

[Home](#) / [Exams](#) / [NextGen UBE](#) / [NextGen Sample Questions](#) / [About Performance Tasks](#) / [Sample Performance Task](#)



NextGen UBE

[About](#)
[Registering](#)
[Preparing](#)
[Test Day Policies](#)
[Scores & Score Portability](#)
[Minimum Passing Scores](#)

Sample Integrated Question Sets

 

[Support](#)

Sample NextGen UBE Standard Performance Task

A standard performance task (PT) focuses on written legal analysis skills. It consists of one extended-length writing assignment that requires an analysis of the specific legal issues identified in the prompt.

PTs may assess skills through subject areas that are partially or fully outside of the Foundational Concepts and Principles; however, the question will provide the resources the examinee needs to give a complete answer. For example, a PT may include aspects of state Trusts and Estates law, but the library will provide all Trusts and Estates law necessary to give a complete answer.

For additional information on performance tasks, visit [About Performance Tasks](#).

The following is a sample standard performance task. It should take approximately 60 minutes to complete.

SAMPLE NEXTGEN UBE STANDARD PERFORMANCE TASK

- > [Memorandum to Examinee](#)
- > [Office Guidelines for Drafting Objective Memoranda](#)
- > [Transcript of Telephone Interview with Laila Johnston](#)
- > [Affidavit of Michael O'Connor](#)
- > [Handwritten Will of Michelle Johnston](#)
- > [Franklin Probate Code excerpts](#)

- > [Thomas v. Anderson, Franklin Court of Appeal \(2007\)](#)
- > [Ramirez v. Ramirez, Franklin Court of Appeal \(2020\)](#)

Select the button below to view the scoring guide for the Standard Performance Task.

Standard Performance Task Sample Scoring Guide

Standard Performance Task Assignment for In re Johnston

Memorandum

To: [You]
From: [Supervising attorney]
Date: [Today]
Re: Johnston Will Contest

We have a new client, Laila Johnston. Laila's mother, Michelle Johnston, recently passed away. In a handwritten will written one month before she died, Michelle left all her property to her neighbor, Josie Robinson. Laila wants to contest that handwritten will.

I have attached the following documents from Laila's file:

- an excerpted transcript of my interview with Laila;
- the affidavit of Michael O'Connor, who witnessed the handwritten will; and
- a copy of the handwritten will.

Additionally, I have included the following sources:

- excerpts from the Franklin Probate Code;
- *Thomas v. Anderson* (Franklin Court of Appeal, 2007); and
- *Ramirez v. Ramirez* (Franklin Court of Appeal, 2020).

Please draft an objective memorandum analyzing the following questions:

1. Whether a court would likely find that Michelle suffered from an "insane delusion" at the time she executed the handwritten will.
2. Whether there is sufficient evidence to submit to a jury the question of whether Josie exerted undue influence over Michelle when the handwritten will was created. There

are four elements required to show undue influence. Analyze only the first element ("person who is susceptible to undue influence") and the third element ("a disposition to exert undue influence"). Assume that the evidence for the other two elements is sufficient.

Discuss only these issues. When preparing your memorandum, follow the Office Guidelines for Drafting Objective Memoranda, attached. As noted in the guidelines, include only the Discussion section of the memorandum.

End of memorandum

Memorandum

To: Associates
From: Firm Partners
Re: Office Guidelines for Drafting Objective Memoranda

The following guidelines apply to drafting objective memoranda.

Memorandum Caption

Omit this section.

QUESTION PRESENTED

Omit this section.

BRIEF ANSWER

Omit this section.

STATEMENT OF FACTS

Omit this section.

DISCUSSION

The Discussion section should provide applicable legal authority and apply that authority to the facts to support an objective conclusion on each legal issue.

Organize the memorandum by legal issue. For example, if the memorandum involves two legal issues, discuss each issue separately, providing a subject heading for each issue.

The subject headings need not be complete sentences. They need only demonstrate which legal issue you are discussing.

