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Virginia Bar Exam, July 2012, Section 1

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VIRGINIA BOARD OF BAR EXAMINERS

Roanoke, Virginia - July 24, 2012

You MUST write your answer to Questions 1 and 2 in WHITE Answer Booklet A

1. Sonny's father, Charlie, died intestate in Hampton, Virginia in 2010, and Sonny qualified as administrator of the estate in the clerk's office of the Circuit Court of the City of Hampton. Sonny, Betty and Diane survived Charlie. Betty is Sonny's mother and Charlie's widow. Diane is Charlie's daughter by a prior marriage to Amy, who died shortly after Diane's birth.

Charlie invested heavily in real estate throughout Virginia. After their marriage, Charlie and Amy purchased Appomattox Farm, located in Appomattox County, Virginia, and took title as "joint tenants by the entirety with right of survivorship." After Amy's death, Charlie remarried and soon thereafter he and Betty purchased Colonial Acres, a 50-acre tract of land in New Kent County, Virginia. Three years later, Charlie and Betty purchased their home in Hanover County, Virginia. Title to both Colonial Acres and their home was held as "tenants by the entirety with right of survivorship."

Charlie also owned a house named "Bayshore Cottage" located on the Chesapeake Bay in Hampton, Virginia, which he inherited from his father in 1980. Title to Bayshore Cottage was held in Charlie's name alone.

Several years before Charlie's death, Charlie and Betty executed a general warranty deed giving Sonny fee simple ownership of Colonial Acres. Charlie gave Sonny a properly signed and notarized deed of gift while in the office of Charlie's lawyer, but Sonny neglected to record the deed until after Charlie's funeral. Unknown to Sonny, approximately one month before Charlie's death, and having forgotten about the deed to Sonny, Charlie and Betty executed a deed of trust on Colonial Acres to secure a promissory note for \$200,000 to State Bank of Virginia. The deed of trust was recorded in the clerk's office of the Circuit Court of New Kent County on the day it was executed and before the Bank learned of Charlie's deed of gift to Sonny.

(a) **What legal interest do Sonny, Betty and Diane each have in:**

(i) **Appomattox Farm?**

(ii) **Bayshore Cottage?**

(iii) **The home in Hanover County?**

Explain fully.

(b) **What legal interest, if any, does Sonny have in Colonial Acres, and, as between Sonny and the State Bank, does the bank have an enforceable interest that takes priority over Sonny's interest? Explain fully**

Reminder: You MUST answer Question #1 above in the WHITE Booklet A

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2. Fred and Wilma married in 2004 at the Chapel of Love in Las Vegas, Nevada and continued to live in Las Vegas until 2006. Fred was a successful venture capitalist specializing in social media, and Wilma was an artist. Those two years were marked by lots of heated arguments, but no violence and no children. After a particularly bad night at a casino, on Christmas Day, 2006, Wilma told Fred that she was leaving him. Fred held the front door open for her and said "Good riddance!" as Wilma walked out. Wilma moved to Norfolk, Virginia to be near her parents and set up a household there on January 1, 2007.

Frustrated because she had no appreciable income and her artwork was not selling in Virginia, Wilma consulted a lawyer and told him she wanted to get support payments and a divorce from Fred. The lawyer suggested that Wilma first try to get Fred to agree upon support and a division of property, and he prepared a separation agreement according to Wilma's instructions. The agreement provided that all marital property would be split equally and that Fred would pay Wilma \$2,000 per month spousal support for a period of ten years commencing on July 1, 2007. During a trip to Virginia to investigate an investment opportunity, Fred met Wilma at a local internet café where she gave him the agreement. Fred took ample time to read it, went to a realtor's office next door, and signed it before a notary public.

On July 1, 2007, Wilma's lawyer filed a complaint for divorce in the Circuit Court of the City of Norfolk. The complaint alleged incompatibility as the ground for divorce, which is a ground of divorce under Nevada law. The settlement agreement that Fred had signed was attached as an exhibit to the complaint. Fred was properly served, but filed no answer.

