July 2022 Virginia Bar Exam - Essay Question Portion

✖✖ After each bar exam, the Virginia Board of Bar Examiners invites the Deans [or the Deans' designees] of all Law Schools located in Virginia, to meet with the Board [remotely]. Representatives from all of the law schools in Virginia collaborate to prepare suggested answers which we think should be acceptable to the Virginia Board of Bar Examiners. These answers also include cites to some of the case and statutory law for reference even though the VBBE may not expect such specificity in applicants' answers on the exam.

✖✖ 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

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The following, provided us great help with suggested answers in each's particular area[s] of specialty: Jeremy W. Hurley of Appalachian School of Law, Robert Danforth of W&L School of Law, Matt Light of W&L School of Law, Walter Erwin of Liberty University School of Law and Thornton Max Hare of Regent University School of Law..

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1. [07.22] [Wills & Trusts] In July of 2005, Donald Davis of Prince William County, Virginia, executed a valid will containing standard introductory language and provided the following:

I direct that my real estate be sold, and the net proceeds paid to my wife, Wendy. I give all of my 500 shares of stock in First Bank to my aunt, Annie.

The Will contained no residuary clause or other provisions.

In 2010, Donald and Wendy divorced. In 2014, Donald's aunt, Annie, died. Annie was survived by her husband, Kevin and their son, Thomas.

Donald died in 2022. Wendy is still living, and Donald is survived by his sister Donna. Donald had no children.

Donald's estate consists of a 500-acre farm in Prince William County, where he resided,2000 shares of American National Bank stock, various items of tangible personal property, and a checking account with a balance of $100,000.

In 2005, when Donald's Will was executed, Donald owned 500 shares of First Bank stock. American National Bank purchased First Bank in 2011 and issued 2000 shares of its stock to Donald in exchange for his stock in First Bank.

After Donald's death, the Will was probated, the real estate was sold, and all of the taxes and debts were paid.

(a) To whom should the 2000 shares of the American National Bank stock be distributed? Explain fully.

(b) To whom should the tangible personal property and the checking account balance be distributed? Explain fully.

(c) To whom should the net proceeds from the sale of the real estate be distributed? Explain fully.

(d) Assume for subpart (d) only that Donald had been survived by a child born to him in 2008. In that case, what would be the effect, if any, on the foregoing distributions? Explain fully.

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(a) The 2000 shares of the American National Bank stock should be distributed to Thomas, Annie's son, since Annie predeceased Donald and the stocks were not adeemed by extinction.

Although the language of a will is construed in light of the circumstances as the existed at execution, the will is considered to take effect upon the death of the testator. If a will beneficiary dies before the testator, the gift lapses. In the Commonwealth, such a gift could be saved under the anti-lapse statute so long as the predeceasing beneficiary was a grandparent or lineal descendant of a grandparent of the testator. [Va. Code §62.2-418.B]. When a testator makes a specific devise, and the identified property is not a part of the testator's estate at his death, the gift is adeemed and the devisee receives nothing. However, exceptions apply to certain property, such as stocks. With respect to stocks, the beneficiary would receive any shares of another entity received as a result of a merger or sale of the original company.

Here, Donald executed a will in 2005, making a bequest of 500 shares of stock in First Bank to his aunt, Annie. Annie died in 2014, before Donald's death in 2022. As a predeceasing beneficiary, Annie's bequest would lapse. However, under the anti-lapse statute, the gift could be redirected to Thomas as a qualifying heir of Annie. Annie's husband, however, is not a qualifying heir, and therefore would not receive anything. Additionally, even though the will specifically read "my 500 shares of stock in First Bank," in 2011 American National Bank (ANB) purchase First Bank and issued 2000 shares of its stock to Donald as a part of this sale. Therefore, Thomas would be entitled to the 2000 shares of stock in ANB.

Thus, since the anti-lapse statute would apply, and the doctrine of ademption does not apply, the 2000 shares of the ANB stock should be distributed to Thomas

[NOTE: Two assumptions are being made here that are not clear from the facts:

(1) This analysis assumes that Thomas is still alive. The fact pattern reads that after Donald's death "Wendy is still living, and Donald is survived by his sister Donna." If an examinee takes the position that Thomas is not alive, then they should receive credit so long as they properly conclude that the lack of a residuary taker would cause Donald to die partially intestate (or completely intestate, as explained in (c)), and therefore the gift should pass to Donna as his sole heir. Either reading of the facts may be appropriate, but perhaps a stronger argument is that Thomas is dead, since the facts tell us who is living and has survived Donald.

(2) This is assuming that Thomas is an adult. The age of majority in Virginia is 18. The fact pattern does not include Thomas's age. If Thomas is a child, then the executor of the estate would need to petition the court to have a guardian of the estate appointed in order to manage the property passing to Thomas. It cannot simply go to Kevin, even if Kevin is the legal guardian of Thomas. Again, if an examinee takes this position and analyzes it in this manner then the examinee should get full credit.]

(b) The tangible personal property and the checking account balance should be distributed to Donna as Donald's closet living heir since the will does not include a residuary taker.

When a person has executed a valid will, but does not dispose of all of the property by the will, then that person dies partially intestate. When a will does not include a residuary provision, any part of the estate of a decedent not effectively disposed of through the will, passes to the decedent's heirs under Virginia's intestacy laws. When a person dies intestate (or partially intestate), if there is no surviving spouse or children, then the estate descends to his kindred in the following order: to the mother and father, or the survivor; if none, then to his brothers and sisters and their descendants; if none, then the estate would be distributed to the aunts and uncles and their descendants.

Here, Donald divorced Wendy in 2010, so she is not a surviving spouse. Donald also has no children. Donald's closest living heir is sister, Donna. Since Donald has a sibling, Thomas, as a descendant of Donald's aunt, Annie, would not take. Therefore, the tangible personal property and the checking account balance should be distributed to Donald's sister since he died partial intestate.

(c) The net proceeds from the sale of the real estate should be distributed to Donna since the devise to Wendy was revoked by operation of law upon her divorce from Donald.

The rules explained in (b) apply here. A validly executed will may be revoked in whole or in part in various methods, including by operation of law. If, after making a will, a testator is divorced, all provisions in the will in favor of the testator's divorced spouse are revoked. [Va. Code §64.2-412.A]. The property devised to the divorced spouse passes as if the divorced

spouse predeceased the testator, unless a contrary intention is apparent from the will. [Va. Code §64.2-412.B; *Jones v. Brown*, 219 Va. 599 (1978)]. If it is a specific bequest, then the bequest falls to the residuary taker. If there is no residuary taker, then the gift passes under intestacy.

Here, Donald executed his will in 2005. In 2010, Donald and Wendy divorced. As explained in part (b), since the will did not include a residuary clause, the devise to Wendy will pass to Donna, his sister.
Therefore, the net proceeds from the sale of the real estate should be distributed to Donna since the devise to Wendy was revoked by operation of law upon her divorce from Donald and there is no residuary clause in the will.

(d) If Donald had been survived by a child born to him in 2008, then that child would inherit Donald's estate, as a pretermitted heir.

The rules explained in (a) – (c) apply here. If a testator executes a will when the testator has no children, a child born or adopted after the execution of the testator's will, or any descendant of his, who is neither provided for nor mentioned in the will is entitled to such portion of the testator's estate as he would have been entitled to if the testator had died intestate. [Va. Code §64.2-419.A] The age of majority in Virginia is 18. Distributions from an estate cannot be made directly to a minor. The executor of the estate would need to petition the court to have a guardian of the estate appointed in order to manage the property passing to a minor. There is no presumption that the child's parent or legal guardian would be the guardian for purposes of distributions from the estate.

Here, Donald executed a will in 2005, but the child was not born until 2008. As a pretermitted heir, the child would inherit Donald's entire estate. Since Donald would be treated as if he died intestate, the devise of the ANB shares to Annie would go to the child, as Donald's closet living heir. The devise of the net proceeds from the sale of the real estate to Wendy was revoked upon their divorce in 2010. Also, since there is no residuary clause, those proceeds and all other property not disposed of under the will would pass under intestacy anyway. The child would then be entitled to the net proceeds from the sale of the farm, the various tangible personal property, the balance of the checking account, and the ANB shares. However, since the child is only 14 (born in 2008, and Donald died in 2022), the distribution cannot be made to the child directly. Presuming Wendy is the mother of the child, she would not automatically receive the distributions on behalf of the child. The court would need to appoint a guardian of the estate and distribute the property to that person on behalf of the child.

