

✖✖ After each bar exam, the Virginia Board of Bar Examiners invites the Deans [or the Deans' designees] of all Law Schools located in Virginia, to meet with the Board. Representatives from all of 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 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. For the July 2021 exam, due to the current pandemic the VBBE did not hold a face to face meeting with us, but asked that the representatives from the law schools collaborate and send in a single summary of what was thought should be acceptable answers to the essay questions. This was done.

✖✖ It should also be noted that while we think the answers that follow should be acceptable for full credit, keep in mind that the VBBE do give credit for good analysis and sometimes will accept for at least partial credit, alternate theories of analysis that are not what they had in mind as the preferred answer. jrz

### Summary of suggested answers to the essay part of the July 2021 Virginia Bar Exam

Prepared by the following who collaborated to prepare the suggested answers for the VBBE: J. R. Zepkin, Jennifer Franklin & William H. Shaw, III of William & Mary Law School, Emmeline P. Reeves of University of Richmond Law School, Benjamin V. Madison III of Regent University Law School, Cale Jaffe of University of Virginia Law School, C. Reid Flinn of Washington & Lee Law School (also a member of the adjunct faculty at William & Mary Law School and University of Richmond Law School), Amanda Compton & Mike Davis of George Mason Law School, Rena Lindevaldsen of Liberty University Law School and Laura Wilson of Appalachian School of Law.

The following, provided us great help with suggested answers in each's particular area[s] of specialty: Carliss Chatman, Washington & Lee Law School & Craig Stern, Regent University Law School.

---

Revised: September 24, 2021 (2:09pm)

1. [07.2021] [UCC Negotiable Instruments] Charlie wrote and delivered a check for \$500 payable to Billy for a custom paint job on Charlie's Harley Davidson motorcycle. Although Charlie liked the way the paint job looked under the lights in Billy's shop, Charlie changed his mind the next day when he decided he had chosen the wrong color. Without telling Billy, Charlie directed his bank (Bank) to stop payment on the \$500 check.

Billy, who had been working long hours, did not have time to shop for a graduation gift for his daughter, Susan. He endorsed Charlie's \$500 check and gave it to Susan as a gift. Neither Billy nor Susan was aware of the stop payment order. When Susan attempted to cash the check, Bank refused to cash it because of the stop payment order.

Susan then presented the check to Charlie and demanded payment. Charlie declined and made some unflattering remarks about Susan's father.

About a week later, Billy wrote and delivered a check for \$100 as a birthday gift payable to his nephew, Willy. The next day Billy became annoyed with Willy because Willy had scraped the new paint job on the side of Billy's 1967 Pontiac GTO automobile. Billy, thinking he had learned something from Charlie, stopped payment on the check.

Not knowing about the stop payment order, Willy cashed the \$100 check at Mary's Ready Cash and received \$85, the other \$15 being Mary's customary handling charge.

When Mary presented the check to Bank for payment, she learned of the stop payment order for the first time. Mary then took the check to VA Collectors, Inc. (Collectors), a Virginia debt collection agency, told Collectors about the stop payment order, and sold the check to Collectors for \$35. Collectors then presented the check to Billy and demanded \$100. Billy refused to pay, citing his stop payment order as his reason.

Susan wants to enforce the \$500 check against Charlie, and Collectors wants to enforce the \$100 check against Billy.

[a] Is Susan likely to succeed in enforcing the \$500 check against Charlie? Explain fully.

[b] Is Collectors likely to succeed in enforcing the \$100 check against Billy? Explain fully.

✖✖

[a] Yes. Charlie and Billy entered into a valid contract for the service of painting of the motorcycle. Charlie had time to inspect, accepted the motorcycle, and has no defenses, personal or real, that would invalidate the contract. He has also not provided notice. Charlie and Billy entered into a second contract when Billy agreed to accept the check as payment, and Charlie signed the check. Therefore, by stopping payment, Charlie is in breach of contract.

Stopping payment on a check does not avoid an obligation; it merely delays payment. Instead, Charlie would need to establish a real defense against a holder in due course by a preponderance of the evidence, or a real or personal defense against a non-holder by a preponderance of the evidence. As there is no evidence of any defenses, Charlie is still bound by the contract for services and the terms of the check.

Billy is a holder in due course of the check because he took the item for value, in good faith, and without notice that the item was overdue or dishonored; the check had no signs of irregularity; and he had no notice of any claims of the item. As a holder in due course, he can endorse a check notwithstanding a stop payment order unless a real defense (infancy, void contract, bankruptcy, forgery, deception, discharge known to holder) is invoked. Holder in due course status is not changed by subsequent notice – Billy's status is defined when he accepts the check in exchange for his work. Therefore, Billy is a holder in due course of the instrument with all rights to collect the instrument from Charlie directly or from the bank.

Although Susan cannot be a holder in due course because she obtained the check as a gift and not for value, she inherits Billy's status through the shelter doctrine. The shelter doctrine states that a party that does not qualify for HDC status can assert the rights of the HDC as long as the party is not personally engaged in wrongdoing affecting the instrument. A holder can enforce a dishonored instrument under a contract theory against the maker (Charlie), the payee (Bank), and the first holder (Billy). Therefore, Susan also has the right to collect the value of the check from Charlie.

[b] Yes. Willy is not a holder in due course of the check because it was a gift and thus not taken for value. Willy and Billy do still have a contract, as Billy signed the check and Willy agreed to accept it. The same standard regarding stop payment orders applies to Billy: while Willy is not a holder, it merely enables Billy to assert real and personal defenses, but there are no defenses for the stop payment. Therefore, under a contract theory Collector can recover against Billy (the maker), Billy's bank (the payee), and Willy (the first holder). In addition, when Willy endorsed the check to Collector, he made transfer warranties that: (1) he was a person entitled to enforce the check (that is, the chain of title is clean, up to Willy); (2) all signatures on the check, including his, are authentic and authorized (no forgery); (3) the check has not been altered; (4) the check is not subject to any claims or defenses that could be raised against him; and (5) the maker of this note (Billy) is not insolvent. This enables Collector to recover against the same parties pursuant to tort theories.

Draftors Comments: These authorities may be in play in some of the subparts to the question: §8.3A-104(2); §8.1A-201(b)(21); §8.3A-301, 302, 303, 305 & 306; §8.3A-203(b) the Shelter Rule

2. [07.2021] [Va Criminal & Constitutional Law] On April 1, 2018, Joe was working at the cash register in a convenience store in Hampton, Virginia, when Butch and Teeny approached the counter with some candy bars and chips in their hands as if to make a purchase. Butch was 25 years old and Teeny, his cousin, was only 16.

Butch put the merchandise on the counter, then suddenly pointed a pistol at Joe and demanded the money in the cash register. Teeny held out his backpack and told Joe to deposit the money there.

Just as Joe reached over to put the money in the backpack, Vincent walked into the store and realized that a robbery was in progress. Vincent attempted to call for help on his cell phone, but this attracted Butch's attention. Butch then turned to face Vincent. Intending to shoot and disable Vincent's cell phone, Butch fired his pistol, but instead of hitting the cell phone, one of the bullets hit Vincent in his chest killing him.

While all of this was happening, Dave was in the back corner of the store using the ATM and witnessed the entire incident. During the police investigation, when Dave was questioned about the shooting and robbery attempt, an old probation charge against Dave was discovered and Dave was arrested. The Commonwealth's Attorney later agreed to dismiss that

charge if Dave would testify against Butch and Teeny.

Two days after the incident, Butch and Teeny were arrested at 11:00 a.m. and taken to the police station. They were placed in separate interrogation rooms, and both were advised of their rights as required by *Miranda v. Arizona*. Butch initially waived his right to counsel and agreed to be questioned, but shortly after the questioning began, Butch realized the trouble he was in and told the officers, "I don't want to talk anymore." The officers continued to question him, and hours later at 3:00 a.m., Butch gave a full confession to the crimes.

Meanwhile, in the other room, Teeny also waived his right to counsel and agreed to be questioned. The police attempted to contact Teeny's parents, but they were out of town and could not be reached. After seven hours of continuous questioning and seeing a video of himself in the convenience store which was taken by the store cameras, Teeny relented and admitted being at the convenience store and participating in the robbery attempt with Butch.

