February 2025 Virginia Bar Exam
Questions & Suggested Answers.

✕✕ After each bar exam, the Virginia Board of Bar Examiners invites the Deans [or designees] of all Law Schools located in Virginia, to meet with the Board [remotely]. Representatives from all the law schools in Virginia collaborate to prepare suggested answers which we think should be acceptable to the Virginia Board of Bar Examiners. These answers may also include cites to some of the case and statutory law for reference even though the VBBE may not expect such specificity in applicants' answers on the exam.✕✕ It should also be noted that while we think the answers that follow should be acceptable for full credit, the VBBE do give credit for good analysis and sometimes will accept for at least partial credit, and alternate theories of analysis that are not what they had in mind as the preferred answer. jrf

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Question 1. Creditor's Rights

For over 20 years, Donny owned and operated a successful heating, air conditioning and plumbing service company. After marrying Wilma in 2012, the couple lived in Donny's house in the City of Poquoson, Virginia, which had been given to him as a gift by his father in 2003, before Donny's marriage. In October 2022, Donny's business and other financial affairs began to fail due to his gambling losses and inability to pay his debts. At the time, he still owned the house in Poquoson.

In November 2022, Donny's business lender, Tidewater Bank (Bank), filed a Complaint against Donny in the Circuit Court of the City of Poquoson for default on a $25,000 business loan to Donny. Donny was served with the Complaint on November 2, 2022. On November 5, 2022, Donny executed a deed conveying his interest in the house in Poquoson to Wilma. The deed recited that it was given in consideration of "love and affection."

In January 2023, Bank obtained a judgment for $20,000 against Donny. The judgment was promptly docketed in the Office of the Clerk of the Circuit Court of Poquoson.

At the time Bank obtained and docketed the judgment, Donny and Wilma owned a Bed and Breakfast located in the City of Newport News, Virginia, which they had purchased soon after their marriage. Title to the Bed and Breakfast was held by Donny and Wilma as tenants by the entireties.

On January 20, 2024, Donny inherited from his father a farm in the City of Smithfield, Virginia. In February 2024, Donny conveyed the Smithfield farm in fee simple to his best friend Johnny, in full satisfaction of a $50,000 debt he owed Johnny. Johnny duly recorded the deed in March 2024.

In April 2024, Bank recorded duly authenticated abstracts of its judgment against Donny in the Clerks' Offices of the Newport News and Smithfield Circuit Courts.

In answering the following, DO NOT discuss the Federal Bankruptcy Code.
Can Bank enforce its judgment against:
(a) The house in Poquoson? Explain fully.
(b) The Bed and Breakfast in Newport News? Explain fully.
(c) The farm in Smithfield? Explain fully.
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(1)(a) Yes, Bank will be able to enforce its judgment against the house in Poquoson. Bank will be able to have the transfer of the house by Donny to Wilma set aside as a fraudulent conveyance (Va. Code Ann. § 55.1-400).

A "gift . . . given with intent to delay, hinder, or defraud" a creditor like Bank is void, and Bank could petition a court to set aside the transfer, returning the house to Donny and allowing Bank to enforce its judgment against the house. Va. Code Ann. § 55.1-400. Transfers between an indebted husband and his wife are presumed to be fraudulent. The problem does not present any facts that would allow Wilma to overcome the presumption that her heavily indebted husband's transfer of the house to her without consideration was intended to delay, hinder, or defraud Bank. Further, the facts indicate that the transfer was made a mere three days after Donny was served with the Complaint, which would tend to indicate that the transfer was made with fraudulent intent. Therefore, a court would be likely to set aside the transfer as a fraudulent conveyance and allow Bank to proceed against the house.

While it does not appear to be necessary in this situation given that Bank will almost certainly be able to have the transfer set aside as a fraudulent conveyance, Bank could also potentially have the transfer of the house by Donny to Wilma set aside as a voluntary conveyance (Va. Code Ann. § 55.1-401). A "gift . . . that is not upon consideration deemed valuable in law, or that is upon consideration of marriage by an insolvent transferor or by a transferor who is thereby rendered insolvent, shall be void as to" existing creditors but not subsequent creditors. Va. Code Ann. § 55.1-401. It seems clear here that the transfer was not upon valuable consideration. It is also at least possible that Donny was insolvent at the time of the transfer or rendered insolvent by the transfer. It is less clear whether Bank is an existing creditor, i.e., a creditor holding a liquidated claim at the time of the transfer, or a subsequent creditor. Assuming that Bank holds a liquidated claim at the time of the transfer and is therefore an existing creditor, a court would likely set aside the transfer as a voluntary conveyance and allow Bank to proceed against the house.

(1)(b) No, the Bank will not be able to enforce its judgment against the Bed and Breakfast in Newport News. Title to the Bed and Breakfast is held by Donny and Wilma, husband and wife, as tenants by the entireties. Property so held is only subject to the enforcement of joint judgments and liens, i.e. judgments and liens that are against both the husband and the wife. Here, the judgment is only against Donny, the husband, and, therefore, the judgment is not enforceable against the Bed and Breakfast.

(1)(c) No, Bank will most likely not be able to enforce its judgment against the farm in Smithfield. Bank could attempt to argue that the transfer of the farm to Johnny should be set aside as either a fraudulent conveyance or a voluntary conveyance as described in part (a). However, based upon the facts provided, Bank is unlikely to succeed under either option.

First, as to the fraudulent conveyance argument, it appears that, rather than attempting to delay, hinder, or defraud Bank by this transfer, Donny was merely preferring one creditor (Johnny) over another creditor (Bank). It is perfectly permissible to prefer one creditor over another. Therefore, Bank is unlikely to prevail in its argument to set aside the transfer as a fraudulent conveyance.

Second, as to the voluntary conveyance argument, the problem does not provide any information regarding the value of the farm. Assuming the value of the farm is no more than the $50,000 debt owed, which is plausible given the wording of the problem, Bank would be unlikely to prevail in its argument to set aside the transfer as a voluntary conveyance.

However, if the value of the farm exceeds $50,000, then the Bank might be able to attack the transfer as to the amount in excess of $50,000 (as either a fraudulent conveyance or a voluntary conveyance). However, given that the problem does not provide information on the value of the farm and that it is at least plausible to conclude that the farm is worth $50,000 or less given that it was

accepted in full satisfaction of the debt, it is unlikely that a court would set aside the transfer to Johnny and, therefore, Bank will not be able to enforce its judgment against the farm in Smithfield.

Question 2. Corporations

Giddy-Up & Go-Kart, Inc. (Giddy-Up), located in Lee County, Virginia, was incorporated several years ago by Frank Updike and Matt Giddy. Frank and Matt, both mechanics and novice go-kart racers, had been designing and building their own go-karts as a side business. In 2022, they decided to form a corporation for the business to reduce their individual risk from this venture, particularly given their lack of significant experience in go-kart design and the fact that they had experienced several past welding failures of their earlier designed go-karts.

When Giddy-Up was incorporated, Frank and Matt became the sole stockholders in the company, with Frank receiving 60% of the shares and Matt 40% of the shares. The operations of the business took place in a small warehouse on Frank's farm. Frank became the sole officer and director, managing the business end of the company and leaving Matt to focus solely on the design and building of the go-karts. Frank opened a checking account in the name of the business and used it primarily to give dividends to himself and Matt when any go-kart sales occurred, leaving no reserves of any significance. Occasionally, Frank also paid his and his wife's personal mortgage and other expenses out of this account, reasoning to himself that Giddy-Up's operations were on their premises.

