

Summary of Answers to the Essay Part of July 2006 Virginia Bar Exam

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After each bar exam, the Virginia Board of Bar Examiners invites representatives from each of the law schools in Virginia to meet with the Board for a review and discussion of the range of answers the Board will accept for each essay question. As a result of these discussions, the Board will often expand the scope of what is an acceptable answer. Please remember what follows is just a summary. jrjz

1. Coop's Market, Inc., a Virginia corporation ("Coop's"), operates a grocery business located in Waverly, Virginia. Its owners, Lewis, Wiley, and Graves, each own one-third of Coop's stock. Lewis and Wiley run the day-to-day operations of the business. Graves has had no involvement with the operations of Coop's.

In November 2005, Graves borrowed \$100,000 from The Bank of Waverly and pledged her stock in Coop's as collateral for the loan. She executed the appropriate documents to grant the bank a security interest in her stock and delivered the stock certificates to the bank, where they are currently being held. On Coop's corporate books, the stock remains registered in Grave's name. The Bank of Waverly loan has never been in default, and Graves has complied with all payment terms of the loan agreement.

In May 2006, Graves learned that Lewis and Wiley were making arrangements to pledge all of Coop's assets in order to secure a large loan from State Bank to finance Coop's entry into a new business venture unrelated to the grocery business. Graves confronted Lewis and Wiley about their intentions and voiced her objections. Subsequently, while reviewing her files, Graves discovered that she had not received any notices of stockholders' meetings since November 2005. When asked about the meeting notices, Lewis and Wiley responded that after Graves pledged her stock to The Bank of Waverly, she was not entitled to notice of stockholders' meetings because Graves had no right to vote her stock.

In early July 2006, Graves learned in a discussion with a Coop's employee that a special stockholders' meeting had been scheduled for August 30, 2006 to vote, as required by Coop's Articles of Incorporation, on the proposed asset pledge and loan from State Bank and the new business venture. Graves has not received written notice of the August 30 meeting.

On July 30, Graves sent a letter to Lewis, who is the corporate secretary, requesting that Lewis send her copies of Coop's books of account so she can inspect them. Lewis wrote back saying he would comply with her request.

Graves seeks advice under Virginia law on the following questions:

- [a] In what ways, if any, does the pledge of her Coop's stock restrict Graves' rights as a stockholder? Explain fully.
- [b] What are Graves' rights with respect to obtaining copies of or inspecting the books of account? Explain fully.

[c] If Graves attends the August 30 meeting, will her attendance constitute a waiver of any objections she might have to the lack of written notice or can she take steps to preserve her objections to the holding of the meeting and the proposed stockholder vote? Explain fully.

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[a] The pledge will not restrict Graves' rights as a stockholder until and unless the shares are transferred into the name of the Bank of Waverly. Va. Code §13.1-662[L].

[b] Graves has a right to inspect and copy, but does not have a right to copies being sent to her. Va. Code §13.1-771. The BBE were not looking for a discussion of all the special requirements, depending on the nature of the documents sought, just a recognition of the right of access and right to copy.

[c] Graves' attendance will not constitute a waiver of any objections over lack of written notice so long as at the beginning of the meeting, she objects to holding the meeting or transacting business. Va. Code §13.1-659[B][1].

2. Husband and Wife married in 1995. Wife worked regularly as a legal secretary. Husband, who was a carpenter, worked sporadically at various construction jobs. In 1996, Wife inherited \$250,000 from her father, and she deposited the entire sum in a savings account at First Bank in their hometown of Chilhowie, Virginia. The savings account was in her name and under her sole control. Husband and Wife maintained a joint checking account at First Bank, into which they regularly deposited their earnings and from which they paid their living expenses. Husband's contributions to their living expenses were minimal, and, at all times, about 95% of the deposits to the checking account were from Wife's earnings.

