Under this theory, title to abandoned property vests in the person who reduces that property to his or her possession.

The court in In re The U.S.S. Hatteras. Her Engines. Etc, (USDC SD Tex 1981) explained how a court should examine facts to decide whether property has been abandoned at sea:

> A formal declaration is not necessary to determine that an abandonment has occurred; it may be inferred from acts and conduct of an owner clearly inconsistent with an intention to return to the property, and from the nature and situation of the property. While mere nonuse of property and lapse of time without more do not necessarily establish abandonment, they may, under circumstances where the owner has otherwise failed to act or assert any claim to property, support an inference of intent to abandon.

The court below correctly applied this standard and the law of finds. To treat the disposition of a wrecked vessel, whose very location has been lost for centuries, as though its owner were still searching for it, stretches a fiction to absurd lengths. The law of salvage does not contemplate a different result. Salvage awards may include the entire derelict property. Brady V S.S. African Queen (E.D.Va. 1960).

On this appeal, the United States claims the treasure chiefly upon two grounds: (1) application of the Antiquities Act to objects located on the outer continental shelf of the United States; and (2) the right of the United States, as successor to the sovereign prerogative asserted by the Crown of England, to goods abandoned at sea and found by its citizens.

[1] Norris raises the specter of violent clashes between competing finders in international waters if abandoned property is held to be a find. We fail to see how salvage law, which gives the right of possession to first salvors, would provide a more effective deterrent to such clashes. Under either doctrine, the property or an award for the value of the salvage efforts goes to the one who is first able to seize possession. The primary difference between the two doctrines is that under salvage law the claim of the finder of abandoned property is satisfied by proceeds from the sale of the property paid into court.

The Antiquities Act authorizes executive designation of historic landmarks, historic and pre-historic structures, and objects of historic or scientific interest situated upon lands owned or controlled by the United States as, for instance, national monuments. Permission to examine ruins, excavate archaeological sites, and gather objects of antiquity must be sought from the secretary of the department exercising jurisdiction over such lands. As the district court noted, the Antiquities Act applies by its terms only to lands owned or controlled by the Government of the United States. The wreck of the Atocha rests on the continental shelf, outside the territorial waters of the United States. We conclude that the remains of the Atocha are therefore not situated on "lands owned or controlled by the United States" under the provisions of the Antiquities Act.

The United States also claims the treasure as successor to the prerogative rights of the King of England. The English prerogative would seem irrelevant to the wreck of a Spanish vessel discovered by American citizens off the coast of Florida. The government contends, however, that the English common law rule - granting the Crown title to abandoned property found at sea and reduced to possession by British subjects - is incorporated into American law, and that Congress has specifically asserted jurisdiction over the M in this dispute.

While it may be within the constitutional power of Congress to take control of wrecked and abandoned property brought to shore by American citizens (or the proceeds derived from its sale), legislation to that effect has never been enacted. The Antiquities Act, which was intended to facilitate preservation of objects of historical importance, could hardly be read to subrogate the United States to the prerogative rights of the English Crown.

A further provision, the Abandoned Property Act authorizes the administrator of the General Services Administration to protect the interests of the government in wrecked, abandoned, or derelict property "being within the jurisdiction of the United States, and which ought to come to the United States." But the Abandoned Property Act has limited application. The Abandoned Property Act is designed to regulate salvage of property abandoned on government lands or property in which the government has an equitable claim to ownership. The Abandoned Property Act is not a legislative enactment of the sovereign prerogative. Since the United States has no claim of equitable ownership in a Spanish vessel wrecked more than a century before the American Revolution, and the wreck is not "within the jurisdiction of the United States," the Abandoned Property Act has no application to the present controversy.

The district court judgment is affirmed.

Owners of The F/V Sea Star. Individually and as Reor .ntatives
for Her Crew v. Tug Gordon Gill. Its Tackle. Etc.

