Summary of Answers to the Essay Part of February 2008 Virginia Bar Exam
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After each bar exam, the Virginia Board of Bar Examiners invites representatives from each of the law schools in Virginia to meet with the Board for a review and discussion of the range of answers the Board will accept for each essay question. As a result of these discussions, the Board will often expand the scope of what is an acceptable answer.

Please remember what follows is just a summary, which includes some "filling in" based on the general information the Board furnished. jrz

[1] On January 15, 2008, following an earlier bench trial, Judge A.J. Wisdom, the newest judge of the Circuit Court of Fairfax County, Virginia issued a letter opinion explaining his rationale for ruling in favor of Plaintiff and directing that Plaintiff's counsel prepare an order to reflect the trial court's holding as set forth in his letter. On January 16, 2008, Defendant's counsel filed a motion for reconsideration of the letter opinion. The hearing on Defendant's motion was set for February 1, 2008.

At the outset of the hearing on February 1, and before the commencement of the argument on Defendant's motion, Plaintiff's counsel submitted a typed order reflecting the Court's January 15, 2008 letter opinion. The pertinent text of the order read:

> *And it appearing to the Court for the reasons stated in the Court's letter opinion, dated January 15, 2008, a copy of which is attached hereto and incorporated herein, that judgment should be entered in favor of Plaintiff in the amount of $275,000;*
>
> *Now, therefore, it is SO ORDERED.*
>
> *And, nothing further remaining to the done in this action, it also is ORDERED that this action be placed among the closed files of this Court.*

Counsel for both parties endorsed the above Order, with Defendant's counsel noting his objection. Judge Wisdom initialed each page and signed the Order, and the Clerk's office of the Circuit Court entered the Order on the Court's docket on that same day, February 1.

The oral arguments on Defendant's motion for reconsideration then proceeded, and at the conclusion thereof, on that same morning, Judge Wisdom stated orally from the bench, and without taking any further action at that time, that he was granting Defendant's motion for reconsideration and would issue a letter opinion in the near future.

On February 25, 2008, Judge Wisdom issued a second letter opinion, articulating his reasons for changing his mind and deciding the entire case in favor of Defendant and against Plaintiff -- a result that was directly opposite to that set forth in the first letter opinion. Judge Wisdom asked that Defendant's counsel prepare, circulate, and submit an order reflecting the February 25, 2008 letter opinion.

In a telephone discussion between counsel on February 26, Plaintiff's attorney told Defendant's attorney that Plaintiff would take action to preserve the earlier result in her favor. Defendant's attorney opined that Judge Wisdom's February 25 letter opinion was entirely proper and cited Code of Virginia ¤ 8.01-428 in support of his position. That Code section states:

> *Clerical mistakes in all judgments or other parts of the record and errors therein arising from oversight or an inadvertent omission may be corrected by the court at any time on its own initiative or upon the motion of any party and, after such notice, as the court may order.*

[a] What authority can Plaintiff bring to bear to preserve the earlier result in her favor, and what is the likely outcome? Explain fully.

[b] Is Defendant's reliance on Code of Virginia § 8.01-428, recited above, likely to prevail against Plaintiff's effort to preserve the earlier result in her favor? Explain fully.

[c] If Defendant is concerned that the Court might restore its February 1 Order in Plaintiff's favor, what steps should Defendant take to preserve his right to challenge it, and what are the immediate requirements for taking such steps? Explain fully.

[a] The February 1st order was a final order as it was clear that the judge he was through with the case. Consequently under Rule 1:1, there was a 21 day period, from February 1st, within which the judge could modify, vacate or suspend that order. After that period, the judge no longer had the authority to modify the February 1st order. Super Fresh Food Markets of Virginia, Inc., et als v. Racquel Ruffin 263 Va. 555 [2002]

[b] No, defendant is not likely to prevail in the motion for relief under §8.01-428(c). These facts are not the type of *errors* covered by this code section. There was no clerical error as the judge intended to enter the order and counsel for both sides had endorsed it. Morgan v. Russrand Triangle Associates, L.L.C. 270 Va. 21 [2005] [very similar facts to those of this problem]

[c] Defendant should file a Notice of Appeal. It must be in the hands of the trial court clerk's office within 30 days from the date of entry of the final order being appealed [February 1st] and counsel must mail a copy to all counsel of record and include his certificate of service on all counsel of record pursuant to Rule 1:12 on the original notice that is filed with the trial court's clerk's office. Rule 5:9

[2] Mary and George, residents of Suffolk, Virginia, had been married for 20 years. They had no children by their marriage. George had a son, Wilbur, by a previous marriage, and, although Wilbur and George had a close relationship, Mary and Wilbur never got along. In 2000, George and Mary executed valid wills, each leaving their substantial estates to the other. To please George, Mary provided in her will that, if George predeceased her, upon her death her entire estate would go to Wilbur.

