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Virginia Bar Exam, July 1988, Section 2

VIRGINIA BOARD OF BAR EXAMINERS
Roanoke, Virginia - July 26, 1988

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1. Harold Homeowner, a law professor at an unnamed Virginia law school, went to Jones Hardware Company in Pulaski, Virginia to purchase an extension ladder so that he could climb up to the roof of his house to fix a broken shingle. Jerry Jones, who had been a classmate of Homeowner in law school, but who had gone into the family hardware business instead of practicing law, waited on Homeowner. When Homeowner learned how expensive ladders are, he asked Jones if he could rent one for the day. Jones agreed to rent Homeowner a ladder for $5.00 and picked one out for Homeowner to use. A receipt was prepared by Jones which was signed by Jones acknowledging receipt of the $5.00 rental and by Homeowner, acknowledging receipt of the ladder. On the back of the receipt, Jones had written "as is."

Homeowner took the ladder home, leaned it against the house and commenced to climb up to fix his roof. When he was about half way, a rung broke and Homeowner fell to the ground, breaking his leg.

Homeowner called Jones from the hospital and told him of the accident. He told Jones that the ladder was not fit for the purpose for which Jones knew Homeowner was going to use it and that Jones Hardware had thus breached the implied warranty of fitness provided for by the Uniform Commercial Code. Jones immediately denied that the implied warranty of fitness provision was applicable and stated that, even if it was, Jones had excluded it from the transaction by writing "as is" on the back of the receipt.

(a) Did the transaction between Homeowner and Jones give rise to an implied warranty of fitness?

(b) Assuming that the answer to (a) is in the affirmative, had Jones effectively excluded it?

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2. John Doe married Jill in 1955 and their son, Joe, was born in 1956. In 1958, Jill disappeared. John, having heard that Jill had died in 1959, married Jean in 1960, and in 1962 Jim was born of that marriage. Jean died in 1965. John died intestate on June 15, 1987, at which time he was a resident of and domiciled in Richmond, Virginia. After his death, it was established that Jill had not died until 1963. At the time of John's death, he was survived only by Joe and Jim, both of whom lived with him in Richmond.

At the time of his death, John owned substantial real and personal property located in Virginia and ten acres of land located in North Carolina.

Assume that under the law of North Carolina, Jim is illegitimate and not entitled to inherit from John. Under Virginia law, Jim is deemed legitimate.

In a properly instituted proceeding in Virginia, who would a Virginia court determine to be entitled to the North Carolina property?

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3. As part of its determination of what equitable distribution should be made of the marital property of a divorcing husband and wife, the Circuit Court of the City of Norfolk decreed that a portion of the proceeds from the sale of the parties' marital home should be paid to the wife's mother because of her contribution of a substantial cash payment toward the original purchase price of the home.

No evidence was introduced that the mother expected or was promised an ownership interest in the property in return for her contribution to the purchase thereof. Further, although her contribution was acknowledged by both husband and wife, it was not acknowledged in any contract or other agreement. The Court found that the mother was entitled to repayment of her contribution on the grounds that it was appropriate to impose a constructive trust in her favor against the proceeds from the sale of the home.

Unhappy with this result, the husband wishes to appeal the decision of the trial court.

(a) What are the husband's rights of appeal?

(b) What grounds should he assert?

(c) What will be the result on appeal?

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4. Mr. Millionaire, a resident of Vinton, Virginia, having won the first Virginia lottery, felt compelled to share his good fortune. He approached his longtime friend Mr. X, who had helped him in bad times, and advised him that he wanted to set up a trust for Mr. X's one-year old son, X, Jr.

He told Mr. X that "I have deposited $50,000 of my winnings in First Bank on which interest is accruing. I hereby appoint you trustee and direct you to take this money at my death in trust for your child X, Jr. I give you the sole discretion as to how the trust is to be managed, but you are to pay the monthly income to X, Jr. until he reaches the age of 21 at which time you are directed to relinquish the principal to him."

Mr. X thanked Millionaire and advised him that he gladly accepted the appointment as trustee and would do everything that Millionaire directed.

Tragically, a month later Millionaire was killed in an automobile accident.

His will which was admitted to probate left all real and personal property to his wife to whom he had been married for two weeks. She immediately claimed to be the owner of the $50,000 at First Bank. Mr. X claimed that there was a valid oral trust under which he, as the sole trustee, was entitled to the money for the benefit of his son X, Jr.

Who is entitled to the money and why?

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5. Grandpa Bean was 87 years old and in ill health. For the past five years, he has been mostly confined to his house in the City of Roanoke, Virginia. Two years ago, a guardian was appointed to care for his property pursuant to Virginia Code Section 37.1-132 which authorizes appointment of a guardian for one incapable of taking care of his person or property because of age or impaired health.

Grandpa Bean has one son, Podd, 46, and one daughter, Lentil, 38. Ever since Podd left home at age 2., he has faithfully written Grandpa Bean once a week, sends gifts on all occasions, and visits at least twice a year. Podd is in the foreign service and for the past fifteen years he has been based in Moscow, USSR. One year ago, as his father's health continued to decline, he left Moscow to move to Roanoke to help with his father's care.