Therefore, as an omitted child, the child would be entitled to Donald's intestate property, with distributions being made to a guardian of the estate.

2. [07.22] [Torts] Two friends, Amy and Zia, rented a remote home in Bath County, Virginia, in late March 2021, for their children's spring break. Amy traveled to Virginia from her home in Florida with her 18-year-old son, Abe. Zia traveled to Virginia from New Hampshire with her 13-year-old son, Zach, and his best friend of the same age, Walt.

After they arrived, a spring snowstorm hit the area one morning and left 8 inches of fresh snow. Given the poor road conditions that day, Amy and Zia cancelled a planned group outing and the boys played in the snow around the house and in the nearby woods. The temperature dipped below freezing in the late afternoon forcing the exhausted boys to retreat to the house. Abe told Zach and Walt that he had never played in snow and that they were lucky to live in New Hampshire.

That night, the boys were watching a movie when Amy and Zia went to bed and fell a sleep at around 10:00 pm. Around 1:00 am Walt, knowing Abe was a licensed driver, suggested the boys go driving around in the snow and said that the keys to Amy's car were hanging by the front door Abe responded that he had never driven in snowy or icy conditions, and he was scared. Additionally, although he often drove Amy's sedan, it had rear-wheel drive which he understood was not good in snow. Walt told Abe that he was a junior snowmobile champion and he could guide him through it. Walt and Zach encouraged Abe and said that it would be "an adventure."

Abe gave in to the pressure, took the keys to Amy's car, and the boys drove away from the house undetected. Abe drove very slowly and cautiously at first. Walt was sitting in the front passenger seat and told Abe to speed up. At the next curve, Walt told Abe that he needed to counter-steer to the right. Attempting to follow Walt's instructions, Abe lost control of the car and struck a tree. All of the boys sustained minor injuries and Walt suffered multiple fractures to his right arm and elbow.

Walt, through his mother, Wanda, filed a proper and timely Complaint in Bath County Circuit Court against Abe and Amy, seeking damages for Walt's personal injuries sustained in the accident. The suit alleges negligence against Abe for his operation of the vehicle and negligent entrustment liability against Amy for her son's negligent operation of her vehicle. Abe

filed an Answer to the Complaint, admitting his own negligence but asserting the defenses of contributory negligence and assumption of the risk by Walt. Amy filed an Answer denying she negligently entrusted her vehicle to Abe and also alleging contributory negligence and assumption of the risk by Walt.

(a) What arguments should be made for and against the claim that Amy negligently entrusted her vehicle to Abe? Who is likely to prevail? Explain fully.

(b) What arguments should be made for and against the defense of contributory negligence? Who is likely to prevail? Explain fully.

(c) What arguments should be made for and against the defense of assumption of the risk? Who is likely to prevail? Explain fully.

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(a) Amy is likely to prevail with regard to the claim that she negligently entrusted her vehicle to Abe. The broad issue is whether Amy knew, or had reason to know, she was entrusting her vehicle to an unfit driver who was likely to cause injury to another person.

The Commonwealth of Virginia rejects the family purpose doctrine. Therefore, the owner of an automobile is not vicariously liable for a family member's negligent operation of an automobile solely by virtue of the family relationship. Although Virginia permits claims for direct liability against parents based on negligent entrustment of a vehicle to a child, the plaintiff must prove that the parent owner of the vehicle knew, or had reason to know, she was entrusting her vehicle to an unfit driver, likely to cause injury to others. The parent owner may be found to have entrusted her vehicle to her child by giving express or implied permission.

Walt should argue that Amy entrusted her son with her vehicle based on her actions in regularly allowing Abe to drive her sedan. Having gone to bed, she hung the keys within an area outside of her control on the night of the accident. These actions arguably implied permission. Walt should also argue that Amy knew, or had reason to know, that Abe was inexperienced with driving in snowy or icy conditions and left her keys available to him with knowledge of the poor road conditions. Therefore, Amy knew that she was entrusting her automobile to an unfit driver, her son, who was likely to cause injury to another person while driving in these unfamiliar conditions.

Amy should argue that she did not expressly or impliedly entrust her vehicle to Abe on the night of the accident. Before going to sleep at 10:00 p.m., Amy did not give express permission for her son to operate her automobile. Further, the mere act of hanging the keys by the front door would not, absent other facts, imply permission to do so. Even if she had entrusted her automobile to Abe on the night of the accident, there are no facts that suggest Abe was an unfit driver likely to cause injury to another. More specifically, there is nothing to indicate that Abe was incapable of driving in these conditions.
Amy's arguments are more persuasive and, therefore, she is likely to prevail against the claim that she negligently entrusted her vehicle to Abe.

See Crowell v. Duncan, 145 Va. 489 (1926); *Hackley v. Robey*, 170 Va. 55 (1938); *Laughlin v. Rose*, 200 Va. 127 (1958); *Denby v. Davis*, 212 Va. 836 (1972); *Bell v. Hudgins,* 1 Va. Cir. 340 (1983); *Bell v. Hudgins*, 232 Va. 491 (1987); *Turner v. Lotts*, 244 Va. 554 (1992).

(b) Walt is likely to prevail with regard to the affirmative defenses of contributory negligence based on application of the child standard of care. The issues are whether Walt was capable of committing negligence and whether his actions constituted a failure to exercise reasonable care for his own safety.

In the Commonwealth of Virginia, a child between the ages of 7 and 14 is presumed not to have the capacity to understand and appreciate the peril and dangers of his acts and is legally incapable of committing acts of negligence. The defendant can rebut this presumption by showing that the plaintiff child did have the capacity to understand the peril and dangers.

The Commonwealth of Virginia is considered a pure contributory negligence jurisdiction. This means that no plaintiff is entitled to recover from another for an injury proximately caused by any negligence committed by the plaintiff. To show that a child plaintiff's conduct amounted to contributory negligence, the evidence must show that the plaintiff's conduct did not

conform to the standard of what a reasonable person of like age, intelligence, and experience would do under the circumstances for his own safety and protection.

Walt should argue that Abe and Amy cannot rebut the presumption that Walt is incapable of committing acts of negligence. Walt is only 13 years of age, and therefore incapable of understanding and appreciating the dangers associated with a joy ride in dangerous conditions and high rates of speed in a sedan on a roadway. Even if it were determined that he was capable of negligence, Walt should argue, as the passenger, that he was not operating the sedan or otherwise in control of its operation. Furthermore, his conduct conformed to the standard of what a reasonable child of his age of 13, intelligence, and experience would do under these circumstances.

Abe and Amy should argue that they can rebut the presumption that Walt is incapable of committing negligence because Walt, having specialized knowledge in the use of motorized vehicles, has the capacity to understand and appreciate the peril and dangers of operating a vehicle in inclement conditions. Walt was a junior snowmobile champion who assured Abe that he was able to "guide him through it." Furthermore, Abe and Amy should argue that Walt failed to exercise reasonable care for his own safety. While Abe was driving slowly and cautiously, Walt instructed Abe to "speed up" and "counter-steer to the right." Walt's conduct fell below the standard of what a reasonable person of Walt's age, intelligence, and experience would do under the circumstances. The accident occurred when Abe lost control of the car in reliance of Walt's instructions. Therefore, Walt's own contributory negligence was a proximate cause of his injuries.

The arguments by Abe and Amy are more persuasive with regard to whether Walt was capable of committing negligence and they would likely prevail on that issue. However, based on application of the child standard of care, Walt has a compelling argument that his actions were consistent with those of a 13-year old who had no experience driving a sedan on a roadway.

See Yeary v. Holbrook, 171 Va. 266 (1938); *Baskett v. Banks*, 186 Va. 1022 (1947); *Smith v. Virginia Elec. & Power Co.*, 204 Va. 128 (1963); *Norfolk & Portsmouth R.R. v. Barker*, 221 Va. 924 (1981); *Endicott v. Rich*, 232 Va. 150 (1986); *Doe v. Dewhirst*, 240 Va. 266 (1990); *Virginia Elec. & Power Co. v. Dungee*, 258 Va. 235 (1999).

(c) Abe and Amy are likely to prevail with regard to their affirmative defenses of assumption of the risk. The broad issue is whether Walt fully appreciated the nature and extent of the risk of riding with Abe in the snowy conditions and voluntarily incurred it.

Assumption of the risk is an affirmative defense in Virginia and operates to bar recovery by a plaintiff, based on the subjective inquiry into what the particular plaintiff knows, understands, and appreciates. Assumption of the risk is venturousness. To succeed, the defendant must prove that the plaintiff fully understood and appreciated a known danger and voluntarily exposed himself to it.

