

Summary of Answers to the Essay Part of the February 2011 Virginia Bar Exam

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

Please remember what follows is just a summary of what is believed to be acceptable answers and which includes some "filling in" based on the general information the Board furnished. jrj

1. [Wills, Real Estate & Va. Civ. Pro] Tom and Jerry bought an apartment complex located on a two acre parcel of land adjacent to Route 58 in Grayson County, Virginia near the village of Mouth of Wilson. They took title as equal tenants in common. The apartment complex, which produced \$150,000 a year in rents, occupied the westernmost acre of the parcel. Tom and Jerry shared equally in the revenues and expenses of the complex.

Tom tried to convince Jerry to participate with him in building a post office on the easternmost acre for lease to the government. Jerry refused to participate, so in March 2010 Tom built the post office using \$100,000 of his own funds. Upon completion of the building, Tom, with Jerry's consent, leased it to the Postal Service for \$10,000 a year, payable to Tom personally.

Jerry offered to sell Tom his (Jerry's) interest in the parcel, and, although Tom was interested in buying Jerry out, he believed the terms Jerry was demanding were unsatisfactory. In the midst of negotiations, Jerry died intestate, survived by his grandfather, a niece, and two aunts.

Efforts to deal with Jerry's survivors have proved fruitless. They refuse even to engage in discussions or to cooperate in any way with Tom regarding the disposition of the property. They also demand that Tom share equally with them in the rental payments he receives from the Postal service. Tom finds it impossible to manage and maintain the property without their cooperation. As a consequence, he wants to sell and get his money out of the property.

[a] Who among Jerry's survivors succeeds to Jerry's interest in the parcel? Explain fully.

[b] Is Tom obligated to share the Postal Service rentals with Jerry's successor in interest? Explain fully.

[c] Is there a form of action that Tom can bring to force a judicial sale of the entire property, and, if so, is it likely that Tom can prove a prima facie case in support thereof? Explain fully.

[d] If Jerry's successor in interest wants to keep the property after determination by the court that a judicial sale would be in order, how can Jerry's successor obtain title? Explain fully.

[a] The cotenancy in the parcel passes to Jerry's niece. Since Jerry was not survived by a spouse, any descendants of his own, or parents, his property passes "to his ... brothers and sisters, and their descendants." Va. Code § 64.1-1(Fourth). Jerry left no surviving siblings, but his siblings did leave a descendant (Jerry's niece) who survived.

[b] Tom would be entitled to recoup what he'd paid to improve the land when the property was sold. [There is some uncertainty that the entire answer was captured from the discussions]

[c] Partition is the proper form of action to seek a sale of the property. In order for the court to be authorized to order the land sold, it must first find that the property can not be conveniently partitioned [§8.01-83] Given the size of the tract and that it has the apartment complex built on it, it is unlikely that the court could conveniently divide [partition] the property and thus it is likely that Tom can prove a prima facie case in support of a judicially ordered sale.

[d] If Jerry's niece [his successor] wanted to keep the property after the judge decided that it was appropriate to order the property sold, the court is authorized to establish a fair value for the property and to permit [allot] any owner to purchase the interest of the other owner[s]. §8.01-83

2. [Partnerships] In 2009, Ron, Aimee, Ken, and Urban Clubs, Inc., ("Urban Clubs") properly formed a limited partnership known as Club Deuce, L.P. ("Club Deuce") to own and operate a restaurant/nightclub in Richmond, Virginia. The limited partnership certificate and partnership agreement set the capital contributions of each partner at \$60,000, designated Urban Clubs and Ron as the general partners, and named Aimee and Ken as limited partners. All the partners except Aimee paid in their full \$60,000. Aimee paid only \$50,000 and promised to pay the balance in due course.

Ron, one of the general partners, was the only partner actually employed by Club Deuce. Occasionally, however, Ken would work in Club Deuce's main office to run the business during Ron's sporadic absences on business trips and vacations. Although Ken was not asked or directed to do so by the general partners, he took it upon himself to act more or less regularly as purchasing agent for food, beverages and supplies from Club Deuce's vendors, including Shockoe Restaurant Group ("SRG"), a major supplier to Club Deuce.

On June 1, 2010, Aimee, with the approval of all the partners, and as allowed by the partnership agreement, withdrew from the partnership. She sold and assigned her partnership interest to Billy for \$30,000. Billy was duly admitted to Club Deuce as a limited partner. Unknown to Billy, at the time of the assignment Aimee had still not paid in the \$10,000 balance of her capital contribution.

On August 1, 2010, Ron decided he no longer wanted to work in the restaurant/night club business and announced to the other partners that he was withdrawing as a general partner as of August 1, 2010. The other partners acquiesced, and that left Urban Clubs as the sole general partner.

The partnership did not record an amendment to the limited partnership certificate to reflect the withdrawals by Ron and Aimee or the addition of Billy as partners.

In December 2010, SRG filed a lawsuit against Club Deuce, Urban Clubs, Ed, Aimee, Ken, and Billy to recover amounts due on past due invoices for product and supplies ordered by Ken and sold to Club Deuce. One invoice, in the amount of \$35,000, was dated July 10, 2010 and was for food, beverages and restaurant supplies delivered during April and May 2010. The other invoice, in the amount of \$20,000, was dated October 10, 2010 and was for food and beverages delivered during August and September 2010.

Club Deuce's only available asset at the time of SRG's suit is \$30,000 in its partnership capital account.