Lentil lives in northern Virginia, and has been estranged from Grandpa Bean for the past ten years. During that time, she has not written, called or visited her father. Two weeks prior to Grandpa Bean's death, his attorney Sebastian drafted a will at Grandpa Bean's instructions, leaving his entire estate to Lentil. Grandpa Bean explained to Sebastian that he did not wish to leave any of his estate to Podd because he felt it was impossible to live in the Soviet Union for a long period of time without developing Communist tendencies, and the reason Podd moved to Roanoke was to try to brainwash Grandpa Bean before he died. Grandpa Bean said he did not love or trust his son anymore and did not want to leave anything to him in his will.

The next morning Sebastian, his secretary, and his paralegal met with Grandpa Bean in his house where the will was duly executed with all requisite formalities.

After Grandpa Bean's death, Podd challenged the will on the basis that Grandpa Bean did not have testamentary capacity. At trial Podd presented unrebutted evidence that he was a loyal American, that Grandpa Bean's best interests were always close to his heart and that he had suffered great personal and financial sacrifice to move to Roanoke to care for his father. He also presented evidence of the appointment of Grandpa Bean's guardian two years before and testified that his father had declined physically and mentally during the past year. He had noted that his father exhibited suspicious tendencies towards several of his friends as well as Podd. Sebastian, the secretary, and the paralegal all testified that it was their opinion that Grandpa Bean knew what he

was doing at the time of the execution of the will.

a) What tests should the court apply in determining testamentary capacity?

b) How should the court decide the case?

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6. Tom Jones, a recent law school graduate newly admitted to the Virginia Bar, was employed as an associate by Washington A. Jefferson, a prominent attorney in Christiansburg, Virginia. Jefferson had practiced law as a sole practitioner in Christiansburg, the county seat of Montgomery County, for thirty years and had an active practice with a number of regular clients.

Two weeks after Jefferson hired Tom, he asked Tom to write a will for Otis Brown. Otis was something of a local character who was not regularly employed and was often seen sleeping on the courthouse lawn cradling an empty wine bottle. Tom thought his time was being wasted when Jefferson ushered Otis into his office and told Tom to conduct an interview to obtain the necessary information for preparation of a will.

Tom was astounded to learn that some years earlier Otis had inherited a 500 acre tract of property, a portion of which had been condemned for construction of an interstate highway and interchange and that the condemnation and the sale of the remaining property on the interchange had made Otis a wealthy man. Otis said he enjoyed his lifestyle and saw no reason to change it.

Otis told Tom that his wife, who never cared for his lifestyle, left him and obtained a divorce some years ago. Otis wanted to leave half of his estate to his only child, a daughter in Washington, D.C., and half to an institution of higher education where he first developed his lifestyle.

Otis told Tom that he did not care who was named as his executor since all he has is cash and "it won't be much of a job."

May Tom properly name himself as executor in Otis Brown's will?

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7. George Jones died in January of 1988 possessed of a substantial estate. Most of his property was owned outright and presents no problems to his executor, other than the payment of tax. However, the executor consults you about the following matters, since he is uncertain if they represent items that should be included in the Jones estate for federal tax purposes. He also asks for a brief explanation of your decisions.

(a) George was the founder and long time guiding spirit behind George Jones, Inc., a successful company wholly owned by him. In 1975, George gave all of his financial interest in the stock he owned to his two sons. The sons were entitled to all dividends and incidents of beneficial ownership. However, George, unsure of their relative management abilities, retained the right to vote the stock, a right which remained unrelinquished at his death. In 1975 the stock was worth $600,000. At his death it was worth $8,000,000. No other shares were ever issued.

(b) In 1978, George purchased an insurance policy on his life, naming his two sons as beneficiaries; proceeds at death were to be in the amount of $1,000,000. In March of 1986, he irrevocably transferred the policy and all ownership rights to his sons. At his death, the sons were paid the $1,000,000.

(c) George's father had created a testamentary trust with George as income beneficiary. Since his father wanted George to be able to maintain a measure of control over his sons, he granted George the power to appoint the remainder between the two sons as he saw fit. George failed to exercise the power and at his death the principal, in the amount of $500,000, went equally to his two sons as takers in default under the terms of his father's will.

How do you advise George's executor?

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8. Claude Client tells you that he had been employed by the Clinch Company (Clinchco), a Virginia Corporation, for twenty-nine years, and in early 1984 he loaned Clinchco his life savings of $50,000. Clinchco executed and delivered to Claude its unsecured 5 year promissory note paying an extremely attractive rate of interest. The Company paid the interest on the note promptly on the first day of each month, and Claude was satisfied that he had made a "blue-chip" investment, until July 1, 1988, when Clinchco failed to pay his interest or his salary.

Your investigation revealed that Clinchco had failed to pay its annual registration fee due in 1987, and the State Corporation Commission (SCC) had, as required by law, entered an order on September 1, 1987, terminating Clinchco's corporate existence.