United States District Court, Alaska (1989)

At around 2:00 a.m., Captain Larry Ricks of the Sea Star, a commercial fishing boat, observed a blip on his radar screen, indicating the presence of another vessel. The initial reaction of Captain Ricks was that the blip could be another fishing vessel dragging a net, which might endanger the Sea Star's string of crab pots. Since the other vessel's lights were off and it did not respond to a distress call, Captain Ricks had the Sea Star set out on a chase to approach and observe the other vessel. He found the Gordon Gill, a sea going tug, floating without power, with boarded-up windows and no one on board. The Gordon Gill was then located about seven miles east northeast of Egg Island, a tiny island in the Aleutian Chain. Temperature at the time was in the 20's (above zero) so there were icing conditions. The wind was blowing twenty to thirty knots in eight to twelve-foot seas.

Captain Ricks contacted the Coast Guard, which advised him that the Gordon Gill had been reported lost at sea several months before. When the Coast Guard asked him about his intentions, Captain Ricks said that he would put a man on board, to effect a tow, and try to get the Gordon Gill into a safe harbor.

Captain Ricks gave crewman Tom Payne his survival suit and several strobe lights, and Mr. Payne leaped, from the Sea Star to the Gordon Gill. It took three tries in heavy seas for the Sea Star to get a good pass allowing the leap. Payne slid across the wet icy deck of the Gordon Gill, after picking a moment when the swells did not produce an eight to twelve-foot difference in the heights of the decks. Payne then secured a tow rope sent across from the Sea Star.

For more than seven hours the Sea Star towed the Gordon Gill, finally bringing it into Beaver Inlet, a somewhat sheltered bay but with no major towns or harbors, located on the east side of Unalaska Island. After several hours in Beaver Inlet working on the tow line, which was threatening to part under the force of the heavy seas, Captain Ricks determined that it was important to try to beat the weather and to get into an established harbor with man-made facili-

ties such as Dutch Harbor. A gale with thirty-five to fifty knot winds was coming in and would produce impassable high seas, making it impossible for Captain Ricks to bring both vessels to Dutch Harbor, the only practical place to leave the Gordon Gill.

The tow line broke frequently as the Gordon Gill was towed through Unalga Pass on the way to Dutch Harbor because of high seas and opposing current. Each time, crew members leaped back and forth between the wet and icy vessels to resecure the line. On each occasion when the line snapped, it posed a hazard to the Sea Star crew and equipment.

The Sea Star finally arrived in Dutch Harbor towing the Gordon Gill, after about twenty hours of extremely difficult and hazardous work in the salvage operation.

Captain Ricks arranged for movement of the Gordon Gill to a protected spot for long-term storage. Before such storage could be completed, the crewof the Sea Star secured the Gordon Gill with its own lines at a dock, and pumped out the bilge of the Gordon Gill in order to assure that the salvaged vessel would not sink. The Sea Star then left Dutch Harbor after devoting three work days to the successful salvage of the Gordon Gill.

If the Sea Star had not taken the Gordon Gill in tow given the weather conditions in effect, it would in all likelihood have run aground on one of the nearby islands and been destroyed. The salvage conducted was thus a high order salvage. The Gordon Gill was rescued from great peril at considerable risk to the salvors. The promptness, skill and energy with which the salvors acted was great, and resulted in the safe return of a vessel which had been floating derelict for four months. The means of rescue, though hazardous and difficult, were reasonable in the circumstances. In the very challenging part of the world in which the salvage took place, the Gordon Gill could not have been salvaged at all if the Sea Star had not engaged in the risky and aggressive methods it used.

The Sea Star incurred expense for three days of labor, reasonably chargeable to the salvage in the amount of $10,743. Other uncontested expenses in the salvage amounted to $13,266. In addition, the Sea Star had damage to its winch and lost fishing equipment in the storm when it was unable to pick it up once it had the Gordon Gill in tow. Thus, the total salvage labor and expenses amounted to $50,931.

The most difficult aspect of the case is the determination of the value of the Gordon Gill. Efforts to sell the vessel, where is and as is, for $500,000 to $600,000 have failed, but bids have come in for $300,000 Canadian, $300,000 U.S. and $400,000 Canadian, as is where is, even though the market for such vessels is very poor at this time. It would cost about $140,000 to $150,000 to repair the vessel and get her resurveyed and properly put back in service. Although the vessel was insured for $1,500,000, this is not evidence of its current value, but rather of the need to insure it against mortgages placed against it.

