

Suggested Answers & Comments to the Essay Questions
on the July 2025 Virginia Bar Exam

Submitted by Jennifer Franklin

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Revision Date: August 31, 2025

Question 1. Domestic Relations

Winona is a successful social media influencer. In 2010, she married Harry, an unemployed cameraman. Harry remained unemployed during the marriage, but Winona's income allowed them to live an extravagant lifestyle.

In 2023, Winona discovered Harry was having an extramarital affair. She threw him out of the house where they resided in McLean, Virginia, and filed suit for divorce in the Circuit Court of Fairfax County on the grounds of adultery.

Harry moved into an apartment and filed a counterclaim for divorce alleging cruelty as the ground and seeking spousal support and equitable distribution of the marital property.

At trial, the evidence established Harry's adultery and that Winona and Harry did not cohabit for more than a year following the separation. In addition, the evidence established that Winona purchased the home in McLean in 2008 for \$3 million in cash. Winona also had an investment portfolio, the sole source of which was her earnings since 2011, and which was managed entirely by her financial advisor. The evidence established that, at the time of trial, the portfolio was valued at \$20 million.

At trial, Harry's attorney made an oral motion to amend his counterclaim to change the ground for divorce from cruelty to the no-fault ground that Winona and Harry had been separated for a year. Over Winona's objection, the court granted the motion.

In January 2025, almost a year after the trial ended, the court issued a decision denying Winona a divorce on the ground of adultery; granting Harry a no-fault divorce based on the one-year separation; and awarding Harry one-half the value of the home in McLean, an equitable distribution of 10% of the investment portfolio valued as of the time of trial, and spousal support of \$20,000 per month to be paid by Winona.

Between the time of the trial and the court's decision, the investment portfolio increased in value from \$20 million to \$25 million due solely to the stock market and the management efforts of Winona's financial advisor. Harry's attorney made a motion to reopen the trial in order to revalue the investment portfolio to reflect the higher current value. The court granted the motion.

Did the court err:

(a) In granting Harry's oral motion to change the grounds of his counterclaim for divorce and awarding him a divorce based on the one-year separation? Explain fully.

(b) In granting Harry's motion to reopen the trial for the purpose of revaluing the investment portfolio? Explain fully.

(c) In awarding Harry one-half of the value of the McLean home? Explain fully.

(a) The court did not err in granting Harry's oral motion to amend his counterclaim and in granting him a divorce based on the grounds of living separate and apart for the one-year statutory period. Harry made his oral motion at trial and the court found that the parties had been living separate and apart for more than a year. Virginia Code §20-91 and Rule 1.8 are the controlling law on this issue. Rule 1.8 states that leave to amend is discretionary and is to be liberally granted to attain the ends of justice. The Rule specifically mentions the ability to make an oral motion to amend. Virginia Code §20-91 states that upon "application of either party" the court can grant a divorce on the grounds that the parties had been separated for more than a year. Moreover, the trial court has the authority to find that neither party met its burden of proof on either of the fault grounds set forth in their respective pleadings but that sufficient grounds existed at the time of the entry of the final decree of divorce based upon a one-year separation. See Williams v. Williams, 14 Va. App. 217, 220 (1992) (it rests within the sound discretion of the judge to determine on what grounds to grant a divorce when multiple grounds are demonstrated).

(b) The court did not err in granting Harry's motion to reopen the trial for the purpose of reevaluating the investment portfolio because the matter was still pending and, therefore, within the control of the trial court. Virginia Code §20-107.3 states that the court shall determine the value of property for purposes of equitable distribution as of the date of the evidentiary hearing unless a motion was filed no later than 21 days before the evidentiary hearing. Although Virginia Code §20-107.3 appears to limit the authority of the court to reopen this trial for reevaluation, some Virginia precedent indicates that in the interests of obtaining a just and fair result, the court can use a valuation date other than the evidentiary hearing even if a motion was not made within the time limit set forth in §20-107.3. See Shooltz v. Shooltz, 28 Va. App. 264, 270- 271 (1998) ("we find that the trial court erred in concluding that Code §20-107.3 barred it from reopening the hearing on the valuation of assets"). Separately, Rule 1:1 would not apply here because no final order had yet been entered. Here, the court had authority to exercise its discretion to reopen the trial for revaluation and did not err in doing so. Almost a year passed between time the trial ended and the order. During that time, market forces caused the portfolio to increase in value \$5 million. To attain the ends of justice, the trial court had the discretion to reopen the trial. As a result, the trial court did not err.

[Note: Given the language of §20-107.3 and no controlling Supreme Court precedent interpreting it, it is reasonable that exam takers might conclude that §20-107.3 precludes the court from reopening the trial for revaluation.]

(c) The trial court erred in awarding Harry one-half of the value of the McLean home. Virginia Code section 20-107.3 is the controlling law on this issue. This section defines separate property as all real and personal property acquired by either party before the marriage (as well as other scenarios). Any increase in the value of separate property continues to be separate property

if not attributable to the personal effort of either party or contributions from marital property. Any personal efforts made by a party must be significant and result in a substantial appreciation of the separate property to be considered marital. Personal effort is defined as any labor, effort, inventiveness, physical or intellectual skills, creativity or managerial or marketing activity applied directly to the separate property. The non-owning spouse has the burden of proving that any contributions of marital property or personal efforts were made and that there was an increase in the value of the property. If that is proven, the burden switches to the owning spouse to prove the increase in value or some portion thereof was not caused by contributions of marital property or personal effort.

The McLean home was purchased by Winona in 2008, prior to the parties' marriage in 2010 so it is presumed to be her separate property at the start of the analysis. The evidence established that the home was paid for in full for \$3 million cash. There was no evidence that the home was ever retitled into both parties' names or that any improvements to the home were made during the marriage that increased its value. In addition, the property had no mortgage or other debt so there were no marital funds used to pay down any outstanding mortgage or other lien on the property. Therefore, the home remains Winona's separate property.

(d) If the court failed to consider the factors in Virginia Code §20-107.1 in fashioning the award, then it erred. Virginia Code section §20-107.1 is the controlling law on this issue. This section sets forth a list of factors that the court must consider when ordering one spouse to pay spousal support to another. Failure to consider the factors would be error. The court must also consider that Winona filed for divorce on the ground of adultery and Harry filed on the ground of cruelty. §20-107.1 states that no maintenance and support shall be awarded from a party if there exists in such spouse's favor a ground of divorce for adultery. The divorce decree need not be issued on the ground of adultery for this rule to apply. *Williams v. Williams*, 14 Va. App. 217, 220 (1992). However, the court may make a spousal support award notwithstanding the adultery if the court determines from clear and convincing evidence that a denial of support and maintenance would constitute a manifest injustice, based upon the respective degrees of fault during the marriage and the relative economic circumstances of the parties. The purpose for the exception is to protect against leaving a spouse destitute.

Here, the Court's ruling indicates that there may not have been sufficient evidence for either party's fault grounds to prevail. Even if the Court had found that Harry committed adultery, that would not be a complete bar to his spousal support claim if the Court finds that based on the respective degrees of fault and relative finances of the parties not awarding spousal support would constitute a manifest injustice. The facts are clear that Winona was always the only wage earner during the marriage. In addition, the parties lived an extravagant lifestyle, relying on Winona's income. The parties were married for 13 years and Harry was completely absent from the job market. There are no facts to indicate whether his age or health prevent him from obtaining employment. The facts indicate he was a cameraman prior to marriage, suggesting he could obtain employment again in that field. The Court did not err so long as it clearly considered the factors of §20-107.1, along with Winona's ability to pay and Harry's need for support, in rendering a decision on the amount and duration of support. As to Winona's ability to pay, the facts do not indicate exactly how much income Winona has per month, but they do indicate that Winona's only source of income is the return earned on the \$20-25 million investment portfolio. The court would have needed to consider whether that income on the portfolio gives her the ability to pay Harry \$240,000 per year in spousal support.

Question 2. Contracts

Roofco, Inc. (Roofco) was a supplier of roofing materials to construction companies in Virginia. It entered into the following written contracts with companies with ongoing projects.

