

**Summary of suggested answers & annotations to the essay part of the February 2013 Virginia Bar Exam. Prepared by Susan S. Grover, Eric Chason & J. R. Zepkin of William & Mary Law School, Emmeline P. Reeves & David Frisch of University of Richmond Law School, C. Scott Pryor & Bradley Jacob of Regent University Law School, Leslie Alden of George Mason University School of Law**

After each bar exam, representatives from some 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 references to some of the case and statutory law for reference even though the BBE may not expect such specificity in the applicants' answers on the exam. jrj

1. [02/13] [Real Estate & Va. Civil Procedure] Sam Seller owned a house [the "House Tract"] located on a half-acre lot in Franklin County, Virginia, and an adjacent 10-acre tract with a glass greenhouse on it [the "Greenhouse Tract"]. Paul Purchaser offered to buy the House Tract, and, on November 12, 2012, they signed a real estate contract [the "Contract"] by which Purchaser agreed to pay \$250,000 on the closing date, January 15, 2013. Purchaser gave Seller a \$2,000 deposit. The Contract provided that, on the closing date, Seller was to convey to Purchaser "marketable title to the house in its present condition."

As an afterthought, Purchaser expressed interest in buying the Greenhouse Tract, and, orally, Seller agreed to sell the Greenhouse Tract to Purchaser for \$100,000, with the closing also scheduled for January 15, 2013. It was obvious to both parties that the glass greenhouse needed extensive repairs, but Purchaser agreed to take it as is and do the repairs at his own expense. Seller and Purchaser shook hands to seal the deal, and Purchaser paid Seller a \$1,000 deposit on the basis of their handshake.

A few weeks before the closing date, Purchaser, with Seller's knowledge and consent, expended \$10,000 to replace numerous glass panels in the greenhouse.

At the end of December, during a title search, an employee of the title company discovered in the land records in the Clerk's Office of the Circuit Court of Franklin County a land sale contract duly recorded in 1995 that was neither canceled nor satisfied of record, whereby Seller had agreed to sell the House Tract to Travis. When asked about it, Seller insisted that Travis had defaulted on the contract, giving up his rights thereunder, and left town and cannot be found. Before it will insure title to the House Tract, the title company requires that Travis sign a document releasing any and all rights to the House Tract.

On January 10, 2013, an unknown person entered the house on the House Tract and ripped out all of the copper plumbing. The cost to replace the copper plumbing is \$12,500. Purchaser did not find out about the missing plumbing until the final walk through on January 14, 2013, the day before the closing.

At closing on January 15, 2013, Purchaser asserted that under the circumstances he would not close the deal unless Seller agreed to the following conditions: Seller must agree to hold Purchaser harmless if Travis or anyone claiming under him were ever to assert an adverse claim and Seller must deduct \$12,500 from the purchase price, due to the missing plumbing. Seller refused to

agree to these conditions and also refused to return Purchaser's \$2,000 deposit.

Purchaser nevertheless agreed to go forward with the purchase of the Greenhouse Tract and tendered the purchase price. Seller refused to close on the Greenhouse Tract unless Purchaser first closed on the House Tract.

Seller sued Purchaser for specific performance of the agreement on the House Tract. Purchaser counterclaimed for specific performance of Seller's agreement to sell him the Greenhouse Tract. What is the likely outcome of each claim? Discuss fully.

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In order to grant specific performance of a contract to sell real estate, the court must conclude generally that the contract is both valid and enforceable [not subject to legitimate defenses], that both parties have obligations to perform under the contract, and that there is no adequate remedy at law. Because real estate is considered to be unique, it is often the subject of specific performance claims. However, each of these contracts exhibit characteristics that may preclude specific performance.

#### Specific Performance of the "House Contract"

Specific performance should not be granted. The Seller's title is not marketable because of the 1995 land contract to sell the land that was of record. While the statute of limitations might have run on the contract, so long as the contract was of record and not released, title would not be marketable until there was a judicial determination that the contract was no longer enforceable.

It could also be argued that specific performance is not warranted because the house is no longer in the condition it was at the time of contract. However, it would be easy to make Seller responsible to replace the copper plumbing and put the property back in condition.

#### Specific Performance of the "Greenhouse Contract"

Virginia's Statute of Frauds, Va. Code §11-2[6] requires any contract for the sale of real estate to be in writing. There is an exception to the requirement of a writing where the party seeking specific performance has partially performed. Purchaser has paid a money deposit and with the knowledge & consent of the Seller expended \$10,000.00 in repairs. While doing this was not required by the terms of the contract, the better argument is that the court should grant specific performance, based on [1] the terms of the oral agreement being certain and definite; [2] while the acts proved in part performance must refer to, result from or be made in pursuance of the agreement, here it was a large amount of money expended in contemplation of the closing of the sale and done with the knowledge and consent of the seller; and [3] refusal to order specific performance would operate as a fraud on the buyer.

2. [02/13] [Local Government & Va. Civil Procedure] Jackson Homes, Inc., ["Jackson"], a Delaware Corporation with its principal offices in Charleston, South Carolina, is a national developer of upscale residential communities. Jackson has recently encountered problems with two of its planned residential developments in Virginia, one located in Loudoun County and the other in Fairfax County, two of the nation's most affluent counties.