Few corporate formalities were observed, although Frank filed corporate tax returns and had one stockholder's meeting with Matt annually at their favorite local pub, at which time Frank always assured Matt that Giddy-Up was doing very well. He did not involve Matt in the day-to-day details of the company. When cautioned by his insurance agent to consider obtaining general liability insurance for his business, Frank declined without involving Matt in the decision. Instead, based on the significant cost of the premium associated with having product liability insurance on Giddy-Up's go-karts, Frank concluded that he and Matt were sufficiently protected from personal exposure given the formation of the corporation itself.

In the spring of 2024, while driving a Giddy-Up go-kart in Lee County, Janet was severely injured due to the separation of the go-kart cage. Shortly thereafter, Janet hired an attorney who timely filed a Complaint against Giddy-Up in the Circuit Court of Lee County, where all parties and events occurred, and properly served Giddy-Up. With no insurance in place, Frank concluded that it was better not to hire an attorney to defend the company but simply let a default judgment be entered. Before entry of default judgment, Frank made final distributions to himself and Matt from all recent sales.

Following entry of default judgment against Giddy-Up, Janet now seeks recovery of the amount of judgment against Matt and Frank personally.

(a) What arguments should Janet make to impose personal liability on Matt and Frank and what facts, if any, will support the imposition of liability against each? Explain fully.

(b) What arguments should Matt and Frank each make in response? Explain fully.

(c) How is the Circuit Court likely to rule? Explain fully.

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(2)(a) To impose personal liability on Matt and Frank, Janet should ask the court to pierce the corporate veil. Shareholders generally are not personally liable for the debts of the corporation. Where, however, shareholders have controlled or used the corporation to evade a personal obligation or perpetrate a fraud or crime, to commit an injustice or to gain an unfair advantage, the court may pierce the corporate veil and hold shareholders liable for the debts of the corporation. In Virginia, piercing is an extraordinary remedy rarely applied; however, piercing the corporate veil is justified when the unity of interest is such that the separate personalities of the corporation and the individual no longer exist and to adhere to that separateness would work an injustice.

The following facts support the imposition of liability against Matt and Frank: Matt and Frank decided to form a corporation for their go-kart business to reduce their individual risk, and, importantly, they were concerned about potential liability because of their lack of significant experience in go-kart design and their past welding failures in their earlier designed go-karts. These facts suggest that Matt and Frank were aware of a substantial risk of injury and that they formed a corporation for the purpose of avoiding liability for any such injury. Additionally, there is no indication that the corporation was adequately capitalized. Frank paid himself and Matt dividends when sales occurred, which left “no reserves of any significance” in the corporate checking account. Frank also did not properly segregate corporate assets. The facts provide that he paid his and his wife’s personal mortgage and other expenses from the corporate account. Next, Frank declined to purchase liability insurance, instead relying on the formation of the corporation to protect the investors from personal exposure. Finally, Frank did not defend against Janet’s lawsuit, knowing that the corporation had no insurance and few assets. In fact, he distributed all remaining corporate assets to himself and Matt just before entry of default judgment. In short, the facts establish that the shareholders did not treat the corporation as a separate entity, and the shareholders misused the corporate form to perpetrate a wrongdoing or injustice. Thus, the requirements for piercing the corporate veil in Virginia have been met.

(2)(b) In response, Frank and Matt will argue that the corporate veil should not be pierced because they observed at least some corporate formalities. The corporation filed tax returns and at least purported to hold an annual shareholder meeting. Additionally, Matt will argue that the corporate veil should not be pierced against him because he was not involved in the management of the business. Specifically, Frank was the sole officer and director of the corporation. Frank seemed not to include Matt in the management of the business, and he simply told Matt that the corporation was “doing very well.” Frank handled the finances – he caused the corporation to make distributions to the shareholders and he paid his personal expenses from the corporate checking account -, and Frank decided not to purchase liability insurance without involving Matt in the decision. Thus, Matt will argue that Frank was primarily responsible for the failure to treat the corporation as a separate entity and for the misuse of the corporate form to avoid personal liability.

(2)(c) Although Virginia courts are reluctant to pierce the corporate veil, the Circuit Court will likely hold Frank personally liable because of the egregious facts in this situation. The court is less likely to hold Matt liable because he was not involved in the management of the business, including the decision not to purchase liability insurance, the undercapitalization and distributions to shareholders, and the commingling of personal and corporate assets.

Question 3 Va Civil Procedure

Paula and Devin were involved in an accident in Suffolk, Virginia, on May 1, 2020, that left Paula with serious injuries. On April 30, 2022, Paula filed a Complaint in the Circuit Court of the City of Suffolk, alleging that Devin’s negligence in failing to stop at a stop sign was the sole cause

of the accident. When Devin received a copy of the Complaint, she immediately filed a Plea in Bar asserting that Paula's claim was barred by the applicable statute of limitations.

The Court ordered oral argument on the Plea in Bar and, on September 15, 2022, after hearing oral argument, the judge announced from the bench that he was sustaining Devin's Plea in Bar and dismissing Paula's Complaint, and instructed Devin to draft a final order encompassing his bench ruling.

Devin prepared the Order of Dismissal in accordance with the Court's instructions and sent it to Paula for signature. Paula noted on the Order that she objected on the basis of a misapplication of the limitations period. Then, she signed the Order of Dismissal and sent it to the Court on September 20. The Court entered the Order of Dismissal on September 22. On September 25, Paula filed a Motion to Vacate in which she asked the Court to vacate the Order of Dismissal on the ground that the Court had misapplied the limitations period. On October 24, the Court entered an Order Denying the Motion to Vacate and affirmed the Order of Dismissal.

Paula then filed a Notice of Appeal with the Clerk of the Court of Appeals on October 27, in which she stated that she planned to appeal both the Order of Dismissal and the Order Denying the Motion to Vacate.

Devin promptly filed a Brief in Opposition in which she argued that Paula's appeal should be dismissed on the grounds that her Notice of Appeal was untimely, deficient and void.

Paula properly filed a Reply Brief arguing that any deadlines related to the Order of Dismissal were tolled by the filing of Paula's Motion to Vacate.

(a) How should the Court of Appeals rule on Devin's argument that Paula's appeal should be dismissed because it was:

1. Untimely? Explain fully.

2. Deficient? Explain fully.

3. Void? Explain fully.

(b) How should the Court of Appeals rule on Paula's argument that any deadlines related to the Order of Dismissal were tolled by the filing of Paula's Motion to Vacate? Explain fully.

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(3)(a)(1) The first issue raised by Devin's argument that Paula's appeal should be dismissed is whether her Notice of Appeal was timely. The Court of Appeals should rule in favor of Devin's argument on this issue.

Under Virginia law, no appeal will be allowed unless the Notice of Appeal is filed within 30 days from the date a final judgment was entered. An order is deemed final when it disposes of the entire matter before the court. This includes an order sustaining a plea in bar unless leave to amend is granted. Here, Paula filed a complaint against Devin in the Circuit Court of the City of Suffolk seeking damages for injuries she sustained in an accident with Devin. After Devin filed a Plea in Bar asserting the statute of limitations, the Circuit Court heard oral argument on September 15, 2022, and entered an Order of Dismissal on September 22, 2022. This Order of Dismissal would constitute a final judgment because it disposed of the entire matter in dismissing Paula's action. Paula filed a Motion to Vacate on September 25. However, unless her motion operated to extend the Circuit Court's

jurisdiction (discussed in (b)), she had 30 days from September 22, 2022, which was October 22, 2022, to file her Notice of Appeal. She filed her Notice of Appeal on October 27, 2022. Therefore, it was not timely.
Because Paula's Notice of Appeal was not timely filed, the Court of Appeals should rule in favor of Devin's argument that the appeal should be dismissed on this ground.