CONCLUSION

Omit this section.

End of memorandum

Excerpt of Transcript of Telephone Interview with Laila Johnston

[Attorney]: Tell me about this new will.

Johnston: Shortly after my mother passed away, I was at her house cleaning, and her neighbor, Josie Robinson, stopped by. During the conversation, Josie said that my mom had made a new will and that the new will was in the top drawer of my mom's desk.

Sure enough, I found a new will. It was dated the same day that my mom and Josie were in a car accident. The will left everything to Josie.

In my mom's previous will, which she had signed four years ago, she had left a generous gift to Josie—about \$10,000 to say "thank you" for helping her throughout the years. But this new will leaves everything—the house, all my mom's savings—to Josie. I'm my mom's only child, and it leaves me nothing.

[Attorney]: Tell me about your mom's relationship with Josie.

Johnston: My mom and Josie always had a close relationship. They were neighbors for 20 years. Josie was also always there to help my mom when I couldn't be there. My mom had a long history of medical concerns: migraines, chronic fatigue, joint pain, anxiety, and depression.

I work a lot of hours, so I wasn't always available for my mom when she needed me. I don't have any other family to turn to, and I never wanted my mom to be alone if she was experiencing a health issue, so I often asked Josie for help when I couldn't be there. Josie was always so kind, driving my mom to medical appointments or going by the house to check on my mom.

[Attorney]: What about your relationship with your mom?

Johnston: It was not easy taking care of my mom and all her health issues. I have a very busy job, and it can be hard to get away during working hours. So, as I said, I couldn't always be there for my mom exactly when she wanted me to be.

In the year before she died, my mom was getting frustrated with me. She began accusing me of going to the Bahamas for vacation when I wasn't able to leave work to see her. Of course, I was never in the

Bahamas, and I never went more than two days without seeing my mom. In fact, due to my mom's health issues, I have not left the state of Franklin once this past year. My boss can tell you that I haven't taken a vacation in more than a year.

[Attorney]: What do you know about the events leading up to your mom writing the new will?

Johnston: After Josie told me about the will, I asked Josie to explain it. Apparently, my mom wrote the will while she was at the hospital. She and Josie were in a car accident. Josie had been driving my mom to a doctor's appointment. Another driver ran a red light and hit Josie's car. Josie was fine because she was wearing a seat belt, but my mom had taken hers off because she said it was painful to wear. My mom was thrown against the front windshield.

Josie didn't need any emergency medical treatment, but an ambulance brought my mom to the hospital. Josie rode with my mom in the ambulance. The medical records show that my mom was in pain after the accident, but she was coherent; she could respond to the paramedic's questions. It was later revealed that my mom broke several vertebrae in her back due to the accident. She also had cuts on her face and neck.

According to Josie, on the way to the hospital, my mom was complaining that I wasn't there. My mom kept repeating, "Once again, Laila is in the Bahamas, instead of here with me. She might be my daughter, but she doesn't deserve anything from me." Josie called me during that ambulance ride and put my mom on speakerphone. I told her I was at work and would be arriving at the hospital within the next two hours. I was in a meeting with my boss when they called, and since we were on speakerphone, my boss wished my mom well and assured her that I would be heading to the hospital promptly. My mom thanked him and told me to get to the hospital quickly.

I arrived at the hospital approximately two hours later, like I said I would. I assured my mom that I had not been in the Bahamas. I said, "Mom, I saw you yesterday, and I'm here right now. Of course I was not in the Bahamas today. The Bahamas is a four-hour flight away, so you know it is impossible for me to have been in the Bahamas today." But she still said, "I can't believe you are always choosing a vacation instead of visiting me." At that point I couldn't argue with her and just had to let it go.

[Attorney]: And did Josie explain why she thought your mom created the new will?

