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✖✖ After each bar exam, the Virginia Board of Bar Examiners, for years, has invited the Deans [or the Deans' designees] of all Law Schools located in Virginia, to meet with the Board. Representatives from 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 September 2020 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 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 September 2020 Virginia Bar Exam

Prepared by the following who collaborated to prepare the suggested answers for the VBBE: J. R. Zepkin & William H. Shaw, III of the Adjunct Faculty of William & Mary Law School, Professor Emmeline P. Reeves of University of Richmond Law School, Professor Benjamin V. Madison III of Regent University Law School, Professor Cale Jaffe of University of Virginia Law School & Adjunct Professor 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), Professors Amanda Compton & Mike Davis of George Mason Law School, Professor Rena Lindevaldsen of Liberty University Law School and Professor Laura Wilson of Appalachian School of Law.

The following, provided us great help with suggested answers in each's particular area[s] of specialty: Dean Brant Hellwig and Profs. Elizabeth Belmont, Carliss Chatman, and Robert Danforth of W&L School of Law; Mary Burkey Owens, Esq., Owen & Owens PLC; Professors Eric A. DeGroff & James J. Duane of Regent University Law School.

1. [09.20] Owen, the owner of three non-adjacent undeveloped parcels of land fronting on Blackbird Road in the City of Roanoke, Virginia, agreed to sell the three parcels to Brian. Brian intended to place a mobile home on each lot for rental, and Owen assured him that he knew of nothing that would prevent him from doing so.

Both Owen and Brian signed separate contracts for the sale of each of the lots, which included the price to be paid by Brian, the separate closing date for each transaction, and provided that Owen would pay his share of the prorated real estate taxes as of the closing date. Each contract also provided that the lots were free and clear of all encumbrances. There was no mention of zoning in any of the contracts.

LOT 1: In an inadvertent oversight, the closing statement failed to allocate any of the real estate taxes to Owen. The deal closed with the entire amount of the taxes allocated to Brian, who received and recorded a properly executed general warranty deed conveying Lot 1 without mention of real estate taxes. A month later, when Brian noticed the oversight, he demanded payment from Owen of Owen's share of the taxes. Owen refused, saying that taxes were allocated on the closing statement and he had no further obligation.

LOT 2: At closing, Brian paid the agreed purchase price for Lot 2 and accepted delivery of a properly executed general warranty deed from Owen. At the time, Brian and his wife were in the midst of a divorce, and, in an effort to avoid having to list Lot 2 on the schedule of property subject to division by the court, Brian decided not to record the deed and to retain it unrecorded in the safe in his office. When Brian's estranged wife became aware of the Lot 2 transaction, she accused him of hiding his ownership of this asset. Brian denied her allegation, arguing that as long as the deed to Lot 2 remained unrecorded, he could not be deemed to be the legal owner of that property.

LOT 3: At closing, Brian received and recorded a deed with general warranty and English covenants of title to Lot 3. Brian then went to the Roanoke City Planning Office and requested a building permit to place a mobile home on the lot. He was informed that the zoning for that area did not permit mobile homes, and he was denied the building permit.

Shortly after closing on Lot 3, Brian was contacted by the lawyer for Saul's Septic Systems (Saul's), who said that Saul's had a judgment lien in the amount of $3,500 on Lot 3 resulting from work Saul's did in installing a septic system

under a contract with Owen. Saul's had obtained a judgment in the General District Court for the City of Roanoke and had docketed the judgment in the Circuit Court Clerk's Office three weeks prior to the closing of the sale of Lot 3. Brian demanded that Owen pay the $3,500 to clear the lien. Owen refused.

[a] Is Owen liable for his share of the real estate taxes on Lot 1? Explain fully.

[b] How should a court rule on Brian's argument that he is not the owner of Lot 2? Explain fully.

[c] What warranties are encompassed by the English covenants of title, and does Brian have a cause of action against Owen for breach of any of those warranties due to his inability to obtain a building permit for Lot 3? Explain fully.

[d] Is Owen liable to Brian for the $3,500 Saul's Septic Systems lien? Explain fully.

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[a] Owen will be liable for his share of the property taxes on Lot 1. Under the doctrine of mutual mistake, a court may give relief where there has been an innocent omission or insertion of a material stipulation, contrary to the intention of both parties. *Ayers v. Mosby*, 256 Va. 228, 234 (1998). Here, the parties agreed in writing that Owen would pay his share of the prorated real estate taxes as of the closing date. In an "inadvertent oversight," the closing statement failed to allocate any real estate taxes to Owen. Instead, Brian paid the entire amount of real estate taxes. Based on the mutual mistake, the court will enforce the terms of the contract of sale, requiring Owen to pay his share of the property taxes on Lot 1.

Also, the doctrine of merger did not apply to cut off Brian's claim for reimbursement. Under the merger doctrine, a previous contract is extinguished by an instrument of higher dignity – the deed. The doctrine of merger only applies to the subject matter specifically covered by the deed. It does not apply to provisions that are collateral to the passage of title. *Tribby v. Tribby*, 241 B.R. 380 (E.D. Va. 1999) (quoting *Empire Management & Dev. Co. v. Greenville Assocs*., 255 Va. 49 (1998)). The merger doctrine is of narrow scope and disfavored. *See Phillip Abi-Najm v. Concord Condominium, LLC,* 280 Va. 350 (2010). Under the merger doctrine, a closing statement does not extinguish a purchase contract*. Empire Management*, 255 Va. at 54. Thus, the purchase contract, including its provisions concerning allocation of the real property taxes, survives.

[b] Yes, a Virginia court should rule that Brian is the owner of Lot 2 notwithstanding his failure to record the deed so long as there is sufficient corroborative evidence of the delivery of the unrecorded deed from Owen to Brian.

In order for a deed to be valid, it must: (1) meet certain formalities; (2) be delivered by the grantor; and (3) be accepted by the grantee. Delivery can occur by various methods, including manual delivery. Failure to record the deed, however, does not invalidate it. Once delivery occurs, title passes to the grantee.

Here, on the closing date, Owen manually delivered and Brian accepted delivery of a properly executed deed from Owen. Although Brian did not record the deed, title passed at the moment he accepted the valid deed from Owen. Therefore, a court should rule that Brian is the owner of Lot 2, despite the deed not being recorded.

[c] No, Brian does not have a cause of action against Owen because a lawfully adopted zoning ordinance is not an "encumbrance," tenancy, or lien on the land.

Here, Owen knew of Brian's intent to place a mobile home on Lot 3. Before signing the contract, Owen assured Brian that he did not know of anything that would prevent him from doing the same. However, after delivery of the deed, when Brian went to request a building permit to place a mobile home on the lot, his request was denied by the Roanoke City Planning Office due to a zoning ordinance preventing this type of use in that area.

Under Virginia Code § 55.1-356: "The words 'with English covenants of title' or words of similar import in the granting part of any deed shall be deemed to be an expression by the grantor of those covenants set out in §§ 55.1-359 through 55.1-362, and in addition thereto the covenant that he is seized in fee simple of the property conveyed."

In other words, the language "English covenants of title" simply mean that the deed is conveyed in fee simple, without any encumbrances of tenancies, or liens on the property. The English covenants of title include the (1) covenant of right to convey; (2) covenant of quiet possession, (3) covenant of free from encumbrances, (4) covenant of further

assurances, and (5) covenant of no act to encumber.

The covenant of quiet possession free from encumbrance simply constitutes a promise that a grantee will hold and enjoy the land free from any interruption, claim or demand by anybody, and that grantor would indemnify and save grantees harmless against any and every charge or encumbrance. *See* Va. Code § 55.1-360; *Adams v. Seymour*, 61 S.E.2d 23, 191 Va. 372 (1950).