In Loudoun County, Jackson submitted its application, including its site and subdivision plans for a 75-acre development to be known as “Lee’s Corner,” along with all required fees, to the proper county official for review and action. The Lee’s Corner application complied with all existing ordinances and regulations, required no changes in zoning classification, and sought no special exceptions. In the real estate development industry, Lee’s Corner was known as a “by right” project. Even though Jackson’s submissions for Lee’s Corner were complete as of August 1, 2012, Jackson has been unsuccessful in its efforts to secure any action on the Lee’s Corner application or even an indication as to when the director of residential planning might act. Jackson’s management team is understandably frustrated by the non-responsiveness of the Loudoun County director and concerned that its option rights to the Lee’s Corner property will expire and its substantial option fee will be lost.

In Fairfax County, Jackson submitted an application and fees for the development of a 22-acre residential community to be known as “Cameron Crest.” Once again, Jackson’s application sought no rezoning or special exceptions. Within 20 days after submission of the application, Fairfax County’s director of residential planning issued the following ruling: “The Cameron Crest application is hereby rejected for the following significant deficiencies: the application fails to coordinate streets within the proposed subdivision with existing streets and to dedicate a portion of the tract and commit to payment for construction of an extension of the County’s adjacent Old Dominion Parkway.”

Jackson’s management believes the real reason for the director’s rejection of the Cameron Crest application is to compel Jackson to reserve, dedicate, and build a portion of Old Dominion Parkway, at an estimated cost of \$1,000,000. Jackson’s traffic studies show that the Old Dominion Parkway is used by 35,000 vehicles per day and that Cameron Crest, once built, will add only negligible traffic to that roadway. Also, a County official told Jackson’s vice president that the “dedication and construction requirements were not imposed because of any particular problem to be generated by Cameron Crest, but because of general conditions prevailing and the County’s need to extend the Old Dominion Parkway.”

In both Loudoun and Fairfax counties, the applicable County development ordinances were identical and required review and action [acceptance or rejection] within 30 days after receipt of the application by the respective County’s director of residential planning.

Jackson’s general counsel wants to file litigation against each of the two counties in a Virginia circuit court and consults you as to Virginia law, asking the following questions:

- [a] Is there a judicial remedy that Jackson can pursue to require Loudoun County’s residential planning director to approve the Lee’s Corner application, and if so, what would be the legal rationale for Jackson’s request for such relief? Explain fully.
- [b] What judicial remedy, if any, can Jackson pursue to test whether or not Fairfax County’s residential planning director properly rejected the application for the Cameron Crest development, and what argument would Jackson make in support of its position that the rejection was improper? Explain fully.
- [c] Should Jackson be dissatisfied with the final order of the circuit court in either the Loudoun County or Fairfax County case, provide the following information regarding an appeal:

- I. Is there an appeal as of right or on some other basis? Explain fully.
- ii. Which court would consider such an appeal?
- iii. In which court is the notice of appeal filed, and what is the applicable time period for such filing?
- iv. In what filing and within what time period would Jackson first be required to state its assignments of errors?

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- [a] [i] Jackson Homes can pursue a Writ of Mandamus in the Loudoun County Circuit Court. The Writ lies to order a governmental body, such as the local Zoning Authority, to perform a specified ministerial act. A ministerial act is one that requires no discretion as long as the requirements of the application have been met. Here, the court could order the zoning authority to act on the application, or to approve the application because it was a “by right” project which complied with all requirements. Planning Commission Falls Church v. Berman et als 211 Va. 774 [1971]
- [ii] Jackson Homes can also bring a Declaratory Judgment action in Circuit Court, seeking a judicial determination that the County must act. Only potential problem with this is that the parties may be beyond an actual controversy. If the County is obligated to act and has not, any breach of duty has occurred.
- [iii] Under Va. Code §15.2-2259[C], if the County’s not acted in 60 days, the developer, after 10 days notice to the County, can petition the Circuit Court to decide if the plat should be approved.
- [b] Under Va. Code §15.2-2259[D], if the County disapproves the application, the developer, can appeal to Circuit Court to decide if the County has improperly disapproved the plat or was arbitrary or capricious.
- [c] [I] There is no appeal of right from the circuit court in either of these cases. The appeal is by Petition for Appeal.
- [ii] The Supreme Court of Virginia would consider the Petitions.
- [iii] The Notice of Appeal must be filed in the Circuit Court within 30 days of entry of the final order being appealed from.
- [iv] The Petitions for Appeal would contain the Assignments of Error, specifying the rulings of the trial court of which the party complains. The Petitions for Appeal must be filed with three months of the entry of the Circuit Court order being appealed from.
3. [02/13] [Wills] Joe and Mable, residents of Roanoke, Virginia, met and married in 2008. Both

of them had experienced long and happy prior marriages that ended with the death of their first spouses. Joe had two children by his first marriage: a son, Bert, whom he had not seen since 1995 when Bert moved to Costa Rica to become a surfer, and Sally with whom he had a very close and loving relationship. Mable had a son, Rob, by her first husband. According to Mable, Rob was the perfect son.