American Construction, Inc. (American) ordered 250 sheets of five-ply construction grade plywood to be delivered to a specified construction site. Roofco's driver made the delivery and deposited the load, at the direction of American's foreman, just inside the chain-link fence surrounding the construction site. Later in the day, American's foreman realized that the plywood was three-ply, not the five-ply ordered. He called Roofco and told them about the mistake, and asked Roofco to deliver the requested five-ply plywood and pick up the three-ply load the next morning. At the end of the day, American's foreman pulled the chain-link gate to the site shut, without locking it. That night, some neighborhood children who had been frequently seen playing in the construction site after hours, entered the site, took 15 sheets of the plywood and used them to build a tree house. The next day, Roofco delivered the five-ply shipment, picked up the remaining 235 sheets of three-ply, and added the cost of the 15 missing sheets to American's bill. American refused to pay for the missing sheets, asserting that, but for Roofco's misdelivery, the plywood would have been moved and used on the site the day before.

East Coast Contractors (East Coast) ordered 20 bundles of black asphalt shingles from Roofco, to be delivered to East Coast's building site. Roofco made the delivery, and soon after the shingles were unloaded and the driver left, East Coast's building superintendent discovered that 10 bundles of the shingles were brown and the other 10 bundles were dark grey. He immediately called Roofco, reported the discovery, and told Roofco to come pick up all of the shingles and replace them with shingles that were black. Roofco informed East Coast's superintendent that black shingles were currently in short supply and that East Coast would have to wait at least a week to get replacements. After thinking about it, and without notifying Roofco, East Coast's superintendent concluded that he could use the 10 bundles of grey shingles at the building site.

In the meantime, Roofco sold those same 10 bundles of grey shingles at a substantial premium to another builder. When Roofco's driver arrived the next morning to pick up all of the shingles, East Coast's superintendent said that he would return only the brown shingles that he could not use and was keeping the grey shingles. Roofco insisted that it was entitled to the return of the entire shipment of 20 bundles of shingles. East Coast insisted that it was entitled to reject part of the shipment and keep the balance.

(a) What are the respective rights and obligations of Roofco and American with regard to the 15 missing sheets of plywood? Explain fully.

(b) What are the respective rights and obligations of Roofco and East Coast with regard to the 20 bundles of shingles? Explain fully.

[a] While Roofco breached its contract with American, it cured its breach. After American rejected the nonconforming goods, it had a duty to hold the goods with reasonable care. A fact issue exists regarding whether American acted reasonably in leaving the nonconforming plywood in an unlocked construction yard. Based on the facts presented, it is difficult to say whether American acted reasonably. If American acted reasonably, Roofco is responsible for the value of the stolen plywood. If American acted negligently, Roofco is not responsible for that loss.

Roofco and American entered into a contract for the sale of goods either by a promise to

ship or by the delivery of goods. Even delivery of nonconforming goods would create a contract under Virginia Code § 8.2-206(1)(b). Accordingly, at the time of delivery, a contract for the sale of 250 sheets of five-ply plywood existed between Roofco and American.

American was entitled to a “perfect tender” of goods conforming to the contract under Virginia Code § 8.2-601. Accordingly, delivery of 250 sheets of three-ply rather than five-ply plywood entitled American to reject the tender, and it did.

Breaching sellers in contracts for the sale of goods have a right to cure their defective tender if there is still time left to perform or if they made the tender with reasonable grounds to believe it would be acceptable under Virginia Code § 8.2-508. The facts do not suggest that either the time for performance has expired or that the seller had no reasonable grounds to believe its tender would be acceptable, so Roofco exercised its right to cure its defective performance and cured by tendering 250 sheets of five-ply plywood.

Generally, where a nonconforming tender gives the buyer a right of rejection, the risk of loss to the goods remains on the seller until cure or acceptance under Virginia Code § 8.2-510(1). Because Roofco was the breaching party, the risk of loss to the goods generally remained with Roofco until its cure. However, a buyer who rightfully rejects goods after taking physical possession of them has a duty to hold the goods with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them under Virginia Code § 8.2-602(2)(b). There is a fact issue regarding whether closing but not locking the gate satisfied American's obligation under Virginia Code § 8.2-602(2)(b). Children had been frequently seen playing in the construction site after hours. This creates a fact issue of whether American acted reasonably by leaving the plywood unattended and unlocked after hours. If American acted reasonably, Roofco bears the risk of loss under Virginia Code § 8.2-510(1). If American acted negligently, American is responsible for the stolen sheets of plywood under Virginia Code § 8.2-602(2)(b).

[b] While Roofco breached its contract with East Coast, it has a right to cure its nonconforming tender, and East Coast's rejection precluded East Coast from keeping the grey shingles after rejecting them.

Roofco and East Coast entered into a contract for the sale of goods either by a promise to ship or by the delivery of goods. Even delivery of nonconforming goods would create a contract under Virginia Code § 8.2-206(1)(b). Accordingly, at the time of delivery, a contract for the sale of 20 bundles of black shingles existed between Roofco and East Coast.

East Coast is entitled to a “perfect tender” of goods conforming to the contract under Virginia Code § 8.2-601. Accordingly, delivery of 10 bundles of brown shingles and 10 bundles of grey shingles, rather than 20 bundles of black shingles, entitles East Coast to reject the tender. Ordinarily, a buyer may accept a commercially reasonable unit and reject the rest under Virginia Code § 8.2-601. However, East Coast did not reject only the 10 bundles of brown shingles and accept 10 bundles of grey shingles. Instead, East Coast rejected all of the shingles. Once East Coast rejected the tender, any exercise of ownership by the buyer with respect to the rejected goods is wrongful as against the seller under Virginia Code § 8.2-602(2)(a). As a result, East Coast has no right to retain the 10 bundles of grey shingles, and Roofco is entitled to the return of all 20 bundles of shingles.

Question 3. Professional Responsibility

Carla Client retained Larry Lawyer to represent her in a civil lawsuit. Larry prepared a fee agreement covering the legal services Larry would provide to Carla in connection with the lawsuit. The fee agreement required a \$5,000 retainer and said that Larry was to be paid \$200 per hour for the legal work he did on Carla's case. The fee agreement also contained the following clause: "Any disputes between Larry and Carla will be resolved through mandatory binding arbitration." The arbitration clause, among other provisions, limited Carla's right to a jury trial, limited her right to conduct discovery, and limited her right to appeal any adverse arbitration award. Carla paid the \$5,000 retainer and she and Larry signed the fee agreement. Larry and Carla did not discuss the arbitration clause when the fee agreement was signed.

A month after he was hired, Larry sent Carla a \$3,000 bill for legal work he had done on the case. Carla objected to the bill, believing that Larry only did \$1,000 worth of work. Carla fired Larry and demanded a \$4,000 refund of the retainer. She also demanded her entire file, including Larry's notes, work product, pleadings, correspondence, and communications within the firm that concern her even if not directly related to her case.

- (a) What are Larry's ethical obligations with respect to the \$5,000 retainer? Explain fully.**
- (b) What are Larry's ethical obligations with respect to Carla's client file? Explain fully.**
- (c) Can Larry ethically seek to enforce the arbitration clause? Explain fully.**

* * * *

The issues raised throughout Question 3 are primarily covered by the Virginia State Bar's Rules of Professional Conduct, Rule 1.5 (fees) and Rule 1.16 (declining or terminating representation).

- (a) What are Larry's ethical obligations with respect to the \$5,000 retainer? Explain fully.**

An attorney is generally required to return any unearned portion of a retainer upon termination of the representation. *See* Rule 1.16(d). At the same time, not every advanced retainer is a prepayment of fees. Comment [11] to Rule 1.5 provides, "A retainer paid to ensure the lawyer's availability for future legal services and/or as consideration for the lawyer's unavailability to a potential adverse party is not an advanced legal fee and is earned when paid."