An encumbrance has been defined as including the existence of physical intrusions or encroachments or superior title or interest in the land held by another party. Lawful zoning ordinances are not encumbrances.

Thus, Brian does not have a cause of action against Owen for a breach of any of the English covenants.

[d] Although Owen breached his covenant that Lot 3 was free from encumbrances, he will not be liable to Brian for the $3,500 unless Brian satisfies the lien himself or suffers damages as a result of the lien being enforced by Saul's Septic Systems. Saul's obtained a judgment in the General District Court for the City of Roanoke arising from work done under contract with Owen. Saul's properly docketed the judgment in the Circuit Court Clerk's Office where Lot 3 is situated three weeks prior to closing. Owen covenanted that the lot was free from encumbrances when he conveyed Lot 3 by a deed with general warranty and English covenants of title. Thus, because there was a judgment lien on the property prior to closing, Owen breached the covenant that the lot was free from encumbrances.

However, with regard to judgment liens, it is generally recognized that so long as the judgment is unenforced, no actual damages are incurred by the buyer unless he discharges the lien or suffers damages as a result of the judgment creditor's enforcement of the lien. Therefore, Owen will become liable to Brian only if Brian suffers actual damages resulting from voluntary satisfaction of the lien or Saul's enforcement of the lien.

Although Saul's lawyer has contacted Brian and informed him of the judgment lien, there are no facts to support that a demand of payment or threat of foreclosure has been made by Saul's.

A possible alternative analysis would be that as explained above in part (c), the covenant free from all encumbrances would include any right to, or interest in, the land, to the diminution of the value of the land. An outstanding right in anyone other than the grantee usually is an encumbrance. This would include a lien, and more specifically a judgement lien. The fact that the outstanding right lies dormant and is not being asserted, or that it is extremely unlikely to ever be enforced does not alter the fact that it is an encumbrance. Whether a property's title is or is not encumbered is not a matter of agreement of the parties.

Comments: Some additional cites and comments that we think are in play for this Essay Question: Capozzella v. Capozzella, 213 Va. 820 (1973); Vicars v. Wiesiger, 121 Va. 679 (1917); and Virginia Code Section §55.1-356.

2. [09.20] Richmond Country Hams, Inc. (Hams), is a Virginia corporation operating a ham processing business. Hams is governed by a six-member Board of Directors and has 200 outside shareholders. Hank, the son of Hams' founder, was the Chairman of the Board of Directors and Chief Executive Officer of Hams until his death in July of 2019.

In February 2017, Hank convinced the Board of Directors of Hams to purchase the assets and assume the liabilities of Specialty Salts, Inc. (Specialty), a small manufacturer of seasonings used specifically in the ham processing industry. Hank's best friend, Susanna, was Specialty's Director of Manufacturing and sole shareholder. Acting solely in her capacity as the Director of Manufacturing, Susanna agreed to sell Specialty to Hams. One of the members of the Hams Board of Directors, Linus, asked questions about the potential liabilities of Specialty. Hank told the Board members that Susanna had assured him that all of Specialty's liabilities were shown on the corporate books, but there was no actual investigation into the company's finances. After a brief discussion of the pros and cons of the purchase, the Board voted unanimously to purchase Specialty and the purchase was consummated.

In June 2018, the Hams Board of Directors, at a regularly scheduled Board meeting with Hank present, voted unanimously to loan Hank $200,000 to use for the purchase of a private airplane. The loan was made from Hams' corporate funds, and Hank purchased the airplane.

In September 2018, a number of former employees of Specialty sued Hams, as Specialty's successor, claiming wage violations of the Fair Labor Standards Act (FLSA). An investigation by Hams before closing on the purchase of

Specialty's assets and assuming its liabilities would have revealed these claims by the former Specialty employees.

In January 2019, the Board of Directors of Hams was presented with a settlement demand of $600,000 for a global settlement of the FLSA suit. The Board of Directors voted unanimously to approve the settlement, which caused the corporate debts of Hams to exceed its assets.

In July 2019, Hank was flying his airplane from Richmond to Virginia Beach, when it crashed. Hank was killed as a result of the crash. Hank's only asset was the airplane, which was a total loss. Hank had failed to procure any insurance on the airplane, so the $200,000 loan will not be repaid by Hank.

[a] Was the decision to sell Specialty to Hams, made by Susanna acting solely as Specialty's Director of Manufacturing, lawful? Explain fully.

[b] Did the Board of Directors of Hams act within its power in purchasing the assets and assuming the liabilities of Specialty without first seeking shareholder approval? Explain fully.

[c] Should the members of the Board of Directors of Hams be held individually liable for (1) the $600,000 paid on the FLSA claims, and (2) the $200,000 loan to Hank? Explain fully.

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[a] Yes, the decision to sell Specialty to Hams was lawful. A sale of all, or substantially all, the assets of a corporation is a fundamental corporate change and generally there are certain procedural steps that a corporation must adhere to when effecting a fundamental corporate change. However, under the Virginia Code, there is an exception when all of the shareholders approve the sale of assets. Here, Susanna was the sole shareholder of Specialty and she clearly approved the sale. Thus, the sale was lawful. Va. Code §13.1-724

[b] Yes, the Hams Board of Directors acted within its power in purchasing the assets and assuming the liabilities of Specialty without first seeking shareholder approval. Purchasing assets of another corporation is not a fundamental corporate change, and there is, accordingly, no requirement of shareholder approval.

[c] It is likely that the members of the previous Board of Directors can be held individually liable for the $600,000 paid on the FLSA claims. Directors owe fiduciary duties, including duties of care and loyalty, to the corporation. In Virginia, directors are protected by the good faith business judgment rule, and they are liable for breaches of their fiduciary duties only where they fail to exercise their good faith business judgment when making decisions on behalf of the corporation. Here, the directors likely failed to exercise business judgment when deciding to purchase the assets and assume the liabilities of Specialty because they did no due diligence. It was not sufficient to simply rely on the assertions of the seller. The directors made no independent inquiry, and because of Specialty's undiscovered liabilities, the decision to purchase Specialty ultimately rendered Hams insolvent.

[ii] The members of the previous Board will not likely be individually liable for the loan to Victor. This transaction does not seem to have violated either the fiduciary duty of care or loyalty. A loan to a director is not per se improper, and there are not sufficient facts to show that the decision to make the loan was not within the good faith business judgment of the directors. Additionally, although a conflict of interest transaction, the Board apparently was aware of the terms of the transaction and, although Victor was clearly interested, the loan was nonetheless approved by a sufficient number of disinterested directors because approval was unanimous. Further, the presence of, or even a vote by, a director with a conflicting interest in a given transaction does not affect the validity of the action. Thus, the directors would not be liable in connection with the loan to Victor.

Comments: Some additional cites and comments that we think are in play for this Essay Question: Willard v. Moneta Building Supply, Inc, 258 Va. 140 (1999); Virginia Code Sections §13.1-690; 691; 723(1); and 724.

3. [09/20] In March 2020, Paige, an avid runner, was jogging along the Turnpike in Albemarle County, Virginia. As she was crossing at an intersection against a traffic signal for pedestrians that was showing the "Don't Walk" command, Paige was struck by one of two vehicles that collided at the intersection. At the moment of the accident, Allen, the driver of one of the cars, was speeding, and Bart, the other driver, had failed to stop at the red traffic light. The impact of the

accident caused Bart's vehicle to strike Paige.