In 2002, Husband and Wife undertook to build a new home in the town of Chilhowie in Smyth County, Virginia on land titled in the names of Husband and Wife as tenants by the entirety. Periodically, Wife would withdraw a lump sum from her savings account and deposit it into the joint checking account to cover the costs of construction. Husband, who was overseeing the construction, would write checks on the joint checking account to pay the construction contractors and suppliers. The entire cost of the construction was paid in that fashion. Husband and Wife moved into the new home in 2003.

In January 2004, while Wife and her friend, Emily, were sorting through items to be donated to a church rummage sale, Wife found some photographs of Husband and a woman in compromising positions. Later that day, Emily helped Wife move all of Husband's belongings out of the master bedroom, which Husband and Wife had shared, into the spare guestroom. When Husband got home, and in Emily's presence, Wife told Husband that she wanted him to leave their home and that, until he did, he was to live in the guestroom.

In March 2005, Wife filed a complaint for divorce in the Circuit Court of Smyth County, Virginia, alleging that the parties had voluntarily separated in January 2004. Wife asserts that, since January 2004, she and Husband ceased having conjugal relations. As proof of their separation, Wife will be able to produce evidence that she stopped attending family, church, and community functions with Husband, and that she stopped depositing money into their joint checking account. Emily will be able

to testify that she visited Wife about once a week and observed that Husband and Wife occupied separate bedrooms. Wife claims that the house in Chilhowie is her separate property and that it should be awarded to her in the divorce proceedings.

Husband, who does not dispute the adulterous relationship revealed in the photographs Wife had found, refused to vacate the house. Husband's answer denies that he and Wife separated voluntarily and asserts that, until he was actually served with the divorce papers in March 2005, Wife continued to buy groceries, pay their living expenses, and do the cooking, laundry, and house cleaning. He also asserts that, although he used the guest room as his sleeping quarters, he and Wife continued to have conjugal relations and live in the "open" relationship they had always agreed to. Husband claims the house is marital property and should be equally divided between them.

[a] Is Wife entitled to a divorce on the grounds asserted in her petition? Explain fully.

[b] How should the court rule on the competing claims to the house in Chilhowie? Explain fully.

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[a] The BBE wanted a good discussion over whether the parties can live separate and apart while residing in the same household. It does not matter which conclusion is reached.

[b] The BBE wanted a good discussion, though either conclusion is acceptable. The answer should recognize that [1] wife can trace her separate money into the purchase of the house; [2] the land was owned during the marriage by both parties as Tenants by the Entirety; [3] commingling and that for there to be commingling there must have been an intent to commingle.

3. Promotions America Corporation ("PAC"), a Delaware corporation with its headquarters in Alexandria, Virginia, creates and manages promotional events for its corporate clients throughout the United States. Andrew Jackson ("AJ"), a life-long resident of Florida, was hired in June 2000 by PAC following a series of recruiting meetings that occurred in Florida and Virginia and worked in PAC's Orlando, Florida office as an event producer until April 2006.

The employment relationship was documented in a written agreement, which provided, among other things, that AJ would not "solicit or divert any of PAC's clients for six months after termination of his employment" and that he would not "disclose to a third party during employment or after termination thereof any confidential information regarding PAC's business operations." The agreement was drafted in Virginia by PAC's attorney, but contained neither choice-of-law nor choice-of-forum provisions. AJ had received the agreement via U.S. mail at his house in Florida, where he signed it and delivered it to a supervisor in PAC's Orlando office. During his six years of employment, AJ made three business trips to PAC's headquarters in Virginia and communicated frequently from Orlando (via e-mail, phone calls, and faxes) with PAC's Virginia employees on business matters.