Here, Client Carla comes to Larry Lawyer to help her immediately with a civil lawsuit, so the retainer would not be seen as a fee to ensure the lawyer's future availability. Rather, it should be understood as the advanced payment of a fee, and Larry Lawyer "is obliged to return any unearned portion." *See* Comment [4] to Rule 1.5. *See also* Rule 1.16(d) ("refunding any advance payment of fee that has not been earned").

Larry agrees that he, at most, performed only \$3,000 worth of legal work before he was fired by Carla. Thus, he must immediately return \$2,000 to Carla as the undisputed, unearned portion.

(b) What are Larry’s ethical obligations with respect to Carla’s file? Explain fully.

Larry Lawyer is barred from withholding Carla’s file as leverage in any dispute with her over the payment of fees. *See* Rule 1.16(e). He must return, within a “reasonable time,” the following items: documents provided to him by Carla; “any originals of legal instruments or official documents;” communications between Larry Lawyer and Client Carla (e.g., attorney-client privileged communications); communications between Larry Lawyer and any third parties concerning the case; and all documents generally considered to be covered under the attorney work product doctrine (e.g., drafts of pleadings, interrogatory responses, investigative reports, legal memos, working and final drafts of legal instruments, etc.).

Carla also seeks Larry Lawyer’s notes, work product, etc., that “concern” Carla even if not “directly related to her case.” Generally, these categories of documents (especially attorney work product documents) should be turned over to Carla to aid her future attorney in representing her. However, there are some documents related to internal firm management that are not part of Carla’s file and may be kept from her: e.g., memoranda relating to management of the firm’s conflicts of interest and internal documents discussing any “difficulties arising from the lawyer-client relationship.” *See* 1.16(e).

In sum, it is Larry Lawyer’s obligation to maintain an accurate and complete client file so that he can turn it over to Carla “one time ... upon termination.” *Id.*

(c) Can Larry ethically seek to enforce the arbitration clause? Explain fully.

In this case, Larry Lawyer has an obligation to fully and adequately explain the retainer agreement, including an explanation of the arbitration clause. *See* Rule 1.5(b). Larry therefore failed in his obligation to discuss the arbitration clause when the fee agreement was signed. While every detail of the agreement did not need to be explained in advance of beginning to work on the case, that discussion should have taken place “before or within a reasonable time after commencing the representation.” *See id.*

That said, the Virginia State Bar does maintain a Fee Dispute Resolution Program (https://vsb.org/Site/03_Legal-Help/fee-dispute.aspx), which does include an option for binding arbitration. Indeed, Comment [9] to Rule 1.5 envisions use of an arbitration procedure “established by the bar.” This Comment goes on to state that the attorney “should comply with the prescribed procedure.”

The purpose of the Virginia State Bar’s arbitration process, it might be said, is to help attorneys and clients cheaply and expeditiously resolve their fee disputes. To serve those ends, binding arbitration does require limiting the parties’ rights to a jury trial, to conduct discovery, and to appeal.

Larry thus can ethically seek to use arbitration to resolve the fee dispute so long as Carla reasonably understood what she was giving up in signing a retainer agreement with an arbitration clause. Alternatively, Larry and Carla can now agree to submit to the State Bar’s Fee Dispute Resolution Program, including use of binding arbitration.

Question 4. Local Government

On March 1, 2024, a major snowstorm arrived in the City of Petersburg, Virginia (the City). The snow accumulated faster than it could be removed from the streets and sidewalks.

Alton, a City resident, was out of food and concerned about the storm, so he traveled to City Market (the Market) to obtain food and other supplies. Although a store employee had been sweeping the snow off its walkways periodically, the snow kept accumulating rapidly. As he walked toward the front door of the Market, Alton slipped on the snow that had accumulated on the sidewalk in front of the Market and injured his knee. As a result, Alton could not walk and had to be transported to the hospital by the City's paramedic rescue squad.

En route to the hospital, the ambulance transporting Alton was hit by a truck at the intersection of Main and King Streets in the City. The truck driver failed to stop because the traffic light at the intersection malfunctioned. Alton suffered a concussion, multiple lacerations, and contusions as a result of this collision.

While waiting in the hospital emergency room with Alton, the City's paramedic filled out a standard City accident report regarding the traffic collision. He submitted the report to the City's Fire Chief, as required by City policy.

Upon his release from the hospital on March 5, 2024, Alton visited his attorney and told her he wanted to sue the City. At a neighborhood association meeting on March 15, Alton's attorney saw the City's Fire Chief, told him about what had happened to Alton, and mentioned that Alton intended to sue the City. When he returned to his office later that day, the Fire Chief called the City Attorney, advised him of the conversation with Alton's attorney, and sent the City Attorney a copy of the accident report submitted earlier by his paramedic.

On December 1, 2024, Alton's attorney sent a letter to the City Attorney advising him of Alton's injury, the date of the injury, the location of the injury, and of Alton's allegation that the City was liable for the injuries he suffered in the collision.

Alton, thinking he would help his lawyer and save some legal fees before his lawsuit was filed, sent a letter by U.S. mail, addressed to the Mayor and members of the City Council, demanding the opportunity to review "all documents (including any e-mails) pertaining to safety inspections, maintenance, and repairs of the City's traffic lights at the intersection of Main and King Streets for the time period January 1, 2023 to the present." The letter made no reference to the collision and listed Alton's residence address for the purpose of a reply. The letter was received by the Mayor and City Council on December 15, 2024.

In January 2025, the attorney filed an action for Alton against the City. The Complaint alleged that the City was liable for Alton's injuries resulting from the collision because it had negligently maintained the traffic light.

(a) What defenses, if any, does the City have to Alton's claim? Explain fully.

(b) Is the City obligated to allow Alton to review the requested documents even though his attorney has not initiated formal pretrial discovery in connection with his lawsuit? Explain fully.

* * * * *

(a) What defenses, if any, does the City have to Alton's claim? Explain fully.

The City's best defense is sovereign immunity. The question is whether the city conduct complained of constitutes a governmental function, thereby enjoying immunity, or constitutes proprietary conduct, which is not covered by immunity. Governmental functions which qualify for immunity include those actions taken for the general health, safety or welfare of the public, and those actions which result from the City's exercise of its legislative or political discretion or authority. Proprietary functions are those which are performed for the benefit of the City, and which are ministerial in nature involving no exercise of discretion by the City actor.

While the maintenance of a city street has been found to be proprietary, City of Richmond v. Branch, 205 Va. 424 (1964), the planning of streets or regulation of traffic is a governmental function. Transportation, Inc. v. City of Falls Church, 219 Va. 1004 (1979). While maintenance of roads is proprietary, **the maintenance of traffic lights is governmental** because traffic lights affect the regulation of traffic. Id. Therefore, the City is entitled to immunity.

[Note: An exception would exist if the city were found to have been grossly negligent in its maintenance of the traffic light, however, there are no facts to suggest this was the case.]

[Note: Because the claim deals explicitly with the negligent maintenance of the traffic light, the above portion of the answer alone would likely be sufficient.]

Any argument that Alton failed to comply with Code section 15.02-209, which requires that a plaintiff with a claim for negligence provide notice to any city, town, or county within 6 months of the accrual of the action would likely fail. Such notice is required to be written and state the nature of the claim, including the time and place where the injury occurred. The statement is to be filed by the claimant, his attorney or representative, and must be filed with the county, city or town attorney or with the chief executive or mayor of the county, city or town. It is deemed filed when received in the of the appropriate official. This is not a jurisdictional requirement so the city would have to raise it. The statute, however, also provides "Failure to provide such statement shall not bar a claim against any county, city, or town, provided that the attorney, . . . , had actual knowledge of the claim, which includes the nature of the claim and the time and place at which the injury is alleged to have occurred, within six months after such cause of action accrued."

Here, Alton was injured on March 1, 2024, and thus, he had until September 1, 2024 to comply with the notice provision of 15.02-209. The facts indicate that a paramedic filled out a standard incident form and submitted the accident report to City's Fire Chief. Alton's attorney verbally told the City's Fire Chief on March 15 that Alton intended to sue. The Fire Chief then informed the City Attorney over the phone and sent the City Attorney the accident report filled out by the paramedic. Alton's attorney then sent a letter to the City Attorney on December 1, 2024.