Thereafter, Butch and Teeny were both charged with the felonies of murder and attempted robbery, and counsel was appointed for them. Both Butch and Teeny waived their right to be tried by a jury; however, the Commonwealth's Attorney refused to agree and demanded a jury. He also advised counsel for Teeny that he would seek to try Teeny as an adult. The court set trial dates for Butch and Teeny and ordered a jury trial for each. The following four pre-trial motions were filed:

- [i] Teeny's attorney filed a motion to vacate the order granting a jury trial because Teeny had waived his right to a jury.
  - [ii] Teeny's attorney also filed a motion to dismiss the indictment against Teeny for lack of jurisdiction.
  - [iii] Butch's attorney filed a motion to quash Butch's confession on the ground that it had been procured in violation of his rights as announced in *Miranda v. Arizona*.
  - [iv] The Commonwealth's Attorney filed a motion *in limine* seeking to preclude the attorneys for Butch and Teeny from cross-examining Dave about his plea agreement on the ground that it was irrelevant to any issue in the cases against the two defendants.
- [a] How should the court rule on each of the four motions? Explain fully.
  - [b] Under what theory or theories might the Commonwealth reasonably support the charge of murder against Teeny? Explain fully.

✖✖

- [a] [i] Motion to vacate the order granting a jury trial for Teeny because he waived his right to a jury.

The court should deny the motion to vacate its order granting a jury trial for Teeny. While a defendant has the right to a trial by jury under the Sixth Amendment, he does not have a constitutional right to demand a trial by a judge. *Pope v. Commonwealth*, 234 Va. 114 (1987), *O'Dell v. Commonwealth*, 234 Va. 672 (1988). No constitutional right is violated by the government's ability to veto the right of a defendant to waive a jury trial. See *Singer v. U.S.*, 380 U.S. 24 (1965), *Vines v. Muncy*, 553 F.2d 342 (4th Cir. 1977).

A juvenile has the same rights to waive a jury trial as an adult. See *Mickens v Commonwealth*, 178 Va. 273 (1941). A jury trial may only be waived with the consent of the defendant, the Commonwealth, and the court. VA Code § 19.2-257.

Here, the facts demonstrate that Teeny properly waived his right to a jury trial after consultation with his attorney, but that the Commonwealth did not consent. As a result, the trial court properly denied the waiver and ordered the jury trial.

- [ii] Motion to dismiss the indictment against Teeny for lack of jurisdiction.

The court should grant the motion to dismiss the indictment against Teeny for lack of jurisdiction. VA Code § 16.1-269.1 allows the Commonwealth to seek to have Teeny tried as an adult. The Commonwealth, however, must do so in the juvenile court. VA Code §16.1-269.1(B) and (C) provide that when a juvenile is 16 years of age or older

and is charged with a felony, the juvenile court shall conduct a preliminary hearing and if the court finds probable cause it will certify the charge to the grand jury. If the court finds probable cause, the court loses jurisdiction over the charge and any ancillary charges, and the Commonwealth may seek direct indictment. An indictment cures any error or defect in the juvenile court proceeding. Here, however, there was no juvenile court proceeding. Although the Commonwealth provided notice that it intended to prosecute Teeny as an adult, it did not do so until after it had obtained a direct indictment. At that time, the Juvenile court had jurisdiction over all of Teeny's charges and the indictment could not cure any error or defect because no proceeding had been held.

[iii] Butch's motion to quash his confession on the grounds that it had been procured in violation of his Miranda rights.

The trial court will likely grant Butch's motion to quash his confession. The facts demonstrate that Butch had been properly advised of his rights pursuant to Miranda and that he waived those rights and consented to questioning. He later made the statement, "I don't want to talk anymore," which is more concrete than an equivocal expression of reservations about answering questions. Although courts decline to read Miranda so narrowly as to compel officers to accept any statement, no matter how equivocal, as an invocation of the right to remain silent, Butch's statement demonstrates a clear desire to stop talking. See Midkiff v. CW, 250 Va. 262 (1995), Akers v. CW, 216 Va. 40 (1975), Mervin-Frazier v. CW, Record No. 2114-08-4 (2010), CW v. Helvenston, 79 Cir. 607 (2009). Upon receiving a clear indication of his desire to stop talking, officers violated Butch's Miranda rights when they continued to question him until 3:00 in the morning.

Draftors' Comment: Some test takers may want to discuss the voluntariness of the confession, however, other than a note that the interrogation lasted until 3 in the morning, there are not sufficient facts to support a discussion of whether the strategies used by the officers would have overborne Butch's will.]

[iv] The Commonwealth's motion *in limine* to preclude defense attorneys from cross-examining Dave about his plea agreement on the grounds that it was irrelevant to any issue in the cases against the two defendants.

The court will likely deny the motion. Although the plea agreement may be irrelevant to any issue in the cases against the two defendants, the plea agreement is directly relevant to the issue of Dave's credibility. The confrontation clause of the Sixth Amendment guarantees the right of cross examination, and a defendant can cross-examine a witness as to any evidence that bears on the credibility of the witness. Indeed, a plea bargain in exchange for one's testimony is highly relevant because it means the witness' testimony may be based on self interest.

[b] Under what theory or theories might the CW support the charge of murder against Teeny?.

First, Teeny is likely a principal in the second degree for felony murder, as he aided in the attempted robbery and acted in concert with Butch. Because there was concert of action, Teeny will be deemed to have shared Butch's intent and will be criminally responsible for Butch's acts. Thus, the Commonwealth would support its charge of murder against Teeny as a principal in the second degree. Although Butch is likely the principal in the first degree because he committed the act, they both may be charged, tried, convicted, and sentenced in the same fashion. See VA Code §§18.2-18, 18.2-33; Riddick v. CW, 226 Va. 244 (1983).

Alternatively, the CW could try to support the charge of murder against Teeny as a co-conspirator, who would be liable for the acts of his co-conspirators. Teeny seemed to understand what he was expected to do because he opened and held out his backpack to receive the money that Butch demanded. However, there is no discussion in the facts of a plan or of an agreement. Thus, although it could be inferred from their actions that they had previously formulated the plan to commit the robbery, it will be difficult to prove that a conspiracy existed.

Draftors Comments: These authorities may be in play in some of the subparts to the question. Va. Code §19.2 – 257; Va. Code §16.1 – 269.1; In re Baskins, 16 Va. App. 241 (1993); Miranda v. Arizona, 384 U.S. 436, 473 (1966); Hewitt v. Commonwealth, 226 Va. 621 (1981); Brown v. Commonwealth, 246 Va. 460 (1993); Riddick v. Commonwealth, 226 Va. 224 (1983); Va. Code §18.2 – 32.

3. [07.2021] [Domestic Relations] After fifteen years of marriage, Alex and Beth, both 40 years old, separated. Beth filed a petition in the Juvenile and Domestic Relations Court for the City of Salem, Virginia, seeking (1) primary custody of their only child, Phil, and (2) child support. At trial, the following was admitted into evidence:

1. Phil is 11 years old and has a close relationship with both parents. He is an excellent student and has attended school with his neighborhood friends his entire life. He has lived in the same house since birth, his grandparents live nearby, and he has regularly attended Sunday school at the local Community Church.
2. Phil excels on his school's baseball and track teams and has a good relationship with his coaches. Additionally, Phil and Alex enjoy hiking and hike together almost every weekend.
3. Witnesses testified that Alex and Beth appeared to maintain a stable home, a well-kept house and a loving relationship with Phil.
4. Alex suffered from alcoholism several years ago, but with treatment, he has been sober for four years.
5. Beth worked for the past ten years as the office manager for a medical practice. For fifteen years, Alex was a manager at a grocery store. Both of their incomes are required to maintain the moderate standards to which they had become accustomed.
6. For the past few years, both Alex and Beth engaged in extramarital affairs, which they managed to keep from each other. Beth was involved with the managing doctor at her office. Alex was involved with Maria, who lives in Roanoke. Alex met Maria several years ago through his Alcoholics Anonymous group. Beth learned of Alex's affair with Maria when she accidentally saw a "steamy" text message from Maria on Alex's cell phone. Overcome with guilt, Beth confronted Alex and disclosed her own infidelity, hopeful that they could save their marriage.
7. Even after admitting to the affair with Maria, Alex could not forgive Beth. He immediately moved out of the house and began living with Maria. He also confronted Beth's lover, who, fearing damage for his own career, fired Beth on the pretext of poor job performance.
8. On the way home from work, distraught from her firing, Beth was involved in a single vehicle accident and suffered serious injuries that have left her temporarily disabled. Her physician testified that although she can perform most household duties, she does not expect Beth to be able to return to full-time employment for at least a year. Beth continues to live in the family home.
9. While Beth recovered, Phil moved in with Alex and Maria and had to transfer to a different school. He testified that although he misses his mom and neighborhood friends, he "is OK" living with Alex and Maria. Alex and Maria want Phil to live with them. Beth wants Phil to live with her and believes it would be harmful for Phil to live in an "unmarried" household. Maria has been divorced twice before and does not want to marry again.