[a] What liability does each of the defendants have for each of the invoices being sued on by Shockoe Restaurant Group? Explain fully.

[b] What liability, if any, do Billy and Aimee each have for the \$10,000 that Aimee never paid toward her capital contribution, and can SRG assert any claim against that \$10,000? Explain fully.

[a] The liability of each of the defendants for each of the invoices being sued on by Shockoe Restaurant Group (SRG) is as follows:

Club Deuce would have liability on all the invoices. The issue is whether Ken, as a limited partner, had authority to enter into these contracts with SRG. A limited partner does not have authority to bind the partnership based solely on his status as a limited partner, and although Ken was not asked or directed by the general partners to act as a purchasing agent, it is likely that Ken had both actual and apparent authority based on the general partners' apparent acquiescence in Ken's conduct of placing orders on behalf of the partnership with its suppliers.

Furthermore, even if Ken did not have authority to bind the partnership on these contracts, the partnership clearly ratified the contracts by accepting the benefits of the transactions (i.e. accepting the goods supplied by SRG) and the partnership either had or reasonably should have had knowledge of the material facts of the transaction at the time of the affirmance. Therefore, the contracts entered into by Ken are attributable to Club Deuce and Club

Deuce is liable on the invoices.

Urban Clubs is liable for all of the invoices. As a general partner in a limited partnership, Urban Clubs has unlimited personal liability for the debts of the partnership. As long as the partnership is liable on the invoices (established above), then the general partner would also be liable.

Ron also has unlimited personal liability for all of SRG's invoices as a general partner. The issue for Ron is whether he effectively withdrew as a general partner from the partnership so as to cut off his personal liability for debts incurred by the partnership after his attempt to withdraw. The Virginia Code requires that a limited partnership amend its certificate of limited partnership within 30 days of a general partner withdrawing. Because Club Deuce failed to timely amend its certificate of limited partnership, Ron did not effectively withdraw and therefore is personally liable as a general partner for all the invoices of SRG. *(Note that the bar examiners mistakenly referred to Ron as "Ed" earlier in the fact pattern.)*

Aimee is not liable on the full amount of SRG's invoices, but she is liable to the extent of her unpaid contribution to the limited partnership. Limited partners generally are not personally liable for the debts of the limited partnership. They are, however, liable for any unpaid contributions to the partnership. Additionally, a creditor of the limited partnership may enforce a limited partner's obligation to make a contribution to the partnership. Although Billy effectively became a limited partner, Aimee remains liable for her unpaid contribution. (See Va Code sect. 50-47.73(c).)

Ken likely is liable for the full amount of SRG's invoices. Generally, limited partners are not personally liable for the debts of the business; however, a limited partner who participates in the control of the business is liable to third parties who transact business with the partnership reasonably believing, based on the limited partner's conduct, that the limited partner is a general partner. The limited partnership statute provides that being an agent or employee of the limited partnership, alone, does not constitute participation in the control of the business. Nonetheless, Ken's actions likely were sufficient to constitute participation in control of the business. Ken would occasionally work in the main office and run the business during the general partner's absence and Ken was acting "more or less regularly as a purchasing agent for food, beverage and supplies from Club Deuce's vendors." Furthermore, SRG would likely be able to establish that it reasonably believed that Ken was a general partner based on this conduct of occasionally running the business and acting as a purchasing agent. Therefore, Ken is personally liable on all of SRG's invoices.

Billy is not liable on any of SRG's invoices, nor is he liable for Aimee's unpaid contribution. As a limited partner, Billy is not personally liable for the debts of the limited partnership. Further, an assignee limited partner is not liable for the assignor's unpaid contribution to the partnership if such unpaid contributions were unknown to the assignee at the time he became a limited partner.

[b] As discussed above, Aimee is liable for the unpaid contribution of \$10,000, and SRG, as a creditor of the limited partnership, can enforce her obligation to make this contribution, but Billy is not liable for her unpaid contribution.

3. [Domestic Relations] John and Anne married in 1990 and had two children born during the marriage. By 2006, their marriage had become untenable, and they agreed to separate. Both consulted attorneys in Norfolk, Virginia, where they had resided during their entire marriage, and entered into a written stipulation and Property Settlement Agreement ("Settlement").

The Settlement provided that Anne would have custody of both children with liberal visitation reserved to John and specifically stated, "John shall make child support payments in the amount of \$3,000 per month for the children." The Settlement also provided that spousal support would be "reserved for future agreement or, if they could not agree, for determination by a court of competent jurisdiction." An order from the court in Norfolk granted them a final divorce in 2007, approved the Settlement and incorporated its terms into the divorce decree.

Shortly after the divorce was final, John stopped making the monthly child support payments, and Anne moved in with her parents in Norfolk because she needed her family's help. During intermittent visits to see the children, John acknowledged to Anne that he was substantially in arrears of his child support payments and promised to begin making up the arrearages. On one such occasion, he and Anne also entered into another written agreement ("Spousal Support Agreement") in which John agreed that he would immediately begin paying Anne \$500 per month in spousal support.

In September 2008, John contacted Anne and told her that he was now living in Roanoke, Virginia, where he had found his dream job. Although John was a highly skilled nuclear engineer who had earned \$225,000 per year in Norfolk, he was now working as a high school teacher in Roanoke making \$50,000 per year. John was now 12 months in arrears of his child support obligation (\$36,000). Six months ago, the elder child had reached the age of 18 years. John was also 10 months (\$5,000) in arrears of the spousal support obligation he agreed to pay in the Spousal Support Agreement.