Because December 1, 2024 is well outside the 6-month window, Alton's attorney's letter to the City Attorney was too late. However, assuming the accident report contained the appropriate information regarding the traffic light, that report along with the information passed on to the City Attorney would provide actual knowledge of the nature of the incident, as well as the time and location of the incident. The City Attorney, therefore, had actual knowledge and the City should lose on this defense.

(b) Is the City obligated to allow Alton to review the requested documents even though his attorney has not initiated formal pretrial discovery in connection with his lawsuit? Explain fully.

Yes. VFOIA provides a non-judicial mechanism for Virginia residents to obtain public records. Va. Code § 2.2-3704 provides that, “Except as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records. Access to such records shall not be denied to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth.”

Va. Code § 2.2-3701 defines “public records” as “all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.”

Here, Alton is a resident of the city and thus a citizen of Virginia. He has requested public records related to maintenance and inspection of a traffic light, including emails, which qualify as “public records” because by their nature, email is an electronic writing or recording.

Therefore, the City is obligated to allow Alton to review the requested documents.

Question 5. Real Property

Walt owned Whiteacre, a large tract of land on top of a mountain in Alleghany County, Virginia, upon which he wanted to develop a subdivision. Whiteacre was not landlocked, but access to Whiteacre from the closest public road was circuitous and extremely difficult. Walt's sister, Gwen, owned Greenacre, an adjoining parcel of land where she raised horses. Access to and from Greenacre was equally difficult.

Bradley owned Blackacre, a parcel adjoining Greenacre and fronting on the highway. Several years ago, Bradley had granted Gwen an easement to use a private road running across Blackacre to the highway. The recorded easement stated that, "This easement shall be for access to the horse farm on Greenacre." There were no public rights of passage over this private roadway.

Gwen decided to move out of the area and she orally offered to sell Greenacre to Walt for \$200,000. Walt, believing the easement across Blackacre would solve the access problem and allow him to develop Whiteacre, orally accepted Gwen's offer. He immediately wrote a check payable to Gwen for \$200,000, making the following notation in the memo line at the lower left corner of the check: "For purchase of Greenacre." Gwen promptly endorsed and cashed the check and left on a vacation.

When Gwen returned, Walt asked her to sign a deed conveying Greenacre to him. Gwen said she had changed her mind about selling Greenacre and offered to refund Walt's money. She told Walt that she did not believe that she was bound by any sale because she had only orally agreed to sell the land to Walt.

Walt filed suit against Gwen for specific performance, and the court, holding that Gwen and Walt had entered into a binding, enforceable contract, granted Walt specific performance. Title to Greenacre, including the easement across Blackacre, was conveyed to Walt by the court.

Walt thereafter subdivided Whiteacre and Greenacre into 25 wooded lots and advertised them for sale. His advertising material contained a map showing that access between the lots and the highway was on the road across Blackacre.

Bradley then sued Walt to enjoin Walt's use of the easement to serve the 25 lots in the subdivision. Walt filed an answer and counterclaim against Bradley. In the counterclaim, he alleged as grounds for relief that, "Walt and his successors in interest have the right to cross Blackacre for access to all the lots in the subdivision either (i) by reason of the extreme difficulty of otherwise obtaining access to said lots or, in the alternative, (ii) by reason of the existing easement heretofore granted by Bradley."

(a) Did the court rule correctly in granting specific performance of the agreement for the sale of Greenacre between Walt and Gwen? Explain fully.

(b) How should the court rule on each of the grounds alleged in Walt's counterclaim? Explain fully.

* * * * *

(a) Did the court rule correctly in granting specific performance of the agreement for the sale of Greenacre between Walt and Gwen? Explain fully.

The issue is whether the court ruled correctly in granting specific performance of the agreement for the sale of Greenacre between Walt and Gwen since the check can serve as a

memorandum and it is signed by Gwen.

Ordinarily, an oral agreement to sell real estate would not be enforceable because it would violate the statute of frauds. [Va. Code §11-2(6)]. Ordinarily, a written memorandum would take an oral agreement outside the statute of frauds—and allow it to be enforceable—if the written memorandum identifies the subject of the contract, is sufficient to indicate a contract has been made, and includes the essential terms of such contract, as well as be signed by the party to be charged. *Drake v. Livesay*, 231 Va. 117 (1986) (a subsequent letter confirming the oral agreement was enough to satisfy the writing requirement). The Virginia Supreme Court liberally has accepted all manner of writings. When the bar is removed it is the oral contract which is subject to enforcement not the memorandum. Specific performance is an equitable remedy typically employed to enforce a contract for unique property, such as land.

Here, Gwen, owned Greenacre and she orally offered to sell Greenacre to Walt for \$200,000. This oral agreement would not serve as a valid contract to sale Greenacre. However, Walt immediately wrote a check payable to Gwen for \$200,000, making the following notation in the memo line at the lower left corner of the check: "For purchase of Greenacre." Gwen promptly endorsed and cashed the check. The check shows that it is to be used for the purchase of Greenacre. It is also signed by Gwen, the party to be charged. Therefore, the check should serve as an acceptable memorandum or note to satisfy the statute of frauds.

Walt may also be able to argue for enforceability of the contract based on part performance. An oral contract for the sale of land may be enforceable, despite the lack of writing, if the court find sufficient evidence of a contract based on part performance of the parties. To make that determination, the court will consider factors such as payment of all or part of the purchase price, possession by the buyer and improvements made by the buyer. Here, Walt paid the entire purchase price, which may be sufficient evidence of the contract for the court to enforce it based on part performance.

Therefore, the court ruled correctly in granting specific performance of the agreement for the sale of Greenacre between Walt and Gwen since the check can serve as a memorandum and it is signed by Gwen.

(b) How should the court rule on each of the grounds alleged in Walt's counterclaim? Explain fully.

(i) Easement across Blackacre

In the Commonwealth, an easement can be established in several ways, including by an express grant or by implication. An easement may not be transferrable to others unless it is an easement appurtenant, which is designed to benefit a specific piece of land. Unlike the easement appurtenant, an easement in gross is not attached to the land. Instead, it's specific to an individual or an entity, making it personal in nature.

Here, Bradley owned Blackacre, a parcel adjoining Greenacre and fronting on the highway. Several years ago, Bradley granted Gwen an easement to use a private road running across Blackacre to the highway. This easement was recorded. While it was difficult to access Greenacre from a public road, it was not landlocked. The easement made it easier to access Greenacre since Blackacre abutted a public highway. Without more facts, it is unclear if this easement was for Gwen's personal use (which would make the easement non-transferrable), or if it was designed to benefit Greenacre specifically. If the latter, then the easement would be transferrable to a

subsequent owner. Additionally, as argued in Part (a), the court correctly granted specific performance of the sale of Greenacre, which included the transfer of title to Greenacre and the easement across Blackacre.

Therefore, Bradley's express easement to Gwen was transferrable to Walt, and Walt has an enforceable easement.

(ii) Scope of the Easement

Unless otherwise provided for in the terms of an easement, the owner of a dominant estate shall not use an easement in a way that is not reasonably consistent with the uses contemplated by the grant of the easement, and the owner of the servient estate shall not engage in an activity or cause to be present any objects either upon the burdened land or immediately adjacent to such land that unreasonably interferes with the enjoyment of the easement by the owner of the dominant estate. § 55.1-305

Here, Walt faces two issues with the use of the easement. First, the purpose of the easement was to "access to the horse farm on Greenacre." The easement does not expressly extend to Blackacre, and the facts do not support that Gwen ever used the easement across Blackacre to travel through Greenacre to get to Whiteacre. Such use may be outside the scope of the easement as originally intended. Second, and more importantly, what is clearly outside the scope of the easement is that it be used as a public access point to enter Greenacre or Whiteacre. In fact, the recorded easement clearly reads that the easement was not for a "public rights of passage over this private roadway." As well, it was most likely intended to only be used by Gwen. The fact that Walt wants to subdivide Whiteacre into 25 plots would greatly increase the traffic across Blackacre. Finally, Whiteacre is not landlocked. Although access to Whiteacre from the closest public road is circuitous and extremely difficult, this is not a basis for expanding the scope of the easement.