George died in 2005. From then until Mary's death in January 2008, Mary and Wilbur had no communication, and Mary lived alone with her cats. In December 2007, upon finding a copy of her 2000 will, which she had long forgotten, Mary mailed the following letter to the attorney who had prepared the 2000 will and retained the original in his office. The letter was entirely in her own handwriting and signed by Mary.

Dear Counselor:

I want to meet with you as soon as possible. I am now canceling the will you wrote for me in 2000, and I am writing a new one. I do not want George's son, whose name I have forgotten, to have any of my property when I die. I have a very large estate, and I know George wanted to see that his son was taken care of, but I have never gotten along with him, and he has paid no attention to me at all. Since I have no living relatives, I want to leave my entire estate to the Stray Cats Society (SCS). As you may recall, I am a cat-lover, and I served on the SCS Board of Directors until recently and, before that, on the Board of Directors of The Kat Doktor (TKD). Both are wonderful nonprofit organizations that take care of homeless cats, but I believe SCS has a better program.

I am somewhat feeble, so I find it hard to get out of the house. Please call me so we can set up time when you can come to my home and write up a formal document.

/s/Mary
December 30, 2007

Mary died on January 5, 2008, before her attorney was able to meet with her. Her 2000 will and the December 30, 2007 letter were presented for probate. In the meantime, SCS had suffered financial setbacks and had gone out of business. Another nonprofit organization named Critter Care (CC), which cares for a variety of derelict animals, not just cats, took over the care of about half of the cats SCS had been caring for, and TKD took over the care of the remaining cats.

In the probate proceedings, Wilbur asserts the following claims: (1) that the December 30 letter is ineffective to dispose of Mary's estate; (2) that the December 30 letter does not revoke Mary's 2000 will; and (3) that he has the right to Mary's entire estate either under the terms of her 2000 will or by intestacy.

TDK and CC each petition the court to be substituted in place of the defunct SCS and claim the right to receive all or part of Mary's estate under the terms of the December 30, 2007 letter.

What arguments should Wilbur, TKD and CC make in support of the claims they each assert, and how should the court resolve each claim? Explain fully.

Wilbur should argue that Mary's letter to her attorney of December 30, 2007 did not constitute a valid will or codicil. He should also argue that the letter did not meet the requirements of a revocation or cancellation of Mary's 2000 validly executed will. Therefore, he would take under Mary's 2000 will.

The applicant was expected to discuss the requirements of a valid holographic will including whether the letter of December 30 showed present testamentary intent. The issue of testamentary capacity should have been mentioned as well since Mary referred to George's son in the letter, by saying..."whose name I have forgotten."

TKD and CCC best arguments would center on the doctrine of cy pres. Here, the facts tell us that SCS is defunct and TKD and CC have assumed their main function. Of course in order for TKD and CC to prevail, they would have to prevail on the argument that Mary's letter of December 30 was a valid holographic will or codicil.

The examiners were of the opinion that the letter was not a valid will or codicil because it lacked present testamentary intent, but that it was much more likely that it did act to cancel or revoke Mary's prior will of 2000.

The examiners cited Va. Code Sections § 64.1-45.2, §64.1-58.1 and §55-544.13 as statutory authority governing this question. Several cases were cited as well, including McCutchan v. Heizer et als 217 Va 938 [1977]; Mumaw v. Mumaw 214Va.573; Wolfe v. Wolfe et als 248 Va. 359 [1994] Searls v. Perry et als 184 Va.1044 [1946]; Thompson v. Royal 163 Va. 492 [1934] ; Smith v. Moore, Admin 225 F. Supp. 434 [1963] and Bell v. Timmins, Admin. 190 Va. 648 [1950].

[3] Gordon, a 13-year-old resident of Phoebus, Virginia, and his parents went on a family hiking trip along Skyline Drive in Virginia. Before leaving, they had made reservations for an overnight stay at a motel called the Waynesboro Mountain Inn ("WMI"). They had never heard of WMI before.

Shortly after checking in to WMI, Gordon slipped on the sidewalk where water draining from an air conditioner had been allowed to accumulate and broke his leg. As a result, he was permanently disabled.

WMI, which is solely owned and operated by an individual named Quinn, is one of 500 Mountain Inns nationwide. Each Mountain Inn is a franchise owned by individual businesspersons and operated under a uniform franchise agreement between the individual and Mountain Inns Corporation ("MIC"). MIC has a website on which requirements for qualifying as a franchisee and the uniform franchise agreement can be conveniently viewed.