In late 2005, AJ collaborated with some of his Virginia colleagues to design a promotional campaign and certain customer events for Columbia Computers, Inc. ("CCI"), a business based in

Columbia, Maryland, near Alexandria. Although AJ was designated as the executive producer, most of the work on the CCI account was performed by employees located at PAC's Virginia headquarters, and nearly all of the confidential information in PAC's possession pertaining to its strategies in dealing with CCI was maintained at PAC's headquarters. The customer events produced by PAC for CCI were by all accounts hugely successful. Soon after the third such event, AJ resigned his employment with PAC and began working for a competitor of PAC's, where he allegedly used information from PAC's business to successfully solicit and divert CCI's patronage beginning in June 2006.

On June 20, 2006, PAC filed a complaint in the United States District Court for the Eastern District of Virginia (Alexandria Division) for breach of contract against AJ, seeking declaratory and injunctive relief as well as \$500,000 in compensatory damages.

Citing his life-long Florida residency as well as the fact that, while employed by PAC, he was always based in PAC's Orlando, Florida office, AJ filed motions in the District Court in Alexandria to dismiss [a] for lack of personal jurisdiction and [b] for improper venue or, in the alternative, [c] to transfer venue to the United States District Court for the Middle District of Florida (Orlando Division).

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[a] The federal court sitting in Virginia would apply Virginia's Long Arm Statute, Va. Code §8.01-328 *et seq* in determining if it can properly acquire long arm jurisdiction over AJ. Answer to whether the court should dismiss the action for lack of in personam jurisdiction should discuss the two prong analysis required [1] on the facts presented, under the *International Shoe* holding, can long arm jurisdiction be constitutionally obtained; and [2] under the specifics of Virginia's Long Arm statute, do the facts qualify?

The BBE wanted a discussion of the various facts provided by the problem that affect this analysis and were looking at quality of application of the facts to the law and not which conclusion was reached. Initially the BBE thought that the court could acquire long arm jurisdiction was the better choice, but after some discussion, may have thought it was a closer call.

[b] With the motion to dismiss for want of venue, venue is an issue of federal, not state, law. Under 28 USC §1406(a), failure of venue can result in dismissal, or if it is in the interest of justice, a transfer to a forum where venue does lie. On these facts, the court should not dismiss the case, if it finds venue does not lie in the court where the case was filed but it being in the interest of justice, the court should transfer the case to Florida.

[c] Venue is established under 28 USC §1391(a), where jurisdiction is based only on diversity, as (1) 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,.... AJ is the sole defendant and resides in Florida and thus venue clearly is in Florida. As to whether venue also exists in Virginia, the applicant should discuss whether the facts provided as to AJ's actions in Virginia constituted "a substantial part of the events or omissions giving rise to the claim occurred". The BBE thought the question of whether venue existed in Virginia was close and were looking

for good analysis.

If the applicant concludes that venue does not lie in Virginia, then under 28 USC §1406 the interest of justice would require a transfer to Florida. If the applicant concludes that venue lies in Virginia, the issue should be discussed of whether under 28 USC §1404(a) the court should grant AJ's motion to transfer for the convenience of the witnesses and parties. The BBE thought that the case should not be transferred because all the witnesses and the parties on one side were in Virginia or at least the general area of the location of the court where the action was filed.

4. As Victor, a local pastor, and his wife Zenia were leaving the Wells Theater in Norfolk, Virginia after a play, they were confronted by 21 -year-old Luke and his 16-year-old brother, Junior. Luke and Junior had mistaken Victor for a local drug dealer who they believed carried large sums of cash and who owed them money for some drug sales they had made. While Luke held a gun on Victor, Junior tried to reach into Victor's vest pocket for his wallet. When Victor resisted, a scuffle ensued. Luke aimed his gun at Victor and pulled the trigger. The bullet missed Victor and struck Zenia in the thigh.

The incident was witnessed by Moe, a felon who was wanted by the police on an outstanding arrest warrant. When the police arrived, they recognized Moe and immediately took him into custody on the outstanding warrant. Moe identified Luke and Junior as the perpetrators of the crime against Victor and Zenia and later struck a plea bargain with the Commonwealth's Attorney in exchange for his promise to testify against Luke and Junior.