Based on all the evidence, the vessel is worth at least $300,000, as is where is, and approximately $750,000 if sold in a commercially reasonable manner from a more accessible port. Further, the Gordon Gill could be towed into a port where it could be marketed effectively for no more than an additional $80,000. Thus, I find that the value of the Gordon Gill is $750,000, less the $150,000 repair cost, and less the $80,000 tow cost, for a net value of $ 5 20, 000.

In the seminal salvage case, The Blackwell (U.S. Supreme Court 1860), Mr. Justice Clifford defined the salvage award as follows:

> Salvage is the compensation allowed to persons by whose assistance a ship or her cargo has been saved, in whole or in part, from impending peril on the sea, or in recovering such property from actual loss, as in the cases of shipwreck, derelict, or recapture.

A salvor is usually entitled to his expenses plus a salvage award. The award is more than quantum meruit; salvors are to be paid a bonus according to the merit of their services, and the awards vary according to a judge's conclusion that the salvage service was of "high order," "medium order," or "low order." Justice Clifford identified the six factors a court must consider in setting a salvage award for those who have rendered a valuable service to the owners of a ship or her cargo:

impending peril. (5) The value of the property saved.' (6) The degree of danger from which the property was rescued.'

Applying The Blackwell standard, the labor provided by the Sea Star was limited but the speed, skills, and energy displayed by the salvors were high. The value of the Sea Star is about $1 .25 million, and the danger to which this craft was exposed was high and the risks to its crew were very great. The value of the Gordon Gill, and of the property salved, was as stated above. The peril to the Gordon Gill was great, the salvage was entirely voluntary, and the salvage was entirely successful.

Considering these factors, the appropriate salvage award is $224,265, composed of about onethird' of the value of the salvaged vessel, plus more than $50,000 in expenses incurred as set out above. This is to be divided between the owners and the crew of the Sea Star in accord with the agreement they have made among themselves.

Judgment for the owners and crew of the fishing vessel Sea Star as ordered.

[2] The value of the property saved is often a most important ingredient in determining the amount of salvage. The remuneration to the salvor and benefit to the owner are always larger where the property that receives assistance is large than where it is small; and viceversa. The rule of decision is not a proportion, although the amount may be and often is expressed in that form in the decree, but an adequate reward.

[3] These six factors have been articulated in exactly the same way since first offered by the Supreme Court in 1860. In recent years, a seventh factor has emerged and is being evaluated, where appropriate, by admiralty courts. As explained by the court in MDM Salvaoe. Inc. v. The Unidentified. Wrecked and Abandoned Sailina Vessel Believed to be the Spanish Treasure Ship. The San Fernando (USDC SD FLA 1986), preservation of the archaeological integrity of the site will constitute a significant element of entitlement paid to the salvor. Unlike the instant matter, in the case of a salvage of an ancient treasure ship, archaeological preservation, on-site photography, and marking of the site, serve the public interest in protecting a window in time and in creating an historical record of an earlier era.

[4] This award fits well within the range of recent salvage awards. See, e.g., Allseas Maritime v. MN Mimosa (USCA 5th Cir. 1987) [salvage award of two-thirds of tanker valued at $400,000 divided among multiple salvors]; Vernooy v. New York (NY Court of Appeals 1987 [salvors who discovered two 18th century cannons in Lake Champlain entitled to a salvage award equal to 50% of the cannons' total $68,000 value, plus $11,500 in non-legal expenses and storage fees]; HRM. Inc. v. SN Martha Mia (USDC RI 1991) [salvage award of 25% of the combined value of $67,000 of two pleasure boats saved from being driven ashore in 30 knot winds].

ANSWER 1 TO PERFORMANCE TEST B

Arbitration Settlement Statement

Statement of Facts

In October 1996, MDG located the remains of a 140 year-old shipwreck of the Merida, after a five year search, using technology and computer analysis developed by MDG specifically for this project.