Several months after their marriage, Joe and Mable engaged Larry Lawyer to prepare their estate plan. Larry had been recommended to them by a friend in their community and had not represented either of them before. They told Larry that they both wanted their combined estate to be available for the surviving spouse, then upon the death of the surviving spouse, everything remaining was to be divided with half going to Sally and half to Rob. Joe said that he wanted nothing to be left to Bert, who he believed to be financially irresponsible.

In 2008, Larry prepared separate wills for Joe and Mable, each of which was the mirror image of the other, leaving everything to the surviving spouse, then, upon the death of the survivor, the remaining estate was to be divided equally between Sally and Rob. Neither will mentioned Bert. Mable was convinced that for the estate plan to work, all their property had to be jointly titled. To satisfy Mable's concern, Joe told Larry to prepare a deed to convey title to his lot near Roanoke to the joint names of Joe and Mable as tenants by the entirety. However, to satisfy his need for some independence, Joe maintained his separate brokerage account as well as a separate bank account. The wills and deed were duly executed, and the deed was recorded.

In December 2009, Joe was killed in a tragic automobile accident. In January 2010, Mable returned to Larry's office and asked him to prepare a new will leaving her entire estate to her son, Rob. Larry prepared the will, which was duly executed. Mable died within the month, and a few weeks later Rob probated Mable's January 2010 will. Rob identified a probate estate in excess of \$3,000,000, consisting primarily of the value of Joe's brokerage account and bank account, neither of which Mable had touched after his death.

Angry that Rob was claiming all her dad's property, Sally engaged Anna Attorney to file suit challenging Mable's 2010 will and to take necessary action to fulfill her dad's wishes as expressed in the 2008 will. Upon learning of Mable's death from Sally, Bert returned to Virginia and intervened in Sally's suit, asking the court to find that he is entitled to share in Joe's estate because he is a pretermitted heir. All claims and suits were consolidated for a hearing.

- [a] How should the court rule on Sally's challenge to Mable's 2010 will? Explain Fully.
- [b] How should the court rule on Bert's claim that he is a pretermitted heir? Explain fully.
- [c] How should the assets remaining at Mable's death be distributed? Explain fully.
- [d] Did Larry Lawyer violate any ethical responsibility in preparing Mable's 2010 will? Explain fully.

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- [a] The question does not specify the nature of Sally's challenge beyond saying that she is challenging Mable's will. Presumably, she will claim that she is a third-party beneficiary to a

contract between Joe and Mable and that Mable violated that contract by revoking the 2008 will.

Joe and Mable executed reciprocal or mirror image wills. This fact alone does not warrant a finding that they created an irrevocable contract. See *Keith v. Lulofs*, 283 Va. 768, 724 S.E.2d 695 [2012]. Sally's uncorroborated testimony would be insufficient to treat the wills as contractual. Larry's testimony could, however, possibly support a finding of a contract.

The exam question does not indicate that Joe, Mable, and Larry discussed whether the reciprocal wills would be contractually binding. According to *Keith*, a contract may still arise "as an implication from the circumstances and relations of the parties and what they have actually provided for by the instrument." Joe did seem to be relying on the coordinated estate plan by deeding the real property to himself and Mable as tenants by the entirety.

In order to successfully challenge Mabel's 2010 will, Sally must establish by clear and convincing evidence a contract between Joe and Mabel to dispose of their estates in accordance with the provisions of the 2008 reciprocal wills. Sally will likely be successful. First, there was consideration for such a contract based on Joe's conveyance of his separately owned lot into his and Mabel's names as tenants by the entirety. Additionally, the contractual nature of the wills likely can be established by the circumstances (mutual desire to provide for their children from previous relationships and the coordinated estate plan) and by the attorney's testimony. Accordingly, although this point could be argued either way, the better answer is that the reciprocal wills were contractual in nature and therefore can be specifically enforced in equity.

- [b] Bert is not a pretermitted [ or as is used in the subject line in the current version of §64.2-420, an *omitted heir*] heir or omitted child under Virginia law, even though the will does not mention him. Joe's will is binding on Bert because it was executed after Bert was born. See Va. Code §§ 64.2-419 & 64.2-420.
- [c] The answer, of course, depends on the answer to Part [a]. If Mable's 2010 will is valid, then it should control, and Rob takes all. If the court finds that Joe and Mable contractually bound themselves with the 2008 wills, then the court should provide for specific performance and direct that Mable's estate be divided 50/50 between Joe and Sally. If, however, Sally fails in her effort to prove a contract between Joe and Mable, then Mable's 2010 will is valid, it controls, and Rob takes all.
- [d] Yes, Larry Lawyer, did violate an ethical responsibility in preparing Mable's 2010 will. Mable's 2010 will was substantially related to the work the lawyer had done for Mabel and her now deceased husband and Larry Lawyer did not obtain Joe's consent, after consultation.

### **Rule 1.9. Conflict of Interest: Former Client**

[a] A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation.