Walt should argue that he did not fully understand and appreciate the danger of riding with Abe. Walt's age is the most significant indication that he was incapable of knowing, understanding, and appreciating the risk associated with riding in a sedan, with an inexperienced driver, in snowy and icy conditions. Walt's experience was limited to snowmobile riding. In addition, Walt's statement to Abe that he could guide Abe in the snowy ride in the sedan further suggests that Walt did not know that there was any danger.

Abe and Amy should argue that Walt did fully understand and appreciate the risk. Abe told Walt that he had never driven in snowy or icy conditions, and he was scared to do so. Abe also told Walt that Amy's sedan had rear-wheel drive which Abe understood "was not good in snow." Walt even characterized riding the sedan around in the snow as an "adventure," which indicates Walt's understanding of the risk involved. Abe and Amy should further argue that Walt voluntarily exposed himself to the risk by suggesting that they should go driving in the snow and told Abe that he could find Amy's keys to the sedan by the front door. Walt continued to pressure Abe despite his appreciation of the risk.

The arguments by Abe and Amy are more persuasive and, therefore, they are likely to prevail with their affirmative defenses of assumption of the risk.

See Landes v. Arehart, 212 Va. 200 (1971); *Budzinski v. Harris*, 213 Va. 107 (1972); *Amusement Slides Corp. v. Lehmann*, 217 Va. 815 (1977); *Arndt v. Russillo*, 231 Va. 328, (1986); *Hoar v. Great Eastern Resort Mgmt.,* 256 Va. 374 (1998); *Nelson v. Great Eastern Resort Mgmt.*, 265 Va. 98 (2003).

Draftors' Note: We think full credit should also be awarded for well-reasoned conclusions in (b) that Abe and Amy are likely to prevail on the issue of contributory negligence and in (c) that Walt is likely to prevail on the issue of assumption of the risk.

3. [07.22] [Domestic Relations] Jed and Sue were married in Richmond, Virginia, in 2013. Both were employed and shared all the expenses of their household in Richmond. In 2015, Jed and Sue had a daughter, Daisy, and after her birth they decided that Sue should stop working to take care of the child. When Daisy was two, Sue returned to work and Daisy went to day care. Sue dropped Daisy off in the morning and picked her up in the afternoon on her way home from work.

In the early years of their marriage, Jed and Sue shared the household duties. Sue took care of the house while Jed maintained their yard and vehicles; however, from time to time each performed chores normally done by the other.

Within a year of returning to work, Sue began getting home later. On those days, Jed picked up Daisy from day care, prepared dinner for the three of them, and put Daisy to bed. Sue also began going to work too early to drop off Daisy at day care, forcing Jed to assume that responsibility as well.

In January 2019, Sue received a promotion with additional responsibilities. By June 2019, Jed was forced to assume all the responsibilities of caring for the home and Daisy. Sue rarely returned home from work before bedtime, and Jed moved into the spare bedroom to avoid being awakened when Sue returned home each night. He could not remember the last time that they had been intimate. Jed then asked Sue to go with him to marriage counseling to discuss their marriage and daughter, but she refused.

Jed finally decided that the family situation was not good for their daughter nor for him. On January 15, 2020, he and Daisy moved out of the family home and into an apartment. Sue contacted him a week later to ask where they were, and he explained what he had done. Jed did not want to divorce and did not wish to spend money on a lawyer, so the next day he personally filed a petition in the Richmond Juvenile and Domestic Relations District Court asking for custody of his daughter and for an award of child support from Sue. Sue was properly served with the petition and a notice for a hearing to be held on February 10, 2020, but she did not appear for that hearing.

The Court awarded Jed custody of Daisy, reserving reasonable visitation to Sue, and ordered Sue to pay Jed child support in the sum of $500 per month beginning March 1, 2020.

Thereafter, Sue saw Daisy sporadically and never paid Jed any of the child support. In March 2021, Sue filed an action for divorce in the Richmond Circuit Court. She also asked for custody of Daisy and an award of child support from Jed. Sue did not ask for a *pendente lite* hearing on any of the issues she raised, and the Circuit Court has taken no action.

Jed timely filed a cross-complaint in Sue's divorce proceeding and asked for a divorce, custody of Daisy, and an award of child support. Jed simultaneously filed a motion in the Juvenile and Domestic Relations District Court asking that Sue be held in contempt for failing to comply with its child support order and to use its contempt powers to compel her compliance with that order.

A hearing was promptly held by the Juvenile and Domestic Relations District Court. At the hearing, Sue asked that Jed's motion be dismissed, arguing that the filing of the divorce action in the Circuit Court divested the Juvenile Court of jurisdiction over issues of custody and child support, and therefore the Juvenile Court's support order was no longer enforceable.

(a) How should the Juvenile Court rule on Jed's motion for enforcement of its support order? Explain fully.

(b) What grounds for divorce, if any, should Sue assert and how is the Circuit Court likely to rule on each ground? Explain fully.

(c) What grounds for divorce, if any, should Jed assert and how is the Circuit Court likely to rule on each ground? Explain fully.

(d) What should the Circuit Court consider in deciding which parent should have custody of Daisy and who is likely to prevail? Explain fully.

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(a) The Juvenile & Domestic Relations Court should deny Sue's motion to dismiss the contempt proceeding and find Sue in contempt for nonpayment of the child support order.

The Juvenile & Domestic Relations District Court and Circuit Court have concurrent jurisdiction over custody and child support orders. After a Juvenile Court issues a custody or support, it is divested of jurisdiction when a party files a suit for divorce asking for custody and support to be decided but only after a hearing is set by the circuit court for a date certain or the matter is on the motions docket to be heard within 21 days of filing. Va Code §16.1-244. Here, the Juvenile Court had previously issued a custody and child support order. Although Sue filed for divorce, nothing in the facts indicate that the matter has been set for a hearing. To the contrary, the facts state that the "Circuit Court has taken no action" on any of the issues raised in her suit. Even if the matter had been set for a hearing, § 16.1-244 further states that the Juvenile Court continues to have jurisdiction to enforce its valid orders prior to the entry of a conflicting order of the circuit court..

Draftors Note: We think that to get full credit, you did not need to mention that the court is divested of jurisdiction only after a hearing is set or the matter is put on the motions docket]

The Juvenile & Domestic Relations District Court should grant Jed's motion for contempt. "Contempt is defined as an act in disrespect of the court or its process, or which obstructs the administration of justice." *Epps v. Commonwealth,* 47 Va. App. 687, 708 (2006) *(en banc).* The power to punish for contempt in inherent in the court. It is essential to the proper administration of the law to enable courts to enforce their orders. It is within the broad discretion of the court whether to exercise its contempt powers. *Petrosinelli v. People for the Ethical Treatment of Animals, Inc.*, 273 Va. 700, 706 (2007). Here, although the facts state she was properly served with the petition in the Juvenile Court, she chose not to appear on the matters of custody or support. The Juvenile Court ordered Sue to pay $500 per month beginning March 1, 2020, and reserved reasonable visitation. Sue did not appeal that order. She has not paid any child support pursuant to the order. Thus, it is within the Juvenile Court's discretionary authority to find Sue in contempt of court.

(b) Sue should assert two grounds for divorce: living separate and apart for one year and desertion.

Va. Code §20-91 sets for the grounds for divorce in Virginia. Where the parties have a minor child, they must demonstrate that they have lived separate and apart without any cohabitation and without interruption for one year. Here, the parties easily satisfy the standards. Jed moved out of the home Jan. 15, 2020, and Sue filed an action for divorce fourteen months later in March 2021. Nothing in the facts show that during that time frame they resumed cohabitation.

§ 20-91 also provides that a party is entitled to a divorce based on willful desertion or abandonment after one year from the date of such act. Desertion is a breach of matrimonial duty that requires a showing of the actual breaking off of the matrimonial cohabitation coupled with an intent to desert in the mind of the deserting party. *Kahn v. McNicholas*, 795 S.E.2d 485, 490 (Va. Ct. App. 2017). Matrimonial cohabitation refers to sexual relations, continuing cohabitation, and carrying out of mutual responsibilities of the marital relationship. Here, the first prong is satisfied in that there was a breaking off of the matrimonial cohabitation when Jed and Daisy left the family home on January 15, 2020 and moved into an apartment. The intent to desert prong is a closer call. The facts indicate that sometime prior to leaving, he asked Sue to go to marital counseling but Sue refused. The facts also state that he did not want a divorce. These facts might establish that he did not intend to abandon the marriage relationship. Because there are no facts indicating the parties agreed to the separation, Jed left the marital home without telling Sue that he was leaving, and Sue did not know where he was until she phoned him a week later, there seem sufficient facts for desertion. The required one year period has also passed.