The next day, Luke and Junior were arrested, given their *Miranda* warnings, and interrogated separately by the police. Luke waived his right to counsel and readily admitted his role in the event at the Wells Theater. Junior repeatedly said he would answer all the questions the police asked him but only after he was allowed to see his parents. The police said he would be allowed to see his parents as soon as he answered their questions. After three hours of intermittent, non-aggressive interrogation, Junior finally admitted that he had participated with Luke in the attempt to rob Victor. The police then allowed Junior's parents to see him.

Junior was charged with malicious wounding, a felony, and given a preliminary hearing in the General District Court. After the hearing, the General District Court certified the charges to the grand jury, which returned an indictment against Junior. Upon resumption of proceedings in the General District Court, the court, pursuant to a motion by the Commonwealth's Attorney, announced its intention to try Junior as an adult, and the court set a trial date.

Later, at a pretrial conference, Junior, through his appointed attorney, affirmatively waived a trial by jury and requested to be tried by the judge. Nevertheless, the court granted the Commonwealth's Attorney's request for a jury trial.

Junior's attorney then filed the following motions, all of which were denied by the judge.

[a] To dismiss the indictment on the ground that, as a matter of law, Junior was not guilty of malicious wounding inasmuch as he had not fired the shot that struck Zenia.

- [b] To vacate the order granting a jury trial, or in the alternative, for an order directing that the jury's sole function shall be to consider only the issue of guilt or innocence.
- [c] To suppress Junior's confession on the ground that the police had denied his initial requests to see his parents.

At the same pretrial conference, the Commonwealth's Attorney filed the following motion, which the judge also denied:

- [d] For an order to preclude Junior's attorney from cross-examining Moe regarding the plea bargain he had struck in exchange for his testimony on the ground that it was irrelevant to any issue in the case.

When the Court convened to try the case, Junior's attorney filed the following additional motion, which the court also denied:

- [e] To dismiss the indictment and vacate the order that Junior be tried as an adult for lack of jurisdiction.

Did the court rule correctly on each of the five motions? Explain fully.

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- [a] The judge was correct to deny Junior's motion to dismiss the indictment. Junior was a participant as a principal in the 2nd degree and is liable as a principal. A principal in 2nd degree must [1] be actively or constructively present at the commission of the crime; [2] possess the requisite intent; and [3] commit an overt act such as inciting, encouraging, advising, or assisting in the commission of the crime [ie lookout]. With felonies, accessories before the fact and principals in the 2nd degree may be indicted, tried, convicted & punished as a principal in the first degree. Va. Code §18.2-18

- [b] The judge was correct to deny Junior's motion to vacate the order granting a jury trial because neither the court nor the Commonwealth concurred in the waiver of trial by jury. All three must concur and the record must show the concurrence. Rule 3A:13, Art. I, §8, Virginia Constitution.

The judge erred in denying Junior's motion for the judge to conduct the sentencing hearing. Under Va. Code §16.1-272, a juvenile that is convicted on an indictment in Circuit Court must be sentenced by the judge alone, without the intervention of a jury.

- [c] The BBE would accept either conclusion over whether the judge erred in denying the motion to suppress Junior's confession on the grounds that the police had denied his initial request to see his parents but for full credit, the student would have to offer a good analysis of the issue and the effect of the denial on the voluntariness of Junior's confession.
- [d] The judge was correct in denying the Commonwealth's motion to bar Junior from offering evidence of the terms of the plea bargain with Moe. A defendant's has a strong right to impeach a witness including showing the witness is biased in favor of the

prosecution.

- [e] Exclusive jurisdiction to conduct preliminary hearings on a charge against a juvenile is vested in the Juvenile & Domestic Relations District Courts and the failure for this court, as opposed to the General District Court, to hold the preliminary hearing is a jurisdictional defect that can be raised at any time. Va. Code §16.1-241. The judge erred in denying the motion to dismiss the indictment and vacate the order that Junior be tried as an adult.