The key provisions of the uniform franchise agreement signed by Quinn provide (1) that the location, plans, and specifications of each motel be approved by MIC; (2) that Quinn pay an annual fee to support MIC's national advertising network, (3) that MIC must approve the sale or other disposition of a controlling interest in WMI before any transfer can occur, (4) that WMI's manager, housekeeper, and restaurant manager receive two weeks training by MIC at the commencement of their employment, (5) that Quinn conduct the business under the MIC "system," (6) that Quinn make quarterly reports to MIC concerning his financial operations, and (7) that Quinn submit to once-a year inspections of WMI facilities and procedures by MIC representatives. Quinn scrupulously complied with those provisions of the uniform franchise agreement.

Gordon's parents retained Alvin, a local attorney, to represent them and Gordon in a personal injury suit to recover damages for Gordon's injuries. A brochure that Gordon's parents had obtained at the WMI described the WMI as, "Owned and operated by Quinn, WMI is one of a chain of 500 fine Mountain Inns across the country. For more information see www.mountaininns.com."

Alvin surmised that he would have a better chance of obtaining a large settlement or judgment by suing MIC rather than Quinn. Without doing any research or further investigation into the relationship between Quinn and MIC, Alvin signed and filed a complaint in Circuit Court naming MIC as the sole defendant. The complaint alleged that, "Gordon's injury was the result of the negligence of Quinn, the agent of MIC acting on behalf of and under the direction and control of MIC."

MIC filed an answer to the complaint, denying all liability. MIC also filed a motion for sanctions against Alvin for filing a frivolous lawsuit.

[a] Should MIC be held liable for the negligence of Quinn? Explain fully.

[b] On what basis, if any, might the court impose sanctions on Alvin? Explain fully.

[a] Applicant should discuss whether Quinn was an agent of MIC and in particular the issue of control as set forth by the terms of the franchise agreement. The discussion should address each of the specific terms and how each affected the control issue. The fact that is was a franchise agreement did not insulate the contracting parties from an agency relationship, nor did what the parties called it. The BBE would accept either conclusion over whether Quinn was an agent, but wanted a thorough discussion of the control issue. Murphy v. Holiday Inns, Inc. 216 Va. 490 [1975], Wells v. Whitaker 207 Va. 616 [1966]

[b] When signing a pleading, in this case the complaint, plaintiff's counsel made the assurances that (i) he'd read it; (ii) to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. Va. Code §8.01-271.1 Student should discuss whether the facts, in particular franchise agreement, were such that the plaintiff's counsel met the duties imposed by the statute. The BBE would accept either conclusion, but if the applicant concluded in [a] that there was an agency relationship, then the statute is not violated. If the applicant concluded that there was no agency relationship, then the discussion should focus on if the facts were close enough that the statute was complied with.

[4] Angus, a resident of Chilhowie, Virginia, made a loan of $25,000 to his nephew, Bob. Angus prepared a draft of a promissory note, which, in addition to standard language of a promissory note, contained the following terms:

[1] This note is payable so long as no earthquake measuring more than 3.0 on the Richter scale hits Chilhowie, Virginia during the term of this note.

[2] The principal amount of this note is $25,000 or its equivalent in Euros as of the due date.

[3] This note is payable to the order of Angus or any other person.

[4] This principal balance of this note, together with accrued interest is due on the earlier of Angus' 70th birthday (July 4, 2015) or on the date upon which the Chicago Cubs baseball team wins the World Series.

Angus wants the note to be fully negotiable, but is concerned that one or more of these specific terms might make the note non-negotiable.

Discuss separately each of the four enumerated terms, and explain fully as to each:

[a] Whether, as stated, the term would make the note non-negotiable;

[b] If not, why the term would not destroy negotiability; and

[c] If so, why and what language would have to be deleted from the term in order to preserve negotiability.

This question is governed by Article 3 of the Uniform Commercial Code, in force in Virginia (1990 Revised Article 3).

[1] [a] A negotiable instrument is:[1] an unconditional, [2] promise or order, [3] to pay a fixed amount of money, with or without interest, [4] payable "to bearer" or "to order," [5] payable on demand or on a definite date, and [6] without any other undertakings (except such additional undertakings as are permitted by the Code). UCC § 8.3-104. This term is negotiability-defeating (it makes the note non-negotiable) because it imposes a condition. A negotiable instrument must be unconditional.