The Merida sunk in November 1857 about 100 miles off the coast of Columbia. When lost at sea, the Merida was carrying a Cargo of gold bullion then valued at $1.6 million and assets belonging to passengers of about $600,000. The present value of possibly recoverable assets is approximately $327 million, according to conservative estimates.

MDG filed an in rem action to claim the property based on its recovery efforts. CGI, an insurance consortium, has contested our claim and asserted an ownership interest based on claims paid on the original disaster of allegedly $500,000 to $1 million dollars in 1857 and 1858.

I. MDG is the true owner of The Merida. an abandoned shipwreck, because MDG has Taken possession and control over the shin by locating. oreservin4, and retrieving the assets.

The law of finds awards title of abandoned property to the first finder who takes possession of the property with the intent to exercise possession and control. (Zych)

MDG has, through its own efforts, researched and developed the tools and means used to locate the property. MDG has developed the technology required to recover the property and has spent 5 years doing so, therefore, MDG should be awarded title to the property.

The Merida is abandoned property

Property is considered abandoned if the original owner:

1. Intended to abandon and
2. Owner physically acted to carry intent into effect. Zvch

Abandonment may be inferred from the circumstances, from conduct clearly inconsistent with the intent to return and from the nature and situation of the property Treasure Salvors.

Here, the owners of the Merida and the insurers have made no effort in the 140 intervening years to locate or recover the cargo or wreckage. Indeed, only the insurance companies assert any present interest. CGI admits that it has not retained any documents relating to the loss, which it would routinely do if it considered any recovery possible.

When MGD began this expedition, CGI was asked to join recovery efforts but

declined and bore none of the risks associated with the effort. Because the lapse of time and the actions of CGI show intention and actions to abandon the Merida, title should be given to MGD.

II. The law of salvage does not apply because CGI clearly abandoned the Merida.

In Treasure Salvors, the Fifth Circuit held that the law of finds, Supra, may be applied to clearly abandoned maritime property rather than the law of salvage. The law of salvage, sometimes applied in admiralty, treats property lost at sea so that original owners retain interest although salvors are entitled to liberal salvage fee. (Zych) In Treasure Salvors the court applied the law of finds to award the property to the salvage company where the intent to abandon was clear from the circumstances.

Zych is distinguishable because although the court awarded the Lady Elgin to the insurance company, it did so because Aetna was able to show that it had no intent to abandon. CGI's intent to abandon is clearly inferred from the circumstances.

III. If the law of salvage al2plies to give title to CGI. MGD is entitled to recover all its expenses, plus a "high-order" salvage award.

A salvage award is compensation for saving/recovering property from loss at sea. Sea Star, citing The Blackwell.

Factors to be considered are:

1. labor expanded
2. skill and energy involved
3. value of property employed
4. risk incurred by the salvor
5. value of the property saved
6. degree of danger from which rescued.

A seventh factor emerging is preservation of the archaeological integrity of the site.

Applying these factors, a salvor is entitled to a bonus according to the merit of their services. Sea Star A high order salvage award may range up to 2/3 of the property saved value.

1. labor

MGD has spent five years on this project. The partners Ansello and Miller are an ocean engineer and a deep sea recovery specialist. Without their skills and efforts, the Merida would likely never have been recovered.

2. Skill and energy

MGD used their personal resources and private investment to finance the venture. They developed computer analysis and the deep sea robotic device, the Atlantis, necessary for recovery.

3. value of property

The computer analysis program and the Atlantis are both cutting edge technology. Overall MDG expended about $5.5 million before any gold or cargo ever recovered.

4. risk incurred

Aside from obvious financial risk, salvage itself is dangerous hazardous work. In fact, Arturo Ansello, son of MDG partner Dr. Ansello was killed during recovery efforts.

5. value of the property

Present estimates of the Merida's value range from around $300 million to $1 billion.

6. degree of danger from which rescued

Without efforts of MGD, Merida may not have been recovered. Changes in tides, seismic activity, other natural forces could have lost the property to CGI forever.

Settlement Proposal

In settlement of CGI's claims, MDG will offer payment of $50 million from the proceeds of sale of property recovered from the Merida. This proposal is fair and reasonable because even if the Merida belongs to CGI, MGD is entitled to expenses and a high order salvage award.