Johnston: I found out after my mom's death that as soon as they got to the hospital after riding in the ambulance, my mom told Josie that she was nervous she wasn't going to survive because she was in severe pain and that she wanted to make a new will so she could leave everything to Josie. So Josie went to the hospital gift shop and bought a pen and paper. She gave them to my mom, and my mom handwrote the will right there in her hospital bed. It happened less than one hour after she arrived at the hospital, and I arrived at the hospital to see my mom shortly after that.

[Attorney]: And then?

Johnston: According to Josie, Josie put the will in the top drawer of my mom's desk at home. Josie has a key to my mom's house, so after Josie left the hospital, she drove to my mom's house and put the will in the desk drawer.

[Attorney]: Tell me about the witnesses. How did they come to sign the will?

Johnston: Apparently, as my mom was writing the will, Josie mentioned that witnesses might be needed to make it legitimate. Josie approached a nurse and another hospital employee and asked whether they would sign it. Eventually, they came over and watched my mom sign the will, and then they signed it too.

[Attorney]: When did your mom pass away?

Johnston: It was one month after the car accident and just two days before her 80th birthday. She seemed fairly coherent immediately after the accident. I was able to see her and talk to her once I got to the hospital. She was in a lot of pain from her injuries, but she was talkative. But about a week after she entered the hospital, she developed pneumonia. Her physical state rapidly declined after that, and she remained hospitalized.

[Attorney]: Okay. I'm going to see whether I can track down the people who witnessed your mom's new will. After that, I'll be able to give you a better assessment of where we stand.

End of excerpt

Affidavit of Michael O'Connor

State of Franklin
County of Westchester

I, Michael O'Connor, being first duly sworn, hereby affirm as follows:

1. My name is Michael O'Connor, and I am a registered nurse. I was working in the emergency room at Mercy Hospital when the events described below occurred.
2. While I was talking with my colleague Angelo Abad, Josie Robinson approached us and asked us to witness a handwritten will for a patient, Michelle Johnston.
3. I initially refused and advised Ms. Robinson that it was not an appropriate time to make an important decision like this when Ms. Johnston was in so much pain. However, Ms. Robinson insisted that I help and explained that Ms. Johnston was upset. Ms. Johnston had been in a car accident and was concerned she might not survive. Ms. Robinson believed that having witnesses sign the will would help Ms. Johnston relax.
4. Mr. Abad and I walked over to Ms. Johnston. Ms. Johnston told us that she had just written a new will and wanted Mr. Abad and me to watch her sign it and be witnesses to the will.
5. We saw Ms. Johnston sign the will. Then Mr. Abad and I signed and dated the will.

6. After we signed, I heard Ms. Johnston say, "Good. That will teach her to go to the Bahamas while I'm here dying."
7. The attached document is the will that I witnessed. The first witness signature is mine.
8. The information contained in this affidavit is true and correct to the best of my knowledge and belief.

[Date]

Michael O'Connor

Michael O'Connor

Notary Public

My commission expires: [Date]

End of document

Handwritten Will of Michelle Johnston

Today, I write my Last Will and Testament. I, Michelle Johnston, being of sound mind, leave all my possessions and other assets of all kinds to my neighbor, Josie Robinson. I leave my daughter, Laila, nothing.

Michelle Johnston

[Date]

Witness 1: Michael O'Connor, registered nurse

[Date]

Witness 2: Angelo Abad, patient care assistant

[Date]

End of document

Excerpts from the Franklin Probate Code

§ 301 Who May Make a Will

An individual 18 or more years of age who is of sound mind may make a will.

§ 309 Undue Influence Prohibited

The execution or revocation of a will or a part of a will is ineffective to the extent the execution or revocation was procured by . . . undue influence.

End of excerpts

Thomas v. Anderson Franklin Court of Appeal (2007)

Opinion

The daughter of the testator appeals from the probate court's decision to invalidate the testator's 2005 will. In 2005, on the advice of the testator's doctors, the testator's son moved the testator into a nursing home. The testator was miserable in the nursing home, but his son refused to move him out of the nursing home.