Paige sued both Bart and Allen for personal injuries in the Circuit Court of Albemarle County. Bart failed to file responsive pleadings within the time required by the applicable Rules. Allen timely filed an answer and grounds of defense. He denied his own negligence, denied that Paige was injured to the extent alleged, and alleged that Paige was guilty of contributory negligence.

Two months after Bart was served with process, Bart's lawyer filed a motion for leave to file late pleadings. He attached an affidavit wherein Bart stated under oath that, while out of town for several weeks, he overlooked taking the suit papers to his lawyer. Counsel for Paige and Allen objected to the motion and moved for entry of default judgment against Bart. The trial court denied Bart's motion and ruled that he was in default. A judgment of default on the liability issue was entered accordingly, reserving the issue of damages pending Paige's proof.

At trial for the issue of damages, Paige presented evidence as to the negligence of Bart and Allen, the resulting injuries to her knee and back, and the medical expenses she incurred because of the injuries. Bart's counsel made several objections to the admission of Paige's evidence regarding her injuries, all of which were overruled on the ground that Bart was in default. Additionally, Bart sought to introduce evidence that Paige had been in a previous accident and that many of the expenses she was claiming in the present suit were duplicative because they had been incurred for the treatment of an injury received in the earlier accident. The court rejected this evidence, again on the ground that Bart was in default.

After hearing all the evidence, the court, on Allen's motion to strike, ruled that Paige was guilty of contributory negligence as a matter of law.

[a] Was the court correct in not allowing Bart to file late pleadings? Explain fully.

[b] Was the court correct in overruling Bart's objections to Paige's evidence as to her injuries and expenses? Explain fully.

[c] Was the court correct in refusing to admit Bart's evidence about Paige's expenses incurred in the earlier accident? Explain fully.

[d] Is Paige entitled to a judgment against Bart despite the court's ruling that Paige was guilty of contributory negligence as a matter of law? Explain fully.

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[a] Because the circuit had broad discretion in determining whether to grant leave to Bart to file late pleadings and Bart did not present good cause, it is likely the court was correct. Under Rule 3:19, Bart fell into default when he failed to timely file his responsive pleadings. For good cause shown, the court had discretion to grant Bart leave to file late pleadings. See Rule 3:19 (b). Factors the court may take into consideration include the extent and reason for the delay and prejudice to Paige caused by the delay. At the time Bart sought relief from default, two months had passed and his only explanation was that he had overlooked taking the suit papers to his lawyer. Therefore, in consideration of the absence of good cause, the court did not abuse its discretion in denying Bart's motion to file late pleadings.

Note: A reasonable alternative approach would be recognition by the student that the good cause standard under this Rule is a liberal standard and that the policy of the Rule favors allowing leave. Thus, in light of the absence by Bart of any intention to delay or obstruct the proceedings, or prejudice to Paige, the circuit court should have granted the motion for leave to file late pleadings and conditioned the relief from default on Bart's payment of any extra costs and fees incurred by Paige as a result of the delay.

[b] Because Bart was entitled to object to Paige's evidence of damages, the court was not correct in overruling Bart's objections. Under Rule 3:19, Bart was permitted to participate in the trial to determine the amount of Paige's damages. Although Bart was not entitled to offer proof or argument on the issues of liability, he was entitled to object to Paige's evidence regarding damages. See Rule 3:19(c)(3)(i). Therefore, when the circuit court overruled Bart's objections to Paige's evidence of damages on the ground that he was in default, the trial court erred.

[c] Because Bart should have been permitted to introduce evidence regarding Paige's damages, the court was not correct in refusing to admit Bart's evidence about Paige's expenses incurred in the earlier accident.

As noted, Bart was entitled to participate in the trial to determine the amount of Paige's damages. Furthermore, he was entitled to offer his own evidence regarding the quantum of Paige's damages. See Rule 3:19(c)(3)(ii). Therefore, the circuit court should have allowed Bart to introduce evidence that Paige had been in a previous accident and that many of the expenses she was claiming in the present suit were duplicative as having been incurred from treatment of an injury from the prior accident. When the circuit court rejected this evidence on the grounds that Bart was in default, it erred.

[d] Because the circuit court previously entered default judgment against Bart on the issue of liability, Paige is entitled to judgment against Bart despite the court's ruling that Paige was contributorily negligent. Under Rule 3:19, once the circuit court entered default judgment against Bart, Bart was not entitled to offer proof or argument on the issues of liability. Here, as to Bart, the circuit court specifically entered a judgment of default "on the liability issue" reserving only "the issue of damages pending Paige's proof." Furthermore, contributory negligence is an affirmative defense that was not plead and, therefore, waived. See Rule 3:18(c) & Va. Code §8.01-235. Thus, because Bart was not entitled to assert contributory negligence or contest liability after entry of the default judgment, the ruling that Paige was contributorily negligent as a matter of law did not affect the earlier adjudication of liability against Bart.

Note: A reasonable alternative approach would be for the student to point out that under Rule 3:19(c)(1), the court shall enter judgment "for the relief appearing to the court to be due." Applying that mandate to these facts, when the court found that Paige was contributorily negligent as a matter of law, it should also conclude that Paige is not due any amount. This approach should note, however, Bart's failure to plead contributory negligence and the prior adjudication of his liability.

Comments: Some additional cites and comments that we think are in play for this Essay Question: Cooper v. Davis, 199 Va. 472 (1957). Chappell v. Smith, 208 Va. 272, 276 (1967); Nolte v. MT Tech Ters, LLC, 284 Va. 80 (2012), Funkhouser v. Millien, 209 Va. 89 (1968) and Rule 3:19

4. [09.20] Wynona was a very successful software designer earning more than $1 million a year. In 2014, she married Hugh and in 2015, Wynona gave birth to their daughter, Daisy. Hugh had negligible income during the marriage, but he and Wynona lived a lavish lifestyle at a waterfront home in Virginia Beach, Virginia, using Wynona's earnings. In January 2017, upon returning home early from a business trip, Wynona discovered Hugh in bed with Daisy's nanny.

Wynona immediately insisted that Hugh leave the marital home and he did so.

Wynona was desperate to get Hugh out of Daisy's life completely and did not want to wait for any court proceedings, so she entered into an agreement with Hugh that she would have custody of Daisy, Hugh would be relieved of any child support obligation, and Wynona would not seek spousal support from him. Shortly thereafter, Wynona filed a complaint in the Circuit Court of the City of Virginia Beach for divorce on the ground of adultery. In the complaint, Wynona asked for sole custody of Daisy but did not seek either spousal support or child support.

Upon being served with the complaint, Hugh filed a counterclaim for divorce alleging cruelty as the ground and seeking spousal support and equitable distribution of the marital property.

Hugh did not object to Wynona having custody of Daisy but asked to be relieved of any child support obligation. Incensed that Hugh was seeking spousal support from her, Wynona changed her mind and, with the court's permission, amended her complaint to request both child support and spousal support from Hugh. In his response to the amended complaint, Hugh asked the court to enforce their previous agreement.

The evidence at trial established Hugh's adultery and that Wynona and Hugh did not cohabit for more than a year following their separation. In addition, the evidence established that Wynona purchased the home in Virginia Beach in 2013 in her name for cash at a price of $3 million and that market forces increased its value to $5 million. Wynona also had an investment portfolio, the sole source of which was her income since 2013, and which was managed entirely by her financial advisor. The evidence established that the investment portfolio was valued at $20 million at the time of the trial.