4. [02/13] [UCC - Sales] In February 2012, River Road Boutique, of Richmond, Virginia ["River Road"], placed a written order for a fall line of clothing from Couture Manufacturing, Inc., of Roanoke, Virginia["Couture"]. The order explicitly stated that the deliveries to River Road must be made "during the June-August 2012 delivery cycle." Couture accepted the order, including the delivery term, by an email confirmation to River Road, with the final price and agreed upon payment terms of one-half within 30 days and the balance due upon final delivery. River Road promptly paid one-half of the contract price by wire transfer to Couture.

Couture did not deliver any of the order to River Road during the months of June or July 2012 even though Couture had promised to commence delivery "soon" each time River Road called to complain about the lack of deliveries. The first delivery, consisting of approximately 70% of the order, arrived at River Road's store on August 15, 2012.

The president of River Road immediately consulted his attorney with the foregoing facts and explained that while it was the store's first time ordering clothing from Couture, he was aware that Couture routinely supplied fall clothing lines to several Richmond area retailers. Although he was not familiar with the practices in Roanoke, the president said that the term "during the June-August delivery cycle" has a definite meaning in the Richmond clothing trade – that is, approximately 40% of the total order is delivered in June, approximately 40% in July and approximately 20% in August. The rationale is that during these months customers are buying clothes prior to the start of the school year and the fall season. The president said he knew from trade publications that larger retailers in the Richmond area that had placed orders with Couture had received their deliveries on the 40%-40%-20% schedule. The problem for River Road is that because the clothes were received so late in the selling season, it would be necessary to mark them down at least one-half off the usual retail price in order to sell them.

- [a] Has Couture breached the contract for the clothing order? Explain fully.
- [b] Can River Road reject the clothing delivered and/or the remaining undelivered portion of the order, and if so, does River Road Boutique have a claim for damages? Explain fully.
- [c] If River Road Boutique decides to retain the August shipment and sells the clothes, would it have any legal claim against Couture? Explain fully.

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- [a] Seller Couture breached the sales contract because it was late delivering the clothes that River Road purchased. Article 2 of the Uniform Commercial Code applies to sales of goods (UCC § 2-102) and clothes are goods (UCC § 2-105(1)). The express agreement between the parties addressed the time for delivery only as the "June-August 2012 delivery cycle." The meaning of this term can be found in a usage of trade (UCC 2-202(a)). The usage observed in Richmond (40%-40%-20%), which Couture followed in its sales to other Richmond-based retailers, is such a usage of trade (UCC § 1-303(c)). Therefore, Couture breached.
- [b] The Couture-River Road contract is an installment contract (UCC § 2-612(1)) because it authorizes the delivery of the clothes in separate lots. River Road can reject late-delivered

clothes only if the late delivery “substantially impairs” the value of the installment (UCC § 2-612(2)). River Road’s need to discount the clothes by 50% indicates a substantial impairment and thus it has the power to reject them provided it does so within a reasonable time after delivery and with seasonable notice to Couture (UCC § 2-602). Given the extent of the lateness, River Road would also have the power to cancel the complete contract even as to the clothes that have not yet been delivered (UCC § 2-612(3)). River Road is entitled to sue for damages with respect to any rejected clothes; the measure of damages would be the difference between the market value of the clothes and the contract price (UCC § 2-713(1)) [probably zero] plus lost profits (UCC § 2-715(2)). Couture had reason to know that River Road intended to resell the clothes at retail and River Road did not fail to mitigate by covering elsewhere given Couture’s repeated assurances that delivery would be “soon.”

[c] UCC § 2-714(1) and (3) together permit a buyer that has accepted non-conforming goods to keep the goods and to recover damages “for any loss” resulting from the breach, including lost profits.

5. [02/13] [Corporations] Red Oak Lumber Company was incorporated in Virginia 40 years ago by three brothers: Bob, Fred, and Tom. Each of them was an officer and director, Bob was president and chairman of the Board of Directors, and each owned 3,000 shares of stock. They were each employees, and they shared equally in the profits of the company.

In 2005, Fred died and left his shares in Red Oak equally, 1,000 each, to his three sons. One of his sons, Ned, became a director and an employee of the company. Fred’s other two sons had no desire to retain any interest in Red Oak, so they sold their shares to Bob, who by virtue of the transaction became the majority shareholder, holding 5,000 shares.

Over the next few years, Bob took an increasingly dominant leadership position to the exclusion and over the objections of Tom and Ned. The company experienced phenomenal growth, and profits soared. However, relationships among the shareholders deteriorated to the point where, at a properly called and noticed shareholders’ meeting in 2010, Bob voted his shares in favor of a motion to remove Tom and Ned as directors; Tom and Ned voted their shares against the motion. The Articles of Incorporation of Red Oak are silent on the election or removal of directors. Bob thereupon installed two close friends to replace Tom and Ned as directors and hired his two children to replace Tom and Ned as employees.

Subsequently, the Board of Directors approved all decisions made by Bob, including the decision to suspend payment of dividends to shareholders. Bob also tripled his salary and those of his children and paid out all year-end profits as bonuses to himself and his children.

Tom and Ned offered to sell their shares either to Red Oak or Bob. Bob says he will buy their shares but claims that Tom and Ned are asking an inflated price. The parties have been unable to agree on the price.

[a] Can Tom and Ned successfully challenge their removal as directors? Explain fully.