[b] N/A

[c] To preserve negotiability, there would have to be only "the standard language of a promissory note" [as stated in the fact pattern] without a condition. The language in term #1 would have to be deleted.

[2] [a] The term is harmless (it does not make the note non-negotiable).

[b] A negotiable instrument must specify a fixed amount of money. "Money" is defined in the Uniform Commercial Code, and it includes non-U.S. currency (currently in Article 1, §8.1-201(b)(24) ("money"). A "euro" is a non-U.S. currency. Therefore this term satisfies the requirement that there be "money." However, there must be a "fixed" amount of money. Here the amount is pegged to the U.S. dollar amount, $25,000 (payable either in U.S. dollars or the euro equivalent). The code is very clear, § 8.3-107, that it is permissible to make the calculation as of the day the instrument is paid, and to do so using the bank offered spot rate at the place of payment.

[c] N/A

[3] [a] The term does not defeat negotiability

[b] A negotiable instrument must be payable "to order" or "bearer" at the time of its issuance. This requirement is met by the "magic words" of negotiability "to the order of Angus..." Those words suffice. If there is any difficulty, it is in interpreting the effect of what comes next: "... or any other person." Those words do not undo the effect of "to the order of" and so do not defeat negotiability. Instead, those words should have the effect of making this instrument one that is, in effect, "bearer paper"—not payable to an identified person, but payable to bearer (like "pay to the order of cash" which is negotiable, but as bearer paper).

[c] N/A

[4] [a] The term is negotiability-defeating ((it makes the note non-negotiable).

[b] N/A

[c] A negotiable instrument must be payable on demand or on a definite date. July 4, 2015 is a definite date. The "date the Chicago Cubs baseball team wins the world series" is not definite. It thus defeats negotiability. It would have been better practice to have made a decision: payable "on July 4, 2015" only or payable "on demand" (if the idea is that the note is due whenever the holder wants).

[5] In October 2007, Petula Jones took a six-month leave of absence from her job in Ashland, Kentucky, where she resided. She traveled to Gate City, Virginia and moved into a spare room in her mother's house so she could care for her elderly mother, who was recuperating from an extended illness. In December 2007, Petula was walking to her car in the parking lot of the City Mall in Gate City when she was struck by an automobile driven by Ruby Smith, a resident of Kingsport, Tennessee. Three friends of Ruby from Kingsport were in the car at the time of the accident. They were just wrapping up a shopping tour and preparing to return to Kingsport. City Mall is a Delaware corporation and has its principal place of business in Gate City, Virginia.

Ruby's passengers told the police officer at the scene that Petula was reading a magazine as she walked across the parking lot and darted out from behind a concrete column at the time of the accident. They also said that Petula was not watching where she was going. Petula told the police that her view was blocked when Ruby's car struck her because she had just walked out from behind a large concrete column supporting the upper level of the parking lot.

Petula sued Ruby and City Mall in the Big Stone Gap Division of the U.S. District Court for the Western District of Virginia, which is the district in which Gate City is located. Big Stone Gap is 35 miles from Gate City. Petula's complaint alleged negligent operation of a vehicle against Ruby and negligent maintenance of the parking lot against City Mall. She sought $60,000 in damages for personal injuries against Ruby. Against City Mall, Petula sought an injunction ordering City Mall to tear down the concrete support column, which she alleged was a safety hazard.

City Mall moved to dismiss Petula's complaint on the ground that the court lacked subject matter jurisdiction. At the hearing on City Mall's motion, the court received probative evidence that, if granted, the injunction would require City Mall to spend in excess of $100,000 to comply with it. The court denied the motion.

Ruby then moved for a change of venue of the action to a U. S. District Court in Tennessee on the grounds that (1) venue in the Western District of Virginia is improper and (2) she is a citizen of Tennessee and it would be a hardship for her and her witnesses to travel to Virginia for trial. The court denied Ruby's motion for a change of venue.

Ruby then filed a notice of appeal to the lower court's denial of her venue motion to the U. S. Court of Appeals for the Fourth Circuit. The Court of Appeals dismissed Ruby's appeal.

[a] Was the district court correct in denying the motion of City Mall to dismiss the complaint on the ground that the court lacked subject matter jurisdiction? Explain fully.

[b] Was the district court correct in denying Ruby's motion for change of venue on each of the two grounds? Explain fully.

[c] Was the Court of Appeals correct in dismissing Ruby's appeal? Explain fully.

Note: You may assume that the claim for injunction against City Mall is properly pleaded. Do not discuss the merits of whether the court could or should grant the injunction.