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

In January 2019, almost a year after the end of the trial, the court issued an order denying Wynona a divorce on the ground of adultery; granting Hugh a divorce based on the one-year separation; and awarding Hugh one-half of the

value of the home in Virginia Beach, an award of equitable distribution equal to 10% of the investment portfolio valued as of the time of trial, and spousal support of $20,000 per month to be paid by Wynona. Stating that the court was enforcing the parties' agreement and without discussing the factual basis of the opinion or making any findings regarding the custody and support of Daisy, the order awarded Wynona sole custody of Daisy and relieved Hugh of any obligation to provide child support.

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

Did the trial court err in:

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

[b] granting Hugh's motion to reopen the trial for the purpose of revaluing the investment portfolio? Explain fully.

[c] awarding Hugh one-half of the value of the Virginia Beach home? Explain fully.

[d] awarding Hugh spousal support? Explain fully.

[e] relieving Hugh of obligation for support of Daisy? Explain fully.

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[a] The court did not err in granting Hugh's oral motion to amend his counterclaim and in granting him a divorce based on the grounds of living separate and apart for the one-year statutory period. Hugh made his oral motion at trial and the court found that the parties had been living separate and apart for more than a year.

Virginia Code §20-91 and Rule 1.8 are the controlling law on this issue. Rule 1.8 states that leave to amend is discretionary and is to be liberally granted to attain the ends of justice. The Rule specifically mentions the ability to make an oral motion to amend. Virginia Code §20-91 states that upon "application of either party" the court can grant a divorce on the grounds that the parties had been separated for more than a year. Moreover, the trial court has the authority to find that neither party met its burden of proof on either of the fault grounds set forth in their respective pleadings but that sufficient grounds existed at the time of the entry of the final decree of divorce based upon a one-year separation. *See Williams v. Williams,* 14 Va. App. 217, 220 (1992) (it rests within the sound discretion of the judge to determine on what grounds to grant a divorce when multiple grounds are demonstrated).

[b] The court did not err in granting Hugh's motion to reopen the trial for the purpose of reevaluating the investment portfolio because the matter was still pending and, therefore, within the control of the trial court. Virginia Code §20-107.3 states that the court shall determine the value of property for purposes of equitable distribution as of the date of the evidentiary hearing unless a motion was filed no later than 21 days before the evidentiary hearing. Although Virginia Code §20-107.3 appears to limit the authority of the court to reopen this trial for reevaluation, some Virginia precedent indicates that in the interests of obtaining a just and fair result, the court can use a valuation date other than the evidentiary hearing even if a motion was not made within the time limit set forth in §20-107.3. *See Shooltz v.* Shooltz, 28 Va. App. 264, 270-271 (1998) ("we find that the trial court erred in concluding that Code §20-107.3 barred it from reopening the hearing on the valuation of assets"). Separately, Rule 1:1 would not apply here because no final order had yet been entered.

Here, the court had authority to exercise its discretion to reopen the trial for revaluation and did not err in doing so. Almost a year passed between time the trial ended and the order. During that time, market forces caused the portfolio to increase in value $5 million. To attain the ends of justice, the trial court had the discretion to reopen the trial. As a result, the trial court did not err.

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

[c] The trial court erred in awarding Hugh one-half of the value of the beach house. Virginia Code section 20-107.3 is

the controlling law on this issue. This section defines separate property as all real and personal property acquired by either party before the marriage (as well as other scenarios). Any increase in the value of separate property continues to be separate property if not attributable to the personal effort of either party or contributions from marital property. Any personal efforts made by a party must be significant and result in a substantial appreciation of the separate property to be considered marital. Personal effort is defined as any labor, effort, inventiveness, physical or intellectual skills, creativity or managerial or marketing activity applied directly to the separate property. The non-owning spouse has the burden of proving that any contributions of marital property or personal efforts were made and that there was an increase in the value of the property. If that is proven, the burden switches to the owning spouse to prove the increase in value or some portion thereof was not caused by contributions of marital property or personal effort.

The Virginia Beach home was purchased by Wynona in 2013, prior to the parties' marriage so it is presumed to be her separate property at the start of the analysis. The evidence established that the home was only titled in her name and was paid for in full for $3 million. There was no evidence that the home was ever retitled into both parties' names, or that any improvements to the home were made during the marriage that increased its value. In addition, the property had no mortgage or other debt so there were no marital funds used to pay down any outstanding mortgage or other lien on the property. The evidence merely demonstrated that market forces increased the value of the home to $5 million. Therefore, there was no personal effort of either party or contributions of marital property to increase the value of the home and it remains Wynona's.

[d] If the court failed to consider the factors in Virginia Code §20-107.1 in fashioning the award, then it erred. Virginia Code section §20-107.1 is the controlling law on this issue. This section sets forth a list of factors that the court must consider when ordering one spouse to pay spousal support to another. Failure to consider the factors would be error.

The court must also consider that Wynona filed for divorce on the ground of adultery and Hugh filed on the ground of cruelty. §20-107.1 states that no maintenance and support shall be awarded from a party if there exists in such spouse's favor a ground of divorce for adultery. The divorce decree need not be issued on the ground of adultery for this rule to apply. *Williams v. Williams,* 14 Va. App. 217, 220 (1992). However, the court may make a spousal support award notwithstanding the adultery if the court determines from clear and convincing evidence that a denial of support and maintenance would constitute a manifest injustice, based upon the respective degrees of fault during the marriage and the relative economic circumstances of the parties. The purpose for the exception is to protect against leaving a spouse destitute.

Here, the Court's ruling indicates that there may not have been sufficient evidence for either party's fault grounds to prevail. Even if the Court had found that Hugh committed adultery, that would not be a complete bar to his spousal support claim if the Court finds that based on the respective degrees of fault and relative finances of the parties not awarding spousal support would constitute a manifest injustice

The facts are clear that Wynona was always the primary wage earner during the marriage and Hugh's income was negligible. In addition, the parties lived a lavish lifestyle in their waterfront home presumably with Wynona's income. However, the parties were only married for a short time and there is no evidence that Hugh was completely absent from the job market or unable to earn a decent income. The Court did not err so long as it clearly considered the factors of §20-107.1, along with Wynona's ability to pay and Hugh's need for support, in rendering a decision on the amount and duration of support. Since Wynona earns approximately $1 million per year (and there was no evidence her income decreased), paying Hugh $240,000 per year in spousal support is approximately 25% of Wynona's overall income. While the parties entered into an agreement in which Wynona would not ask for spousal support from Hugh, the agreement did not go both ways and Hugh had the right to seek spousal support. If the court properly considered the factors set forth in Virginia Code §20-107.3 in fashioning the award of support for Hugh, it is likely the court did not err; however, if the court failed to cite sufficient findings in making the award, the Court of Appeals could find that the trial court erred and remand the case for further findings.

[e] The trial court erred in relieving Hugh of his support obligation for Daisy. Virginia Code Sections §20-108, §20-108, and §20-124.2 are the controlling statutes in this issue. Every parent owes a duty of support for a child and the child support guidelines are the presumption amount of child support for a child.

Since both parties have adequate income to support Daisy, they both have a duty to support her. The trial court should have calculated the presumptive amount of child support for Daisy based upon their incomes, cost of health insurance and any daycare costs as well as the number of overnights a year that Hugh has Daisy. If it is less than 90 overnights, the trial court would calculate child support based upon the sole custody guidelines. If there is a sufficient

reason to deviate from the guidelines, then the trial court may do so after making written findings that the guidelines would be unjust or inappropriate in the case.