While still in the nursing home, the testator accused the son of stealing money from him. After the testator had been in the nursing home for two months, the testator's daughter moved him out. The testator continued to complain that his son had stolen money from him.

One month after moving out of the nursing home, the testator executed a new will (the 2005 will), which disinherited the son and left the testator's entire estate to the testator's daughter. Six months after that, the testator died.

All parties agree that no evidence suggests that anyone, including the son, stole any money from the testator.

Discussion

For a will to be valid, Franklin law requires that the will be made by a person "of sound mind." Franklin Probate Code § 301. If a will is contested, the law presumes that the testator was of sound mind and had the mental capacity to make a valid will. A testator's "insane delusion," however, will invalidate a will to the extent that the will, or a part of it, was the result of an insane delusion. *Jackson v. Lewis* (Franklin Ct. App. 1982).

In this case, the sole issue on appeal is whether the probate court correctly held, as a matter of law, that the testator suffered from an "insane delusion" at the time he executed the 2005 will. For the reasons discussed below, we affirm the probate court's determination.

The first inquiry is whether the testator suffered from a delusion. A "delusion" is simply a false belief, and this standard is met when the contestant of the will provides evidence that the belief at issue is objectively false. *Doyle v. Roddy* (Franklin S. Ct. 1942). That burden is easily met in this case because the testator's belief that his son was stealing from him was objectively false.

Next, the court must ask whether that "delusion" was an "insane delusion." A delusion is "insane" if there is no reasonable foundation for the false belief. *Id.*

In *Jackson v. Lewis* (Franklin Ct. App. 1982), the Franklin Court of Appeal addressed the insane delusion rule. In that case, the testator's earlier will left his entire estate to his wife. However, about two months before his death, the testator told a friend that his wife had been unfaithful. As evidence of an affair, the testator said he had seen his wife and another man talking in a coffee shop. Both the friend, and later the wife, tried to persuade the testator that the wife was not having an affair, to no avail. A few weeks after the conversation with the friend, the testator created a new will, which left nothing to his wife. In a handwritten note written just before he died, the testator again ranted about his wife's alleged infidelity and said he would leave her nothing as punishment. Although the wife admitted to talking to a man in a coffee shop, no evidence suggested that the testator's wife had ever been unfaithful to him. *Id.*

The *Jackson* court held that these facts were sufficient evidence to support a finding that the testator was laboring under a delusion when he created his will. *Id.* However, the court concluded, as a matter of law, that the delusion was not an insane delusion because there was a basis in reality for the husband's delusion—namely, he had seen the wife with another man. *Id.* Although the husband's conclusion may have been illogical and

unfounded, the husband's delusion was not an insane delusion because his belief had some basis in reality. *Id.*

This case is distinguishable from *Jackson*. Here, the testator's false belief that his son had stolen from him had no basis in reality. No facts have been presented suggesting that anything was ever stolen from the testator. For example, there is no evidence that money was missing from a bank account that the son could access. Furthermore, there is no evidence that any checks were forged or that cash was taken from a safe. Unlike the testator in *Jackson*, who saw his wife at a coffee shop with another man, here, the testator never saw the son do anything to suggest that he was stealing. Therefore, the testator's delusion was an insane delusion that had no basis in reality.

The daughter's contrary argument is without merit. The daughter points out that, at the time he made his will, the testator felt betrayed by his son because the son had refused to remove the testator from the nursing home. That betrayal, the argument goes, was based in reality, and it was that sense of betrayal that led the testator to conclude that the son had also stolen from the testator.

However real the testator's sense of betrayal may have been, that sense of betrayal did not stem from any real-world evidence that his son had stolen from him. For these reasons, in this case, the testator's delusion was an insane delusion—it had no basis in reality.

The final inquiry is whether the disinheritance was the direct result of the insane delusion. This is an issue of causation. However, the trial court's determination regarding causation was not brought to this Court on appeal; therefore, we will not address it.

Judgment affirmed.