5. Arnold resided in Virginia with his wife, Jean, and their only child, Sam. They lived in a condominium Arnold and Jean had acquired in 1985, taking title as tenants by the entirety, with the right of survivorship.

In 1990, Arnold made and executed the following valid holographic will, which provided in its entirety as follows:

"July 4, 1990

This is my last will and testament. I give all my common stock to my wife, Jean. I give all my tangible personal property to my son Sam. I give all my real estate to my brother, Bob.

/s/ Arnold"

In 2000, Arnold made and executed another valid holographic will, which provided in its entirety as follows:

"December 24, 2000

This is my last will and testament. I give my truck to my sister Andrea. I give one-half of my real estate to my son, Sam.

/s/ Arnold"

In 2002, Arnold and Jean divorced. The final decree did not contain any express provision regarding property rights. Jean moved out of state, and Arnold and Sam continued to live in the - condominium. Also in 2002, Arnold's brother, Bob, died survived only by Bob's wife, Dolly.

Arnold died in 2005 survived by Jean, Sam, Andrea, and Dolly. Arnold's estate consisted of 10,000 shares of Abco, Inc. common stock, a 2004 pickup truck, a valuable coin collection, and his interest in the condominium.

To whom and on what basis should the following items of property in Arnold's estate be distributed? Explain fully.

- [a] The 10,000 shares of Abco, Inc. common stock
- [b] The coin collection
- [c] The 2004 pickup truck
- [d] The condominium interest

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There should be recognition of the rule that a later will that does not expressly revoke an earlier will supercedes the earlier will to the extent of inconsistency, but otherwise, provisions of the earlier will may remain effective. Va. Code 64.1-58.1. Because neither will makes a complete disposition of all of decedent's property, there is partial intestacy.

- [a] [common stock] Jean cannot take the common stock under the earlier will, but the subsequent divorce operates to revoke all provisions in favor of a former spouse. Va. Code 64.1-59. Accordingly, testator is intestate as to intangible property and it passes by inheritance to son Sam, who is sole heir.
- [b] [coin collection]. The collection is tangible personal property and passes by the terms of the earlier will to son Sam as legatee. This bequest is not affected by the later will, because the provisions of the later will are not inconsistent in this regard.
- [c] [truck] This passes under the express terms of the later will to sister Andrea.
- [d] [condominium] Under Title 20 (Va. Code §20-111) divorce terminates the tenancy by the entirety and converts in into a tenancy in common. Former wife therefore owns a one-half interest that is not impaired by testator's death. As to the remaining one half interest, over which testator had ownership immediately before death and which is seemingly given to brother Bob by the earlier will, neither Bob nor Bob's widow can take, because the legacy to Bob lapsed when Bob predeceased the testator without leaving any issue. Va. Code §64.1-64.1, the "anti-lapse" statute, is not applicable. A lapse of a specific legacy or devise falls into the residue. Va. Code §64.1-65.1. However, neither the earlier or the later will disposes of the "residue." Son Sam takes ½ on testator's interest (1/4 undivided interest in the condo) by the express terms of the later will, and takes the remaining 1/4 undivided interests by inheritance as sole heir.

6. The Craig Land Trust ("Craig") has contracts to purchase five adjacent tracts of land in Craig County, Virginia. Craig has obtained current title examinations of each parcel. All documents in each tract's chain of title have been properly recorded.

Tract 1. Twenty years ago, Dave conveyed Tract 1 by a deed reciting, "I convey Tract 1 to my son, Richard, for life and, upon his death, to Richard's son, Earl." Recently Earl conveyed his interest to George by a deed, which recites, "I convey all of my right title and interest in Tract 1 to George." Richard is still living. George has contracted to sell Tract 1 to Craig.