Therefore, Walt's intended use of the easement is outside the scope of its intended use, and cannot be used as a basis for accessing Blackacre.

Question 6. Civil Procedure

Jamie and Devon married in 2012 and resided in Lebanon, Virginia. In late 2023, Jamie began having an affair with another woman and eventually left Devon and moved in with the other woman. In 2024, Jamie decided to file for divorce from Devon.

To avoid attorney's fees, Jamie turned to a "do-it-yourself" divorce website, where he obtained forms for a "Complaint for Divorce" and a "Summons." In a space in the Complaint form in which the "grounds of divorce" were to be stated, Jamie typed, "I wish to divorce Devon because the thrill of our marriage is gone."

After completing the forms, Jamie filed the documents with the local circuit court clerk and delivered file-marked copies of the Summons and Complaint to the sheriff's office to be served on Devon. The deputy sheriff serving the documents went to Devon's home in Lebanon; however, Devon was not there, but her seventeen-year-old daughter, who also lived in Devon's home, answered the door. The sheriff handed the documents to Devon's daughter, explained their importance, and told her to give them to her mother when she got home. When Devon got home, her daughter gave her the documents, and Devon promptly retained an attorney to represent her in the divorce proceedings.

Devon's attorney moved to quash the service of process on her due to defective service. The judge denied the motion to quash. Immediately thereafter, Devon's attorney filed a demurrer requesting the court to dismiss Jamie's Complaint on the ground that the Complaint failed to state a proper ground for divorce and therefore failed to state a claim. The judge overruled the demurrer. Without objection from Devon's attorney, a hearing ensued in which Jamie was granted a divorce from Devon. At the same hearing, the marital assets of Jamie and Devon were divided between them. A final order memorializing the judge's decisions was entered on December 1, 2024.

In the spring of 2025, Devon found out that Jamie had lied about his financial status when he testified at the divorce hearing and that he had hidden marital funds in several offshore bank accounts. On April 1, 2025, Devon's attorney filed with the court a request for leave to file a Bill of Review. In the request, Devon's attorney stated the sole ground for the request was that, after entry of the court's final order, Devon had for the first time discovered new evidence (the hidden offshore accounts), that was substantial and would have altered the judge's division of property. The judge denied the request for leave, ruling that it had been untimely filed, and, in addition, that the grounds asserted for a Bill of Review were inadequate.

- (a) Did the judge err by denying Devon's motion to quash service? Explain fully.**
- (b) Did the judge err by overruling Devon's demurrer? Explain fully.**
- (c) Did the judge err in her ruling concerning Devon's Bill of Review? Explain fully.**

* * * * *

(a) The judge did not err by denying Devon's motion to quash service. The issue raised is whether service by the sheriff upon Devon's daughter was proper.

Service of process on natural persons in Virginia involves a hierarchy of methods under the service statutes: 1. personal service; 2. substituted service; and 3. constructive service. These are not alternatives but successive methods ranging in descending order from the most effective to least effective and are applicable to divorce actions. Thus, personal service must be reasonably attempted before substituted and constructive service. If a party to be served is not found at her

usual place of abode, substituted service may be made by delivering a copy of the process to a family member found there who is 16 years or older and not a temporary sojourner or guest. The process server must give information of the import of the process to such family member. Process may be served by a sheriff or a disinterested person 18 years or older.

Here, the deputy sheriff went to Devon's home in Lebanon but she was not there. The sheriff did find Devon's seventeen-year old daughter there who lived in Devon's home. The sheriff handed the documents to the daughter, "explained their importance," and told the daughter "to give them to her mother when she got home." When Devon returned home, her daughter did give her the documents. Therefore, the sheriff obtained proper service by making a reasonable attempt to serve Devon at her usual place of abode before making substituted service on her daughter who, at age 17, was 16 years or older and not a temporary sojourner or guest. The sheriff further complied with the requirements of the service statute in explaining the import of the process. Accordingly, the judge properly denied the motion to quash service.

Va. Code 20-99.2 and 8.01-296; Evans v. Evans, 300 Va. 134 (2021)

(b) The judge did err by overruling Devon's demurrer. The issue raised is whether Jamie's complaint failed to state a viable claim under Virginia law.

A demurrer in Virginia is a responsive pleading that challenges the legal sufficiency of the facts alleged in the plaintiff's complaint. In particular, the purpose of the demurrer is to determine whether the complaint states a cause of action upon which the requested relief may be granted under Virginia law. Virginia permits parties to assert fault-based and no-fault grounds for divorce. Fault-based grounds include adultery, cruelty, acts of physical abuse, desertion, abandonment, and conviction of a felony on which the spouse is confined for more than a year. The no-fault ground for divorce in Virginia is based on a separation of the parties for the required time period.

Here, Jamie obtained a form for a "Complaint for Divorce" from a "do-it-yourself" divorce website. In a space in the form in which the grounds for divorce were to be stated, Jamie typed, "I wish to divorce Devon because the thrill of our marriage is gone." This ground is not one of the enumerated fault-based grounds recognized under Virginia law and is not a proper no-fault ground, which must be based on a separation of the parties for the requisite time period. Therefore, Jamie's complaint did not state a cause of action upon which the requested relief may be granted under Virginia law. Accordingly, the judge should have sustained Devon's demurrer.

Va. Code 20-91; Abi-Najm v. Concord Condominium, 280 Va. 350 (2010)

(c) The judge likely did err in her ruling regarding Devon's bill of review. The issues raised are whether Devon's request for leave to file the bill was timely filed and whether the grounds asserted in the bill were adequate.

Under Virginia law, a bill of review may be allowed to a final equitable decree when it is exhibited within 6 months after entry of the decree. The law provides that no such bill shall be filed without leave of court unless it is for an error law apparent upon the face of the record. The other permissible ground for a bill of review is the discovery of new evidence. In order to support a claim of after-discovered evidence, the evidence must be discovered after the trial and be such as could not have been discovered before by the exercise of reasonable diligence. Additional requirements are that the new evidence is material, it can be produced at trial, it is not merely cumulative, and it would produce opposite results on the merits.

Here, the divorce hearing apparently took place in late 2024 as the final decree was entered

on December 1, 2024. In the “spring of 2025,” Devon found out that Jamie had lied about his financial status when he testified at the divorce hearing and that he had hidden marital funds in several offshore bank accounts. Devon filed a request for leave to file a bill of review on April 1, 2025, and asserted that the hidden offshore accounts constituted new evidence that was “substantial” and “would have altered the judge’s division of property.” Given that the leave was requested only four months after the date of the final decree, the request was timely. Furthermore, the evidence was discovered after trial and probably could not have been discovered with reasonable diligence because Jamie lied at the hearing and the offshore accounts were hidden. The evidence was material and, as asserted, likely would have changed the merits as it relates to the division of property. Therefore, the judge should have granted the request for leave to file the bill of review.

Va. Code 8.01-623; Barnhardt v. Smith, 150 Va. 1.

Question 7. Wills & Estates

Teresa, a resident of Virginia Beach, Virginia, gave birth to Steven just after graduating from high school in 1971. Steven's father, Mark, was killed in the Vietnam War in 1972. Teresa and Mark never married. In 1975, Teresa married Daniel and later gave birth to Jack, a child of that marriage. Teresa and Daniel raised both boys with equal love and affection, never treating Steven any differently from Jack. However, Daniel never formally adopted Steven.

Teresa owned 100 acres of real property that she had inherited from her father. The property was located in the coalfields of Buchanan County, Virginia, upon which 88 gas wells had been drilled by a company to which the gas rights had been leased through 2030. Under the lease, Teresa received royalties that exceeded \$250,000 a year, all of which had been deposited in a joint savings account, with the right of survivorship, in Teresa's and Steven's names. Teresa had maintained the joint account since before her marriage to Daniel.