Based on an independent cost benefit analysis, the value of all property recovered to date and yet to be recovered is approximately $327 million. Of the $327 million, about 1 /3 of those assets represent gold coins/assets carried by passengers which were not insured. CGI represents insurers of the cargo and vessels only and cannot claim an interest in these assets. Since no estates of deceased passengers have made any claim, these assets, worth approximately $1 10 million belong to MDG.

Of the remaining $217 million, MGD is entitled to a salvage award of expenses and bonus based on Blackwell factors. Here, MGD's expenses are over $26 million.

Also high-order salvage bonuses range from 1 /4 to 2/3 the value of the property. ,-ga .Star. Therefore, CGI would at a minimum owe $80 million to MGD ($54 million salvage and $26 million expenses) or up to $134.5 million ($108.5 salvage and $26 million expense). CGI's maximum entitlement would be $82 million - $200 million. Because this settlement allows CGI to avoid loss by being found to have abandoned Merida and the related litigation expenses and because MGD bears all risk that recovery is less than expected or more expensive to recover, present settlement of $50 million is fair to CGI.

ANSWER 2 TO PERFORMANCE TEST B

ARBITRATION SETTLEMENT STATEMENT

Statement of the Merida Discovery Group (MDG1

Earlier this year, MDG finally was able to confirm that it had discovered the long-lost ship Merida, culminating an arduous, multi-million dollar high-tech exploration by a team of scientists and explorers led by Dr. Ansello and Buck Miller. The Merida sank in 1857 off the coast of Columbia, carrying large deposits of gold bullion and even greater wealth carried by the passengers on board. The exact location of the wreck remained a mystery. The insurance companies, who apparently paid between $600,000 and $1 million in claims for the bullion - records are scarce and reports vary - apparently made no effort to locate the ship, considering it a lost cause. As one expert at the time noted, under the conventional wisdom of the time, "The Merida is lost forever." Two companies, The Sojourner and Leeds Companies, did talk to an eccentric inventor who hoped (by some accounts "claimed") to invent a submarine to search for the ship. However, the companies did not pay anything to him and no search was attempted. Submarines have in fact existed since the 1860s, but that alone created little hope the ship could be found.

MDG is an experienced team of scientists and divers who have exclusively focused and dedicated themselves to finding the Merida for more than two years, and the team leaders, Dr. Paulette Ansello and Buck Miller, have been researching for more than five years. Ansello is an expert ocean engineer, and Miller is a highly-experienced, world renowned diver with experience as a sea recovery specialist at sites all over the world. MDG sought investors and received $5.5 Million.

The substantial investment was entirely dedicated to the risky proposition of finding the gold - if nothing was found, the backers would have little to show for their investment. Including the development of new research technology and infrastructure and all dives through June 30, 1997, MDG has spent nearly $12,000,000. Costs for the project through July 31, 1998 are estimated at $26.35 million, not including an additional $3 million in legal costs that would be required to defend the suit by CIVIL

MDG has agreed to submit the issues to arbitration in the hope that they can be expedited more efficiently.

ARGUMENT

Introduction

The law of sunken underwater treasures is governed by two legal doctrines: abandonment, which awards full recovery to the finder, and salvage, which awards a substantial award to the finder, above and beyond its costs under quantum meruit. It is important to recognize that, while abandonment is the preferred argument, MDG should recover the vast majority of the value whichever theory is used.

I. The Majority of the find cannot be claimed by CMI because they do not have subrogation rights of personal property

While it remains unclear whether CMI ever had any ownership rights over the gold bullion, it is clear that the consortium has no interest in the personal property aboard the ship, including the gold coins and jewelry that belonged to the passengers. According to the estimates of an independent cost-benefit analyst hired by MDG, the gold bullion represents only 15 % of the value of the find. Furthermore, while historical accounts indicate the ship carried $2 million in bullion (1857 dollars), the insurance companies only paid claims of $600,000 to $1 million (and even this needs to be established, since they have destroyed records). Therefore, they apparently should only have subrogation rights over a portion of the gold bullion.