The trial court erred in relieving Hugh of any obligation to pay child support as it failed to calculate the guidelines and then make written findings in the court order that stated that it would be unjust or inappropriate for Hugh to pay child support on behalf of Daisy. Moreover, the court retains continuing jurisdiction to award child support based upon a material change in circumstances until the child is emancipated, and a parent cannot waive child support. Agreements between parties regarding child support will not be upheld if they contain a waiver and it is error for the trial court to enforce the agreement between Hugh and Wynona containing the waiver of child support in favor of Hugh.

Comments: Some additional cites and comments that we think are in play for this Essay Question: Featherston v. Brooks, 220 Va. 443; Carter v. Carter, 215 Va. 475; Scott v. Scott 12 Va. App. 1245; Kelley v. Kelley, 248 Va. 295; Allen v. Allen, 188 Va. 717; Robertson v. Robertson, 215 Va. 425, Zinkhan v. Zinkhan, 2 Va. App. 200; Lassen v. Lassen, 8 Va. App. 502; Robbins v. Robbins, 48 Va. App; Rowe v. Rowe, 33 Va. App. 250; Virginia Code Sections §20-91, 107.3, 121.02; 124; §16.1-278.15; §16.1- 228 ; §19.2-152.7:1.

5. [09.20] Peter, who was retired and very frugal, went to Donald's Hardware Store (Donald's) in Warrenton, Virginia, to purchase an extension ladder and a nail gun so that he could fix some broken shingles on the roof of his home. Peter was helped by Donald, who owned the store.

Peter told Donald he needed a ladder long enough to reach the roof on his two-story home, but when he learned how expensive the extension ladders were, he asked whether Donald would rent one to him for a day or two. Donald agreed to do so at the price of $20 per day and picked out a ladder for Peter to use.

Peter also was displeased with what he considered to be the high price of nail guns. Peter looked through the display of nail guns and found, for a price of $60, a used nail gun that had been traded in by another customer and reconditioned by Donald.

While Donald was busy with another customer, Donald's sixteen-year-old daughter Cameron was at the store's cash register. Cameron prepared two receipts. Because she did not know how long Peter would keep the ladder, she wrote the following on the front of the ladder receipt:

Extension Ladder - $20/day. Received: $20 on 9/1/2020

On the back of the ladder receipt, Cameron wrote in large letters the words "AS IS," just the way Donald had instructed her to do on all receipts. Cameron signed the receipt to acknowledge receipt of the $20 payment, and Peter signed it to acknowledge receipt of the extension ladder.

Cameron then asked Peter if he would like to try out the nail gun on some wood in the back of the store, but Peter declined, saying it "looked OK" and that he needed to get home. Cameron then wrote the receipt for the nail gun, which read: "Used/Reconditioned Nail Gun - $60." Cameron forgot to write "AS IS" on that receipt.

On the first day he used the items they both malfunctioned. The nail gun immediately malfunctioned when Peter tried to use it, and two nails shot into his hand. As he hurried down the ladder to tend to his injured hand, a rung on the ladder broke, and Peter fell to the ground, breaking his leg.

Peter timely brought a lawsuit against Donald's in the Circuit Court of Fauquier County, alleging that under the Uniform Commercial Code as adopted in Virginia (UCC): the ladder was not fit for the purpose for which Donald knew Peter was going to use it, and that Donald's had thus breached the implied warranty of fitness for a particular purpose. Peter also alleged that because the receipt for the nail gun did not contain a disclaimer, Donald's is in breach of the UCC's warranties.

Donald's responded to Peter's claims that, regarding the ladder: (1) there was no applicable implied warranty of fitness, and (2) that even if the implied warranty of fitness for a particular purpose was applicable, the warranty had been excluded by Cameron's writing "AS IS" on the receipt.

Donald's also argued that, regarding the nail gun: (1) the nail gun was expressly identified as a used item and,

thus, the UCC does not apply, and (2) even if the UCC did apply, there is no implied warranty claim of any sort under the UCC because at the time of contracting, Peter did not rely on Donald's skill or judgment to select or furnish suitable goods.

[a] Is Donald's correct on each of the arguments made regarding the absence of an implied warranty of fitness as to the ladder? Explain fully.

[b] Is Donald's correct on each of the arguments made regarding the absence of any sort of implied warranty as to the nail gun? Explain fully.

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[a] **[1]** No. The transaction was a lease [Va. Code § 8.2A-103(1)(j)], which is governed by UCC Article 2A. Va. Code §8.2A-213 provides that, "Except in a finance lease, if the lessor at the time the lease contract is made has reason to know of any particular purpose for which the goods are required and that the lessee is relying on the lessor's skill or judgment to select or furnish suitable goods, there is in the lease contract an implied warranty that the goods will be fit for that purpose." Peter told the seller that he needed an extension ladder tall enough to reach the roof of his two-story home, and Donald then picked out a ladder for Peter based on Peter's statement. This was not a finance lease, so the warranty of fitness was implied in the transaction.

[2] Yes. Va. Code §8.2A-214(3)(a) provides that, "Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," or "with all faults," or by other language that in common understanding calls the lessee's attention to the exclusion of warranties and makes plain that there is no implied warranty, if in writing and conspicuous." Here, Cameron acting as the seller's authorized agent wrote "AS IS" in large letters on the receipt, which was conspicuous. The warranty was thus effectively disclaimed.

[b] **[1]** No. The UCC applies to transactions in used goods as well as new goods. The definition of "goods" in Va. Code § 8.2-105 is "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Title 8.8A) and things in action." The nail gun was a moveable item when identified to the contract and does not fall into any of the listed exceptions. Thus the UCC applies.

[2] No. Peter's assertion is premised only on the implied warranty of fitness, but the implied warranty of merchantability applies to the sale of the nail gun. Va. Code § 8.2-314 provides that, "Unless excluded or modified (§ 8.2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind" and that "goods to be merchantable must be at least such as pass without objection in the trade under the contract description." Donald's is a hardware store, and therefore regularly deals in goods such as nail guns. The nail gun was unmerchantable because it malfunctioned immediately by shooting nails into the user's hand rather than the object to be nailed, thereby causing serious injury to the user.

The warranty was not modified or disclaimed. There was no express language ("as is," "with all faults,' etc.). Nor was there any refusal by the buyer to inspect the goods when required by the seller. Cameron asked if Peter would like to try the nail gun, but that is not enough to trigger the disclaimer in § 8.2-316.

Comments: Some additional cites and comments that we think are in play for this Essay Question: Leake v. Meredith, 221 Va. 14; Whittle v. Timesaver, Inc, 614 F. Supp. 115; and Sections §8.2-315 and 316.

6. [09.20] In June 2017, Patrick was shopping at Big Green Gifts (BGG) in Norfolk, Virginia, when he slipped on liquid on the floor of a store aisle and fell. Patrick, who is a 50-year-old physical therapist living in Norfolk, complained of injury to his lower back as a result of the accident. BGG is a New Hampshire corporation with its principal place of business in Hanover, New Hampshire.

In June 2018, Patrick timely filed a Complaint against BGG in the United States District Court for the Eastern District of Virginia, Norfolk Division, properly alleging diversity jurisdiction and seeking damages for personal injury as a result of BGG's negligence.

In September 2018, during discovery, BGG filed a motion with the court requesting an order requiring Patrick to

submit to (1) a physical examination by a physician, and (2) a mental examination by a psychiatrist. Over Patrick's objections to the motion, the court ordered Patrick to submit to the requested examinations.