The younger child suffers from a chronic illness that requires frequent hospitalizations. To care for her, Anne had to stop practicing nursing and her license to practice nursing has lapsed. The arrearages are desperately needed to pay for the younger child's accumulated and predictable future medical bills.

Anne contacted John and told him that if he did not immediately pay all \$36,000 of the child support arrearages and the \$5,000 spousal support arrearages and keep up with future payments, she would take him to court. She also told him that, as far as she was concerned, the fact that he had voluntarily given up his high paying job and would now have trouble keeping up the payments was his problem, not hers.

John consults you as his attorney, poses the following questions, and asks you for a full explanation of your answers:

[a] Is it likely that he could persuade a Virginia court to reduce the amount of the child support arrearages?

[b] Is it likely that he could persuade a Virginia court to reduce his spousal support arrearages and to modify the amount of his spousal support going forward?

[c] What arguments could he make in court in support of a request to reduce his monthly child support payments from \$3,000? What arguments would Anne be likely to make in opposition, and what would be the likely outcome?

[a] No, it is not likely that he could persuade a Virginia court to reduce the amount of the child support arrearages. The child support payments past due under the original order have vested, and the obligation to pay child support under the original order continues unless and until changed by the court. Once John files a motion to modify child support, however, the court could make retroactive changes to the support order, dating back to the filing of the motion to modify.

[b] No, it is not likely that he could persuade a Virginia court to reduce his spousal support arrearages or to modify the amount of his spousal support going forward. Although the spousal support obligation was not incorporated into a court order, it was part of a presumably valid and enforceable contract between the parties. (There are no facts to suggest that the contract was not valid and enforceable.) Anne could sue John for the past due spousal support and recover in contract. Furthermore, the court likely would not modify John's future spousal support obligation. Virginia courts are reluctant to remake the parties' contract even if it was not incorporated into a court order.

[c] In order to seek a modification of the child support order, John must first establish a material change in circumstances. If the court finds a material change of circumstances, then the court would look to the Virginia child support guidelines, which create a rebuttable presumption as to the amount of support, based upon the gross income of both parents and the number of children. If the court deviates from the child support guidelines, then the court must make written findings supporting its award of support based upon the statutory factors. Furthermore, if a parent is voluntarily unemployed or underemployed, then the court may impute income to that parent.

Here, John would argue that there has been a material change in circumstances based upon his change in employment and significant reduction of his income. John would further argue that these facts also justify a reduction of the child support. John could also point to the fact that elder child has now reached the age of 18 and therefore John is no longer legally obligated to support this child. Finally, John will argue that Anne's unemployment is voluntary and that the court would impute income to her based on what she could be earning as a nurse.

Anne will argue that John's underemployment is voluntary and that the court should impute income to him based on what he could be earning as a nuclear engineer. Anne will also argue that the younger child's chronic

illnesses and frequent hospitalizations militate against decreasing the child support award. Further, Anne's unemployment is not voluntary, rather it's necessary to care for their chronically ill child and no income should be imputed to Anne.

It is likely that the court will be willing to revisit the child support order, given the changes in circumstances. However, the court likely would impute income to John, and, given the younger child's illness, the amount of child support likely would not be reduced. The court likely will impute income to John, as his underemployment seems voluntary. The court likely will not impute income to Anne, assuming that she can prove that her unemployment is necessary to care for their ill child. The court will certainly hold that the elder child turning 18 leaves but one child eligible for support, and will calculate guideline support for that one child based on John's prior income and Anne having no income. The court will likely deviate upward from the guidelines based upon the current circumstances, and that result may be a reduction, no change or an increase in support, depending on the extent of the medical bills.

4. [Va. Civ. Pro] Physicians Winery, a limited liability company formed by four doctors from Lynchburg, Virginia, acquired from Ansel Jones a 100-acre tract of land in Nelson County, Virginia, for building and operating a grape growing and wine manufacturing facility. Ansel Jones purchased the property from the Estate of Ryland Moore 15 years ago. The deed to Physicians Winery from Ansel Jones conveyed title in fee simple without mention of any other interests in the property. Until 25 years ago, Ryland Moore maintained a producing apple orchard and commercial cider mill on the property. At that time, the cider mill was abandoned, and the tract has since reverted to woods and farmland.

There is evidence of a railroad spur that runs for about 100 yards from the main line of the C & S Railroad to the old site of the cider mill. The tracks remain, overgrown with weeds and brush, and are unusable. They have not been used since the cider mill closed down. A title examination revealed that the right-of-way for the railroad spur was conveyed by Ryland Moore to the C & S Railroad Company in 1930. That deed described a "right-of-way for construction and maintenance of a railroad track through the lands of the Grantor, not to exceed 50 feet in width, so long as said railroad track to be built shall be maintained and operated, but no longer."

A representative of Physicians Winery approached the C & S Railroad Company about a release of the right-of-way. C & S responded that, "We might have further use for the right-of-way, and, besides, we never voluntarily release any of our rights-of-way."

[a] Without regard to which party is likely to prevail, describe the nature and function of each of the following forms of action, discuss whether each of them is an appropriate proceeding in which Physicians Winery can test both its title and right to possession free of the right-of-way, and explain your conclusions.

- i] Declaratory judgment;
- ii] Unlawful detainer;
- iii] Bill to quiet title; and
- iv] Ejectment.