The judge said that she would rule on the issue of custody immediately and would rule on the child support issue on a later date.

On the issue of custody of Phil, the judge referred counsel to Va. Code §20-124.3, which delineates ten factors the court "shall consider" in determining Phil's best interests. Because the court will balance the factors, the judge directed counsel to file briefs applying the facts admitted into evidence to the following four of the ten factors:

- [i] The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs;
- [ii] The age and physical and mental condition of each parent;
- [iii] The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual, and physical needs of the child;

- [iv] The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age, and experience to express such a preference.

Although he feels that he has strong arguments for obtaining custody of Phil, Alex is very concerned because he has heard that Virginia recognizes a presumption in favor of the mother in awarding custody of a child.

- [a] Is Alex correct in his belief that Virginia recognizes a presumption in favor of the mother in awarding custody? Explain fully.
- [b] Applying the facts to the statutory factors listed above, what arguments should Beth make in support of her petition for primary physical custody of Phil? Explain fully.
- [c] Applying the facts to the statutory factors listed above, what arguments should Alex make in support of his desire to maintain primary physical custody of Phil? Explain fully.

✖✖

[a] Alex is incorrect in his belief that Virginia recognizes a presumption in favor of the mother in awarding custody. Pursuant to VA Code §20-124.2B, Virginia has abolished all presumptions in favor of either parent in custody determinations. Rather, the court is directed to determine custody based on the factors set forth in the statute for the best interests of the child.

[b] Beth: With respect to the age and physical and mental condition of child, Beth will argue that Phil is an eleven-year old, very well-adjusted child who has excelled in his current educational environment, both academically and in sports. He has had the same friends and school his entire life. She would argue that to maintain stability during this time, he should continue to attend the same school, live in the same home, and stay near family members. While Phil states that he is “OK” with the idea of continuing to live with Alex, the facts indicate that he misses his mom and neighborhood and has thrived in the school district and home he has grown up in. There are no facts to indicate he is given the same academic or athletic opportunities in the new school.

With respect to the age and physical condition of each parent, Beth will emphasize that although she was injured in the car accident, leaving her unable to work, the doctor states that she is able to perform most household duties. Her injury alone is insufficient to justify a switch of custody. Rather, the court must consider how the injury impacts her ability to serve as custodial parent. Given that Phil is eleven years old, he demands less physical assistance from his mother than if he were an infant or toddler. And, during the time that she is off from work, she will have more time to spend with Phil.

The facts indicate that both parents have been involved in Phil’s life, and he has a loving relationship with both parents. Alex and Phil hike together regularly. Beth will argue that Alex is not able to meet the emotional needs of Phil because he is living with Maria in an unmarried household. The Supreme Court of Virginia has stated that while an illicit relationship to which minor children are exposed cannot be condoned, there is not a per se rule prohibiting awarding custody to a parent involved in an adulterous relationship. *Ford v. Ford*, 418 S.E.2d 415 (1992); *Brown v. Brown*, 237 S.E.2d 89 (1977). In determining the best interest of the child, the court must consider all facts relevant to the best interests of the child, including what effect a nonmarital relationship by a parent has on the child. *Brown*, 237 S.E.2d at 91. Beth will argue that Alex has taken no steps to conceal the fact that he is in an extramarital relationship with Maria. In fact, Phil is currently living in the same home with Alex and Maria. As a result, Beth will argue it is in Phil’s best interests to be placed with her.

Finally, Beth will argue that Phil has not expressed a preference to live with Alex and that even if he has expressed a preference, the court should not give much weight to his preference. The statutory factor requires the court consider the reasonable preference of child if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference. Under Virginia law, there is no specific age at which the courts afford such deference, while courts routinely give great weight to the preference of teenagers. First, Beth will argue that Phil has not even expressed a preference to live with either parent. Rather, he simply stated that he was “OK” with staying with Alex and Maria. To the extent a court would consider Phil’s statement as a preference, Beth will argue that Phil is only eleven years old and has not reached the age where the court should give his preference much weight.

[c] Alex: With respect to the age and physical and mental condition of child, Alex will argue that Phil is healthy, well-adjusted, and excels in school. Although he has recently changed school districts after his mother’s accident, Phil has adjusted well to the change, saying that he is “OK” with the move.

With respect to age and physical condition of each parent, Alex will emphasize the fact that Beth was injured and is incapable of working for a year. Although the doctor states she is able to perform most household duties, she is not capable of fully caring for herself or Phil.

Beth's accident also is part of the analysis of the factor evaluating the relationship between each parent's ability to meet emotional, intellectual, and physical needs of the child. Alex will argue that while both parents have historically been able to meet the emotional and intellectual needs of Phil, Beth's accident has hindered her ability to fully perform household duties, which includes her ability to meet Phil's physical needs. In addition, Alex will likely rebut Beth's argument about Alex's living situation by pointing out that there are absolutely no facts to show that Phil is being harmed by the situation.

Finally, Alex will argue that the court should consider the reasonable preference of Phil. Alex will emphasize that Phil is of reasonable intelligence, age, and experience to express a preference. He has stated he is "OK" with living with Alex and his new girlfriend.

4. [07.2021] [Corporations] One Foundation, Inc. is a non-stock corporation validly organized under the laws of Virginia. The primary purpose of One Foundation as stated in the Articles of Incorporation is to perform good charitable deeds and generally promote fellowship and empowerment for the welfare of the residents of Wakanda, Virginia. Every resident of Wakanda is entitled to become a voting member of One Foundation upon payment of such dues as may be determined by the Board of Directors. In its twenty-year existence, One Foundation has completed various economic and community development projects and education-related initiatives.

One Foundation was named as a beneficiary under the Will of a wealthy man named David Drucker, who left his home and several acres of valuable land to One Foundation. With the exception of a small sum in the bank account, this property was the only asset of One Foundation. At a duly called meeting at which all ten of the members of the One Foundation Board of Directors were initially present, the Board considered a motion to list the property for sale with Ricky Realtor, a real estate broker who also served on the Board of Directors. Ricky agreed to reduce his usual commission on the sale from 7% to 5%. The directors were aware that while some Board members wanted to sell the property, many members of One Foundation wanted the organization to keep the property and develop it as a community center for Wakanda residents. A local real estate appraiser recently advised the Board of Directors that commercial property values, including the Drucker property, would likely have a higher value after the planned construction of a nearby road project.

During heavy debate at the beginning of the meeting, Lewis, a member of the Board of Directors, pleaded with the Board to move forward with the sale and to direct Ricky to market the property as "prime for a neighborhood shopping center." The vote on the motion was finally taken at the close of the long meeting and after five of the directors had left. The vote was three (3) in favor and two (2) against the listing and sale. Both Ricky and Lewis voted in favor of the sale. The Bylaws of One Foundation provide that six directors constitute a quorum. At the time of the vote, except for Lewis, the Board members did not know that Lewis' wife owns the property next to the Drucker property and that Lewis had informed Ricky that he and his wife wanted to be the first to make an offer on the Drucker property if One Foundation decided to sell it. His wife's parcel has been on the market for a long time. A sales brochure for her parcel states that it may be too small for large commercial development, but if added to the Drucker property the combined parcels would be large enough for a shopping center.

When Gladys Watching, a resident of Wakanda and a dues-paying member of One Foundation, learned of the Board's actions and of Lewis' interest in the sale, she was immediately enraged and retained an attorney to take legal action to stop the sale. She believes it is inadvisable to sell the Drucker property now because it will increase in value significantly next year if the state approves construction of the nearby road project.

- [a] What legal challenges to the Board's action might Gladys reasonably bring to stop the sale of the Drucker property, what defenses might the Board reasonably assert, and what is the likely outcome? Explain fully.
- [b] Under these facts, is a vote of the membership of One Foundation required in order to sell the Drucker property? Explain fully.

✖✖

[a] Gladys can challenge the sale of the Drucker property on two grounds: First, the sale was not properly approved by the Board and, second, the sale is a conflict of interest transaction.