[a] The district court was correct in denying the motion of City Mall to dismiss the complaint on the grounds that the court lacked subject matter jurisdiction. The federal court has diversity jurisdiction under the diversity jurisdiction statute, 28 U.S.C. section 1332, in that, Petula Jones is a citizen of Kentucky and Ruby Smith is a citizen of Tennessee and City Mall is for jurisdictional purposes a citizen of Virginia. Because Petula, as plaintiff, is a citizen of a state different from all defendants, complete diversity of citizenship exists, as is required by federal courts' longstanding interpretation of the diversity statute. In addition, the other requirement of the diversity statute - amount in controversy exceeds $75,000, exclusive of interests and costs is met, as the Plaintiff's claim against Ruby is for $60,000 and the Mall would have to spend in excess of $100,000 to comply with an injunction in the event Plaintiff prevails. The court may aggregate the damages of claims against multiple defendants to reach the threshold amount of exceeding $75,000 as long as the defendants are jointly liable to the plaintiff.

The examiners also expected to give full credit if an applicant analyzed and discussed supplemental jurisdiction under 28 U.S.C. section 1367as a way of reaching the jurisdictional amount.

[b] Yes, the district court was correct in denying Ruby's motion for a change of venue on both grounds. The case was brought in the Big Stone Gap Division of the U.S. District Court for the Western District of Virginia, which is where a substantial part of the events or omissions giving rise to the claim occurred, making venue proper under 28 U.S.C. section 1391. The court could not order transfer of the case to the Tennessee Federal District Court as the case could not have originally been filed there because not all the defendants reside in Tennessee. See 28 U.S.C. section 1404(a) (imposing requirement that transfer not available unless transferee district is one "where it might have been brought".)

[c] The Court of Appeals was correct in dismissing Ruby's appeal since there was no final order in the case. See 28 U.S.C. section 1291 (providing that "courts of appeal shall have jurisdiction from all final decisions of the district courts).

[6] Trustor, a lifelong resident of Norfolk, Virginia, died in 1975. His will included a transfer of a valuable parcel of land in Virginia Beach and cash of $500,000 in trust to Trust Co., as Trustee. The valid trust provided in relevant part:

The Trustee shall hold and manage the trust assets and shall have all the powers and authorities conferred by Virginia law. The Trustee is authorized in its discretion to pay my son, Rufus, as much of the income and principal as the Trustee determines to be required for Rufus's support and maintenance for his lifetime. Upon Rufus's death, the trust shall continue, and the Trustee shall pay so much of the income of the trust to Rufus's surviving children as the Trustee determines necessary for their support and maintenance. When the youngest child of Rufus attains the age of 50 years, the Trustee shall distribute the remaining principal, outright, in equal shares to the then living children of Rufus.

The interest of each beneficiary hereunder, to the extent permitted by law, shall be held and possessed by the Trustee in trust upon the condition that the same shall not be subject to liabilities or creditor claims or to alienation, assignment, or anticipation by such beneficiary.

Before Trustor's death, Rufus had been financially irresponsible, spending most of his time surfing in the summer and skiing in the winter. Within a few years after Trustor's death, Rufus settled down, earned a college degree, married, had a child (Suzy), and established a successful business. There were, however, some outstanding unpaid debts from his youthful misadventures, including a valid judgment obtained by Arvin Ski Resorts in the Norfolk General District Court for damages Rufus caused to his hotel room during the winter of 1975. Arvin Ski Resorts had renewed the judgment periodically in order to keep it current but had taken no other steps to effect its rights and had never attempted to enforce it.

In 2005, having just learned about the trust, Arvin Ski Resorts obtained a valid garnishment summons and served it on the Trust Officer at Trust Co. Arvin demanded that the Trustee honor the garnishment and pay the judgment in full from the principal and income of the trust. When the Trustee refused, Arvin's lawyer asserted that the judgment constituted a lien on the property in Virginia Beach and threatened to file suit to enforce the judgment lien against that property.

In 2006, on her 25th birthday, Rufus's only child, Suzy, asked him to give her the down payment for a new home. Rufus phoned the Trust Officer at Trust Co. and directed him to draw $50,000 from the trust principal, explaining that the money was to be a gift to his daughter for the down payment. When the Trust Officer refused, Rufus consulted his lawyer and asked for advice on whether, if he (Rufus) renounced all interest in the trust, he could thereby require Trust Co. to terminate the trust and distribute the remaining income and principal to Suzy in a lump sum.

[a] May Trust Co., as Trustee, lawfully honor the garnishment? Explain fully.

[b] May Trust Co. lawfully comply with Rufus's demand that it distribute $50,000 to Suzy? Explain fully.