[b] Which of the foregoing forms of action is the preferred form under these facts? Explain fully.

- [a] [i] A declaratory judgment action, in cases of "actual controversy", is used to seek a court ruling determining the rights and obligations of the parties to a dispute before an actual cause of action has matured. However, where there is an existing cause of action, a declaratory judgment proceeding is not appropriate. American Nat. Bank v. Kushner 162 Va. 378. If a cause of action has matured, regular customary process should be used. §8.01-184 *et seq.*
- [ii] An unlawful detainer action is used to seek a court order for the defendant to surrender possession of real estate. It tries the issue of right to possession, not title to the real estate. It would not be a proper form of action because title is in issue here, not the right to possession. §8.01-124 *et seq.*
- [iii] A bill to quiet title is an equitable proceeding asking the court, in the exercise of its equitable powers to determine title to land. §55-153. However, a bill to quiet title may not be appropriate because there exists a law remedy in

the form of ejectment [see ¶ iv] and the common law rule is that if there's an adequate law remedy, equity does not take jurisdiction, unless a specific statute expressly grants it, a bill to quiet title may not be appropriate.

[iv] An action in ejectment would address the issue of title to the real estate on which the railroad track runs. It tried title to land and the plaintiff must recover on the strength of his own title. §8.01-134 *et seq.*

[b] Ejectment would be the preferred form of action since it's a law based claim and it tried title to land.

5. [Local Government] Peter, a resident of Arlington County, Virginia, is an 8 year old, third grade student at Arlington Heights Elementary School (the "School"), a public school operated by the Arlington County School Board (the "School Board"). Peter is a special needs child who uses a wheelchair for mobility.

In Arlington County, public school students (including Peter) are transported on buses owned and operated by Arlington County, which is a legal entity separate and distinct from the Arlington County School Board. Because of Peter's special needs, Arlington County assigned him a full-time bus aide, who was a County employee and whose duties included, assisting him in getting on and off the bus, remaining with Peter on the bus, and accompanying him to his classroom.

Arlington County maintains a motor vehicle insurance policy with Rilco Insurance, Ltd., a solvent and responsible insurance company licensed to do business in the Commonwealth of Virginia. Arlington County's motor vehicle insurance policy through Rilco states, in pertinent part, that Rilco "will pay all sums the County of Arlington must pay as damages because of Bodily Injuries or Property Damage caused by any Accident and resulting from the ownership, maintenance or use of a Covered Vehicle." The policy limits under the Rilco policy are \$1 million per occurrence.

On September 15, 2010, Peter was transported to School on the County's bus, accompanied by the bus aide. The County's bus first stopped at a junior high school, where the bus aide disembarked, leaving Peter unattended. The County's bus then proceeded on to School, where the County's bus driver (who also is an employee of Arlington County) operated the handicapped lift system and removed Peter, in his wheelchair, from the bus. The bus driver left Peter unattended on the sidewalk, strapped into his wheelchair, and the bus driver walked away to talk with a motorist, whose automobile was stopped behind the bus. Peter's wheelchair rolled down the sidewalk, over a curb, throwing him face first into the School's driveway. Peter sustained injuries to his head, wrist and cervical spine.

Peter, by his father (who is not an attorney) as next friend, wants to sue Arlington County in the Circuit Court of Arlington County, Virginia for failing to safely transport Peter to School and seeks \$2 million in compensatory damages. Peter's father believes that Arlington County was unquestionably negligent. He is also aware of the existence of the following statute:

In case the locality or the school board is the owner, or operator through medium of a driver, of . . . a vehicle involved in an accident, the locality or the school board shall be subject to the action up to, but not beyond, the limits of valid and collectible insurance in force to cover the injury complained of . . . and the defense of governmental immunity shall not be a bar to action or recovery. Va. Code Ann. §22.1-194. ("Locality" means a city, town or county.)

Peter's father consults with you in your law office about the following:

[a] Is there a way he can require the County to disclose whether it has motor vehicle insurance and require the County to give him a copy of the policy, and, if so, how soon can he obtain it? Explain fully.

[b] What is the applicable legal analysis of the above-cited statute in the context of these facts, and what effect would that statute have on Peter's claim? Explain fully.

[a] Under the Rules for Discovery, Rule 4:1(b)(2) the existence and contents of any insurance agreement that may cover the claim, in full or in part, is specially designated as within the scope of permitted discovery. Under the Rules for Discovery, Rule 4:9(a), a party may require the production of any document or writing which is in the possession of a party and within the scope of Rule 4:1. Peter may obtain copies of any applicable insurance policies.

[b] The BBE wanted a good analysis of the facts, the statute cited and the quoted extract from the Rilco insurance vehicle liability policy. The code section waives the absolute sovereign immunity of counties to the extent that there is "valid and collectible insurance in force to cover the injury". The BBE wanted the applicant to consider that language, along with the provisions in the locality's insurance policy with Rilco, which provided "... resulting from ownership, maintenance or use of a Covered Vehicle" and to discuss whether on these facts, in particular that the bus had been parked, the young child had been removed from the bus and the driver had walked away to talk with a motorist. The BBE thought the answer was that the incident in which Peter was injured was too remote to be covered by the locality's insurance policy and thus the locality's sovereign immunity was not waived and it had no liability. State Farm Mutual v. Powell, Administratrix 227 Va. 492 [1984] and Griffin v. Brunswick County Public School Board 77 Va. Cir. 275 [2008].