(c) Jed should assert desertion and constructive desertion and, if Sue did not, living separate and apart for one year.

In *Chandler v. Chandler*, 132 Va. 418 (1922), the Supreme Court explained that desertion could be established where there was willful withdrawal of the privilege of sexual intercourse, without just cause or excuse when such withdrawal is accompanied with willful breach and neglect of other marital duties as to practically destroy home life in every true sense and to render the marriage intolerable and impossible to be endured. In more recent years, the Virginia Court of Appeals has interpreted *Chandler* to mean that where sexual privileges are willfully withdrawn, desertion does not require the breach and neglect of all martial duties but only the breach of other significant duties. *Jamison v. Jamison*, 3 Va. App. 644 (1987).

It would be difficult to establish desertion here. Although Jed could not remember the last time they had sexual relations, the facts indicate that he moved into the spare bedroom to avoid being awakened when Sue returned home. Unlike other cases, there were no facts to show she denied him sexual conduct by, for example, locking him out of the marital bedroom. Even turning to Sue's failure to assume any of the household responsibilities, those facts tend to look more like the

realities of the requirements of some jobs rather than her refusal to participate in shared household responsibilities. In Jamison, for example, the wife ceased performing all household responsibilities for husband – doing only her laundry, refusing to clean the room he stayed in, and preparing meals only for herself. These facts are drastically different than Jed's situation, which makes it unlikely he will succeed on a claim for desertion against Sue. Jed might have more success arguing these facts demonstrate constructive desertion.

Constructive desertion generally can be established by cruelty on the part of one spouse that justifies the other spouse's decision to discontinue marital cohabitation. However, in *Rowand v. Rowand*, 215 Fa. 344 (1974), the Virginia Supreme Court held that a spouse may be free from legal fault in breaking off cohabitation even where the other party's conduct falls short of constituting a grounds for divorce (e.g., cruelty). Although the facts are clear that the parties lived in separate rooms, that they did not engage in sexual relations, that Sue worked such long hours that she did not share any household, and that Sue refused to attend marital counseling, it is questionable whether the court would find these facts sufficient to support Jed's claim for constructive desertion. The facts do state that Jed moved out because he believed the family situation was not good for his daughter or himself. However, that seems to fall short of constituting an intolerable situation. There are no facts establishing that either his or Daisy's health or physical welfare were endangered. *See, e.g., Breschel v. Breschel*, 221 Va. 208 (1980) (the wife left after suffering from a significant deterioration in her physical health as a result of the husband's conduct).

(d) The Court should treat Sue's custody request in the Circuit Court as a request to modify a prior custody determination and conclude that Sue has not demonstrated a material change of circumstances. *See Peple v. Peple,* 5 Va. App. 414 (1988). Where a Juvenile Court has properly issued a custody order, a subsequent request for a custody order accompanying a suit for divorce in Circuit Court should be treated as a modification rather than a de novo review of a custody determination. Here, nothing in the facts indicate that the parties' circumstances have changed since the Juvenile Court entered the custody order.

If the court determines there is a change of circumstances, it should apply the best interests factors set forth in the statute and decide that Jed should have custody of Daisy, with visitation to Sue. Virginia law requires the court to consider the factors set forth in § 20-124.3 in deciding the best interests of the child in making a custody and visitation determination. The most relevant factors are discussed below.

Age and needs of the child: Daisy is now seven years old. She needs a parent who is able to get her to school and be there for her after to school – for school activities, preparing dinner, doing homework, and putting Daisy to bed. For at least the past three years, Jed has demonstrated the ability to perform all of those tasks. Sue, on the other hand, has worked such long hours that she has not been able to perform those tasks. Nothing in the facts indicate that her work situation has changed. These factors weigh in favor of Jed.

The existing relationship between each parent and the child: As noted above, Daisy and Jed seem to have a good relationship, with Jed performing most of the parenting duties. For the past two years, he has been the primary custodian for Daisy. Nothing in the facts indicate that she is not well adjusted or that he has anything other than a good relationship with Daisy. On the contrary, since the custody order was issued in February of 2020, Sue has only seen Daisy sporadically. The facts do not indicate the nature of the existing relationship between Daisy and Sue. However, even if they have a good relationship, this factor weighs in favor of Jed.

The role that each parent has played in the upbringing: Since January 2019, Jed has assumed most if not all of the parenting responsibilities. He also has been the primary custodian of Daisy since January of 2020. In contrast, Sue has not been there to take her to school, pick her up from school, make her dinner, or put her to bed. Since Jed moved out and the court granted Sue reasonable visitation, she has only sporadically exercised her visitation rights.

The propensity of each parent to actively support the child's contact with the other parent: Nothing in the facts indicate that either parent is unwilling to foster a good relationship between Daisy and the other parent. Although Sue only sporadically visited Daisy during the past two years, the facts do not indicate that it was because Jed frustrated Sue's visitation. Rather, it is likely because of Sue's work schedule.

The willingness of each parent to maintain a close and continuing relationship with the child: As discussed above, the facts indicate that Joe has demonstrated a willingness to maintain a close and continuing relationship with Daisy, but Sue has not – only sporadically seeing her for the past two years despite being given reasonable visitation by the court.

Based on all of these factors, the court should grant custody to Jed with reasonable visitation to Sue.

4. [07.22] [UCC Sales] On April 1, Harley, President of Apollo Mosaic Tile Gallery (Apollo) located in Daleville, Virginia, visited the showroom of David's Flooring (David's) to view flooring options for her office and Apollo's gallery. Harley met with David, the owner, and viewed flooring samples displayed in David's showroom. Harley selected carpeting for her office and black-veined marble tiles for the gallery.

On April 4, David measured the two areas at Apollo, discussed the details with Harley, and on April 5, delivered to Harley two separate written proposals specifying the work to be done, the quantity of materials to be used, and the price for each part of the work as $2,500 for the office carpet and $27,000 for the marble tiles in the gallery. In each case, 75% of the price was for materials and 25% for services, i.e., the cost of labor for installation.

The proposals contained the following notation:

David's does not carry in stock the black-veined marble tiles you selected from our floor sample because we don't sell much of it. However, our supplier carries it in inventory, so we will place an order and will advise you when it is received.

In the cover letter transmitting the proposals, David stated:

These proposals confirm the agreement you and I reached in your office on April 4. Please sign and return each of these proposals signifying your approval.

Harley did not sign either of the proposals. Instead, she spoke to David by telephone and told him, "Your proposals are acceptable. Go ahead with the work."

On May 15, David's completed the installation of the office carpet and sent Apollo an invoice for $2,500, which Apollo paid. The next day, David's received the black-veined marble tile from its supplier, and David called Harley to set the date for installation of the gallery tile. Harley said she had reconsidered, and in light of the price, she had decided not to go forward with the installation.

David responded, "You can't just cancel our contract. Those tiles were a special order just for you. David's has already paid for them. We've never had another customer express interest in these tiles, so I don't know how long David's will have to carry them in inventory before someone else wants to buy them. Besides, the carpet and marble tile installation are part of a single deal, and you can't just comply with the part of the contract you like and ignore the rest." Harley said, "Well, I don't think we have an enforceable contract, so I'm not going to go forward with it."

David's timely filed a Complaint in the Circuit Court for Botetourt County, Virginia, against Apollo alleging breach of an enforceable contract under the Uniform Commercial Code (UCC) and to recover the price of the contract. Apollo filed a timely Answer asserting the affirmative defenses that its transaction with David's was not subject to the UCC and that no enforceable contract existed because Harley never signed either proposal.

(a) What arguments should Apollo make in support of its defenses that its transaction was not subject to the UCC and no enforceable contract existed because Harley never signed either proposal? Explain fully.

(b) What arguments should David's make in response to Apollo's defenses and who is likely to prevail on each defense? Explain fully.

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[a] <u>The transaction was not subject to the UCC:</u>

[i] Apollo may argue that the transaction for the tiles was not exclusively for "goods" [Va. Code §8.2-106(1) and §8.2-102], and thus not governed by UCC Article 2, since the contract covers the installation of the tiles as well as the tiles themselves.