[c] If Rufus and Suzy concur, may Trust Co. lawfully terminate the trust and distribute the income and principal to Suzy in a lump sum? Explain fully.

[d] Does Arvin have a judgment lien against the real property in Virginia Beach? Explain fully.

DO <u>NOT</u> DISCUSS THE RULE AGAINST PERPETUITIES.

[a] Trust Co. may not lawfully honor the garnishment since the trust is a valid spendthrift trust

[b] Trust Co. may not distribute to Rufus's daughter Suzy under the plain language of the trust, so long as Rufus is still alive, the Trustee is limited to providing for Rufus' support & maintenance.

[c] Rufus and Suzy may not agree to terminate the trust and distribute the income and principal to Suzy. Rufus could still have more children; therefore unborn beneficiaries being a possibility preclude such termination.

[d] Arvin does not have a judgment lien against the real property in Virginia Beach. Rufus does not have an interest in the real property, as title to the real property is owned by the trust. A beneficiary' interest in the trust properties is an interest in personal property.

The examiners cited Va. Code Sections §55-545.02, §64.1-196.4, §55-17.1 and §8.01-501 as authority. Supreme Court of Virginia cases cited were <u>Schmucker v. Walker</u> 226 Va 582 [1984] & <u>Telephones v. Laprade, et als</u> 206

Va 388 [1965].

[7] Steve owned and operated a sole proprietorship located in Irvington, Virginia, known as "Steve's Boat & Tackle," where he sold and repaired boats and catered to recreational fishing enthusiasts. For some time, Olly Owner had kept his 35-foot cabin cruiser, *Nimrod*, at Steve's boatyard and paid an annual fee to Steve's for storing and performing any needed repair work on *Nimrod*.

At the end of the 2007 season, Olly decided to relocate to Texas and to sell *Nimrod*. Before leaving, Olly put a "For Sale" sign on *Nimrod* and told Steve, "I'll pay you a fee of 10% for selling my boat, so long as I clear $40,000 on the deal. Sell it 'as is.' The maintenance records are in the drawer next to the captain's chair."

Unknown to Steve, and before he left for Texas, Olly had intentionally altered the maintenance records to show a reduction in the boat's engine running time from 15,000 hours to 5,000 hours.

After Olly moved, Peter Purchaser visited Steve's boatyard and said he was looking for a good-sized boat for "long runs out to the Bay for the best deep water fishing." Steve replied, "The *Nimrod* is for you."

Steve sold *Nimrod* to Purchaser. Steve said to Purchaser, " The boat is to be sold 'as is.' Olly kept it here for the last 5 years, and I've done all the maintenance. The boat runs like a dream." Prior to completing the deal, Steve took Purchaser out for a short run on the Chesapeake Bay, let him operate and inspect the boat, and showed him where the boat's records were kept. Purchaser's inspection revealed nothing ostensibly wrong with the boat or the engine, and he was unable to see anything irregular in the maintenance records. Based on that, Purchaser agreed to pay $45,000. Steve prepared the necessary paperwork, including a bill of sale, which read, "Sold as is, no warranties."

Within a month, Purchaser experienced engine trouble. He immediately took the boat to Alan's boatyard, where, at a cost of $2,500, he had the engine torn apart and inspected. Alan confirmed that laboratory tests run on the old engine demonstrated that it simply was worn out, having been run for more than 12,000 hours, which was the customary life expectancy for that model of engine. Alan said that the old engine could not be repaired and that a replacement would cost a minimum of $10,000.

[a] Can Purchaser assert against Steve a claim arising under the Uniform Commercial Code by reason of Steve's status as seller of the boat? Explain fully.

[b] Did Olly's alteration of the maintenance records give rise to any cause of action under the Uniform Commercial Code that Purchaser can assert against Olly? Explain fully.

[c] Can Purchaser revoke the sale and, in addition, recover any damages under the Uniform Commercial Code? Explain fully.

Note: You may assume that both Steve and Olly are sellers under the UCC.

[a] Steve is a merchant because he deals in boats. Va. Code Ann. § 8.2-104(1). Steve's sale of the boat to Purchaser would have created an implied warranty of merchantability because Steve is a merchant who deals in goods of that kind. Va. Code Ann. § 8.2-314(1). The sale of this boat would also have included a warranty of fitness for a particular purpose because (i) Purchaser specifically asked Steve for a boat for the particular purpose of "long runs out to the Bay" and (ii) Steve knew that Purchaser was relying on Steve's judgment to select a suitable boat. Va. Code Ann. § 8.2-315. However, both implied warranties would be disclaimed by an "as is" clause. Va. Code Ann. § 8.2-316(3)(a). Similarly, Purchaser's inspection of the boat probably disclaims both implied warranties. Va. Code Ann. § 8.2-316(3)(b). Purchaser's only hope is that a Virginia court will impose a requirement that the "as is" clause be conspicuous (notwithstanding the absence of such a requirement in Va. Code Ann. § 8.2-316(3)(a)) by extension from *Armco, Inc. v. New Horizon Development Co. of Virginia, Inc.*, 229 Va. 456 (1985) (holding that express disclaimers of warranties of merchantability and fitness much be conspicuous according to Va. Code Ann. § 8.2-316(2)). Absent such an extension, however, Purchaser has no claim for damages under the UCC against Steve.