[b] What judicial remedy can Tom and Ned seek that will allow them to obtain a distribution equivalent to the portion of the value of Red Oak that their shares represent? Explain



fully.

- [c] If Tom and Ned pursue a judicial remedy seeking a distribution as described in [b] above, is there an election that Bob can make to acquire all the shares owned by Tom and Ned? Explain fully.

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- [a] No, Tom and Ned cannot successfully challenge their removal as directors. Shareholders may remove directors at a meeting specially called for that purpose, and the removal need not be for cause. Additionally, a majority vote of the shareholders is sufficient to remove a director. Here, Bob owns 5,000 of the 9,000 shares, whereas Ned and Tom combined own only 4,000 shares. Thus, Bob can outvote Ned and Tom on their removal as directors.
- [b] Tom and Ned can seek judicial dissolution. Under the Virginia Code, the circuit court may dissolve a privately held corporation if the plaintiff shareholders can prove that the controlling shareholder(s) are engaging in oppressive conduct. Here, Bob's conduct is clearly oppressive. Specifically, Bob, the controlling shareholder, has removed the two minority shareholders as directors, fired them as employees and suspended all payments of dividends. Thus, he has excluded them from management of the corporation and has prevented them from receiving any income, either in the form of salary or dividends, from the corporation. The facts in this case are egregious enough that a court would likely dissolve the corporation.
- [c] Yes, Bob can elect to purchase the shares owned by Tom and Ned. In a proceeding for judicial dissolution, the corporation or a shareholder can elect to purchase the shares of the shareholder(s) seeking judicial dissolution at fair value.

6. [02/13] [Local Government & Va. Civil Procedure] Riles Plumlee ["RP"] filed a complaint in the Circuit Court of Loudoun County against Loudoun County, alleging that he suffered physical injuries as a result of the County's gross negligence in maintaining a public park and seeking \$1,000,000 in compensatory damages for his injuries. RP admittedly made no attempt to contact the County prior to filing the complaint.

Loudoun County filed a demurrer to the gross negligence allegations and a special plea of sovereign immunity. The Circuit Court heard argument on the County's defensive pleadings and sustained the demurrer as to gross negligence on the ground that the facts as alleged in the complaint did not as a matter of law constitute gross negligence. The Circuit Court declined to rule on the County's special plea of sovereign immunity.

Plaintiff appealed, arguing that the Circuit Court erred in sustaining the County's demurrer as to gross negligence. The County did not cross appeal and did not assign any cross error. Nor had the County previously noted any objection on the final order of the Circuit Court, which sustained the demurrer.

In its appellate brief, the County argued for the first time that, because it has sovereign immunity from tort claims, the Circuit Court lacked jurisdiction to hear RP's lawsuit.

RP countered that his complaint is allowed by the Virginia Tort Claims Act as well as by Virginia Code section 15.2-1809, which states:

No city or town which operates any park, recreational facility or playground shall be liable in any civil action or proceeding for damages resulting from any injury to the person or from a loss of or damage to the property of any person caused by any act or omission constituting ordinary negligence on the part of any officer or agent of such city or town in the maintenance or operation of any such park, recreational facility or playground. Every such city or town shall, however, be liable in damages for the gross negligence of any of its officers or agents in the maintenance or operation of any such park, recreational facility or playground.

The immunity created by this section is hereby conferred upon counties in addition to, and not limiting on, other immunity existing at common law or by statute.

The appellate court judge, for whom you work as a law clerk, asks you to analyze and answer the following questions:

- [a]] Is the County's argument on sovereign immunity one that the appellate court can now consider? Explain fully.
- b] What is the Virginia Tort Claims Act, and what effect does the Act have on RP's claim against Loudoun County? Explain fully.
- [c] Is RP correct that section 15.2-1809 allows his claim against Loudoun County to proceed? Explain fully.

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[a] Yes. In Afzall v. Commonwealth 273 Va. 226 [2007] and Seabolt v. County of Albemarle 283 Va. 717 [2012], the SCV held that the issue of sovereign immunity is a subject matter jurisdictional issue and cannot be waived by the Commonwealth, absent legislative action by the General Assembly of Virginia. Even though the issue was pled by the County, the County did not pursue it, by asking the trial court to rule on the issue, it can be raised on appeal because if sovereign immunity applies, the SCV is without subject matter jurisdiction to adjudicate the claim.

[b] The Virginia Tort Claims Act, §8.01-195.1 *et seq.* waives the sovereign immunity of the Commonwealth for negligent or wrongful acts or omissions of its employees, acting within the scope of their employment and subjects the Commonwealth to liability for up to \$100,000.00 to the same extent that a private person would be liable. §8.01-195.3

Per the last paragraph of §8.01-195.3, the VTCA waives the sovereign immunity of only the Commonwealth, not that of any county, city or town nor diminishes the sovereign immunity of any county, city or town.

[c] In Seabolt v. County of Albemarle 283 Va. 717 [2012], from which the facts of this question are taken, the SCV, construing §15.2-1809, held that as to the operation of any park,

recreational facility or playground by a county, [1] the statute does not waive any sovereign immunity of counties; [2] it grants counties immunity in claims based on ordinary negligence; and [3] does not in anyway abrogate the sovereign immunity of counties, leaving them immune in claims based on gross negligence.