(3)(a)(2) The second issue raised by Devin's argument that Paula's appeal should be dismissed is whether her Notice of Appeal was deficient. Although the Notice may be deficient in its content, this is probably not a sufficient ground to support dismissal of the appeal as long as the case was adequately identified. The more significant problem is where she filed the Notice which is addressed below in (a)(3).
Under Virginia law, the Notice of Appeal should identify the correct caption of the case, the name of the circuit court, and date of final judgment. In addition, the Notice should contain a statement whether any transcript or statement of facts will be filed. Generally, any defect in the Notice of Appeal that does not touch on its timeliness or identity of the case will be considered procedural and insufficient to deny the active jurisdiction of the appellate court. Paula stated in her Notice of Appeal that she planned to appeal the Order of Dismissal and Order Denying the Motion to Vacate. If Paula did not include a statement regarding whether any transcript will be filed, the Notice would be deficient. However, this deficiency, alone, would not affect the active jurisdiction of the Court of Appeals.

Unless Paula's Notice of Appeal did not adequately identify the case and judgment, the Court of Appeals should reject Devin's argument that there was a deficiency that would support dismissal of the appeal.

(3)(a)(3) The third issue raised by Devin's argument that Paula's appeal should be dismissed is whether her Notice of Appeal was void. The Court of Appeals should rule in favor of Devin's argument on this issue.

For an appeal from the Circuit Court to the Court of Appeals of Virginia, the Notice of Appeal should be filed in the Circuit Court with a copy provided to the Court of Appeals. Here, Paula filed her Notice of Appeal with the Clerk of the Court of Appeals. This should render her Notice of Appeal void and of no effect.

(3)(b) The Court of Appeals should rule against Paula with regard to her argument that any deadlines related to the Order of Dismissal were tolled. The issue is whether Paula's Motion to Vacate extended the Circuit Court's jurisdiction.

Under Virginia law, final judgments remain under the control of the trial court for 21 days after the entry and no longer. The judgment may be modified, vacated, or suspended during that time, but a motion to vacate or suspend will not operate to extend the jurisdiction of the court. As discussed in (a), the Circuit Court entered its final order on September 22, 2022. Without any further order vacating or suspending the order, the case remained under the control of the trial court for only 21 days, which would be until October 13. Although Paula filed a Motion to Vacate on September 25, this motion could not operate to extend the 21-day period beyond October 13. The Circuit Court did not enter any further orders until it entered the Order Denying the Motion to Vacate on October 24, in which it affirmed the Order of Dismissal. Because the Circuit Court no longer had jurisdiction over the final order entered on September 22, its order on October 24 was of no effect.

Because Paula's Motion to Vacate did not operate to extend the Circuit Court's jurisdiction, the Court of Appeals should reject Paula's argument that any deadlines related to the Order of Dismissal were tolled.
Va. Sup. Ct. Rules: 1:1; 5A:6
Super Fresh Food Markets of Virginia, 263 Va. 555 (2002)

Question 4 **Va Civil Procedure**

IM, Inc. owns and operates the Friar Oaks Shopping Center (the Mall) in Fairfax County, Virginia. On February 1, 2010, Adam was shopping at the Mall when a display fell from the ceiling, knocking an expensive laptop out of his hand and destroying it.

In March of 2014, Adam read an article about an individual who was injured by another falling display at the Mall who had filed suit for compensation for his injuries. The article described the suit as between the injured person and the "Friar Oaks Shopping Center."

On April 1, 2014, Adam filed a negligence suit for damage to his laptop in Fairfax County Circuit Court. The suit named the "Friar Oaks Shopping Center" as the owner and operator of the Mall and alleged that Friar Oaks Shopping Center's negligence, in its role as owner and operator, caused the loss of his laptop. There is no actual company with the name "Friar Oaks Shopping Center." Adam served the Complaint on the President of IM, Inc. on January 31, 2015.

After receiving the Complaint, counsel for IM, Inc. advised Adam that the owner and operator of the Mall was "IM, Inc." and not "Friar Oaks Shopping Center" and that IM, Inc. had no intention of responding to the Complaint.

On February 15, 2015, Adam filed a Motion to Amend the Complaint to change the defendant's name to "IM, Inc." He served a copy of the Motion on IM, Inc., who entered a special appearance to object to the Motion to Amend on the ground that the original Complaint against the nonexistent Friar Oaks Shopping Center was a misjoinder that could not be corrected by simply changing the name of the defendant. IM, Inc. also filed a Plea in Bar in the event the Court allowed the amendment, arguing that the statute of limitations for the negligence action had run against IM, Inc.

Adam responded that his error in suing the defendant in the wrong name was a misnomer that could be corrected as he had done, and not a misjoinder. He opposed the Plea in Bar, arguing that the statute of limitations had not run as to IM, Inc. For purposes of the Plea in Bar, the parties stipulated to the above facts and agreed that no further evidence need be taken.

The Court took the matter under advisement to issue a written opinion.

(a) **How should the Court rule on Adam's Motion to Amend the lawsuit to change the name of the defendant from "Friar Oaks Shopping Center" to "IM, Inc.?" Explain fully.**

(b) **What is the statute of limitations for Adam's cause of action against IM, Inc.? Explain fully.**

(c) **If the Court rules that the lawsuit was properly amended, how should it rule on IM, Inc.'s Plea in Bar that the statute of limitations has run against it? Explain fully.**

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(4)(a) The Court should rule in favor of Adam's Motion to Amend the lawsuit to change the name of the defendant from "Friar Oaks Shopping Center" to "IM, Inc." The issue is whether the error in suing the defendant is a misnomer that can be corrected by changing the name of the defendant.

A misnomer is generally described as a mistake in the name of a party such that the proper

party to the underlying action has been identified but incorrectly named. On the other hand, a misjoinder occurs when the wrong party has been identified. The court will consider the pleadings as a whole to determine whether the incorrectly named party is, in fact, a correct party that has been sufficiently identified. With regard to corporations, in particular, where the corporation is correctly identified, but is incorrectly named such as through use of a trade name, the mistake is generally considered a misnomer. Under the Virginia Code, a misnomer may, on motion of a party and affidavit of the correct name, be amended by asserting the right name.

Here, after Adam's laptop was damaged at the Friar Oaks Shopping Center (the Mall), Adam filed a complaint that named "Friar Oaks Shopping Center" as the defendant who owned and operated the Mall. This was a commonly used name for the Mall as evidenced by the article Adam read that discussed a lawsuit between an injured person and the "Friar Oaks Shopping Center." Adam's complaint alleged that the owner's negligence caused the damage to his laptop. As it happened, there was no actual company with the name "Friar Oaks Shopping Center," but the Mall was owned and operated by IM, Inc. and the President of IM, Inc. was served with process. These facts demonstrate that the pleadings identified the correct party, the owner and operator of the Mall, against whom Adam sought damages for negligence.

Because the error in naming the defendant was a misnomer, the Court should grant Adam's Motion to Amend the lawsuit to change the name of the defendant.