[b] Va. Code Ann. § 8.1-103 expressly states that the law relating to fraud and misrepresentation supplements the UCC. Olly's alteration of the maintenance records is certainly fraudulent. In addition, the altered records would also amount to an express warranty because they amount to affirmations of fact as well as a description of the goods. Va. Code Ann. § 8.2-313(1)(a) and (b). Purchaser's mere review of the altered records made them part of the basis of the bargain; he need not show reliance on them. *Yates v. Pitman Mfg., Inc.*, 257 Va. 601 (1999). Purchaser thus has a strong claim against Olly for damages for breach of warranty measured by the difference between the value of the boat as warranted (presumably around the purchase price of $45,000) and the boat as accepted (presumably $35,000, i.e., the value of the boat less the cost of a new engine)). Va. Code Ann. § 8.2-714(2). Purchaser would also be entitled to incidental damages like the $2,500 he paid Alan to inspect the engine. Va. Code Ann. § 8.2-714(3).

[c] Purchaser can revoke his acceptance of the boat if it suffers a non-conformity that substantially impairs its value to him but only where he failed to discover the nonconformity because it was difficult to discover before acceptance. Va. Code Ann. § 8.2-608(1)(b). The failure of the boat's engine is clearly a substantial nonconformity. The cost of replacement-$10,000-likewise is a substantial impairment of the boat's value to Purchaser. Purchaser must revoke his acceptance within a reasonable time after he discovers the nonconformity. A month after acceptance to discover the nonconformity and prompt notice to Olly without further use of the boat would easily meet this requirement. *See Gasque v. Mooers Motor Car Co., Inc.*, 227 Va. 154 (1984). Upon revocation, Purchaser is entitled to restitution of the purchase price (Va. Code Ann. § 8.2-711(1)) plus damages measured by the difference, if any, between the market value of the boat (if it had been as warranted) and the purchase price of $45,000 plus any incidental expenses like the $2,500 he paid Alan to inspect the engine. Va. Code Ann. § 8.2-713(1)

[8] In 1980, Nimrod Rivers moved out of the house in Alleghany County, Virginia, where he and his wife, Ginger Rivers, lived. He moved in with his long-time girlfriend, Carla Majors, in Bath County, Virginia. Nimrod and Ginger never divorced and never cohabited after 1980.

Nimrod and Carla lived together thereafter and, in 1985, actually went through a civil marriage ceremony in Virginia. Thereafter, they considered themselves to be husband and wife, and Carla adopted the name Carla Rivers.

In 2000, Nimrod purchased a valuable parcel of property (Blackacre) in Bath County and received a deed, which, based on his specific instructions to the grantor, conveyed title as follows: "Nimrod and Carla Rivers as tenants by the entirety with the right of survivorship." Nimrod died intestate in 2007.

Ginger filed a suit for declaratory relief against Carla in the Circuit Court of Bath County, asking the court to declare that she was an owner of a one-half interest in Blackacre. In the complaint, she included a legal description of Blackacre and alleged the following:

- That Nimrod died intestate in 2007.
- That Carla and Nimrod were never husband and wife;
- That, although Ginger and Nimrod separated in 1980, they never divorced, so Ginger remained Nimrod's wife up to the time of his death;
- That it is undisputed that Nimrod intentionally took title to Blackacre as "Nimrod and Carla Rivers as tenants by the entirety with the right of survivorship;"
- That, under the circumstances, a tenancy by the entirety with the right of survivorship is a legal impossibility; and
- That Ginger, as Nimrod's surviving spouse, is entitled to a one-half interest in Blackacre.

Carla filed a demurrer asserting that Ginger's complaint failed to state a cause of action.

[a] Were Nimrod and Carla husband and wife? Explain fully.

[b] Explain fully what the purpose of a demurrer is, what pleading requirements must be present for a demurrer to lie, and whether the court should sustain or overrule Carla's demurrer.