From July 1, 2007 through June 30, 2008, Fred made the monthly \$2,000 support payments called for in the agreement, but when the recession hit in 2008, his investments failed and he stopped making payments. He called Wilma, told her about his reduced financial situation, and asked her to agree to a reduction in the support payments. Feeling some sympathy and having recently inherited a tidy sum from her Uncle Joe, Wilma agreed to reduce support to \$1,000 a month beginning on July 1, 2008. The agreement to reduce support was never put in writing. Fred's finances continued to decline. He made no support payments at all until July 1, 2011, when he began paying \$1,000 per month.

In the meantime, frustrated by Fred's failure to pay her, Wilma instructed her lawyer to set the divorce proceeding for hearing, to seek (i) a judgment for support payment arrearages in the amount of \$72,000, representing support payments at the rate of \$2,000 per month for the three years during which Fred made no payments, and (ii) an award of \$2,000 per month going forward. Wilma did not tell her lawyer about the oral support reduction agreement, although later, at the divorce hearing, she admitted that she had agreed orally to the reduction.

Fred's lawyer answered the complaint and counterclaimed for a divorce on the ground of desertion. He asserted that, based on the oral agreement by which he and Wilma had agreed to reduce the support payments to \$1,000 per month, the arrears were only \$36,000. He also alleged that, because of his significantly changed financial circumstances, Fred was entitled (i) to have the arrearages eliminated or at least reduced and (ii) to have any future support obligation eliminated or at least reduced.

Fred came to Virginia for the hearing on the complaint and counterclaim held on May 3, 2012. He asked for an immediate final decree of divorce so he could go forward with a marriage to a Las Vegas showgirl on the beach of the Atlantic Ocean while he is in Virginia.

- (a) May the court grant a divorce to either party on the ground sought in the complaint and counterclaim? Explain fully.
- (b) How should the court rule on the respective claims of Wilma and Fred regarding the arrearages and support payments going forward? Explain fully.
- (c) Is there a ground upon which the Virginia court may grant an immediate final decree of divorce to either Wilma or Fred, and, if so, are the prerequisites for such a final decree satisfied in this case? Explain fully.

Reminder: You MUST answer Question #2 above in the WHITE Booklet A

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→→ Now MOVE to the YELLOW Answer Booklet B ←←

You MUST write your answer to Questions 3 and 4 in YELLOW Answer Booklet B

3. Grand Slam Collectibles, LLP (“Grand Slam”) is a two-person Virginia limited partnership that specializes in buying and selling baseball memorabilia. Its main store is in Roanoke, Virginia, and it has a smaller store in Norfolk. Its two partners are Peter Pedroia, who resides in Roanoke and manages the store there, and Lamar Smith, who resides in Sweet Springs, West Virginia and occasionally visits the Norfolk store to oversee affairs there.

In early February 2012, after an unusually heavy snowfall, the roof of Grand Slam’s Roanoke store partially collapsed. Realizing Grand Slam stood to lose significant business if the store was closed when spring training began in March, Peter inquired around for a roofer who could do the repairs promptly. On the recommendation of a friend, Peter contacted Kwik-Fix Constructors, Inc. (“Kwik-Fix”), a general contracting business incorporated in Delaware and operating exclusively out of Greensboro, North Carolina. After dickering over specific terms, in which Kwik-Fix committed to completing the job by March 1, Peter, on behalf of Grand Slam, entered into a valid service contract with Kwik-Fix. Until then, Kwik-Fix had never done any work outside North Carolina.