Under Virginia's Non-Stock Corporations Act, an action by the Board of Directors must be approved by a majority of the Directors in a vote taken when a quorum is present. One Foundation's bylaws set the quorum at six directors, and only five directors were present when the vote was taken. Thus, the sale was not properly approved by the Board.

Additionally, the proposed sale is an impermissible conflict of interest transaction. The Virginia Code defines a conflict of interest transaction as a "transaction with the corporation in which a director of the corporation has an interest that precludes him from being a disinterested director." VA Code §13.1-871A. Such a transaction is permissible if either (1) it is approved by disinterested directors or members after disclosure of material facts or (2) it is fair to the corporation. Here, Ricky and Lewis clearly are interested directors. Ricky stands to earn a commission from the sale, and thus, he is interested. The facts provide that Lewis's wife has a significant financial interest in purchasing the Drucker property. She owns the adjacent parcel, which has been for sale for a long time, and her tract would be much more marketable if combined with the Drucker property. Although Ricky's interest was known to the directors, Lewis's was not. Also, only one disinterested director voted in favor of the motion. Thus, the listing has not been approved by disinterested directors after disclosure of all material facts. The Board may argue that the proposed transaction would be fair to the corporation. However, given that a real estate appraiser has advised that the property would likely have a higher value after the road construction project, the Board probably will not be able to establish fairness of the deal.

Gladys likely will be successful on both grounds in challenging the sale of the Drucker property.

[b] Yes, a vote of the membership of One Foundation is required to sell the Drucker property. The sale of substantially all assets outside the regular course of business is a fundamental corporate change and must be approved by the members of the non-stock corporation. The Drucker property was the only asset of One Foundation, aside from a small sum in the bank account, and thus, the sale of the Drucker property would constitute a sale of substantially all of the corporation's assets outside the regular course of business. Accordingly, the sale would have to be approved by the membership of One Foundation.

Draftors' Comments: These authorities may be in play in some of the subparts to the question: §13.1-849, §13.1-868, §13.1-871, §13.1-900

5. [02.2021] [ Wills & Estates] In 2013, Irma, a widow, had two living adult children, Chase and Derrick. That year, in the presence of her two best friends, she wrote in her own hand and signed the following document:

*I, Irma, as my last will and testament, do hereby leave 50% of my estate to my son, Chase, and 50% of my estate to my neighbor, Nancy. I do not want to leave any of my estate to my son, Derrick, because he recently won the state lottery.*

*/S/ Irma April 9, 2013*

In the years that followed, Irma did not get along well with either Chase or Derrick. In 2018, Chase and Derrick drove Irma to a relative's funeral. When they arrived back at her house, they got into a terrible family fight. Irma announced, "I am disgusted with you both. I am revoking my will and not leaving either of you a thing!" and tore the 2013 document in half in front of Chase and Derrick, throwing the pieces in a desk drawer.

In 2019, Irma fell and broke her hip. She struggled to get around her home, which had several flights of stairs. Fortunately, Irma and Chase had recently made amends and she moved in with him. While living happily with Chase, Irma handwrote and signed the following note in Chase's presence:

I, Irma, hereby declare that I am reviving my April 9, 2013 will (attached).

*/S/ Irma September 24, 2020*

Irma taped the two torn pieces of the 2013 document together and placed the taped document in an envelope with

the September 24, 2020 note.

In January of 2021, Nancy, Irma's neighbor, died. One week later, Irma died. Irma's only surviving relatives are Chase and Derrick.

- [a] Was the 2013 document a valid will? Explain fully.
- [b] Was the 2018 revocation of the 2013 document effective? Explain fully.
- [c] Was the 2020 revival of the 2013 document effective? Explain fully.
- [d] How should Irma's estate be distributed? Explain fully.

✖✖

[a] Yes, the 2013 document was a valid holographic will since it meets all of the required elements. In the Commonwealth, a holographic will is valid without further requirements, provided that (1) it is wholly in the testator's handwriting; (2) it is signed by the testator, and (3) is proved by at least two disinterested witnesses familiar with her handwriting. Va. Code §64.2-403. The testator must also be 18 and have the requisite testamentary intent and capacity. The holographic will must be signed in such a manner as to make it manifest that the name is intended as a signature. Virginia law does not define what shall constitute a signature, and a first name, initials or even a mark can be sufficient, if that was an ordinary way for a testator to sign her name. *Irving v. Divito*, 294 Va. 465 (2017).

Here, Irma wrote in her own hand and signed the 2013 document in the presence of her two best friends. Assuming that neither of the best friends is also her neighbor Nancy, then the two friends would be disinterested witnesses who would be familiar with Irma's handwriting. The signature was placed at the end of the document, but it was only signed "Irma." Still, this would be an acceptable signature. It is also clear that Irma had the requisite testamentary intent since she wrote this was her "last will and testament." Also, since Irma has two adult children it can be assumed that Irma is over 18. Finally, there are no facts to suggest that Irma lacked testamentary capacity.

Therefore, the 2013 document was a valid holographic will.

[b] Yes, the 2018 revocation of the 2013 document was effective since Irma physical tore up the 2013 document.

If a testator with the intent to revoke a will, cuts, tears, burns, obliterates, cancels, or destroys the will, such will is void and of no effect. Va. Code §64.2-410.

Here, in 2018, Irma tore up the 2013 will in its entirety after making the unambiguous statement, "I am revoking my will," thus demonstrating her intent to revoke. Although this was done in response to her fight with her two children, Chase and Derrick, Irma's actions completely revoked the 2013 will, including the bequest to her neighbor, Nancy.

Therefore, the 2018 revocation of the 2013 document was effective.

[c] Yes, the 2020 revival of the 2013 document was effective since the 2020 document is a valid holographic codicil.

Once a will is revoked, the will cannot be revived unless it is re-executed with full testamentary formalities. A codicil is a later testamentary instrument that amends, alters, or modifies a previously executed will. A codicil must be executed with the same testamentary formalities as a will. The valid execution of a codicil that makes referenced to the revoked will would cause the will to be revived under the republication by codicil. Va. Code §64.2-411. A disinterested witness is someone that is not a beneficiary under the will.

Here, the 2020 note is a validly executed holographic codicil. As explained in [a] A holographic will or codicil must be proved by two disinterested witnesses. The codicil is entirely in Irma's handwriting and signed by her in such a way to make it manifest that her name was intended as her signature (signed at the bottom of the document, after its dispositive portion). Irma's intent to revive her earlier revoked will is evident from the express language of the note ("I am reviving my April 9, 2013 will."). However, Irma executed the holographic codicil in front of one witness, Chase. Chase is not a disinterested witness since he is a beneficiary under the will. Nevertheless, Irma's two best friends would be able to prove that the document is in

Irma's handwriting.

Therefore, the 2020 revival of the 2013 document was effective since the holographic codicil met the formal execution requirements and validly republished the 2013 holographic will.

[d] Irma's estate should be distributed 75% to Chase and 25% to Derrick since the bequest to Nancy will not be saved under the anti-lapse statute and that portion would pass under intestacy.

A testator may disinherit her child. If a will beneficiary dies before the testator, the gift lapses. In the Commonwealth, such a gift could be saved under the anti-lapse statute so long as the predeceasing beneficiary was a grandparent or lineal descendant of a grandparent of the testator. Va. Code §62.2-418. If the beneficiary, is not protected under the anti-lapse statute, a non-residuary bequest made to that beneficiary will pass under the residuary clause. If there is no residuary clause, then the gift will pass under intestacy. If a decedent dies partially intestate and without a surviving spouse, the estate passes to the decedent's descendants, who take per capita with representation. The property is divided into equal shares at the first generational level at which there are living takers. Va. Code §64.2-200

As explained in [c], Irma's 2013 will was properly revived. Under the terms of the will, 50% of her estate will go to Chase, and 50% of the estate will go to Nancy. Irma did not leave a bequest to her other child Derrick. However, Nancy predeceased Irma. Nancy's bequest will lapse since she is only Irma's neighbor, and the gift will not be saved under the anti-lapse statute. Additionally, the 2013 will does not have a residuary clause. Therefore, Nancy's bequest will pass by intestacy. Although Irma did not want Derrick to have a portion of her estate, this will not prevent him from taking a portion of the estate that passes under intestacy. Irma only surviving relatives are her two children, Chase and Derrick. Nancy's 50% will be split equally between them. Chase will receive 50% of the estate per the terms of the will, and will get 25% of the estate through intestacy.