(4)(b) The Statute of Limitations for Adam's cause of action against IM, Inc. is five years because he seeks damages to injury to his personal property.

Under Virginia law, actions for injury to property must be brought within five years after the cause of action accrues. The right of action is deemed to accrue and the limitation begins to run from the date the injury is sustained in the case of damage to property. Here, Adam alleges his expensive laptop was destroyed on February 1, 2010, when a display fell from the ceiling at the Mall. Therefore, he is alleging a cause of action for damage to property, which is governed by the five-year limitation period that began to run on that date.

(4)(c) Assuming the Court grants Adam's Motion to Amend, it should deny IM, Inc.'s Plea in Bar. The issue is whether the amendment changing the name of the defendant will relate back to the original filing of the complaint.

Under Virginia law, an amendment changing the party against whom a claim is asserted, whether to correct a misnomer or otherwise, will relate back to the date of the original pleading if (1) the claim arose out of the same conduct, transaction, or occurrence set forth in the original pleading; (2) the party received notice of institution of the action within the limitations period prescribed for commencing the action; (3) the party will not be prejudiced in maintaining a defense; and (4) the party should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against that party.

Applying those requirements here, the claim against IM, Inc. has not changed, but is the same claim for damage to Adam's laptop. The President of IM, Inc. was served the suit papers on January 31, 2015. Because Adam's action is governed by the five-year statute of limitations that began to run on February 1, 2010, the bar date was February 1, 2015. Therefore, IM, Inc. had notice of the institution of the action within the limitations period and should know that but for the mistake, it would have been named. Given that IM, Inc. knew about the suit within the limitations period and without facts indicating otherwise, it doesn't appear IM, Inc. would be prejudiced in maintaining a defense. Thus, although Adam's Motion to Amend was filed on February 15, 2010, past the bar date of February 1, 2015, the amendment should relate back to the date of his original filing, which was April 1, 2014.

Accordingly, the Court should deny IM, Inc.'s Plea in Bar that the statute of limitations has run against Adam's cause of action.

Va. Code § 8.01-6; Va. Code §§ 8.01-243; Va. Code § 8.01-230;
Edwards v. Omni International, 301 Va. 125 (2022); *Richmond v. Volk*, 291 Va. 60 (2016); *Jacobson v. Southern Biscuit* (1957); *Baldwin v. Norton Hotel*, 163 Va. 76 (1934)

Question 5 **Domestic Relations**

Alfred and Betty have lived in Montgomery County, Virginia, since they got married in 2014. They have one child, Chip, who was born in 2020. Alfred is an architect and Betty is an engineer. Their incomes are identical.

In 2021, they decided that they were unhappy and entered into a Property Settlement and Custody Agreement (Agreement) that was later incorporated into a decree of divorce in late 2022. The Agreement included a standard provision consistent with statutes that allowed the parties to seek modifications of the Agreement subject to proving a material change in circumstances. The Agreement included the following provisions:

1. The couple owned a vacation home on a lake. Alfred agreed to pay Betty $750 per month for five years, and in exchange, Betty would convey her interest in the vacation home to Alfred.
2. Alfred agreed to pay Betty $1,000 per month for spousal support, until such time as Betty remarried.
3. Betty and Alfred would have joint custody of Chip. Alfred agreed to pay $2,000 per month in child support because Betty had primary physical custody.

After the divorce was final, Betty leased a home for herself and Chip. Soon thereafter, her coworker, David, moved into the home with Betty and Chip. Betty and David get along well but have separate bedrooms, closets, and bathrooms. David helps Betty care for Chip but has his own separate bank account and pays one half of the lease payments on the home that they share, although his name is not on the lease. Betty and David admit to occasional sexual intercourse but have no plans to marry.
David is considering transferring to another state with his job within the next year. Betty and David have no joint monetary accounts.

David had been residing in the same residence with Betty for slightly more than one year when Betty's father died and left her an inheritance that included $500,000 in cash.

Upon hearing about Betty's inheritance, Alfred hired an attorney who filed a petition seeking to amend the obligations of the Agreement. The attorney moved to terminate Alfred's monthly obligation for payment on the lake home on the ground that Betty's inheritance constituted a material change in circumstances. He also moved to terminate spousal support on the ground that Betty and David had lived together more than a year in a relationship analogous to marriage. He also moved to reduce Alfred's child support obligations on the ground that Betty's inheritance should be considered income for the purpose of determining each party's child support obligation.

(a) **How should the Court rule on the motion to terminate payments for the lake home? Explain fully.**

(b) **How should the Court rule on the motion to terminate spousal support on the ground that Betty and David had lived together in a relationship**

analogous to marriage for more than one year? Explain fully.

(c) Should the Court consider Betty's inheritance in determining whether to reduce Alfred's child support obligations? Explain fully.

* * * * *

(5)(a) The court should deny the request to terminate payments for the house because the $750/month payments for five years is not subject to modification. Although child and spousal support payments are subject to modification when there is a significant change of circumstances, orders concerning division of property are not subject to modification based on changed circumstances. Here, the $750/month payments for five years represent payments by Alfred in exchange for Betty conveying her legal interest in the vacation home to Alfred. The payments are not support payments and, thus, not subject to modification.

(5)(b) The court should deny Alfred's request to terminate spousal support payments. Unless provided by stipulation or contract or terminating support would be unconscionable, upon order of the court based upon clear and convincing evidence that the spouse receiving support has been habitually cohabiting with another person in a relationship analogous to a marriage for one year or more. Here, although the agreement specifically states that Alfred shall pay Betty $1000/month for spousal support until such time as Betty remarries, it does not specifically state that Alfred will continue to pay even if Betty has been habitually cohabiting with another person in a relationship analogous to a marriage for one year or more. Absent such specific language, the basic statutory rule applies. Thus, the court will evaluate four factors to determine if Betty has been cohabiting with David in a relationship analogous to marriage.

Those factors are whether they have a established a common residence, whether they are intimately or romantically involved, whether they provide financial support for each other, and the duration and continuity of the relationship. To determine if the couple established a common residence, courts look at whether they are living together and, if so, whether they are mutually assuming the duties and obligations normally attendant with a marital relationship. The facts indicate that they are living more like roommates than as a married couple. They have separate bedrooms, closets, and bathrooms. They do not share a bank account. David pays one-half the rent.

Here, David has shared a common residence with Betty for more than a year. Some of these same facts demonstrate that they are not providing financial support for each other. While the facts indicate they occasionally engage in sexual intercourse, they have no plans to marry and do not appear to be romantically involved in an ongoing relationship akin to marriage. Finally, the courts consider the duration and continuity of the relationship. They have shared a residence for just over a year, but David indicates that he is considering transferring to another state within the next year, which weighs against the conclusion that they are cohabiting in a relationship analogous to marriage. (*See, e.g., Cranwell v. Cranwell,* 59 Va. App. 155 (2011)).