Toward the middle of March, a couple of weeks into spring training, Kwik-Fix had not yet begun the work. Finally, on April 2, 2010, Kwik-Fix sent a team of workers from Kwik-Fix’s subcontractor, Rapid Roofers, Inc. (“Rapid Roofers”) to fix Grand Slam’s roof. Rapid Roofers is a business incorporated under the laws of West Virginia with its principal place of business in Covington, Virginia. One week later, the Rapid Roofers team finished, but Peter discovered after a rainstorm that the roof had been shoddily repaired and contained holes and inferior materials not agreed to in the contract. As a result of the roof’s condition, the rain leaked into Grand Slam and ruined several expensive pieces of inventory.

On May 15, 2010, Grand Slam filed suit against Kwik-Fix in the United States District Court for the Eastern District of Virginia in Norfolk, Virginia alleging jurisdiction based on diversity of citizenship. Grand Slam’s attorney filed in the Eastern District, noted for its “rocket docket,” because he wanted to bring the matter to trial quickly. The complaint alleged that Kwik-Fix is liable for breach of contract in the amount of \$70,000 and for the negligent destruction of \$10,000 worth of Grand Slam’s inventory.

After being properly served in North Carolina, Kwik-Fix filed motions to dismiss for lack of subject matter jurisdiction and, in the alternative, to transfer venue to the Western District of Virginia, in which Roanoke is located. The motion to transfer cited the applicable venue statute, 29 USC § 1391, which states as follows:

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may . . . be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred . . . , or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced

* * *

(c) For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

The court denied both of Kwik-Fix's motions.

- (a) **Did the court rule correctly on Kwik-Fix's motion to dismiss for lack of subject matter jurisdiction? Explain fully.**
- (b) **Should the court have granted Kwik-Fix's motion to transfer venue to the Western District of Virginia? Explain fully, addressing the provisions of the venue statute.**
- (c) **What action might Kwik-Fix take against Rapid Roofers in the same lawsuit to recoup in the event Kwik-Fix is ultimately found liable to Grand Slam? Explain fully.**

Reminder: You MUST answer Question #3 above in YELLOW Booklet B

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4. George Jones, a Vinton, Virginia, businessman, died in 1998 survived by a daughter, Jane, who was severely physically and mentally disabled. George's wife predeceased him, and they had no other children. George is also survived by a brother and a sister.

George's estate consisted of a business he had successfully operated for a number of years, a home, and a few modest investments. George's will named Blue Ridge Trust Company as executor and trustee and gave the executor and trustee full power to sell assets and invest in its sole discretion. The will established a trust that the trustee was to administer as follows:

My Trustee shall hold the Trust Estate in trust for the benefit of my daughter.
My Trustee shall pay to or for the benefit of my daughter so much of the net income as is necessary for her support and so much of the principal as My

Trustee deems advisable in its sole and absolute discretion to provide for her health, maintenance, support and comfort. Upon my daughter's death, the trust principal and undistributed income shall be distributed to my brother and sister, per stirpes.

Blue Ridge Trust Company sold the house, the business and all the other assets in the estate and invested the funds solely in United States government bonds. Jane was placed in a long-term care facility, Unlimited Care, which provides for all her needs.

For the last 14 years, Blue Ridge Trust has paid Unlimited Care an annual fee that has gradually increased to \$50,000. In the early years of the trust, the income was more than adequate to provide for Jane's care. However, in recent years, trust income has declined to \$40,000 per year. Unlimited Care has advised Blue Ridge Trust that its annual charges for the current year will increase to \$55,000. No one disputes the quality of the care being furnished by Unlimited Care. It is also undisputed that moving Jane to another, cheaper facility will have a detrimental effect on her well-being.

However, Blue Ridge has advised Unlimited Care and Earl Rogers, an attorney appointed by the Circuit Court of Roanoke County as Jane's guardian, that it will not pay more than \$35,000 from the trust income and no principal toward Unlimited Care's annual charge. Blue Ridge Trust gives the following reasons for its decision: First, Jane has a life expectancy of approximately 20 years, and Blue Ridge Trust is concerned that the trust property will be exhausted by invasions of principal before Jane dies. Second, Blue Ridge Trust is concerned that Unlimited Care's charges exceed those of similar facilities for comparable care. Third, although George's surviving brother and sister have not expressed any opposition to invasion of the principal, Blue Ridge Trust is concerned about its potential liability to the remaindermen of the trust.