6. [Real Estate & Va. Civ. Pro] Bob Jones, the owner of three non-adjacent undeveloped parcels of land fronting on Peters Creek Road in the City of Roanoke, Virginia, agreed to sell the three parcels to Jim Caldwell. Caldwell intended to place a mobile home on each lot for rental, and Jones assured him that he knew of nothing that would prevent him from doing so.

Both Jones and Caldwell signed separate contracts for the sale of each of the lots, which included the price to be paid by Caldwell, the separate closing date for each transaction, and provided that Jones 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 Jones. The deal closed with the entire amount of the taxes allocated to Caldwell, who received and recorded a properly executed general warranty deed conveying Lot 1 without mention of real estate taxes. A month later, when Caldwell noticed the oversight, he demanded payment from Jones of Jones' share of the taxes. Jones refused, saying that taxes were allocated on the closing statement and he had no further obligation.

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

LOT 3: At closing, Caldwell received and recorded a deed with general warranty and English covenants of title to Lot 3. Caldwell 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, Caldwell was contacted by the lawyer for Sam's Septic Systems, who said that Sam's Septic had a judgment lien in the amount of \$3,500 on Lot 3 resulting from work Sam's did in installing a septic system under a contract with Jones. Sam's Septic 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. Caldwell demanded that Jones pay the \$3,500 to clear the lien. Jones refused.

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

[b] How should a court rule on Caldwell'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 Caldwell have a cause of action against Jones for breach of any of those warranties by reason of his inability to obtain a building permit for Lot 3? Explain fully.

[d] Is Jones liable to Caldwell for the \$3,500 Sam's Septic lien? Explain fully.

- [a] Jones will be liable for his share of the property taxes on Lot 1. There was a mutual mistake of fact over the failure to apportion liability for the taxes. Also, the doctrine of merger did not apply as to cut off Caldwell's claim for reimbursement.
- [b] A court should reject Caldwell's argument that he is not the owner of Lot 2. For an effective transfer of real estate, a deed must only be delivered. Recording is not necessary to transfer title. Here, the deed clearly was delivered, and Caldwell is, therefore, the owner of Lot 2, regardless of whether he recorded the deed.
- [c] The English covenants of title include the covenant of right to convey; covenant of no act to encumber, covenant of quiet possession, covenant of free from encumbrances, and covenant of further assurances. None of these covenants were breached.
- [d] When Sam docketed his GDC judgment in the circuit court clerk's office where the land was situated, it created a lien on the land to secure payment of the judgment and this lien survived the sale of the land. While Jones is not personally liable on the judgment, unless the judgment is paid, even though it was not Jones' debt, Sam can bring an equitable action in circuit court seeking enforcement of his judgment lien by the court ordering Jones' land sold and the proceeds used to pay the judgment. §8.01-458 *et seq.*

7. [Fed. Civ. Pro] Paula, a 36-year-old resident of Alexandria, Virginia, suffered severe injuries while attending the City of Alexandria's Fourth of July fireworks show in 2009. A box of linked fireworks misfired, sending a fire rocket zooming into the crowd of people who were watching in the designated audience area. The rocket exploded next to Paula, and the blast broke her arm, impaled shrapnel into her shoulder, ruptured her eardrums, and left her with first degree burns and brain damage. Paula's medical bills have exceeded \$1 million, and the brain damage she has suffered has reduced her future earning capacity by an estimated \$900,000.

The fireworks show was conducted by Fireworks Shows, Inc. ("Shows"), a Pennsylvania corporation with its principal place of business in Ligonier, Pennsylvania. The rocket that injured Paula was manufactured by Light Bursts LLC ("Light"), a Pennsylvania limited liability company with its principal place of business in Pittsburgh, Pennsylvania. Shows and Light regularly did business with each other, with Light furnishing fireworks to Shows under separate contracts for fireworks shows in different states. All their contracts contained reciprocal indemnity agreements by which each agreed to indemnify the other for damages incurred as a result of the use of the fireworks.

Because of the incident in the Alexandria show in which Paula was injured, Shows has refused to pay the \$65,000 that Light claims it is owed on that contract. Also, Shows disputes and has refused to pay an outstanding contract with Light in the amount of \$70,000 relating to a 2008 fireworks show in Annapolis, Maryland.

Paula's lawyer filed a Complaint in the Circuit Court of the City of Alexandria against Shows, on February 1, 2011, seeking \$10 million in compensatory damages and \$1 million dollars in punitive damages. On February 3, 2011, the Complaint was properly served on the registered agent for Shows, which is qualified to do business as a foreign corporation in Virginia. Shows has not yet filed a responsive pleading. Shows consults you as its lawyer and poses the following questions:

[a] Concerned that it might not get a fair trial in a Virginia state court, Shows asks whether there is a procedure by which Paula's suit can be placed before a federal court instead. If so, (i) what is the name of the procedure, (ii) can Shows avail itself of it, (iii) what are the timing requirements, if any, for availing itself of the procedure, and (iv) what are the procedural steps necessary to accomplish this?

[b] Shows believes that, if it is found liable to Paula, Light is in turn liable to Shows under the contractual indemnity provisions on the theory that Light furnished defective fireworks. Shows asks whether there is a procedure in federal court by which it can bring Light into the suit so that Shows can assert its claim for indemnity. If so, (i) what is the name of the procedure, (ii) is the procedure available in this case, and (iii) what procedural steps are required for availing itself of the procedure?