In October 2018, just days before the discovery cut-off date provided in the court's Pre-Trial Scheduling Order, BGG, without Patrick's consent, served Patrick with a Notice of Trial Deposition of Dr. Jones, an orthopedic surgeon in Charlottesville, Virginia, who had treated Patrick for injuries related to a motor vehicle accident in 2014. BGG wanted to use the deposition testimony at trial because Dr. Jones charges $600 for a deposition and $7,000 per day to testify in person at trial. Patrick intends to object to the Notice of Trial Deposition of Dr. Jones.

[a] Did the court err by ordering Patrick to submit to **(1)** the physical examination and **(2)** the mental examination? Explain fully.

[b] Upon what bases should Patrick object to the Notice of Trial Deposition of Dr. Jones and how should the court rule? Explain fully.

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[a] The Court **(1)** did not err in ordering Patrick to submit to the physical examination, but **(2)** did err in ordering Patrick to submit to the mental examination. Federal Rule of Civil Procedure 35 allows the court to order a party to submit to a physical or mental examination by a suitably licensed examiner when the party's "mental or physical condition…is in controversy." Patrick alleged in his complaint arising from the fall at BGG's store in 2017 that he suffered injury to his lower back. BGG later in discovery filed a motion for an order requiring Patrick to submit to "(1) a physical examination by a physician, and "a mental by a psychiatrist." Patrick opposed both motions. The pertinent facts state that Patrick sought damages for "physical injury" and mention only complaints of injury to his lower back. Nothing in the facts suggest that Patrick sought damages for mental, emotional, or similar damages. Moreover, nothing in the facts state any defense by BGG that puts in controversy Patrick's mental state. The request for a physical examination does suggest that the defendant BGG contests the plaintiff's alleged physical injuries and/or the extent of these injuries. Because Patrick's physical injuries were in controversy, the court properly ordered a medical examination as to those. However, because there was no basis for a controversy over Patrick's mental condition, the court erred in ordering a mental examination.

[b] Patrick can object to the Notice of Trial Deposition of Dr. Jones and the court should sustain his objection based on grounds specified below but reject other grounds. It should first be pointed out that there is no such thing as a "Notice of Trial Deposition" in the Federal Rules of Evidence. The proper notice that should be filed is BGG's "Notice of Deposition." Having said that, there are substantive issues to address.

First, Rule 32(a) provides for a deposition of a witness who is "unavailable." Unavailability under the Federal Rule includes a witness who at a time of the trial is dead, is beyond a 100 mile radius from the place of trial or outside the U.S., is unable to attend trial because of "age, illness, infirmity or imprisonment," and/or the party offering the deposition could not procure the witness' testimony by subpoena, or other extraordinary reasons. Virginia's discovery rules allow the taking and using the deposition of a treating or examining health care professional to be used at trial, even if he/she is available for trial (Virginia Supreme Court Rule 4:7(a)(4)). The Federal Rules of Civil Procedure contain no such provision. The present action was filed by Patrick in 2018 in Norfolk. The facts state that Dr. Jones is an orthopedic surgeon in Charlottesville. Although the facts do not state what the geographic distance is between the Norfolk courthouse and Charlottesville, the court could take judicial notice that the distance is more than 100 miles (165 miles according to Google maps). Therefore, any objection to the deposition of Dr. Jones made by Patrick on this ground should be overruled. In addition, BGG's offered reasons for the deposition—i.e., that "Dr. Jones charges $600 for a deposition and $7,000 per day to testify in person at trial"—are not ones that qualify a deposition to be used at trial under Rule 32.

Second, the facts state that in "October 2018, just days before the discovery cut-off provided in the Court's Pre-Trial Scheduling order, BGG, without Patrick's consent, served Patrick with a Notice of Trial Deposition of Dr. Jones." BGG apparently notified Patrick that it planned to take the deposition testimony of Dr. Jones relating to the prior accident of 2014 when Dr. Jones was his treating physician. Here, the lateness of BGG's notice provides grounds on which Patrick should object and the court should rule that Dr. Jones' testimony cannot be offered in the 2018 trial. Patrick could rightly claim prejudice and violation of the court's Pre-Trial Scheduling order because a deposition could not be conducted before the cut-off. The point of a cut-off is to preclude further work so close to trial and to allow parties to prepare for the final pretrial conference and for trial. Allowing BGG to proceed would undermine the schedule and impair such preparation.

Comments: Some additional cites and comments that we think are in play for this Essay Question: Gasperini v. Ctr for Humanities, 518 US 415; Schlagenhauf v. Holder, 379 US 104; Sibbach v. Wilson & Co, 312 US 1; FRCP 35 and 32.

7. [09.20] Emma, a wealthy resident of Richmond, Virginia, was the proud owner of a sizeable private coin collection, including a very valuable gold Canadian Maple Leaf coin (Maple Leaf). The coin had been appraised at over $1,000,000.

Emma's neighbor, Silvio, was a coin dealer from whom Emma had bought several coins in the past. Before leaving on an extended vacation to South America, Emma gave Silvio a key to her house and the entry code to her silent burglar alarm system. She asked Silvio if he would keep an eye out for her collection and periodically go into her house to see that things were in order. She asked him to be especially vigilant about the Maple Leaf coin. Silvio agreed.

Silvio's antique gallery was experiencing financial difficulties. He had connections in the stolen coin market and thought he could probably find a private collector who would pay handsomely for Emma's Maple Leaf coin. Silvio secretly developed a scheme in which he would make it appear that thieves had broken into Emma's house and stolen the coin. He knew there was a period of delay before the burglar alarm would trip and the police would respond. Accordingly, late one night, Silvio, using the key Emma had given him, entered the house without turning off the alarm system, and proceeded quickly down the hall to where the coin was stored. On the way, he overturned some furniture to make it look like a real break-in. He grabbed the coin, exited through the back door, and hid the coin in his basement. The police arrived within five minutes.

Another private collector who did business with Silvio's gallery delivered to Silvio a 1913 Liberty Head nickel (Liberty Head) worth about $2,000,000 for which he wanted Silvio to find a buyer. Silvio stored the Liberty Head in a vault in his gallery and began soliciting potential buyers.

Emma returned from her vacation and learned of the "break-in." She later learned through various channels that Silvio had been the one who took the Maple Leaf coin, but she did not report it to the authorities. She also learned that Silvio was trying to sell the Liberty Head coin and that the owner was insisting on getting $2,000,000 for it. She told Silvio that she knew he had both the Maple Leaf and the Liberty Head coins and that she intended to report him to the police, but that she would refrain from doing so if he would sell the Liberty Head to her for $750,000. Silvio refused.

Emma met with Larry, her attorney, and told him about Silvio's theft of the Maple Leaf coin and about the Liberty Head coin. She told Larry that she would be willing to forget about the Maple Leaf if she could get the Liberty Head at a bargain price.

Emma instructed Larry to do the following: to get in touch with Silvio on her behalf, tell Silvio that Emma knew that Silvio had taken the Maple Leaf, and tell Silvio she would report it to the law enforcement authorities unless Silvio agreed to sell the Liberty Head to Emma for $750,000.

[a] Of what crimes, if any, is Silvio guilty? Explain fully.

[b] Of what crime, if any, is Emma guilty? Explain fully.

[c] Can Larry ethically carry out Emma's instructions? Explain fully.

[d] What ethical obligation, if any, does Larry have to disclose to law enforcement authorities what Emma has revealed to him? Explain fully.

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[a] Silvio is guilty of embezzlement of the Maple Leaf coin from Emma. She had given him the key to her house, the alarm code, and told him she was particularly concerned about the coin. Therefore, Emma entrusted the home and its contents to Silvio. As here, Silvio violated that entrustment by taking the coin, which was worth more than $500.00, without Emma's permission and to permanently deprive her of her ownership. The value of the coin makes the crime a felony.