Tract 2. Ten years ago, Cain transferred Tract 2 by a deed reciting, "I convey Tract 2 to Sam and his heirs so long as Tract 2 is used solely for residential purposes." Five years ago, Sam built and has continually operated a garage for automobile repair on Tract 2. Cain died last year and, in his will, he left his entire estate to his son, Jethro. Jethro has contracted to sell Tract 2 to Craig.

Tract 3. Fifteen years ago, Hazel conveyed Tract 3 by a deed reciting, "I convey Tract 3 to James for life, then to Ken for life, and then to Larry." Five years ago, Larry obtained a loan from Roscoe and gave Roscoe a deed of trust conveying all of his right title and interest in Tract 3 to a trustee as security for a promissory note payable to Roscoe. Last year James and Ken died, and

Larry defaulted on the loan. Larry contracted to sell Tract 3 to Craig. In the meantime, Roscoe advertised a sale of the property under the terms of the deed of trust he holds, gave all required notices, and set the sale for 30 days from today.

Tract 4. Ten years ago, Ursula conveyed Tract 4 to her children, John and Mary, as joint tenants. Mary died five years ago and by her will left all of her property to a friend, Henry. John has contracted to sell Tract 4 to Craig, advising Craig that he and Mary owned with right of survivorship.

Can the Craig Land Trust acquire title to each of these tracts free of any other interests by purchasing the tracts at the present time from the persons who contracted to sell them? Discuss fully, being certain to identify the nature of the interest held by each of the persons who contracted to sell each tract.

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- [Tract 1] George received only the remainder interest which is still subject to the life estate in Richard, who is living. All Craig will get is George's remainder interest.
- [Tract 2] Jethro now holds the entire title to the property. When Cain conveyed the property subject to the use condition and the condition was breached, title reverted to Cain and when he died, he owned the entire title. His will left his entire estate to Jethro. Thus Craig can acquire the entire title.
- [Tract 3] The two life estates have been extinguished by the deaths of the two life tenants. Larry held the remainder interest which now is the full interest, subject to the deed of trust he executed. So long as the balance on the loan secured by the deed of trust is paid in full before the property is sold at the foreclosure sale, Larry can convey the full title to Craig.
- [Tract 4] The deed to the children as joint tenants did not include language making it a joint tenancy with the right of survivorship. Thus each child took a ½ interest with no survivorship feature. When Mary died, her ½ interest would have passed per her will to her friend Harry. John owns only a ½ interest and that's all he can convey. Applicants should recognize the statutory law abolishing survivorship between joint tenants and requiring express provisions in the conveyance instrument providing for survivorship. Va. Code §55-20 & §55-20.1

7. Annie, a 75-year-old widow suffering from a crippling disease, lived in a large house in Norfolk, Virginia. During a visit with her niece, Nancy, who was recently widowed herself, Annie asked Nancy to move in with her and take care of her so that Annie could avoid moving to an assisted living facility. Because Annie was Nancy's favorite aunt and Nancy was lonely since her husband's death, Nancy told Annie she would consider doing so but that she would need to be compensated for the services she would render and the loss of her independence.

Shortly after their initial conversation, Nancy received an unsigned birthday card in the mail from Annie. Enclosed with the birthday card was an unsigned note in Annie's handwriting, which stated:

"As we talked about, you are my dearest relative. My children are not interested in me, so, if you'll move in with me and take care of me for the rest of my life, I'll make sure you are well provided for. You'll have no living expenses because you can stay in my house. I'll pay for all your food and necessities, and, if you rent your house in Richmond, it will give you some extra income. I'll also change my will so that you'll inherit my house when I die. Please say you'll do it. "

Nancy then told Annie, "OK, since you've agreed to leave me your house, I'll do it, and all you'll have to do is pay my living expenses." Nancy rented her house in Richmond and moved in with Annie. From 1990 until Annie died in 2005, Nancy rendered loving care for Annie, fulfilling all her personal needs and doing all the shopping, housekeeping, banking, and bill-paying. Annie paid all of Nancy's living expenses but gave her no other compensation. The arrangement saved Annie a substantial amount of money she would otherwise have had to pay a professional caregiver.