Only cities and towns lose any sovereign immunity they have as to these claims based on gross negligence by virtue of the statute.

7. [02/13] [Corporations & Va. Civil Procedure] Dan Davis, a resident of Virginia Beach, Virginia, is a real estate developer who is experiencing severe financial difficulties. He has interests in the following assets:

- Dan Davis, LLC: Dan is the sole member of this Virginia limited liability company [LLC]. The only asset of this LLC is a beach house in Virginia Beach which is primarily rented to vacationers, but Dan occasionally uses it for his own pleasure. The beach house is valued at \$950,000 and is encumbered by a deed of trust of \$850,000. It generates rental income of approximately \$30,000 a year net of all expenses.
- Family farm in Northampton County: This farm consists of several hundred acres of waterfront property on the eastern shore of Virginia, which Dan and his two brothers had inherited at his father's death. His father, a widower, died intestate last year, and at the time of his death this farm was valued at \$150,000 and is subject to no deeds of trust or other liens.
- Dan's Delight, Inc.: Dan's Delight, Inc. is a Virginia corporation, which owns a hall that is rented out for social events. This property is valued at \$300,000 and is subject to a deed of trust for \$150,000. Dan is the sole officer, director, and shareholder of this corporation. Although he regularly held corporate meetings, maintained minutes and kept separate financial books, Dan has not filed the necessary annual reports with the State Corporation Commission or had a registered agent for the past two years. Recently, the State Corporation Commission notified Dan that the corporation had been terminated.
- Home in Virginia Beach: Record title to this home shows that it is jointly owned by Dan and his ex-wife, Winona, as tenants by the entirety. Dan and Winona have been divorced for three years, but Winona continues to live in the house which is valued at \$400,000. The mortgage was paid-off at the time of the divorce.
- A late model Porsche: Dan refers to this car, previously owned by Tom Cruise, as "the love of my life," and it bears the license plate "CRUISER." Last week, Dan transferred title to the Porsche to his daughter, but he continues to drive it and keep it in his garage. CRUISER is valued at \$45,000 and title to it is free and clear of liens.

A month ago, Virginia Bank obtained a judgment against Dan, individually, in the Virginia Beach Circuit Court in the amount of \$1,000,000 as a result of his default on an unsecured line of credit from the Bank.

What remedies, if any, might Virginia Bank employ to reach each of the foregoing assets, and what amount would be available from each to be applied to the Bank's judgment? Explain fully.

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Dan Davis, LLC:

Virginia Bank cannot reach Dan's interest in the LLC or the beach house owned by the LLC. A personal creditor of a LLC member can attach any income that the member receives from the LLC through a charging order, but such a creditor cannot reach the member's ownership interest in the LLC. Furthermore, the beach house is owned by the LLC, an entity separate and apart from Dan. Therefore, as a creditor of Dan personally but not the LLC, Virginia Bank also cannot reach the house.

Family Farm in Northampton County:

Dan & the two brothers are co-parceners owners and a creditor of any one of multiple owners in land can docket its judgment in the circuit court clerk's office where the land is situate and then bring an equitable action seeking partition of the debtor's [Dan's ] interest and then to subject Dan's part/interest in the land to the judgment lien, enforcing it by judicial sale if the rents and profits will not satisfy the judgment in five years. If the rents & profits from the land will pay the judgment in five years, the Bank can ask the court to direct that the net rents & profits be paid into court for the account of the Bank and get paid that way. Since there are no prior liens on the property, if there's a judicial sale, all of the sales proceeds are available to satisfy the Bank's judgment.

Dan's Delight, Inc.:

Because the SCC has involuntarily dissolved Dan's Delight, Inc., the corporation no longer exists. Under the Virginia Code, any property owned by a corporation that has been involuntarily dissolved passes automatically to the directors as trustees in liquidation. The directors then pay of any creditors and then distribute any remaining assets to the shareholders. Thus, as the only shareholder, Dan will own the hall after the deed of trust is paid off.

Once Dan becomes owner of the property, assuming the "hall" means a building situate on real estate, the Bank can docket its judgment, or if the Bank has already docketed its judgment, in the circuit court clerk's office where the land is situate it will have a lien on what's now Dan's real estate and then bring an equitable action seeking enforcement of its judgment lien by sale of the property, or, if the rents and profits from the land will pay the judgment in five years, then the payment of the net rents & profits into court for the account of the Bank. If there's any balance due on the prior deed of trust, it will be paid first out of any proceeds if there's a judicial sale and then the Bank will get paid.

Home in Virginia Beach:

Once the final decree of divorce was entered, it converted the tenancy by the entireties to a tenancy in common. A creditor of any one of multiple owners in land can docket its judgment in the circuit court clerk's office where the land is situate and then bring an equitable action seeking partition of the debtor's [Dan's ] interest and then to subject Dan's part/interest in the land to the judgment lien, enforcing it by judicial sale if the rents and profits will not satisfy the judgment in five years. If the rents & profits from the land will pay the judgment in five years, the Bank can ask the court to direct that the net rents & profits be paid into court for the account of the Bank and get paid

that way. Since there are no prior liens on the property, if there's a judicial sale, all of the sales proceeds are available to satisfy the Bank's judgment.