[a] No they were not husband and wife unless Nimrod got divorced from Ginger. The "marriage" to Carla was void since Nimrod was already married.

[b] The purpose of a demurrer is to challenge the sufficiency of the allegations in pleading it's filed against to make out a cause of action against the defendant. The defendant, when demurring, for purposes of the court's ruling on the demurrer, admits the truthfulness of all the factual allegations in the pleading against which the demurrer is filed. The court must look solely to the face of the pleading against which the demurrer was filed in order to rule. Va. Code §8.01-273

The BBE thought the demurrer should be sustained. The complaint alleged that two parties, who were not married, took title to real estate as tenants by the entirety. This is an estate that can be held only by husband and wife. However, parties, married or not, are free to hold property jointly and if the instrument creating the estate manifests the requisite intention, the joint tenancy will be clothed with the common law right of survivorship. Va. Code 55-20.1 and Gant v. Gant 237 Va. 588. Since the deed to Nimrod and Carla expressed an intent that the property be held with survivorship, they took title as joint tenants with the right of survivorship and thus on Nimrod's death, title passed to Carla and this is all shown by Ginger's complaint which means that as a matter of law, shown on the face of the complaint, she's not entitled to recover and the demurrer should be sustained.

[9] Mary Scott Boone and her daughter, Staci, are both residents of Virginia. On December 1, 2007, Mary signed and delivered to Staci the following writing:

> KNOW ALL MEN BY THESE PRESENTS, That I, Mary Scott Boone, because of my natural love and affection for my daughter, reserving unto myself the use thereof and income therefrom for and during my natural lifetime, do hereby give and set over and deliver to my daughter, Staci Boone, all my stocks, bonds, notes and all other personal property deposited by me in the safe deposit box in the Menchville National Bank, rented in the name of myself and of my daughter, Staci Boone. It is my full intent and purpose, testified to by my signing this instrument, to presently pass title to such personal property as may be located in said box immediately upon its being so placed therein.

Mary and Staci then took certain securities and jewelry to the Menchville National Bank, where they rented a safe deposit box in the names of "Mary Scott Boone and Staci Boone." They placed the securities and jewelry in the box along with the December 1, 2007 writing, and each of them received a key to the box. Under the terms of the box rental agreement, which they both signed, each of them had the right to open the box any time without the consent or presence of the other.

A few days later, Mary discovered that Staci's boyfriend had misappropriated some money that Mary had entrusted to his care. Concerned that Staci might inadvertently or otherwise give her boyfriend access to the safe deposit box and that the boyfriend might steal something out of it, Mary decided that she no longer wanted Staci to have access to the box or any rights in the securities and jewelry in the safe deposit box.

Without telling Staci the reason, Mary asked Staci to give her the key Staci had in her possession. Staci gave the key to her mother. At that time, however, Mary said nothing to suggest that she no longer wanted Staci to have any rights in the securities and jewelry.

About a week later, Mary prepared a release document, which stated. "By signing this document, Staci Boone hereby surrenders all rights to the property contained in the safe deposit box in Menchville National Bank." Mary confronted Staci with the facts and demanded that she sign the release. Staci refused to sign it.

Staci then filed a complaint seeking to have the December 1, 2007 writing declared to be a valid deed of gift and seeking a determination of her rights in the securities and jewelry in the safe deposit box.

Mary asserted the following defenses:

First: That she never made a valid gift of the securities and jewelry placed in the safe deposit box because none of the securities or jewelry were actually in the box at the time Mary signed and delivered the writing to Staci.

Second: That there was no valid gift of the property in the box because both Mary and Staci had equal access to the safe deposit box.

Third: That whatever rights Staci might have had in the contents of the safe deposit box ceased when Staci returned the key to Mary.

[a] How should the court rule on each defense? Explain fully.

[b] What is the nature of Staci's rights in the securities and jewelry in the safe deposit box? Explain fully.

[a]

First: The court should rule that the deed of gift was valid. The property was placed in the safety deposit box immediately following the execution of the deed of gift and was accessible by Staci. Sawyer v. Matthews, et als 166 Va. 177 (1936).

Second: The fact that both had equal access to the safety deposit box did not prevent the gift from being effective. Staci had immediate access to the property & if Mary died the next day, all of the rights in and to the property would have been fully vested in Staci.

Third: The return of the key to Mary did not change the status of Staci's ownership. At the time of returning the key to her Mom, Mary, Staci was not aware of Mary intent to try to revoke the gift and thus her returning the key can not be taken as an acquiescence to any attempted revocation.

[b] Subject to Mary's reserved life estate, Staci had present ownership of the property along with a present right of possession, shared with her Mom.