[ii] Apollo may also argue that the contract was for a mix of goods and services, and thus should be governed by the "predominant purpose" rule. Apollo would argue that the installation of the tiles (*i.e.*, services) predominates, taking the contract out of the purview of UCC Article 2. Palmetto Linen Service v. U.N.X., Inc., 205 F.3d 126, 129 (4th Cir. 2000); See also Stoney v. Franklin, 54 Va. Cir. 591 (2001). Here, however, the cost of installation was only 25% of the total contract price, so this argument appears tenuous.

[iii] Apollo may further argue that the tiles are fixtures, not goods as defined in §8.2-105, and thus not governed by UCC Article 2 since marble floor tiles are by nature permanently affixed to the realty. This argument is unlikely to succeed, however, since floor tiles differ in the degree and permanence of affixation from fully integrated structural systems.

No enforceable contract existed:

[i] Apollo would raise the affirmative defense of the Statute of Frauds. This transaction was for the sale of goods for $500 or more and thus a writing capturing the material terms and signed by the party to be charged was required. Here, however, only the offer was in writing; the acceptance was merely a phone conversation.

(b) [i] As discussed in part (a) above, this part (b) of the answer assumes the transaction was subject to Article 2 of the UCC because it was for the sale of "goods" (moveable items at the time of identification to the contract: §8.2-105). This argument should prevail.

[ii] An enforceable contract was formed despite the absence of a signed writing because of the "specially manufactured goods" exception to the Statute of Frauds [§8.2-201(3)(a)]. Here, the goods were "not suitable for sale to others in the ordinary course of the seller's business" and "the seller has made … a commitment for their procurement." To find otherwise would have the effect of penalizing an innocent party, which would defeat the purpose of the Statute. This argument should prevail.

[iii] There is also an argument that a "merchant's confirmatory memorandum" makes the contract enforceable unless objected to within 10 days, which did not happen here. Va. Code §8.2-201(2) provides: "Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received." This argument should prevail.

[iv] Finally, the doctrine of part performance may make the contract enforceable. To the extent a contract has already been performed in good faith, it may become enforceable despite the lack of a traditional writing compliant with the Statute of Frauds, for the same reason as the "specially manufactured goods" exception: to prevent fraud and avoid wrongly penalizing an innocent commercial party. This argument should prevail.

5. [07.22] [Professional Conduct] Liz Swann is a young lawyer in a mid-sized Fairfax County, Virginia law firm. Her firm represents Alpha Corporation (Alpha), a Fairfax-based corporation. The head of Alpha's Research & Development division, John Sparrow, recently left Alpha and went to work for Zeta, Inc. Zeta, a competitor of Alpha. Alpha believes that Sparrow gave Zeta confidential information and company secrets and has filed suit against both Sparrow individually and Zeta. Zeta has in house counsel. Sparrow has hired personal counsel to represent him.

Liz has been tasked with interviewing individuals who may have knowledge of the issues in the case, including:

* Vivian, the former senior Zeta VP and head of Zeta's Research & Development division before she retired last year.

* Diane, a current Zeta data entry clerk who Alpha believes has important factual information about the theft of its trade secrets.

* Sam, a former Zeta research scientist who, through his own lawyer, has filed a whistleblower action against Zeta alleging a pattern of intellectual property theft.

* Carla, an outside consultant to Zeta who, while not involved in the litigation, has retained her own lawyer to consult with her about potential liability.

While preparing for these interviews, Liz received an unsolicited phone call from Sparrow, who insisted that he wants to "tell her how we can resolve this whole thing."

Later, while Liz was at her son's soccer game, she began talking to the parent of another player. That parent mentioned that she is on the Board of Directors of Zeta.

The President of Alpha then told Liz that he and the President of Zeta are fraternity brothers and are having dinner together next week. He asked Liz if there is anything she wanted him to ask the Zeta President about the litigation.

Under the Virginia Rules of Professional Conduct:

(a) May Liz interview Vivian without the permission of Zeta's in-house counsel? Explain fully.

(b) May Liz interview Diane without the permission of Zeta's in-house counsel? Explain fully.

(c) May Liz interview Sam without the permission of Zeta's in-house counsel or without Sam's attorney's

permission? Explain fully.

(d) May Liz interview Carla without Carla's attorney's permission? Explain fully.

(e) What are Liz's ethical obligations, if any, when Sparrow calls her? Explain fully.

(f) May Liz properly continue her discussion with the Zeta Board member on the soccer field about matters unrelated to the litigation between Alpha and Zeta? Explain fully.

(g) May the President of Alpha discuss the litigation with the President of Zeta and, if so, may Liz suggest topics for him to discuss? Explain fully.

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(a) Yes. Notwithstanding the general prohibition on communication with a person that a lawyer knows to be represented by another lawyer in the matter, (See Rule 4.2 of the Virginia Rules of Professional Conduct), Liz may interview Vivian because Vivian has retired from Zeta and is now a "former constituent" of the organization. Comment [7] to Rule 4.2 provides the specific resolution of this question. It states in relevant part, "Consent of the organization's lawyer is not required for communication with a former constituent."

However, Liz does not have *carte blanche* in communicating directly with Vivian. Liz should pay special attention to language in Comment [7] to Rule 4.2, which provides that in communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. Comment [7] cross-references Rule 4.4 , which outlines other responsibilities of a lawyer who receives material that is privileged and was inadvertently sent.

The confines of Rule 4.2 are discussed in extensive detail in Legal Ethics Opinion (LEO) 1890, "Communications with Represented Persons (Compendium Opinion)," which was approved by the Supreme Court of Virginia on January 6, 2021.

(b) Yes. With respect to organizations, Comment [7] to Rule 4.2 of the Virginia Rules of Professional Conduct prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

Diane, as a data entry clerk, is not a supervisor nor does she have any authority to obligate Zeta on any legal matter. Thus, Liz may communicate with Diane provided Liz follows the same guidance in Comment [7], which prohibit her from obtaining evidence through Diane that would violate the legal rights of Zeta. *See* Rule 4.4.

(c) Likely no. Sam is a former employee of Zeta, and thus Liz does not need the permission of Zeta's in-house counsel. However, she does need the permission of Sam's personal attorney. Comment [7] to Rule 4.2 provides, "If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule."

Sam's whistleblower complaint references a pattern of intellectual property theft. The controversy involving John Sparrow similarly involves intellectual property theft from Alpha to Zeta. Because the whistleblower complaint and Alpha's claims are closely related, Liz must first seek the consent of Sam's counsel before reaching out to him. Further, Comment [8] clarifies that Rule 4.2 applies even if a person is not a party to a formal proceeding but is represented by counsel concerning the matter in question.

That said, Liz might have some leeway to talk with Sam without the permission of Sam's attorneys based on guidance from LEO 1890: "The Rule limits communications with represented persons only when the person is represented "in the matter," so communication with a represented person about a different "matter" than the one in which the person is represented is permissible even if the communication involves facts that also relate to the matter in which the person is represented."

(d) No. While Comment [4] to Rule 4.2 allows an attorney to communicate with a represented person concerning matters outside the representation, that exemption does not apply here. Carla has retained her own lawyer to assist her in managing her own potential liability with respect to the very same issues that are at stake with Alpha's claims against Zeta. Because the matters are so closely related, Liz must first communicate through Carla's attorney. *See also* Comment [8] to Rule 4.2.1.

(e) The fact that Sparrow has volunteered to communicate with Liz directly does not relieve Liz of her obligations under Rule 4.2. As Comment [3] makes clear, "The Rule applies even though the represented person initiates or consents to the communication." Comment [3] also explains that Liz must "immediately" terminate communication with Sparrow if he calls, but immediately does not mean instantaneously. The Supreme Court of Virginia has clarified that the Virginia State Bar's Principles of Professionalism allow a lawyer to take the time to end the call with respect and courtesy. *See Zaug v. Virginia State Bar,* 737 S.E.2d 914, 918 (Va. 2013).

To be clear, Liz can only communicate with Sparrow by first reaching out *both* to Sparrow's personal attorney and to Zeta's in-house counsel. This is because Sparrow likely has some supervisory or managerial role at Zeta given his prior position at Alpha as head of Alpha's Research and Development division. Comment [7] covers the obligation to include Zeta's in-house counsel.

Assuming Sparrow did not sing and disclose any material over which Zeta would have a claim of privilege, then Liz has no obligation to inform Sparrow's or Zeta's lawyers about the brief call. However, if Sparrow did disclose attorney-client privileged materials, then Liz must abide by Rule 4.4 to determine whether she needs to promptly notify opposing counsel.