[b] Emma is guilty of the crime of attempted extortion. She knew that Silvio had taken the Maple Leaf coin from her house, but did not tell the police. Instead she threatened Silvio that she would report his crime to the police if he did not sell

to her for $750,000.00 the Liberty Head coin, worth $2,000,000.00, that the owner had entrusted to Silvio for sale to a buyer. The threat to report Silvio's crime is the injury she would cause in exchange for acquiring the property at much less than its value, which satisfies the elements of the crime.

[c] If Emma is in the process of committing a crime or fraud (see answer to Question 7(b) above) then Larry cannot ethically carry out Emma's instructions without violating Virginia Rules of Professional Conduct 1.2 and 8.4. He cannot allow his legal services on behalf of Emma to be used to further criminal or fraudulent conduct.

Virginia Rule of Professional Conduct 1.2(c) provides, "(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law."

When the client's course of action has already begun and is continuing, the lawyer's responsibilities are especially delicate. The lawyer must respect the obligation to protect confidentiality on the one hand without allowing the lawyer's services to be used to assist in criminal or fraudulent conduct on the other hand.

Additionally, when a lawyer knows that a client expects assistance that is not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct. *See* Virginia Rule 1.2(e).

Virginia Rule 8.4(c) further provides, "It is professional misconduct for a lawyer to: … (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law…."

Here, when Emma met with Larry, she told him of Silvio's theft. She also told Larry that she attempted to get Silvio to sell the Liberty Head to her at a bargain. She then instructed Larry to contact Silvio and broker a deal on her behalf. If Larry were to follow through on these instructions, he would be assisting in the furtherance of a crime.

For these reasons, Larry cannot carry out theses instructions and he would be required to tell Emma the same.

[d] Virginia Rule of Professional Conduct 1.6 guides a lawyer's obligations to protect a client's confidential communications. It provides, "A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c)."

Generally speaking, Larry would not be able to disclose to Law Enforcement the information that Emma has revealed to him. However, if Emma is in the process of committing a crime that would cause substantial financial harm to another person, then disclosure of that information by Larry may be required under Rule 1.6(c) *after* Larry has discussed the ramifications of Emma's actions with her and notified her of his duty to disclose.

Specifically, Virginia Rule of Professional Conduct 1.6(c)(1) specifies that a lawyer *shall* "promptly reveal" "the intention of a client, as stated by the client, to commit a crime reasonably certain to result in … substantial injury to the financial interests or property of another and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned."

An important takeaway from Virginia Rule 1.6(a) is that the obligation to protect client confidentiality is interpreted to apply broadly and the exemptions to that obligation (in parts (b) and (c) of the rule) should be narrowly construed. Comment [10] to Virginia Rule 1.2 further explains the challenges a lawyer faces in navigating situations such as these: "When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted or required by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer shall not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. See Rule 1.16 [Declining Or Terminating Representation]."

Comment as to the last paragraph: Here, the Virginia Rule is more strongly worded than its counterpart in the ABA Model Rules, which would simply authorize an attorney to disclose the material but would not necessarily require disclosure. (The ABA Model Rule states a lawyer "may reveal" …). On the Essay Questions, the BBE expect you to answer using the Virginia Rules of Professional Conduct. This distinction with the ABA Model Rules is pointed out because for the MPRE, the ABA Rules are used.

Comments: The answer to subpart (a) could also include burglary as well as embezzlement. Some credit would likely also be given for a good discussion of larceny as long as the fact of entrustment is included in the analysis.

8. [09.20] Joe Johnson, a long-time resident of the City of Alexandria, Virginia (City), was seriously injured during a fire which burned down his townhouse in the historic district of the City.

Although City firefighters arrived promptly, the fire hydrant located in front of Joe's house did not produce a sufficient, uninterrupted flow of water. Firefighters had to resort to the next closest fire hydrant, about 1,000 feet away, which delayed their efforts to rescue Joe and to put out the fire. The City installed and maintained all fire hydrants in the City without additional charge to residents.

As a result of the fire, Joe suffered smoke inhalation as well as serious burns, and has since then required the use of a portable oxygen tank at all times.

Joe's next-door neighbor Lucy, who is also a City resident, submitted a written request to the City for a copy of a recently completed report, by a City-retained consulting engineer, analyzing variances in water pressure by district throughout the municipal water supply system. Lucy thought to herself that the fire hydrant problem was really due to the City's inept failure to maintain adequate and consistent water pressure throughout its system. The City's water supply system was purchased 40 years ago from a private, for-profit company. Since then, the City has imposed a per gallon water usage fee on all residential and commercial customers.

Without communicating with the City, Joe filed in the Circuit Court of the City of Alexandria a personal injury complaint against the City, alleging negligence on the part of the City in failing to adequately maintain the fire hydrant in front of his house. Joe's complaint sought $2,000,000 in damages and included a request for a jury trial.

In response, the City filed a plea in bar, asserting that Joe had not provided the City with the required notice of claim and that sovereign immunity barred Joe's complaint. The Circuit Court heard legal argument on the sovereign immunity defense only. Because the City did not dispute the factual allegations in Joe's complaint, the Circuit Court declined Joe's request for a jury trial on this portion of the plea in bar, deciding instead to accept as true the facts alleged in Joe's complaint.

[a] How should the Circuit Court rule on the City's defense of sovereign immunity to Joe's complaint? Explain fully.

[b] *For purposes of subpart (b) only*: How should the Circuit Court rule if Joe's complaint *instead* set forth Lucy's theory that the proximate cause of Joe's injuries from the fire was the City's systemic negligent maintenance of its water supply system, which prevented a sufficient flow of water to the fire hydrant in front of Joe's townhouse? Explain fully.

[c] Was Lucy entitled under Virginia law to review and receive a copy of the City retained consulting engineer's report regarding water pressure variances throughout the City's water supply system? Explain fully.

[d] What was the required notice which the City maintained Joe was obligated to provide, when was it required to be provided, and what is the consequence of not providing such notice? Explain fully.

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[a] The court should grant the City's plea in bar of sovereign immunity and dismiss the complaint. A Virginia municipality is immune from negligence while acting in its governmental but not its proprietary functions. A municipality engages in a governmental function when it exercises powers and duties exclusively for the public welfare. Proprietary functions involve the municipality's exercise of its powers and privileges primarily for its own benefit. *Massenburg v. City of Petersburg*, 298 Va. 212 (2019). In determining whether a municipality is engaged in a governmental or proprietary

function, the court considers whether, in providing the services, the governmental entity is exercising the powers and duties of government conferred by law for the general benefit and well-being of its citizens. If so, the function is governmental and the municipality is immune. *Id.*

Virginia courts have previously held that operation of a fire department is a governmental function. The sole reason municipalities undertake the expense of installing fire hydrants is to promote their ability to respond to fire emergencies. Thus, fire hydrants are installed to provide for the general safety and welfare of the citizenry. As a result, the City's provision and maintenance of fire hydrants should be considered an immune governmental function. *See Massenburg*, 298 Va. at 220. The court should grant the City's plea in bar of sovereign immunity.