(a) What is the effect of the SCC order on the properties and affairs of Clinchco?

(b) Is Clinchco a proper defendant if Claude decides to sue on the note?

(c) Are the directors of Clinchco personally responsible for the payment of the note?

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9. During the spring of 1987, the Board of Directors of Weatherby Industrial, Inc. (Weatherby) voted unanimously to install a new air conditioning system in their corporate offices and to apply to Farmers Loan Bank (Bank) for a loan to cover the costs. A few days after making the loan application, Fred West, Executive Vice President of Weatherby visited the Bank which was the lending institution principally used by his company, in order to procure the loan.

Upon arriving at the Bank, Fred was pleased to hear that the loan had been approved. In fact, all of the documents were ready to be executed according to

Pat Mann, the loan officer at the Bank. Pat stated to Fred that her Bank was always happy to lend money to a good customer such as Weatherby, and that the financial sheet and loan application submitted by Weatherby looked as good as any she had ever reviewed. However, due to Weatherby being a small company, Pat did request that the company's president, Jerold Snodgrass, personally guarantee the loan. Fred telephoned Jerold, and he agreed to do so. The loan documents were executed by each of them that day.

Shortly thereafter, Weatherby began experiencing financial problems and stopped paying the Bank. Pat Mann comes to you, the new attorney for Farmers Loan Bank, and presents the note signed by Fred West and Jerold Snodgrass, a copy of which is set forth below, and tells you that according to her investigation, Weatherby is insolvent. She asks you the following questions:

(a) Does the Bank have a valid claim against Weatherby for the repayment of the loan?

(b) Does the Bank have a valid claim against Fred West for the repayment of the loan?

(c) Does the Bank have a valid claim against Jerold Snodgrass for the repayment of the loan?

"NOTE

Abingdon, Virginia
Date: 5-18-87

FOR VALUE RECEIVED, Weatherby Industries, Inc. promises to pay to FARMERS LOAN BANK, or order, at P.O. Box 1903, Abingdon, Virginia, the principal sum of SIX THOUSAND THREE HUNDRED SEVENTY-ONE AND 65/100 ($6,371.65) DOLLARS, with interest on the unpaid principal balances from time to time remaining at the rate of TWELVE (12%) per cent per annum. The said debt shall be due and payable in monthly installments of ONE HUNDRED FIFTY DOLLARS ($150.00) each, beginning on the 18th day of June, 1987, and on the 18th day of each succeeding month thereafter, until the entire debt, principal and interest, is fully paid, except that if not sooner paid, the entire debt shall be due and payable on June 18, 1991.

WITNESS the following signatures and seals:

/s/ Fred West (SEAL)

Payment guaranteed.

/s/ Jerold Snodgrass (SEAL)"

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10. Jimmy Joy was the proprietor of a restaurant called "Jimmy Joy's Chinese Restaurant" in Bristol, Virginia. This restaurant had been operated in its present location for 25 years and for the entire time had the name "Jimmy Joy's Chinese Restaurant" painted in large letters on the plate glass window near the front entrance. Because of the extra-ordinary food served over the years, the restaurant developed a wide reputation for good Chinese food and became an extremely successful business. Six months ago Jimmy decided it was time to retire and for his son to step into a leadership role in the family business. Accordingly Jimmy purchased a condominium in Florida where he has spent most of his time since his retirement.

Shortly before his retirement, Jimmy and his son, Joe, went to Attorney Vanderbilt's office to formalize the new business relationship. The attorney drafted a limited partnership agreement which named Joe as the general partner and Jimmy as the limited partner of the business which, because of the good will developed over the years, would continue to be known as "Jimmy Joy's Chinese Restaurant." A certificate of limited partnership was duly filed as required by Virginia law.

This business arrangement was agreed upon because Joe did not have the funds to purchase his father's business, and Jimmy was not in position to give the business to Joe. This made it possible for Joe to be the operating manager, and for Jimmy to retain a financial interest in the business. Joe frequently consulted with Jimmy to discuss menus, recipes and business management decisions in order to maintain the good reputation and successful operation of the business.

Three months ago, a customer was injured on the premises when he slipped on a fortune cookie. The customer has filed a personal injury action against Jimmy Joy and Joe Joy as partners operating the restaurant. The plaintiff alleged that Jimmy Joy participated in the control of the business as indicated and that by the continued use of the name "Jimmy Joy's Chinese Restaurant" he held himself out to the public as the proprietor or, at a minimum, a partner in the operation of this business.

Counsel for Jimmy, in her answer denied the plaintiff's allegations, and took the position that Jimmy, as a limited partner, had no liability under the facts stated.

In your role as law clerk to the Circuit Judge, you have been asked the following questions:

(a) Does Jimmy have any liability because he allowed his name to continue to be used in the name of the limited partnership?

(b) Under the facts stated, is there any other basis for holding Jimmy liable for the plaintiff's injuries?

How do you respond?

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