[c] Shows also wants to know whether, if it joins Light in the litigation, Light can in turn assert its claims against Shows for the unpaid amounts on each of the two disputed contracts. If so, (i) what is the name of the pleadings in which Light can assert those claims, and (ii) would Light be entitled to bring those claims in this proceeding?

Answer each of Shows' questions and explain your answers fully.

- [a] [i] There is such a procedure by which the case may be placed before a federal court and it is called "removal." See 28 U.S.C. § 1441.
- [ii] Shows may avail himself of the removal procedure. 28 U.S.C. § 1441(a) provides that a civil action over which the federal district courts have original (non-appellate) subject matter jurisdiction "may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." This case is within the federal district courts' diversity subject matter jurisdiction because the facts suggest that the defendants are citizens of Pennsylvania, the plaintiff is a citizen of Virginia and the amount in controversy exceeds \$75,000. See 28 U.S.C. § 1332. Removal in this case would comport with the constraints of 28 U.S.C. § 1441(a), which prohibits removal in diversity cases if any defendant resides in the forum state. [Although, in theory, there are potential ramifications of the fact that Light Bursts is an LLC, the facts give no indication that such would be the case here. For diversity purposes, the citizenship of an LLC is that of each state in which all of its members reside. The facts do not indicate where the LLC members reside, stating only that it is a "Pennsylvania LLC." It thus appears safe to assume that its citizenship is Pennsylvania.]
- [iii] Timing requirements for removal: 28 U.S.C. § 1446(b) requires that the case be removed within thirty days after service of the complaint on the defendant.
- [iv] The procedural steps to accomplish removal are set out in 28 U.S.C. § 1446(b), which requires the defendant to "file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served" to date in the case. 28 U.S.C. § 1446(d) requires the removing defendant(s) to give notice promptly to all adverse parties and file a copy of the notice with the clerk of the state court, "which shall effect the removal and the State court shall proceed no further unless and until the case is remanded." [The Examiners stated that they would give "extra credit" if a student showed an awareness that, to avoid default, a careful plaintiff should (1) file a pleading that qualifies as a responsive pleading in Virginia state court, and (2) simultaneously or later within 30 days remove. Rule 81 recognizes that a defendant who has responded in state court will be treated as having responded in federal court. See Fed. R. Civ. P. 81(c)]
- [b] [i] Yes, there is such a procedure in federal court by which Shows can bring Light into the suit and assert a claim for indemnity using Rule 14 Impleader.
- [ii] Impleader is appropriate in this case because indemnification is the type of derivative claim that impleader allows. Derivative liability means that the third-party defendant will owe an amount to the original defendant if and only if the original defendant owes an amount to the plaintiff. Even though the federal joinder rules permit this impleader, it is also necessary to assure that the federal court would have subject matter jurisdiction over the claim that would be added through the impleader. The indemnification claim asserted by the original defendant (Shows) against the newly added third-party defendant (Lights). As stated above, it appears that Shows and Lights are both citizens of Pennsylvania, so diversity subject matter jurisdiction would not be available. Nevertheless, the claim is a proper one for the federal courts' supplemental subject matter jurisdiction under 28 U.S.C. § 1367 (a). That provision states:
... in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.
 Because the indemnification claim is closely factually related to Paula's claim against Shows, the court may assert supplemental subject matter jurisdiction over it. Section 1367(b), which takes away some of the supplemental subject matter jurisdiction that section 1367(a) grants does not interfere with jurisdiction over this claim because this claim, being asserted by a party in a defensive posture (the original defendant) is not among those listed in 1367(b) as improper for supplemental subject matter jurisdiction.

[iii] The procedural steps required for Shows to avail itself of the impleader procedure are set forth in Rule 14(a)(1). To implead Light, Shows should serve a summons and complaint on Shows within 14 days after serving the original answer (or obtain court permission for later service).

[c] [i] Light's claims against Shows are called counterclaims.

[ii] Under Rule 13, Light would be required to assert the claim arising from the Alexandria show. It is a compulsory counterclaim because it "arises out of the transaction or occurrence that is the subject matter of" Show's claim against Light. Fed. R. Civ. P. 13(a)(1). Light would be permitted, but not required, to assert the claim arising from the 2008 Annapolis show because it is a permissive counterclaim. Fed. R. Civ. P. 13[a]

Even though the federal joinder rules permit the counterclaims, it is necessary to determine in addition whether the federal court has subject matter jurisdiction over the counterclaims. There is no federal question and, regardless of whether there is complete diversity of citizenship, both counterclaims are for less than \$75,000. Although there is no independent basis in federal subject matter jurisdiction supporting the counterclaims, it is possible that the Supplemental Jurisdiction statute can still supply a basis for federal jurisdiction. See 28 U.S.C. § 1367. Subsection (a) of 1367 asks whether the jurisdiction invoking claim—i.e., the main claim between Show and Light, that IS supported by Diversity Jurisdiction—and the additional claim (here, the counterclaims) arise from the same case or controversy. The compulsory counterclaim by Lights over the Alexandria show is likely to be deemed to have arisen from the same case or controversy as the main claim (Paula v. Lights) and thus to satisfy subsection (a) of the Supplemental Jurisdiction statute. Subsection (b) of 1367 removes supplemental jurisdiction only over claims by original plaintiffs, and these counterclaims are asserted by defendants, so 1367(b) is inapplicable. Therefore, the compulsory counterclaim should be within the Court's supplemental jurisdiction.