(f) Yes, Liz may continue the conversation. As Comment [4] to Rule 4.2 explains, the existence of a controversy between an organization and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Clearly, the children's soccer game is a separate matter unrelated to the litigation.

(g) Yes, the President of Alpha can discuss the litigation with the President of Zeta because "parties to a matter may communicate directly with each other" without the presence of attorneys. *See* Rule 4.2, Comment [4]. Liz should advise the President of Alpha not to disclose anything to the President of Zeta that Alpha wishes to keep confidential, since any disclosure would waive a claim to attorney-client privilege over that material. At the same time, Liz must be careful not to try to use the meeting to surreptitiously gain attorney-client privileged material from the President of Zeta. For example, Liz cannot give the President of Alpha a list of questions to ask. The spirit of Rule 4.2 focuses on "[c]oncerns regarding the need to protect uncounselled persons against the wiles of opposing counsel." *See* Rule 4.2, Comment [9]. Thus, Legal Ethics Opinion (LEO) 1890 clarifies, "Represented persons may communicate directly with each other regarding the subject of the representation, but the lawyer may not use the client to circumvent Rule 4.2."

6. [07.22] [Criminal Procedure] Bob and Jane lived in Blacksburg, Virginia. They had been married for ten years. They jointly owned a condominium where they resided together. The first several years were happy for both of them, but over

the last two years they argued constantly. One day, after an argument, Jane left the house angrily without saying where she was going or when she would be back. Jane took nothing with her other than a few articles of clothing. After three days of separation, Jane returned to the condominium to pick up clothing and to attempt reconciliation with Bob. Jane used her key to enter the condominium and discovered that Bob had been entertaining a woman in the condominium. She changed her mind about reconciliation and left the condominium in anger.

Still angry, Jane went to the sheriff's office and spoke to a deputy. Jane told the deputy that Bob was a home burglar and that stolen jewelry could be found in the desk drawer in the dining room of the condominium. The desk was Jane's before the marriage and had been used as marital property during the entire marriage. The deputy asked permission to search the condominium without a warrant. Jane agreed and took the deputy to the condominium while Bob was not there. Jane opened the door with her key and led the deputy to the desk. The deputy found a large quantity of jewelry in the desk and took the jewelry as evidence.

The deputy determined that the jewelry had been stolen from a home in Montgomery County, Virginia, during a recent break-in. Bob was then indicted in Montgomery County Circuit Court on counts of burglary and grand larceny.

Bob pleaded not guilty and was set to be tried by a jury on the question of guilt. Bob's attorney moved to suppress all of the evidence seized during the search of the condominium on the ground that his right to be free from unreasonable searches and seizures had been violated. The Judge denied his motion to suppress.

During the trial, Jane agreed to voluntarily testify against Bob. Before Jane testified, Bob's attorney objected on the grounds that Bob had not agreed to allow his wife to testify against him and that his right to spousal privilege was being violated. The Judge overruled the objection and allowed Jane to testify. Bob did not testify and was found guilty on all counts.

During the hearing on sentencing by the Judge, the Commonwealth introduced five prior felony convictions against Bob. Bob's attorney objected to the introduction of the prior convictions on the ground that Bob had not testified, and the convictions were therefore irrelevant. The Judge overruled the objection.

Bob was sentenced to serve five years in the penitentiary and wants to appeal his conviction and sentence.

(a) Did the Judge err in denying Bob's motion to suppress the evidence seized during the warrantless search of the condominium? Explain fully.

(b) Did the Judge err in allowing Bob's wife to testify against him over his objection? Explain fully.

(c) Did the Judge err in allowing the introduction of Bob's five prior felonies? Explain fully.

(d) To which court should Bob direct his appeal and what steps must he take to perfect the appeal? Explain fully.

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(a) The judge did not err in denying Bob's motion to suppress evidence obtained during the warrantless search of Bob's condominium: The Fourth Amendment protects individuals from unreasonable searches and seizures and warrantless searches are presumptively unreasonable. However, search pursuant to consent is valid. Consent may be given by one with actual authority or by one with apparent authority. Where multiple parties have common authority over a premises, any one party with authority may grant consent despite the lack of express concurrence by any of the other parties. Bob was not home at the time of the search, but his lack of express concurrence does not undermine Jane's authority as a co-owner of the home to grant consent to enter the home and search the desk. Given Jane's express consent, the search of the home was valid and the judge correctly denied Bob's motion to suppress. (See Glenn v. Commonwealth, 49 Va. App. 413 (2007).)

(b) The judge properly allowed Bob's wife to testify against him over Bob's objection. In Virginia, in criminal cases, however, spouses must be allowed to testify against each other, though absent rare circumstances cannot be compelled to do so.

The statute addressing spousal privilege affords a defendant on trial no right to object to a spouse's voluntary testimony. Here, Jane voluntarily agreed to testify against Bob and thus, Bob had to right to object to Jane's testimony. (Code § 19.2-271.2; Turner v. Commonwealth, 33 Va. App. 88 (2000).)

(c) The judge properly allowed the Commonwealth to introduce Bob's five prior felony convictions at the sentencing hearing. Bob is correct that his prior convictions would not be admissible as impeachment evidence during the guilt phase of his trial, as Bob did not testify. (Code § 19.2-169). However, the evidence is relevant during the sentencing phase. Had his sentencing taken place before a jury, the Commonwealth would be expected to present Bob's prior convictions (so long as the Commonwealth provided proper notice) (Code § 19.2-295.1). In his sentencing by the judge, such evidence is properly admitted as part of the presentence report.

(d) Bob should appeal to the Court of Appeals of Virginia. In order to perfect his appeal, he should file a notice of appeal with the Montgomery County Circuit Court within 30 days of entry of his sentencing order (and transmit notice to opposing counsel)(Rule 5A:6(a)) and file a copy of the notice of appeal with the clerk of the Court of Appeals along with the filing fee. (Rule 5A:6 (c)). The notice should contain a statement as to whether a transcript will be filed. (Rule 5A: 6(b)). The notice must contain the appropriate certificate. (Rule 5A:6(d)).

If a transcript is to be filed it must be filed with the trial court within 60 days. Once the trial record has been received by the Court of Appeals of Virginia, Bob will have 40 days to submit his opening brief. (Rule 5A:6)

7. [07.22] [Local Government] After several years of searching, Wilma and Harry Homeowners (Homeowners) found an idyllic parcel of land in the City of Chesapeake, Virginia (City), adjacent to a city park. They built their dream home there in 2010 and added a swimming pool in the backyard a year later. The city park was very large and the portion bordering their home site was remote, wooded and largely used for hiking and "wilderness" camping. Wilma and Harry loved the privacy it offered.

In 2018, the City decided to build a baseball complex near Wilma and Harry's home. Concerned about the possible effect the construction of the baseball complex would have on their property, Wilma and Harry engaged an engineering firm to determine any effect on their property. The engineer advised them that the City's plans for the baseball complex would alter the drainage from the park and direct large amounts of water onto their property. In particular, he advised that there was a high probability that drainage from the baseball complex would frequently flood their garage as well as the basement of their house. In addition, the engineer predicted that their swimming pool would be in the drainage area, thus making it impossible to keep the pool in usable condition.

Wilma, Harry and their engineer met the City building officials to advise of the potential damage to their property, and they requested that the City alter its plans so their property would not be affected. The City ignored their request, and there was no further communication with the Homeowners. After the construction was completed in 2020, the predicted flooding of their property began. The flooding has continued to the present and is especially bad during rainy periods.

On March 1, 2022, Wilma came home for lunch and found that their truck and camper were covered with spots of yellow paint. City workers were painting lines in the parking lot of the baseball complex. It was a windy day, and the paint was being blown from the baseball complex and onto the Homeowners' truck and camper parked on the driveway near their home.

Wilma and Harry were furious with the City and promptly filed suit in the Chesapeake Circuit Court against the City of Chesapeake. The first count alleged that the City's negligence in painting the parking lot on the windy day had damaged their truck and camper. The second count claimed that the City violated their constitutionally protected right to ownership and enjoyment of their home through inverse condemnation by constructing the baseball complex, and that as a result, their property was a total loss.

The Chesapeake City Attorney responded to the suit by filing a Motion to Dismiss both claims, citing sovereign immunity, and claiming that Wilma and Harry had failed to provide any notice of their claims for damages to the City prior to filing the lawsuit.