A late model Porsche:

1. The facts and the conveyance engage Va. Code §55-80 involving fraudulent conveyances and Va. Code §55-81, involving voluntary conveyances. Each statute, when applicable permits the Circuit Court, in the exercise of its equitable powers to set aside the conveyance and bring the property under control of the debtor and subject to the reach of creditors.
  - a. The conveyance was clearly done with the intent to defraud, etc. Dan's creditor and can be set aside under the authority of §55-80.
  - b. The facts do not provide all of Dan's assets and liabilities, but if the conveyance either left Dan insolvent, or he was insolvent at time of the conveyance, it can be set aside under the authority of §55-81 as a voluntary conveyance.
  - c. Va. Code §55-82 authorizes a creditor, before or after getting a judgment to bring an action to set aside the conveyance that is either a fraudulent conveyance or a voluntary conveyance.
2. Once, or before, the title to the car is back in Dan's name, the Bank can request that a writ of execution be issued from the court where the judgment was rendered, put up a bond for the Sheriff and ask the Sheriff to take the car into possession and sell it at a Sheriff's sale, applying the net proceeds toward the Bank's judgment against Dan. Since there are no other liens on the vehicle all of the net proceeds would be available to satisfy the Bank's judgment.

8. [02/13] [Federal Civil Procedure & Va. Civil Procedure] Roger Dodger was arrested in New York City by federal Drug Enforcement Agency [DEA] officers and charged with transporting and selling illegal drugs. The DEA seized and declared forfeited property worth \$500,000 belonging to Roger. All proceedings against Roger were brought in the U. S. District Court for the Southern District of New York.

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

Solicitor, recognizing that her experience in forfeiture proceedings was limited, searched online Internet sources and found Bob Buzzer, a lawyer residing and practicing in Richmond, Virginia, who appeared to be highly qualified in defending civil forfeiture proceedings in the U.S. District Courts. With Roger's consent, Solicitor associated Buzzer as co-counsel and entered into a written agreement reciting that Solicitor would keep the first one-fourth of any fee earned in the civil forfeiture proceeding and Solicitor and Buzzer would share the remaining three fourths in proportion to the amount of time each spent working on the forfeiture matter.

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

Asserting that Buzzer had not performed any meaningful work on the case, Solicitor declined to pay Buzzer any part of the contingent fee. Buzzer, claiming that he had spent just as much time on the forfeiture matter as Solicitor, filed suit for breach of contract against Solicitor in the U. S. District Court for the Eastern District of Virginia, claiming \$87,500 as his share of the contingent fee. Solicitor, through Virginia counsel, filed the following three-part motion: [a] to dismiss for lack of subject matter jurisdiction; [b] to dismiss for lack of personal jurisdiction over Solicitor; and [c] for transfer of venue to the U.S. District Court for the Southern District of New York. Solicitor's supporting affidavit asserted that Buzzer's efforts had not contributed to the settlement with the DEA and that, in any event, the time spent by Buzzer on the forfeiture matter and therefore his share of the fee, if any, would be minimal.

In opposition to the motion, Buzzer filed an affidavit describing the communications exchanged in the course of his association with Solicitor.

How should the U.S. District Court for the Eastern District of Virginia rule on each of the three parts of Solicitor's motion? Explain fully.

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[a] Motion to dismiss for lack of subject matter jurisdiction:

The federal district court appears to have diversity subject matter jurisdiction over this state law claim. The plaintiff resides and works in Virginia, which suggests that it is likely that the plaintiff's domicile is Virginia. The defendant resides and works in New York, which suggests that it is likely that the defendant is a New York domiciliary. If these parties places of residence are indeed coterminous with their domiciles, then diversity between the parties exists. The amount in controversy, \$87,500, exceeds the statutory minimum of greater than \$75,000 for diversity cases. Only if it is clear to a legal certainty that the plaintiff cannot recovery the amount demanded will the court reject the plaintiff's demand for diversity jurisdictional amount purposes.

[b] Motion to dismiss for lack of personal jurisdiction over Solicitor:

There are two issues to resolve the personal jurisdiction question: whether the circumstances of the case fall within the Virginia long arm statute and whether the assertion of jurisdiction over this nonresident defendant would comport with the constitutional due process minimum contacts test. The reason why the Virginia long arm statute is relevant to personal jurisdiction in a federal court is that Rule 4 of the Federal Rules of Civil Procedure effectively incorporates by reference the state long arm statute of the state where the federal court is sitting. It appears likely that the court would find that defendant Solicitor has "transacted business" in Virginia and pursuant to Va. Code §8.01-328.1(1), the conduct falls within the long arm statute. The transacting business category in the long

arm is satisfied by a single act on the part of the defendant. This application of the Virginia long arm statute is consistent with the federal due process minimum contacts test. The defendant very purposefully found the Virginia plaintiff on the Internet and reached out to the plaintiff in Virginia to establish an ongoing business relationship. The defendant sent emails and made phone calls into Virginia in furtherance of the relationship. Such actions qualify as minimum contacts that render it foreseeable and fair and reasonable for the defendant to be sued in Virginia. This is a specific jurisdiction case, since the plaintiff's claim arises directly from the defendant's contacts with Virginia [defendants contacting the Virginia plaintiff to arrange the contract]. For that reason, fewer contacts are necessary to meet the jurisdictional minimum. The defendant's contacts meet that test.