Teresa also owned a number of certificates of deposit (CDs) amounting to \$350,000 in various banks.

In 2015, Teresa sought the assistance of Reverend Rauls, the minister of her church, for the purpose of making a will. At Teresa's direction, Reverend Rauls typed the information given to him by Teresa into a simple printed will form she had purchased at a local office supply store. The will named Reverend Rauls as Executor. The will was signed by Teresa in the presence of Reverend Rauls and the church secretary, both of whom signed as witnesses in Teresa's presence.

The will left all the CDs to Cynthia, the Reverend's wife to whom Teresa was not related. The will left the gas royalty bank account in equal parts to Daniel, Steven, and Jack. The will left all other personal property to Daniel. There was no mention of the 100 acres in Buchanan County.

Teresa died in January 2025, leaving behind the 100 acres, the royalty bank account, and the CDs described above. She was survived by Daniel, Steven, Jack, and Reverend Rauls. Cynthia had predeceased Teresa by six months.

Reverend Rauls, acting as Executor, filed the will for probate and claimed the right to receive the bequest to Cynthia as her successor in interest based on Virginia's anti-lapse statute. Jack intervened in the probate proceedings and made the following assertions: (1) that, as preparer of the will and because of the bequest to Cynthia, Reverend Rauls was disqualified from serving as Executor; and (2) that, in any event, the will was invalid.

(a) How should the court rule on each of Jack's assertions? Explain fully.

(b) Assume for this part only that the will was valid. To whom and in what proportions should the 100 acres in Buchanan County, the CDs, and the royalty bank account be distributed? Explain fully.

* * * * *

a) Jack's assertions raise two issues: 1) does Reverend Rauls meet the statutory qualifications to serve as Executor, and 2) is Teresa's will a valid attested will, and even if so, can the will be invalidated on the basis of fraud or undue influence?

1) Is Reverend Rauls eligible to serve as Executor? The issue is whether a party who is a potential beneficiary under a testator's will and was involved in preparing the will can serve as executor of that testator's estate. Under Virginia Code § 64.2-500(B), a person may qualify to be

an executor if they take the required oath and give bond; is not an infant, incapacitated, or a convicted felon; and “the court or clerk is satisfied that he is suitable and competent to perform the duties of his office.” Here, Reverend Rauls is not an infant and we have no facts to suggest that he is a felon or incapacitated. However, as the will is likely vulnerable to invalidity on the grounds of fraud or undue influence (see analysis below), the court or clerk would be unlikely to find Reverend Rauls “suitable” based on undue influence in preparing the will. Therefore, while Reverend Rauls likely meets the main statutory qualifications to serve as Executor, the court would likely either not appoint him as Executor due to suitability or would wait until after the fraud and undue influence claims had been dealt with to make a decision; if the will is invalid because of fraud or undue influence, the question of who is the executor would be a moot point, but if the will survives the undue influence challenge, Reverend Rauls would likely be appointed as Executor.

2) Is Teresa’s will a valid attested will, and if it is, can it be invalidated on the basis of fraud or undue influence?

a) Teresa’s will must meet the requirements for an attested will to be validly executed. Under Virginia Code § 64.2-403(A) and (C), an attested will is valid if it is in writing, signed by the testator in the presence of at least two witnesses, and witnessed by at least two competent witnesses in the presence of the testator. While some states do not allow interested parties to serve as witnesses to an attested will, Virginia Code § 64.2-405 provides that no person is incompetent to serve as a witness to an interested will solely because they are an interested party to the estate. Here, Teresa’s will is in writing as typed into the printed will form by Reverend Rauls, was signed by Teresa in the presence of Reverend Rauls and the church secretary, and was then witnessed by Reverend Rauls and the church secretary in Teresa’s presence. As Teresa’s will meets each of the three requirements of an attested will, it is likely that Teresa’s will was validly executed.

b) Even though the will was likely validly executed as an attested will, however, Jack may seek to have the will invalidated on the grounds of fraud or undue influence.

Fraud

Under Virginia law, a presumption of fraud may arise if (1) the will is drafted by one in a confidential or fiduciary relationship to the testator; and (2) there are suspicious circumstances (e.g., the will gives a substantial gift to its drafter). As Teresa’s minister, Reverend Rauls likely was in a confidential relationship with her. Also, Teresa’s leaving a substantial gift to Reverend Rauls’s wife likely constitutes suspicious circumstances. Although Reverend Rauls was not the direct beneficiary in the will, he was an indirect beneficiary through his wife. Thus, a court is likely to find that the facts are sufficient to raise a presumption of fraud.

Undue Influence

While the burden of demonstrating undue influence is generally placed on the party asserting that the will should be invalidated, the burden shifts under Virginia Code § 64.2-454.1 if a presumption of undue influence arises. The Virginia Supreme Court has ruled that a presumption of undue influence arises if three factors are met: the testator was old when their will was established, they named a beneficiary who stood in a relationship of confidence or dependence, and the testator had previously expressed an intention to make a contrary disposition of their property. If all three factors are met, the burden would shift to Reverend Rauls to disprove undue influence. Here, Teresa graduated from high school in 1971 and sought Reverend Rauls’s assistance in 2015, meaning that she was likely 64 or 65 years at the time she wrote her will, which

would probably qualify as old given the ages of similarly situated testators in Virginia Supreme Court cases. As her minister, Reverend Rauls likely was at least in a position of confidence (and potentially in a position of dependence if their pastor-parishioner relationship was particularly deep). While there are not facts here about a previous testamentary plan, it seems unlikely that Cynthia would have been in Teresa's testamentary plan before her meeting with Reverend Rauls, so this is likely a departure from what she had intended. Therefore, it is likely that all three elements are met and the burden would have shifted to Reverend Rauls.

Since the burden has likely shifted to Reverend Rauls, he would be responsible for disproving the elements of undue influence. The elements of undue influence are that the donor was susceptible to undue influence, that the alleged wrongdoer had both the opportunity and the disposition to exert undue influence, and that the resulting will appears to have been caused by undue influence. Here, since Teresa relied exclusively on Reverend Rauls without utilizing independent legal advice, it is likely that she was susceptible to undue influence. While the facts here do not give a great deal of detail about the conversation between Teresa and Reverend Rauls, as Teresa sought his assistance as her minister and he created a will that placed his wife as the beneficiary, it is likely that he had both the opportunity and the disposition to exert undue influence, and it appears that the will – which ended up benefiting his wife – was the product of undue influence. Since the burden would be on Reverend Rauls to disprove these elements, it is more likely than not that, given the facts here, he would be unlikely to disprove any of those elements, and the will would likely be found to be a product of undue influence and therefore invalidated.

In conclusion, although the will was likely validly attested, it would likely be invalidated as a product of undue influence.

b) If the will is valid, the remaining issues are how the following property should be distributed, as well as in what proportions: the CDs, the 100 acres in Buchanan County, and the royalty bank account.

1) Since the CDs were originally given to Cynthia, who has died, and Teresa's will had no residuary clause, the issue is whether Reverend Rauls can take under Virginia's antilapse statute or if the CDs lapse into intestacy. Under Virginia Code §64.2-418, if a predeceased beneficiary is a grandparent or a descendant of a grandparent of the testator, their surviving descendants can take in their stead. Here, Reverend Rauls seeks to receive his deceased wife Cynthia's bequest using the antilapse statute; however, since Cynthia is not a descendant of Teresa's grandparents, the antilapse statute does not apply (even if Cynthia and Teresa were related, since Reverend Rauls is not a descendant of Cynthia, the antilapse statute would not apply to him). Therefore, the 100 acres would lapse into intestacy.

Under Virginia's intestacy laws, all intestate property goes to a surviving spouse unless the decedent has at least one child who is not a child of the surviving spouse, in which case 2/3 of the intestate property goes to the children and 1/3 to the surviving spouse. Here, Teresa is survived by her husband Daniel, their son Jack, and her son Steven from a previous relationship, who Daniel never adopted. Since Steven is not a child of Daniel, Daniel will receive 1/3 of the CDs in intestacy, and Steven and Jack will split the remaining 2/3 – so each of the three will receive \$116,666.66 (repeating) from the CDs.