Rogers, the guardian, believes that Blue Ridge Trust must pay the Unlimited Care bill from income and principal of the trust, and he has told Blue Ridge Trust that, if it does not pay the entire annual charges of Unlimited Care, he will commence a judicial proceeding to require such payments and/or to remove the trustee and appoint a successor.

- (a) **Is a court likely to compel Blue Ridge Trust to distribute all the trust income in payment of Unlimited Care's annual charge? Discuss fully.**
- (b) **Is a court likely to compel Blue Ridge Trust to distribute any of the principal in payment of Unlimited Care's annual charge? Discuss fully.**
- (c) **Is a court likely to remove Blue Ridge Trust and appoint a successor trustee upon the unilateral application of the guardian, Earl Rogers? Discuss fully.**

Reminder: You MUST answer Question #4 above in YELLOW Booklet B

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➔➔ **Now MOVE to Salmon colored Answer Booklet C** ←←

You MUST write your answer to Question 5 in Salmon Answer Booklet C

5. Catawba Manufacturing Corporation, which is based in Botetourt County, Virginia, manufactures a premium applesauce that it markets throughout the eastern United States. Catawba's applesauce has a unique flavor and it sells both wholesale and retail for an above market price. The recipe for Catawba applesauce contains 10% from an heirloom Virginia mountain apple grown only in Botetourt and Allegheny counties of Virginia.

For several years, Catawba has purchased its Virginia mountain apples from Jeremiah's Orchard near Eagle Rock and found their product to be the best available for its applesauce. In 2011, it entered into a written contract with Jeremiah's Orchard to supply all of Catawba's requirements of Virginia mountain apples for \$500 per ton on and after July 1, 2012. The contract, which is on Catawba's standard form, prohibits Jeremiah's from selling any excess of this variety of apples without Catawba's express consent. The contract also provides that Catawba may reject Jeremiah's apples for any reason, even if they conform to the contract. The Jeremiah's representative considered those provisions onerous and objected to their inclusion in the contract. The Catawba representative assured the Jeremiah's representative that, although these provisions were part of Catawba's standard form, the company never enforced them. In fact, to the contrary, Catawba routinely required its suppliers to comply with those provisions.

On June 1, 2012 Catawba wrote to Jeremiah's setting forth dates for delivery of apples in 10-ton increments from the July and August harvests and confirming the price of \$500 per ton. Due to a poor growing season, Virginia mountain apples were in short supply and the price rose dramatically.

Another manufacturer, Allegheny Apples, LLC, without knowledge of the Catawba-Jeremiah's contract, offered Jeremiah's \$750 per ton for its entire crop of Virginia mountain apples. On June 15, Jeremiah's accepted Allegheny's offer and informed Catawba that it was not going to fulfill its contract with Catawba.

After learning of this from Jeremiah's, Catawba tried unsuccessfully to contract for Virginia mountain apples, but found that the season's entire crop was committed to other manufacturers. Other varieties of apples are readily available, but Catawba is reluctant to switch to the other varieties because Virginia mountain apples give its applesauce unique color, texture and flavor.

It is now June 20, 2012. Catawba demands that Jeremiah's fulfill the Catawba-Jeremiah's contract in all respects.

In a suit to require Jeremiah's to deliver to Catawba 100 tons of Jeremiah's Virginia mountain apples, what remedies might Catawba seek; what defenses might Jeremiah's reasonably assert; and what is the likely outcome on each remedy sought by Catawba? Explain fully.

Reminder: You MUST answer Question #5 above in Salmon Booklet C

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END OF SECTION ONE