End of opinion

Ramirez v. Ramirez **Franklin Court of Appeal (2020)**

This appeal concerns a will contest between the testator's son and the testator's daughter. The testator's last will and testament disinherited the daughter. Contrary to the contention of the son, who is the proponent of the will, the evidence raised sufficient issues of fact to warrant submitting the issue of undue influence to the jury.

Three weeks before he executed the will at issue in this case, the 94-year-old testator suffered a heart attack. He received treatment at a hospital and was then admitted to a nursing home. Two days after the testator's nursing home admission, the son, without notifying the daughter and against the advice of the testator's physician, drove the testator to a lawyer's office, where the testator executed a new will. That new will named the son as the testator's sole beneficiary.

Two months after the new will was executed, the testator died. The daughter testified that she learned of the new will only after the testator's death. She contested the will, arguing that the will was the result of the son's undue influence.

An otherwise valid will can be set aside if that will is the result of "undue influence." Franklin Probate Code § 309. There are four elements of undue influence: (1) a person who is susceptible to influence; (2) an opportunity to exert undue influence; (3) a disposition to exert undue influence; and (4) a result indicating undue influence. *Kelly v. Landers* (Franklin S. Ct. 1970).

Under Franklin law, the question of undue influence in will formation is an issue of fact for the jury. *Id.* However, it is only

when there is evidence to support each of the four elements that the issue of undue influence should be sent to the jury for consideration. *Id.* Otherwise, the court will determine, as a matter of law, that the will was not the result of undue influence. *Id.*

Susceptibility to Undue Influence

Susceptibility concerns the general state of mind of the testator: whether he would be readily subject to the improper influence of others at the time he executed the will. Of particular concern is a testator who has undergone marked deterioration of mind or body shortly before the will was executed.

However, a testator is not considered susceptible to undue influence solely on the basis of the testator's advanced age or physical limitations. For example, the Court in *Edwards v. Robinson* (Franklin S. Ct. 1972) found no susceptibility to undue influence when the 85-year-old testator used a walker and had limited mobility because the Court found that the testator's health was "stable" at the time of will formation.

Here, the testator experienced a physical decline shortly before will formation—he had just been moved into a nursing home following treatment for a heart attack. Nevertheless, the son brought the

testator to the lawyer's office just a few days after the move into the nursing home. On these facts, given the testator's physical decline shortly before he signed the new will, a jury could find that the testator had experienced a marked deterioration of his body and was susceptible to influence.

Opportunity to Exert Undue Influence

...

Disposition to Exert Undue Influence

Under this requirement, the question is whether the beneficiary's conduct shows a likely interest in taking advantage of the testator. One way to demonstrate the beneficiary's disposition to exert undue influence is through evidence of the beneficiary's suspicious conduct in the arranging of the will. *Taylor v. Taylor* (Franklin Ct. App. 2000). This includes actions taken in an attempt to control or alter the creation of the will. *Andrews v. Phillips* (Franklin Ct. App. 2012).

For example, in *Andrews*, the Franklin Court of Appeal held that the beneficiary's conduct was "suspicious" because the beneficiary was directly involved in arranging the will. He scheduled an appointment with the attorney who drafted the will and paid the fees associated with that appointment. He also suggested language to include in

the will. The court held that the beneficiary's conduct showed a disposition to exert undue influence.

Similarly, in this case, a jury could find that the son exhibited a disposition to exert undue influence. The son took the testator to a lawyer to sign a new will against the advice of a doctor and without telling the daughter. His direct involvement in arranging the testator's new will could constitute "suspicious conduct" in the eyes of the jury.

A Result That Appears to Be the Effect of the Exercise of Undue Influence

...

Conclusion

Because there is evidence supporting each of the four elements of undue influence, the probate court properly submitted the question of undue influence to the jury.

Judgment affirmed.

End of opinion

Content Scope Designation

Content Scope: Skill D.27; Subject Matter: Trusts and Estates

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Standard Performance Task Sample Scoring Guide

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