[c] Motion to Transfer Venue:

The defendant's motion for change of venue may be based on improper venue or on convenience. If it is based on improper venue, then the court should deny the motion. The eastern district of Virginia is a proper venue for the case because a substantial portion of the facts underlying the claim occurred in Virginia. It was there in Richmond that the plaintiff received the invitation from defendant to enter the agreement and continuing activities occurred. If the ground for the defendant's motion is convenience, then it is possible that the court will grant the motion. Witnesses and evidence are more likely to be located in New York because that is where the criminal litigation took place.

9. [02/13] [Wills] Mr. Wilson, a resident of Dinwiddie County, Virginia, died on December 26, 2011. Four children, John, Rob, Sally and Mary, survived him. Following Mr. Wilson's death, his safe deposit box at Dinwiddie Bank was opened and inventoried. It contained Mr. Wilson's Last Will and Testament, three sealed envelopes, and one savings account passbook evidencing an account with Dinwiddie Bank to which was attached a photocopy of the bank's signature card.

The envelopes were individually addressed to Rob, Sally and Mary respectively. Each envelope contained a United States Government Bond payable to Bearer. Rob's envelope contained a bond in the principal amount of \$150,000, the bond in Sally's envelope was for \$90,000, and the bond in Mary's envelope was for \$75,000. Additionally, each envelope contained a letter from Mr. Wilson to the appropriate child, each dated November 1, 2011, stating: "The enclosed Bond is a gift for Christmas."

Mr. Wilson's savings account had a balance of \$50,000. Mr. Wilson had established it in January 2011 in the names of "Mr. Wilson and John Wilson, joint tenants with right of survivorship." The copy of the signature card had both Mr. Wilson's and John's signatures in two places, once to establish their signatures for account purposes and once next to a statement reading: "JOINT ACCOUNT WITH SURVIVORSHIP."

Mr. Wilson's will dated December 1, 2011 contained a specific provision stating that John was to receive nothing from the estate and further stating that the \$50,000 joint savings account in the name of Mr. Wilson and John was not to pass to John, but be divided equally among Rob, Sally and Mary. There were a number of specific bequests variously to Rob, Sally, and Mary but no specific bequests of the bonds contained in the sealed envelopes. The residue of Mr. Wilson's estate was also to be divided in equal shares among those three children.

At a hearing on the probate of Mr. Wilson's will, Rob, Sally and Mary each testified that Mr. Wilson had informed them that he intended to make gifts to each of them of certain bonds that he had instructed Sally to put in his safe deposit box. Sally testified that she had always been an authorized user to enter Mr. Wilson's safe deposit box and that on November 1, 2011, at Mr. Wilson's request, she entered that box and delivered all of the subject bonds to Mr. Wilson. According to Sally, Mr. Wilson dictated to Sally the letters later found in the envelopes. She typed them, addressed the envelopes, and gave them to Mr. Wilson who placed the letters and bonds in the envelopes and sealed them. Mr. Wilson then said to Sally, "Since you have access to my safe deposit box, put these envelopes back in there," which she did. She testified he later said to her, "Don't forget those envelopes I told you to put back in my safe deposit box. Come Christmas, I want you, Rob, and Mary to have them." She further testified that, because Mr. Wilson became terminally ill just before Christmas, the family delayed their Christmas celebration to be with him during his final illness and that, as a consequence, she never got around to handing out the envelopes before he died on the day after Christmas.

John testified concerning the joint account. He stated that he executed the signature card at his father's request and acknowledged that all of the money placed in the account had belonged to Mr. Wilson. None of the other children had any knowledge of the account, although Sally had seen the passbook in the safe deposit box. No other testimony was received.

- [a] What are the arguments pro and con that the Government Bonds are either the property of Rob, Sally and Mary, or that they are assets of Mr. Wilson's residuary estate, and what is the most likely outcome? Explain fully.
- [b] Should the savings account be divided equally among Rob, Sally and Mary as specified in Mr. Wilson's will? Explain fully.

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- [a] Best analysis appears to be an examination of whether there was a completed inter vivos gift. There was evidence of a present intent, but on the facts, it was not clear that a delivery had been made because it was not established that the "donor" relinquished control. This was a close issue and one that a good thorough analysis should gain full credit no matter which conclusion was reached. Sense of the group is that the facts did not support an analysis of whether there was a trust because Mr. Wilson never expressed any intention to do so..
- [b] The joint account is nonprobate property and Mr. Wilson's ownership in the account would be controlled by the terms of the account. The account contract provided for survivorship between the two account owners. The will does not govern it. Also, Va Code § 6.2-608 provides that "sums remaining in a joint account belong to the survivor as against the estate of the decedent unless there is clear and convincing evidence of a different intent at the time the account is created."