Upon Annie's death, Nancy was surprised to learn that Annie had never changed her will, which had been drafted in 1985 and left her entire estate, including the house in Norfolk, in equal shares to her children, Sam and Donna. Both Sam and Donna lived in California, and neither of them had visited or communicated with Annie for several years. Sam and Donna refuse to acknowledge that Nancy has any claim to the Norfolk house or to any other relief.

- [a] On what theories might Nancy assert a right to obtain title to the house, what defenses might be raised, and what is the likely outcome on each? Explain fully.
- [b] If Nancy instead elects to pursue a monetary claim for the services she rendered to Annie, on what theory might she base that claim, what defenses might be raised, and what is the likely outcome? Explain fully.

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- [a] (obtain title to house). The statute of frauds prevents the enforcement of the parol contract to convey land by will in an action at law. Technically, equity cannot decree specific performance, giving the fact that a dead person cannot make a will or revoke a will previously made. However, because of the parol contract and Nancy's performance, Annie's house is subject to equities in favor of Nancy, and Sam and Donna, who have succeeded to legal title, can be treated as holding the title under a constructive trust in favor of Nancy, and a court of equity may enforce the trust by decreeing a transfer of title to Nancy. Sam and Donna, not being bona fide purchasers for value, are subject to the equities favoring Nancy. *Story v. Hargrave*, 235 Va. 563 (1988). See also *Everton v. Askew*, 199 Va. 778, 102 S.E.2d 156 (1958). Sam and Donna, relying on the statute of frauds, may contend that the contract giving rise to the equities in favor of Annie has not been sufficiently proven to justify equitable relief. However, this defense will likely fail. Nancy's conduct is full performance of the contract on her part, and her behavior is fully consistent with the alleged terms of the contract, and there is corroborating evidence of the parol contract in the unsigned birthday card to Nancy in Annie's handwriting.
- [b] (claim for services rendered) The common law remedy of an action in assumpsit for quantum meruit may be brought to prevent unjust enrichment. Where services are rendered pursuant to a valid contract, whose express terms are not enforceable, as

where the statute of frauds is applicable, the law implies a promise to pay for the reasonable value of services rendered. *Ricks v. Sumler*, 179 Va. 571, 19 S. E 2nd 889 (1942).

8. Ronny Church, a member of the Virginia State Bar since 1960, practices law in the Town of Leesburg, Virginia, where he serves as the managing partner for a well-established local law firm of twenty lawyers. Ronny seeks your counsel about his ethical responsibilities in connection with two cases his law firm is currently handling.

In the first, the firm's largest client, Blackheart Development Corporation ("Blackheart"), is challenging an adverse zoning decision by the Board of Supervisors of Loudoun County, Virginia.

Ronny, who is Blackheart's lead attorney in the case, believes that among the best evidence available to Blackheart is testimony by Ronny's law partner, Peter, who is head of the law firm's real estate team, about conversations he had with a Loudoun County official.

In the other case, a relatively new client of the law firm, Great Southern Restaurants, Inc. ("Great Southern") is embroiled in a sexual harassment lawsuit in the United States District Court for the Eastern District of Virginia. In the course of discovery for the sexual harassment case, Ronny defended the deposition of Great Southern's district manager. A substantial portion of the district manager's deposition testimony focused on a meeting between the district manager and the plaintiff, who alleges that one of her coworkers at the restaurant subjected her to sexual harassment. Ronny was not present at that meeting, but one of Ronny's law firm's newer associate attorneys, Anna, did attend the meeting. Yesterday, Ronny received from plaintiffs counsel a notice of Anna's deposition. When Ronny met with Anna yesterday afternoon, he discovered that her recollection of the meeting between the district manager and the plaintiff was alarmingly different from the deposition testimony provided by Great Southern's district manager.