[b] If Joe's complaint asserted the theory that the cause of his injuries was the City's systematic negligent maintenance of the water supply system, then the court should deny the City's plea in bar of sovereign immunity. In contrast with the installation and maintenance of a fire hydrant, which is a governmental function, the operation of a water department for the purpose of supplying water for domestic and commercial purposes is a private or proprietary function. The facts even indicate that residents are charged a per gallon rate for the water usage. The fact that the water can also be used to extinguish fires does not change the result. *City of Richmond v. Virginia Bonded Warehouse Corp.*, 148 Va. 60, 70-71 (1927); *see also Massenburg*, 298 Va. at 219 (contrasting the facts of *Massenburg* with *Virginia Bonded*). If Joe asserted such a theory, the court should deny the City's plea in bar of sovereign immunity.

[c] Lucy should be entitled to review and receive a copy of the City-retained consulting engineer's report. Under the Virginia Freedom of Information Act, public records are to be open to all citizens of the Commonwealth unless a specific exception excludes the record from mandatory disclosure. Va. Code § 2.2-3704(A). None of the exceptions apply here. The engineer's report does not constitute an engineering drawing that disclosure of which could jeopardize the public safety under § 2.2-3705 (14) or constitute a proprietary record or trade secret under § 2.2-3705.6. It also does not indicate in the facts that this report was prepared specifically for use in litigation. § 2.2-3705.1(3) or relates to a matter that is properly the subject of a closed meeting. Rather, the facts simply state that the report was "recently completed."

Absent a statutory exclusion, Lucy is entitled to review and receive a copy of the report. The City, however, is not required to provide a copy at no cost to Lucy. If the cost of producing the report is likely to exceed $200, the city may require Lucy to pay a deposit toward the final cost of providing the copy. *See* Va. Code § 2.2-3704 (G) and (H).

[d] Joe's failure to provide the required notice to the City will bar his claim. Pursuant to §15.2-209, every claim against a city for negligence is barred unless the claimant or his representative has filed a written statement of the nature of the claim, which includes the time and place at which the injury is alleged to have occurred, within six months after the cause of action accrued. The notice shall be filed with the city attorney or with the chief executive or mayor of the city.

There are only two exceptions noted in the statute that would prevent the claim from being barred, neither of which apply here: the city had actual knowledge or Joe was under a disability. First, there is nothing in the facts to indicate that the attorney, chief executive, mayor, or insurer had actual knowledge of Joe's claim, including the nature of the claim and the time and place at which the injury is alleged to have occurred. Second, there are no facts to indicate that Joe was under a disability at the time the cause of action accrued, which would toll the time for filing notice.

Because Joe failed to provide the required notice, his claim is forever barred.

Comments: Some additional cites and comments that we think are in play for this Essay Question: Carter v. Chesterfield City, 259 Va. 588; Gambrell v. City of Norfolk, 267 Va. 353; Robertson v. Western Virginia Water Authority, 287 Va. 158; Woods v. Town of Marion, 245 Va. 44.

9. [09.20] In 2016, Dr. Ted Thomas, a widower and resident of Charlottesville, Virginia, executed a valid will in which he named his sister Sara as executor and made the following bequest: "I leave all my property, real and personal, to my daughter Dawn, provided, however, that if I die before she reaches her majority, all my property shall be distributed to my sister Sara to be held in trust for the benefit of Dawn until she reaches her majority. It is my intention that, in all events, Dawn shall have the benefit of all the property in my estate." At the time, Dawn was 14 years old.

For many years, Ted maintained a safe deposit box at First Bank, where he kept jewelry, large amounts of cash, and bearer bonds. In 2019, Ted contracted a life-threatening disease for which he was undergoing prolonged treatment.

Anticipating that he would need help in managing his affairs and caring for Dawn, he gave Sara a key to the safe deposit box and told her that if it got to the point where he could not take care of things, she should take out, as necessary, enough money and bonds to pay for household expenses, his medical bills, and Dawn's support. He told Sara not to remove any of the jewelry because it had belonged to Dawn's mother, and he wanted Dawn to have it when she turned 18. Periodically, Sara withdrew money from the safe deposit box to cover Ted's and Dawn's expenses.

As Ted's condition worsened, Ted told Sara, "I think I'm nearing the end. I believe my $1 million life insurance policy will be enough to take care of Dawn. I want you to empty the safe deposit box and hold the jewelry for Dawn, so that, when I'm gone, the cash and bonds will provide for you and your family." On the same day, Sara emptied the safe deposit box as directed. At the time, the balance of the cash and bonds was $250,000, which Sara deposited in her own brokerage account. She put the jewelry in her own safe deposit box. She told Ted what she had done, and he responded, "Good. Now I can rest knowing I've taken care of my family." Later the same day, while Dawn was visiting him, Ted said, "Don't worry Dawn, Sara will have the money to take care of you."

Ted died in 2020, a week before Dawn turned 18. He was survived by Dawn and Sara. At the time of his death, there was in place an insurance policy on Ted's life with a $1 million death benefit naming Sara as beneficiary, "as trustee for the education and support of Dawn." There was also a ten-unit apartment building that Ted and his only sibling, Sara, had inherited from their widowed mother, who had died intestate.

Dawn is now 18. She asserts that the $250,000 in cash and bonds and the jewelry that Sara removed from Ted's safe deposit box, the apartment building, and the $1 million life insurance proceeds are all part of Ted's estate and that she is entitled to it all under Ted's will.

What rights, if any, does Dawn have in:

[a] the $250,000 in cash and bonds? Explain fully.

[b] the jewelry? Explain fully.

[c] the apartment building? Explain fully.

[d] the life insurance proceeds? Explain fully.

✖✖

[a] The answer depends on whether the elements of a gift inter vivos are proven. Present donative intent is clear from Ted's express language to Sara, and the facts stipulate acceptance by the purported donee. The delivery element is arguable, however.

If the Court finds that handing over the key suffices for a constructive delivery and thus a valid gift inter vivos, then the assets would belong to Sara and not to the trust, and their disposition would no longer be controlled by the terms of Ted's will. The reasoning would be that although Ted initially authorized Sara to use the funds only for Ted's benefit and the benefit of Dawn, that intention changed when he stated to Sara that he wanted her to have the funds to "provide for you and your family." This transaction should then satisfy the common law requirements of a gift inter vivos.

However, it is arguable that the key was given merely in a fiduciary capacity, in which case Sara holds the contents of the safe deposit box as trustee for Dawn. By this reasoning, Ted's later statement would be an oral modification of the earlier trust. This assumes that Ted's intent is proven by clear and convincing evidence. [Va. Code §64.2-725]

[b] Ted transferred the jewelry to Sara in her capacity as trustee, so she is obligated to hold the jewelry for the benefit of Dawn. The terms of the trust are set forth in Ted's will, which provides that the trust terminates in favor of Dawn when she reaches age 18.

[c] The facts do not specify how the apartment building is currently titled. Since it passed to Ted and Sarah by intestacy, they would have each taken an undivided one-half interest as tenants in common at that time. If they retitled the apartment as joint tenants with right of survivorship, however, it would pass by operation of law to Sara upon Ted's death.

If it was titled as tenants in common, then a one-half interest would pass through Ted's will into the trust for Dawn, to be distributed outright to her upon her attaining the age of 18.

[d] The life insurance is payable to Sara in her capacity as trustee. The terms of the trust are set forth in Ted's will, which means that the proceeds will be managed for the benefit of Dawn, followed by an outright disposition of the proceeds to Dawn when she reaches age 18.

The only possible source of ambiguity has to do with what Ted meant when he referred in his will to Dawn attaining the age of "majority." The common meaning of this term would be age 18, as provided by Va. Code §1-204.

Comments: Some additional cites and comments that we think are in play for this Essay Question: Woo v. Smart, 247 Va. 365; Pitts v. United States, 242 Va. 254; Kurtz v. Dickson, 194 Va. 957.