Therefore, Irma's estate will be distributed as follows: 75% to Chase and 25% to Derrick.

**6. [07.2021] [Real Property & Contracts]** Dr. Jones was a graduate of State University and a proud supporter of the State University medical school. It was his desire to endow a chair for the medical school to help recruit medical professors. He contacted the medical school and was referred to the Alumni Association (AA). He began discussions with representatives of the AA and they developed a plan together.

Dr. Jones owned a commercial property in Danville, Virginia. It was worth approximately \$800,000. It had an existing mortgage held by Dominion Federal Bank (Bank) in the amount of \$600,000. The Danville property was fully occupied with tenants and making a profit for Dr. Jones. One tenant was a national chain with a ten-year lease which generated rent sufficient to pay off the mortgage on the property in eight years by regular monthly payments. After lengthy discussions, Dr. Jones and the AA agreed that Dr. Jones would provide a deed of gift to the Danville property and that the equity he donated would endow the chair. Dr. Jones had a deed of gift prepared which stated that the Danville property donated "was subject to a deed of trust held by Bank and that the Grantee (AA) does hereby assume payment of such obligation and agrees to hold the Grantor (Dr. Jones) harmless from further liability on such obligation." The deed was not signed by a representative of the AA, nor was there a place for a signature. The deed was prepared by Dr. Jones' attorney. After reading the deed, Dr. Jones advised his attorney that it was correct and signed the deed of gift. Dr. Jones mailed the signed deed to the AA.

The AA recorded the deed in the Circuit Court for the City of Danville and hired a management company to manage the Danville property. The accountants for the AA listed the Danville property as an asset of the AA, and the obligation to Bank as a liability. The property management company collected the rents, paid the mortgage, and profit was credited to Dr. Jones as a charitable donation. Unfortunately, four years later, the economy of Danville began to falter, the national chain renting the commercial property went bankrupt and ceased paying rent, and the management company did not have enough income to pay the mortgage. There was a balance of \$300,000 due on the mortgage at this point.

Bank contacted Dr. Jones about payment of the note. Dr. Jones demanded that the AA pay the note under the language contained in the deed. The AA refused. Dr. Jones paid off the mortgage under protest and sued the AA for indemnity.

How should the court rule on each of the following arguments made by AA in response to Dr. Jones' lawsuit:

- [a] That no representative of the AA signed the deed of gift to the Danville property and therefore the AA is not bound by the terms of the deed? Explain fully.
- [b] That the agreement between Dr. Jones and the AA regarding the Danville property is not enforceable pursuant to the Statute of Frauds? Explain fully.
- [c] That during discussions with Dr. Jones, the AA advised Dr. Jones that the AA would not assume the loan owed to Bank and now argues that it should be allowed to introduce evidence of these conversations to avoid indemnity to Dr. Jones? Explain fully.
- [d] That the AA claims it can avoid indemnity to Dr. Jones on the ground that there was a mistake of fact? Explain fully.

✖✖

[a] The court should deny AA's argument that AA is not bound by the terms of the deed because a valid deed does not need to be signed by a representative of AA.

A deed may validly convey real property by inter vivos gift so long as there is [1] donative intent, [2] delivery, and [3] acceptance. The deed must [1] be in writing, [2] signed by the grantor; and reasonably identifies [3] the parties and [4] the land. With respect to the identification of the parties, the parties' names need only to be reasonably identifiable. Delivery can occur by various methods, including manual deliver. The grantee becomes bound by the terms of the deed by his acceptance of a deed delivered by the grantor, even though a deed is signed only by the grantor. Acceptance on the part of the grantee can be implied since the conveyance is presumed to be beneficial.

Here, the deed of gift from Dr. Jones to AA was valid. The facts clearly show his donative intent- Dr. Jones is an alum of State University, had been a proud supporter in the past, and wanted to create an endowed chair. The Danville property is valued at \$800,000 and is making a profit for Dr. Jones due the tenants on the property. Additionally, the deed of gift expressly included language that reflected his intent to donate the Danville property, and later the profit received from the property was credited to Dr. Jones as a charitable gift. The deed was signed by Dr. Jones, the grantor, and was delivered to AA. AA accepted the deed as evidenced by the fact that AA recorded the deed, hired a management company to manage the property and began collecting rent on the property. With respect to the other elements, the language provided identities the parties- "the Grantee (AA)... the Grantor (Dr. Jones)." The facts also read that the deed of gift "stated that the Danville property" was the subject to a deed of trust. Therefore, this language reasonably identifies the property. We also know that the deed was prepared by an attorney, read and signed by Dr. Jones, and later recorded by AA. Therefore, the deed was in writing.

Therefore, despite not being signed by AA, the deed is valid and the court should deny AA's argument.

[b] The court should deny AA's argument that the agreement between Dr. Jones and AA regarding the Danville property is not enforceable pursuant to the Statute of Frauds since the mortgage assumption clause is not subject to the suretyship provision of the Statute of Frauds.

The suretyship provision of the Statute of Frauds provides that no action concerning an agreement shall be brought against any person upon a promise to answer for the debt, default, or misdoings of another, unless that agreement is in writing and signed by the party to be charged or his agent. VA Code §11-2. A collateral undertaking applies when the promisor is merely a surety or guarantor, receives no direct benefit, and is liable only if the debtor defaults. A grantee who assumes an existing mortgage is not a surety. The grantee makes no promise to the mortgagee to pay the debt of another, but promises the grantor to pay the mortgagee the debt the grantee owes to the grantor. Thus, a valid deed containing an assumption clause, when accepted by the grantee, is an enforceable agreement to assume the mortgage debt. *Langman v. Alumni Assn of the University of Va.*, 247 Va. 491 (1994); *Thacker v. Hubbard*, 122 Va. 379 (1918).

Here, as explained above, the deed was properly executed and included a provision that AA would assume the mortgage. Despite not signing the deed, AA accepted the deed and should be bound by this provision. Additionally, AA is receiving a direct benefit from this gift and is not merely acting as a surety for the Dr. Jones. AA gained title to the property, lists the Danville property as an asset of the AA, and collects rent from the property. AA also acknowledged its direct obligation to the Bank, as the accountants for AA list it as a liability.

Therefore, the court should deny AA's argument that the agreement between Dr. Jones and AA regarding the Danville property is not enforceable since the Statute of Frauds is inapplicable.

Draftors' Note: It's our view that the BBE did not anticipate a discussion on part performance, but that is such discussion was included, that consideration would be given for those applicants that mention part performance and Statute of Frauds.

[c] The court should deny AA's request to allow evidence of prior discussions between AA and Dr. Jones to the effect that AA advised Dr. Jones that it would not assume the loan. Evidence of these discussion is subject to the parole evidence rule, which applies to written instruments, including deeds. Parole evidence is inadmissible to vary or contradict a complete and unambiguous written instrument. Where the language of a deed is explicit, the intention is clear, and the result is not repugnant, the court should look no further than the four corners of the instrument.

Here, the language of the deed clearly stated that the property being donated "was subject to a deed of trust ... and that Grantee (AA) [would] assume payment of such obligation and agrees to hold Dr. Jones harmless from further liability on such obligation." Furthermore, there is no repugnancy because Dr. Jones transferred his whole interest in the property including the mortgage and the income, which was signed over to AA as a gift.

See *Langman v. Alumni Association of the University of Virginia*, 247 Va. 491, 503-504 (1994)

[d] The court should deny AA's argument that it can avoid indemnifying Dr. Jones on the grounds of mistake of fact.

A contract may be reformed or rescinded in equity on the ground of mutual mistake. A unilateral mistake of fact, on the other hand, will not invalidate a contract. AA argues mistake of fact, perhaps based on the fact that it thought Dr. Jones was entirely gifting the property to AA rather than transferring the property subject to the mortgage assumption clause. If that is true, then, at most, there was a unilateral mistake of fact.

Here, the facts state that Dr. Jones had the deed prepared with the language that the gift "was subject to a deed of trust held by the bank" and that the grantee assumes payment of the obligation and to hold Dr. Jones harmless from further liability on the obligation. The facts also state that Dr. Jones read the deed, advised his attorney that it was correct, and signed the deed of gift. Dr. Jones intended for the language to be in the deed. As a result, at best, the facts present a unilateral mistake of fact (on the part of AA) and, as a result, the contract will not be reformed or rescinded. See *Langman v. Alumni Association of the University of Virginia*, 247 Va. 491, 503-504 (1994)

Draftors' Note: This question is based on the facts of *Langman v. Alumni Association of the University of Virginia*, 247 Va. 491 (1994). However, a key fact in the *Langman* case that gave rise to the mistake of fact argument was that the alumni association specifically argued that the mortgage assumption clause had been mistakenly (or fraudulently) inserted in the deed. Because any such facts are missing in the fact pattern for this essay, we do not know that examinees will understand the factual basis for AA's mistake of fact claim in part [d] if the mistake of fact argument is to be made.