- [a] May Ronny and his law firm continue to serve as trial counsel for Blackheart in the real estate litigation, even though it will be necessary to call Peter as a witness? Explain fully.
- [b] May Ronny and his law firm continue to serve as trial counsel in the sexual harassment litigation even though Anna may be called as a witness? Explain fully.
- [c] Given the possibility that Peter and Anna may have to testify in the matters, what immediate steps should Ronny take to avoid any prejudice to the clients or any ethical violations? Explain fully.

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- [a] Yes, Ronny and the firm can continue in the case even though Peter will be called as a witness. There is no rule of imputed disqualification for the entire firm if the testimony is on behalf of the client. Rules of Professional Conduct, Rule 3:7©
- [b] Ronny may not continue in the case because Anna may be called as a witness at a

deposition. Her testimony, if called, would contradict [impeach] the testimony of the client's district manager. Rules of Professional Conduct, Rules 3:7[c], 1:7[b] & 1:10

[c] The BBE decided to strike this sub-part of the question, but if a student answered it correctly, extra credit would be given. The answer should include that Ronny should talk with the client and discuss the matters of testimony by firm lawyers. Even with Peter testifying, which he can do, there is a risk that his testimony will arguably be weighted less by the trier of fact due to Peter being a member of Ronny's law firm. The client needs to be consulted and to make the decision whether to seek other counsel or continue with Ronny.

✖✖ The BBE did not ask about whether Ronny had a duty to report it if he had information that the district manager of his client had testified falsely at a deposition. If the student discussed this issue, some extra credit will be given. Rules of Professional Conduct, Rule 3:3[a](2)

9. Since 1880, the Roanoke & Southern Railroad Company ("the R&S") has operated a railroad line in Franklin County, Virginia, which crossed the land of Callaway Farms, Inc. ("Callaway"). In 2004, the R&S stopped using the line, took up its tracks, and conveyed the property included in its right of way to Franklin County for use as a public trail. Callaway disputed Franklin County's right to use the property where the rail line had crossed its property, and erected barricades and "no trespassing" signs at the boundaries to its property.

Callaway based its actions on the language of an 1880 deed from Callaway to the R&S, which Callaway interpreted to give it title to the right-of-way when it was no longer used for railroad purposes. Franklin County contended that it had acquired fee simple title from the R&S and demanded that the barricades be removed.

Negotiations between the parties have not resolved the title issue, and Franklin County has decided to bring suit to enforce its claim of ownership and right to possession.

Without regard to which party is likely to prevail, discuss whether, under the given facts, each of the following is a proceeding that Franklin County can maintain to establish both its title and its right to possession and explain your conclusions:

- [a] Unlawful detainer
- [b] Partition
- [c] Ejectment
- [d] Bill to quiet title
- [e] Declaratory judgment

- [a] Unlawful Detainer can not be used because it does not try title to land [which is the issue in this case] but present right to possession. Va. Code §8.01-124 *et seq.*
- [b] Partition can not be used because the facts do not involve two or more parties sharing ownership of property. Here each claims to own 100% of the fee simple title. Va. Code §8.01-81 *et seq.*
- [c] Ejectment is the correct form of action to use. It tries the issue of who owns the title to the property. Va. Code §8.01-131 *et seq.*
- [d] A suit to quiet title might be used, but there is the problem that this being an equitable remedy [Ejectment if a law claim] generally one is not entitled to assert an equitable claim if a law claim will provide an adequate remedy. Va. Code §55-153 *et seq.*
- [e] A Declaratory Judgment proceeding is not appropriate because the right of the parties have matured and there is a presently existing cause of action. Generally the law prefers using a traditional cause of action if one is available. American National Bank and Trust Company of Danville v. Samuel A. Kushner, Trustee 162 Va. 378 [1934] and Liberty Mutual Insurance Company v. Bishop 211 Va. 414 [1970] Va. Code §8.01-184 *et seq.*