2) Since the 100 acres in Buchanan County were not mentioned in the will, the issue is what happens to property in the probate estate when there are no provisions in the will handing it

down and no residuary clause. When a will is silent as to the disposition of property, it is given to the beneficiary of the residuary clause; however, if there is no residuary clause or residuary beneficiary, or if the residuary beneficiary has lapsed, the property is distributed through intestacy. Here, Teresa's will had no residuary clause or beneficiary, and her will did not dispose of the 100 acres, so the 100 acres lapse into intestacy.

Under Virginia's intestacy laws, all intestate property goes to a surviving spouse unless the decedent has at least one child who is not a child of the surviving spouse, in which case 2/3 of the intestate property goes to the children and 1/3 to the surviving spouse. Here, Teresa is survived by her husband Daniel, their son Jack, and her son Steven from a previous relationship, who Daniel never adopted. Since Steven is not a child of Daniel, Daniel will receive 1/3 of the 100 acres in intestacy, and Steven and Jack will split the remaining 2/3 – so each of the three will receive 33.33 (repeating) acres.

3) Finally, regarding the royalty bank account, the issue here is whether a will can override the written terms of a joint account. Under Virginia Code § 6.2.618, a joint account that specifies that it is an account with right of survivorship automatically transfers to the surviving party outside of probate. Any will disposition seeking to otherwise dispose of the account is therefore invalid because the joint account is not part of the probate estate. Here, Teresa left the gas royalty bank account in her will in equal parts to Daniel, Steven, and Jack; however, the account was a joint savings accounts with the right of survivorship shared by Teresa and Steven. The will provision cannot override the account designation, so the joint account is not part of the probate estate and cannot be split between the three; Steven became the sole account holder as soon as Teresa died.

[Note for part b). We believe applicants should also receive credit for an elective share analysis in part b). A surviving spouse's elective share is 50% of the value of the marital property portion of the augmented estate, which is determined by the length of the marriage. When the parties were married 15 years or more, the marital property portion of the augmented estate is 100%. The augmented estate does not include property that was acquired and maintained as separate property. Here, Daniel and Teresa were married for over 15 years, and thus, his elective share would be 50% of the entire augmented estate. However, the land in Buchanan County and the royalties deposited in the joint account would not be part of the augmented estate because Teresa inherited the land from her father and separately maintained the land and the royalties. Thus, only the CDs and any personal property would be included in the augmented estate.]

Because the facts do not provide the value of the acres in Buchanan County or the personal property left to Daniel, it is not possible to definitely determine whether the elective share of the augmented estate would be more than Daniel's intestate share.

Question 8. Torts

After a weekend competing in the local dog show with her beloved beagle Barkley, Josey went to sleep early Sunday night. She was abruptly awakened in the night by the sound of a delivery truck crashing into her downstairs sunroom, the very room where Barkley slept at night. The accident occurred after the truck driver, David, had driven sixteen hours straight, contrary to his specialized training by his employer. He was trying to earn extra money by picking up more deliveries. He was in a hurry that night and tired from pushing the drive for so long, yet he wanted to keep driving, despite knowing that his night vision problems would make this part of the trip more difficult and even more tiring.

As David had approached the vicinity of Josey's house, he failed to notice a sharp turn in the road, likely because of his problems with night vision, and ran off of the roadway into the side of Josey's house. Josey ran out of her upstairs bedroom towards the staircase leading to the sunroom. Her next-door neighbor, Ned, who had seen the truck impact the house, ran into the house through the kitchen door. He passed Barkley the beagle in the process who was out of Josey's view. Josey yelled down asking Ned if Barkley was okay. In a moment of sheer meanness, due to his intense dislike of the dog and longstanding feud with Josey over his barking, Ned impulsively yelled back to Josey "your damn dog has finally chased his last cat and barked his last bark." Before he could amend his response to reassure her that Barkley was alive and well, Josey began experiencing heart palpitations. She collapsed in the hallway, crying unconsolably and then fainted right before Barkley bounded upstairs to her side. EMT workers arrived shortly, revived Josey, and reassured her that Barkley had not been hurt in the accident. After determining that Josey's heartrate had returned to normal and she had no other signs of injury, they left the scene. However, before leaving, they instructed Josey to follow up with her family physician should she develop any signs of injury. She did not experience any signs of injury so she never called her physician.

Josey intends to file a lawsuit against David based on his negligence, seeking recovery for property damage to her home and punitive damages. Josey also intends to file a lawsuit against Ned seeking recovery for her emotional distress.

(a) What argument(s) might Josey assert in support of her claim for punitive damages against David, and is she likely to prevail? Explain fully.

(b) What cause(s) of action for infliction of emotional distress under Virginia law might Josey reasonably bring against Ned, and is she likely to prevail? Explain fully.

* * * * *

(a) The issue raised is whether Josey will be able to support a claim of punitive damages in an action against David with sufficiently egregious facts to satisfy the fault level required in Virginia for such claims.

Punitive damages are something in addition to full compensation that is given as a punishment to defendant and as a warning and example to deter defendant and others from committing like offenses. In Virginia, only negligence that is so willful or wanton as to evince a conscious disregard of the rights of others will support an award of punitive damages. This may include action taken with reckless indifference to consequences with the defendant aware that his conduct would probably cause injury to another. Willful and wanton negligence generally involves conduct that goes beyond that which shocks fair-minded people. On the other hand, when the

conduct is free from fraud, malice, oppression, or other special motives of aggravation, only compensatory damages are permissible.

Josey should argue her claim for punitive damages is shown by willful and wanton conduct committed by David in connection with the action he undertook that caused him to run off of the roadway and into the side of Josey's house. In particular, she should argue that David's decision to drive sixteen hours straight, contrary to his specialized training, and late at night evinced a conscious disregard of the rights of others especially given his night vision problems. The facts state that David was in a hurry that night, tired from pushing the drive for so long, and knew that his night vision problems would make that part of the trip more difficult and even more tiring. The facts also state that David failed to notice a sharp turn in the road, which was "likely because of his problems with night vision." However, these facts may not rise to the level of egregiousness required under Virginia law. While David was certainly negligent, and possibly even grossly negligent, the facts do not clearly show that David harbored actual or constructive consciousness that injury would result and do not clearly appear to involve conduct going beyond that which would shock fair-minded people. Nevertheless, the specialized training he received from his employer may be a significant factor in proving his conscious disregard that injury would result given that his failure to adhere to the training likely contributed to the cause of the accident.

Accordingly, while the bar is high for punitive damages, Josey may be able to create a triable issue for the jury if she seeks punitive damages in a claim against David.

Alfonso v. Robinson, 257 Va. 540 (1999); Harris v. Harman, 253 Va. 336 (1997); Doe v. Isaacs, 265 Va. 531(2003).

(b) The issue raised is whether Josey could establish the required elements of either intentional infliction of emotional distress or negligent infliction of emotional distress in a claim against Ned. Under Virginia law, Josey might reasonably assert a cause of action for both but is unlikely to prevail on either one.

The tort of intentional infliction of emotional distress (IIED) consists of the following elements: (1) a voluntary act amounting to extreme and outrageous conduct; (2) committed intentionally or recklessly by the defendant; (3) causing emotional distress that was severe. The conduct must transcend all bounds of decency and be utterly intolerable in a civilized society. The distress must be such that no reasonable person could be expected to endure it. The allegations must be proved by clear and convincing evidence. Here, the facts state that after David's truck ran into Josey's house, her neighbor Ned ran into her house. Ned yelled to Josey that "your damn dog has finally chased his last cat and barked his last bark." He did this in a "moment of sheer meanness, due to his intense dislike of the dog and a longstanding feud with Josey over his barking." Josey began experiencing heart palpitations, collapsed, crying inconsolably and then fainted. Ned's conduct was likely done with the intention of causing Josey to suffer emotional distress or in reckless disregard of such distress. However, it isn't clear his conduct would be considered utterly intolerable and beyond the bounds of decency so as to constitute extreme and outrageous conduct, which is a high bar to satisfy in Virginia. Even if it was, it doesn't appear that Josey can establish severe emotional distress. She was crying that evening but there is no other indication of emotional distress, much less distress that was so severe no reasonable person could be expected to endure it.