Note: [CMI also has some claim, if their rights are established at all, to part of the $45 million from the ship artifacts - before we submit this brief, we should ask Munson and Peters to break down how much is from the ship, which CMI can claim, and how much was personal property (CMI has no claim)]. (This is note to firm - should be answered and then removed from doc.)

II. Substantial Evidence Exists that a court would reject CMI's claim in its entirety on the grounds that it abandoned Merida.

To save time and avoid litigation, MDG has agreed to submit to arbitration, and will not make a claim here for 100% recovery. However, in doing so, it is sacrificing a substantial legal claim of abandonment.

Any settlement calculated upon a salvage theory should additionally compensate MDG for forgoing this legal claim. CMI benefits from the litigation costs and avoids a risk of complete divestment.

A. CMI made no physical attempts to search for Merida: allowing an inference of abandonment.

CMI has presented no evidence that it has ever, in 140 years, lifted a finger to search for Merida. While it "hired" an erratic man who said he would look for it, this person had no apparent experience, funding, or equipment, and CMI paid him no consideration and did not assume any liabilities, according to newspaper accounts. For years, CMI might have operated on the belief that it was scientifically impossible to find and recover Merida. However, as CMI's officer admits, the company has known that scientific advancements have made an exploration possible, perhaps even cost effective, for 20 years. Still, CMI has apparently never considered searching for the ship.

In In re Hatteras, a federal district court held that a formal declaration is not necessary to establish abandonment, and that it may be inferred when the owner "has otherwise failed to act or assert any claim to property."

While in Zych, a court found this doctrine inapplicable when only minimal choice of success existed, CMI representatives acknowledge and MDG's find proves that the technology does now exist and has for at least several years. A third court, in Wiggins, agreed that when failure to conduct any efforts occurred while the location and availability could be determined, an inference of abandonment could be raised.

Because CMI failed to take any steps whatsoever to locate the ship even after its

own representatives appreciated its discoverability, it can be inferred that they abandoned the ship.

B. Even if affirmative evidence of abandonment is required. CMI abandoned Merida by destroying all records and by refusing to cooperate with or show interest in legitimate recovery efforts.

Zych and some theorists have asserted that there is a presumption against abandonment and some affirmative evidence must be shown. CMI has taken at least two steps that illustrate its abandonment.

1. Destruction of Records

Mr. Birch, Document Director for Leeds, one of the largest CMI reps, asserted in a sworn deposition that it is a long-standing practice in the insurance industry to maintain records of any policies for goods lost at sea that the company had any hope of recovering. Such documents were exempt for the regular document destruction policy. While MDG is unable to prove that the policy was in place in the 1860's, the fact that the documents no longer exist indicate a substantial likelihood that Leeds had abandoned any hope of recovering. The physical destruction of papers is a manifest affirmative act.

2. Refusal to cooperate with or show interest in MDG's work

When MDG approached CMI about the possibility of finding Merida, CMI clearly refused to be of any help and told MDG that they were not interested, even after MDG demonstrated a impressive team and technology plans capable of finding the ship. Their behavior shows an unwillingness to expend effort, effort that is essential to avoid an inference of abandonment. It could also be interpreted as an affirmative revocation.

CMI might argue that it continued its assertion of ownership by placing surveillance planes to watch MDG. While this does help their claim by showing some interest, it should hurt even more by illustrating their lack of genuine efforts necessary to warrant the protection of property rights.

Therefore, MDG is capable of making a substantial good faith claim that it is entitled to 100% of the find because CMI has abandoned it. Because any settlement would spare CMI this risk, it should be accounted for in the calculation.

III. Even if CMI did not abandon Merida MDG is entitled to a substantial portion as salvage award.

It should be first noted that CMI is not entitled to the personal property as a matter of law, and the salvage calculations only apply to the estimated $52 million in gold bullion and the undetermined value of personal property.

Second, it is important to establish that, while salvage awards are often represented as a percentage, they are in fact primarily intended to compensate in money the efforts, risks, and investment of the finder. While the common range for such awards, as noted by one count, is 25-67%, they can be as high as 100% when the finder's risks and expenses greatly exceed the owners's present-day interests (see Brady v. Africa Queen for 100%

salvage award). The awards of less than 50% are generally low order and medium order services (see below).