Whether the permissive counterclaim falls within the court's supplemental subject matter jurisdiction depends on whether the "same case or controversy" requirement of 1367(a) is, by definition, NOT met by a permissive counterclaim which rule 13 defines as a claim that "does not arise out of the same transaction or occurrence" as the main claim. See Fed. R. Civ. P. 13(b). If a court equates "same transaction or occurrence" and "same case or controversy," then supplemental subject matter jurisdiction cannot be asserted over a permissive counterclaim.

8. [Va. Crim. Law & Pro.] Returning to her home in Virginia Beach, Virginia late one evening, Victoria found a man, later identified as Joe, going through her jewelry box. Joe turned toward Victoria, put his hand into his pants pocket, and told Victoria to sit quietly on the bed or he would shoot her. Fearing he had a gun, Victoria did as he said. After taking Victoria's valuable jewelry, Joe demanded her purse from which he took credit cards, \$75.00 in cash, and a cellular telephone.

As soon as Joe left the house, Victoria called the police. The police responded and Victoria reported to the two officers everything that had occurred. She described Joe as a white male with blond hair and blue eyes, about 6 feet tall, weighing about 180 pounds, and with a heart-shaped tattoo on his left forearm.

On the following day, Victoria placed a call to her cellular phone number to retrieve her messages. A man's voice answered the telephone. Victoria recognized the voice as being that of the man she had found in her house, so she called the police and told them. They then asked her to come to the police station and call again and gave her instructions to try to persuade the man who answered the phone to meet her at a designated location. She made the call and arranged to meet Joe at McDonalds on Elm Street. Joe said he would be driving a green 2007 Ford Explorer and that he was wearing a tank top and a blue baseball cap.

Police, staking out the McDonalds, saw a green 2007 Explorer driven by a man in a gray tank top and blue baseball cap, stopped him, and detained him until other officers could bring Victoria to the scene. Victoria arrived and was told by the police that this man may or may not be the person she found in her house, and that she should concentrate on physical features she might recognize rather than his clothing or his vehicle. After receiving that caution, Victoria was led to the car in which Joe was detained. She immediately recognized the man, even down to the heart shaped tattoo, and told the officers that he was the person who had been in her house and had taken her personal property.

Joe was arrested and charged with the following felonies: common law burglary, use of a firearm while committing

burglary, robbery, use of a firearm while committing robbery, abduction, and use of a firearm while committing abduction. He waived his right to a preliminary hearing, and the grand jury subsequently indicted him for the offenses charged.

At the trial, the Commonwealth's Attorney presented as evidence the facts recited above. Joe made the following motions:

- [a] At the beginning of the trial, to exclude all witnesses from the trial until they were called to testify.
- [b] At the conclusion of the Commonwealth's case in chief, to strike the Commonwealth's evidence on all charges on the grounds that the police lacked probable cause to arrest him and that Victoria's identification of him at the scene was made under circumstances so suggestive as to deny him due process.
- [c] At the conclusion of the Commonwealth's case in chief, to strike the Commonwealth's evidence concerning the charges of using a firearm in the commission of the felonies because there was no proof that he actually possessed a firearm.

How would the court likely rule on each of these motions? Explain fully.

- [a] Under §19.2-265.1, the court is required, on motion of either attorney to exclude the witnesses to be called. This is subject to the exception referenced in this code section and contained in §19.2-265.01, that permits the complaining witness to remain in the courtroom and shall not be excluded, unless the court finds in its description that the presence of the victim would impair the conduct of a fair trial.
- [b] [i] The police did have probable cause to make the arrest, based on the positive ID by the victim, that the accused showed up after the cell phone conversation to the victim's cell phone and was wearing the attire he'd described on the phone as what he'd be wearing. The ID was not violative of Joe's due process protections by being unduly suggestive, based on the ample time the victim had to look at Joe and the tattoo that she'd described to the police when she called for help that matched the one the accused had when he arrived at the meeting.
- [ii] Under §19.2-266.2 the motion challenging whether the PO had probable cause to arrest and whether the ID at the scene violated due process, both motions seeking to exclude evidence, must be raised in writing before trial by motion filed and notice given to opposing counsel not later than seven days before trial in circuit court. Joe did not comply with these requirements. While the circuit court is empowered, in its discretion to still permit these types of motions to be made at trial, the facts do not suggest Joe made any such motion. The judge should rule these motions were untimely and the issues waived. In addition;
- [c] The BBE wanted a good analytical discussion of this part. The student should recognize that it is not necessary that the victim actually see a firearm. The trier of fact can consider Joe put his hands in his pocket and told her that he would shoot her. The facts are close to those in Powell v. Commonwealth 268 Va. 233 [2004], where the defendant entered a store, confirmed there were no other people around told the employee he had a pistol, moved about in a nervous or fidgety manner with his hand in his pocket, told the employee not to move "and won't nobody get hurt". When they made the arrest, the police did not find any gun. The SCV held that the jury's finding beyond a reasonable doubt that the defendant possessed a firearm would not be disturbed. The facts of this problem are not quite as strong as in Powell.

9. [Wills] Mag, a resident of Haysi, in Dickenson County, Virginia, gave birth to Stan just after graduating from high school in 1951. Mag and Stan's father, who was killed in the Korean War in 1952, never married. In 1955 Mag married Tom and later gave birth to Jack, a child of that marriage. Mag and Tom raised both boys with equal love and affection, never treating Stan any differently from Jack. However, Tom never formally adopted Stan.