(a) What do Wilma and Harry need to show in order to prevail on their inverse condemnation action? Explain fully.

(b) How should the Court rule on the City's Motion to Dismiss Wilma and Harry's negligence claim and their inverse condemnation claim on the grounds of sovereign immunity and failure to provide notice? Explain fully.

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(a) Article I, Section II of the Constitution of Virginia confers on a property owner a right to just compensation from the government when the government takes or damages the owner's property for public use. Richmeade, L.P. v. City of

Richmond, 267 Va. 598, 601, 594 S.B.2d 606, 608 (2004). Further, the Supreme Court of Virginia has held that when the government fails to condemn private land taken for public purposes, the landowner's recourse is to file an action for inverse condemnation based on the implied contract between the government and the landowner. C & 0. Ry. C'o. v. Ricks, 146 Va. 10, 18, 135 S.E. 685, 688 (1926).

A cause of action for inverse condemnation is a specific type of proceeding based on a constitutionally created right connected to the "taking" or "damaging" of property by the government. Taking or damaging property in the constitutional sense means that the governmental action adversely affects the landowner's ability to exercise a right connected to the property. Bd. of Supervisors of Prince William County v. Qmni Homes, 253 Va. 59, 72, 481 S. E.2d 460, 467 (1997).

To prevail on a claim for inverse condemnation, Wilma and Harry must establish that: (i) the property owner owns private property or has some private property right, (ii) the property or a right connected to that property has been taken or damaged by the government, (iii) the taking or damaging was for "public use," and, (iv) The government or condemning authority failed to pay just compensation to the property owner. Close v. City of Norfolk, 82 Va. Cir. 636, 640 (2009).

Drainage projects are a public use under Virginia Code Section §1-219.1(A)(i) and (ii), Virginia Code Section §15.2-970(A), Virginia Code Section §15.2-1902(1)(ii) and Virginia Code Section §15.2-1904(A)(ii).

In the case of Kitchen v. City of Newport News, 275 Va. 378, 657 S.E.2d 132 (2008), the Virginia Supreme Court in an inverse condemnation action found the city liable for compensation on the theory that by allowing additional development in the watershed had caused the plaintiffs' subdivision to act as a "contingent retention or detention pond areas" for water overflowing nearby creeks or ponds supports Wilma and Harry's inverse condemnation claim.

In addition, in the case of Livingston v. Virginia Department of Transportation, 284 Va. 140 (2012), the Virginia Supreme Court held that a single event of flooding can support an inverse condemnation claim. The Court held that when Virginia Department of Transaction (VDOT) constructed highway improvements for public benefit, a property owner may be entitled to compensation if VDOT's improvements cause damage to real or personal property. In this specific case, VDOT relocated the channel of a waterway in order to permit highway construction, but failed to maintain the relocated channel, and the property owner alleged that the improper design or lack of maintenance caused flooding and water damage of their home and personal property. The Supreme Court held that the property owner's allegations were sufficient to maintain an inverse condemnation claim against VDOT if the property owner could prove the flooding to their property was caused by VDOT's failure to maintain the waterway channel.

(b) (i) Sovereign Immunity Defense. The facts given specifically state that the baseball complex was constructed as part of the City park. Section 15.2-1809 of the Code of Virginia specifically provides the City, a "locality", with immunity from "simple" negligence in the operation of various facilities including, "parks", "playgrounds", and "recreational facilities." In AGCS Marine Ins. Co. v. Arlington County, the plaintiff insurance companies alleged simple negligence in their lawsuit and the County's demurrer raising sovereign immunity as a defense was granted. The student may note that cities remain liable under the statute for gross or wanton negligence in operation of these facilities. The facts given here, however, do not support gross negligence. The City's motion to dismiss Wilma and Harry's negligence claim against the City on the grounds of sovereign immunity should be granted.

(ii) Failure to Provide Notice Defense. The City's motion to deny Wilma and Harry's negligence claim on the grounds of failure to provide notice of their claim prior to filing suit may have merit. Even though Wilma and Harry's engineer advised the City of the likelihood of flooding prior to construction, Section § 15.2-209 of the Virginia Code provides that every claim against a county, city, or town for negligence shall be forever barred unless the claimant or his agent, attorney, or 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 such cause of action accrued. The purpose of the notice requirement is to afford a locality the opportunity to investigate the circumstances giving rise to the alleged negligence. In this case, Wilma and Harry failed to give the required notice before filing their lawsuit. The giving of such notice is mandatory and is essential element of a plaintiff's case. Daniel v. City of Richmond, 199 Va. 490, 100 S.E.2d 763 (1957). The fact that City officials were generally aware of the incident does not provide an exception to the notice requirement. Town of Crewe v. Marler, 228 Va. 109, 319 S.E.2d 748 (1984).

However, since Wilma and Harry filed and served their lawsuit within six months of the damage to their property, they can argue that the filing and service of the lawsuit satisfied the statutory notice requirement because the City had an opportunity to investigate the incident and gather the evidence within six months of the alleged negligence by the City.

(iii) Inverse Condemnation Claim

(i) Sovereign Immunity Defense. Although sovereign immunity is “alive and well” in the Commonwealth, Messina v. Burden, 228 Va. 301, 307 (1984), it is not without limits. Although sovereign immunity will protect a municipality against liability for many torts, the doctrine will not protect against a valid claim of inverse condemnation.

The city is not immune from proper inverse condemnation actions because such actions arise not out of tort, but rather out of a quasi-contractual claim under Article 1, Section 11 of the Virginia Constitution. Specifically, an inverse condemnation action arises when a property owner can show that his or her private property has been taken for public use without just compensation. See Va. Code § 8.01-187. However, the line between a tort and inverse condemnation can be difficult to distinguish.

The Supreme Court of Virginia held that flooding of a Harris Teeter grocery store by Arlington County's sewer system could be an inverse taking after Harris Teeter alleged that the county had purposefully caused the backup of the sewer system in order to keep other parts of the sewer system flowing. AGCS Marine Ins. Co. v. Arlington County, 293 Va. 469 (2017). In summarizing the law on inverse condemnation claims, the Supreme Court explained that "the common thread ... is that the purposeful act [i.e., the flooding of the store] causing the taking of, or damage to, private property was for [the] public use" of keeping the rest of the sewer system running. The Court was quick to differentiate this type of claim from a simple negligence action. This government action was different because here, as alleged, "'the government asked private property owners ... to bear the cost of a public improvement.' This element distinguishes an inverse condemnation claim from a mere tort claim alleging negligence, nuisance, trespass, or other common-law theories of recovery." AGCS Marine Ins. at 469 (citing Livingston v. Va. DOT, 284 Va. 140, 160 (2012)).

Therefore, the City’s motion to dismiss Wilma and Harry’s inverse condemnation claim on the grounds of sovereign immunity should be denied.

(ii) Failure to Provide Notice Defense. Wilma and Harry’s inverse condemnation claim sounds in contract. The notice requirements under Section 15.2-209 apply only to negligence claims against the City. Therefore, the City’s motion to dismiss Wilma and Harry’s inverse condemnation claim on the grounds of failure to provide notice prior to filing their lawsuit should be denied.

8. [07.22] [Virginia Civil Procedure] Tony McCoy and Susan Wilson are partners in Buckroe Partnership, a Virginia general partnership. Buckroe Partnership operates a coffee shop in Hampton, Virginia, which is the only business of the partnership. Tony and Susan agreed that Tony would handle customer relations, retail operations and purchasing, while Susan would handle the financial affairs of the coffee shop.

Ten months ago, with Tony’s knowledge, Susan arranged for a short-term loan for the partnership to borrow $40,000 from Lighthouse Bank for inventory and startup costs for the coffee shop, and Susan signed a promissory note on behalf of the partnership. Tony and Susan believed they would be able to make installment payments for a year and then pay off the loan with the required balloon payment at the end of the twelve-month term.

Business at the coffee shop has been far below expectations for several months. Susan has recently disappeared, and Tony does not know her whereabouts.

Pursuant to a judgment against the partnership, Tony was visited last week by the Sheriff of Hampton who properly levied on the inventory and cash at the coffee shop.

Tony checked the records in the Hampton General District Court Clerk's Office and learned that Lighthouse Bank had brought an action against Buckroe Partnership to collect on the balance of the note and that personal service of a Motion for Judgment had been made on Susan as a partner of Buckroe Partnership. Tony had not been served and had no knowledge of the court proceedings. A default judgment in favor of Lighthouse Bank in the principal amount of $20,500 plus interest, attorney's fees and costs was entered against the partnership 15 days ago.