7. [07.2021] [FCVP] James Donovan was arrested in New York by Federal Bureau of Investigation (FBI) officers and charged with interstate transportation and sale of stolen property. The FBI seized and declared forfeited property worth \$500,000 belonging to Donovan. All proceedings against Donovan were brought in the U.S. District Court for the Southern District of New York.

Donovan retained Arnold Austin, an attorney residing in and practicing criminal defense law in New York City (which is within the Southern District of New York), to defend him on the stolen property charges and in the related civil forfeiture proceeding to recover the seized property. Donovan entered into a written contingency fee arrangement by which he agreed to pay Austin 40% of the value of any property recovered from forfeiture.

Austin, recognizing that his experience in forfeiture proceedings was limited, searched online internet sources and found Linda Long, a lawyer residing and practicing in Harrisonburg, Virginia, who appeared to be highly qualified in defending civil forfeiture proceedings in U.S. district courts. With Donovan's consent, Austin associated Long as co-counsel and entered

into a written agreement reciting that Austin would keep the first one-fourth of any fee earned in the civil forfeiture proceeding and that Austin and Long would share the remaining three-fourths in proportion to the amount of time each spent working on the forfeiture matter.

Although they never met face-to-face, Austin and Long exchanged from their respective offices in Virginia and New York several telephone calls, letters, and e-mails related to Donovan's defense. Before the trial, Austin and the U.S. Attorney reached a plea bargain in which Donovan pleaded guilty to a lesser offense, and the U.S. Attorney agreed to release the \$500,000 worth of property from forfeiture. Donovan then paid Austin \$200,000 as the agreed 40% contingency fee.

Asserting that Long had not performed any meaningful work on the case, Austin declined to pay Long any part of the contingent fee. Long, claiming that she had spent just as much time on the forfeiture matter as Austin, filed suit for breach of contract against Austin in the U.S. District Court for the Western District of Virginia, claiming \$87,500 as her share of the contingent fee. Austin, through Virginia counsel, filed the following three-part motion:

- [i] to dismiss for lack of subject matter jurisdiction;
- [ii] to dismiss for lack of personal jurisdiction over Austin; and
- [iii] to transfer venue to the U.S. District Court for the Southern District of New York.

Austin's supporting affidavit asserted that Long's efforts had not contributed to the settlement with the U.S. Attorney and that, in any event, the time spent by Long on the forfeiture matter was minimal.

In opposition to the motion, Long filed an affidavit describing the communications exchanged in the course of her association with Austin.

- [a] How should the U.S. District Court for the Western District of Virginia rule on the motion to dismiss for lack of subject matter jurisdiction? Explain fully.
- [b] How should the U.S. District Court for the Western District of Virginia rule on the motion to dismiss for lack of personal jurisdiction over Austin? Explain fully.
- [c] How should the U.S. District Court for the Western District of Virginia rule on the motion to transfer venue to the U.S. District Court for the Southern District of New York? Explain fully.

✖✖

- [a] The court should deny the motion to dismiss for lack of subject matter jurisdiction.

Because no federal question is at issue here, subject matter jurisdiction would have to rest on diversity of citizenship jurisdiction ("diversity"). Diversity has two requirements. First, there must be complete diversity of citizenship, i.e., every party on the plaintiff's side must be a citizen of a different state from every party on the defendant's side. Second, the amount in controversy must exceed \$75,000 exclusive of interests and costs. Here, plaintiff Long is a citizen of Virginia, and defendant Austin is a citizen of New York and, thus, complete diversity exists.

The amount-in-controversy requirement follows the legal certainty test, under which a case will meet the requirement unless the court can say, to a legal certainty, that the plaintiff cannot recover more than \$75,000 exclusive of interest and costs. The fee agreement between Austin and the plaintiff (Donovan) provided that Austin receive a 40% contingency fee from the amount recovered in the action. The agreement between Austin and Long, whom Austin brought on to help, stated that the first one-fourth of any fee earned in the civil forfeiture proceedings and that Austin and Long would share the remaining three-fourths in proportion to the amount of time working on the forfeiture proceeding. The amount of forfeited property seized was \$500,000. Forty percent of that is \$200,000. Austin was entitled to \$50,000, and that left \$150,000 for Austin and Long to share. Austin and Long dispute how much Long worked on the case. The facts state that Long claims he had spent "just as much time on the forfeiture matter as Austin." Whether the amount-in-controversy requirement has been met is, as noted, governed by the legal certainty test. Under that test the court must conclude that the required amount (more than \$75,000 exclusive of interests and costs) is at issue unless the court can determine to a legal certainty that the plaintiff will be unable to recover more than \$75,000 exclusive of interests and costs. Because the amount due to Long depended on the proportion of time she worked on the case, and Long contends the time she worked on the case was significant, the court would be unable under the legal certainty test to determine that the amount-in-controversy requirement had not been met.

Thus, the court should deny the motion to dismiss for lack of subject matter jurisdiction. 28 U.S.C. § 1332.

[b] The court should deny the motion to dismiss for lack of personal jurisdiction. To exercise personal jurisdiction over Austin, the U.S. District Court for the Western District of Virginia must satisfy two requirements. First, one of the grounds under the Virginia Long Arm statute must be satisfied. Second, even if the Long Arm is satisfied, the exercise of personal jurisdiction over the nonresident defendant must not violate due process of law.

The Virginia Long Arm provides that if the claim in the suit arises from a number of specified activities, then that allows a court in Virginia to exercise personal jurisdiction over a nonresident defendant. The grounds include transacting business in Virginia and other grounds such as contracting to supply goods or services, causing tortious injury, and other grounds. Indeed, one of the last grounds is to use a computer network in Virginia.

Here, the most evident ground for satisfying the Virginia Long Arm Austin's transacting business in Virginia. The facts state that Austin (in New York) and Long (in Virginia) exchanged several phone calls, letters, and e-mails. Virginia's transacting business requirement requires solely a single transaction of business. The defendant does not have to come to Virginia to meet the transacting business requirement. Although the use of e-mails should also satisfy the use-of-computer network requirement, the satisfaction of the transacting business criteria in Virginia should be enough.

In addition, to exercise personal jurisdiction, the U.S. District Court for Western District of Virginia must not violate the due process clause. The test here, typically called the "minimum contacts" test, requires that the defendant have sufficient minimum contacts with the forum (Virginia) that the defendant could reasonably anticipate being sued in the forum. Purposefully availing oneself of the state puts the defendant on notice of the potential to be sued there. Here, Austin sought Long in Virginia, had telephone calls concerning the representation of Donovan, exchanged letters with Long in Virginia, and exchanged e-mails. These acts are precisely the acts that reasonably put Austin on notice that he could be sued in Virginia. Therefore, the federal court in Virginia can exercise personal jurisdiction over Austin.

Va. Code §8.01-328.1 and *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945).

[c] The court should deny the motion to transfer venue from the U.S. District Court for the Western District of Virginia to the U.S. District Court for the Southern District of New York.

Under the federal general venue statute, venue is proper in a federal district where substantial events or a series of events giving rise to the claim arose. Alternatively, venue is proper in a federal district where the defendant resides. The substantial-events part of the statute supports both districts as proper venues.; the defendant's residence supports the Southern District of New York. Just because there are more bases under the general venue statute for one district over another doesn't determine whether a transfer of venue is appropriate. Instead, the question here comes down to whether the district to which the case is being transferred would have jurisdiction. In other words, the venue statute provides that transfer requires that the action have been properly filed in that jurisdiction. When here the plaintiff files suit in a proper forum, the presumption favors the plaintiff's choice of district. Here, Long chose the U.S. District Court for the Western District of Virginia. Because that is a proper district, and Long's choice was the Western District of Virginia, the court should refuse to transfer the case. Venue should remain in the Western District of Virginia.