(5)(c) Yes, the court should consider Betty' inheritance in determining whether to reduce Alfred's child support obligations. In a motion to modify child support payments, there must be a showing of a material change of circumstances. A large, one-time inheritance of $500,000 in cash would satisfy that standard. The child support guidelines indicate that gifts are included as gross income and the courts have held that gifts include inheritances, even though it is irregular income. That is because when determining child support, the emphasis is on including, not excluding, income, particularly when it more accurately reflects the parents' income for that year. It is important to note that after including the inheritance in the calculation of gross income, the court still has the discretion under 20-108.1 to deviate from the guidelines based on the statutory factors. One reason to deviate would be if the income was not readily available income to the recipient. Here, however, the $500,000 cash

inheritance is readily available. In any event, the court should consider Betty's inheritance in the gross income calculation in determining whether to reduce Alfred's child support obligations. (*See Da'mes v. Da'mes*, 74 Va. App. 138 (2022); *Goldhamer v. Cohen*, 31 Va. App. 728 (2000)).

Question 6 **Real Property**

Amy and Benny were married in 1999 and had one child, Jada, in 2000. After a few years of saving their money, they purchased a house and lot (the Property) in Hampton, Virginia, and took title as "tenants by the entireties, with the right of survivorship."

In 2019, Amy and Benny divorced, by which time the Property was fully paid for, and Benny moved out and took up residence in Richmond, Virginia. In 2020, Benny died without a will, survived by Jada who was his sole heir.

In 2020, Amy married her personal trainer, Willie. Willie promptly moved into the house with Amy. In 2021, Amy executed and recorded a deed purporting to convey the Property to herself and Willie as "tenants by the entireties, with the right of survivorship."

In 2022, Amy and Willie obtained a $100,000 loan from the Bank of Phoebus (Bank) and used the money to finance significant improvements on the Property. Amy and Willie signed a note for the
$100,000 and executed a deed of trust in favor of Bank as security for the note. The deed of trust contained a warranty, which Amy and Willie believed to be true, that Amy and Willie were the sole owners of the Property. Bank, without examining the title, recorded the deed of trust.

Upon learning that Amy and Willie had made the improvements and given Bank a deed of trust on the entire Property, Jada filed in the appropriate court a properly pleaded suit against Amy, Willie, and Bank, asking the Court to determine the respective proportional interests of the parties in the Property. Bank counterclaimed asking the Court to impose on the Property a constructive trust in order to avoid Jada being unjustly enriched by the improvements that were made using Bank's loan.

(a) **How should the Court decide Jada's claim for relief? Explain fully.**

(b) **What are the arguments for and against Bank's prayer for imposition of a constructive trust, and how should the Court rule? Explain fully.**

* * * * *

(6)(a) The issue is how should the court decide Jada's claim for relief regarding the respective proportional interests of the parties in the Property.

Spouses may own property as a tenancy by the entirety (TBE) for as long as they are married. § 55.1-136. A TBE with a right of survivorship is created when five unities are in place at the creation of the tenancy. Rogers v. Rogers, 257 Va. 323 (1999). Upon the death of one spouse, the interest in the land with pass outside of probate to the other spouse. Vasilion v. Vasilion, 192 Va. 735 (1951). Upon divorce, the TBE is severed, and the ex-spouses would hold the property as tenants in common (TIC). A TIC is inheritable, devisable and conveyable. A joint tenant or tenant in common may encumber her interest, but may not encumber the interest of other co-tenants. For example, if one contenant in common mortgages her interest, the mortgagee can foreclose only on the mortgage of the co-tenant's interests. In order to execute a valid deed of trust, interest held by a tenancy by the entirety must be executed by both spouses.

Here, Amy and Benny owned the Property as tenants by the entirety with a right of survivorship. However, in 2019, Amy and Benny divorced. Their divorce severed their TBE, and they then owned the property as TIC. For this reason, when Benny died intestate, leaving Jada as his sole heir, his one-half interest in the Property passed to Jada. At this moment, Jada and Amy owned the Property as TIC. Then in 2022, after her marriage to Willie, Amy conveyed her interest in the Property from herself to both Amy and Will as TBE. On its face, it would appear that the deed conveyed 100% of the interest in the land. But, it only conveyed the interest that Amy held (50% held as TIC).

Therefore, Amy and Willie own a one-half interest as TBE in the Property, and Jada holds a one-half interest as a TIC common in the Property. With respect to Bank, the deed of trust would only apply to Amy and Willie's interest, and not Jada's interest.

(6)(b) The Bank's prayer for imposition of a constructive trust, and how should the Court rule?

A constructive trust, is a tool of equity to prevent unjust enrichment or remedy a fraud. Constructive trusts are often imposed where a person in a fiduciary capacity, such as a trustee, breaches a duty owed to a plaintiff. In the context of a deed of trust, the debtor/notemaker is the trustor. He gives a deed of trust to a third-party trustee, who is usually closely connected to the lender (the beneficiary). On default, the lender instructs the trustee to foreclose the deed of trust by sale. The debtor In order to prove a fraudulent transaction, the creditor would need to prove that the debtor had actual intent to hinder, delay, or defraud the creditor. With respect to improvements, the Supreme Court of Virginia observed that a tenant in common or joint tenant who places improvements upon common property at his own expense is only entitled to compensation in the event of partition. In Rutledge v. Rutledge, 204 Va. 522, 531 (1963). This right could extend to a creditor who is seeking compensation as a result of a breach of the deed of trust. But again, the debtor would need to be in default before a creditor could bring a partition action.

Here, Amy and Willie obtained a $100,000 loan from the Bank of Phoebus (Bank) and used the money to finance significant improvements on the Property. Additionally, Amy and Willie signed a note for the $100,000 and executed a deed of trust in favor of Bank as security for the note. This put Amy and Will in in a fiduciary relationship with the bank. Still, despite the deed of trust containing a warranty, that Amy and Willie were the sole owners of the property, Amy and Willie believed this to be true. Therefore, they didn't have actual intent to defraud the bank. Additionally, the Bank didn't examine the title, had they done so, they would have discovered that Amy once held the property as a TBE with Benny. This should have prompted the Bank to then inquire about the state of the title and whether Benny or his heirs had any remaining interest in the Property. Finally, as co-tenants with Jada, Amy and Willie would not have a right to seek compensation from Jada unless a partition action was filed. Since Amy and Willie are not in default of the loan and have not breached a fiduciary duty owed to the Bank would not have a claim to for a constructive trust.

The Court should deny the Bank's prayer for imposition of a constructive trust.

Question 7 Wills & Estates

Alice and Bernard were married but had no children. They lived on a large horse farm in Loudoun County, Virginia, that Bernard had acquired before they were married, where they cared for their horses and played polo. After a few years, Alice left Bernard, running away to Bermuda with a man she met on the polo circuit. Alice and Bernard never officially divorced.

On May 1, 2020, Bernard was diagnosed with a terminal illness. Knowing that he would not live long and feeling quite generous, on May 5, Bernard decided to give the farm to his best friend, Donald. He had his attorney prepare and record a deed conveying the farm to Donald and Bernard as "joint tenants with the right of survivorship." Bernard also gave his friend, Edward, a pair of diamond studded riding boots, valued at $2,500, and an antique riding saddle, valued at $1,500. He had inherited the boots and saddle the year before when an uncle died and had kept them in a shed to which Bernard had the only key. On May 6, he gave a valuable painting to his friend, Frank, but told Frank that the painting needed to stay at the farm until after Bernard died so that Bernard could continue to enjoy the painting.

Alice heard that Bernard was sick, so she returned from Bermuda on May 15, in hopes of seeing Bernard before he died. She made it back to the farm and spent Bernard's last few days with him.