In searching through the partnership’s correspondence and business records, Tony found a letter from Lighthouse Bank to Susan written after the lawsuit was filed in General District Court, but before default judgment was taken, in which Lighthouse Bank confirmed the parties’ agreement to continue the case to allow Susan the opportunity to obtain legal

counsel. Tony learned that Lighthouse Bank did not advise the court of the agreement to continue the trial and Lighthouse Bank obtained default judgment in Susan's absence on the scheduled trial date.

While continuing his search of the partnership's records, Tony found evidence of service of process on Susan thirty days earlier in another action brought against the partnership. This action was filed in Hampton Circuit Court by John Jones, who claims to have been injured during a slip and fall accident while inside the coffee shop. Tony learned from the Clerk of the Circuit Court that Susan had not filed responsive pleadings to the Jones action and that a hearing was scheduled the following day for entry of default judgment and determination of damages.

Tony has retained counsel to represent Buckroe Partnership.

(a) What remedies are available, if any, to the partnership in the Hampton General District Court regarding the Lighthouse Bank action and are they likely to succeed? Explain fully.

(b) Can the Lighthouse Bank judgment be appealed by the partnership? Explain fully.

(c) May the partnership's attorney participate in the Jones action in the Circuit Court default judgment hearing? Explain fully.

(d) What actions might the partnership's attorney reasonably take regarding the Jones' action? Explain fully.

✖✖

(a) This part of the question is based on the case of National Airlines v Shea 223 VA 578 [1982]. The 10 day period to appeal the GDC judgment has passed, so the Partnership can not appeal. §16.1-106.

Va Code §16.1-97.1 grants the GDC the authority, on motion made within 30 days from the judgment, to, within 45 days of the judgment, to reopen the matter.

Under §8.01-428[A][i], so long as the motion is made within 2 years from the date of the judgment, the Court can vacate the judgment on the ground of fraud on the Court. This provision was in play in the National Airlines case, where plaintiff's counsel, in the GDC, had failed to tell the Court that he'd had conversation with the defendant's counsel. Here, the facts are more egregious because there was evidence that the parties had agreed to a continuance and plaintiff's counsel had not disclosed this.

The court should vacate the judgment.

Draftors' Note - An analysis engaging Rule 1:1 is incorrect. While the Header for Part One of the Rules refers to "all proceedings", Va. Code §16.1-97.1, grants the GDC the authority to, when a motion is made within 30 days of the judgment, to, within 45 days of the date of entry of the judgment, reopen the matter and enter some other judgment. Va. Code §8.01-3[D] provides that if there's conflict between a Rule of Court and a Code Section, the Code section always wins. Rule 1:1, if applied to the GDC, would conflict with the code section. There has been references in appellate decisions to Rule 1:1 applying to the GDC, but to our knowledge, there are no appellate cases where this issue was actually before an appellate court.

However b/c a lot of the Virginia Civil Procedure Course dealing with how long after a final judgment the Court has authority to re-open the final judgment, is focused on Circuit Court proceedings, it's our feeling that credit should be given for an answer that relies on a Rule 1:1 analysis.

[b] The judgment is not appealable b/c the 10 day period to note the appeal has passed. §16.1-106 If the motion for relief is timely made under the codes sections mentioned above, either side would be entitled to appeal within the 10 day period from the judge's order. This is what happened in the National Airlines case.

[c & d] Yes, in the Circuit Court, under Rule 3:19, the defaulting defendant is entitled to appear at the hearing, and fully participate in the damages hearing. The Circuit Court can grant leave to the defendant in default to file late responsive pleadings and cure the default.

If this happens,, then the partnership's attorney can fully participate in the proceeding.

9. [07.22] [Business Organizations] Kitt and Vic formed a business to develop land and sell houses in Fairfax County, Virginia. They filled out the paperwork to properly create a Virginia corporation, and named it KV Homes, Inc. The Articles of Incorporation identified Kitt and Vic as Directors. The Bylaws named Kitt as President and Vic as Secretary of the corporation.

Kitt mailed the corporate formation documents to the Virginia State Corporation Commission on January 1, 2021, but neglected to put proper postage on the package. It was returned to her on January 15, 2021, because of the insufficient postage. Embarrassed by the oversight, Kitt put the paperwork into her desk drawer and did not tell Vic that the paperwork had been returned. Kitt then resubmitted the paperwork, and on May 1, 2021, the State Corporation Commission issued a Certificate of Incorporation.

Beginning February 1, 2021, they had begun operating under the name KV Homes, Inc. They opened a bank checking account in that name and purchased equipment using the KV Homes, Inc. bank account. On March 1, 2021, Kitt and Vic signed a five-year lease of office space with Cassius, signing the lease "Kitt, President of KV Homes, Inc. and Vic, Secretary of KV Homes, Inc." They did not personally guarantee the lease. The rent was paid for the next several months using the KV Homes checking account.

At a family gathering over the 4th of July weekend, Kitt's brother, Sam, told her about a parcel of developable land in Fairfax County that was about to go on the market, the "McLean Property," and asked if she would be interested in developing it with him. Kitt declined.

Later that month, Kitt purchased the McLean Property personally, intending to hold the property for a time and then sell it for a profit. When Vic found out, Kitt explained that she did not think KV Homes would want the property and that she did not intend to develop it.

On November 1, 2021, KV Homes vacated the office space and defaulted on the lease. Cassius then sued Kitt and Vic personally for the breach of the lease.

(a) How is the Court likely to rule on Cassius' breach of lease lawsuit against Kitt? Explain fully.

(b) How is the Court likely to rule on Cassius' breach of lease lawsuit against Vic? Explain fully.

(c) Has Kitt breached any duties owed to KV Homes in relation to the McLean Property? Explain fully.

✖✖

(a) The court is likely to rule in favor of Cassius on the breach of lease lawsuit against Kitt. Shareholders, directors and officers generally are not liable for the debts of a corporation or for contracts signed as agents of a corporation. Under the Code of Virginia, however, anyone who purports to act on behalf of a corporation knowing that the entity has not been incorporated is personally liable unless the other party also knew that there was no incorporation. Va Code §13.1-622. Here, Kitt entered into a lease agreement with Cassius, purportedly on behalf of KV Homes, Inc., on March 1, 2021, knowing that the entity had not yet been incorporated. The Articles of Incorporation were returned to Kitt on January 15, 2021, and she did not resubmit the paperwork to the State Corporation Commission until sometime shortly before May 1, 2021, when KV Homes, Inc. was incorporated. Additionally, nothing in the facts suggests that Cassius was aware that KV Homes, Inc. had not been incorporated when the lease was executed on March 1. Thus, Kitt will be personally liable on the lease with Cassius.

(b) The court will likely rule against Cassius on the breach of lease lawsuit against Vic. Unlike Kitt, Vic did not know that KV Homes Inc. had not been incorporated when he executed the lease with Cassius on behalf of KV Homes Inc. He and Kitt had filled out the required paperwork and the facts are clear that Kitt did not tell Vic that the paperwork was returned for lack of postage. Thus, Vic will not be personally liable on the lease with Cassius.

(c) Kitt likely breached her fiduciary duty of loyalty owed to KV Homes Inc. by purchasing the McLean Property. Directors owe fiduciary duties of care and loyalty to the corporation. The duty of loyalty includes, among other things, the duty not to misappropriate, or usurp, a corporate opportunity. In determining whether an opportunity belongs to the corporation and must be offered to the corporation before a director takes it for herself, a court will consider factors such as the similarity of

the opportunity to the business of the corporation and how the director learned of the opportunity. Here, Kitt learned of the opportunity to purchase the McLean Property at a family event, thus in her personal capacity not in her role as a director of the corporation, which weighs against concluding that the opportunity belonged to the corporation. However, the opportunity was exactly the type of business engaged in by the corporation. The facts provide that KV Homes Inc. was formed to develop land and sell houses in Fairfax County, Virginia. The McLean Property was located in Fairfax County, and, although Kitt bought it to hold and resell, rather than to develop, it is clear that the property could have been purchased for development. It is given that the property was "developable" and Kitt's brother asked her about developing the land with him. Thus, on balance, the better conclusion is that the McLean Property was a corporate opportunity and Kitt breached her fiduciary duty of loyalty to KV Homes, Inc. by purchasing it for herself without first offering it to the corporation.

Draftors' Note: We think that partial credit should be given for an answer that treated Kitt's actions as those of a common law promoter.