28 U.S.C. section 1404.

**8.** [07.2021] [VCVP] While making his usual weekend rounds of yard sales, Paul purchased an antique chest at Susie's yard sale. The chest had been in Susie's living room in Norfolk, Virginia, and unbeknown to her, a few days before the sale, the housekeeper found a shoe box full of baseball cards on top of the chest and put them into one of the chest's drawers. The housekeeper forgot to tell Susie, so she was not aware that the cards were in the chest.

When Paul returned home, he unloaded the chest without opening it and placed the chest in his garage until he could refinish it. Some months later, when Paul decided to refinish the chest, he opened it and discovered the box full of old baseball cards, including six Babe Ruth cards dated 1939.

That evening, Paul met some friends for their weekly poker game and told them about the cards he had found in the chest. Colin, an avid baseball card collector, asked Paul if he had any idea how much the cards were worth. Paul guessed they had some value and told Colin that he thought he would have them appraised. Colin agreed that the cards might be valuable, but he said that baseball cards were really hard to value. Knowing that the Babe Ruth cards were very valuable,

Colin offered to purchase three of them for \$1,000 each. Paul thought Colin was joking, but Colin found some paper and wrote the following:

*I agree to purchase, and Paul agrees to sell to me three Babe Ruth baseball cards dated 1939 for the sum of \$1,000 each (total sale price of \$3,000). Paul will deliver the cards to me within three days. Paul acknowledges receipt of \$3,000 paid to him simultaneously with the signing of this agreement.*

Paul and Colin both then signed and dated the paper and Colin gave Paul his personal check for \$3,000.

The next day, Paul had all the cards appraised and learned that the Babe Ruth cards were valued at \$100,000 each. The appraiser told Paul that he knew Colin because they were both avid baseball card collectors and expressed surprise that Colin had not told Paul the real value of the cards. Three days later, Paul called Colin and told him that he had changed his mind and did not want to go through with the sale of the three Babe Ruth baseball cards to Colin. Colin demanded that Paul give him the three cards as the agreement contemplated.

Susie's husband was one of the friends at the poker game and heard Paul's story about his discovery of the baseball cards in the chest. He relayed the story to Susie, who immediately recalled the chest that she sold to Paul in her yard sale. Believing that the box of baseball cards was the collection given to her by her father that she had misplaced, Susie immediately called her attorney and asked him to take such legal action as necessary to get the cards returned to her.

Colin filed a lawsuit against Paul seeking specific performance of the contract for the sale of the three Babe Ruth cards. When Susie's attorney learned of Colin's suit, he recommended to Susie that she seek a temporary injunction prohibiting Paul from disposing of any of the baseball cards in his possession from the chest during the pendency of the action.

- [a] What defenses should Paul raise to the prayer for specific performance and is he likely to succeed? Explain fully.
- [b] What procedure must Susie's attorney follow in order to seek an injunction in the lawsuit that Colin has filed against Paul? Explain fully.
- [c] What must Susie allege to support her suit for a temporary injunction and is she likely to succeed? Explain fully.

✖✖

[a] Paul should raise the defenses of fraud, unclean hands, hardship or oppression, and availability of a legal remedy.

#### Unclean Hands

Under the doctrine of unclean hands, a party seeking equitable relief must himself not have been guilty of inequitable or wrongful conduct, and the wrongful conduct must relate to the claim asserted. Here, Colin is an avid baseball card collector and, according to the appraiser, knew the real value of the Babe Ruth cards. Thus, for Colin to offer \$1,000 each to Paul after suggesting the cards would be hard to value, is wrongful conduct dealing directly with the claim he asserts for specific performance of the contract.

#### Availability of a Legal Remedy

Specific performance is an equitable remedy, which compels the performance of a contract in the precise terms agreed upon, or such a substantial performance as will do justice between the parties under the circumstances of the case. Equity may compel parties to perform their agreements, when fairly entered into, according to their terms; but it has no power to make agreements for parties, and then compel them to execute the same. *Rison v. Newberry*, 18 S.E. 916, 919, 90 Va. 513, 521 (Va. 1894). In addition to the basic elements for specific performance (the contract at issue is enforceable; all conditions precedent to performance have been satisfied; the contractual terms at issue are sufficiently definite to be enforced by the court; the defendant is able to perform or the performance can be abated; and it would be fair (equitable) to specifically enforce the contract), Colin would need to show that there is no adequate remedy available at law. Here, Paul should assert that monetary damages could be awarded.

#### Hardship or Oppression

A court of equity will not decree specific performance of the agreement where it would entail great hardship, and the hardship was due, in some measure, at least, to the conduct of the other party. *Southern Ry. Co. v. Franklin & P.R. Co.*,

32 S.E. 485, 490, 96 Va. 693, 708 (Va. 1899). Here, to require Paul to sell to Colin the three Babe Ruth cards valued at a total of \$300,000 for only \$3,000 constitutes a financial hardship. That hardship was a direct result of Colin's failure to disclose to Paul the real value of the cards and even suggesting to Paul that the cards can be hard to value.

### Fraud

To rescind a contract based on fraud, there must be a false statement of facts, positively made, not mere matters of erroneous opinions. A concealment to afford ground of rescission for fraud must be a willful suppression of such facts in regard to the subject-matter of the contract as the party making it is bound to disclose. *Rison v. Newberry*, 18 S.E. 916, 919, 90 Va. 513, 522 (Va. 1894). Here, the facts indicate that Colin was aware of the real value of the cards as well as the fact that Paul did not know the real value of the cards. In fact, Paul was surprised that Colin would offer as much as \$1,000 for each card. In offering to purchase the cards for only \$1,000 each, after stating that the cards can be hard to value, Colin made a false statement about the value of the cards that was intended to induce Paul to sell the cards for \$1000 each. Paul did rely on that false statement to his detriment. Paul should be entitled to rescission of the contract.

[b] Susie's attorney should seek to intervene in the pending action between Colin and Paul. Pursuant to Rule 3:14, Susie's attorney should file a motion to intervene in the case. Intervention requires leave of court, and the court has considerable discretion in granting or refusing such a request. See *Layton v. Seawall Enterprises*, 231 Va. 402, 344 S.E. 2d 896 (1986).

[c] To support her suit for a temporary injunction, Susie must allege facts showing that she has a recognized legal right to the baseball cards and will suffer irreparable harm without an injunction prohibiting Paul from disposing of them. Susie must further allege facts showing that the balance of equities weighs in her favor, that she is likely to succeed on the merits of her claim to the baseball cards, that exigent circumstances support the injunction, and that she has no adequate remedy at law. The granting of an injunction is an extraordinary remedy and rests upon the discretion of the court. It will not be awarded unless the court is satisfied of Susie's equity. See Va. Code §8.01-628.

Here, Susie has asked her attorney to take legal action necessary to have the cards returned to her. Thus, she is seeking to prove she is the true owner of the baseball cards and entitled to possession of them. She will likely be able to show she has a legal right to the baseball cards. Susie's housekeeper placed the box of cards in the antique chest and Susie was not aware the cards were in the chest when she sold the chest to Paul at her yard sale. Paul also had no knowledge that the cards were in the chest and did not discover them until some months later. Thus, Susie likely can show that neither she nor Paul intended that the cards be included in the sale and that title to the cards remains with her.

Susie can show that she will suffer irreparable harm without an injunction because the box of cards was given to her by her father and includes valuable and rare collectors' items, such as the Babe Ruth cards dated 1939 and appraised at \$100,000 each. She should assert that she cannot be made whole by money damages due to the personal value of sentiment attached to the cards. Furthermore, Paul has already indicated a willingness to sell the cards based on the agreement he signed with Colin that is the subject of the already pending action, which lends support to Susie's claim of exigent circumstances. The balance of equities favors Susie since the temporary injunction would only delay Paul's ability to sell the cards pending a determination of Susie's right to the cards.

Because Susie is ultimately seeking to get the cards returned to her, she arguably has an adequate remedy at law. An action in detinue will lie against Paul, who is in possession of the cards. Such action would allow the court to determine who is entitled to possession of the baseball cards or award damages where the cards cannot be returned. See *McGrath v. Dockendorf*, 292 Va. 834 (2016). As explained in subpart (b), Susie could file a pleading to intervene as a plaintiff in the lawsuit Colin has filed against Paul and assert her claim in detinue therein. See Rule 3:14. An injunction may be awarded to protect any plaintiff in a suit for specific property, pending either at law or in equity, against injury from the sale, removal, or concealment of such property. See VA Code § 8.01-622. Thus, Susie would likely succeed in her suit for temporary injunction under this procedure.