Bernard died on May 18. After Bernard's death, Alice was shocked to learn that Bernard had conveyed an interest in the farm to Donald and that Bernard had given away the boots, the saddle and the painting. She was also outraged to learn that Bernard had only left her $500. Bernard left the remainder of his estate, which consisted of stocks and bonds that he had accumulated both before and during his marriage to Alice, as well as miscellaneous farm equipment, to the Fund to Help Old Polo Horses. Because Bernard died in Loudoun County, his will was probated at the Loudoun County Circuit Court on June 15.

Alice claims she is entitled to receive the farm, the stocks and bonds, the farm equipment, the painting, the boots and the saddle. She believes that to get these items, she needs to claim an "elective share" of Bernard's augmented estate.

(a) Which of the following assets, if any, would be included in Bernard's augmented estate:

1. **the farm,**
2. **the stocks and bonds,**
3. **the painting,**
4. **the boots and saddle, and**
5. **the farm equipment?**

Explain each fully.

(b) Is Alice entitled to receive an elective share in Bernard's augmented estate and, if so, what is that share? Explain fully.

(c) Assume for this question that Alice is entitled to claim an elective share in Bernard's augmented estate. When must Alice make the election and when must she file a Complaint to determine the elective share? Explain fully.

* * * * *

(7)(a) The issue is what, if any, assets would be included in Bernard's augmented estate.

In the Commonwealth, a surviving spouse is entitled to a specific share of the deceased spouse's estate, if the deceased spouse died without a will or with a will leaving less than the statutory amount to the survivor. The augmented estate includes (1) the decedent's net probate estate, (2) the decedent's non-probate transfers to others, (3) the decedent's non-probate transfers to the surviving spouse, and (4) the surviving spouse's property and non-probate transfers to others. § 64.2-308.4.

The augmented estate does not include certain assets, such as (1) the value of any property received by the decedent, before or during the marriage to the surviving spouse, by gift, will, intestate succession, or any other method or form of transfer to the extent it was (a) received without full consideration in money or money's worth from a person other than the surviving spouse, and (b) maintained by the decedent as separate property; or (2) the value of any property excluded from the augmented estate. § 64.2-305. Probate property is property that is subject to the probate process, including real property not subject to a right of survivorship, personal property, stocks and bonds. Non-probate property includes property that would transfer outside of the estate, such as property that is owned with a right of survivorship.

Here, with the exception of the boots and saddle, all of the listed assets would be included in Bernard's augmented estate, and a surviving spouse would be entitled to a portion of the value of those assets.

1. Farm

Here, Bernard acquired the farm before he married Alice. Despite both of them living on the farm during their marriage, including when Alice returned to take care of Bernard, the facts do not indicate that Alice was ever a co-owner of the property. Therefore, when Bernard conveyed the farm to Donald and Bernard as "joint tenants with the right of survivorship." This is non-probate property as it would pass to another outside of the estate. Still, the value of the farm should be included in the augmented estate.

2. Stocks and Bond**s**

The stocks and bonds would also be included in the augmented estate. However, since Alice would be the recipient of stocks and bonds, the value of these items would be subtracted from the value of the augmented estate. § 64.2-306.

3. Painting

As explained below, any inter vivos gifts made during the marriage, may be included in the augmented estate unless the property was held separately by the decedent. In order to create a valid inter vivos gift, there must be donative intent, delivery, and acceptance. Donative intent is determined by the words of the grantor, and acceptance is presumed. When property is found to be in the possession of the grantor, it is presumed that delivery did not occur. This is a rebuttable presumption. If an attempted gift fails, the property would be included in the augmented estate. If a life estate is created, then only the value of the life estate would be a part of the augmented estate. Property is valued as of the decedent's death, except that property irrevocably transferred during the lifetime of the decedent is valued as of the date the transferee came into possession or enjoyment of the property if such date precedes the date of the decedent's death.

Here, there is a question as to whether an inter vivos gift was made. If the gift failed, then the painting is probate property, and would be included in the augmented estate. However, it could be argued that Bernard created a life estate in the painting, with a vested remainder in Frank. The facts read that Bernard "gave" the painting to Frank, but that the painting was to remain on the farm for Bernard's enjoyment until he died. If this is a valid conveyance, then the value of the life estate in the painting would be included in the augmented estate.

4. Boots and Saddle

Here, the boots and saddle would not be included in the augmented estate. Bernard made a valid inter vivos gift to Edward. Additionally, Bernard maintained this property separately. He had inherited the boots and saddle from his uncle died and kept them in a shed to which Bernard had the only key.

5. Farm equipment

As explained above, the value of the farm equipment would also be included in the augmented estate. It is personal property that was owned by Bernard at the time of his death. Although he died leaving a will devising this property to FHOPH, the value of this property would be included in the augmented estate.

(7)(b) The issue is whether Alice is a surviving spouse and thus entitled to receive an elective share in Bernard's augmented estate and, if so, what is that share since they may not have been married for more than 15 years.

A surviving spouse is someone who is legally married to the decedent at the time of the decedent's death. However, if a spouse willfully deserts or abandons the other spouse and such desertion or abandonment continues until the death of the other spouse, the party who deserted the deceased spouse shall be barred of all interest in the decedent's estate. § 64.2-308. If the surviving spouse claims the elective share within the permitted time frame, the surviving spouse is entitled to an amount equal to one half (1/2) of the decedent's "augmented estate" if the decedent left no children or their descendants. The elective share is calculated by first determining the value of the decedent's "augmented estate" and then applying the appropriate fraction (e.g. 1/2) to the value of the augmented estate. When the value of the elective share has been determined, the value of any assets that are considered to be a part of the "augmented estate" and that pass to the surviving spouse anyway, regardless of the election are credited against the value of the elective share and the remaining value of the elective share is satisfied from other property in the estate. Once the value of the augmented estate has been determined, the value of the elective share is determined by a multiplier based upon how long the couple was married, which ranges from 3% to 100%. In all cases, the surviving spouse is entitled to 50% of the final figure.

Here, Alice and Bernard were married and were never officially divorced. However, after a few years of marriage, Alice left Bernard and ran away with another man. An argument could be made that Alice abandoned the marriage. Still, Alice returned before Bernard death, and took care of him until he passed. Therefore, the abandonment did not continue until Bernard's death. As a surviving spouse, Alice would be entitled to a share of Bernard's augmented estate since he left a leaving less than the statutory amount to which Alice is entitled. As explained in (a), once the value of the augmented estate is established, this amount will be reduced in light of any property that would be inherited by Alice. That number would then be subject to the multiplier based on how long Alice and Bernard were married. The facts are not clear on when Bernard and Alice were married. We know they were married for at least a few years before Alice left, but also we do not know how much time passed from when Alice left to when Bernard died in 2020.

If they were married for 15 years or longer, Alice would be entitled to 100% of her elective share (i.e. 50% of the final figure of the augmented estate). This amount would continue to reduced based on the length of their marriage.

(7)(c) Process for Establishing a Claim to the Elective Share

This elective share claim must be made within six months from the later of (i) date of probate or (ii) date of qualification of a person to administer an intestate estate. § 64.2-308.12 (A). The surviving spouse must file the complaint to determine the elective share no later than six months after the filing of the election. § 64.2-308.12 (B).

Here, the will was submitted for probate on June 15, 2020. Alice would have six months from this date to make the election. Once the election is made, she would then have six months from that date to file the Complaint.