Where conduct is merely negligent and physical impact is lacking, a plaintiff can only recover for infliction of emotional distress in Virginia where the facts establish a clear and

unbroken chain of causal connection between a negligent act, emotional disturbance, and a physical injury. First, the facts do not clearly support a claim of breach of some legal duty owed by Ned to Josey. He ran into her house and was yelling at her from the lower level of her house while Josey was upstairs. Furthermore, there is no physical impact between Ned and Josey. Assuming for the sake of argument there was a negligent act committed by Ned, it may be difficult for Josey to establish a clear and unbroken chain of causal connection between the act, her emotional disturbance, and a physical injury. While it may be that she began experiencing heart palpitations as a result of Ned's conduct in yelling that her dog had died, it could also have been the result of David crashing his truck into her house. Furthermore, the facts state that the only possible physical injury would be her heart palpitations. Josey did not develop any "signs of injury" and did not call a physician for that reason.

In summary, while Josey could reasonably assert intentional and/or negligent infliction of emotional distress, she is unlikely to prevail on either one of those claims.

Doe v. Baker, 299 Va. 628 (2021); Harris v. Kreutzer, 271 Va. 188 (2006); Delk v. Columbia/HCA Healthcare, 259 Va. 125 (2000); Russo v. White, 241 Va. 23 (1991); Womack v. Eldridge, 215 Va. 338 (1974); Hughes v. Moore, 214 Va. 27 (1973).

Question 9. Criminal Law

Andy and Billy were both candidates in a hotly contested City Council election in Buena Vista, Virginia. Billy publicly accused Andy of several incidents of seriously immoral and embarrassing behavior. Andy became very angry and went to Billy's campaign headquarters and pushed open the door. Andy saw Billy and started screaming at him. Billy told Andy to leave. Andy picked up a heavy paperweight and threw it at Billy. Billy saw it coming and ducked. The paperweight missed Billy but struck one of Billy's campaign helpers, Candace. Andy saw that Candace was bleeding from the head and took off running. Candace suffered a severe head injury and died the next day.

Andy had a close friend named Danielle that lived in Buena Vista. He went to Danielle's house and told her something had happened and that he needed to hide at her house for a while to give him time to figure out what to do. The next day, the police came to Danielle's house looking for Andy. The police told Danielle that Andy was responsible for injuring Candace and that she had died from her head injuries. Although Andy was still hiding at Danielle's house, she told the police that she had not seen Andy and did not know where he was. The police officers left but suspected that they had heard Andy in the house and noticed a jacket with Andy's name on it. They went to the magistrate and obtained a search warrant, returned to Danielle's house with the warrant and found Andy in the home. Danielle then admitted that she had been hiding Andy.

- (a) With what crime or crimes, if any, should Andy be charged regarding Candace, and is he likely to be convicted? Explain fully.**
- (b) With what crime or crimes, if any, should Andy be charged regarding Billy, and is he likely to be convicted? Explain fully.**
- (c) With what crime or crimes, if any, should Danielle be charged, and is she likely to be convicted? Explain fully.**
- (d) Should Danielle be convicted of giving a false report? Explain fully.**

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- (a) With what crime or crimes, if any, should Andy be charged regarding Candace, and is he likely to be convicted? Explain fully.**

Andy should be charged with second-degree murder of Candace. Second-degree murder is the unlawful killing with malice. Malice is the intent to kill someone or cause serious bodily harm. Second-degree murder can be the result of transferred intent. In addition, second-degree murder can be the result of felony homicide, the accidental killing of another while committing a felony other than those that would elevate the crime to first-degree murder. Malice can be inferred from the killing. Here, Andy picked up a heavy paperweight and threw it at Billy. His intent to cause injury from the throwing of the paperweight transferred to Candace when he hit her with it instead. Even if there was no transferred intent, the attempt to maliciously or unlawfully wound Billy (as discussed below) is a felony, so killing Candace by accident would be felony homicide. Andy would likely be convicted.

Andy should also be charged with voluntary manslaughter, which is the unlawful killing of another without malice, and/or involuntary manslaughter, which is the accidental or unintentional killing. Andy should not be convicted of either because these crimes would be lesser-included offenses of the second-degree murder conviction.

(b) With what crime or crimes, if any, should Andy be charged regarding Billy, and is he likely to be convicted? Explain fully.

Andy should be charged with attempted murder, attempted malicious wounding, and assault regarding his actions toward Billy. As above, the assault (an attempted battery) charge will ultimately be absorbed by the attempted malicious wounding conviction. Malicious wounding is maliciously injuring another with intent to maim, disfigure, disable, or kill. If the act is done unlawfully but not maliciously, it would be unlawful wounding. Attempt is where there is a specific intent to commit an act, there was a direct, substantial but ineffectual step towards committing the act.

It is unlikely that Andy would be found guilty of attempted murder of Billy. As discussed above, the prosecutor would have to have proven Andy's intent to kill Billy. Other than being angry and throwing the paperweight, there is no evidence that Andy did so with the intent to kill Billy. Although the paperweight is heavy, there is nothing from which to infer that Andy knew the paperweight could kill someone. (Unlike cases where the intent to kill someone is inferred by the use of a firearm.)

Andy will likely be found guilty of attempted malicious wounding. Here, Andy picked up a heavy paperweight and threw it at Billy. It is reasonable to infer that throwing a heavy object at someone would cause a maiming or disfiguring injury. But for Billy ducking, the paperweight would have hit Billy and caused a substantial injury. As it was, the paperweight killed the person that it did hit. Andy would be convicted of attempted malicious wounding.

(c) With what crime or crimes, if any, should Danielle be charged, and is she likely to be convicted? Explain fully.

Danielle should be charged with being an accessory after the fact to murder and obstruction of justice. The definition of accessory after the fact, requires that the accused receive, relieve, comfort or assist a felon, who the accused knows is guilty of a felony, and the felony must be complete. Knowledge that the felony be complete means that if the accused is charged with being an accessory after the fact to murder, the victim must have died. Furthermore, knowledge does not have to be actual knowledge. If the accused knows or should have known, the felon committed the offense, that is sufficient. See Commonwealth v. Dalton, 259 Va. 249 (2000); Suter v. Commonwealth, 67 Va. App. 311 (2017).

When Andy first arrived at Danielle's house, she was unaware that he had committed a crime. So she committed no crime by allowing him to stay with her. However, the following day, after Candace had died and the police told Danielle that Andy had injured and killed Candace, Danielle assisted Andy by telling the police that he was not there and she did not know where he was. Thus, Danielle, who assisted a felon, after knowing a felony had been committed and the felony was complete, is likely to be convicted of the crime of being an accessory after the fact to murder.

Danielle may also be charged with obstruction of justice, which is the knowingly obstructing, without just cause, a law enforcement officer in the performance of his duties. However, she would not be convicted. Here the law enforcement officer was attempted to investigate a crime which is the performance of his duties. Danielle knew the officer was trying to find Andy and she lied saying that she had not seen him. The officer did not have a search warrant or an arrest warrant and, thus, Danielle had no obligation to let him into her home. Her lying to the

officer did not thwart his investigation, as he was able to use available information to obtain a search warrant and find Andy. See Maldonado v. Commonwealth, 70 Va. App. 554 (2019).

(d) Should Danielle be convicted of giving a false report? Explain fully.

No. Danielle should not be convicted of giving a false report. 18.2-461 defines giving a false report as either knowingly reporting falsely about a crime with the intent to mislead, or summoning law enforcement by phone or alarm without just cause. Here, Danielle did not report falsely about a crime. She may have intended to mislead law enforcement, but she made no report about a crime.