Drafters Note: Although we have included the point regarding a potential detinue action, our guess is it does not appear it necessary to discuss detinue for a complete answer. Some sources that might support the answers are: Rule 3:14 of the Rules of the Supreme Court of Virginia; *Richards v. Musselman*, 221 Va. 181 (1980); *Rison v. Newberry*, 90 Va. 513 (1894) and *Allstate Ins. Co v. American Bankers Ins. Co*, 882 F.2d 856 (4th Cir. 1989); *Gary Youngblood v. Anthony Fasano, et al*, CL 2009 – 18188 (Va. Cir. Ct. 2010); *Stephen v. Dickens*, 63 Va. Cir. 403 (Va. Cir Ct. 2003); *Lehner Family Bus. Trust v. United Leasing Corp.*, 71 Va. Cir. 150 (Va. Cir. Ct. 2006); *Blackwelder Furniture Co. of Statesville v. Seilig Mfg. Co.* 550 F. 2d 189 (4th Cir. 1977); *Winter v. Natural Resources Defense Council, Inc.* 555 U.S. 7 (2008); *Flax v. Monticello Realty Co.*, 185 Va. 474 (1946); *Munaf v. Geren*, 553 U.S. 674 (2008); *Amoco Production Co. v. Gambell*, 480 U.S. 531 (1987); *Weinberger v. Romero-Barcelo*, 456 U. S. 305 (1982)

9. [07.2021] [Local Government] Paul was a student at Lancaster High School, a public high school in Lancaster, Virginia. He was injured while attending school during physical education class. He filed a personal injury lawsuit in the Circuit Court of Lancaster County. Paul named the Lancaster County School Board and his physical education teacher, Mr. Davis, as defendants. Each party was sued under an allegation of negligence. Although Mr. Davis taught physical education at Lancaster High School, he was also employed by the Northern Neck Academy, a local private high school, to coach the Academy football team. Mr. Davis routinely recruited students at Lancaster High School to attend and play football at Northern Neck Academy.

One day during the physical education class at Lancaster High School, Mr. Davis divided the class into two groups, Group A and Group B. Paul was placed in Group B. Mr. Davis provided Group A with protective football equipment, but not Group B. He then told Group B to go to a corner of the school field and play whatever game they wanted. Thereafter, Mr. Davis devoted his attention to Group A, which included several players that Mr. Davis was recruiting for his private Academy team. Meanwhile, Group B, including Paul, decided to play tackle football. Paul was preparing to throw a pass when he was tackled from behind. The tackle caused him to suffer a compound fracture of his leg, which required extensive surgery.

Paul sued to recover damages for his injuries, alleging that Mr. Davis knew, or should have known, that the activity posed a danger to the participants. He alleges that Mr. Davis was negligent in the supervision and control of the physical education activities which caused his injury and damages.

In response, both defendants asserted Sovereign Immunity as a defense. In addition, Mr. Davis asserted the defenses of Contributory Negligence and Assumption of the Risk.

How should the court rule on the defenses asserted by:

- [a] the School Board? Explain fully.
- [b] Mr. Davis? Explain fully.

✖✖

[a] The court should grant the school board's motion to dismiss based on sovereign immunity.

The doctrine that the State and its governmental agencies, while acting in their governmental capacities, are immune from liability for tortious personal injury negligently inflicted, has long been recognized and applied in Virginia. Counties were created as geographical subdivisions for the administration of state authority at the local level; therefore, counties are viewed as "political subdivisions" of the Commonwealth entitled to the same immunity as the Commonwealth, receiving a greater level of sovereign immunity protection than do cities unless a statute provides otherwise. A county retains sovereign immunity even when the county takes on characteristics of a city and exercises powers and performs services rendered by a city. County actions are not assessed under the governmental-proprietary distinction applicable to municipalities. Instead, county immunity extends to acts that would be considered governmental or proprietary. County immunity extends to cover county officers and employees who negligently cause injury to another.

The basis for a school board's immunity from liability for tortious injury has been generally found in the fact that it is a governmental agency or arm of the state and acts in a governmental capacity in the performance of its duties imposed by law. The immunity is incident to a governmental agency. *Boice Board of Education of Rock District*, 111 W.Va. 95, 96, 160 S.E.

566. Pursuant to Virginia statute, immunity for school boards has been waived for damages arising out of an accident to the extent of an insurance policy covering a vehicle involved in the accident. Va. Code §22.1-194.

Here, the claim does not arise from a vehicle accident; thus, the school board is cloaked with sovereign immunity.

[b] The court should deny Davis' motion to dismiss based on sovereign immunity.

The purpose of sovereign immunity is to protect the public purse and provide for smooth operation of government. In order to eliminate public inconvenience and danger that might spring from officials being fearful to act or to take public jobs based on the threat or use of vexatious litigation, certain government employees are cloaked by the sovereign immunity that applies to their employers.

The Supreme Court of Virginia has established factors to determine whether an employee is covered by sovereign immunity: (1) the nature of the function the employee performs, (2) the extent of the governmental entity's interest and involvement in the function, (3) the degree of control and direction exercised by the governmental entity over the employee, and (4) whether the alleged wrongful act involved the exercise of judgment and discretion. The court also considers whether plaintiff is asserting a claim of negligence as compared to gross negligence or intentional conduct. See *James v. Jane*, 282 S.E.2d 864 (Va. 1980).

The first factor weighs in favor of Davis given that he was performing the important function of a teacher at the time of the incident. The second factor also weighs in favor of Davis. The school board that hired Davis has an interest and direct involvement in the function of student instruction and supervision. The third factor is, at best, neutral. On the one hand, the school board exercises control and direction over the employee through the school principal. But, here, the principal appears to have given Davis too much latitude to run the class, allowing him to essentially recruit for his private school team while teaching this public school physical education class.

The fourth factor weighs strongly against Davis. The Supreme Court of Virginia has previously held that a teacher's supervision and control of a physical education class, including the decision of what equipment and attire is to be worn by students, clearly involves, at least in part, the exercise of judgment and discretion by the teacher. That would weigh in favor of sovereign immunity for the teacher. *Lentz v. Morris*, 236 Va. 78 (1988) (applying *Messina v. Burden*, 228 Va. 301 (1984)). However, here, the injury did not arise from an exercise of discretion – whether to have the entire group wear certain equipment, or what game to play. Rather, Davis selected his favored group of students, provided them with appropriate safety protection, and essentially told the other students to go off and do whatever they wanted to do. They chose to play the same game as the ones supervised by Davis, but without any protective gear. As a result, plaintiff was injured. [Note: applicants would get credit for arguing either way on this factor as long as the analysis and conclusion are consistent and reasonable].

#### Davis' arguments of contributory negligence and assumption of risk:

The court should rule against Davis on both defenses of contributory negligence and assumption of risk.

#### Contributory Negligence

Contributory negligence, if proved, is a complete bar to recovery by a plaintiff in Virginia. This affirmative defense must be raised in writing in an initial responsive pleading or the defense is waived, unless contributory negligence is shown by the plaintiff's own evidence. A plaintiff is contributorily negligent if he fails to act as a reasonable person for his own safety under the circumstances. As in all negligence claims, the defendant has the burden of proving not only that a plaintiff is negligent, but that his negligence is a proximate cause of plaintiff's injuries.

Here, Paul was under the direct supervision and "command" of his teacher, Davis. Group "B" was "told" to "play whatever game they wanted." Playing tackle football was not unreasonable given the circumstances of the class, especially given the unbridled direction and condoning from a teacher in authority. Playing tackle football was not, under the circumstances, negligent, and certainly there was no proximate cause between Paul's actions and his injuries.

#### Assumption of Risk

Assumption of Risk, if proved, is a complete bar to recovery by a plaintiff in Virginia. Davis must prove that Paul fully understood and appreciated a known danger and voluntarily exposed himself to that danger.

Group “B” were “told” by Davis to “play whatever game they wanted.” When the students were dispersed in two separate groups there was no mention to group “B” as what game(s) to play (or not play). There are no facts in the fact pattern to suggest that Paul was aware and fully understood and appreciated the extent of an alleged danger (playing tackle football).

Draftors' Note: Relevant authority for question 9 includes Article VIII, Section 6 of the Virginia Constitution; Va. Code §22.1-71; Va. *Carson v. LeBlanc*, 245 Va. 135 (1993); *Messina v. Burden*, 228 Va. 301 (1984); *Kellam v. School Board of the City of Norfolk*, 202 Va. 252 (1960).