<u>Question 8</u> **UCC 9**

Bev, who lives in Roanoke, Virginia, decided to purchase an outdoor pizza oven to perfect her pizza recipe. She went to Creative Culinary Concepts (CCC), a local business engaged in the sale of home pizza ovens and other appliances. Bev selected a new wood burning model with a price tag of

$5,000, which CCC had just added to its inventory and placed in the showroom. Bev accepted CCC's offer to finance the purchase over 36 months and signed a Security Agreement memorializing the obligation. The CCC customer service representative promptly placed the Agreement in a file maintained by CCC in its office for all purchase money security agreements with its customers.

Several years ago, CCC borrowed money from Star Bank (Bank) to open the appliance store. Unbeknownst to Bev, in obtaining that loan, CCC had executed a Security Agreement which gave Bank a security interest in all of its inventory, including "inventory now owned, and inventory acquired in the future." After execution of the Security Agreement, Bank promptly filed a Financing Statement with the Virginia State Corporation Commission which included information regarding Bank and CCC's identities and addresses, as well as identifying information regarding the collateral of all inventory, including the same language pertaining to after-acquired inventory.

After delivery of the oven to her home, Bev began using it but soon realized that it took hours to create a wood burning fire capable of reaching the necessary temperatures to make even one pizza. She quickly lost interest, stopped paying the monthly payments to CCC and moved the oven into her garage. Soon thereafter, Bev sold the pizza oven for $2,000 to Warner, a neighbor who spotted the pizza oven in Bev's garage, who seemed undaunted by the amount of time it took to warm up. Warner was unaware of the fact that Bev had not fully paid off the oven at the time he bought it from her.

Behind on its own loan payments to Bank, CCC recently received a letter from Bank's counsel demanding up-to-date payment by CCC to avoid legal action, which would include enforcement of Bank's security interest against CCC's customers. CCC has responded to Bank's threats, in part, by contesting the validity of the after-acquired inventory language of the Security Agreement and denying that Bank has a security interest in any inventory acquired after the date CCC obtained the loan and signed the Security Agreement. CCC has also initiated legal proceedings against Warner upon realizing that he is now in possession of the oven. Warner contests CCC's claim, contending that he purchased the oven free of any security interest held by CCC.

DO NOT discuss any issue of the potential priorities between the creditors CCC and Bank.

(a) Was the Security Agreement between Bank and CCC limited to inventory owned by CCC at the time the Agreement was executed? Explain fully.

(b) Assuming Bank's security interest did extend to CCC's after-acquired inventory, did Bank have a valid security interest in the oven against Bev during the time she owned it? Explain fully.

(c) Did CCC obtain a perfected security interest in the oven when it sold and delivered it to Bev? Explain fully.

(d) Assuming that CCC obtained a valid security interest in the oven when it was purchased by Bev, how will the Court likely rule on whether CCC can successfully assert its interest against Warner? Explain fully.

* * * * *

(8)(a) No, the Security Agreement between Bank and CCC was not limited to inventory owned by CCC at the time the Agreement was executed. Instead, the Security Agreement covered not only

the inventory that CCC owned at the time the Agreement was executed but also the inventory acquired by CCC after the Agreement was executed.

Va. Code Ann. § 8.9A-204(a) provides that "a security agreement may create or provide for a security interest in after-acquired collateral." The Security Agreement "gave Bank a security interest in all of its inventory, including 'inventory now owned, and inventory acquired in the future.'" This language is sufficient to grant Bank a security interest in the inventory owned by CCC at the time CCC executed the agreement **and** inventory acquired by CCC after the execution of the Agreement.

While not directly asked by the question, Bank's security interest was attached to CCC's current and after-acquired inventory. Attachment requires (1) that "value has been given," (2) that "the debtor has rights in the collateral," and (3) that "the debtor has authenticated a security agreement" describing the collateral (or some other requirements not relevant to this problem have been satisfied). Va. Code Ann. § 8.9A-203(b)(1)-(3)(A). Here, Bank's loan satisfied the value requirement, CCC (the debtor) obtained rights in the current and after-acquired inventory when the inventory was acquired, and, as discussed above, CCC authenticated a security agreement describing the inventory, both currently owned and after-acquired. Therefore, the Bank's security interest was attached to CCC's current and after-acquired inventory.

Further, Bank's security interest was perfected. Va. Code Ann. § 8.9A-308(a) provides that "a security interest is perfected if it has attached and all of the applicable requirements for perfection . . . have been satisfied." As noted above, Bank's security was attached. An attached security interest in inventory may be perfected by the filing of a financing statement. Va. Code Ann. § 8.9A-310(a). Bank appears to have filed a financing statement proper in all respects with the Virginia State Clerk of the Corporation Commission, which is the proper place for the filing of financing statements in Virginia. Accordingly, Bank's security interest was attached, and Bank satisfied the applicable requirements for perfection. Therefore, Bank had a perfected security interest in CCC's current and after-acquired inventory.

(8)(b) No, Bank did not have a valid security interest in the oven against Bev during the time she owned the oven. Bank did have a valid security interest in the oven when owned by CCC (as discussed above), but Bev, as a buyer in the ordinary course of business, took the oven free of Bank's security interest.

The default rule is that, unless some exception applies, a security interest is effective against the parties, creditors, and buyers. Va. Code Ann. § 8.9A-201(a). Consequently, unless some exception applies, Bank's security interest in the oven would be effective against Bev, a buyer. However, Va. Code Ann. § 8.9A-320(a) provides an exception for a buyer in the ordinary course of business. This exception has three requirements: (1) the buyer must be a buyer in the ordinary course of business, (2) the buyer buys goods other than farm products, and (3) the security interest in question must have been created by the buyer's seller. Bev meets all of these requirements.

First, Bev is a buyer in the ordinary course of business. Va. Code Ann. § 8.1A-201(b)(9) defines a buyer in the ordinary course of business, requiring that the buyer buys (1) in good faith, (2) without knowledge that the sale violates the security interest, (3) in the ordinary course of business, and (4) from a person in the business of selling goods of that kind. All of these requirements appear to be satisfied here. There are no facts that indicate anything other than that Bev acted in good faith and without knowledge that the sale violates Bank's security interest. (In fact, it would be unusual if it did violate Bank's security interest as most security interests in inventory permit sales in the ordinary course of business.). Further, there are no facts that indicate anything other than that Bev purchased in the ordinary course of business from CCC, who is a person engaged in selling ovens. Accordingly, Bev is a buyer in the ordinary course of business.

Second, the oven is inventory in the hands of CCC, and, therefore, Bev did not buy farm products. Third, the security interest in question was created by CCC. CCC is the buyer's (Bev's) seller. Consequently, since all the requirements of the buyer in the ordinary course of business

exception are satisfied here, Bev took the oven free of Bank's security interest.

(8)(c) Yes, CCC did obtain a perfected security interest in the oven when it sold and delivered it to Bev. CCC's security interest attached to the oven and was perfected automatically upon attachment because it is a purchase money security interest in consumer goods.

Attachment requires (1) that "value has been given," (2) that "the debtor has rights in the collateral," and (3) that "the debtor has authenticated a security agreement" describing the collateral (or some other requirements not relevant to this problem have been satisfied). Va. Code Ann. § 8.9A-203(b)(1)-(3)(A). Here, CCC's financing of the oven over 36 months satisfied the value requirement. Upon purchasing the oven, Bev obtained rights in the oven (the collateral), and Bev "signed a Security Agreement memorializing the obligation," which presumably included a description of the oven. Accordingly, CCC's security interest in the oven sold to Bev was attached.