Mag owned 100 acres of real property that she had inherited from her father. The property was located in the coalfields of Dickenson County, upon which 88 methane gas wells had been drilled by a company to which the gas rights had been leased through 2025. Under the lease, Mag received royalties that exceeded \$250,000 a year, all of which had been deposited in a joint savings account, with the right of survivorship, in Mag's and Stan's names. Mag had maintained the joint account since before her marriage to Tom.

Mag also owned a number of certificates of deposit amounting to \$150,000 in various banks.

In 2000, Mag sought the assistance of Pastor James, the minister of her church, for the purpose of making a will. At Mag's direction Pastor James typed the information given him by Mag into a simple printed will form she had purchased at a local office supply store. The will, which named Pastor James as Executor, was signed by Mag in the presence of Pastor James and the church secretary, both of whom signed as witnesses in Mag's presence.

The will left all certificates of deposit to Gloria, the pastor's wife to whom Mag was not related and had never met. The will left the gas royalty bank account in equal parts to Tom, Stan, and Jack. The will left all other personal property to Tom. There was no mention of the 100 acres in Dickenson County.

Mag died in January 2010 leaving the 100 acres, the royalty bank account, and the certificates of deposit described above. She was survived by Tom, Stan, Jack, and Pastor James. Gloria had predeceased Mag by six (6) months.

Pastor James, acting as Executor, filed the will for probate and claimed the right to receive the bequest to Gloria as her successor in interest. Jack intervened in the probate proceedings and made the following assertions: (a) that, as preparer of the will and because of the bequest to Gloria, Pastor James was disqualified from serving as Executor; and (b) that, in any event, the will was invalid.

How should the court rule on each of Jack's assertions; and to whom and in what proportions should the 100 acres in Dickenson County, the certificates of deposit, and the royalty bank account be distributed? Explain fully.

[a] Under Va. Code § 26-3, "the court may revoke and annul the powers of any" executor "whenever from any cause it appears proper." *Clark v. Grasty*, 210 Va. 33, 168 S.E.2d 268 (1969) leaves the decision within the discretion of the circuit court (subject to appellate review for abuse of discretion). *Clark* notes that friction between beneficiaries is insufficient. Removal or disqualification must benefit the estate. Examples of sufficient grounds for removal are fraud, gross negligence, or some other breach of duty.

The mere facts that the Pastor is draftsman and that his wife received a benefit are probably not sufficient to disqualify him. As discussed below, Jack could argue that the bequest to the Pastor's wife is presumptively fraudulent or made under undue influence. If credible, the allegations would justify removal.

[b] Mag signed the will with all due formalities. She signed it in the presence of at two witnesses, present at the same time, and the witnesses subscribed the will in the presence of Mag. Va. Code § 64.1-49. Pastor James' interest in the will (as executor and spouse of a beneficiary) does not disqualify him as a witness. Va. Code § 64.1-51.

The facts do suggest fraud. The facts here are similar to *Carter v. Williams*, 246 Va. 53, 431 S.E.2d 297 (1993). There, the testator's will left most of her estate to the wife of the attorney who drafted the will (named Williams), even though the testator had never met the wife. The Court found this to be presumptive fraud:

"We think these circumstances, as well as others in evidence, gave rise to a presumption of fraud that operated to shift to Williams the burden of producing evidence to rebut the presumption. It was for the jury to determine whether this burden had been met. We reach this conclusion even though Williams was not the direct beneficiary in the will. By naming his wife as a beneficiary, Williams became an indirect beneficiary, and that, coupled with the other suspicious circumstances, was sufficient to raise the presumption. We hold, therefore, that the trial court erred in striking the contestants' evidence as it related to the alleged fraud of the draftsman. The ultimate burden of persuasion, however, remains upon the contestants."

Carter did not find presumptive undue influence because the testator was not "enfeebled in mind." *Parfitt v. Parfitt*, 277 Va. 333, 672 S.E.2d 827 (2009), however, alters the test for undue influence somewhat, requiring either weakness of mind or a confidential relationship between the testator and alleged influencer. *Parfitt* has a facts and circumstances test for the existence of a confidential. We do not have any facts about how close Mag was to the Pastor.

Even if fraud or undue influence exists, however, the Pastor can no longer benefit from it. As noted below, Gloria is now dead and the gift lapses. Thus, the court should admit the will to probate.

Distribution of Estate:

100 acres in Dickenson County: Since the will does not dispose of the land, it passes by intestacy. Mag left a surviving spouse (Tom) and two children (Jack and Stan). Since one child (Stan) was not a child of Tom, Tom takes only 1/3 in intestacy. The remaining 2/3 is split between Jack and Stan. Va. Code § 64.1-1(First).

Certificates of deposit:

The will leaves the CDs to Gloria, but she has predeceased. She does not come within the scope of the Virginia anti-lapse statute, which applies only to testator's grandparents and their descendants. Thus, the gift lapses. Va. Code § 64.1-64.1. It should pass to Tom, who is entitled to all remaining personal property under the will.

Royalty bank account:

The will left the gas royalty bank account in equal parts to Tom, Stan, and Jack. However, the account is held as joint tenants with rights of survivorship with Stan. It is not probate property and does not pass under the will. Stan takes the account.