The US Supreme Court set forth a six-part test for salvage awards in The Blackwell, in 1860. With only the addition of a 7th factor, the test continues to be applied today.

The Court said, "A salvor is usually entitled to his expenses plus a salvage award. The award is more than quantum meruit - salvors are paid a bonus according to the merit of their services, and the awards vary according to whether the service was of "high order," "medium order" and "low order." This determination is made using a 6 (now 7) factor test:

1. Labor Expended: Ansello and Miller have worked on this project for 5 years, full-time for nearly two. They assembled a team of researchers and divers and have conducted extensive research. Even using special new techniques devised by them for this project, they still had to scour 750 square miles of uncharted ocean floor. This was clearly a major effort. Thousands of man-hours were put in, many not calculated in the $26 million projected cost.

2. Skill and Enerav Used: Miller is recognized as an international expert, and Ansello is a Ph.D. scientist. The team used complex meteorological and mathematical models to calculate the approximate location. They used wide-swath sonar, and developed what has been described as a new field of science, using patterns to calculate sinking rates, drifting patterns, and currents. They designed a prototype and then actual ocean rover, using state of the art research and design. The Atlantis rover cost $2,346,000 to design and build. These highly-specialized techniques required considerable skill, investment, and dedication.

3. Value of Eauil2ment Used: As noted the Atlantis rover cost over $2 million. The boats, sonar, diving equipment, computers, and other materials are also worth millions. (Note: better calculation would be preferred - can be an estimate).

4. Risk Incurred: The project was a tremendous financial risk and was also very dangerous. The two initial investments, totaling over $5.5 million were drawn from financial investors seeking a return on their money. All of this money was expended on the project, and would have been completely lost had the project failed. The personal risk took a serious toll. Dr. Ansello's son was killed during the project. Diving in deep ocean is very dangerous and requires special care. Ansello's son was an experienced diver, but using new equipment exposed new risks.

5. Value of Prol2erty: The Sea Star case emphasized that finders should reap greater fees when they make a difficult recovery of a more expensive treasure.

6. Dearee of Dan,9er from which Rescued: The degree of danger is more relevant to property which is at risk of immediate destruction, like the Sea _ tar. For underwater treasure, a more apt test is difficulty of recovery. Because owner, CMI, had a very low expectation for recovery, they are less entitled to recovery, more so than if they were likely to get it back intact on their own.

7. A seventh factor has been added in modern courts - see Sea Star, footnote 3, Archeological and scientific value - Finders are entitled to keep a greater share when

their activities result in public goods. MDG is carefully preserving historical, scientific and archeological details of the ship. They are working closely with marine biologists and Smithsonian curators. These efforts should be reflected in their compensation.

Thus, on each of the seven factors MDG's efforts are of the highest order. The 25 recovery named in Sea Star was a low order find. High Order recoveries range from 50% and up. Any arbitrator should rationally conclude that, if this suit went to court, CMI stands to lose at least half of the gold bullion.

IV. Settlement Offer (Res is total amount subject to salvage fee)

Total Res

Gold Bullion - The value of the bullion is estimated at $52 million, $7 million of which has already been recovered.

Other Property - For now, I will assume the other property, valued at $50 million, is 75% personal property and 25 % ship, based on the percentages of gold. Thus, the property available to CMI here is $12.5 million.

The total res is $64.5 million. All other property is personal property for which they have no claim. Because CMI only paid up to $1, million in insurance, they only covered %2 the gold bullion. Thus, that amount should be reduced to $26 million, and res = $38.5 million. The costs of the project are $26 million. As noted, MDG is entitled to costs. $38.5M -$26M = $12.5M. Of this amount, MDG should receive at least a 50% salvage fee. This would leave CMI with $6.25 million.

Because CMI is willing to drop its claims, we are willing to add half our expected litigation costs of $1.5 million. Also, we are willing to add 5 % to our estimated gold price, which was conservative. At $420/oz., it would raise the take by about $600,000. (.05x1/2goldx.5% fee). Thus our offer is 6.25M & 600K & 1.5M = $8.3 million.