Va. Code Ann. § 8.9A-308(a) provides that "a security interest is perfected if it has attached and all of the applicable requirements for perfection . . . have been satisfied." CCC's security interest is attached, and it is also a purchase money security interest in consumer goods. A purchase money security interest is a security interest granted to secure an extension of credit to the buyer to enable the buyer to purchase the goods in question. Here, CCC extended credit to Bev to enable her to purchase the oven, and Bev granted CCC a security interest in the oven to secure that extension of credit. In addition, the oven is a consumer good because Bev uses it for personal, family, or household purposes. Therefore, CCC's security interest in the oven is a purchase money security interest in consumer goods.

A purchase money security interest in consumer goods is automatically perfected upon attachment. Va. Code Ann. § 8.9A-309(1). Therefore, even though CCC did not take any other steps to perfect its security interest in the oven, such as filing a financing statement, CCC's security interest in the oven automatically perfected upon attachment giving CCC a perfected security interest in the oven it sold and delivered to Bev.

(8)(d) The Court will likely rule that CCC cannot successfully assert its interest against Warner. CCC' did have a valid security interest in the oven when owned by Bev (as discussed above), but Warner, as a buyer of consumer goods who satisfies what is sometimes called the "garage sale exception", took the oven free of CCC's security interest.

The default rule is that, unless some exception applies, a security interest is effective against the parties, creditors, and buyers. Va. Code Ann. § 8.9A-201(a). Consequently, unless some exception applies, CCC's security interest in the oven would be effective against Warner, a buyer. However, Va. Code Ann. § 8.9A-320(b) provides an exception for a buyer of consumer goods who satisfies what is sometimes called the "garage sale exception". This exception has five requirements: (1) the Seller either bought or used the goods primarily for personal, family, or household purposes; (2) the buyer buys without knowledge of the security interest; (3) the buyer buys for value; (4) the buyer buys primarily for the buyer's personal, family, or household purposes; and (5) the buyer buys before the filing of a financing statement covering the goods. These five requirements are met in this situation.

First, as stated above, Bev bought and used the over as consumer goods, i.e., for personal, family, or household purposes. Second, the facts state that "Warner was unaware of the fact that Bev has not fully paid off the oven," which would lead to the reasonable conclusion that he bought without knowledge of the security interest. Third, Warner paid Bev $2,000 for the oven, which satisfied the value requirement. Fourth, while the facts are not entirely clear, it appears that Warner also bought the oven for personal, family, or household purposes. Certainly, nothing in the facts indicates that he bought the oven for purposes other than personal, family, or household purposes. Finally, CCC did not file a financing statement covering the oven (as noted above, CCC relied on automatic perfection in the oven instead of filing a financing statement). Thus, the Court is likely to rule that Warner's

purchase satisfied the "garage sale exception," allowing him to take the oven free of CCC's security interest.

Question 9 **Criminal Procedure**

Albert and Barry were lifelong friends. After graduating from college, they both got jobs in Richmond, Virginia. They began a tradition of going to happy hour every Friday after work. Their favorite bar was O'Reilly's Irish Pub (O'Reilly's). They became friendly with a bartender named Cathy. Albert began meeting with Cathy for dinner without Barry knowing. Unknown to Albert, Barry was also meeting with Cathy and wanted to pursue a relationship with her.

One Friday, Albert and Barry were drinking at O'Reilly's and Cathy was their bartender. Barry was drinking heavily when Albert told Barry that he had been dating Cathy. Barry was enraged when he learned this. Barry paid his tab and told Albert as he was leaving, "I am going to kill you."

Barry decided to drive around to cool off. When he drove by O'Reilly's, he saw Cathy and Albert kissing in the street. Barry accelerated his car rapidly directly at Cathy and Albert. Barry hit and killed Albert. Cathy saw the car and jumped away at the last minute. The car grazed her leg, but Cathy was not seriously injured. Barry's vehicle stopped after colliding with a parked car.

The police were called to the scene where they found Barry incoherent and unaware that he had been driving his car. He had no idea that his vehicle struck Albert. Barry agreed to perform field sobriety tests, which he failed. The police took Barry to the police station where his blood alcohol level was found to be far in excess of the legal limit to drive a motor vehicle. The police discovered the love triangle and learned that Barry made the statement that he would kill Albert when he left O'Reilly's in anger.

The Commonwealth's Attorney indicted Barry for first-degree murder of Albert, battery of Cathy, and for driving under the influence. On the day of trial, Barry pleaded guilty to driving under the influence. The judge found him guilty and convicted him of driving under the influence. Barry then pleaded not guilty to the charges of first-degree murder and battery. During presentation of the evidence on the murder and battery charges, the Commonwealth introduced all of the above facts into evidence. The Commonwealth also introduced evidence from a toxicologist that Barry's level of intoxication was so high that Barry was incapable of premeditation or deliberation.

When Barry's attorney had the opportunity to cross-examine the toxicologist, the toxicologist confirmed that Barry was so intoxicated that he was incapable of premeditation or acting with deliberation.

When the Commonwealth rested its case, Barry's defense lawyer immediately made a motion to strike the evidence of the first-degree murder charge and the battery charge in order to have the charges dismissed. He claims that when Barry was convicted of driving under the influence, any other charges connected with that conviction, such as the murder and battery charges, were prohibited by the double jeopardy clause of the Fifth Amendment of the U.S. Constitution.

Barry's attorney also moved to strike the evidence for the charges of first-degree murder and battery on the ground that the evidence presented by the Commonwealth proved that

Barry was incapable of premeditation or deliberation.

(a) How should the Court rule on the motion to strike based upon double jeopardy? Explain fully.

(b) What is the standard of review that the Court must use when considering the motion to strike and how should the Court rule on the motion to strike as to the first-degree murder charge if double jeopardy does not apply? Explain fully.

(c) How should the Court rule on the motion to strike as to the battery charge if double jeopardy does not apply? Explain fully.

* * * * *

(9)(a) The Court should overrule the motion to strike the evidence on both the first degree murder charge and battery charge on the alleged violation of Barry's Fifth Amendment double jeopardy rights. The answer requires application of the Blockburger elements test: essentially if an offense, considered in the abstract, contains an element that the other lacks, then prosecution is not prohibited under the Fifth Amendment. The crimes of murder, battery and drunk driving each contain at least one element that the other does not; for example, malice in murder, driving in drunk driving and rudeness or insulting manner.

(9)(b) The Courts may strike the evidence if, after considering the evidence in favor of the Commonwealth, the evidence is insufficient as a matter of law to sustain a conviction of the charge. The court should sustain the motion as to first degree murder because the evidence is undisputed that Barry was so intoxicated, even if voluntarily, that he could not deliberate or premeditate with respect to his actions. Such intoxication, therefore, is a defense to first degree murder which require that the accused be able to deliberate and premeditate his actions. However, Barry may be prosecuted for second degree murder. The motion to strike should otherwise be denied. The Commonwealth's evidence would clearly support convictions for second degree murder because the offense does not contain the elements of premeditation or deliberation and voluntary intoxication is not a defense.

(9)(c) Battery is the unlawful touching of another in an angry, rude or vengeful manner, without lawful excuse or justification. Specific intent to harm is not required to convict, nor is premeditation, deliberation or malice. Intoxication is not a defense. Although intoxicated, Barry was angry and drove his car at Albert and also struck Cathy. The evidence would clearly support a conviction of battery. The motion to strike should be overruled.